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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 21, 1995

(AFTERNOON SESSION)

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Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 21st day of July, A.D. 1995, between the hours of 12:05 o'clock p.m. and 6:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

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

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 PRESENT:

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

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 21, 1995 - AFTERNOON SESSION

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(MEETING RECONVENED 12:00 NOON.)

CHAIRMAN SOULES: Okay. We're going to start on Rule 6. Thank you all for coming back promptly. Rule 6.

MR. SUSMAN: Okay. The Subcommittee, in its redrafting Rule 6, you will note that there are no major changes in the words at all. We changed the title to make it clear to everyone that we are talking about what happens to the trial because of the failure to provide timely discovery. And that is not the same as what happens to the lawyers who fail to do it.

Now, we put a note to the Sanctions Committee at the bottom that we recommend some sanction be imposed on parties that fail to provide discovery reasonably promptly, even if provided more than 30 days before trial. But we leave that for the Sanctions Committee, and I think maybe they have addressed something like that in what they sent us on July 18th. Otherwise, the rule is pretty much the way it is.

Scott Brister, he will articulate his own -- I mean, the big picture of Scott's is

just, again, it seems to me, a reargument of the minority's positions that have been articulated on our approach. Our approach, as you know, has been that it may take some time, but ultimately courts have got to get involved in the issue of whether the other side was surprised or not. Was it serious surprise or not serious surprise? That should be the litmus test of whether the evidence should be excluded or whether the trial should continue, et cetera.

Now, Scott makes as eloquent an argument, I think, as could be made on the other side of the issue, that we ought to have bright lines here, clear lines. And if you don't do something by a certain time or certain things, tough luck. And so I think that's where -- that's the big debate.

And just again, because this rule has been approved so many times in this form, the only question is how many converts Judge Brister picked up by his appeal in his letter to us that's attached under Tab 6. Now, that's for his general appeal. He's got some specifics that we will get to in a second. I

mean, that should be the first one. But that's the first issue, and we still have general agreement in the way we've been going.

CHAIRMAN SOULES: Okay. Judge Brister.

HON. SCOTT A. BRISTER: Well, I just, as a trial judge, even if -- this is going to take a lot more time for me to do. I've got to decide whether it's reasonably prompt. We've got to have a hearing on that. We've got to have a hearing on whether you're going to be unprepared by this information, and I mean, you know, that may mean certainly calling opposing counsel to say why -- what you -- how you're going to be spending your time coming up to trial and why shouldn't you be spending it on this new stuff that I just gave you rather than what you want to spend it on; expert testimony as to whether they should be prepared, be able to get prepared on this information fast enough; and then whether or not it will affect the outcome of trial is another issue in that satellite litigation.

And you know, just as I say there, it's real easy -- it's not an easy decision to

decide if the option is continue or not. Look, it was within 30 days and nobody -- it wasn't because somebody died or something like that; you just didn't do it. And then weigh how much do we really need this information, how important is it, versus how important is this trial setting. And those are things that are not an easy decision, but it don't take a lot of testimony on it.

The other route, where there's no bright line and we go into preparedness, trial outcome and stuff, is, it seems to me, no easier a decision, but it's also a very long hearing.

HON. DAVID PEEPLES: Scott, why does it need to be a long hearing? Why can't you, plain vanilla, get to the nitty-gritty and not let people call on all those witnesses?

HON. SCOTT A. BRISTER: Well, I certainly can do that, if you'll promise that I won't get reversed. But until you say this is totally discretionary and can never be reversed, somebody is going to say, "Brister didn't give me enough time to put on my record

about why this would affect the outcome of trial why I couldn't get prepared. I was just started into my list on how I planned to spend my time in the next three weeks after that." And then some silly appellate judge somewhere may listen to it.

CHAIRMAN SOULES: Judge McCown.

HON. F. SCOTT McCOWN: Well, I don't think it needs to be a long hearing in most instances. In some cases the hearing might be longer than in others, but the rule was written to come up with a kinder and gentler regime which then we hope will be less expensive. I mean, this ties straight back into cost; that any time you've got tough, tough exclusionary rules, then you drive up the cost of litigation because lawyers have to be extraordinarily diligent because there is such a severe penalty. And so we tried to balance the level of diligence with -- you know, a reasonable level of diligence without being too severe and hit that balance.

The other thing I would point out is, I don't think Judge Brister's alternative solves the problem he's identified. I think it's the

same under either rule. His rule is unless the court makes a finding of good cause. Well, you know, good cause is what the party pleads good cause is, and he's entitled to offer his evidence and make his bill on whatever he thinks good cause is. And the judge makes the call, and the appellate court then has to review it for discretion. I think that's the same under this rule. This rule just tries to give the judge a road map that will produce a balanced decision and get away from the harsh exclusion of evidence.

CHAIRMAN SOULES: I'm not a convert to Judge Brister's view because I've always been there. This rule, as written in many, many courts and for a few lawyers, totally eliminates automatic exclusion of evidence. It just ain't going to happen. So should we just erase it altogether? Because for a big part of this state's jurisprudence it's gone. Shouldn't everybody have the same advantage?

HON. F. SCOTT McCOWN: Well, the way I would respond is --

CHAIRMAN SOULES: I can tell

you that in a West Texas county for at least one or two lawyers it will never happen no matter how egregious the situation is. The evidence is coming in and there's not going to be a continuance, because this standard is so light and it does not give the judge a command to exclude the evidence. And I think the current rule does.

So we have shrunk discovery, we've given tremendous latitude for gamesmanship in this limited discovery that we've now imposed on the bar, and lightened up the abuse at trial of evidence not disclosed during a constrained amount of discovery. That's what we're doing. Gamesmanship is going to be rampant.

HON. F. SCOTT McCOWN: Luke, I --

CHAIRMAN SOULES: And that's -- as long as we know that's what we're doing, well, then that's -- so be it.

HON. F. SCOTT McCOWN: I agree with the first part of what you said. I disagree with the second part. I think that what this does is it makes exclusion discretionary. It does say to the judge that

under these circumstances you can exclude. I don't think gamesmanship results, because I think you still have the threat of exclusion as a deterrent.

The only thing I would say on this kind of in conclusion is this is a big policy issue. We have fought about this policy issue at three or four different meetings. There's lots of people like Tommy Jacks who aren't here today that have had a stake in this, and I think to change the policy decision now is kind of not in the spirit of things, if there are drafting problems or technical problems but I think we ought to stay with our policy decision.

CHAIRMAN SOULES: Okay. Does anyone have a motion on this subject?

HON. SCOTT A. BRISTER: I'm moving to --

MR. SUSMAN: I move that we adopt the rule that the Subcommittee has presented and that has been approved by a large majority at at least three or four meetings.

CHAIRMAN SOULES: Well, we've

got to go through Judge Brister's --

MR. SUSMAN: I mean, he's got specifics.

CHAIRMAN SOULES: -- specifics before we do that, but no one has got a motion on that yet.

HON. SCOTT A. BRISTER: Yeah. Probably an up or down on my motion to substitute the task force would be the best way to vote on it, wouldn't it? And then we would get to tinkering with the Subcommittee rule.

CHAIRMAN SOULES: Okay. Is the task force --

HON. SCOTT A. BRISTER: It's the next page under Tab 6. The task force proposal is on the right and the subcommittee proposal is on the left. I put it in as small a print as possible.

CHAIRMAN SOULES: So Judge Brister, you're moving what?

HON. SCOTT A. BRISTER: To substitute -- actually it's the first paragraph -- to substitute the task force proposal for paragraph 1 of Rule 6 for the

Subcommittee's paragraph 1 on Rule 6.

CHAIRMAN SOULES: The text of which says, "Exclusion or continuance. Unless the court makes a finding of good cause, the party that fails to make or supplement a discovery response in a timely manner should not be entitled to present evidence that the party was under a duty to provide or to offer the testimony of a witness other than a named party who has not been properly designated. The burden of establishing good cause is upon the party offering the evidence or witness, and good cause must be shown on the record. Notwithstanding the foregoing, the court may in its discretion grant a continuance to allow the" --

HON. SCOTT A. BRISTER: And that's just -- the intention of the task force was just to write the rule to follow current law given as Alvarado vs. Farrah and the named party exception. It wouldn't change the law.

MR. MARKS: I second the motion.

CHAIRMAN SOULES: John Marks seconds. Those in favor show by hands. 10.

Those opposed. Eight.

Let's counts them again. Those in favor of Judge Brister's motion show by hands. 10. Those opposed. Eight.

It carries by a vote of eight to 10.

HON. F. SCOTT McCOWN: Luke, can I move, and I don't know if this is appropriate or not, but I'd really like us to send both versions up to the Supreme Court, and I think that would be a fair thing to do. We're having a meeting in the middle of the summer with a fair number of people absent.

HON. SCOTT A. BRISTER: I second that. That makes sense. I mean, I was going to propose that when I anticipated losing this vote, to be honest.

MR. LATTING: Your generosity is an example to us all.

CHAIRMAN SOULES: Okay. Then we will submit Judge Brister's amendment substitute as the vote of the Committee by a vote of 10 to eight, and then the alternative, which is, what, Rule 6, paragraph 1, to indicate what the eight voted for. Okay. Can we do that? Will you handle that, Alex?

PROFESSOR ALBRIGHT: Uh-huh.

CHAIRMAN SOULES: Okay. Now then, let's get to the specifics. Judge Guittard.

HON. C. A. GUITTARD: I'm not sure in paragraphs 1 and 2 of our Rule 6 what "continuance" means. Does it mean any delay? Does it mean to say, well, we'll put this case off until Thursday or until next week? Is that a continuance? I can foresee under subdivision 2 where there's the question of taxable costs, the party could say, "You can't tax the costs against me. You just had a brief delay here. It was not a continuance."

"Continuance" means the case goes off the docket and has to be reset or something like that; whereas what we're really talking about is a postponement.

And I suggest to you that although we all may think it's different -- or that it means the same, there are a good many lawyers who wouldn't think so and there might be some satellite litigation or unnecessary hearings because of the use of the word "continuance."

Therefore, I move that instead of the word "continue" we substitute the word "postpone"; and instead of the word "continuance" we substitute "postponement."

CHAIRMAN SOULES: Is there a second? No second. It fails for lack of a second.

Okay. Judge Brister, you've got -- since there will be an alternative going to the Supreme Court, we need to go ahead and take your specifics on it.

HON. SCOTT A. BRISTER: With the Subcommittee I had the three. One was the split infinitive, which is just a personal offense, but I also just wanted to focus, and maybe you all -- is "timely" the same as -- is that when the 30 days after the request is sent, is that when the supplementation occurs?

MR. SUSMAN: Let me -- I mean, you raised a good point. I mean, one of the problems that we have on what we mean -- one of the problems of adopting the alternative is that when the Subcommittee dealt with what we mean by "timely supplementation or amendment,"

we were content to leave it kind of vague, "reasonably prompt," because the consequences of what they really mean by "reasonably prompt" did not seem to be very draconian.

Under the task force proposal that you have now adopted, you have made the consequence much more draconian. Do we want to go back and consider with more specificity when these things need to be done, is my only question. I mean, what is meant by "reasonably promptly"? I mean, don't we need to put more teeth in that now?

HON. SCOTT A. BRISTER: I don't see why that's really changed.

CHAIRMAN SOULES: Does anybody have a motion on that subject?

MR. LATTING: I'm trying to think through what Steve said. I'm trying to think about this.

CHAIRMAN SOULES: While he's doing that, Alex, put the word "timely" after "information." "If a party fails to disclose information timely during discovery."

PROFESSOR ALBRIGHT: Well, I think you need to talk to Scott McCown about

that. That's Scott McCown's language and he has a reason for it.

HON. SCOTT A. BRISTER: He likes split infinitives.

HON. F. SCOTT McCOWN: I'll send you a brilliant article on how split infinitives are actually part of the logical structure of language and the rule is artificial from Latin, and that in fact we ought to split infinitives to be clear about what we're doing, but -- and Sarah agrees.

HON. SARAH DUNCAN: I like it.

CHAIRMAN SOULES: "If a party fails to disclose information timely during discovery" is a bad idea. Okay. Then back to the question of Steve's issue. Rusty.

MR. McMAINS: The question I have, Steve, is I don't see that there's a different result from the rule as drafted by the Subcommittee, because the rule drafted by the Subcommittee, which is what I thought that the judge was talking about, actually says if a party fails to timely disclose information. And wherever you put the "timely" doesn't matter. If they didn't disclose it initially

and when the response date was due, that is a failure to timely make a response.

HON. SCOTT A. BRISTER: Right.

MR. McMAINS: Now, whether or not it causes a problem is the other thing that is addressed by this rule. But the burden, of course, is on them to show that they didn't cause any problem. One would assume that what you're trying to say is that if they got the information later on while the discovery period was still going on that somehow that should satisfy any of the obligations that they might otherwise have about the prejudice.

But we don't really say how this rule is implemented anyway; that is, kind of who moves or when and what your burdens are. You could theoretically be sandbagging and taking the position they didn't timely respond to the discovery, even though you know about the information from some independent source. And that's possible under the rule as drafted by the Committee as well, it seems to me. There's nothing in here that just refers this to supplementation material. This is a

failure to disclose information timely, and that can be either supplemented or just not supplemented; it's done. And it's like the cases we have where they leave out the phone number of the witness.

HON. SCOTT A. BRISTER: I guess, yeah, do we mean failure to -- if you fail to disclose information when due, or do we mean if you fail to disclose information reasonably promptly?

HON. F. SCOTT McCOWN: When due.

HON. SCOTT A. BRISTER: When due.

HON. F. SCOTT McCOWN: "Reasonably promptly" relates to your duty to supplement.

HON. SCOTT A. BRISTER: If you say "when due," that takes out any confusion about which one you're talking about, and I think that is what you ought to mean to say in that.

MR. LATTING: Well, excuse me, but the task force report says, "A party who fails to make or supplement a discovery

response in a timely manner." Now, I'm looking back over at Rule 5, and it tells me that I have to amend or supplement my prior responses reasonably promptly. So if there's a hearing, and it will be a quick one in your court now, and --

HON. SCOTT A. BRISTER: They're all quick.

MR. LATTING: -- and I didn't supplement reasonably promptly, then you will be commanded by the motion that you carried to keep all the evidence out, right?

PROFESSOR ALBRIGHT: And even if --

MR. LATTING: Am I right about that?

PROFESSOR ALBRIGHT: And even if it's six months before trial.

MR. LATTING: Yeah. Now, that doesn't seem like a good idea.

PROFESSOR ALBRIGHT: And that's the difference between the two proposals. Under our version it's only excluded if it matters and you didn't have time to conduct discovery on it. But under the task force

strategy it's excluded, period, even if it was six months before trial and you had plenty of time to find everything out about it and it's no surprise whatsoever, but because you failed to reasonably promptly amend because you knew about it two months before you disclosed it six months before trial.

HON. SCOTT A. BRISTER: Well, to me that's a different question.

MR. LATTING: It is.

HON. SCOTT A. BRISTER: With "reasonably promptly" you get into this "as soon as practical" problem, as I've indicated in my discussion. If that's the standard and that's a test and that's a ground for excluding, then yeah, you need to rephrase it that way.

I was intending it by having the task force proposal not when due but that it would be any time during the discovery period or reopened discovery period with the exception of the 30-day cutoff, et cetera.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: I believe

that lack of surprise and lack of prejudice to the opposing party should be matters on which the trial court could base a finding of good cause, and I would propose an amendment to that effect to whichever one of these that we've adopted or both.

HON. F. SCOTT McCOWN: Well, that's the concept that the Committee's Rule 6 --

JUSTICE CORNELIUS: I know that.

HON. F. SCOTT McCOWN: -- incorporates. And the concept of the task force, you really you don't know if it incorporates it or not. You're leaving it up to --

JUSTICE CORNELIUS: Only to the extent of granting a continuance, as I read it.

HON. F. SCOTT McCOWN: Right. But what you're doing with the task force report is not advising the Supreme Court, because you're not taking a position on what the rule ought to be. And case law has said that things aren't good cause that most of the

lawyers in this state think ought to be good cause.

JUSTICE CORNELIUS: That's right. Absolutely.

HON. F. SCOTT McCOWN: And we're leaving the term and providing no advice or guidance.

HON. SCOTT A. BRISTER: Not entirely. There is a task force comment that said specifically what "good cause" was not. That was in the task force report, and I didn't have -- my computer doesn't do footnotes so I couldn't do a footnote on this. But that was the task force way of handling it, was to define in a comment what the case is, so the lawyer that's lived under a rock for the last 10 years will immediately, following the rule, see the comment that says what good cause is and is not.

MR. LATTING: What does it say in essence, Scott? Really I'm asking, does surprise to the other party have anything to do with it?

HON. SCOTT A. BRISTER: No.

HON. F. SCOTT McCOWN: See, the

problem is that the bar has this disagreement with really our jurisprudential. It's not that they don't understand it; it's that they do and don't agree with it.

CHAIRMAN SOULES: Judge Cornelius, would you articulate what your amendment would be again so that I can make note of it?

JUSTICE CORNELIUS: That the trial court may in its discretion find that lack of surprise or prejudice to the opposing party is good cause.

MR. LATTING: For allowing the evidence in?

JUSTICE CORNELIUS: For allowing the evidence or for denying exclusion.

MR. SUSMAN: I second that motion.

HON. SCOTT A. BRISTER: Here we go. Here it is (indicating).

CHAIRMAN SOULES: Okay. It's been moved and seconded that we add to the paragraph 1 that we earlier adopted from the task force report a sentence that says that

"The trial court may in its discretion find that lack of surprise or prejudice to the opposing party is good cause." It's been moved and second. Now, those in favor show by hands.

MR. KELTNER: Can we discuss it briefly first?

CHAIRMAN SOULES: Sure. Discussion.

MR. KELTNER: I have a problem with -- I think Judge Cornelius is going the right way in looking at it. But remember, good cause is good cause for failure to supplement. So surprise to the party can't be good cause, because it's the reason you didn't supplement is what you're trying to prove.

And maybe we ought to go at it in a different concept; that whether it's good cause or not -- and Scott, you got me as a convert and I may be converting back the other way -- the issue is that we ought to allow it because there is no surprise, which I think was what --

JUSTICE CORNELIUS: Well, like what Joe Latting said a while ago, it would be

good cause for admission of the evidence or for failure or for denial of exclusion.

MR. KELTNER: So Judge, would be it okay to say that the trial judge in his or her discretion could allow the admission of the evidence upon a showing that it did not prejudice or surprise the other side, and not tie it to good cause?

JUSTICE CORNELIUS: Yes, that would be acceptable.

MR. KELTNER: I think that's a better way to look at it. That also, Steve, gets us close to --

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

MR. KELTNER: That gets us closer to the rule that the Subcommittee came up with as well, and I think, Scott, that's what you were thinking of.

HON. F. SCOTT McCOWN: Well, it is the Subcommittee's rule.

MR. KELTNER: Well, our problem with the Subcommittee rule, Luke, is this: We want to have some hammer, since we have cut down the amount of discovery and there's going

to be an opportunity with the limitation of discovery for some gamesmanship, so we want to have some hammer, and I think everybody in the room agrees with that. The question with the Subcommittee rule is there's a general feeling, and I think that's the reason that we got 10 votes against it basically, that the hammer wasn't big enough.

HON. F. SCOTT McCOWN: Well, if this group adopts the sentence that you just suggested, we can draw down the subcommittee version and send only the single version, and that's fine with me.

MR. KELTNER: All right.

JUSTICE CORNELIUS: I will accept the language recommended by Judge Keltner.

MR. LATTING: A friendly question: What does "prejudice" mean? Because everything that I want to put in evidence is prejudicial to the other side or I don't want to put it on. Now, do we know what that word means?

HON. SCOTT A. BRISTER: Yeah. I would leave that -- I mean, if it's not

going to prejudice the other side, that's kind of like my one about the outcome of trial. If it's not going to affect the outcome of trial, let's not fool with it.

MR. LATTING: I don't mean to be facetious here. It's just that it says that if it doesn't unfairly surprise or prejudice. And if I'm on the other side of this, then I'm always going to be saying, "Well, I may not be surprised, judge, but I'm certainly prejudiced by you allowing this witness."

HON. F. SCOTT McCOWN: There's a body of case law about what "prejudice" means.

MR. LATTING: Well, that's my question: Do we know what it means?

HON. F. SCOTT McCOWN: Yes. There's a body of case law. It's a term of art.

MR. LATTING: What does it mean?

HON. F. SCOTT McCOWN: It doesn't mean that the evidence is against you.

MR. LATTING: Okay.

HON. F. SCOTT McCOWN: It means that you are unfairly disadvantaged.

JUSTICE CORNELIUS: It means that your ability to prepare and try your case has been unfairly impaired.

MR. LATTING: Okay.

JUSTICE CORNELIUS: Of course, we can say that if we wanted to. Instead of using the word "prejudice," we could say "find that lack of surprise or lack of" --

MR. LATTING: Well, no, prejudice is fine if we have some literature on it.

JUSTICE CORNELIUS: -- "or having a prejudicial effect on the opposing side's ability to prepare and try the case." But you're getting into a lot of verbage there.

MR. MARKS: I have an unfriendly question.

CHAIRMAN SOULES: John Marks.

MR. MARKS: An unfriendly question: That added sentence emasculates what you're trying to do, and that is to

eliminate the gamesmanship. If you open the door to the judge to make exceptions there by saying, "Oh, you haven't been prejudiced," or that sort of thing, aren't we right back where we started?

MR. LATTING: Yes. The truth is, yes, which is where we ought to be.

MR. KELTNER: Well, let me tell you why I think not, John.

CHAIRMAN SOULES: All right. David Keltner.

MR. KELTNER: I think we're not quite there because, remember, we're talking about a limited time period and we're talking about two instances here. One, about when somebody just comes up and you find out about it for the first time at trial. Now, that's what you're worried about and legitimately so. And in that instance there's no doubt that the chance of prejudice and surprise is great.

The other thing that can happen under these new rules, John, that can't happen now is this could be disclosed three or four months before the trial and still you have a

sanction rule that would call for exclusion. That makes no great sense, especially with what we've already voted on that would allow a reopening of discovery to take away the prejudice. So it seems to me that it doesn't emasculate the rule and that it is a better all-around rule with that in.

I mean, everybody agrees that -- I think even the Supreme Court, and I say "even the Supreme Court" and I didn't mean it that way, Justice Hecht, but the Supreme Court in Alvarado said precisely, "Geez, we're giving the trial court too few options here to deal with it." And I think that's part of the problem. I think it's a good trade in the middle, and I think cause ought to have some effect in this, and I think this is just another reason the trial judge could overrule it. I mean, excuse me, rule for the --

CHAIRMAN SOULES: Undo prejudice is the test for a change in request for admissions, responses or getting out of deemed admissions, and of course, that could be as prejudicial as not getting a piece of discovery. But we already have a body of law

developed about here's what you have to show --

HON. SCOTT A. BRISTER: Or late filed pleadings.

CHAIRMAN SOULES: -- to change your responses to request for admissions or deemed admissions or -- what, Judge Brister?

HON. SCOTT A. BRISTER: Late filed pleadings.

CHAIRMAN SOULES: Or late filed pleadings. Well, it's really stronger, I think, than 169.

So let's see where this will go in the one we adopted. "Unless the court makes a finding of good cause or a finding that there is no undue surprise or undue prejudice to the opposing party, a party fails to make" and so forth --

HON. SCOTT A. BRISTER: One more time.

CHAIRMAN SOULES: So the judge can make either one of those findings, so that takes care of good cause for not doing. Okay. If you look on -- the task force is on the right-hand side of this page that's right

behind Judge Brister's comments. This insertion would go after these words.

It starts out "1. Exclusion or continuance. Unless the court makes a finding of good cause," write in these words, "or a finding that there is no undue surprise or undue prejudice to the opposing party," then the rest of it would read as written.

PROFESSOR ALBRIGHT: Can I make a suggestion?

CHAIRMAN SOULES: Is that where you want to place this for discussion?

MR. SUSMAN: Yeah. And I second it.

CHAIRMAN SOULES: Okay.

JUSTICE CORNELIUS: I so move.

CHAIRMAN SOULES: Alex, what were you suggesting?

PROFESSOR ALBRIGHT: I have a friendly amendment. I think the problem with just using the word "good cause" is that what we're really talking about is two concepts of good cause, good cause for failure to timely disclose and good cause to admit the testimony. So I would say "Unless the court

makes a finding that there was good cause for the failure to timely disclose or a finding that there was no undue surprise," and then go on with Luke's language.

And I might also put the "unless" cause at the end of the sentence rather than at the beginning because it's gotten so long.

MR. LATTING: That's fine.

JUSTICE CORNELIUS: That's acceptable.

MR. LATTING: So we're voting on Judge Cornelius' motion as modified?

CHAIRMAN SOULES: Right. But I've got to get her language down first. Unless the court makes a finding that there was what?

PROFESSOR ALBRIGHT: A finding that there was good cause for the failure to timely disclose. Then go back to your language, or a finding that there was no undue surprise or prejudice to the other party or that the failure does not -- or that the failure does not unduly surprise or prejudice the other party.

Okay. "A party who fails to make or

supplement a discovery response in a timely manner shall not be entitled to present the evidence that the party was under a duty to provide or to offer the testimony of a witness other than a named party who has not been properly designated, unless the court makes a finding that there was good cause for the failure to timely disclose, or that the failure does not unduly surprise or prejudice the other party."

MR. LATTING: Judge Guittard wants to make a friendly suggestion.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: I have a friendly suggestion, and that is that you say "unfairly" instead of "unduly."

CHAIRMAN SOULES: Well, "unfairly," I don't know whether that's got a body of jurisprudence, but "unduly" does.

HONORABLE C. A. GUITTARD: How much prejudice is undue?

PROFESSOR ALBRIGHT: I liked "unfair" first.

MR. SUSMAN: "Unfair" is

better.

CHAIRMAN SOULES: Okay. We'll go with "unfair."

JUSTICE CORNELIUS: Let's put "unfair."

CHAIRMAN SOULES: "Unfair surprise and unfair prejudice." And then how about dropping the words "failure to disclose" and just say "failure," because it starts "A party to who fails to" whatever.

PROFESSOR ALBRIGHT: All right.

MR. SUSMAN: Rusty has got his hand up.

CHAIRMAN SOULES: Okay. Rusty. Excuse me for delaying us there.

MR. McMAINS: I have two comments about those changes. First, in the first sentence you're talking about, it is unclear in my judgment from that liberal reading whether you are requiring a finding as to either or only a finding as to good cause and then an abstract concept of undue prejudice.

CHAIRMAN SOULES: I said a finding, a finding on both.

MR. McMAINS: I know what you said, but if you read the sentence as you wrote it, it says "finding of" and then it says "or."

CHAIRMAN SOULES: Or what? Or what? Or a finding.

MR. McMAINS: Well, that's not what you said earlier.

JUSTICE CORNELIUS: Well, it's in there now.

MR. McMAINS: Well, that's not what Alex said. Let's put it that way.

CHAIRMAN SOULES: Well, that's maybe not what she said, but that's what I said.

MR. McMAINS: The burden on the second part is nowhere articulated in the proposed amendment. The burden on good cause is clearly delineated in the rule to be on the party that is seeking admission. Whichever standard you're using, that burden needs to also be imposed on the undue prejudice issue as well.

HON. F. SCOTT McCOWN: The way to fix that is to say that the burden of

establishing the finding is upon the party offering the evidence or witness and the record must support the finding.

JUSTICE CORNELIUS: That's good.

CHAIRMAN SOULES: Okay. Let me see if I've got this now. We would say, " 1. Exclusion or continuance." Strike "Unless the court makes a finding of good cause." Start with "(a), A party who fails to make or supplement a discovery response in a timely manner shall not be entitled to present evidence that the party was under a duty to provide or offer testimony of a witness other than a named party who has not been properly designated unless the court makes a finding that there was good cause for the failure or that the failure caused no" --

JUSTICE CORNELIUS: Or the finding of.

CHAIRMAN SOULES: "Or a finding that the failure caused no unfair surprise or unfair prejudice to the opposing party."

PROFESSOR ALBRIGHT: How about "does not unfairly surprise or prejudice"?

CHAIRMAN SOULES: Or a finding that what?

PROFESSOR ALBRIGHT: The failure does not unfairly surprise or prejudice. Isn't that shorter?

CHAIRMAN SOULES: Or unfairly prejudice?

PROFESSOR ALBRIGHT: Do we need to have "unfairly" both places?

CHAIRMAN SOULES: I think so.

JUSTICE CORNELIUS: Yes.

CHAIRMAN SOULES: To be clear. Then we have "The burden of establishing the finding" -- is that it?

HON. F. SCOTT McCOWN: Yes.

CHAIRMAN SOULES: -- "is upon the party offering the evidence or witness, and good cause must be shown on the record" --

HON. F. SCOTT McCOWN: No. And the finding. And the record must support the finding. You don't want to just say "good cause," because the record has to support the finding of undue surprise or undue prejudice as well.

CHAIRMAN SOULES: And the

record must support the finding.

HON. F. SCOTT McCOWN: Right.

MR. MARKS: Now, where is the burden on -- who has the burden of showing undue prejudice or unfair surprise?

HON. F. SCOTT McCOWN: It's right there. The burden of establishing the finding, whichever finding it is, the burden of establishing it is upon the party offering the evidence or witness.

CHAIRMAN SOULES: Okay. Any further discussion on this? Carl Hamilton?

MR. HAMILTON: Does "properly designated" mean that if you leave off the phone number or some other information that's requested, that the witness is excluded?

HON. F. SCOTT McCOWN: The court can find that there's no undue surprise or undue prejudice there.

MR. KELTNER: And Carl, when you look at the disclosure rules under that, you're going to see a different standard than before.

CHAIRMAN SOULES: Anything else?

MS. McNAMARA: Just a question: Can the parties agree to let the evidence in, or do you have to have the finding even if there's really not a fight?

HON. F. SCOTT McCOWN: If there's no objection --

MS. McNAMARA: Is that clear, that if there's no objection, you can --

HON. F. SCOTT McCOWN: If there's no objection --

CHAIRMAN SOULES: The case law is clear that the objection has to be made or there's no error. There's certainly no reversible error.

CHAIRMAN SOULES: Okay. Anything else on that? Okay. Those in favor as it is now dictated into the record show by hands. I'm sorry, let me start over. Hold your hands high. 17. Those opposed. There's no opposition to this.

HON. F. SCOTT McCOWN: And Luke, I take it we've got agreement, then, and we don't need the Subcommittee's 6? I mean, this is fine?

CHAIRMAN SOULES: Will the

Subcommittee withdraw Rule 6 and substitute this?

PROFESSOR ALBRIGHT: Yes.

CHAIRMAN SOULES: Okay. That's done. So we'll send just one version to the Supreme Court, which will be -- paragraph 1 will be what's just been dictated into the record and voted on by a vote of 17 to zero.

And now back to Judge Brister's specifics. Have we addressed most of these, Judge?

HON. SCOTT A. BRISTER: Yeah. The last one I had was on paragraph 2, as you see on the left side. It's a question about when you get costs and expenses. The Subcommittee's was if the court continues the case, you get costs and expenses, and I propose to say if a party fails to disclose timely, the argument being there's plenty of times when your failure to disclose timely costs extra costs. But the Subcommittee rule would make it unless there's a continuance those costs are just down the drain. And it seems to me there ought to at least be the discretion in the court to assess the costs

even if I decide not to grant a continuance.

If you have to, okay, I think we can go forward with the trial date, you're not going to be unduly prejudiced, but you do have to fly to New York this afternoon, which is going to cost more than if you had been able to plan 30 days in advance to go take the last-minute deposition. So I move the task force of that phrase.

CHAIRMAN SOULES: As the task force has posed it.

HON. F. SCOTT McCOWN: But the reason we didn't go with that is because giving trial judges more discretion to hit you with costs was something that we were very hesitant to do. And the argument that this is late and therefore I had to fly to New York and therefore all my airfare and hotels should be paid for, we just didn't think it was wise to give trial courts that much authority.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I think it's more -- I think, Scott, probably the more -- the explanation that makes more sense was in the footnote we had to the Sanctions

Committee, the note to the Sanctions Committee. In other words, we were just dealing with the effect on a trial setting. And how it affected the trial setting is an integral part of the failure to disclose and what should be done with the trial to diminish the effect on trial, as the heading refers to.

We made it clear in our note to the Sanctions Committee that there are other sanctions you may certainly want to impose through the sanction vehicles on lawyers who don't timely disclose, which would be where you could impose such sanctions as the extra expense of proving something or having to do it on an expedited basis or things like that.

Now, I frankly -- but I don't oppose doing what you're doing. It just occurred to us that it would be better to think about it in those terms.

CHAIRMAN SOULES: What about a hybrid here where we just add to it what's in the Committee version, "and may impose other sanctions under Rule blank," which would be the Sanctions Rule, so that there is something

that plainly addresses the continuance issue?

HON. SCOTT A. BRISTER: Or just drop it and we'll put it in the Sanctions Rules somewhere.

MR. McMAINS: The problem is that while we voted on the substance of the rule, we didn't really vote on the title. When we redid the title -- I mean, the title to the rule is the Effect on Trial of Failure to Provide Timely Discovery. If that's what the title to the rule is going to be, then in some respects you don't need (2) at all because we're merely talking about whether the evidence is excluded or -- I mean, we don't kind of need it.

MR. SUSMAN: Yeah. For example, as we went through this, we noticed you don't really -- how about a person who doesn't provide timely discovery and doesn't want to use it? I mean, he is late and failing to provide something that is against him that you found out. I mean, there's no effect of that failure built in these rules. That's got to be solely dealt with by sanctions, because excluding it from trial

would make him happy as a pig in mud. I mean, the only way you're going to deal with that party is throw him in jail or do something serious to him or that lawyer or the party that does it.

So we thought the title was deceptive, and that's why we changed the title, so I would suggest that we put the new rule that we just passed, 6(1) at least, with the title that the Subcommittee came up with and leave (2) the way it is, because --

HON. F. SCOTT McCOWN: Or drop (2) completely and refer it to the Sanctions Committee.

MR. McMAINS: I think that makes more sense.

HON. SCOTT A. BRISTER: Second.

MR. MARKS: I have a question.

MR. SUSMAN: That's fine.

MR. MARKS: The way this is written, it applies to parties. But normally the offending person is a lawyer. And if you're in personal injury litigation, you usually have a poor person on one side and a rich person on the other side, which may be a

rich lawyer on the side of the poor person.

Now, this is not a very effective rule for a defendant unless there are some sanctions against the lawyer. Now, no offense. No offense intended. That's a friendly question.

HON. F. SCOTT McCOWN: I think that's a good point, but I would recommend that we drop (2) out and refer it to the Sanctions Committee and let Joe Latting's group solve it.

MR. KELTNER: Hear, hear.

MR. LATTING: No problem.

CHAIRMAN SOULES: Any opposition to that? Okay. Just be sure that the Sanctions Committee does address the issue of costs resulting from a delay of the trial for a late discovery response.

MR. KELTNER: And Joe, the rich lawyer issue.

MR. LATTING: The rich plaintiff's lawyer. That's a tautology, isn't it?

CHAIRMAN SOULES: So in Rule 6, the motion is to delete paragraph 2.

HON. SCOTT A. BRISTER: And delete the title of paragraph 1. And since you'll only have one paragraph, you don't need to number it, and then make the title --

CHAIRMAN SOULES: Just make the words "Exclusion or continuance" after No. 1?

HON. SCOTT A. BRISTER: Right. Can No. 1, yeah.

HON. F. SCOTT McCOWN: And go with the Subcommittee's title.

HON. SCOTT A. BRISTER: Yes.

CHAIRMAN SOULES: And go with the Subcommittee's title. Okay. Any opposition to that? That's unanimous.

Rule 7.

MR. SUSMAN: All right. On Rule 7, let me try to pick up the pace here so we can get through without staying all weekend.

Rule 7 has had -- the main redrafting took place in section 2(c), as you can see. The rest of it is pretty much as you have seen it before. We just tried to clarify it. I think we have succeeded in clarifying it.

And the only comment we received here is

again from Scott Brister. And Scott, I think the reason in response to your question of why we keep a separate Rule 7 and Rule 8 is because Rule 8 is intended to be a device that's used by nonparties primarily and/or depositions, to quash deposition notices; whereas Rule 7 really deals with how you object and present privileges in responding to written discovery.

It does not deal with how you object or present privileges during an oral deposition obviously. How you object we cover in the oral deposition rules. How you present privileges and preserve privileges in oral depositions is really not covered. I mean, it is not covered. I mean, we do not say what happens when during an oral deposition -- remember, we allow the lawyer to instruct a witness during an oral deposition, "Do not answer to the extent that that discloses conversation with me." And so the witness says, "Well, subject to my lawyer's objection, here is the answer." And you know the witness is withholding something or probably withholding something because the lawyer made

the instruction.

What duty is there, then, to identify what was withheld? I mean, we don't really deal with it, is what I'm saying. We really didn't grasp that issue. But that seems to be a different kind of problem than withholding a document that can be identified as privileged, which is primarily what is what Rule 7 is dealing with.

We try to make it clear that a protective order can only be used where Rule 7 cannot be used. Now, I don't know whether that's responsive to your question, but I tried to kind of tell you what we had in mind. That is what we had in mind.

CHAIRMAN SOULES: Does this cover where documents are being withheld on the grounds of relevance? Is it intended to cover that?

HON. SCOTT A. BRISTER: 7 is.

MR. SUSMAN: Yeah, 7 is. That's what I'm trying to -- 7 is, yeah. You just object.

CHAIRMAN SOULES: Is there any requirement that you describe what has been

withheld on the grounds of relevance?

MR. SUSMAN: No. There never has been. I don't know how you would do that.

HON. SCOTT A. BRISTER: It would defeat the purpose to kind of have to describe everything that you don't think is relevant.

CHAIRMAN SOULES: Well, if you asked for every vehicle General Motors has made since 1942, and there's a real case on that, well, how about just front-wheel drive since 1990?

HON. SCOTT A. BRISTER: The gist of my suggestion was just that all 8 is is that it says that the court can make any order and then list three orders a court might make. And it just didn't seem to me that that was anything different from what we were dealing with in 7, and why not just put it all in one place, was all I meant.

MR. SUSMAN: Well --

CHAIRMAN SOULES: Steve.

MR. SUSMAN: -- it clearly deals with a nonparty. I mean, clearly 8 says "any person."

HON. SCOTT A. BRISTER: No. Eight says, "Except that any party may move for such an order when an objection pursuant to Rule 7 is not appropriate."

MR. SUSMAN: Yeah. Well, I mean, I think what we meant to say, and maybe we need to insert it, is that "any party may move for such an order only when an objection" -- we need to insert the word "only," which I think was always our intention. "Any party may move for such an order only when an objection pursuant to Rule 7 is not appropriate."

And the only time an objection under Rule 7 would not be appropriate is when you're dealing with oral depositions, right?

HON. SCOTT A. BRISTER: And the oral deposition rule covers how you object to a subpoena for documents, how you object to the time and place. You know, I mean, there's just so little left that this is covering. It just doesn't seem to me to justify a whole separate rule, because, I mean, those matters are covered in the deposition rule, how you object to those deals and when.

MR. SUSMAN: Well, my concern -- listen, here is my concern: I think, Scott, I mean, this is a point of drafting --

HON. SCOTT A. BRISTER: Sure.

MR. SUSMAN: -- and aesthetics. And my real problem is I don't think we will ever finish this if we begin drafting again. We have some rules here that are going to have to be -- they will have to be all combined. But we have to sit here and make sure --

HON. SCOTT A. BRISTER: But this is a simple thing. And I'm suggesting if you're going to take a truckload of new rules to the bar, it's better to have fewer rules than many rules, especially if they don't add anything. I mean, what does a rule add that says a court can make any order it wants to and here are three orederes it might want to make? Thank you. Fascinating. How about 20 orders a court might want to make? How about one? I mean, Rule 8 really doesn't do me anything.

HON. F. SCOTT McCOWN: Okay. Let's give up on this.

MR. MARKS: I have a motion with respect to Rule 7.

CHAIRMAN SOULES: Rule 7.

MR. MARKS: And my motion is that we delete the last two sentences.

CHAIRMAN SOULES: The last two sentences of Rule 7?

MR. MARKS: Of Rule 7, paragraph 1.

CHAIRMAN SOULES: Any second to that motion? It fails for lack of a second. I'm sorry, did I hear a second?

MS. GARDNER: I'll second it.

MR. McMAINS: Well, I'm trying to figure out what it's for. You're saying you don't have a good faith objection, but did you want to be able to not have a good faith basis for an objection?

MR. MARKS: Well, I don't know how it hurts anybody to have to read some objections to the interrogatories. It never hurt me, and you know, I just don't think those sentences ought to be in there. There are other ways to take care of that situation than saying that you waive all your objections

because you obscured your real objection by a lot of them and you've got to timely object or you waive it. But then if you make too many objections, then you waive them. I think it kind of puts people between a rock and a hard place.

CHAIRMAN SOULES: Okay. The sentence -- you're talking about the last two sentences?

MR. MARKS: Yes.

CHAIRMAN SOULES: Okay. The first of those I'll call Sentence No. 1. The purpose of that is to eliminate the need for prophylactic objections in order to avoid any waiver situation. It says you only have to make them if you have a good faith basis at the time. You don't have to make prophylactic objections. That's what I understood it to mean. Now, it may not say that, but that's the purpose of it.

The last sentence may be what you're describing.

MR. MARKS: Yeah. That's my biggest area.

CHAIRMAN SOULES: It says,

"Objections shall be made only if a good faith factual and legal basis for the objection exists at the time the objection is made." You make it whenever you have a good faith basis for making it. You don't waive it by not making it within 30 days if within 30 days you had no basis to make it.

MR. MARKS: Okay. I'll withdraw my motion with respect to the second clause of that.

MR. McMAINS: I don't agree with that.

MR. SUSMAN: Well, listen, John, I guess, again, we can go through this and debate line by line these things. This has been in there for -- a number of drafts have been voted on by this Committee repeatedly. It has not even had any draftsman changes since the last draft.

MR. MARKS: Well, I raised questions about it earlier, Steve, and I think I'm entitled to have a vote on it, if it's going on up to the Court.

MR. SUSMAN: I think that's fine. All I'm saying is that it has been -- I

mean, if we want to record another vote, it needs to be discussed and debated, and it seems to me we'll be here for a week. I mean, I don't mind another vote on things, and that's fine, but...

HON. F. SCOTT McCOWN: Well, this is a policy issue in which the group said we want lawyers to stop making a zillion objections, we want a new day in Texas, and we're writing it into the rule. And John is saying he doesn't want a new day, so why don't we just move the question and vote on it.

CHAIRMAN SOULES: Which sentence do you want deleted or both?

MR. MARKS: I think the last sentence is the one that I would like to delete.

CHAIRMAN SOULES: You're moving to delete the last sentence of Rule 7, paragraph 1. Is there a second?

MS. GARDNER: I'll second it.

CHAIRMAN SOULES: It's seconded. Any further discussion? Joe Latting.

MR. LATTING: I reluctantly

speak against my friend and colleague John on this, but it seems to me that if we're making it clear that you don't need to make prophylactic objections, which we've done in the preceding sentence, then all the more reason for lawyers not to fill up their papers with lots of unnecessary objections. And I think it's a dandy idea to tell lawyers they shouldn't and can't do that, especially if we don't need to any more.

CHAIRMAN SOULES: Anyone else?

MR. MARKS: Well, I'm just concerned about the court that's going to be looking at this and ruling on it, you know, because every judge we're up against is not a Judge Brister or a Judge McCown.

CHAIRMAN SOULES: Mike Prince, do you have your hand up?

MR. PRINCE: No. I've answered my own question. Thank you.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: I don't have any problem with voting. I don't like the idea that the record in this Committee is that the purpose of that rule is, as you say, that you

don't need to make prophylactic objections; that they're just kind of -- that you can make them later. That's not what I understood the purpose of this rule to be.

The purpose of this rule is that if you don't make objections for no reason at all and if a reason occurs to you 10 months down the road, that doesn't resurrect your right to make an objection. Now, I don't think that -- which is what I thought you were saying.

HON. F. SCOTT McCOWN: No. The way this works is that the trial judge would have to find, number one, that there were numerous objections; and number two, that they were unfounded; and that therefore the one good one that was buried inside all the numerous unfounded ones is waived.

MR. McMAINS: I understand. But what I'm saying is that I think, and I may be mistaken, but I thought what Luke was saying is that the sentence that he doesn't have an objection to says, "Objections shall be made only if a good faith factual and legal basis for the objection exists at the time the objection was made." That somehow infers that

you can make an objection later that you could have made early, and I don't think -- I don't know if you meant to say that, but that's what I heard you say.

CHAIRMAN SOULES: If there's a good faith factual and legal basis for an objection during the response period, you have to make it.

MR. McMAINS: Right.

CHAIRMAN SOULES: If there's not, and you later get into the other warehouse of documents and you suddenly find a bunch of attorney-client privileged stuff you didn't know about, you can make it then.

PROFESSOR ALBRIGHT: Luke, I need to correct that for the record. That is not section 1; that would be under section 2.

MR. McMAINS: Absolutely.

PROFESSOR ALBRIGHT: That's your privilege. If you're going to make any relevance objections, objections to the scope or the form of the question, you need to make them within the time of the response.

MR. McMAINS: Right. That's what I was getting at; that that's not

something that you get to wait and sit on and decide that maybe you have the scope or relevance or some of these general ones that we now call prophylactic objections later on.

PROFESSOR ALBRIGHT: But it is true that if you find another box of attorney-client privileged information, you may claim that privilege under section (2) even though you never made an attorney-client assertion before.

MR. McMAINS: I understand. I agree with that.

MR. PRINCE: Question.

CHAIRMAN SOULES: Okay. Mike Prince.

MR. PRINCE: Let's take the same analogy, but the box is relevance. Let's say you've got three boxes and they're called for and relevant and you produce them and you don't object. Two months later you find the fourth box that's called for but is not relevant. Does the operation of this rule mean that that objection is gone?

PROFESSOR ALBRIGHT: Well, is your objection to the question because the

question was overly broad, or is your problem that this document is not responsive to that request?

MR. PRINCE: Well, the request is overly broad, but you don't make the objection because the documents that have been called for are the only ones that you believe that you have that are responsive to this overly broad request. You don't make the objection. You produce the documents. You discover a box of documents later that is called for but is beyond what a relevant request would be. Now, I take it that the way this rule would operate is that you are thereafter barred from at that time on discovery of those later documents from making that objection.

PROFESSOR ALBRIGHT: Well, I think that's the way it is under the current rules and we have not changed that.

MR. PRINCE: So to be safe you need to make that objection, even though not founded at the time you make it, because the documents you have don't indicate that there's a good basis for it on the off chance that

you're going to discover a box later that is?

PROFESSOR ALBRIGHT: Well, I think what the question is or what the issue is is that you need to make clear to the requesting party what you -- what you're responding to. And if you think that the request is overly broad, you need to tell them that you think the request is overly broad so that they know how you're responding to it.

MR. PRINCE: So to tell them that it either is overly broad or that it might be overly broad would be a proper response and not an unfounded response?

PROFESSOR ALBRIGHT: Correct.

CHAIRMAN SOULES: Well, for the record, I disagree. I would think that if you don't know that there's a warehouse and whoever you're dealing with doesn't know there's a warehouse in the first 50 days and you've got 50 days to answer the interrogatories and document requests and you do your best but you find out there is a warehouse, that you can make the relevance objection.

PROFESSOR ALBRIGHT: Well,

that's not a relevance objection. That's an unduly burdensome objection.

MR. LATTING: Well, it could be a relevance objection.

CHAIRMAN SOULES: It could be a relevance objection. But there's only one motion on the floor, and that is that we delete the last sentence and not the next to the last sentence, and that's been seconded. Is there any further discussion about that?

Those in favor show by hands.

MR. KELTNER: This is to eliminate that?

CHAIRMAN SOULES: To eliminate the last sentence. Four. Let me count them again. Five.

Those opposed. 12. It fails by a vote of 12 to five, so that sentence stays in.

Anything else on Rule 7?

HON. SCOTT A. BRISTER: Why don't we just get a vote.

CHAIRMAN SOULES: Judge Guittard.

HON. C. A. GUITTARD: I offer a clarifying amendment to the second sentence of

subdivisions 2a. That sentence reads, "If materials or information responsive to a request are privileged, the party shall withhold the privileged materials" and so forth.

Now, that could be interpreted to mean that if it's privileged, the party can't waive it. I don't think that's the intent. I think the intent is something like this: "If a party claims a privilege with respect to information requested, the party shall withhold."

MR. LATTING: Hear, hear.

HONORABLE C. A. GUITTARD: I move that it be amended with those words.

CHAIRMAN SOULES: Give me the words again. Exactly where do they go and what are they?

HON. C. A. GUITTARD: At the beginning of -- well, it's the first sentence actually since the previous first sentence has been stricken. "If a party claims a privilege with respect to information requested, the party shall" and so forth.

PROFESSOR ALBRIGHT: Judge

Guittard, would this work: If a party claims that materials or information responsive to a request are privileged, the party shall withhold the privileged materials or information from the response.

HON. C. A. GUITTARD: That's okay. Or you can just change "shall" to "may."

PROFESSOR ALBRIGHT: So all we're doing, Luke, is after the word "if" in the first sentence is insert "a party claims that."

CHAIRMAN SOULES: Okay. "And the party shall withhold"?

HON. C. A. GUITTARD: Yeah.

CHAIRMAN SOULES: Okay. Anything else on Rule 7? Judge Brister, you had something else?

HON. SCOTT A. BRISTER: My proposal is to combine the fourth paragraph of 7 with Rule 8 so that the ruling -- the kind of rulings the court can make is all in one place. If you want to put it all in 7 or put it all in 8 it doesn't matter, but just that everything on what kind of rulings the court

can make is in one place. And that's purely just so it won't be in two places, so it's not a big substantive deal to me.

CHAIRMAN SOULES: Is there a second to that? The motion fails for lack of a second. Anything else on Rule 7?

MR. SUSMAN: I move we adopt Rule 7 then.

HON. F. SCOTT McCOWN: Second.

CHAIRMAN SOULES: Those in favor show by hands. 13 in favor. Those opposed. 13 to two. It passes 13 to two.

Rule 8.

MR. SUSMAN: Rule 8, Protective Orders. We had the converse of what Judge Brister just proposed, which I guess since it didn't get seconded it will get tabled again. That's the only comment we had on this, except I would insert in the third line, "A party may move for such an order only when an objection pursuant to Rule 7 is not appropriate," which I think is what our intention was. If you use the objections vehicle, use it, not a protective order.

CHAIRMAN SOULES: Okay. Any

opposition to that change? Any discussion of Rule 8? Those in favor show by hands. One more time, please. 14. Those opposed. None opposed. It passes by a vote of 14 to nothing.

Rule 9.

MR. SUSMAN: Rule 9. The only comments we have were from Judge Brister, who suggests that we should drop paragraphs 2(g) and 2(h).

HON. SCOTT A. BRISTER: Do you want me to just summarize what those are?

CHAIRMAN SOULES: Yes, please.

HON. SCOTT A. BRISTER: (g) is the one -- under 2(f) this is -- you can say, "Please send me the following." (f) is "please send me a medical authorization so I can get the bills"; (g) is the usually plaintiff then sends back "send me any records that you got pursuant to my authorization," and it's just a minor thing. It seems to me, if that's in there, then somebody is not going to do it. And then the patient is going to be objecting, "Don't let them put my records in, because even though I had a superior right to

get them and even though I was there when the treatment was done, because they didn't produce them, I don't want them admitted," which just seems silly.

I mean, this is something that the court reporter calls up and says, "Do you want a copy of the records?" You ought to just say yes and not consider this some big discovery deal, so I would just drop that one.

HON. DAVID PEEPLES: Is this something new, or was this in existing law?

HON. F. SCOTT McCOWN: Which provision?

HON. SCOTT A BRISTER: (g). It is in existing law.

CHAIRMAN SOULES: In a suit alleging physical or mental injury and damages from the occurrence that is the subject of the case?

HON. SCOTT A. BRISTER: It's not a big deal, but it just seems to me it makes it simpler if you just say, when the court reporter says, "Do you want a copy of the records," to just say yes.

CHAIRMAN SOULES: Okay. The

motion is that we delete the last paragraph on the first page of Rule 9. Is there a second? No second. That motion fails. Next.

HON. SCOTT A. BRISTER: The other one is of more substance, and that is that you have to produce relevant documents. That's going to be a big problem and a big hubbub from the lawyers. The main hubbub I hear on the federal rules is I've got to produce any relevant documents.

HON. F. SCOTT McCOWN: Which one are you on now?

HON. SCOTT A. BRISTER: 2(h) of Rule 9.

CHAIRMAN SOULES: Judge Brister is talking about the first line on Page 2 of Rule 9.

MR. SUSMAN: Can I respond to that, Judge Brister?

HON. SCOTT A. BRISTER: Sure.

MR. SUSMAN: We have always understood -- again, I have the same question that you have, what the hell is meant by "written instruments"? It's not relevant documents; it's written instrument upon which

a claim or defense is based. What the response is to that that I have heard from the people who have given us this language, which I think it came out of the task force and all these other committees, is that that means a promissory note, a written contract, a release. We are not talking about producing relevant documents. We are talking about the type of thing that is normally attached as an exhibit to a petition, because it's one key crucial document upon which the claim or defense is based, and that's what's called an instrument.

HON. SCOTT A. BRISTER: All right. But the problem is that the more complicated the case, the more of those documents there are going to be. And the party that doesn't get them produced to them is going to claim that their claim, maybe it's their 19th defense to the 32nd complaint, is based on a waiver provision in an insurance policy, or you know, who knows what all else, that some minor claim is based on a letter, you know, that's the notice letter. It could be a thousand things.

It is narrower than relevant documents, but, look, everybody is asking for that in the request for production anyway. Isn't this one supposed to be the one that's just so plain vanilla, we're not going to have objections to it, we're not going to have a big dispute about it? If so, I suggest that we drop that one, because there is going to be a dispute about that one.

MR. KELTNER: Luke, there may be, and this did come from the task force. We got this, interestingly, from both California, Illinois and Colorado, who have not had a problem with it. Now, it's gone through some machinations, Scott, and that may be part of the problem. It was to be the instrument or suit upon which a defense was based on, but quite frankly, that was just a few cases.

It's okay to take it out, as far as I'm concerned, because I can see people trying to make more of it than it is. But I don't know how the Subcommittee people or the other Committee people feel about it.

HON. SCOTT A. BRISTER: Yeah. I agree with it, if it's just the note you're

sued on. But that's not going to be the way it works out. Somebody is going to claim that defense that you're raising way back there in your petition is really based on a letter you sent us or on a deposition that was taken.

MR. KELTNER: It truly is not a problem. And if that's your interpretation on it, that makes me somewhat fearful that we're going to see other things occur, so it's not a problem removing it from the rule.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: Realistically speaking, if your suit or your counterclaim really is based on a written instrument like a written contract or a release or insurance policy, you're going to attach it to the pleading anyway. And if you don't, somebody is going to ask for it somewhere along the way. I agree with Judge Brister. I think it's asking for problems.

MR. KELTNER: Steve, let's take it out.

MR. SUSMAN: I'm not going to fight. I mean, I've never been a proponent of

disclosure anyway.

MR. KELTNER: (To the reporter) Did you get that?

MR. PRINCE: Certify that, please.

MR. SUSMAN: A proponent of voluntary disclosure, I mean, standard disclosure.

CHAIRMAN SOULES: Okay. The Discovery Subcommittee agrees to delete --

MR. SUSMAN: And that's the only comment I've got.

CHAIRMAN SOULES: -- the paragraph, the subparagraph -- let's see, Rule 9, subparagraph 2(h), which is at the top, and then I guess that will renumber the rest and so forth all the way down.

MR. SUSMAN: I move the adoption of Rule 9.

CHAIRMAN SOULES: Anything else on Rule 9? Don Hunt.

MR. HUNT: Luke, I assume that Lee will take care of this, but we have a couple of situations where we have the title reversed. It's "Request for Standard

Disclosure" and then "Standard Request for Disclosure" in Rule 9(1) in the first sentence and then in the first sentence of Rule 9(2). I just think we ought to make the language the same as the title.

CHAIRMAN SOULES: Where are they again, Don?

MR. HUNT: 9(1), second sentence; and 9(2), second sentence.

CHAIRMAN SOULES: Standard Request for Disclosure.

MR. SUSMAN: Luke, I think we prefer the articulation of "standard request." We just didn't change it to that throughout.

CHAIRMAN SOULES: Okay. So the change needs to be made in the third line of the rule, right?

MR. HUNT: Correct.

CHAIRMAN SOULES: Anywhere else?

MR. SUSMAN: It needs to be made in Rule 3(1) if we continue to define "written discovery."

CHAIRMAN SOULES: Rule 1?

MR. SUSMAN: Rule 3(1).

CHAIRMAN SOULES: Okay. We'll find it.

Anything else on Rule 9? Justice Duncan.

HON. SARAH DUNCAN: Subparagraph (4), where it says the time and place of production can't be more than seven days from the date of response, is that another one of those things that the court can't change under Rule 2, or is that not a prohibition? If the parties can't agree on a reasonable time and place for production and they go to the court to ask the court to set a reasonable time, is that not one of the things that the court can't change under Rule 2?

PROFESSOR ALBRIGHT: No, because this doesn't prevent the court from changing it. All this does is just say that -- it just makes people designate a time and place within a specified time within a week where they're going to produce these voluminous documents. They can go to a court which allows them to produce whatever the court will allow them to. The only places

where the court can't do something is where it specifically says the court cannot do it.

CHAIRMAN SOULES: Anything else on Rule 9? Those in favor of Rule 9 show by hands. 15. Those opposed. None. It passes by a vote of 15 to none.

Rule 10. Here we are.

MR. SUSMAN: Rule 10. There's obviously a typo in the third line of the Committee's draft, red-line draft. It should read "pursuant to Rule 9" rather than "pursuant trouble 9." That's "pursuant to Rule 9."

The other responses we have or the other points we have are from Judge Brister. Scott, would you mind explaining them to us?

HON. SCOTT A. BRISTER: Sure. I just suggested that you make it all, rather than one level, since (2) and (3) -- (2) is just the designation of the expert. (3) is the stuff about the expert. As a practical matter, everybody is going to ask for all of them. This is the standard requests only; that you just collapse them and put them together.

Do you want to do them one by one, or do you want me to do them all at once?

CHAIRMAN SOULES: Any of them that are related we probably ought to take together.

HON. SCOTT A. BRISTER: That's just by itself.

CHAIRMAN SOULES: Okay. By itself. You're saying --

HON. SCOTT A. BRISTER: Because you end up with, for instance, on response, you know, it just makes this a long unwieldy rule to me, to have totally different standard requests, times, procedures and rules from the expert's name versus the expert's opinions when everybody is going to ask for both. It's purely --

MR. SUSMAN: My response to that is that has a long legislative history and it works for this Committee. Again, the Subcommittee began with one disclosure about experts to take place at a particular time prior to the end of the discovery period. There were members of this Committee who felt very strongly that there was other information

about experts that shouldn't be available earlier, at least some information that should be available earlier, or at least gettable earlier if it was available earlier.

You recall someone talking about a party that bandies around the name of their expert early on in the game for settlement purposes but doesn't want any discovery directed to that expert. As a result, we have worked very hard trying to draft this, and ultimately what we came up with was two ways to satisfy the Committee.

You can get some information very early about name and subject matter, if known, but all the other information comes at the fixed time in wave 2, which is really the main wave. And that was just the history of it all.

Now, I would agree with you that we could go back and make it much more -- a much nicer looking product, but --

HON. SCOTT A. BRISTER: Well, I've got -- on the next page I've got it put together in that way, but it's -- you know, that's purely a matter of if people want them

separate, leave them separate.

It just seems to me everybody is going to request all of it and just put it all together, so I move to put -- to combine paragraphs 2 and 3 like I have on the page attached under Tab 10.

MR. PRINCE: Yours being on the right-hand side?

HON. SCOTT A. BRISTER: Right.

MR. PRINCE: I'll second it.

PROFESSOR ALBRIGHT: May I ask a question?

CHAIRMAN SOULES: Just a minute, I've got to catch up here.

Okay. Alex Albright.

PROFESSOR ALBRIGHT: So Scott, the difference between the two drafts, between the Committee draft and your draft, is that in your draft, upon request the party then would have a response -- would have the duty to reasonably and promptly respond to all the expert information with the deadline being the 75/45 mandate?

HON. SCOTT A. BRISTER: Right.

PROFESSOR ALBRIGHT: Where

under our rule, the Committee rule, you only have the reasonably promptly obligation as far as the identity and subject matter, and then the rest of it you don't even have to think about doing until 75/45 days.

HON. SCOTT A. BRISTER: Well, they're both standard requests.

PROFESSOR ALBRIGHT: Right.

HON. SCOTT A. BRISTER: And again, I'm not that clear on reasonable -- what has to be reasonably promptly and what's not. The way I put them together is just that you can amend pursuant to your (5)(2), but if it's not reasonably prompt, you know, then whatever happens on (6) happens, but that the drop-dead dates are the 75/45 that you all have.

PROFESSOR ALBRIGHT: I think, going back to the legislative history, the way that the Subcommittee originally drafted this was that you didn't have to give over any information concerning experts until 75/45 days before the end of the discovery period. Then in this big Committee meeting it was felt that, well, the identity and general subject

matter need to be given as soon as you know about it. And so then Scott's draft then goes even further and says we'll give everything concerning experts as soon as you know about it. So I think that's the continuum of what's going on.

MR. PRINCE: That's right.

CHAIRMAN SOULES: Well, I think what Judge Brister is saying is that under Rule 9, if you ask for the same information, you get it in 30 days.

PROFESSOR ALBRIGHT: Right. Where under the Committee draft you only get identity and subject matter in 30 days, and then -- well, all of it is subject to you may not decide to designate your expert until 75 days or 45 days before the end of the discovery period, so you may not get anything.

CHAIRMAN SOULES: But under the Discovery Subcommittee's own Rule 9 --

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: -- you get all 10(2) and 10(3) in 30 days.

PROFESSOR ALBRIGHT: No.

CHAIRMAN SOULES: That's what

it says.

MR. SUSMAN: You're reading something that's crossed out.

CHAIRMAN SOULES: No. "Provide the information pertaining to expert witnesses as set forth in Rule 10(2) and 10(3)."

PROFESSOR ALBRIGHT: Right. But the time for response --

CHAIRMAN SOULES: There it is, within 30 days.

PROFESSOR ALBRIGHT: No. The time for response, except as provided for expert witnesses in Rule 10, the party has to respond in 30 days.

CHAIRMAN SOULES: And so when do you have to respond under Rule 9 to expert witnesses?

PROFESSOR ALBRIGHT: You look to Rule 10, and your date for the response is in 2(b) and in 3(b). It's all very, very, very complicated, but it's based upon the discussion and vote in this Committee a couple of meetings ago.

I would favor doing it one way or the other and not have this type of version like

we have now.

CHAIRMAN SOULES: I don't think 10(3) ought to be in Rule 9. After you get their identities, if you want anything further, you ought to move over to Rule 10, and then that would harmonize them.

HON. SCOTT A. BRISTER: And just request that by an interrogatory?

CHAIRMAN SOULES: By any means.

HON. SCOTT A. BRISTER: An interrogatory is the only other thing to me.

CHAIRMAN SOULES: Whereas a standard disclosure means "Tell me who your experts are." And then if a person wants more than that, they have to go under 10(3) and get the other information.

PROFESSOR ALBRIGHT: But that's not what we -- I -- we've written this like the last vote was.

CHAIRMAN SOULES: Okay. But under Rule 9 it does not say when you have to -- when a party has to give --

MR. SUSMAN: -- standard disclosure as to experts.

CHAIRMAN SOULES: -- standard

disclosure as to experts.

MR. SUSMAN: Correct. You've got to look under Rule 10 to figure out the timing.

CHAIRMAN SOULES: But it doesn't say that Rule 10 controls it either. It says -- is that correct?

PROFESSOR ALBRIGHT: So maybe we need another sentence that says the time for response for experts is provided in Rule 10, but I think we have it.

CHAIRMAN SOULES: That's fine either way.

PROFESSOR ALBRIGHT: There are some drafting problems, but much of the drafting problem is because of this hybrid version that we have right now. I think we should talk about the philosophical decision about when should you provide your discovery for experts and when should you respond to these. Do we want to keep the hybrid version, or do we want to go one way or the other?

MR. SUSMAN: Well, the only thing really I question at this stage of the game in fairness is talking about

philosophical discussions.

PROFESSOR ALBRIGHT: Well, we've changed philosophically on Rule 6 big time.

MR. SUSMAN: Well, it turns out we haven't. Okay? It turns out we haven't. I mean, it turns out that what happened after a long drafting session we've got a Rule 6 that everyone agreed to because it's substantively the same thing that we had before, I think. That's why everyone agreed to it so readily.

And so what I'm saying, what I'm scared of is that we're going to have another hour drafting session on these rules as we go through it to get to the same point, and my only fear is that there were people in the group that thought that some information about the experts should be available early. There were other people in the group that thought that nothing should be available until a time, a drop-dead time certain so you aren't dribbling out information about experts. Everyone knows clearly when you've got to disclose information about experts, and you

disclose everything at one time.

The votes at our last several meetings have put those two together, and we have struggled to come up with a vehicle and a timetable to express it in English so that you get a little of both.

You can at any time during the discovery period ask for the name of the other guy's experts and the subject matter of his testimony. And if he's got them, he has a duty to reasonably promptly disclose them to you.

On the other hand, you cannot require him to reasonably promptly disclose to you early in the discovery period the substance of the testimony, the documents that the expert may have prepared, et cetera, et cetera. That comes at the 75/45 day time period. That's the way we tried to write the rule. I mean, I can explain what we have done, but I hope we've done it in English.

And my fear is that to go back now and get a philosophical viewpoint -- I mean, I do think there is some question here on fairness, a basic fairness of what we're doing, you

know, with the people who are in attendance.

CHAIRMAN SOULES: Well, we'll leave it confused. Is that what the Committee wants? I mean, it's not that hard to fix. If you look at Rule 9 -- just a minute, look at Rule 9 under "Response."

This whole last part is subsumed already. Unless the time to serve a response is extended in the request or by agreement or court order, that's all totally redundant. It's governed by an earlier rule. Okay. That's completely redundant. If we strike that and we just reverse the rest of the sentence, "a party served with a Standard Request for Disclosure" --

PROFESSOR ALBRIGHT: I don't know where you are.

CHAIRMAN SOULES: A party served with a Standard Request for Disclosure shall file and serve a response making the requested disclosure within 30 days after the service of the request, 50 days if the request accompanies citation, and then except the responses pertaining to expert witnesses shall conform to Rule 10 or be governed by Rule 10.

And that fixes it. It says when they are to come. And then Rule 10 is true. We've split it, but it's been split for a long time.

The progress of that rule, Judge Brister, was that the Committee voted that the expert information would come late, but there was a sensitivity that we didn't even know who they were and we ought to be able to at least find that out sometime early on so we can start doing some planning. So we said okay, you can find out who they are and the general subject early, but still they don't start doing their reports or their depositions until basically the facts of the case fill out.

HON. SCOTT A. BRISTER: But is that what the Subcommittee's Rule 10 does? In Part 2 it says the response shall be made within 30 days, but if it's amended or supplemented, such supplement, which of course means you can do it any time you want, becomes unreasonably prompt if it's 75/45. That clearly implies and infers, or I infer from that you don't have to do it within 30 days. You just have to do it reasonably prompt.

CHAIRMAN SOULES: That's right.

HON. SCOTT A. BRISTER: And all I'm saying is if that's the standard on all of it, let's put it all together. You should do it at 30 days, but the fact of the matter is you can do it reasonably prompt. And 75/45 is the drop-dead as to what's reasonably prompt, so to me 10(2) is not any "you have to respond in 30 days."

CHAIRMAN SOULES: Well, you do if you don't.

HON. SCOTT A. BRISTER: Well, you just amend late and you claim it's not unreasonably prompt because they had three months left in the discovery period or six months left in the discovery period. And almost everybody says that's not unreasonably prompt, if you had six months to do discovery on it.

MR. McMAINS: Well, except that if it's more than 75 days, it's never unreasonably prompt, is it?

HON. SCOTT A. BRISTER: No. It doesn't say that. It's only if it's less than 75 it's --

MR. YELENOSKY: -- presumed.

HON. SCOTT A. BRISTER: -- it's presumed unreasonably prompt. I'm suggesting it can be unreasonably prompt a long time before that.

CHAIRMAN SOULES: Okay. We set up Rule 10 for the reasons I discussed just earlier, and I guess, Judge Brister, if you have a motion, well, make it.

HON. SCOTT A. BRISTER: I proposed you collapse (2) and (3) into the (2) and (3) I have on mine and just treat them all the same.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: Now, that's if -- let me except out from that if you want to play around with making it a firm 30 as opposed to reasonably prompt or something, that's fine. I'm just -- the gist of mine is that you don't have two separate confusing procedures. Only one confusing procedure will be enough.

CHAIRMAN SOULES: Okay. Is there a second to that?

MR. PRINCE: Second.

CHAIRMAN SOULES: It's been moved and seconded. Carl Hamilton.

MR. HAMILTON: I have a problem with the 75 and 45 days.

HON. SCOTT A. BRISTER: Different question. I do too, but that's --

MR. HAMILTON: Okay. Then we'll save that until later.

CHAIRMAN SOULES: Okay. Those in favor of Judge Brister's motion show by hands. Seven. Those opposed. Four. We've only got 11 people with opinions on that. Okay. It carries seven to four.

PROFESSOR ALBRIGHT: Since we had such a low vote, should we submit perhaps two or three different versions to the Court or the hybrid version or --

CHAIRMAN SOULES: Well, I don't -- let me just count and see how many people are here.

HON. F. SCOTT McCOWN: Well, a low vote may simply indicate -- I don't think it necessarily justifies different versions. I mean, if we can go with one versions, I think that would be better, as I see it.

CHAIRMAN SOULES: Well, we've got 22 people here and 11 are voting on it, and I feel like that's a duck because it quacks like a duck. You all take positions on these. These are very, very important policy decisions here that we're making.

HON. SCOTT A. BRISTER: This one is not that important. This one is not as -- I said, everybody is just going to request both of them anyway. All I'm suggesting is just put it in one place. It's not that important.

MR. SUSMAN: Well, why don't we go back to the notion that nothing about experts is due until a time certain before the end of discovery date. Then we can talk about what time they should be. But why should we get into arguments about what has to be disclosed about experts until you get to some time certain.

And the fact of the matter is, that's the way most pretrial orders are anyway, where there's a time certain at which expert disclosure has got to be made. Why not provide that -- I mean, go back to the way we

originally worked, Scott, which was before we had this dual system of disclosure; that at a point in time certain that is easy for the bar to know you have to make your disclosures about experts and you can make them all at the same time. I mean, that's what I -- I mean, that's fine.

CHAIRMAN SOULES: Just let me be sure that I understand what the vote was. You've got Rule 10 here on --

HON. SCOTT A. BRISTER: The Subcommittee version is on the left, and my version combining them --

CHAIRMAN SOULES: And yours is on the right. And your motion was to delete what part?

HON. SCOTT A. BRISTER: Well, it doesn't really delete anything.

CHAIRMAN SOULES: No, but put this in place of what?

HON. SCOTT A. BRISTER: Make it so parts (2) and (3) of 10 appear in (2) and (3) of my version.

CHAIRMAN SOULES: Come out and in the place of that is your --

HON. SCOTT A. BRISTER: (2) and (3).

CHAIRMAN SOULES: (2) and (3). Okay.

HON. SCOTT A. BRISTER: Which is really just the same thing put into one rather than repeating it all.

CHAIRMAN SOULES: Okay. I've got it.

HON. SCOTT A. BRISTER: And to respond to Steve, I mean, I agree with that, but then you would have to go back -- that would be contrary -- I mean, the whole idea of supplementation is there's not a firm drop-dead date. I mean, the reasonable promptness comes in back at Rule 5 on every other kind of discovery. The same argument could be made.

CHAIRMAN SOULES: Okay. That motion is made and carried, and do we have another motion relative to Rule 10? Are you making another motion, Judge Brister?

HON. SCOTT A. BRISTER: Sure.

CHAIRMAN SOULES: Okay. What is it?

HONORABLE SCOTT BRISTER: Okay. The paragraph 5 of the Subcommittee's, court-ordered reports, the last sentence I propose to drop. It says that a court cannot compel production of a report before the 75/45 cutoff dates.

I'm assuming, on the cases that John and others are probably concerned about, I'm going to want to move up those dates earlier than -- make them more than 75/45 before. Does this mean I can't do that as to the reports? It just doesn't make sense to me to say the court can't order you to do your reports early at any particular time when it makes reasonably good sense for me to order it under the circumstances of that case.

CHAIRMAN SOULES: The motion is to delete the last sentence of paragraph 5 of Rule 11. Is there a second? Paragraph 10, I'm sorry. To delete the last sentence of paragraph 5 of Rule 10. Is there a second?

MR. PRINCE: Second.

CHAIRMAN SOULES: It's moved and seconded. Is there a discussion? Alex.

PROFESSOR ALBRIGHT: This does

not prevent a court from requiring an early report. All it does is say that if you're going to require the report early, you require all the other expert information to be disclosed at the same time. It just makes you move all of the deadlines for discovery disclosure earlier. If we're going to your reasonably prompt, it doesn't make any difference.

See, this was with the idea of you shouldn't even have to think about putting all your expert documents together early in the discovery period because you don't have to disclose them until 75/45 days, and so that's a whole different part of the case that you're not really worried about as far as discovery is concerned right now.

If the judge is going to start making lawyers disclose experts early or make expert disclosures early before the 75/45 days, they should do it all at the same time, and so you do your report, your documents, your general substance, et cetera, all at the same time.

HON. SCOTT A. BRISTER: How many judges are going to order reports before

the date when they're setting also to order designating the experts? I mean, nobody is going to do that.

PROFESSOR ALBRIGHT: Well, we just wanted to make sure that this deadline all came together so you're not doing a report one day and then six weeks later then you have to make these other disclosures.

HON. SCOTT A. BRISTER: I mean, I don't have any objection to that. I just don't think that would ever arise. I mean, a judge won't order the reports a year before they have to designate the experts. I mean, why would a judge --

PROFESSOR ALBRIGHT: But under this rule, our draft, which this was originally written for, you would have to designate your experts, quote, reasonably promptly or whatever. But this was just to keep those second disclosures, those more onerous disclosures, at the same time as the report.

So I think what we have contemplated is that you can only get a report by a motion. So if somebody files a motion and says, "I

need a report from the other side's expert," and the judge says, "Yeah, you're entitled to one" and signs an order and nobody really thinks about the times, then you're having to do a report and then later on you're doing everything else. And we just want to make sure that everything was kept together, and that's the -- it was not to limit the judge in changing those dates at all.

MR. YELENOSKY: But isn't that what the -- the pursuant to Rule 3 seems to import the deadlines from Rule 3, not just -- if you stop the sentence with "at the same time as Standard Requests for Disclosures are due," then it seems to read like what you're describing, which is the judge can set the standard disclosures at a different time, but the report should be coterminous with that, whenever it is.

That's what I understand Judge Brister to be saying, is that it seems to import and hold sacrosanct the 75-day periods in Rule 3 when all you really want to import from Rule 3 is the notion of what a standard disclosure is and say that the reports should be due at the

same time.

PROFESSOR ALBRIGHT: Okay. But under our rule, we had to separate two different kinds of standard disclosures. We had the earlier ones and the later ones. Under Scott's --

MR. YELENOSKY: I don't know if it's been modified or --

PROFESSOR ALBRIGHT: Under Scott's rule, you don't have to differentiate between the two kinds.

MR. YELENOSKY: But it's distinguished just by the capital standard or what you say, the Standard Requests for Disclosure.

PROFESSOR ALBRIGHT: No, because we have standard requests under 2 --

MR. YELENOSKY: Additional standard requests.

PROFESSOR ALBRIGHT: -- under "Designations," but then we have additional disclusures under 3, and we just want to tie it to additional disclosures under 3. We're not worrying about two different kinds of disclosure under this -- except actually under

Scott's rule this is all floating anyway so it doesn't make any difference.

HON. SCOTT A. BRISTER: My rule is not different on that. I just took the language direct from yours. I didn't intend to change anything about dates.

PROFESSOR ALBRIGHT: But under yours, when do you want to -- how do you want to put together reports with these other disclosures?

HON. SCOTT A. BRISTER: Well, I hadn't addressed that. I just copied that part directly out of yours. I didn't change a bit of that. In other words, in the Subcommittee draft there never was, other than 75/45, any drop-dead date anyway.

PROFESSOR ALBRIGHT: Right.

HON. SCOTT A BRISTER: It was you send it out, they should respond in 30 days, good people will, some people won't and they'll do it late, and then there's a reasonably promptness question.

CHAIRMAN SOULES: It looks to me like this last sentence says you can't compel production until 75/45.

HON. SCOTT A. BRISTER: That's what it looked like to me when I read it, and that's what it's going to look like to a lot of judges.

PROFESSOR ALBRIGHT: But that's not what it was intended to do, so I agree it may need some redrafting, but I'm also saying it may not -- if we're adopting Scott's rule, it may not be so important so maybe we should drop it.

MR. YELENOSKY: I have a suggestion. If you just say instead of -- it's the reference back, since you're referring to it. A court may not compel production of such a report before the date upon which the designating party is required to submit additional Standard Requests for Disclosure, because you use initial caps there, and you don't -- I mean, you know what you're talking about.

HON. SCOTT A. BRISTER: I move we drop it.

CHAIRMAN SOULES: Let's take Judge Brister's motion that it just be dropped, and that way the judge decides if he

wants to move it to any time he wants to, and he probably may have some reason for doing it that way.

HON. SCOTT A. BRISTER: One might imagine certain circumstances where you would want to do a report first.

CHAIRMAN SOULES: Okay. It's moved. Was there a second?

MR. MARKS: Second.

CHAIRMAN SOULES: John Marks seconded it. Those in favor show by hands. 10. Opposed. 10 to nothing we delete the last sentence of paragraph 5 of Rule 10.

Now, we have to go back to Rule 9 for a moment, while we were talking about 3, because there is only Rule 10(2), is that right, or is it 10(2) and (3)?

HON. SCOTT A. BRISTER: What are you looking for?

CHAIRMAN SOULES: The top sentence of Page 2 of Rule 9 says "Provide the information pertaining to expert witnesses set forth in Rule 10(2) and (3)."

PROFESSOR ALBRIGHT: So now it's just 10(2).

CHAIRMAN SOULES: So wouldn't that just be 10(2) only?

PROFESSOR ALBRIGHT: Correct.

HON. SCOTT A. BRISTER: Yes, that's correct.

CHAIRMAN SOULES: Okay. And then down to No. 3 under "Response" on that same page, let me suggest that we delete -- let's see, one, two, three, four, five -- in the fifth line under "Response" the words "unless the time to serve a request is extended in the Request or by agreement or court order." That would be in redundant. That's mainly so that we can keep the first sentence less complex.

And then change the first sentence to start with the words "A party served with" in the first line. "A party served with a Standard Request for Disclosure shall file and serve a written response making the requested disclosures within 30 days after the service of the request, 50 days if the request accompanies a citation, except that responses pertaining to expert witnesses shall be made in accordance with Rule 10."

PROFESSOR ALBRIGHT: I don't think that's needed any more.

MR. SUSMAN: I'm going to suggest that -- I think it's -- let me put a motion before the house.

CHAIRMAN SOULES: Because I don't understand how these rules are working timewise.

MR. SUSMAN: Let me make a motion, because they're not --

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I move using Scott's draft on Rule 10, 10(3), "Response," be worded as follows: A party served with a Standard Request pertaining to expert witnesses shall make its response -- now, eliminate the language there to the end of the line, the next three lines, and say, shall make its response the earlier of 75 days before the end of any applicable Discovery Period or 75 days before trial, et cetera, until the end of the paragraph, so that there is a time certain to respond to a Request for Standard Disclosure on expert witnesses that is the 75/45-day time period.

And let me tell you why I favor that approach. I think that we are requiring a lot of information now in the response to a standard request about experts, and that's fine. We are also requiring that that standard request be answered within 30 days. I think it's putting an undue -- I think it's moving the expert process up too close to the front end.

I may have an expert at the beginning of the case. You serve a standard request on me. Within 30 days I've got to respond. I've got to give you two days that that expert is available for his deposition within the next 45 days. That's what the rule says. Okay? And within two days that he's available I've got to give you all of the work that he's already done. I think we ought to -- I mean, I really urge us -- I think Scott's approach is fine. I'm in favor of eliminating a dual system of responding, but I think it ought to be moved to a time certain toward the end of the discovery period, not -- so it will operate just like expert cutoff dates or disclosure dates in pretrial orders, rather

than saying it begins the first day that a standard response is done. If you do that, then that simplifies it, and I have no problem with Scott's version whatsoever.

I mean, I do not think we ought to be asking lawyers, Scott, to do things and then say, "But you don't really have to do it; it's not serious if you don't do it." I mean, that's not right. Okay? And I think when we say reasonably promptly do something, you ought to reasonably promptly do it. But I don't think we ought to allow a Standard Request for Disclosure, which can be served at any time and is normally responded to in 30 days, be served at the beginning of the discovery period, which requires the lawyers to do everything that's in (a) through (f), including you have to state the substance of the expert's impression. I just think it's premature and will create all kinds of make-work. There will be all kinds of amendments and supplements throughout the discovery period. And you just shouldn't be focused -- I mean, we all know that experts come late.

CHAIRMAN SOULES: Okay. What I'm proposing is that the part of the request for disclosure, the Standard Request for Disclosure that pertains to experts be governed by the same rule as an interrogatory seeking the same information, that is, be governed by Rule 10 entirely. That's what I have dictated. In other words, the standard request for discovery can operate the same way.

MR. SUSMAN: I'm not sure I'm following what you're saying. I made the proposal that we change the language of Rule 10(3) for the response time on the standard disclosures on experts.

PROFESSOR ALBRIGHT: Well, let's deal with Rule 10 and then go back and --

MR. SUSMAN: Yeah, we need to deal with Rule 10.

PROFESSOR ALBRIGHT: Because once we get Rule 10 resolved, then we can go back to Rule 9 and check whatever we decided to do with Rule 10.

MR. SUSMAN: I move that.

PROFESSOR ALBRIGHT: I second it.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: So the idea is -- actually it's not that big a change. All it is is instead of 30 days before trial you get in trouble if you don't name your experts, it now goes to 75 if it's your expert, 45 if it's the responding expert, and if you want more than that you need to go to the court and get something earlier than that?

MR. SUSMAN: Right. But keep in mind it's 75/45 not before trial but before the end of the discovery period, which may be months before trial. It's only in rare cases that the discovery period will come right up to the trial setting, because the discovery period goes nine months from the opening.

HON. SCOTT A. BRISTER: That's fine.

MR. SUSMAN: And it's just saying, you know, if you've got nine months to conduct discovery in, the last few months you ought to be messing around during the last

75 days with expert discovery.

CHAIRMAN SOULES: So we're not going to be able to discover anything about experts until the 75/45-day time period.

HON. SCOTT A. BRISTER: No. It doesn't prohibit you.

CHAIRMAN SOULES: Well, you've got to go to the judge to get it.

MR. SUSMAN: Yeah, you've got to go to the judge to get it.

HON. SCOTT A. BRISTER: Or by agreement.

MR. SUSMAN: Or by agreement.

MR. MEADOWS: But keep in mind, I mean, that's basically six months into the case.

MR. SUSMAN: I mean, it's really quick.

HON. SCOTT A. BRISTER: It's a default provision, though. The fact is, the way it works in real life, we all know, is you send out the interrogatory, the lawyers that are ready and know who they are send back the response. There are some people that then wait to try to get to the 31st day, but that's

a risky thing to do because sometimes you forget. So I think you send it out, and if people know, they will go ahead and respond like they do now.

But if you need more time -- because I was real troubled with the 75/45 on the complex case, but you have to keep reminding yourself you can always go to the judge on the complex case and say move it back.

CHAIRMAN SOULES: Well, this is a major retreat from what this Committee voted to tell the Subcommittee to do, because you don't even get the expert's name until 75/45. That's what it -- that's what's being proposed now. David Keltner.

MR. KELTNER: Luke, I tend to agree. And Steve and Alex, here is my point: In many instances -- and Scott, what you said is true, that in many instances a court sees this in a default provision; that it is the last time you designate an expert. But what I don't think gets before the court but what is going on with the lawyers is this: All of a sudden, I see Susman asking very specific questions of fact witnesses. I know he's got

an expert who is telling him how to develop the case and what to do, which is exactly the way it ought to be. Now, what I want to do to be able to take that apart is know the basis for all that. And if when the first time I learn it is 75 days before the end of the discovery period and all of the discovery is done, what we've done is apparently our preparation has crossed in the night, which is part of the problem with the concept of the time period. That is a huge problem. That's why I think that this is a safeguard, that the standard disclosure is a safeguard on the system.

If I'm diligent and ask, I ought to be able to get some of that information up front and not have to wait until 75 days before the end of the discovery period when the other side has done all the discovery based on something I wasn't told about.

MR. SUSMAN: David, you're --

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: I agree with David. In cases where you have experts,

they're generally the most important witnesses in the case. Why wait until the very end of the discovery period to start talking to them in oral deposition?

The other thing is that if the plaintiff designates 75 days before the end of the period and then gives two days during the next, let's say, 30 days even, he can give the witnesses on the 31st day, so before the defendant ever gets to take the depositions the defendant has to designate experts. So the defendant either has to designate unnecessary experts because he doesn't know what the plaintiff's experts are going to say, or he doesn't designate an expert that he needs because he doesn't know what the plaintiff's expert is going to say.

So there needs to be a plan whereby the plaintiff's experts are designated, the defendants get an opportunity to depose them and then designate their experts. But this plan here is a disadvantage to the defendants.

CHAIRMAN SOULES: This won't work. The bar is going to run us out of the state if we make a rule that you can't find

out who somebody's experts are until 75 days before the close of the discovery or 45 days before the close of discovery without the court.

HON. SCOTT A. BRISTER: So you want --

CHAIRMAN SOULES: We're smokers. Look, this was set up this way in the beginning by the Discovery Subcommittee and we had a lot of discussion and we said at least we ought to be able to get with reasonable promptness, after the party knows who they're going to be, the names and the subject matter.

HON. SCOTT A. BRISTER: That's what this is. Now, Steve wants to drop that in his motion, but that's what this said. That's what the Subcommittee did, and that's what's in mind. The problem is, if you write a rule saying "If you know, you have to tell me in 30 days," what is the sanction? The bar is going to go crazy if we tell them, "If you don't answer the interrogatory the first time it's sent within 30 days, your experts are all struck."

To make somebody answer within 30 days, what's the only sanction, "If you don't, you can't call them"? That will make the bar go crazy that we move it up not 30 days before trial but 30 days after the case starts. They will go crazy.

So now the only alternative is a reasonable promptness, if you think reasonable promptness actually makes people do something more than a drop-dead date, which I'm not convinced whether it really does or not.

MR. SUSMAN: I mean, see --

CHAIRMAN SOULES: Your rule, the way you've got it written in paragraph 3, would require everything, (a) through (f) --

HON. SCOTT A. BRISTER: Your duty is to respond --

CHAIRMAN SOULES: -- with reasonable promptness.

HON. SCOTT A. BRISTER: -- to the impressions, et cetera, within 30 days just like other standard requests. It understands that many people, like they do on the interrogatories right now that are supposed to be answered in 30 days, will

answer and say "haven't decided yet" and will supplement at a reasonably prompt time thereafter, and but in no event later than 30, 75 or whatever days you want to do. That operates exactly like it does right now.

MR. KELTNER: Well, in brief response to that, Scott, I think it operates only partially that way now. What happens is people are so afraid of the Builder's Equipment vs. Onion deal that they don't operate that way.

My theory is, and I see where Steve is going and he's got a good point, I'm not saying it has no merit whatsoever, but what I am saying is that there's got to be a check on it. I'm not so sure that you have to give everything up front.

If he's developing a case through an expert, and this is long before I come to see you, I want to know who it generally is. And sometimes quite frankly the identity is going to be enough for me to know. But I want to have some idea in preparation of the case. I may not want the report, I may not need all the specific information, and Steve is right

about that, but I at least need some safeguard that's got the sanction that if he knew and didn't tell me -- I mean, if he has employed this guy and he says, "On October 1st, 2001, you're going to be in Scott Brister's courtroom testifying, and I want you to help me prepare all of this case for trial," and the first time I get to know about it is 75 days before the end of discovery, whether I am plaintiff or defendant makes no difference, I am in a world of hurt, and we haven't prepared the lawsuit that will be tried, and that's what I worry about.

HON. SCOTT A. BRISTER: What would you do now on that?

MR. KELTNER: What I would do is just leave it up to the court. I would go to the court. I would do it this way: I would say -- and what the court is going to tell me is, what did we say, 75/45, Dave, and, man, I don't know what he's doing. I guess we'll find out. And sure enough, I'm going to find out after the discovery period is finished, and then there's not anything you're going to be predisposed to do to help me, nor

should there be at that point.

But my point is, at least in Rule 9 I get some information up front that is helpful to make me make a decision about whether to come to you.

MR. SUSMAN: David.

MR. KELTNER: Yeah, Steve, I'm sorry.

MR. SUSMAN: I mean, the problem with what we are doing is like -- I mean, this is the debate we were having at the earlier meetings, okay, and we're going full circle.

MR. KELTNER: You're right.

MR. SUSMAN: And we've had a group of lawyers that diligently tried to do what you all wanted done and it just got voted down, I mean, by this last vote when we took Scott's version. Okay?

We -- you're saying some things up front. Those are exactly the same words that we tried to accommodate in drafting the things that we drafted, although it was awkward to do it, where the bar knows that some things about an expert, if you know them early, you've got

to give them early; and other things like the dates that they're going to be available, all their written product, their biography and their current resume, there's a certain time when you -- there's a certain rhythm when you give those things and that's later, not earlier. And that's how we tried to draft the rule.

Now, you know, it turns out the majority wants it all done at one time or maybe they don't want it all done at one time or we can't agree on the time. My only problem is --

MR. KELTNER: Steve, it's slightly different. I like the safeguards that Rule 9 gives currently, and we haven't revisited that yet. So my theory is, I'm fine to go ahead and let everything else go in there as long as you let me have Rule 9 to come and take care of just some basic fairness issues.

MR. MEADOWS: But I don't read Judge Brister's rule as changing what you're saying. I mean, it says in the very first sentence of his rule that there's a designation under Rule 9. There's an early

right to request and receive information on experts under his Rule 10.

MR. SUSMAN: Right.

HON. SCOTT A. BRISTER: And if you know it and you're using it, there's an argument you should have disclosed it already because it's not reasonably prompt. That's in what I've got, and I just took it from what they have. It seems to me the only discussion is, do you want reasonably prompt in or do you want a drop-dead cutoff. You can't, again, make somebody tell you the name, and there's no ability to say, "Well, I wasn't decided yet" or something like that or "I'll tell you later," unless you follow it with a drop-dead date. And if that's 30 days after the request, that is not going to be acceptable.

MR. KELTNER: I don't have a disagreement with what you're saying. But what I read Steve as saying, though, is that you can make it the 75 or the 45 and that's it. That's what I'm --

HON. SCOTT A. BRISTER: The proposal to drop out the reasonably promptness would do that.

MR. KELTNER: And that's what my comments are addressed to. I probably didn't make that clear.

MR. SUSMAN: Well --

HON. SCOTT A. BRISTER: And I don't think putting them all together changes the concept of if you've got the name but he hasn't done his studies yet, that makes the reasonably prompt date different for the name versus all the paperwork.

MR. SUSMAN: Scott, why don't we tell lawyers when they are -- I mean, I don't --

HON. SCOTT A. BRISTER: If you tell them -- because if you tell them this date and none other, then you have to cut the expert after that date, and that's --

MR. SUSMAN: I mean, I think --

CHAIRMAN SOULES: We're back to the same tension that we had once before. The tension is I can't tell you everything I know about my experts until I've got my discovery done and that's going to be toward the end of the discovery period, so you can't learn anything about my experts until towards the

end of the discovery period. That was the position that was taken here --

HON. SCOTT A. BRISTER: Is that reasonable --

CHAIRMAN SOULES: -- and debated at length.

And Carl Hamilton and others that I remember said, "Wait a minute, we've got to at least have a clue sometime before that what is going on. At least let us know who your expert is and the general subject matter of his testimony."

MR. SUSMAN: And that's why we --

CHAIRMAN SOULES: So we said after literally hours of discussion about this, "Okay. We'll fix that. We'll accommodate those people who acknowledge that it's silly to expect anybody to give full disclosure about their experts early by putting that towards the end of the discovery period. But you can ask for this limited amount of information early, and you can get it early."

MR. SUSMAN: And that's why we

have a rule --

CHAIRMAN SOULES: And those are the tensions that were there, and we split the rule to take care of both of those issues.

MR. SUSMAN: And there's an (a) through (f) --

CHAIRMAN SOULES: Now, what has happened now is we've folded everything back together, that that can't be learned until later with that that somebody wants a clue about early. And we can't reconcile them and we never have been able to reconcile them except by splitting them into two peices and given them different time frames.

MR. SUSMAN: And that's why I suggest that we go back to what the Subcommittee was doing, which was treating (a) and (b) of content, which is something, not everything about experts, but (a) and (b), which is on a different time frame than (c) through (f). That has been our solution to the problem. Now, that's why you had this dual -- the Subcommittee has had this dual thing. I mean, you're either going to have --

CHAIRMAN SOULES: And both

people, both sides are right. You can't give a lot of information about experts in most cases until late, but you can give some information about those experts early, and we want those two things done at a time that's fair to everybody.

MR. SUSMAN: So I move we reconsider the Subcommittee's draft of Rule 10 --

HON. F. SCOTT McCOWN: Second.

MR. SUSMAN: -- in lieu of Judge Brister's treating all those items on the same timetable.

HON. F. SCOTT McCOWN: Second.

HON. SCOTT A. BRISTER: Let me explain again. My view of it is, what you're saying, then, is I know my expert, who they're going to be, documents, I've got their resume, I know when they can testify, but reasonably promptly -- because the Committee is not saying you have to do it within 30 days, right? I mean, yours is reasonably promptly. I tell you the name, and then not a minute before 75 days I tell you everything else.

PROFESSOR ALBRIGHT: It doesn't

prevent you from --

CHAIRMAN SOULES: Unless the court orders it or agreement.

PROFESSOR ALBRIGHT: But you certainly don't have to.

HON. SCOTT A. BRISTER: No. That's not even when it's due, according to the Subcommittee one. Sure, you can always volunteer stuff up. You can volunteer without the request being sent, but that's not going to happen.

Look at your 3(b). A party seeking affirmative relief must respond to the requests upon the later of 30 days or the earlier of 75. In other words, you must respond by 75 days before the end.

MR. KELTNER: But Scott, that's as to the additional disclosure. If you look at 2(b) under "Response" --

HON. SCOTT A. BRISTER: That's what I'm talking about. I know everything but I'm not going to tell you a minute before 75 days early. But the name, even if I know the name, I have to tell you within 30 days or later so long as it's reasonably prompt, I

mean, so --

CHAIRMAN SOULES: Where is the duty to respond to written discovery, the time, the time line. Where is it?

PROFESSOR ALBRIGHT: Under our rules, there are two duties. Actually this is much --

CHAIRMAN SOULES: Where is the time?

PROFESSOR ALBRIGHT: This is much easier to see if you will all look at the one-page single-spaced version, because you'll see them right next to each other.

If you look at that on Rule 10 you have 2(b), Rule 10(2)(b) is the response to the request for designating experts. 10(3)(b) is the response to requests for additional disclosures.

The way we envision this working is I make a -- if I'm a party in a lawsuit, I make a standard request for disclosure soon after the lawsuit starts, and I say, "Pursuant to Rule 9 you're requested to make the following disclosures within 30 days."

One of those is (h), provide the

information pertaining to expert witnesses set forth in 10(2) and 10(3). You then go to Rule 10(2) and 10(3) to see when you have to respond to that particular Standard Request for Disclosure.

The Standard Request for Disclosure for designating experts, which is part 2 of Rule 10, is identify each expert and state the subject matter on which each identified expert is expected to testify.

I have to respond -- the other party has to respond to that 30 days after the request, or reasonably promptly thereafter if they have not decided who that expert is. The deadline, the drop-dead deadline for reasonable promptness is the 75/45 day deadline before the end of the discovery period.

Then the rest of those standard disclosures, 3(a)(1) through (4), I don't have to respond to those until the later of 30 days after service of the request, for instance, if the request is served very, very late in the discovery period, or the earlier of 75 days before the end of the discovery period or 75 days before trial; and then for opposing

experts, 45 days before the end of the discovery period or 45 days before trial.

So Scott is correct on these part 3 additional disclosures. You have no duty to respond until your 75 day/45 day drop-dead date.

CHAIRMAN SOULES: That's right.

PROFESSOR ALBRIGHT: And this was the cut-the-baby compromise based on this exact same discussion that we had at the last meeting.

CHAIRMAN SOULES: The Committee has drafted right on our votes.

HON. F. SCOTT McCOWN: So let's stick with it and move on.

CHAIRMAN SOULES: Any other discussion on that? The motion has been made not to do Judge Brister's Rule 10(2) and (3) and go back to the Committee version.

PROFESSOR ALBRIGHT: Second.

CHAIRMAN SOULES: Okay. The motion is made and seconded. Those in favor show by hands. 11. Those opposed. Five.

11 to five to go back to the Committee's proposal.

Okay. Now that that is done, unless we want to revisit it again, a couple of more points here. Let me just go back to Rule 9 for a minute now, what I was talking about in terms of the response to the Standard Request for Disclosure. It's on the second page of Rule 9.

And that first sentence I propose to read, "A party served with a Standard Request for Disclosure shall file and serve a written response making the requested disclosures within 30 days after service of the request, 50 days if the request accompanies citation, except that responses pertaining to expert witnesses shall be made in accordance with Rule 10."

PROFESSOR ALBRIGHT: The Subcommittee accepts that.

MR. SUSMAN: That's fine.

CHAIRMAN SOULES: And we will put 10(2) and 10(3) back in (h). We had taken out (3) and now it needs to go back in.

PROFESSOR ALBRIGHT: But we're still taking out the last sentence of (5)?

CHAIRMAN SOULES: We're taking

out what now?

PROFESSOR ALBRIGHT: The last sentence of (5).

CHAIRMAN SOULES: That's in Rule 10, right. We're taking out the last sentence of (5).

Now, we've got Rusty's point, because Rule 10, paragraph 1, still has this last sentence, "If the expert has personal knowledge of the relevant facts" and so forth, which makes the discovery of facts -- may make discovery of facts from a designated expert who knows -- who is also a person with knowledge of relevant facts just like any other person with knowledge of relevant facts appear to be more limited. What would happen if we just -- would it fix it just to delete the word "personal"?

MR. KELTNER: Done.

MR. McMAINS: Yeah. I think that's the minimum that needs to be done.

CHAIRMAN SOULES: Okay. That's the minimum. Any opposition to that? Steve Susman.

MR. SUSMAN: You know, the

problem is every expert has knowledge of relevant facts, right? There's not an expert that doesn't have knowledge of relevant facts, right?

MR. KELTNER: Right.

CHAIRMAN SOULES: My police officer testifies he saw the accident, or he got there and heard information.

MR. SUSMAN: But my economist knows the business was making a million dollars pretax for the last six years and he knows that -- I mean, all experts know relevant facts.

HON. F. SCOTT McCOWN: Well, you can't -- you can't --

MR. SUSMAN: And what we don't want to do is -- what we didn't want here is to allow people to depose retained experts, who have knowledge of relevant facts for sure, outside the Discovery Rules, to get to them outside of the Discovery Rules. I mean, that was our problem. I don't understand.

HON. F. SCOTT McCOWN: Well, what Steve is saying is that if you delete the word "personal" and it just reads "if the

expert has knowledge of relevant facts," the problem that creates is you talk to an expert, you tell him about your case, he now has secondhand knowledge. And if you left out the word "personal," you could then use the other rules, the non-expert rules to start deposing the expert, finding out about the expert, before the expert rules allow you to.

The problem that Rusty originally raised was the in-house expert who actually has firsthand knowledge of facts. And we agree that that person in their capacity as a fact witness, they kind of have two hats. You need to be able to get at them. And so that's why it says if the expert has personal knowledge of relevant facts, you get at them. And so that's where we drew the line.

CHAIRMAN SOULES: David Keltner, and then we will get to Rusty.

MR. KELTNER: Well, since they were directing comments at what Rusty said, maybe I'll wait.

CHAIRMAN SOULES: Okay. Rusty.

MR. McMAINS: Well, the problem again is that when we said it in the first

place, it says that you can only get experts and the scope under 9 -- I mean, under 10. I mean, you can't get them anywhere else. And then 10 sends it back if they have personal knowledge. But remember, the first one defines what knowledge of relevant facts is and specifically puts in what the case law is on what that means, and that means that it can lead to discoverable information as well.

Now, I understand that they're trying to protect obviously the discussions with the lawyers, which I thought frankly was protected under the work product stuff, it seems to me, where there's a consultation thing in there as well, but so I'm not sure that is much of a concern.

My problem is that you are limiting the scope of these people who have been there. They may have been involved in the design of the transmission for 20 years. A lot of the information they may have may not be personal knowledge. It may be secondary knowledge. It may be hearsay. It may be something somebody told them. That's discoverable information as to anybody else, except, because you poke him

as an expert, he ain't. That is not right in my judgment under the current case law and shouldn't be under our rules.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I think there's a way to cure it. What we're really talking about is information that was -- at least what Steve is concerned with is information that is passed on in the litigation to the expert in order for the expert to be able to consult or testify. Obviously we don't want them to get into that kind of situation.

What the expert can testify to is to matters that he or she learned or became aware of outside the litigation process, and I think that's the dichotomy or test we ought to focus on.

You can accomplish that, I think, Luke, in two ways. We could either drop this provision completely, and I think case law takes care of the issue, but for Rusty's very accurate assessment that in scope we have a general statement that is a problem, or we use the "outside of the litigation" or "in

anticipation of litigation," which we do have case law to help on as well. Quite frankly, I think we probably ought to do the second or eliminate or change, go back and change the scope deal slightly.

HON. F. SCOTT McCOWN: Well, I don't think you can use a time test. I don't think you can say "has knowledge of relevant facts acquired before the litigation," because what we're really talking about are underlying transactional facts. But every expert is going to have had lots of knowledge about relevant facts. Your economist is going to know a lot of facts that he knew before the litigation.

MR. KELTNER: Yeah.

HON. F. SCOTT McCOWN: So I kind of like your idea of just taking it out altogether and just letting the --

MR. KELTNER: Scott, if we do take it out, I do think we have to go back and change the initial scope point to meet Rusty's concern, because in looking at it over the lunch break it is awful broad. And we don't mean to create anything new there and I think

inadvertently we're doing it.

And quite frankly we can go back to the scope provisions that Scott Brister suggested in using the first paragraph of -- or explaining what an expert witness is and what a consulting expert is. That's what the scope provisions in the current rules do, I think.

HON. F. SCOTT McCOWN: What rule is that? Where is that?

MR. McMAINS: Do you mean in your rules?

CHAIRMAN SOULES: In the Subcommittee's rules. I think it's Rule 3.

MR. KELTNER: Yeah. Let me suggest this to move this along: Why don't you let Rusty, Scott, Alex and I take a look at that on the scope deal and see if we can take care of that, and let's pass on to the next item. It might just add some verbage, but it's not going to hurt anything. And it was Scott's suggestion in the first place, and I think he's right.

HON. SARAH DUNCAN: David, are you going to include --

CHAIRMAN SOULES: One at a

time, please.

Okay. David, you've got the floor.

MR. KELTNER: Sarah was asking where that was in the scope.

HON. SARAH DUNCAN: No. I was asking are you going to include -- the way it seems to me right now, although I'm sort of unclear on the organization of all this, is that we don't even discuss this problem with respect to consulting experts, and that's because they are subsumed under the privileges rule rather than either the scope rule or the experts rule, and it's the same problem.

MR. KELTNER: That is correct. But I think that the definitional provision in scope would take care of that, and we can do that and I think report back to you tomorrow and get on. This will be an easy thing to do. It will just add some -- we're going to have one duplication, but the duplication is not going to be big.

HON. F. SCOTT McCOWN: But before we do that, can I just ask one thing. Wouldn't it solve the problem if you just took out (e) from the scope and took out the last

sentence of 10(1) and just have a rule about how you discover experts, a rule about how you discover persons with knowledge of relevant facts, and then let the parties make the common sense application?

MR. McMAINS: Except what you do then is you just throw it on the courts. You just say, "Okay, guys. Use your own imaginations."

HON. F. SCOTT McCOWN: But it's going to be next to impossible --

MR. McMAINS: In every single case, products case that I have ever seen or been involved in with in-house experts, they refuse to disclose them as consultants most of the time, and it takes a long time before you can get to those people, even though they may have been involved in the design of the product that is the subject of the issue.

MR. KELTNER: Well, again, I think we can change this, and I'm sorry to interrupt, Rusty, but we can change this without changing any part of the law by doing the definitional suggestion that Scott made, and I bet we can do it in about five minutes,

and if not, we'll report back to you that we can't.

CHAIRMAN SOULES: Anything else on Rule 10?

HON. C. A. GUITTARD: May I make a suggestion to this proposed subcommittee on the last sentence of subdividion 1 of Rule 10. "If an expert has personal knowledge of relevant facts" and so forth, why don't you just say, "If an expert has personal knowledge of relevant facts or other information not acquired by trial preparation."

MR. McMAINS: Well, that still doesn't change the fact that we treat experts differently than we treat the ordinary folks.

HON. C. A. GUITTARD: That's right.

MR. McMAINS: We have a different standard of whether they are witnesses. Not that the same person may have two hats; it's that one hat is smaller than the other. Once he's an expert, he's got a smaller hat; you can't get into his head on things other than that which he has personal

knowledge of, and that's a cop out. It's the "I don't remember" stuff that you get out of that.

MR. LATTING: But doesn't Judge Guittard's comment take care of that, though? It seems to me it does.

MR. McMAINS: No, because that deals with the personal issue.

CHAIRMAN SOULES: Okay. I'm going to accept David's suggestion on this, and David and Rusty and Judge McCown and anyone else who wants to participate, Judge Guittard, take this up somewhere and get back to us.

Okay. Anything else now on Rule 10?

MR. McMAINS: Yes. I have one question that is really a clarification.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: It's regarding these drop-dead dates that everybody seems to think are pretty clear. It says "A party seeking affirmative relief" in terms of identifying when they have to do certain things. It seems to me that in most business litigation cases I've been involved in of any

size, everybody is seeking affirmative relief. Now, there are claims, counterclaims, different causes of action, some permissibly joined, some otherwise.

The assumption, unfortunately, of this rule is like you just have a plaintiff and you have a defendant and that's kind of all there is. You may have plaintiffs, defendants, third-party plaintiffs and so on, and in your different capacities, as I read this rule, you might have to assume that you're going to have to do your experts 75 days at least with regard to certain issues in the case, but you could wait 45 days on others. Now, is that -- am I wrong on that or is that --

MR. SUSMAN: That is absolutely correct.

MR. McMAINS: You just kind of -- you figure it out, right? 75 days and you're safe; 45 days and you may be sorry.

MR. SUSMAN: Well, the only thing, Rusty, we need to do -- I mean, the only thing we knew to do is call them plaintiffs or defendants. And that's one -- that's the way we set out to do it because

it's simple and it's more like a pretrial order. Plaintiff shall designate at such a date; defendant shall designate on another date. Then we talked about other formulations, like the party who has the burden on most of the case or the whole case.

MR. McMAINS: Yes.

MR. SUSMAN: And that didn't seem to work because that was a judgment call. And so the one way we got it down was to basically say if the experts testify about an issue on which you have the burden, then you've got to designate that expert -- you lead with his designation because the other guy is responding. Now, to be sure, it may be that both sides of that lawsuit designate their experts on the same day.

CHAIRMAN SOULES: Strike "on which you have the burden" and you're probably all right. You can have the burden of proof on an affirmative defense and you don't have to designate in 75 days.

MR. McMAINS: That's right. It doesn't -- it's not the burden; it's the affirmative claim.

MR. KELTNER: Which we do in federal court and it works out all the time.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: Is the intent of this that, number one, you cannot take the oral deposition of an expert prior to the time that that party has given the two dates; and secondly, you have to take it on one of those two dates?

MR. SUSMAN: I'm sorry, what was the question?

CHAIRMAN SOULES: The first question was can you take --

MR. SUSMAN: You can take them anytime you want.

MR. MARKS: Oral depositions?

MR. SUSMAN: Yeah. You don't have to --

MR. MARKS: Oral depositions of an expert anytime you want?

MR. SUSMAN: After they've been disclosed to you, yes.

MR. HAMILTON: After the first 30-day designation, you can take them anytime

you want to.

CHAIRMAN SOULES: Right. But you're burning time.

MR. HAMILTON: But someplace over here it says you can only obtain discovery concerning experts pursuant to Rule 10. And Rule 10 says you have to identify two dates on which they will be available.

MR. SUSMAN: We did not mean to suggest that you could only depose -- that the opposing party could only depose the experts on those two dates. You could notice them up for a different date. You could try to reach an agreement on a different date. We just thought it will make things move a lot quicker if the inquiries of the experts are made and at least two dates were given for them at the time the disclosure is made. That's part of your homework you've got to do, so at least the other side, if he doesn't want to get into an argument and have you claim you're not available and go to court on a very tight time frame, at least you will have two dates certain where you can have that expert. It

was not menat to exclude you from trying to do it on a different date.

MR. HAMILTON: I was wondering if we shouldn't have something in there that says it, that makes that clear, because it looks like you designate the two dates and those are the only two dates that you can depose those experts.

MR. SUSMAN: We could certainly put a comment to that effect. Do you all think that it needs it?

HON. F. SCOTT McCOWN: Rather than a comment, why don't we just say "two suggested dates," and that let's you know that they're just suggestions.

MR. HAMILTON: Rule 3(2)(e) says, "A party may obtain discovery of the identity of and information concerning expert witnesses only pursuant to Rule 10."

MR. SUSMAN: I think that's fine to put "suggested date" in.

CHAIRMAN SOULES: 3(2), what is that, Carl?

MR. HAMILTON: 3(2)(e).

CHAIRMAN SOULES: And that's

what now?

MR. SUSMAN: Scott has suggested that we put in the word "suggested dates."

HON. F. SCOTT McCOWN: Does that solve the problem, Carl, if we say "suggested dates" to make it clear that they're just suggestions?

MR. HAMILTON: Yeah, that might help.

MR. SUSMAN: Alex, have you got that?

PROFESSOR ALBRIGHT: Got it.

HON. SCOTT A. BRISTER: Can I ask Steve, on 3(b), experts not retained or employed or otherwise in the control, is the plaintiff's doctor one of those or not one of those?

PROFESSOR ALBRIGHT: This was put in there specifically because Tommy Jacks was concerned that there are some treating physicians who have treated the patient but the plaintiff has no control over them. They're not their primary expert witness.

HON. SCOTT A. BRISTER: Yeah.

And as I said, so Tommy wants the defense attorney to call them up and chat with them about available dates and so forth? I can't imagine Tommy Jacks wants that.

PROFESSOR ALBRIGHT: He said --

HON. SCOTT A. BRISTER: If he said he did, well, that's fine.

PROFESSOR ALBRIGHT: Tommy Jacks says that he has no control over that person and he does not want to be responsible for suggesting dates that that person may not ultimately comply with later on.

HON. SCOTT A. BRISTER: That's fine. The plaintiff attorneys in my court never want the defense attorney talking to those people under any circumstance. But if that's what this means, that's fine. We'll just have a rule across the board.

HON. F. SCOTT McCOWN: I think what it really means is that the defense attorney's legal assistant is going to be talking to the doctor's receptionist about deposition dates.

MR. SUSMAN: Anything else on Rule 10? Can we vote? Can we approve

Rule 10?

CHAIRMAN SOULES: Other than by implication under 3(a)(4), is there anyplace that says you can take the deposition of an expert?

MR. SUSMAN: Under (4)?

CHAIRMAN SOULES: (4).

MR. SUSMAN: On Page 3, Oral depositions.

CHAIRMAN SOULES: Okay. Thank you. Anything else on Rule 10? Subject to the work that Keltner and his group are going to do on paragraph 1, then let's take a vote.

Those in favor of Rule 10, show by hands. 15. Those opposed. 15 to two it carries.

Okay. Rule 11.

MR. SUSMAN: We are entering into a real easy phase, Rule 11 and 12. This is our afternoon lull. We have no comments on these rules from anyone on these rules, but I guess we ought to take them up one at a time.

Rule 11, no one has commented. The Subcommittee moves the adoption of Rule 11. Is there a second?

MR. KELTNER: Second.

CHAIRMAN SOULES: It's moved and seconded. Those in favor show by hands. 16. Those opposed. No opposition. It's unanimous.

MR. SUSMAN: Rule 12, same ball of wax.

CHAIRMAN SOULES: The Committee moves.

MR. SUSMAN: The Committee moves. No comments.

CHAIRMAN SOULES: Any discussion? Those in favor show by hands. Any opposition? No opposition. It's unanimous.

MR. SUSMAN: We are going to make it, Justice Hecht.

Rule 13. That's unless Keltner with his work product messes me up. It wouldn't be the first time.

MR. KELTNER: I know, but I enjoy it too much.

MR. SUSMAN: Rule 13, Request for Admissions. Scott asked the question, why was the phrase struck allowing the response to

be signed by the party or his attorney. That's paragraph 3.

HON. SCOTT A. BRISTER: It's actually paragraph 2.

MR. SUSMAN: Is it paragraph 2?

HON. SCOTT A. BRISTER: It's the last sentence of your paragraph 2.

PROFESSOR ALBRIGHT: I think it's because we decided it was redundant, because all pleadings and responses have to be signed by attorneys, so the only time you have to set it out that something has to be signed by an attorney is if it has to be signed under oath or something. It's always signed by an attorney. I think that's why we struck it out.

HON. F. SCOTT McCOWN: The interrogatories are the only thing that we require be signed by a party. Everything else including objections are just signed by an attorney, so you don't have to say it every time. It's just by exclusion.

HONORABLE SCOTT BRISTER: Yeah. It's in (3), you're correct, "signed by the party or his attorney."

PROFESSOR ALBRIGHT: So that means there's a general rule that says everything has to be signed by the party or the party's attorney. Are you happy?

HON. SCOTT A. BRISTER: Oh, yeah. As long as there's a rule saying it somewhere.

MR. SUSMAN: That's all we have on Rule 13.

HON. F. SCOTT McCOWN: I move its adoption.

CHAIRMAN SOULES: Any opposition to Rule 13? No opposition. It carries. Rule 14.

MR. SUSMAN: The comments on Rule 14 are from Scott.

HON. SCOTT A. BRISTER: The first one was just to reinsert the definition of who can attend the deposition.

MR. SUSMAN: I don't know why we took it out.

HON. SCOTT A. BRISTER: It's the only place it appears in any rules and it seems to me it ought to stay in.

CHAIRMAN SOULES: Where is

that? Paragraph what?

HON. SCOTT A. BRISTER: It's Part 2(b).

PROFESSOR ALBRIGHT: I think it just got moved.

MR. SUSMAN: Did it move somewhere?

HON. SCOTT A. BRISTER: I didn't see it in here.

CHAIRMAN SOULES: Other attendees. If any party intends -- it's on the second page. "Other attendees."

PROFESSOR ALBRIGHT: That must have been deleted by accident, because we have not intended to do that.

HON. SCOTT A. BRISTER: Yeah. I can't -- it's on my Tab 14 on the right-hand side, 2(b). It says the parties and their spouses and counsel and their employees can show up.

MR. SUSMAN: It's in there. It's in (b).

HON. SCOTT A. BRISTER: It wasn't in the 2(b) I got.

PROFESSOR ALBRIGHT: It got

deleted by accident.

HON. SCOTT A. BRISTER: I move we put it back in.

CHAIRMAN SOULES: Is it red-lined out?

HON. SCOTT A. BRISTER: It's just out. It didn't get red-lined out. It's just out completely.

MR. SUSMAN: It just says "other attendees."

HON. SCOTT A. BRISTER: It doesn't say who they are.

CHAIRMAN SOULES: Okay. Oh, I see, there's a sentence, the last sentence of Rule 14, paragraph 1, starts with the word "Notice." Okay. The last sentence of that paragraph is shown stricken and we're going to put it back in.

MR. SUSMAN: It will be inserted on the following page after the words "Other attendees."

PROFESSOR ALBRIGHT: Yeah. It was supposed to be moved, but it somehow got deleted.

HON. SCOTT A. BRISTER: On your

red-line version, "if any party intends to have any other persons," something got dropped out in there, because you haven't defined who can attend.

MR. SUSMAN: What got dropped out was that sentence.

PROFESSOR ALBRIGHT: And it was intended to be included and it got deleted and it should be in there.

HON. PAUL HEATH TILL: Say it again, please.

MR. SUSMAN: All right. What is now scratched through on our red-line copy as the last sentence of paragraph 1, "The notice shall," goes back in as the first sentence on the following page of subsetion (b) after the words "other attendees."

MR. PRINCE: No. The second sentence.

CHAIRMAN SOULES: Let me give it to you this way: At the end of -- okay. Excuse me, please. At Rule 14, paragraph 2(b) on Page 2, at the end of the first sentence after the word "persons," we will insert from

Page 1 not all of the sentence, but part of the sentence that says "other than the witness, parties, spouses of parties, counsel of parties and employees of counsel, and the officer taking the deposition"

PROFESSOR ALBRIGHT: It's written correctly in Scott Brister's right-hand version of Rule 14(2)(b).

CHAIRMAN SOULES: That's right. So we're going to use Judge Brister's 14(2)(b). Any opposition to that? It carries. No opposition.

MR. HAMILTON: I have a question.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: There's an argument over whether or not invoking the rule applies to depositions. And I don't think there's a whole lot of case law on that; there's a Bar Journal article on it. And it looks like it reaches two different results.

It seems like this rule ought to have something in there that will speak to that question as to whether or not the rule can be

invoked during depositions and that other witnesses that are not parties are excluded. By this statement here you kind of imply that by designating that other parties can be there, maybe that's intended to abrogate anyone from invoking the rule.

CHAIRMAN SOULES: It was. And this Committee debated that before that language was put in the rule, and that was the resolution as to whether the so-called rule exlusion would apply.

MR. HAMILTON: Well, why don't we say that in the rule. It doesn't really say that.

CHAIRMAN SOULES: Well, I don't know why it wasn't put in the rule, but that was the outcome of the somewhat debate. It's in the record of the past years, about this same issue you have come up with, and that was if somebody else was going to take somebody to the deposition, they would give reasonable notice that they would be at the deposition and then they would take it to the court.

But the rule of exclusion doesn't apply. This didn't use to be in the rule. It's been

in since about 1990. It's about a 1990 change, and I can send you the debate on that if you like.

Okay. Anything else on Rule 14? Any opposition to Rule 14?

HON. SCOTT A. BRISTER: I had -- the first -- I had some changes to 2(d), the first of which is just a parallelism change. If you all want to look at that and accept it, otherwise I'll drop it. I'll take it either way.

CHAIRMAN SOULES: 2(d).

HON. SCOTT A. BRISTER: It's just to change the first phrase to say "the party may in the notice request," since everything you're talking about in that part has to do with the notice, and it makes it more parallel to say "a party may in the notice request production" rather than "the deponent may be compelled to produce."

PROFESSOR ALBRIGHT: I accept that.

CHAIRMAN SOULES: All right. That change will be made. The Committee accepts that.

HON. SCOTT A. BRISTER: The second -- the only other one really would probably make more sense if it were taken up in connection with Rule 24.

CHAIRMAN SOULES: Taken up with Rule 24?

HON. SCOTT A. BRISTER: Yeah.

CHAIRMAN SOULES: And (3) also?

HON. SCOTT A BRISTER: Yeah, same thing.

CHAIRMAN SOULES: Okay. Anything else on Rule 14? Any opposition to Rule 14 as now amended? There being no opposition, that carries unanimously.

And we'll take 10 minutes. We'll take a 10-minute recess.

(At this time there was a recess.)

CHAIRMAN SOULES: Rule 15, is there any opposition to Rule 15? The motion is made to drop the third and fourth sentences of Rule 15, paragraph 3. The sentences deal with conferences between deponents and their attorneys.

HON. SCOTT A. BRISTER: I've

kind of taken a straw poll of folks showing up in my court on Monday morning hearings, and everybody recognizes that they hate that when opposing counsel whispers to them, and they want that rule to apply to opposing counsel. But when you turn it around to apply to them, they don't -- they always want the right to confer with their own client, so my experience is that everybody always wants this to apply to the other guy but never to me.

HON. F. SCOTT McCOWN: Why don't we just say opposing counsel may not hold private conferences?

HON. SCOTT A. BRISTER: But the real quandary is, I wonder how this will work. Okay. Joe is sitting next to the deponent, and I ask the question, and Joe leans over and whispers, which is okay if they're discussing whether or not to assert a privilege, but not okay if they're discussing anything else.

I go, "Stop. What are you all talking about?"

And Joe naturally says, "What I'm talking with my client about is an attorney-client

privileged matter and I'm not answering that question."

CHAIRMAN SOULES: Okay. Steve Susman.

MR. SUSMAN: I believe that the rule as written has a wonderful effect. I mean, we want to make the deposition room look like the courtroom. Okay? I'm not allowed to go up and whisper in my witness' ear when he is on the witness stand. I've got to sit there and grin and bear it as he gets demolished and taken down, and it's the truth. I mean, cross-examination really works because it's a tool for discovering the truth.

I mean, I would like to forbid conferences altogether. That would be what I would do. Alternatively, I might provide that, well, if you're going to have conferences, make sure that the videotape of that conference is shown to the jury.

HON. SCOTT A. BRISTER: Sure.

MR. SUSMAN: But people didn't want to do that to that extreme, you know, so this is a compromise position.

HON. F. SCOTT McCOWN: And let ask you this --

CHAIRMAN SOULES: Let Steve finish.

MR. SUSMAN: But basically I think that a court -- it's pretty easy to see, I think, if the conference is designed to remind the witness -- that's what's usually done then. You usually lean over and tell your witness, "And don't forget you also talked to Joe and Blow."

And then the witness says, "Oh, yeah. I also talked to Joe and Blow."

Okay. It's pretty easy to see that that wasn't to invoke -- my conference with him was not to invoke -- advise him whether it invoked a privilege or not. And I think if a judge saw that, he would let that part be played -- the sanction that the judge would have for that kind of conference would be "You weren't supposed to have it. I'm going to let the jury see you whisper into his ear those other two things."

And if it continued, I might stop the deposition. But I mean, I think it's the way

to go. I mean, I sat through a deposition on Monday. I haven't had to defend many depositions recently, but I did one Monday under these rules basically, and there was a good lawyer deposing my client, and there were some times when I wanted desperately to reach over. There was a video camera going, and I was afraid to do it because I was afraid someone would hear what I've been saying on these speaking tours and play it to the jury. But I mean, you know, and Julius Glickman took the deposition. He got some great stuff from a lawyer. And I was dying to reach over and tell the guy, "Did you forget everything I told you yesterday?"

And yes, there is -- it is going to put a huge premium on preparing witnesses, just like there is a huge premium on getting them ready to be cross-examined at trial, but I still think it's the way we ought to go, and I do not think we ought to change that portion of the rule.

HON. SCOTT A. BRISTER: Let me just say one other thing just briefly.

CHAIRMAN SOULES: Judge

Brister.

HON. SCOTT A. BRISTER: I mean, our training and the thing that we are excoriated for is the very technical, precise use of words, and that is not anybody else's training. And in a question and answer, writing it down, that's to me the much more dangerous game than an attorney warning his client or reminding his client of something. I mean, this can't be a rule that's aimed at getting the attorney who tells the client to lie. This is aimed at the attorney, stopping the attorney from reminding or helping, and it just seems to me to put an unfair advantage to the side asking the questions whose training is for a lifetime on very precisely phrasing the questions for something that a layman might not catch. I mean, that's all lawyers do, and I'm concerned that this may shift the burden the wrong way.

I like the idea of having the video playing to the jury somebody that's coaching too much, and if it's too much, then you can stop the deposition and do something about it. But just a flat prohibition of -- so when

the lawyer asks an unfair tricky question, that you just have to let your client answer it and devastate the case, even though you can say, "Well, I didn't understand that question" later, I think that's a bad idea.

CHAIRMAN SOULES: Okay. Judge McCown and then Joe Latting.

HON. F. SCOTT McCOWN: I don't think, Scott, that that's going to be a problem. We may have a little bit different deposition practice under this rule than we do presently, and what we may have under this rule is a little redirect or recross that we wouldn't have had.

Under the present system you present your witness for deposition, you're defending, you may well not ask any questions. Under this regime, you may well come back and ask a few clarifying questions where you think your witness misunderstood or was misled or got tricked up. And I think that juries cut witnesses a lot of slack and see through that.

And so if the lawyer asks a technical question and the witness slips up a little,

rather than correct it through a private conference, where you may be doing more than just what is legitimate, you come back when it's your turn to ask a few questions and you correct it, and the jury hears that contemporaneous correction, not to mention that you still have the safeguard that the witness can change his answers and sign the deposition. Now, I know he's subject to impeachment. But again, juries are pretty forgiving. They can hear the ring of truth and they can hear the clank of falsehood generally.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I take a lot of depositions and I've been to a lot of them, and this is not a major problem in my life. That's number one. So I think we're fixing something that's not very much broken. That's what I think.

Number two, I think that this is like a rule forbidding undergraduates from kissing; I think it's just kind of silly.

Number three, what this is going to do is exactly contra to what your stated purpose was

earlier. It's going to make me spend a lot more time before my clients go in and give depositions, because I am now not -- if this is the way that the law is going to be read and enforced, then I'm going to have to think about and consider all of the things that might come up and rehearse my client much more carefully than I would now because I can't just correct things that get off course. And so it's going to require much more preparation time and it's going to be more expensive for my clients. But if we think this is a real good idea, well, okay.

MR. MARKS: Well, I have a question.

CHAIRMAN SOULES: John Marks.

MR. MARKS: You know, when you're taking a deposition and the lawyer is sitting there virtually telling the client everything to say, can't you get that in anyway? I mean, doesn't that affect his credibility? That can be got into evidence right now.

MR. LATTING: And plus, what are you going to do with that guy at trial?

If you have to sit there and tell him everything, you can make hash out of him in front of the jury anyway, so it's not going to do any ultimate good. I don't -- it's not a big deal to me. It just doesn't seem like it's going to make much difference.

And really what are you going to do about it? Because it says that if the lawyers and witnesses do not comply, the court may allow discussions conducted during the oral deposition that reflect upon the veracity to be introduced in evidence. And I take it that that will mean that for an oral deposition that you will be able to say "discussion between lawyer and witness" and that the court reporter's notes will show "Whereupon, a discussion was held."

And then I have this question: Will the court be able -- or will the jury be able to hear that this rule was in effect, or will they just know that there was a discussion without more? That's what I -- Steve, what do we do about that?

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Well, I mean, I

think it will be -- I think this provision is good because I think it will be a good prophylactic. There are some lawyers who do abuse the privilege of talking to their witness a lot, coaching them a lot. Not a lot. I mean, it doesn't happen a lot.

We're talking about limiting lawyers to taking depositions in a very short time frame and in a short number of hours per deponent, so I don't want my time eaten up by the other guy talking to his lawyer and coaching him. I know the court reporter is supposed to keep track, but I would just warn the other side, you know, that there's a rule that says you can't do that.

If I had a video deposition and I thought it was done in an inappropriate place, I would ask the judge for permission to show that to the jury on the ground that -- I mean, that's why the rule is made. It affects the credibility of this witness' answer, the fact that half of the answer came after he talked to his lawyer.

If it continued so much that I felt it was eating into my time and interfering with

my business and my ability to really cross-examine the witness thoroughly, I'd adjourn the deposition and go to the court.

I think you have those remedies, and I just think what we ought to tell the bar is that you're going to get a very limited time to depose witnesses and we're not going to tolerate anything that interferes with your right to go in there just like at trial and cross-examine like at trial. Why shouldn't it be just like court? I have never heard a good reason for it not being just like court.

MR. LATTING: I've got another question.

CHAIRMAN SOULES: John Marks.

MR. MARKS: My problem with this is that I think the abuse is going to come from the other direction; that if a lawyer is there with his client and virtually hamstrung, the abuse is going to be coming from the questioner, not from the answerer and his lawyer. And I think that's the problem with this. And that's the biggest problem I have now, is the abuse from the questioner, and that's been more my experience than the

other way, and I think this just makes it a lot easier for him to do that.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Here is a question I have, and it's not meant to be rhetorical. I really don't know what we do about this. It says, "Private conferences may be held, however, during agreed recesses and adjournments." A squabble comes up during a deposition. I think somebody is beating on this witness unfairly, and I lean over and there's a row about this, and I say, "Well, I want to have a recess here. We need a recess."

And the other side says, "I don't agree."

Now, am I in violation of this rule if I say, "Well, we're taking one. We're going to go walk down the hall."

It looks to me the way this is written that I'm in violation of this rule if I talk to my client without the agreement of the other side. Now, that's what it says and surely we don't mean that. I guess we don't. I hope we don't.

MR. YELENOSKY: Well, if we don't mean that, then what you're saying is that you can just take a recess whenever you want and talk to your client and there is no prohibition on consulting with your client except that you say, "I'm taking a recess."

MR. LATTING: That's what happens now in my world and the sun keeps coming up just fine.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: If the lawyer on the other side of the deposition table says, "We're out of here. It's time for me to take a recess," and I'm just hot in the middle of asking a good line of questioning, I mean, I'd be -- I would go crazy. It's not going to happen in the courtroom. Why should it happen in the deposition room?

What happens in depositions is that there are agreed recesses. We go for an hour, an hour and 20 minutes. There gets to be a rhythm, and you stop, and everyone says, "Are you ready? Are you through with that line of questioning, Mr. Susman?"

"Yeah."

"Let's take a recess."

And then you can talk all you want.

MR. MARKS: Isn't that what happens now, Steve, that generally you agree on recesses?

MR. SUSMAN: Yes.

MR. MARKS: I mean, is it really a problem, I guess, is what Joe is asking.

MR. SUSMAN: The problem I have is the lawyer who on the record, particularly -- and it's a particular problem if it's not videotaped, where you have a -- where you don't take a videographer to a deposition, where the lawyer frequently with impunity can lean over and tell his client, "You just gave two reasons, Dummy. There's a fourth reason. There are two other reasons. Don't forget it."

And he says, "Oh, yeah."

And you know, you say, "Well, I want the record to reflect that so and so just conferred with his client."

Usually that's totally beyond the jury,

apart from the jury. The judge never even let's you read it in at trial. I mean, it's not a very effective remedy, because the lawyer is doing the testifying under those circumstances and telling the witness what to say, and I think we ought to try to put a stop to it.

CHAIRMAN SOULES: Okay. Anything else on this? Okay. Judge Brister has moved that we delete the third and fourth sentences from paragraph 3, and I didn't get a second.

MR. LATTING: I'll second it.

CHAIRMAN SOULES: Joe Latting seconds it. Any other discussion on this? Okay. Those in favor show by hands. Nine. Those opposed. Nine. Nine in favor. I need to take a count again. I'm not sure I got that.

MR. YELENOSKY: I didn't understand the vote and I was hoping to understand it before you finished.

CHAIRMAN SOULES: Okay.

HON. SCOTT A. BRISTER: My proposal was to drop the two sentences that

begin "Private conferences." That will still allow you to --

CHAIRMAN SOULES: Okay. Look at paragraph 3. There are two sentences there. The second one is "Counsel are expected to cooperate with and be courteous to each other and to the deponents." Okay. Then the next two sentences start with the words "Private conferences." Drop that out until you get to "recesses and adjournments."

And then the last sentence goes out, too, doesn't it?

HON. SCOTT A. BRISTER: No. I would leave that in.

CHAIRMAN SOULES: Okay. Just those two sentences, "Private conferences between deponents and their attorneys during the actual taking of the deposition are improper except for the purpose of determining whether a privilege should be asserted. Private conferences may be held, however, during agreed recesses and adjournments."

The motion is to delete those from Rule 15. Those in favor show by hands to delete it. 10 to delete. Those opposed to

deleting it; in other words, those in favor of leaving it in. 11. It fails by a vote of 10 to 11, so those sentences will be kept in the rule, Rule 15.

Next Judge Brister suggests that we drop the first sentence in Paragraph 4 on the next page.

HON. SCOTT A. BRISTER: And substitute the last sentence in its place.

CHAIRMAN SOULES: And substitute the last sentence in its place. In other words, move the last sentence up to number one and delete what's now the first sentence.

Judge Brister, is there a reason for this?

HON. SCOTT A. BRISTER: Yes. The reason for that is to -- to me, as I said, it's draconian to say you can't say anything other than the following six words, objection, leading; objection, form; objection, nonresponsive; that to start, and then try to see if the problem, in the places where this is a problem, can be cured by saying objections or explanations that coach, et

cetera, can be grounds for termination.

In other words, urge people not to do it first before you make a bright-line hard and fast rule, no words may be uttered other than the following six words, and see if that works as an intermediate step.

CHAIRMAN SOULES: Is there a second?

MR. MARKS: Second.

CHAIRMAN SOULES: John Marks seconds it. Okay. Discussion. Steve Susman.

MR. SUSMAN: I want to remind you again that this provision has been voted on repeatedly by this group with a large majority, you know, like 18 to three. I mean, we have been through this a lot of times, and I mean, it is a major departure from the way we have gone to now allow more conversation in deposition.

HON. SCOTT A. BRISTER: I'm just -- and the only reason I bring them up is I've given two or three talks on this now and people would rather have limited deposition hours than not be able to do this. This will be the most controversial thing, when you tell

attorneys you may not say with your own client sitting there in a deposition anything other than the following six words. They will hit the roof. But that may be good for them to hit the roof. I don't know.

I just think there are more important things in trying to cut cost and expense of litigation rather than -- this is something that bothers lawyers. This doesn't bother clients. They would like to be told if it's a tricky question. This just bothers lawyers. I don't like having to take depositions bickering with people. My understanding of our duty from the Supreme Court was not to try to make lawyers' lives less bickersome but to save money for their clients, and that's the only reason I raise it. It's going to be vigorously contested by most lawyers.

CHAIRMAN SOULES: I think there's some concern that these speaking objections are going to eat up a lot of your time that's now very precious.

MR. SUSMAN: And even the ones that aren't -- you know, there are lawyers particularly from other jurisdictions that

will get in there and every question you ask they will say, "That question is too complicated. You asked three questions in one. Would you break it down. What do you mean by form?"

MR. LATTING: Or "I don't understand your question."

MR. SUSMAN: "I didn't understand your question." I mean, you can never be expected to finish that deposition in three hours. That's unfair.

HON. SCOTT A. BRISTER: And my proposal says exactly what yours does. If they do that, you go to court and say there, "This guy is being abusive. Make him stop it." I'm not going to say that's okay. All I'm saying is that it's one thing to say you shouldn't do that; it's another thing to say you may not say any words except the following six, period. That's what this says.

MR. SUSMAN: But the problem is, Scott, I mean, really the problem with it is, if you can get all the judges' attention and get them to read the deposition so that they will say, "Yes, that is abusive." All we

have now is the deponent who was here for three hours and he went back to New York City, and I've got to persuade a judge that "I was short-changed, Your Honor, because" -- and no judge is going to sit there and read the deposition to see how many times the guy, you know, jacked me around with some "Well, I didn't understand the question. That question is very confusing. That's misleading. It states something that there's no basis in the record." I just think it's unnecessary.

And listen, I mean, on this rule particularly, this rule is in effect in numerous jurisdictions and I haven't heard anyone say that life is miserable in those jurisdictions and that there's any real problem. I mean, this is not a rule that we came up with on our own. It is a rule in effect in many places.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Well, I've been in depositions where this rule is in effect, and as I say, the questions can be very abusive. And sometimes the lawyer has no ability to protect his client, and then the other side

goes to the court and you get these draconian sanctions against you because you tried to protect your client. I understand exactly what you're saying, Steve, but I think there should be some protection from that.

And just to only be able to sit there and say, "Object to form, object to form, object," that really doesn't help and really it's not enough. So maybe a comment or something in the rules that, you know, it is expected that the objections will be this or something along those lines to give the court some direction on what they should be looking out for, that might work. But to make a rule like this I think would be a mistake.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, there is one other thing you can do, and it comes in (5), which is that if it's abusive, you can instruct your client not to answer. And it may not do that much now, but in this new regime where it's understood that that's the remedy you have when you're abused, I think that that will be the threat upon the abusive

attorney.

MR. MARKS: Well, is asking the question over four and five and six times abusive?

MR. YELENOSKY: Well, you know, like anything else, it may not be clearly black and white. You may have to take some chances.

MR. MARKS: Well, a lot of times that's what happens. They ask a question five, six or seven times the same way. They keep asking the same question, and all you can do is sit there and say, "Object to form, object to form, object to form."

MR. SUSMAN: For three hours? For three hours? They can ask the same question for three hours as far as I'm concerned if they want to use their time that way.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: I think at least that lawyers ought to be able to articulate what's wrong with the form. You know, it could be a multifarious question, and the

witness ought to know whether he's answering the first or the second or the third. It could be a question that assumes facts not in evidence and the witness probably doesn't perceive that and an affirmative answer to that is misleading. At least as to form we ought to be able to explain without having to have a request to do so of what is wrong with the form of the question.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: We have a later sentence that says, "Upon request, the objecting party shall explain the grounds of the objection clearly and concisely in a non-argumentative and non-suggestive manner." If someone wants to know what it is that's wrong with the form, they can ask.

MR. HAMILTON: Does that mean that the client can ask? If the client can ask, then that's all right.

CHAIRMAN SOULES: John Marks.

MR. MARKS: But as I understand the rule, I can't state the basis unless somebody requests it. Is that what this

means?

MR. SUSMAN: That's what it means. But why would you want to state the basis unless it's to coach the client? Honest to God, if I'm asking your client a question and I'm willing to take the chance that the form is okay -- okay? -- and I'm not even curious as to what your form objection is about because I'm convinced I've asked a good question and I'm willing to risk having the answer stricken at trial because it was not a good question, and you preserve the objection by saying "objection, form," the only possible reason that I can think of that you would want to tell me what's wrong with my question by not having expressed any curiosity is you want to tell the witness, alert the witness to the fact that this is some kind of tricky question, be careful, watch out.

And you know, John, my point is that when this happens at trial -- you know, it doesn't happen at trial because no good trial lawyer is going to do it in front of the jury. You pay too high a price.

And I also say I don't care what goes on

in the deposition if you all will agree that the full videotape of everything that goes on in the conference room is playable to the jury. If you will agree to that, cut this out. Okay? Fine. But we have eliminated that a lot. We have cut that down a lot now, the right to play the whole video to the jury. But if you don't mind the jury seeing everything you do in a deposition, I mean, the other lawyer, I don't have any problem with taking this out.

MR. MARKS: Well, I think that certainly the jury ought to see things like that that affect the veracity of the witness, and I think that's covered, and I think that's perfectly appropriate that that be done. But this limits too much right here.

HON. F. SCOTT McCOWN: Luke.

CHAIRMAN SOULES: Scott McCown.

HON. F. SCOTT McCOWN: From a trial judge's point of view, and I think you all know it's true, the trial judge is going to be much more limiting on what they're going to let the jury see. You may say it goes to

veracity, but it may look a lot like to the trial judge like squabbles between the lawyers or squabbles between the lawyer and the witness. So don't look to that as a big remedy, because from the trial judge's point of view, it prejudices the jury against the lawyers, it's time consuming, and it's a lot of controversy for very little gain.

CHAIRMAN SOULES: Okay. Anything else on this? Anything new?

Okay. The motion is made to drop the first sentence and substitute the last sentence in place thereof in paragraph 4. Those in favor show by hands. 10. Those opposed. 10. It fails on a vote of 10 to 10.

If anybody wants a recount I'll do it.

Okay. By the way, in terms of our scheduling, we've persuaded them to keep the garage open until 7:00, so we'll work until 6:30 as indicated in the letter. We've got a sign-up list. Anybody who hasn't signed or who may have come in late, please put your name on the list showing your attendance today.

That takes us to --

MR. SUSMAN: Let's do Rule 15.

CHAIRMAN SOULES: Okay. Those in favor of Rule 15 show by hands. 12. Those opposed. Six. It passes by a vote of 12 to six.

CHAIRMAN SOULES: Rule 18.

MR. SUSMAN: 16.

CHAIRMAN SOULES: Rule 16?

HON. SCOTT A. BRISTER: It's been renumbered.

CHAIRMAN SOULES: Rule 18, Nonstenographic recordings.

HON. SCOTT A. BRISTER: No.

CHAIRMAN SOULES: No?

HON. SCOTT A BRISTER: Didn't we switch these around, Alex?

PROFESSOR ALBRIGHT: That's why the numbers are switched, but they're still in the same order, so we can either go ahead and take nonstenographic recording now or we can do it later.

HON. SCOTT A. BRISTER: That's fine.

CHAIRMAN SOULES: So what

number is it?

PROFESSOR ALBRIGHT: We decided, Scott Brister and I decided that it really belonged more in the place of No. 18, but I wanted to keep everything together because everybody has tabs with all these rules.

CHAIRMAN SOULES: Well, let's take it as we go. Nonstenographic recording.

HON. SCOTT A. BRISTER: Yes. It's our Tab 18.

PROFESSOR ALBRIGHT: Well, it's in several different places.

HON. SCOTT A. BRISTER: It's under several different numbers.

CHAIRMAN SOULES: Okay. It's going to be in the Brister comments under Tab 18.

HON. SCOTT A. BRISTER: And my comments are just primarily that since this is the least used discovery device, I think I can say categorically in Texas, it ought not be the longest rule, and so I suggest dropping -- the only difference in (a) and (b) on paragraph 4, besides dropping some unnecessary

verbage, is if you want to use the nonstenographic -- now, this is a deposition where no court reporter was present. And if you want to use a transcript from it, the Subcommittee draft said if it's trial or summary judgment, you have to get the whole thing typed up. If it's some other hearing, you only have to get a part. And I just suggest that if you want to use it anytime, anywhere, you have to get the whole thing typed up. And that was because of a discussion we had on the Appellate Rules about the problems that come up if there's no transcript and a cheater wants to pull out two sentences of it and type it up and submit it as a partial transcript, it shifts the burden and expense to the noncheater to have to get the rest typed up and put it in context.

And besides, it's a rule that ain't used much and it ought to be a short rule. It just makes it shorter and easier this way to read.

CHAIRMAN SOULES: Okay. Can you put that in the form of a motion?

HON. SCOTT A. BRISTER: I propose that we substitute my Rule 18 on the

nonstenographic recording for the Subcommittee's Rule 18.

MR. PRINCE: Second.

CHAIRMAN SOULES: It's been moved and second by --

HON. F. SCOTT McCOWN: I think the Subcommittee can probably accept that, can't we, Alex?

PROFESSOR ALBRIGHT: Yeah.

HON. SCOTT A. BRISTER: It makes no substantive changes.

MR. SUSMAN: What is the substantive change? I'm trying to figure out where the substantive change is.

MR. PEACOCK: If you're going to use the nonstenographic transcript at all, you've got to get the whole transcription.

PROFESSOR ALBRIGHT: Steve, when we discussed this, you pointed out that if you were using it, there might be a situation where you might want to get only one part of it transcribed. And this requires you to get the whole thing transcribed instead of just part of it.

CHAIRMAN SOULES: Okay. Moved

and seconded that we change Rule 18 to the short form, which is on the right side of Page 2 under Tab 18, for what's printed by the Committee. Is there any discussion?

MR. SUSMAN: Well, let me ask that question. Let me -- I mean, I don't feel strongly about this, but I do ask the question. I mean, if the goal is to cut down the expense of discovery and there are -- and we want to encourage and hopefully this will encourage and have the effect of encouraging some lawyers to take depositions by nonstenographic means as a way of cutting down the expense of discovery, because so many times cases get settled or settle at mediation or go away before any depositions at all are utilized or needed, I mean, what's wrong with a regime that would say you get the depositions transcribed on an as needed basis?

And I can see where you definitely will need the transcription for trial, a full transcription for trial and summary judgment, because it would you unfair, I think, to pick and choose. But I can think of a lot of other

purposes, motion purposes, for which you would not need a whole transcript. And so why require a whole transcript under those circumstances? It just -- isn't that an unnecessary expense?

HON. SCOTT A. BRISTER: Well, the idea was to save money by doing it. But when you take a part out of context you save your money, but you make the other side pay to get it all typed up. It's the same as if you had a deposition with a court reporter and told them, "Only type up my direct and make the other side pay for their own cross." I mean, you could go through with that on everything, but it's just that that's not the way it works in all the other deposition circumstances. That's not the way it's going to work on trial and summary judgment. Why create a special little niche for nontrial, nonsummary judgment, nonstenographic hearings that nobody takes? Let's just forget about it and keep the rule simple.

CHAIRMAN SOULES: Okay. I think the line is pretty well drawn. Two people have stated their positions. John

Marks.

MR. MARKS: Maybe this is just part of the same problem, but let's say somebody decides he wants to take a bunch of witness depositions by nonstenographic means. He wants to tape them. And I say, "Well, you know, I'm not so sure I like that, so I'm going to bring my own court reporter."

And so you bring your court reporter and you have your court reporter do all of this. And then down the line this fellow that took the deposition says, "Well, you know, I think I want to use those transcripts."

Well, you've gone to the expense of getting it done because you want to have that record, and now this guy wants to use them, and yet he was the one that took the depositions in the first place.

Shouldn't there be some provision in the rule that requires him, if he wants to use that deposition, to pay you for the cost of using that court reporter and doing the transcript by that means?

CHAIRMAN SOULES: Any other discussion? Okay. Those in favor --

MR. MARKS: Well, I move that we add a provision like that in this.

HON. SCOTT A. BRISTER: They could recover it as costs in any event, right?

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

HON. SCOTT A. BRISTER: Yeah, it's a cost. I mean, it's a cost.

MR. LATTING: Say it again, John. You want to add a provision that does what?

MR. MARKS: Well, let's say you notice a deposition that you're going to tape, just use a tape recorder. I take a court reporter and I have it transcribed properly and I've got that deposition. And then the other side says, "Well, I think I'll use that," yet he hasn't paid for it.

HON. SCOTT A. BRISTER: I bet they'll have to pay the court reporter before they get a copy.

CHAIRMAN SOULES: Well, why don't you just notice --

MR. MARKS: But not for the taking of the deposition, which is a major cost.

MR. JACKSON: Because they'll just want to buy a copy.

MR. MARKS: That's right.

HON. SCOTT A. BRISTER: And then you just assess them costs. I mean, the court reporter's fee -- in other words, there's no reason to put a shifting provision in here if they're going to be reshifted after the trial or settlement is over anyway.

MR. MARKS: Well, it seems to me that if they want to use it, they should pay for it then and then let costs deal with it, is my thought on it.

HON. F. SCOTT McCOWN: But the rules already allow you for good cause to add certain costs to the loser, and so you could already under the rules hit the losers for this as they stand now. That would be good cause.

MR. MARKS: But that rule doesn't really address the problem, and that is, I've gone to the expense of doing this and he's taking advantage of it.

HON. F. SCOTT McCOWN: But you get reimbursed.

MR. MARKS: Not necessarily. You settle the case or a lot things happen to the case before it gets to the point where you get reimbursed. That's my problem with it. And if they want to use it as though, you know, it's their deposition and they want to use your transcript, my motion is they have to pay for the deposition costs.

MR. MEADOWS: John, as a practical matter, how do they get the transcript? If it's your court reporter, surely that court reporter is not going to let them have it without paying the fair costs. And if you have it, it's within your discretion not to let them use it unless they pay for it; so therefore, they're stuck with using a transcription of their recording.

MR. JACKSON: The way the rules are now, the court reporter is obliged to give anybody there access to that transcript.

HON. SCOTT A. BRISTER: But you would charge them.

MR. MEADOWS: But they would charge them. They would --

MR. JACKSON: We charge them

for a copy. We charge them a lot less rate. It's like less than a fourth or like around a fourth of the O-and-one cost to prepare the original transcript for the attorney that hired us. Our firm charges 4.15 a page to the attorney that hires us, and a dollar and a quarter for the other side if they want a copy of what we've prepared.

So you will have lawyers noticing depositions by tape knowing that John is going to bring a court reporter, and they probably won't even bother setting up their tape because they know John is going to bring a court reporter and they're going to get their discovery done for a buck and a quarter a page.

MR. YELENOSKY: Well, actually, though, under the current rules, can't you even get the deposition from the other side? Can't you just tell the other side, "I want to get your deposition," and copy it yourself? That encourages it. So it's not a buck and a quarter; it's cheaper.

HONORABLE SCOTT BRISTER: By the way, this is not a new rule. This is

existing rule. And again, it ain't a problem because nobody does it.

HON. F. SCOTT McCOWN: This has never come up.

HON. SCOTT A. BRISTER: I've had it once in six years. Somebody suggested it, and the other lawyer was astounded that such a thing could even be done. Even after reading the rule he could not believe it, and came in and did what you can do, like in John's case, which is come into court and object and say, "I don't want to do it, and make him pay for it," and all this other stuff which you can do under the rules no problem.

MR. MARKS: Well, why are we even honoring it?

CHAIRMAN SOULES: At the present time it says nothing -- the present rule says a nonstenographic transcript doesn't prevent the other party, it says, from getting a stenographic one at his own expense. Let me see what it says.

HON. DAVID PEEPLES: Can I ask why this rule needs to be rewritten in the first place?

CHAIRMAN SOULES: "Such order shall not prevent any party from having a stenographic transcription made at his own expense." That's the current rule.

HON. DAVID PEEPLES: I'd like to know why this existing rule in this book needed to be tampered with in the first place.

PROFESSOR ALBRIGHT: I think what happened was originally there was discussion about making nonstenographic recordings more available than under the present rule and making them less expensive. What happened was that this rule kind of got put off, and then we also had two very different views of nonstenographic recordings on the Committee.

And I also wanted to bring this up, because we haven't talked about this, but Paul Gold is not here, but Paul Gold is one person who definitely wants to have nonstenographic recordings available very cheaply, and he does not want to require a court reporter.

Under our rule, we have required a transcript be made by a certified court reporter. Well, that makes it as expensive or

more expensive than having a court reporter there in the first place, so I can't imagine people using this rule very often.

If we were going to require -- allow nonstenographic recordings with people letting their secretaries or a transcription service transcribe it, then perhaps that would be less expensive and then we would need all these other safeguards that we have in the rule. That's why we changed it.

Ultimately, the way the rule came out of the Committee was we required a certified court reporter to transcribe it, and so I think a lot of this may be superfluous.

I think there's a philosophical decision that this Committee needs to make. Are we going to accept it like the Subcommittee drafted it, requiring a court reporter and making nonstenographic recordings, you know, basically nonexistent, or are we going to allow the other kind of nonstenographic recordings with a court reporter -- I mean, with someone other than a court reporter transcribing those? And I think once you've made that decision, then the rules that you

need are very different.

CHAIRMAN SOULES: Judge Peeples, in the current Rule 202(1)(e), it says, "The nonstenographic recording shall not dispense with the requirement of a stenographic transcription of the deposition, unless the court so orders." And I guess that's being interpreted to mean that a stenographic transcription is to be done by a certified court reporter.

HON. DAVID PEEPLES: Unless you go to the court first?

CHAIRMAN SOULES: Unless you go to the court first. And this proposed rule eliminates the need for that.

HON. DAVID PEEPLES: It would seem to me, then, that in big money cases nobody, neither side is going to want an important deposition to be taken this way. And I'm just wondering if what John Marks is worrying about is going to happen, where one side is going think, "I'm going to notice it nonstenographic, and they will probably, because of the importance of it, pay for a reporter." And we're going to get into that

kind of jockeying.

CHAIRMAN SOULES: Well, and then the current rule says that nothing prevents another party from having a stenographic transcription of the deposition, of having it taken stenographically as opposed to -- or I guess concurrently with the taping. So 202 as it is presently written doesn't maybe save expense like Steve Yelenosky and others have commented about before.

But under the rule that's proposed by the Subcommittee, it indicates, I believe, that a portion of the tape can be transcribed and used for whatever purpose. And Judge Brister is saying that if any part of the transcript is going to be -- any part of the deposition is going to be taken, the entire transcript has to be typed up by somebody and shared.

Steve Yelenosky.

MR. YELENOSKY: Yeah. I just wanted to say that you're right, I mean, it probably doesn't come up in big money cases. But I was at Legal Services for 10 years, and hopefully it will survive, but at this point

we don't know that Legal Services is going to survive.

But if it does, the way in which nonstenographic recordings were used, I think one thing was, people would go into -- let's say there was an eviction proposed or something and they would go do a deposition of the apartment manager without any real expectation that it would go to trial or to the Public Housing Authority. And if something came up, they would later take the tape and the secretary would transcribe it without the expense of a court reporter. And in some instances you would do a nonstenographic recording intending to have it later transcribed by a secretary.

What has developed over the years, with the good graces of the court reporters in Austin anyway, was a pro bono court reporting service, and that has spread pretty far and wide across the state, although I haven't been with Legal Services for a year now, I think it's still around, and maybe David could speak to that, so that Legal Services do have access to certified court reporters. If they don't,

then being able to get nonstenographic recordings and transcribe them in house is an important cost saving measure.

MR. HERRING: Well, in line with that, I hate to analogize Legal Services and big law firms, but we now have the divorce clinics in Austin and in Dallas. In Austin at least they advise you, because we've overused the court reporters, the pro bono services, to do it nonstenographic, and so it's done in house or was being done in house at the big firms.

MR. YELENOSKY: But even now, even with the cutbacks at Legal Services, you could normally do them nonstenographically. The problem was you only had one secretary for five lawyers or something like that and they didn't have the time to do it, so I don't know. I mean, in some instances it would be helpful to still have it.

MR. MARKS: Well, my suggestion does not impact that at all, because what concerns me is that Paul Gold wants to have it, because Paul Gold handles big cases. And I don't know what he has in mind along those

lines, but my suggestion and my motion would certainly prevent someone from taking advantage of the rule to get some cheap discovery.

CHAIRMAN SOULES: All right. To get us focused, state your motion, John.

MR. MARKS: I move that --

MR. KELTNER: Are you saying you don't want cheap discovery?

MR. MARKS: Well, no. I'm saying that --

CHAIRMAN SOULES: What's your motion, John? Please state your motion.

MR. MARKS: Okay. I move, and I need to be sure I say this correctly, I move that in the event that a nonstenographic recording is made at a deposition by notice by a party, that if the other party brings the court reporter to the deposition and has the deposition done by a stenographic reporter, if the noticing party wants to use that deposition that you paid for, then the noticing party has to pay the entire cost for the taking of the deposition up front, not as a court cost thing, but has to pay the lawyer

for doing it, if he's going to use it.

CHAIRMAN SOULES: Okay. Is there a second?

MR. HAMILTON: Second.

CHAIRMAN SOULES: Moved and seconded. So the party taking the nonstenographic deposition has to make a decision whether to use your court reporter transcript and pay for it or have somebody else type it up and use his own version.

HON. SCOTT A. BRISTER: Another way you might say that is you can bring a stenographic reporter for your own use and it ain't discoverable.

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: No, that's not what he's saying.

HON. SCOTT A. BRISTER: It's the same thing. In other words, I get a stenographic record, I take it, I get it typed up. Now, you've got a tape. If you want to get it typed up, you go to a court reporter and get it done that way.

CHAIRMAN SOULES: Well, of course, the current -- the proposed rule

doesn't require that the tape be typed by a stenographer.

HON. SCOTT A. BRISTER: No, but the Subcommittee rule does.

MR. YELENOSKY: But one party would come in with a transcript and the Legal Services attorney sitting over there with a tape recording wouldn't be able to look at it, I guess, until trial, and it may be -- I mean, how do you handle that?

HON. SCOTT A. BRISTER: The deal, as I understood it, was the Subcommittee requires a court reporter to type it up.

CHAIRMAN SOULES: Excuse me a second. I'm trying to locate in the Subcommittee's version where it is that -- let's see --

HON. SCOTT A. BRISTER: 4(a) and (b) both; the first sentence of both 4(a) and 4(b). And as I understood it from Alex, the reason for that was to avoid bringing in court reporters into this fight over the new rules, because that's a big issue if you say you cut out court reporters from discovery. Correct, David?

MR. JACKSON: I'm sorry?

CHAIRMAN SOULES: It's been moved and seconded. Any further discussion on John's motion? Carl Hamilton.

MR. HAMILTON: I would like to make an amendment to the motion that it include that that transcribed deposition by the court reporter is not discoverable by the other side.

CHAIRMAN SOULES: The amendment has been made. Is that acceptable to you, John? Okay. Then we vote on the amendment first. Those in favor of the amendment show by hands. Any other discussion on the amendment?

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Regardless of whether it's discoverable, can the party that initiates the deposition nonstenographically say at the trial, "I offer the stenographic transcript that I haven't seen, but I know that that court reporter is a good fellow and he does it well, so I offer his transcript"? Can you do that?

MR. LATTING: A nondiscoverable deposition? This is a new concept.

CHAIRMAN SOULES: Any other discussion on the amendment? Alex Albright.

PROFESSOR ALBRIGHT: After hearing all this discussion, and I don't have any experience with nonstenographic depositions and I was hoping Judge Brister would get involved because he uses nonstenographic recordings in his court, but it seems to me that what we're talking about is a much more expensive and much more burdensome procedure than just leaving it like it is, because we have heard no one say that it is a problem right now; that it just manages to work out in the cases that it needs to work out in and it's not a problem in other cases; where it may be that we're creating horrible problems in some cases.

So I would rather see that we leave the rather vague rule that we have now than creating this very cumbersome procedure with these concepts of nondiscoverable deposition transcripts.

CHAIRMAN SOULES: Okay.

Anything else on Carl's amendment? Steve Yelenosky.

MR. YELENOSKY: Yeah. I mean, if we're going to write the rule just so that it allocates costs, let's not do it, or at least put it somewhere in costs. I mean, now, if you really think that Paul Gold is going to do this and you want to go to the judge and ask him to pay for it, fine. But let's not write the rule for that specific circumstance.

CHAIRMAN SOULES: Okay. Those in favor of Carl's amendment show by hands. Two. Three -- no, two. Those opposed. 15. It fails 15 to two.

HON. DAVID PEEPLES: Does Alex speak for the Subcommittee? I mean, do you want to withdraw this and leave this as is (indicating)?

PROFESSOR ALBRIGHT: I don't know if I speak for the Subcommittee or not. I would make a motion to substitute the current nonstenographic recording rule for our nonstenographic rule.

MR. JACKSON: And I would second that.

MR. MARKS: If you do that, I'll withdraw my motion.

CHAIRMAN SOULES: Any other discussion on this? Okay. Anyone opposed to -- go ahead, Steve.

MR. SUSMAN: I mean, we began with the notion of trying to save people money, and I mean, I like the Subcommittee's. Our approach was somewhat compromised. It still has to be typed up by a certified court reporter, but at least for certain hearings you don't have to get the whole thing typed up. It seems to me sensible that for a motion to transfer venue, why do I need to get the whole guy's deposition, especially if I just want to quote one thing? I give them 20 days' notice.

That was the intent, that maybe there are lawyers who will use this and save money by using it by not having the entire deposition transcribed. It seems to me quite different when you're talking about these kinds of motions where you give ample notice and they aren't knock-out motions. They aren't like appeals or summary judgments or trials. And

the notion was to save money.

Now, Scott's doesn't do that, but at least Scott gives you the alternative of taking all your depositions by nonstenographic means and getting them transcribed later. You don't have to do it at the same time. You take it by nonstenographic means, and if you want to get it transcribed, if you want to use it for any purposes, you're going to have to get it transcribed by a court reporter. That won't save us as much money as the Subcommittee's formulation, but I think it is an improvement over the current rule.

As I understand the current rule, you have to have both a court reporter and a videographer in the deposition room, I assume.

HON. SCOTT A. BRISTER: Unless you've gone to court and gotten an order to the contrary.

MR. SUSMAN: Yeah. And I think that's -- I mean, I don't understand why you need to go through with that, because in fact there are court reporters, I think, who can probably -- I mean, it just stands to reason that there are court reporters who, if they

can transcribe things on their own time rather than on your time schedule, on the weekends and in the evenings, and people who can't get to the deposition using help, that can't come in, so they can give you cheaper transcripts than if you insist that the court reporter be sitting there during the deposition. And so why wouldn't we try and save people money? I mean, why insist on the formality of having a court reporter there?

CHAIRMAN SOULES: Let's see, I guess the first motion made -- or you're moving for a substitute motion to Judge Brister's amendment?

MR. MARKS: Well, I'm moving for my motion if they're going to keep the Subcommittee's motion on the table. If they're going to withdraw it, then --

PROFESSOR ALBRIGHT: Well, John, why don't you make a motion to substitute current Rule 202 for the Subcommittee's rule and we can vote on that.

MR. MARKS: Okay. Let's do that one first. Okay. I move that we substitute current Rule 202 for the

Subcommittee's rule.

CHAIRMAN SOULES: Is that an acceptable substitute motion for you, Judge Brister? Your motion is on the floor.

HON. SCOTT A. BRISTER: Oh, I'm happy to vote on that one first.

CHAIRMAN SOULES: Okay. Those in favor of using current Rule 202 in place of the rule in the Subcommittee's report show by hands. 10. Those opposed. 10. It fails on a tie vote.

Now we've got Judge Brister's versus the Subcommittee's. Those in favor of Judge Brister's proposal on the right-hand side of this page show by hands. 13. 13 for. Those opposed. Six. 13 to six that carries.

Okay. So we use Judge Brister's Rule 18.

MR. MARKS: Did I get procedured out of my motion?

CHAIRMAN SOULES: And your motion is to amend that by providing language that you put on the record earlier as to the nonstenographic -- the party moving for the nonstenographic -- the party taking the

nonstenographic deposition, if you take your court reporter, they can't get a copy of the transcript without paying for the original. Those in favor show by hands. Three. Those opposed. 10. It fails by a vote of 10 to three or four. I think we had some hands coming up early.

Mike Hatchell.

MR. HATCHELL: Luke, I would propose that we eliminate from either version of this rule the words "or for summary judgment, at the time other evidence must be filed with the court," because as I read the rule, if I am in a toxic tort case with 300 defendants and 2500 plaintiffs and I intend to move for summary judgment under (a), myself as against five other plaintiffs, I've got to serve God only knows how many copies of this nonstenographic recording, and I don't think that that is efficient.

I believe that we could solve the laudable goal of the drafters in requiring that the matter be reduced to written usable form by substituting the language "the party using a nonstenographic deposition as summary

judgment proof must provide a complete transcription to an opponent upon request."

CHAIRMAN SOULES: Mike, where is that?

MR. HATCHELL: It's on (4), "Use," the very last sentence of either version.

HON. SCOTT A. BRISTER: I would --

CHAIRMAN SOULES: Okay. Let me just try to get this understood first.

HON. SCOTT A. BRISTER: It's the last sentence of the paragraph, part 4.

CHAIRMAN SOULES: "Or for summary judgment," and you would want to insert some language there or where?

MR. HATCHELL: Or eliminate the phrase having to do with summary judgment and substitute language that says, "The party using a nonstenographic deposition as summary judgment proof must provide a complete transcription to an opponent upon request."

HON. SCOTT A. BRISTER: Let me suggest, how about this, Mike, if you just say "the complete transcript must be filed."

MR. HATCHELL: That's an alternative that I would suggest, yes. That works as well, because actually that's probably more consistent with what we use with deposition transcripts today, so that might even be better.

HON. SCOTT A. BRISTER: So the complete transcript must be filed within 30 days.

PROFESSOR ALBRIGHT: What do the clerks think about filing complete transcripts?

MS. WOLBRUECK: Well, personally, we would prefer that they not be filed. But right now we are receiving depositions that are filed for summary judgments. The statute is there --

HON. SCOTT A. BRISTER: I suggest we worry about that when people start taking these by the hundreds, which is not going to be any time this century.

MR. HATCHELL: But Scott, 30 days doesn't work in a summary judgment context.

HON. SCOTT A. BRISTER: That's

why I say 30 days before trial, or for summary judgment, at the time the other evidence must be filed, which will be either 21 or seven or whatever.

CHAIRMAN SOULES: Is that -- what he said makes it fine?

MR. HATCHELL: That's fine. But Steve has some concerns.

MR. SUSMAN: My concern is this: I take a nonstenographic deposition. The case does not settle at mediation. I decide I need to get it transcribed. What we want to do is make it as if that were like I'm in no worse position than I would be had I had a court reporter attending the deposition, in which case the court reporter takes the original, gives it to the witness to correct or sign, and anyone who wants a copy orders it from the court reporter and pays for it. I mean, I don't want to be in a worse position by having to provide people with a bunch of copies of these things at my expense.

HON. SCOTT A. BRISTER: I just copied that out of the Subcommittee's rule. That was you all's idea, not mine. That's

directly from your 4(a). If you want, I'm happy to make it a lot less than 30 days.

CHAIRMAN SOULES: Just a moment, please, we've got to have only one person speaking.

MR. SUSMAN: My only point, Scott, is we ought to make it like as if the reporter were there taking the deposition originally, which is you notified all the other parties that the deposition has been transcribed and the original is filed with the court or something like that. I mean, that's what we ought to provide. And then anyone who wants a copy can get it from the court reporter, so can we do that? Does anyone have any problem with that?

CHAIRMAN SOULES: State it again. I didn't quite follow it.

MR. McMAINS: Well, that doesn't completely solve Mike's concern, though. Even if you've got to notify 2500 people, that's still pretty burdensome, so I mean, there's some problem with that. I mean, you don't have to do that if you have a court reporter there, so by not having a court

reporter there trying to save money and then later on it turns out you want it transcribed and all of a sudden you've got to notify 2500 people, that's obviously not what you want to do.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I mean, when you have a court reporter there from the start, everybody knows if I want a copy I can always ask for it because there was a court reporter there and they're going to get it transcribed. But if you've done it nonstenographically and you don't notify them that you've transcribed it, they may think that it was never transcribed. You've got to send notice to them. But there's no reason for you to have to send a copy unless they've requested it and there's no reason to file it. And they can always request it from the court reporter.

CHAIRMAN SOULES: Judge McCown.

HON. F. SCOTT McCOWN: The tip of the tail is wagging the dog. I think we ought to go with the present rule and leave it

alone.

CHAIRMAN SOULES: Okay. But we've already voted that down.

HON. F. SCOTT McCOWN: But it may look better now.

CHAIRMAN SOULES: Let me ask you this: Does anyone want to remove the requirement that a certified court reporter transcribe it? We don't do that for the appellate record, the audio record at trial. Anybody can type it up, and it goes forward to an appellate court for just disposition on the merits.

MR. LATTING: Does anyone want to move that that requirement be taken out?

CHAIRMAN SOULES: Yes.

MR. LATTING: Yes, I do.

MR. HERRING: That's the change they made in the 1993 federal rules. You just present a transcript to the court and you can have anybody type it up. And the other party can contest it or can have their court reporter come up with another one. That would be a lot cheaper.

CHAIRMAN SOULES: Okay. Moved

and seconded that the requirement for a certified court reporter to make the transcript be deleted so that anybody can make a transcript and use it. Those in favor show by hands.

MR. JACKSON: Well, can we discuss it?

MR. YELENOSKY: I thought we had.

MR. JACKSON: Not that motion.

CHAIRMAN SOULES: Any discussion?

MR. JACKSON: We haven't discussed that.

CHAIRMAN SOULES: Okay. Let's have discussion on it. Mr. Jackson.

MR. JACKSON: Then you get into the situation where anybody is typing up these tapes. You're not complying with Rule 205, 206, and getting the witness' signature, and you've got to go back into rewriting all these other rules to try to accommodate the fact that you're not complying with all the certification rules for submitting the deposition to the witness so the witness has

the opportunity to read it and sign it before he gets to the courthouse.

Some lawyer has some secretary type up what part of the tape they want typed up. They try to impeach a witness on the stand and test his credibility and veracity with the typed tape transcript that he's now put to the burden of typing up his version of it. You're going to get into the battle of the transcripts.

CHAIRMAN SOULES: Scott McCown.

HON. F. SCOTT McCOWN: Well, of course, this goes to kind of philosophically how you feel about requiring court reporters or not, and I do come down on the side of court reporters. And I would just point out that taking a tape and producing a written word, there's a lot of skill and training that goes into doing that right about paragraphing and punctuation, and it is a lot harder, I think, than people may realize.

We may have done that in the Appellate Rules, but at least in the Appellate Rules the tape is the court's tape with all of the

safeguards we have about the court experiment, and you've got a court officer running the tape, et cetera. Here we're talking about somebody's little tape machine out in the world as they take the nonstenographic recording.

I'd rather see us continue to require that the court reporter do the transcript. Even though that has added costs, it also has a lot of safeguards about accuracy.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Yeah. But the protection against that is that the other side can have a court reporter. The way the federal rule works, it's really two parts. It says a party offering deposition testimony may offer it in stenographic or nonstenographic form. But if in nonstenographic form, the party shall also provide the court with the transcript of the portion so offered. Upon the request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if

available, unless the court for good cause orders otherwise.

That's a little bit too complicated, but the whole goal of that change in the federal rule was to save money, and if it's good enough -- if we're going to be doing it anyway in federal court, it seems to me we can do it in state court.

CHAIRMAN SOULES: Any other discussion? Judge Peeples.

HON. DAVID PEEPLES: Present Rule 202 and this rule both deal with both videotaped depositions and tape recorder depositions, which are at opposite ends of the spectrum. A videotape is probably a big money case that's used for trial. A tape recorder is when you just want to talk to a witness under oath and get it on tape and it's a no-money case frequently. In a lot of family law cases they do it. And I don't think the same considerations and rules ought to apply to both of them.

Now, we've got an existing Rule 202 that is not causing problems. And this rule here, 18, I think this is the first time we've

discussed it. Now, we're making a mistake changing something that's not causing problems, when we have, as Scott says, more important things to do. I think we ought to reconsider and go with Rule 202 as written.

CHAIRMAN SOULES: Any other discussion? Okay. Those in favor of eliminating the requirement of a certified court reporter to transcribe a nonstenographic deposition show by hands.

MR. YELENOSKY: I need to ask a question before I can vote on this.

CHAIRMAN SOULES: All right. It's yours.

MR. YELENOSKY: Because the old rule says "stenographic," and I'm hearing from some people that they read that to mean that it requires a certified court reporter, although it doesn't actually say that. Is that what it means? Because the practice has been to accept things that were not transcribed by a court reporter at least from my experience. Does anybody have an answer to that?

CHAIRMAN SOULES: Apparently

the practices are different. They differ.

MR. YELENOSKY: Because the old rule then offers -- I mean, if the old rule allows for that, then that might be a reason that I might prefer the old rule.

CHAIRMAN SOULES: Okay. Those in favor of eliminating the requirement that the transcripts of a nonstenographic deposition be done by a certified court reporter show by hands. 10. Okay. Those opposed to that. 12. Okay. By a vote of 12 to 10, transcripts must be prepared by a certified court reporter as written in Rule 18.

Are there any other changes to Rule 18 as proposed by the Discovery Subcommittee? Judge Peeples.

MR. HATCHELL: Well, you didn't deal with my problem about --

CHAIRMAN SOULES: We didn't deal with that, but Judge Peeples moved for a reconsideration. Were you -- which way did you vote for originally, for the Rule 18 as proposed?

HON. DAVID PEEPLES: I voted

for 202.

CHAIRMAN SOULES: You voted for 202. The motion for reconsideration needs to come from somebody who voted for Rule 18 as proposed. Is there a motion?

HON. PAUL HEATH TILL: Yes, I do. I voted for the Subcommittee rule, and I make that motion right now to resubmit it.

CHAIRMAN SOULES: You're moving to reconsider and to ask that Rule 202 be left as is. Is that right, Judge Till?

HON. PAUL HEATH TILL: That's right, in place of the Subcommittee rule.

CHAIRMAN SOULES: Okay. Those in favor of the judge's motion show by hands.

HON. SCOTT A. BRISTER: Let me just -- I'm a little concerned about this, because, you know, on all of these we could discuss them for two hours and then at the end move we ought to drop the whole thing and go back to where we started and that would probably always win. I mean, you know, at 6:30 I'm ready to say, "Let's vote on whether we do any of these," and we'll get a majority on not touching them.

So let me again briefly say the advantage of the Subcommittee rule. It doesn't go all the way towards cost saving, as Steve explained, but it is a step towards there, and it would at least allow you in the poor folks' case to take the deposition even with a cheap tape recorder on the bet that 99 percent of the cases settle, don't go to trial, and you don't have to have a court reporter to do a deposition. And for poor folks who are not anticipating ever going to trial, it will save money to do the Subcommittee's as amended.

HON. DAVID PEEPLES: Scott, why can't you do that right now under 202? That happens right now under 202.

HON. SCOTT A. BRISTER: No. Under 202 right now you have to have a court reporter unless you get a court order.

HON. DAVID PEEPLES: You do have to go to court?

HON. SCOTT A. BRISTER: You have to go to court for an order, which for the Legal Services people, sure --

CHAIRMAN SOULES: What now? Are you saying that you have to have a court

reporter under 202?

HON. SCOTT A. BRISTER: Yes, sir. 202(1)(e) says a nonstenographic notice does not dispense with having a court reporter.

CHAIRMAN SOULES: Hold it, please. Rule 202(1) says, "Any party may cause testimony to be taken nonstenographically without leave of the court."

HON. SCOTT A. BRISTER: Paragraph (e).

CHAIRMAN SOULES: But it can't be used unless a stenographic transcription is made?

HON. SCOTT A. BRISTER: Look, read the first sentence of paragraph (e).

MR. YELENOSKY: But the way that has been interpreted was that you needed to get it typed up later from the recording. And that may be wrong, but in practice that's what happens. We go and we do a tape recording, and then you would have to do a type-up by a secretary of the tape recording, if in fact it was going to go anywhere. But

we didn't go in for a court order.

I mean, to me "stenographic" doesn't mean the same as that it was taken down by a court reporter, but I may just be wrong.

CHAIRMAN SOULES: Those in favor of Judge Till's motion show by hands.

MR. YELENOSKY: That's why I was asking that question earlier.

Now, what's the issue we're voting on now?

CHAIRMAN SOULES: We're voting on no change to 202, just using 202 as the rule.

HON. SCOTT A. BRISTER: We're voting to substitute in Rule 202.

CHAIRMAN SOULES: That's right.

MR. PRINCE: For the substitution of the substitution.

CHAIRMAN SOULES: Nine. Those opposed. 13. Okay. The Committee's draft still prevails by a vote of 13 to nine.

And Mike, would you provide some language to take care of your summary judgment problem. And I think the Committee has agreed that we will accept that to the effect --

state it again for the record -- to the effect of what?

MR. HATCHELL: Well, I just think that the notice provisions and the service provisions of the rule are just inoperable in a summary judgment context. But I think it can be very easily handled by just requiring the party using the nonstenographic deposition to have a copy available to be provided in some reasonable way, whether it's filed or it's supplied, either one.

If they're filed, you junk up the files and you make it a little bit more difficult for them responding to the summary judgment in Houston and going down there and having to read it, so I personally prefer that the party using it just has to make it available to the summary judgment opponents, but this is pretty simple.

PROFESSOR ALBRIGHT: What about for trial? Does it offend you to have to mail it to everybody to use it at trial?

MR. SUSMAN: I think we ought to write some language that nothing ought to be more cumbersome than having the court

reporter there in the first instance. I mean, you don't want to make it more expensive so that I pay a penalty for not having a court reporter there.

MR. JACKSON: Mike, in 166a(d), doesn't that solve the problem already there as far as you're concerned?

MR. HATCHELL: Well, if we eliminate that from this rule.

CHAIRMAN SOULES: "If the deposition is to be used as evidence at trial, the complete transcript must be served on all parties at least 30 days before trial." That's what the rule says now.

MR. SUSMAN: I suggest Alex work on the language.

PROFESSOR ALBRIGHT: I don't see why we can't -- since it has to be typed up by the court reporter, I don't see we can't just adopt the regular deposition rules where the court reporter sends a notice to everybody asking if they need a copy and then sends the original to the opposing attorney who then has to make it available to everybody again.

CHAIRMAN SOULES: Okay. And

that's what you're going to do. And then if somebody wants to use that transcript, they use it just like it was taken by the court reporter in the first instance.

Okay. Does everybody agree with that? Does anybody disagree? No disagreement. Okay. So that passes, so we're through with Rule 18.

MR. SUSMAN: Rule 17.

CHAIRMAN SOULES: Okay. Rule 17.

MR. SUSMAN: Rule 17, the only issue we have from anyone is Scott's suggestion about --

HON. SCOTT A. BRISTER: That's better taken up with Rule 24. Skip it. It really only applies to Rule 24. Let's take it up there.

MR. SUSMAN: Okay. Then we have no additions to Rule 17.

CHAIRMAN SOULES: Okay. Those in favor of Rule 17 show by hands. 13. Those opposed. None opposed. It's unanimous.

And now 18.

PROFESSOR ELAINE CARLSON: Is

that really 16?

PROFESSOR ALBRIGHT: Yes. Now we go back to Rule 16 in the bound volume.

HON. SCOTT A. BRISTER: What happened there, Luke, is it was just -- it makes more sense to have the rules go in order, how to notice an oral deposition, how to conduct an oral deposition, which is 15, and 16 would be how to certify and sign and file an oral deposition before you go on to depositions on written questions and nonstenographic stuff, rather than the current system where they're all kind of stuck in mixed amongst.

CHAIRMAN SOULES: Nobody disagrees with that new organization, do they? Okay. There being none, it's unanimous.

Looking at Rule 18, Signing, Certification, and Use of Depositions, is anybody opposed to Rule 18, Signing, Certification, and Use of Depositions.

MR. JACKSON: Isn't that Rule 16, though?

HON. SCOTT A. BRISTER: Did you

all agree with me on paragraph 2 there, Alex? Doesn't that need to go in?

PROFESSOR ALBRIGHT: Yes, that's correct. We'll accept that.

CHAIRMAN SOULES: Paragraph 5?

HON. SCOTT A. BRISTER: No. Paragraph 2, little roman numeral (v). It's just a technical addition that needs to be stuck in.

The only suggestion I have was on paragraph 6.

CHAIRMAN SOULES: Wait a minute, I don't understand what we just did.

HON. SCOTT A. BRISTER: Look at the Subcommittee's paragraph 2. I'm adding in another thing for the court reporter to certify, which is the amount of time used in the deposition. Since we say in another rule the court reporter is supposed to do that, we need to put that in here saying that's one of the things that they certify.

CHAIRMAN SOULES: So it's the amount of the deposition officer's charges and the amount of time used by each party at the deposition?

HON. SCOTT A. BRISTER: I was going to say it as a separate one, but you can stick it on the same one if you want.

PROFESSOR ALBRIGHT: We can accept it as that.

CHAIRMAN SOULES: Any opposition to that? There being no opposition, it will be declared unanimous.

And then on paragraph 5 --

HON. SCOTT A. BRISTER: Actually, this does what we were talking about with Mike, which is drop the parenthetical about the 30 days before, since you're just going to treat it like the same court reporter certificate, et cetera.

CHAIRMAN SOULES: So in the beginning towards the end of the second line in paragraph 5, we would delete "(30 days if the deposition" --

PROFESSOR ALBRIGHT: No, wait. What this does is make a distinction between a nonstenographic one and a stenographically recorded deposition. I think the thought was that you needed more time to look at your nonstenographically recorded deposition to

make sure that it accurately reflected the nonstenographic recording. But it may be that since it's being transcribed by a court reporter nobody cares, so just file it the day before.

HON. SCOTT A. BRISTER: That's what I would anticipate.

CHAIRMAN SOULES: Okay. So Judge Brister is proposing that we delete the words "(30 days if the deposition was recorded by nonstenographic means)." Is there any opposition to that? There being none, that will be declared unanimous. And that was paragraph 5.

Now, paragraph 6.

HON. SCOTT A. BRISTER: One of these is really substantive and the others are just -- this paragraph has lots of -- it seems to me the second and the last sentence both say the Rules of Evidence shall be applied to depositions. I assume the Rules of Evidence apply to everything so there's no reason to say it.

But the substantive one, this when you can use it against a party that's not present,

the Subcommittee version in the middle of their paragraph 6 says: A deposition is admissible against a party joined after the deposition was taken (1) if they have a similar interest; or (2) had a reasonable opportunity to redepose. Now, that is a change in current law, right, which requires (1) and (2)?

PROFESSOR ALBRIGHT: Well, what we determined is that the current law, when you read it, really is nonsensical, so we were trying to interpret what we thought it might mean.

HON. SCOTT A. BRISTER: Okay. Well, I've always read current law to require (1) and (2), and my proposal is that the rule would only require (2), which is, in other words, if they have a chance, plenty of opportunity to redepose, who cares whether they had a similar interest or not. The question is, you can use it against somebody if they have a reasonable opportunity to redepose after they're joined and they don't.

CHAIRMAN SOULES: Isn't that in the Rules of Evidence also?

HON. F. SCOTT McCOWN: It's not exactly in the Rules of Evidence.

MR. HERRING: I think it's just in the deposition rules.

CHAIRMAN SOULES: Well, it is. It's in 804(b)(1), I think, which, when this language was put into the current rule, the language out of 804(b)(1) was tracked verbatim, and it says --

HON. F. SCOTT McCOWN: Right. For former testimony, you have to have had a similar interest so that you get a fair cross-examination. And what Judge Brister is saying is that in the same proceeding all you ought to get is an opportunity to redepose. It shouldn't matter that the people had the same interests or not, because you can read the deposition and decide if you want to redepose or not. So there's a little bit different factors when you're talking about former testimony and you're talking about the same proceeding.

CHAIRMAN SOULES: Well, this says: Former testimony in a deposition taken in the course of the same proceeding, if the

party against whom the testimony is now offered, or a person with a similar interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination.

And then the language that was changed was "after becoming a party, to redepose and has failed to exercise," in the place of "had an opportunity and similar motive to develop the testimony by direct, cross or redirect."

HON. F. SCOTT McCOWN: So what you're saying is it ought to just be what 804(b)(1) is now?

CHAIRMAN SOULES: Well, except it is an opportunity to redepose depending on how you read that rule.

MR. PRINCE: No. I don't read the Rule of Evidence as dealing with depositions taken in this proceeding and then later added parties in this proceeding.

CHAIRMAN SOULES: Isn't that what (b)(1) is talking about?

MR. PRINCE: No. It says, Testimony given as a witness at another hearing of the same or different proceeding,

or in a deposition taken in the course of another proceeding.

CHAIRMAN SOULES: "The same or another proceeding," is what my book says.

MR. PRINCE: Do I have an old book? Oh, old book. Sorry, never mind.

HON. SCOTT A. BRISTER: I think mostly that paragraph is addressed in the Rules of Evidence.

PROFESSOR ALBRIGHT: Well, let's leave it out.

CHAIRMAN SOULES: You start off with the command that any part or all of the deposition may be used for any purpose in the same proceeding in which it was taken. It doesn't say "subject to the Rules of Evidence," so is the problem. The concern with this, again, was that we could just use that first sentence so that it would compel the induction of any part of the deposition. So this Committee went on and wrote more than in the current rule. What is the current rule on this? 207.

HON. F. SCOTT McCOWN: Well, can't we just say "subject to the Rules of

Evidence the deposition may be used"?

MR. SUSMAN: Any part or all of the deposition may be used for any purpose subject to the Rules of Evidence.

HON. F. SCOTT McCOWN: Yeah.

CHAIRMAN SOULES: That misses one piece of what's in the current rule and what's in the proposed rule, and that is, "had a reasonable opportunity after becoming a party to redepose and failed to exercise the opportunity." That's not in the Rule of Evidence.

PROFESSOR ALBRIGHT: The Rules of Evidence don't address a late added party.

CHAIRMAN SOULES: Well, let me see if I can understand Judge Brister's comment.

HON. SCOTT A. BRISTER: In other words, I have had hearings about whether somebody added later has a similar interest to somebody else, to which my response was, if you can retake the deposition, who cares? I'm not going to decide this. Just retake the deposition.

CHAIRMAN SOULES: Well, "or" is

correct in here, because, I mean, that's the current rule. But the current rule does have an interest similar to that of any party and says a deposition is admissible against him only if he has had a reasonable opportunity after becoming a party to redepose and has failed to exercise.

And you're problem in your court has been what, Judge Brister?

HON. SCOTT A. BRISTER: Well, satellite litigation over whether they had a similar interest; I want to use this deposition against them; I've told them that this guy is available and they can take extra parts of the deposition or more if they want to; and they say no, he can't use that deposition at all; throw it away because I don't have a similar interest to somebody in the litigation, which is crazy.

CHAIRMAN SOULES: Well, if you've got the disjunctive "or" which gives you two bases for requiring the use, doesn't that take care of your problem?

HON. SCOTT A. BRISTER: Except that means that a deposition can be used, the

person has died, and if I find you've got a similar interest, though you don't think you do and you don't have a lot of questions answered that you would have liked to have answered on an asbestos case, for instance, tough, we're going to use it against you on this dead man anyway. And I think that goes a little too far. I understood you have to have both, but the main point is, if you can redepose, it's an easy question.

CHAIRMAN SOULES: Well, I think you do have to have both under the current rule. This is 207(1)(c), which is different than what I was looking at earlier, which was 804(b)(1).

HON. C. A. GUITTARD: Mr. Chairman.

CHAIRMAN SOULES: Is it on this point, Judge?

HON. C. A. GUITTARD: Yes. I have a question as to whether the Discovery Rules should deal with questions of admissibility that, it seems to me, should be dealt with in the Rules of Evidence. If something shouldn't be admitted into evidence

or should be admitted into evidence, then the Rules of Evidence should say that, not the Discovery Rules.

CHAIRMAN SOULES: I'm not sure that the Rules of Evidence say you can use a deposition.

PROFESSOR ALBRIGHT: Judge Guittard, wouldn't you address it, if this issue came up, if you were in a trial and a party says, "You can't use that deposition against me because I was joined after it was taken," then wouldn't you just do it within your discretion as to whether to allow it or not?

HONORABLE C. A. GUITTARD: I would consider whether they had the same interest.

PROFESSOR ALBRIGHT: So you take these things into account even if there's not a rule that specifically says it?

HONORABLE C. A. GUITTARD: Or you can make a specific rule or a specific amendment to the Rules of Evidence.

PROFESSOR ALBRIGHT: That makes more sense.

HON. SCOTT A. BRISTER: It's a little bit procedural, because it's kind of like, Who can you use admissions against? Well, you can use admissions against only the party that they were directed to. Who can you use interrogatories against?

HON. C. A. GUITTARD: Same question.

MR. SUSMAN: Well, we have to do something on this, don't we, because there is a provision in Rule 207. If we don't do something, then we need to put something in there. 207(c) requires that later joined parties in the same proceeding, you've got to both have the same interest and the opportunity to redepose. We have put either/or. And Scott's version drops the same interest because it's silly to require both.

HON. SCOTT A. BRISTER: Basically.

CHAIRMAN SOULES: Is "same proceeding" defined in the Rules of Evidence anywhere?

HON. SCOTT A. BRISTER: The Rules of Evidence say for the definition of

"same proceeding," see the Rules of Civil Procedure.

MR. HERRING: If you look under 801(e)(3) --

CHAIRMAN SOULES: Okay. What we could do --

MR. SUSMAN: I think Scott is right.

CHAIRMAN SOULES: -- is x out (6) altogether, and move the definition of "same proceeding" to Rule of Evidence 801(e)(3).

MR. HERRING: No, because it's a backwards cross-reference.

CHAIRMAN SOULES: Well, let's see, 207, if we just move this definition of "same proceeding" into the Rule of Evidence, then it works here, and use of deposition will then be governed by the Rules of Civil Evidence which includes -- Justice Hecht just pointed out to me under 801 a deposition taken in the same proceeding can be used, and then you've got these other factors. But nowhere in the Rules of Evidence does it talk about opportunity to redepose. That's the one thing

we would lose from doing what I'm saying.

Judge Guittard.

HON. C. A. GUITTARD: Couldn't the Rules of Evidence be amended to provide that? Wouldn't it be more appropriate to do it there? Couldn't this Committee recommend that for the Rules of Evidence?

MR. SUSMAN: I don't really think the Subcommittee much cares. We want to get this product out, enacted and in effect as soon as possible. And my problem is that if it's dependent -- if we are taking something out of the existing rule, I'm a little concerned about when they will get around to amending the Rules of Evidence. I mean, it's a long process. And in the meantime, what do you do?

So I would rather work under the assumption that the Rules of Evidence will not be amended. We need to have these rules speak as a whole here, and at such time as they are, then this can be changed. So it seems to me that I would move we adopt Scott Brister's proposal for 16, for Rule 16(6), which I think is fine.

MR. PRINCE: Second.

CHAIRMAN SOULES: Again, Judge, what is the need to delete the similar interest requirement if you've got a disjunctive?

HON. SCOTT A. BRISTER: Well, because it means even if you had a chance to redepose -- well, let me see --

CHAIRMAN SOULES: It's the dead guy.

HON. SCOTT A. BRISTER: You didn't have a chance to redepose, yeah, the dead witness. You didn't have a chance to redepose. But if I can get a judge to decide your interests were similar enough, I can use that depo.

CHAIRMAN SOULES: Well, it is admissible under the Rules of Evidence now under those terms.

HON. SCOTT A. BRISTER: Well, again, I haven't really studied the Rules of Evidence in relation to this. Under the Rules of Civil Procedure it ain't. You've got to have both.

CHAIRMAN SOULES: Under the

Rules of Evidence it gets in if the party against whom the testimony is now offered, or a person with a similar interest, had an opportunity or a similar motive to develop the testimony by direct, cross or redirect.

HON. SCOTT A. BRISTER: And I think, you know, when you're working on the Rules of Evidence you need to see how these cross-reference. But I'm like Steve; it's in the Rules of Civil Procedure.

MR. SUSMAN: But that's a different issue now. We ought to fix it, because we have a defective Rule of Civil Procedure then, Scott, because it's in conflict with the Rules of Evidence.

HON. SCOTT A. BRISTER: Let me see --

MR. SUSMAN: You're saying you can get -- you can use a deposition --

HON. SCOTT A. BRISTER: First of all, 804(b)(1) is only if the declarant is unavailable. I mean, I'd have to think about this overnight to see. All I was focusing on was, if the Rule of Evidence is "or," it's different from the Rule of Civil of

Procedure. If the Rule of Evidence is "and" --

MR. SUSMAN: -- it's stupid.

HON. SCOTT A. BRISTER: -- it's the same thing, and it's a dumb rule, yeah.

MR. SUSMAN: Can we pass on this overnight? You're planning on bringing back the group even if we finish these rules tonight, aren't you?

CHAIRMAN SOULES: Oh, yeah.

MR. SUSMAN: I think that's a good idea.

HON. SCOTT A. BRISTER: We've still got a lot of drafting to do.

MR. SUSMAN: I think that is a good idea, which is to quit pretty soon. We will definitely finish this tomorrow, we're making good progress, but we just have some redrafting of the rough places.

CHAIRMAN SOULES: How many redrafting groups do we have?

MR. SUSMAN: Three.

HON. F. SCOTT McCOWN: Rule 4 is done.

CHAIRMAN SOULES: Rule 4 is

finished, isn't it?

HON. F. SCOTT McCOWN: No. You asked us to redraft it, but the redraft is done.

CHAIRMAN SOULES: The redraft is done. Okay. Well, we're going to keep working.

MR. SUSMAN: I would suggest that we come back to this one and let Scott think it through.

HON. SCOTT A. BRISTER: Well, Chuck Herring just pointed out to me that the unavailability of the witness, I mean, that's addressing a different problem than this Rule of Civil Procedure, which is just we've taken depositions, we've added some new parties, and should we throw them away or not.

And the thing is, if they've got a chance to redepose, let's don't throw them away and let's not have a big hearing about whether your interests are exactly the same, whether the interests of the asbestos distributors are the same as the interests of the asbestos manufacturers.

CHAIRMAN SOULES: Here is what

I think ought to be done: No. 1 in the paragraph 6, "A deposition is admissible against a party joined after the deposition was taken (1) if that party has an interest similar to that of any party present or represented at the taking of the deposition or who had reasonable notice thereof" -- is that what our current rule says?

PROFESSOR ALBRIGHT: The current rule is "If one becomes a party after the deposition has been taken and has an interest similar to that of any party described in (a) or (b) above, the deposition is admissible against that party only if that party has had a reasonable opportunity after becoming a party to redepose the deponent and has failed to exercise that opportunity."

That is an "and" requirement now, which we feel like doesn't really make much sense.

CHAIRMAN SOULES: I think, Judge Brister, can you look at 804(b)(1)?

HON. SCOTT A. BRISTER: Yeah.

CHAIRMAN SOULES: Okay. If we change (6) to say a deposition is admissible against a party joined after the deposition

was taken pursuant to -- maybe I haven't got that in the right place -- 804(b)(1), or if the party has had a reasonable opportunity to redepose, because your example is clearly the --

HON. SCOTT A. BRISTER: -- unavailable witness.

CHAIRMAN SOULES: -- unavailable witness, so that's taken care of by 804. But what we would want to take care of also is if the party came in and they may have had the opportunity to redepose and didn't, then the deposition ought to be able to be used against that party too.

HON. SCOTT A. BRISTER: I missed the last part.

CHAIRMAN SOULES: Well, the last part is what's now written in the draft, if the party has had a reasonable opportunity after becoming to party to redepose and has failed to exercise the opportunity.

So either under 804(b)(1), or if the party has the opportunity to redepose and doesn't, then the deposition ought to be used.

PROFESSOR ALBRIGHT: But the

distinction is if the witness is available or not. If the witness is unavailable, then you have to use 804(b)(1).

CHAIRMAN SOULES: That's right.

PROFESSOR ALBRIGHT: But if the witness is available, then you would have an opportunity to redepose, and we don't care. Just we redepose them.

CHAIRMAN SOULES: Well, the witness may not be available, but maybe they had two years to take his deposition before he died and didn't do it. So the court would decide whether there is all this similar interest and if it's developed by cross-examination by a similar -- or if the party just didn't take care of business, then the deposition could be used.

And that's what we're trying to do, is to keep from having to start all over again. The purpose of this is whether we have to ditch all the depositions when a party is added even if that party has the opportunity to redepose and doesn't.

HON. SCOTT A. BRISTER: You see, the "or," the similar interest, if it is

disjunctive, it adds nothing unless you posit that you didn't have an opportunity to redepose. To say that another way, in other words, if you have the opportunity to redepose, it doesn't matter whether you have a similar interest or not if it's "or."

CHAIRMAN SOULES: Right.

HONORABLE SCOTT A. BRISTER: So you only want to add the first one in if you posit by definition you didn't have a chance to redepose. You got added late, you didn't ever have the chance to take this person's deposition, but we're going to use it against you if I think it's a close enough interest.

MR. HAMILTON: I believe that 207 and 804 both require that you have an opportunity to redepose, so that's all you really need, is an opportunity to redepose.

HON. SCOTT A. BRISTER: That's the current rules.

MR. HAMILTON: You don't need the other part, the similar interest part.

CHAIRMAN SOULES: That's right, because 804(b)(1) takes care of that.

HON. SCOTT A. BRISTER:

804(b)(1) would be an added requirement if they died.

CHAIRMAN SOULES: So what I'm suggesting is that we just take (6) as it is with this change; that we delete from the (1) that's in parentheses all of that, "if the party has an interest similar to that of any party present or represented at the taking of the deposition or who had reasonable notice thereof."

HON. SARAH DUNCAN: Say that again, Luke.

CHAIRMAN SOULES: And substitute "A deposition is admissible against a party joined after the deposition was taken (1) as provided in the Texas Rule of Evidence 804(b)(1); or (2)" and then the rest of the paragraph. Does that work, Mike?

MR. HUNT: Do you really mean "taken"?

CHAIRMAN SOULES: After the deposition was taken. What word would you use?

MR. HUNT: Well, state how you propose to substitute for (1) again.

CHAIRMAN SOULES: Okay. Let's just read the sentence in its entirety. It starts with "A deposition is admissible."

"A deposition is admissible against a party joined after the deposition was taken (1) as provided in Texas Rule of Evidence 804(b)(1); or (2) if the party has had a reasonable opportunity after becoming a party to redepose the deponent and has failed to exercise that opportunity."

MR. HUNT: But it says if the deposition were taken as provided in 804?

CHAIRMAN SOULES: No.

MR. MARKS: Just delete "after the deposition was taken."

MR. PRINCE: Luther, how about this, just to paraphrase what you just did on section 1, have section 1 read, "If Rule 804(b)(1) of the Texas Rules of Evidence applies;" and then "or 2." Does that work?

CHAIRMAN SOULES: Okay. That's fine with me. "A deposition is admissible against a party joined after the deposition was taken (1)" --

HON. C. A. GUITTARD: -- as

provided in Rule 804.

CHAIRMAN SOULES: -- "if admissible under TRE 804(b)(1); or if the party" -- that's sort of a lot of "if" -- "if the deposition is admissible under TRE 804(b)(1), or if the party" -- okay. Would that work, Don Hunt?

MR. HUNT: Yeah.

CHAIRMAN SOULES: Okay. Those in favor of adjusting that sentence in that way show by hands. Okay. Anybody opposed? Okay. There's no opposition. That passes.

Now, with that change, those in favor of paragraph 6 show by hands. Is anybody opposed? No opposition.

MR. HUNT: Are we voting on Judge Brister's substitute or the --

CHAIRMAN SOULES: I think this fixes it. Does this fix your problem, Judge Brister?

HON. SCOTT A. BRISTER: Yeah. It's, you know, acceptable; it's fine. I just think this whole paragraph makes -- it says several things are governed by the Rules of Civil Evidence that are unnecessary because,

of course, admissibility is governed by the Rules of Civil Evidence. That's what you have the Rules of Civil Evidence for. But I don't mind having extra words in if nobody else does.

CHAIRMAN SOULES: Okay. Excuse me, let me confer.

MR. SUSMAN: He has his substitute for Rule 6.

PROFESSOR ALBRIGHT: Part (6).

MR. SUSMAN: And instead of writing your interlineation, just substitute his. Instead of writing your interlineations on the Committee's draft --

PROFESSOR ALBRIGHT: See, they're exactly the same. The last sentences that you're changing are exactly the same, so let's just make your amendment to his --

CHAIRMAN SOULES: -- to his 16?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Okay. Anything else on Rule 16? Is anybody opposed to Rule 16 as now constituted on the record? No opposition, so that's unanimous. Rule 16

or Rule 18, we've used it both ways, but we're talking about the Signing, Certification, and Use of Depositions Rule, and that's now passed.

And we go now to Rule 21, is that right, Compelling Production from a Nonparty?

MR. HAMILTON: Is there no Rule 19 or 20?

MR. HERRING: No.

PROFESSOR ALBRIGHT: Rules 19 and 20 got combined at Judge Brister's suggestion, I might add.

MR. SUSMAN: Let me just ask this, Judge. I hate to go back to Rule 16, but there is in Rule 16 of the Subcommittee's draft a reference to depositions taken in different proceedings. There are same proceedings and different proceedings. Now, we've taken out any reference to different proceedings, but we still mean that they can be used the way the Rules of Civil Evidence say they can be used, right?

HON. SCOTT A. BRISTER: Sure.

MR. SUSMAN: Okay. I'm just wondering if maybe we should say that. I

don't know why we had that in there in the first place.

HON. SCOTT A. BRISTER: Because it's been in there for years probably.

PROFESSOR ALBRIGHT: Yeah. The current rule addresses same proceedings and different proceedings. They're also addressed in the Rules of Evidence. What Judge Brister did was delete all of the situations that were dealt with under the Rules of Evidence, and what we have done is we have kept the same proceeding, I'm not sure why, but we have also addressed the situation of late joinder, which is not addressed in the Rules of Evidence.

MR. SUSMAN: My only question is, is someone going to say since we have dropped out 207(2) in its entirety, which is a provision that says "Use of Deposition Transcripts Taken in Different Proceedings," okay, that that was an intentional act on our part to say that essentially it can't be done any more, when in fact we aren't doing that. But I'm just concerned that somebody is going to make that argument, because it's no longer referenced at all.

MR. PEACOCK: Why not just add that last sentence, "Depositions taken in different proceedings may be used subject to the provisions in" --

MR. SUSMAN: Would you accept that, Scott --

HON. SCOTT A. BRISTER: That's fine, sure.

MR. SUSMAN: -- that we add that one sentence that says, "Depositions taken in different proceedings may be used subject to the provisions in the Texas Rules of Evidence?"

HON. SCOTT A. BRISTER: As long as it doesn't happen again, that's fine.

CHAIRMAN SOULES: And then what depositions include, that's coming out, right?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay. Is everybody in agreement? Okay. Rule 16 or 18, or anyway, the rule called Signing, Certification, and Use of Depositions is unanimously approved without dissent.

Now we go to Rule 21.

HON. SCOTT A. BRISTER: My

suggestion on this was to combine it, since 24 has to do with subpoenas and since the only way you get production from a nonparty is to subpoena them. It made more sense to me. Rather than saying when you could do it, what the notice said and where the time and place was here and in 24, let's just do it in one place.

If you look at the first part of 24, you do have to -- this might be the best time to look at the first -- on Tab 24, in my notes on paragraphs 1, 3 and 4, I indicate all of the parts that are identical to previous rules, and it's just repeating the same thing, it seems to me.

PROFESSOR ALBRIGHT: Scott, can I tell you the reason why that's in there?

HON. SCOTT A. BRISTER: Sure.

PROFESSOR ALBRIGHT: The reason why there is a Rule 21 is because we need a mechanism to make sure that the other party has notice that there was a subpoena going out; because when you file this notice compelling production, it requires service on all of the parties. It may be that we have

now changed the subpoena rule to require a copy of the subpoena to go to everybody. But traditionally copies of the subpoenas do not have to be served on all of the parties. And there was a concern that this subpoena rule concerned both trial subpoenas and then discovery subpoenas. And I think people did not want to require service of trial subpoenas on all parties, because you want to be able to not disclose who you were subpoenaing for trial as a strategy decision, so that is the history behind Rule 21.

CHAIRMAN SOULES: Why does this have to start with a subpoena? That's not the way the old rule worked.

HON. SCOTT A. BRISTER: How do you get documents from a third party, from somebody who is not in litigation?

CHAIRMAN SOULES: First you have to probably serve a citation that carries a motion to produce directed to a nonparty.

PROFESSOR ALBRIGHT: No. We have changed that.

CHAIRMAN SOULES: I understand you have, but -- and then there's a hearing.

PROFESSOR ALBRIGHT: Under current law.

CHAIRMAN SOULES: And then the court can order the party to do it. And it's not "Gather up all your documents and bring them to the courthouse," which is what a subpoena says, or "Gather up all your documents and bring them over to my office." It's "Come on down to the court and talk to the judge about this notice because I want your documents," which to me is simpler than saying to somebody, "Gather up all this stuff and bring it to me," which I think is a subpoena.

PROFESSOR ALBRIGHT: Okay. We wrote this, the subpoena rule, to be like the federal rule that allows parties to subpoena documents from nonparties without a motion and without a deposition. There was some discussion at one of the big meetings to try to draft the rule that way. I know some people are of the opinion that we should not have that procedure, but we drafted the rule at the request of the Committee.

I don't think we have ever really

discussed and voted as to whether that even was a good idea or not, but there were several people that suggested that we might draft it and see what we got.

CHAIRMAN SOULES: Okay. I see what you're proposing, which is we just subpoena without ever having a court order.

HON. SCOTT A. BRISTER: You get a subpoena, and then what I proposed was you to have subpoena them and then the other party, the nonparty, does exactly what a party does when they get -- in other words, when you say -- if you serve a notice of production on a party, it's treated the same as a subpoena.

And so what I'm saying is why not just say then -- and if you get a subpoena and you're a nonparty, you act the same way as if you got subpoenaed and you were a party. In other words, you do withholding statements, et cetera, which is what I understand the Subcommittee's plan was anyway.

PROFESSOR ALBRIGHT: So include it in the request for production of documents?

HON. SCOTT A. BRISTER: Yes. What I was doing on 24 was referencing

everything. Subpoenas, if you're a nonparty, you just follow the same rules in 14 or 11 for production of parties or depositions or whatever it happens to be. You get your 30 days, you do a withholding statement, and just, you know, you file your objections; you don't produce privileged stuff; you don't have to go to the court for a hearing if the other side is satisfied with what you actually produce subject to those objections, et cetera.

PROFESSOR ALBRIGHT: I think the way the subpoena rule is written now, it does not require nonparties to do as much in response as it requires parties. It makes for a more cumbersome procedure, but everybody should read Rule 24 and compare it with what we require parties to do in Rule 7 and decide whether it's okay to make nonparties do what parties do in Rule 7.

HON. SCOTT A. BRISTER: The two definitely operate together.

CHAIRMAN SOULES: They should be combined, because we even have the protection provisions as to nonparties over in

24.

PROFESSOR ALBRIGHT: Because I think that's a policy decision. Are you saying Rule 21 and 24 should be combined?

CHAIRMAN SOULES: Right. That's right. That's been suggested.

PROFESSOR ALBRIGHT: Well, not necessarily, because these subpoenas are concerning trial subpoenas, deposition subpoenas and compelling production subpoenas, so the subpoena is broader than Rule 21. We have a vehicle to notice a deposition. We have a vehicle now for compelling production of a nonparty; and subpoenaing for a trial, you just bring them to the courthouse. So Rule 21 is strictly a vehicle to file and give notice to all the other parties, and then the subpoena is then issued to the nonparty. All the nonparty has to look at is Rule 24 to find out what that nonparty has to do in response to that subpoena.

MR. SUSMAN: What I suggest we do is go through Rule 21 and see what in it we like and don't like.

PROFESSOR ALBRIGHT: I think it

makes more sense to go through Rule 24.

HON. SCOTT A. BRISTER: I agree with Alex.

PROFESSOR ALBRIGHT: Because 21 is just a vehicle that we can deal with depending upon what we do with 24.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Then let's go through 24 first.

CHAIRMAN SOULES: Rule 24, Subpoena, and so forth. Okay. Step us through this, Steve. This is the first time we've looked at this.

MR. SUSMAN: Okay. Alex, why don't you do section 1 from the red-line version, "Subpoena."

PROFESSOR ALBRIGHT: Okay. We have the form and the issuance of the subpoena. The subpoena -- what the subpoena looks like is kind of -- what this rule is is kind of a combination of the Texas rule and the federal rule. The subpoena commands the person to whom it is directed to attend and give testimony for a deposition, hearing or trial, so this would be a deposition subpoena

or a trial subpoena or a hearing subpoena, or simply to produce and permit inspection and copying of designated documents or things. So the difference between this rule and the current rule is that this allows you to subpoena a nonparty to simply produce documents just like parties do without taking their deposition.

MR. SUSMAN: In other words, this is very important. I think this is a very important change we ought to make. I got in a fight today with an attorney that -- we're trying to get some documents from a third party, and the other side is objecting that there's not enough notice to attend the deposition. Well, I don't want a deposition from a third party; I just want his documents, so it's a big hassle. Go ahead.

PROFESSOR ALBRIGHT: Okay. Then (b) and (c) are simply administrative, who serves it, et cetera.

"Service." Here we have David Perry's suggested alternative service provision. The way the Subcommittee had it, we had a sheriff or constable or any person not a party and is

not less than 18 years of age may serve a subpoena. This is current rule. And David Perry's suggestion is that when the witness is a party, that service be upon the party's attorney instead of upon the witness.

And I'm going to let -- is Scott McCown still here?

HON. F. SCOTT McCOWN: Yeah.

PROFESSOR ALBRIGHT: Scott was the one that was concerned about that because of the power of the court issue, I believe.

HON. F. SCOTT McCOWN: Well, the remedy if somebody doesn't comply with a subpoena is attachment, and to come into court and ask the judge to send out the constable to grab somebody is a lot to ask the judge to do. And so I think a subpoena ought to be served on the party that you're commanding and the party that you would attach.

Serving the subpoena on the lawyer leaves -- you all wouldn't believe some of these lawyers that we see, and there can be a big slip between the lawyer and the client. So what you might wind up doing if you change the rule is undermining your remedy, because

judges are going to be hesitant to attach if there wasn't personal service of the subpoena.

CHAIRMAN SOULES: When you've got a document request and the notice is duces tecum to the parties anyway, it can be served on the party's lawyer.

PROFESSOR ALBRIGHT: These would be basically trial subpoenas, trials and hearings. If I want you to come to -- if I wanted your client to come to trial, I say, "Here is a subpoena for your client."

HON. F. SCOTT McCOWN: This is different. This is if they don't come, then you're sending out the constable to get them. And as a trial judge, if I'm going to do that, I'm going to want to know that the command for them to come was served on them personally.

CHAIRMAN SOULES: I don't want to be a witness on whether or not I told my client to be there. That's absurd. I think that's your job to get him served.

Joe Latting.

MR. LATTING: As a trial lawyer, I don't think we ought to impose a requirement to go have somebody found and

served. I think that the whole notion of dealing with the lawyer on the other side is that you can serve the witness -- I mean, serve a party by handing papers to his lawyer. That's the way we do everything else.

And don't we have enough troubles that we don't have to go find somebody when we're dealing with his lawyer every day? There are a lot of times when I want people to come to court and I just give his lawyer -- really what I do is say, "Are you going to have him there?" And if they say yes, they always come. But I just don't see any sense in having to hunt somebody down if he's got an attorney in court.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I think Joe is right. I mean, in 90 percent of the cases, if you tell a lawyer, serve the lawyer a subpoena, he's going to bring his client. I mean, you're not going to have a problem. You're not going to have to send someone out to attach him or arrest him.

In the case where he doesn't show, it

seems to me the trial judge can look at whether he was personally served or served through his lawyer before he imposes any kind of sanction or arrest or attachment, so why make it cumbersome? Why should someone have to actually go serve a corporate client of mine when you can just let me have it.

CHAIRMAN SOULES: Well, Orsinger is not here, but in a family law context, sometimes my client ain't coming and I can't find him. But when I'm served, I'm served, and I don't think that I ought to get in the middle of that. I think that's just -- I've still got to go protect his rights if he's not there because I have a fiduciary duty and some other responsibilities to him and to the court to be there if I've got notice of a hearing, but I may not have a clue where the person is if he's hiding from me like he's hiding from everyboby else.

MR. LATTING: But Luke, you are in the middle of that. You're in the middle of that when I hand you that document. And if he doesn't show up, as Steve says, probably if your client doesn't come, probably Scott

McCown is not going to go have him arrested, but Scott McCown can say, "Well, Mr. Soules, did you get his subpoena?"

"Yeah. But he's not here."

We can deal with that. I just don't want to stack more requirements on us there.

MR. SUSMAN: Unnecessarily.

MR. LATTING: And if I want to, I can serve him. This doesn't prevent me from serving him.

CHAIRMAN SOULES: Now, this is a change.

HON. F. SCOTT McCOWN: That's right, this is a change. Right now, you have to work it out with the other side or subpoena him. Now, if you can work it out now, you can work it out under this rule. But what you're saying, and I don't -- maybe Judge Brister and Judge Peeples feel differently, and I'd like to hear them say it, but it is a big deal for me to sign a writ of attachment for the constable to go out and forcibly bring somebody to court, which is the remedy for a failure to respond to a subpoena. And if I'm going to do that, I want to know that they

were summoned personally.

PROFESSOR ALBRIGHT: And then also this would deal with parties or people that are really outside your subpoena range. If you're subpoenaing a party or someone that is in the control of a party, they may be in another state, but we're providing a mechanism for them to be subpoenaed, and somehow then there's a court order bringing them to you in Judge McCown's court.

HON. F. SCOTT McCOWN: And let me add one other thing. This is kind of the difference on what part of the elephant you're working at. While you're all working up at the top of the elephant, I'm down there at the back end of the elephant. And for a lot of lawyers and a lot of clients, the "let's work it out" doesn't happen. The lawyer loses touch with his client because the lawyer screwed up or the lawyer loses touch with his client because the client screwed up.

MR. SUSMAN: I just got -- she was just telling me what the consequences of this are. Perry's idea is ridiculous. The consequences are for trial, okay, where I

represent General Electric or IBM as a defendant in a trial, okay, the other side can, by serving a subpoena on me, have me bring every single executive to Houston, Texas; where now I can make a choice of whether I want to have them hang out at their home office because they're outside of the subpoena range. This would be a big change. I take it back. It would be -- I agree.

PROFESSOR ALBRIGHT: Can we vote up or down on that proposal?

CHAIRMAN SOULES: All right. Is there any motion to adopt David Perry's suggestion? Okay. There's no motion, so that's --

MR. SUSMAN: -- out.

CHAIRMAN SOULES: -- out.

CHAIRMAN SOULES: If David Perry makes it, does anybody want to second it? Okay. There are no seconds.

PROFESSOR ALBRIGHT: Okay. Then we have part 3.

MR. SUSMAN: Wait a minute, what about (b), (c) and (d)?

PROFESSOR ALBRIGHT: Well, (b),

(c) and (d) are just how do you serve them, how do you prove up service. These are just the technicalities of serving subpoenas.

MR. SUSMAN: Okay. 3.

PROFESSOR ALBRIGHT: Okay. Well, then I guess (d) is significant. (d) is the reason we have that Rule 21, because a subpoena for appearance at a deposition or for the production of documents or things other than at a trial or a hearing shall be issued only after service of a notice of deposition, or after service of a notice to compel production. So this is what -- you have to have that vehicle where you've requested -- this is on 2(d) -- where you've requested this activity to happen, because the subpoena only gets issued after proof that this has been filed and served.

So that means that all of the parties that are in the lawsuit have notice that someone is being subpoenaed either for a deposition or subpoenaed to compel production, so you know what's going on. You can't just issue a subpoena to get production of documents and not let everybody else know

what's happening.

HON. SCOTT A. BRISTER: Well, see, I think -- well, go ahead.

PROFESSOR ALBRIGHT: Okay. 3.

CHAIRMAN SOULES: Is that nonparties only or parties?

PROFESSOR ALBRIGHT: No, this is -- well, for parties you don't need a subpoena.

MR. SUSMAN: It's just a notice.

CHAIRMAN SOULES: For trial?

PROFESSOR ALBRIGHT: No. No. For trial, you can get a subpoena issued for trial and not let anybody know that you're doing that. You can go down to the clerk's office, get a trial subpoena, get it served. Only when it's returned does it appear in the file of the clerk.

MR. SUSMAN: For either appearance or documents?

PROFESSOR ALBRIGHT: Right, for appearing or documents at the trial or a hearing. We decided that's okay, because that's your trial strategy. If you're going

to subpoena somebody, that's your trial strategy. It may be you had to identify them, you know, as a trial witness someplace else.

CHAIRMAN SOULES: But this is just discovery.

PROFESSOR ALBRIGHT: Right. But for discovery, if you're going to bother a nonparty to get them to produce documents, everybody should know that you're bothering them so that they can get the documents that they want from that party; and also they can make objections to the request. They may have some valid objections to your request. Okay. So the only people you have to subpoena are nonparties, and that's in the other rule.

MR. SUSMAN: Right.

PROFESSOR ALBRIGHT: Okay. So part 3 is Protection of Nonparties Subject to Subpoenas. This kind of comes from the federal rule. What the federal rule does is it says we want one place where if a nonparty, somebody from out of the blue, is served with a subpoena, they can look to one rule to find out what they have to do to comply with that subpoena.

The Texas rules right now do not have such a thing, so what this does is it says, "Okay. I'm a nonparty, I've been served with a subpoena. I know to look at Rule 24."

And Rule 24(3) tells me what I have to do. Okay. Part (a), this is from the federal rule, says, "A party responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense upon a nonparty subject to that subpoena."

Then what the rest of the rule does, and I have not read it recently, but it provides a procedure whereby nonparties who have been served with subpoenas have to respond to subpoenas and make their objections and make withholding statements, et cetera. And I think we maybe just ought to take a minute and read it, because I can't remember exactly how it came out on the top of my head.

Okay. A nonparty commanded to produce and permit inspection and copying of designated documents and things, within 10 days after service or before the time specified for compliance if such time is less

than 10 days after service, may serve upon the party at whose instance the witness is summoned written objections to inspection or copying of any or all of the designated materials. If the objection is made, the party at whose instance the witness was summoned shall not be entitled to inspect and copy the materials except pursuant to court order. And after the objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order to compel the production.

So this is different from the way you would treat a party. A party has an obligation to figure out what part of the request they can comply with, and comply with that request. What this does is, if a nonparty objects to a request, the nonparty then doesn't have to do anything else unless the party gets a court order commanding the production. If a nonparty objects, it automatically goes to the court for the court to decide whether there has to be production and the extent of the production.

HON. SCOTT A. BRISTER: And

it's different from parties because it can be -- they may have to respond under this version real quick. They don't get the 30 days that a party gets.

CHAIRMAN SOULES: Why not?

HON. SCOTT A. BRISTER: That's my question.

MR. SUSMAN: Because, in the first place, that's the way it has operated under current law. And a lot of times third parties do not object to giving over those documents quickly. I mean, they don't.

I think that when a party, when you are being sued in a lawsuit or you're the plaintiff who brings a lawsuit, there's much more attorney involvement to find out what the contentions are and thinking about where the documents are than there is when you're a third party. If your law firm gets subpoenaed for some records as a third party or something, there's not so much attention paid to it and you frequently don't hire a lawyer.

HON. F. SCOTT McCOWN: When you think about the kinds of records, you realize by and large you don't need 30 days. The

police accident reports that are day in and day out subpoenaed from the city; doctors records that are day in and day out subpoenaed by the records service. The 30-day requirement would slow down the world too much, and so for nonparties you've got a 10-day requirement or before time of compliance they have to object, and most of them won't.

MR. LATTING: Why are we changing the subpoena rules from what they are now?

PROFESSOR ALBRIGHT: With the subpoena rules now there are several different subpoena rules; and one, they don't allow for this subpoena without a deposition.

MR. LATTING: Is that a problem?

PROFESSOR ALBRIGHT: Apparently. We were asked to draft one so you didn't have to have a deposition, but I don't know if it's a problem.

HON. F. SCOTT McCOWN: It's designed to reduce costs. There are a lot of records that people want to get, but they

don't want to have a take a deposition to get the records, and this will save costs.

PROFESSOR ALBRIGHT: And another thing this does is provide one rule that nonparties who are served with subpoenas can go to to figure out what they have to do to respond to it.

Part (c). Okay. Part (b) was the objection, and part (c) is if the nonparty, instead of making an objection and then waiting to see if the party that served the subpoena gets that objection heard, the nonparty can file a motion for protective order either in the court where the action is pending or in a district court in the county where the subpoena was served, so they can file -- they can take the initiative and file a motion for protective order in their own county to determine the scope of the production under this subpoena.

Part (d) is if the subpoena directs them to come to trial or a hearing less than 10 days after the date of service, if they don't have 10 days, then you just hear these objections at the hearing or the trial.

HON. F. SCOTT McCOWN: Can I explain (e), Alex?

PROFESSOR ALBRIGHT: Yes.

HON. F. SCOTT McCOWN: Steve Yelenosky originally raised the red-lined (e). If you look at the red-lined (e), you will remember that came up early on; which is, you are a hospital and you were served with a subpoena for confidential records that belong to a third party. The third party doesn't know about that subpoena, and so we developed (e), which talks about the specific Rules of Civil Evidence 509 or 510.

We realized that really that's just illustrative of a broader problem, and so we developed an (e) that addresses the problem; and that is, you are a records custodian and you were served with a subpoena for somebody else's records that you hold. But you are under a duty imposed by law either in a rule, regulation or statute to keep those confidential. You're confused. You're told under the law that they have to be confidential. You're also given a subpoena told by the court to produce them. They're

not your records, so you really don't care much. And so what (e) says is that when you serve that kind of a subpoena on a records custodian, you also have to serve the nonparty whose records they belong to.

If you don't do that, then the records custodian has to notify the nonparty, so that the nonparty can come into court and say, "These records that are confidential by law ought to stay counfidential because you can't compel their production."

So that would be mental health records, drug treatment records, certain banking records, and we felt like we couldn't catalog all the endless kinds of statutory confidentiality provisions that there were, and so what we developed instead was a procedure.

If you know they're confidential, you've got to serve the nonparty. If you don't know but the records custodian knows, then the records custodian has to alert the nonparty giving the nonparty a certain amount of time to get in.

MR. LATTING: Just a point of

order here. This is already the law under the Bank Privacy Act, and I don't know if anybody has looked to see if this is consistent with the Bank Privacy Act itself. It's in the Banking Code.

HON. SCOTT A. BRISTER: Funny should you ask. That's my item there on paragraph 3(e). It mostly is consistent, except that the Bank Privacy Act requires 10 days' previous notice.

MR. LATTING: That's right.

HON. SCOTT A. BRISTER: And there's no whatever limitation; this does not require that you give 10 days' notice. You could subpoena and get them in less time.

MR. LATTING: So it doesn't seem to me we ought to pass a rule that's contra to the Bank Privacy Act.

HON. F. SCOTT McCOWN: Well, let me argue it just the other way around.

MR. LATTING: I mean, I don't care, but I don't think -- what's the court going to do when the Act says you have to have 10 days' notice?

CHAIRMAN SOULES: You have to

provide both, this and the Bank Privacy Act and whatever other stuff, the federal statute, the DOJ rules. I mean, this doesn't get us through the DOJ and the Bank Privacy Act.

HON. F. SCOTT McCOWN: Right.

CHAIRMAN SOULES: It only gets us to --

HON. F. SCOTT McCOWN: It sets up a procedure, though, where you alert the nonparty whose records somebody is trying to get. And what often happens is the nonparty doesn't know that these confidential records of his have been subpoenaed. The people that are getting the subpoena may not be very motivated to protect the confidentiality, or may be confused by the fact that, yeah, it's confidential, but here I've got a court summons to turn it over. And so we have a procedure that protects them. It obviously doesn't override any provisions in the law, and you can come into court and assert those provisions.

MR. LATTING: As it's written, does it protect the rights of a party whose records are subpoenaed from a third party or

nonparty? That is, if you ask a hospital to produce the records of some party, do you have to notify the party?

MR. SUSMAN: The party will get notice.

PROFESSOR ALBRIGHT: The party will get notice of it.

MR. LATTING: In all cases?

MR. SUSMAN: In all cases.

CHAIRMAN SOULES: Okay. Steve Yelenosky.

MR. YELENOSKY: Before you get to that, I mean, as Scott mentioned, this came about because of my concern. Now I'm wearing my other hat where I am now at Advocacy, Inc. with people with disabilities. And one of our lawyers has written a letter about this a couple of years ago. And there is one drafting comment I should have written to you, but I'll bring that up in a minute.

But overall on this, first of all, the custodian isn't confused. Well, they may be confused, as Judge McCown suggests, but if they get a subpoena, the confidentiality rules say you don't release this stuff unless by

court order. Well, a subpoena is a court order, so they're not so confused and they turn it over. The custodians at MHMR aren't going to wait a second before they turn over somebody's mental health records.

And that's what's happened in whistle blower cases, for example, where an employee there says, "I was fired because I reported abuse of a patient," and the plaintiff's attorney gets the mental health records of that patient without the patient ever knowing. So it is important to have the procedure that he's saying that people get notice.

Secondly, as far as overlap, you know, we have the Bank Privacy Act apparently, which covers that. We have a whole rule in here that talks about what you've got to do to walk on somebody's front lawn, but we don't have anything in here that protects a nonparty's medical records, in particular mental health records, so I don't know. I mean, if it were addressed in a statute perhaps that would solve the problem, but I think we still need the procedure.

The drafting point that I'm concerned about here is that it says, "If the party serving the subpoena does not serve it in accordance with this rule," and then the custodian goes on, and I'm not sure how the custodian knows whether or not the nonparty has been served.

It would have to be -- even if you put it on the subpoena itself that this is being served on the other party, the custodian also wouldn't know whether in fact that service was accomplished, and therefore might release the records without any extension of time for the person to respond. So I have some thoughts about that, but that's my drafting problem.

HON. F. SCOTT McCOWN: Well, what is your drafting solution?

MR. YELENOSKY: Well, and I don't know if this will work, but within this context, since there is a problem that -- I mean, first you could put on the subpoena certifying that it's being served on the nonparty, but that wouldn't solve the problem of whether service was accomplished. And the only way to solve that problem that I can see

would be if before you serve the subpoena on the custodian that you certify that notice has been served on the nonparty, if you want to get into that.

MR. MARKS: Well, I have a question about the power that you have over a nonparty anyway. In other words, can you tell a nonparty who is not in court, who is not a party to the lawsuit, that he has to do something?

HON. SCOTT A. BRISTER: With a subpoena you can.

MR. MARKS: Well, I mean, you can subpoena a party, but you can't -- I mean, can you require him to give notice to somebody else under the rule, a nonparty?

MR. YELENOSKY: Well, you can certainly create a situation where the custodian at MHMR would be concerned about his or her liability if they didn't, but that's true. I think that's the only way in which it would be enforced.

The other concern that's not really addressed here, and I'm not -- I think this has to be addressed through MHMR, is when you

have inidividuals who are mentally ill and notice to them isn't going to be effective because they're not competent. The way in which I think we might -- some of them are not competent; obviously, a lot of them are. But the way in which that might have to be accomplished is through an agreement with MHMR that they're going to copy the individual's documents so that somebody can then contact an attorney, somebody who is competent can contact an attorney. But yeah, I mean, it's true. I don't know how you force the custodian other than through fear of liability.

CHAIRMAN SOULES: Doris Lange.

MS. LANGE: You also have juvenile records going through the court. Both mentally ill and juvenile records both go through our court.

MR. YELENOSKY: Well, as far as -- Scott, what do you think?

HON. F. SCOTT McCOWN: I think you raise a real good problem, and I think John Marks raises an important issue too. And I think they both can be solved by saying in

the third line, instead of saying "also," make that "first." Change "also" to "first."

"When a party serves a subpoena upon any custodian of records concerning a nonparty that are protected from disclosure by a rule, regulation or statute, the party serving the subpoena shall first serve a copy of the subpoena upon the nonparty to whom the records pertain, or if the nonparty is represented by an attorney, upon the attorney. The nonparty may make any objection or motion for protective order in the same manner as the records custodian served with the subpoena." And then just delete that last sentence and not require the nonparty to do anything. Because if he is served, then he knows that you have first served a copy upon the nonparty.

MR. YELENOSKY: That may work.

CHAIRMAN SOULES: What if you can't find the nonparty but you can find the custodian?

HON. F. SCOTT McCOWN: Then I think you have to get a court order.

CHAIRMAN SOULES: Steve

Yelenosky.

MR. YELENOSKY: Well, the only thing I can think of here, which I think pertains to what you said initially, is the custodian may know, but the plaintiff or the requesting party or his attorney may not know that it's protected by confidentiality. I'm not really concerned about that because what I'm concerned about is medical records. Everybody knows they're protected and that they better serve it first under your version on that person.

In a situation, though, where the requesting party didn't know and the custodian just gets a subpoena, the requesting party didn't know that it was confidential and the custodian will assume by virtue of the fact that he's got a subpoena that it's already been served on the party who has the confidentiality interest. But I can live with that because everybody knows that medical records are confidential and they're going to have to serve the individual first.

CHAIRMAN SOULES: So you can live with what?

MR. YELENOSKY: I can live with Scott's proposal.

HON. F. SCOTT McCOWN: And let me add one alteration to take care of Luke's point, because I think it's a good one. At the end of that first sentence, "shall first serve a copy of the subpoena upon the nonparty to whom the records pertain, or if the nonparty is represented by an attorney, upon the attorney, unless excused by court order," because there may be instances where you just can't find the nonparty.

HON. SCOTT A. BRISTER: Then I think it's especially important that we add in there somewhere that this doesn't -- to the extent this conflicts with any other statute, it's overridden, because unless everybody has reviewed every one of these statutes and regulations, et cetera, we're going to end up passing a rule that's contrary to something that the legislature has done, which is not a good idea.

HON. F. SCOTT McCOWN: But I think the way it's rewritten now, that's impossible, because all we're saying is that

before you serve the subpoena you've got to first serve the nonparty. We're not saying anything about compliance or deadlines.

HON. SCOTT A. BRISTER: But you just said "unless the court orders otherwise."

MR. YELENOSKY: Well, that part I disagree with, because I think the routine is going to be just to go into court and say, "We need these medical records," and the judge is just going to sign it. So if you're really in a situation where the person can't be found, you can figure out a way to get the court -- and it's implicit that the court will have some authority, but it's going to be a little harder, I think.

But as far as your point -- I mean, I don't think it will be in conflict with any other law. It will only be additive that you first require the subpoena to be served.

HON. SCOTT A. BRISTER: How do you know? I mean, there's got to be hundreds of these. I'm not so confident what we just agreed to doesn't conflict.

MR. YELENOSKY: Well, if you don't know, if you don't know that there's a

law requiring this, then you're not going to serve the person, right?

HON. SCOTT A. BRISTER: And then you're going to be in violation of the Bank Privacy Act, which says before you can get them, period, you have to serve them.

MR. YELENOSKY: Right. Well, if you follow Scott's latest wording on it, you're going to, if you know that there's a Privacy Act, you're going to serve it on them, right? I mean, you know it's protected by the Privacy Act, therefore you're going to serve them before you serve the custodian.

HON. SCOTT A. BRISTER: And if you don't know, you still have to serve them.

MR. YELENOSKY: Right. Sure you do. But you're absent the knowledge -- I mean, this doesn't -- I don't see how that -- if you don't know about the Bank Privacy Act, that's a separate matter, isn't it? I mean, this can't cause you to do anything differently, would it?

HON. PAUL HEATH TILL: Why would it not?

CHAIRMAN SOULES: Judge Till.

HON. PAUL HEATH TILL: If they didn't know, they're going to serve the notice on whoever has the records. They're going to assume that the people who have an interest in privacy have already been notified. They haven't been. Yes, it would definitely have an effect. How could it not have an effect?

Furthermore, whoever serves this subpoena or whoever issues the subpoena, they're going to have to explore it to make sure whether this is all right.

Would not the party that has the records be in a much better position to know whether there is any privacy or confidentiality in the records?

MR. YELENOSKY: They may be, but they're under court order to turn it over, which overrides whatever knowledge they have.

HON. PAUL HEATH TILL: They should be able to file with the court a notice that these are under confidentiality and go from there.

CHAIRMAN SOULES: One at a time.

MR. YELENOSKY: But they won't

do that.

CHAIRMAN SOULES: Okay. Ms. Lange.

MS. LANGE: A subpoena will not cause me to turn over any juvenile or mentally ill records. It's going to take a court order from that court to do that because the statute requires that. And Judge Brister is right. You need to tie it in to any legislation that has passed that causes that to be confidential. A subpoena will not cause me to turn it over, and I'd be concerned about mentally ill hospitals doing it.

MR. YELENOSKY: Well, they're doing it.

CHAIRMAN SOULES: Okay. Who else wants to speak? Judge McCown and then I'll get to Steve.

HON. F. SCOTT McCOWN: Well, maybe we can add a sentence that says this doesn't authorize anything that contravenes the law.

But right now our rules allow you to subpoena anything from anybody and they don't say that confidentiality statutes trump. So

again, the disadvantage you're pointing out here is not unique. It's a problem in our present rule. It's a problem in this rule. But what we've at least done in this rule is add some procedural safeguards so that the real party in interest, the nonparty whose records they are has some opportunity to inform the court.

And in a lot of instances the court may not know. The guy who subpoenaed them may not know. The records custodian may not know. The nonparty may not know. I mean there are lots of these little laws, but at least this way everybody is told, and hopefully one of them is going to know and assert the issue.

MR. LATTING: Well, just for clarity then, would it hurt --

CHAIRMAN SOULES: Wait a minute, Steve is next. Steve.

MR. SUSMAN: My only concern here is, I mean, I don't think we are going to take away some privacy rights that a federal statute or other particular statute like the Bank Privacy Act has given by virtue of anything we put in these rules. I mean, it

would trump whatever we have in the rules.

My concern is that we may make it more difficult to subpoena records from third party custodians if we require that everyone who has an interest, the real owners of the records, all be served with a subpoena in person first.

I can think of things where you would want to subpoena records from a stockbroker that has customers all over the United States. Now, shouldn't we really rely on that stock -- you know, the brokerage house to come in and assert the privacy rights of its customers, or do I first have to serve all of these customers?

HON. F. SCOTT McCOWN: Well, but --

MR. SUSMAN: I mean, it's usually in the custody of -- I mean --

HON. F. SCOTT McCOWN: That's what the "unless excused by court order" can mean. If you've got a good argument for why the nonparty shouldn't be served because it's $100 worth of records and 2,000 nonparties, you can make that pitch to the court and be

excused.

And then I would add this language at the end to cover Judge Brister's comment: Nothing in this rule authorizes a court by subpoena or order to compel production of records made confidential by law.

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: Well, I was just going to ask if it wouldn't be good for clarity to say that this rule does not take away from any statute or some words to that effect.

HON. F. SCOTT McCOWN: How about the words that I just used?

HON. SCOTT A. BRISTER: Well, because it's not just confidentiality, it's the procedure too.

MR. LATTING: That's what I had in mind.

HON. SCOTT A. BRISTER: The Bank Privacy Act requires 10 days. The subpoena rules would allow less than 10 days. I do agree with you, the problem is this isn't in the current subpoena rule at all. When you

add it in, it does look like you're changing something unless you say we're not intending to change it. And it does apply to procedures, because a lot of these confidentiality things have procedures on how you get them and how you do notice in addition to a definition of what is confidential.

HON. F. SCOTT McCOWN: Okay.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, the additional problem I have along the line of what Steve said is that to require us to first serve the person to whom the records pertains assumes that we know to whom the records pertain before we've got them. I mean, we ain't got them. They may pertain to somebody that we're -- that's not what we're doing them for. It just so happens that the scope of the subpoena embraces perhaps or implicates somebody that we had no intention of doing. I mean, we can't possibly require us to first serve somebody that we've got no reason to know that they're there.

I mean, I have a serious problem with the

idea that -- it's like chicken and egg; that we're supposed to know what's in the records before we get them. And a lot of times we don't know what's in them. If we did, we might not want them. But that's what we subpoena them for frequently, is to find out what's in them and who is implicated in them or who it pertains to.

I mean, this rule is drafted as if it's only dealing with medical records or someone where you're talking about a particular custodian or a particular person. But once you get beyond that and it's merely a tangential "pertaining to," then it seems to me that you've really kind of trumped the entire procedure anyway.

CHAIRMAN SOULES: Justice Duncan.

HON. SARAH DUNCAN: I'd just like to say a word on behalf of the nonparties who aren't here. I think we would all agree that as lawyers, yeah, we want every document out there that we can get and we really don't care how inconvenient or expensive it is for anyone else. And what we're doing is we're

forcing someone to get a lawyer simply because we decide to send them a notice that we want their documents, and I think this is misguided.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, two things, and maybe what's appropriate, and I thought of this as a fall-back position, is that we have a rule that speaks to medical records like we have a rule that speaks to entry on property. And if it's confined to that, then maybe there's something we can agree on.

Secondly, something Doris Lange said reminded me that this same issue comes up outside of the subpoena context. It comes up when MHMR is a party and you merely have a request for production, so that you need the same kind of notice to the nonparty written into the request for production provisions there, like if you have a whistle blower case.

In fact, I have an example of one. If the whistle blower case is against MHMR,

they're going to be getting a request for medical records via a request for production, not by a subpoena, so that part needs to be parallel.

But I guess what I would maybe propose is that we have something that speaks to medical records and that that specifically requires notice to the nonparty.

CHAIRMAN SOULES: John Marks.

MR. MARKS: It seems to me we need to talk about this more and it's not something that we need to send up to the Supreme Court. And maybe you ought to appoint a subcommittee to look at this a little bit closer, because it obviously involves a lot more than anybody has thought of around this table.

HON. SCOTT A. BRISTER: I'd second that. I think we should drop this out. It's not in the current rules. Let's focus on it separately.

CHAIRMAN SOULES: Does anybody disagree with that? Steve Yelenosky.

MR. YELENOSKY: Well, I do, because there are a lot of things here that,

you know, maybe we could come together on some language on. But there are a lot of things here that we ventured out to make suggestions on and I think this is important, not just from the perspective of mental health records. I think Judge Duncan has pointed out quite appropriately that certainly the Supreme Court is interested in how the public at large is affected by what we do, and not just those people that happen to be involved in litigation.

CHAIRMAN SOULES: Judge McCown.

HON. F. SCOTT McCOWN: Well, kind of in answer to Sarah's point, she's saying, "Hey, we don't want to be serving these nonparties and making them get lawyers." But when you stop and think about it, if we don't serve them, then we're potentially taking their confidential records without telling them and breaking their confidentiality.

I don't feel strongly about whether we do (e) now, which is, I'll admit, complicated and difficult, or whether we do (e) later. But i don't know if you can make (e) much better. I

mean, it's just a notification procedure. It's not going to accomplish everything. It's just going to provide some additional protection that we don't have now, but I'm happy to postpone it.

CHAIRMAN SOULES: I think we can make it better in several ways. Justice Duncan.

HON. SARAH DUNCAN: Just to clarify, my comment was not restricted to confidential records. My comment was meant to encompass the records of all nonparties, because what we're doing is saying you no longer have to get a court order or send out a notice of deposition with a subpoena duces tecum, as you did under the old rules. All I have to do is send somebody a request for the documents with a subpoena, and unless they object within 10 days, which is a very short time fuse for at least a lot of the business people that I know, they're going to have to produce.

I know people who are legitimately out of town for two weeks every month. Now they either have a notice of deposition, or you

have to go get a court order and someone in the judicial system has to determine that these documents are discoverable.

CHAIRMAN SOULES: Let me see where we're at on Rule 24. But for this debate on (e), are we otherwise satisfied with Rule 24? Is there anyone --

HON. PAUL HEATH TILL: I have a small correction.

CHAIRMAN SOULES: Okay. A small correction from Judge Till.

HON. PAUL HEATH TILL: I don't think this has anything to do with the substance of it, but it's on (a) -- no, let's see, (c). You have a list that it starts "The clerk of the district or county court, or justice of the peace," and I believe it should be the clerk of the district, county or justice court, since we all have clerks now.

CHAIRMAN SOULES: District, county or justice court?

MR. PEACOCK: But keep "justice of the peace"?

HON. PAUL HEATH TILL: No.

CHAIRMAN SOULES: Okay. We'll

make that change. Any other changes to Rule 24 other than our concern about the item (e)? Judge Brister.

HON. SCOTT A. BRISTER: Yeah. Two things. One is substantive, and that's the 10 days or actually it can be much less than 10 days for nonparties to respond. Again, I think it ought to go the same way as a party. Somebody who is not a party doesn't know anything about case, et cetera. I agree on medical records. It's not a problem. They're used to copying them, et cetera. But when it's a big oil company case and they just subpoena records from some other oil company because they want to compare a million records and we want them this week too, and you have to hire somebody to run in immediately and file an objection to it, this shifts all of that to them without enough time to look at it. Now, it may be taken care of.

The other differences I read between parties and nonparties is that a nonparty can just say, "I object," period, and do nothing, which again, I don't think is the way they normally do it. They normally do it like a

party does, which is the direction we're going in on our Rule 11. They object to the extent they disagree, produce to the extent they agree, go to the court if they can't work out the rest. And it just seems to me a very short fuse and the absolute you don't have to do a thing if you say the words "I object" means it definitely will go to court or will go to court more often than it is currently.

HON. SARAH DUNCAN: Scott, they've got to know they've got to say the words "I object," and they need a lawyer tell them that. So you're telling them that you've got to figure out what this means; you've got to get to the proper person in your organization; you've got to go get a lawyer. The lawyer has got to read Rule 24, and then you've got to say "I object." And this is without any objective nonparty nonlawyer saying these are discoverable records.

CHAIRMAN SOULES: I understand. But we're not talking about just discovery. We're talking about in trial subpoenas while the trial is in process, and we're trying to get somebody down there with

some records on rebuttal.

HON. SCOTT A. BRISTER: Which is why those are two different things to me. Because the problem with the subpoena rule is it's in standard subpoenas for trial right now and discovery stuff, and they ought to be treated -- the discovery stuff out to be just treated like discovery and the "show up right now at trial" ought to be treated as something different.

CHAIRMAN SOULES: And if this rule passes, as I'm understanding it, there will not be any standard "bring your records to trial," because everybody gets at least 10 days.

HON. SCOTT A. BRISTER: No.

CHAIRMAN SOULES: Where is that?

HON. SCOTT A. BRISTER: Well, it says you just come to court and object then.

CHAIRMAN SOULES: I'm sorry? Where is that? I don't see it. Did I miss it?

HON. SCOTT A. BRISTER: It's in

3(d).

CHAIRMAN SOULES: 3(d). Okay. So you are you suggesting that the 10 days ought to be a different number of days, Judge Brister?

HON. SCOTT A. BRISTER: Yeah.

CHAIRMAN SOULES: How many?

HON. SCOTT A. BRISTER: Well, the way I set it up under Tab 24 in my version of 24, part (4), is if you get a subpoena to produce documents, you respond according to Rule 11 like a party would. If it's to appear at a deposition, you do it in accordance with 14 and 15. But a subpoena to appear at testimony or a hearing or trial, you just make your objections when you show up at hearing or trial.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: My reluctance here, Scott, is the present system is working pretty well. I mean, we don't have any complaints. There have not been a lot of complaints. I mean, we left these rules to the end. There's not been a lot of complaints

that third parties are harassed or have to unduly hire a bunch of lawyers or that the time fuses are too short, and so the notion was not to change much of the current practice on this third party document productions.

The only thing we thought really seriously about changing and wanted to change was the notion that you also had a deposition. Now, under current practice, I can notice the deposition of a third party. I give them five days' notice. Okay. I can issue a subpoena that requires them to produce documents at their deposition. We haven't changed the practice. Where has the practice been changed? I mean --

HON. SCOTT A. BRISTER: Under the current practice, you can do that with a party, a lot of people think --

MR. SUSMAN: But we've made that clear. We've made that clear that you cannot do that with a party.

HON. SCOTT A. BRISTER: Right. And why? Because you need more time than that. It's not fair to expect people to do what you have to do with a request for

production in five days for parties, but it still is for nonparties who don't know a thing about the case?

CHAIRMAN SOULES: Let's get this boiled down. Has anybody got a motion on this? If so, make the motion. We've really debated this up and down a lot and I think the policy issues too.

MR. SUSMAN: I move we adopt Rule 24 as drafted without section (e) in it, the one that we have discussed for so long.

HON. F. SCOTT McCOWN: Second.

CHAIRMAN SOULES: All right. It's moved and seconded.

MR. SUSMAN: That's section 3(e).

CHAIRMAN SOULES: All right. Does anyone have an amendment to that motion? Steve Yelenosky.

MR. YELENOSKY: Well, I'll go along with that, and then I'll move for a very short rule on medical records, which I have drafted.

CHAIRMAN SOULES: Okay. Now, we're talking about making the change that

Judge Till suggested in 1(c), deleting David Perry's suggestion, and deleting (e), which is 3(e), and otherwise we're voting on Rule 24 as stated. Carl Hamilton.

MR. HAMILTON: Changing Rule 1(c) is really a substantive change, because the current rules don't authorize the clerks of the justice court to issue subpoenas. It's the justice of the peace that has to issue them.

CHAIRMAN SOULES: Is that right, Judge Till?

HON. PAUL HEATH TILL: That's very true, because when this rule was written there wasn't a clerk for the justice courts and now there is one. Specifically we got one appointed, and the reason I know it is because I went to the legislature and I had the law passed. So there is a clerk of the justice courts now. They are sworn in and registered with the secretary of state just like district and county court clerks, and they certainly can.

CHAIRMAN SOULES: Are they authorized issued to subpoenas?

HON. PAUL HEATH TILL: They're authorized to issue anything that's not judicial, and we would like for them to be able to do the same here. They receive the same training and are under the same supervision.

PROFESSOR ALBRIGHT: And this is what authorizes them to do so.

HON. PAUL HEATH TILL: This is what authorizes them.

CHAIRMAN SOULES: Okay. Any problem with that? Does anybody see any problem with that? I don't think there's any problem with that.

PROFESSOR ALBRIGHT: Can I just point out one more substantive change, is we have also allowed lawyers, authorized lawyers to issue and sign subpoenas like they can in federal court.

CHAIRMAN SOULES: Okay. Those in favor of 24, then, as stated hold your hands up. Six. Those opposed. Eight against. Somebody said I miscounted on the first. Those in favor show your hands again.

HON. F. SCOTT McCOWN: Without

(e), right?

CHAIRMAN SOULES: Without (e). Six. It fails by a vote of eight to six.

MR. PEACOCK: I saw eight.

MR. SUSMAN: Let's recount.

CHAIRMAN SOULES: Okay. Let me stand up. Those in favor, without (e) and with the change as Judge Till recommended on the justice court and without David Perry's suggestion, those in favor of 24 hold your hands up and let me count. 10. Those opposed. Hold your hands up. Eight. Okay. It passes 10 to eight.

Okay. We have now 25 minutes to work. How do we use it?

MR. SUSMAN: We turn to 21.

CHAIRMAN SOULES: 21.

MR. YELENOSKY: Luke, can I propose the amendment on the medical records?

CHAIRMAN SOULES: Do you have a chance to type it up overnight or write it out and give it to us tomorrow?

MR. YELENOSKY: Yeah, I have a computer; I just don't have a printer.

CHAIRMAN SOULES: Write it out

in longhand.

MR. YELENOSKY: That's what I'll do, and I'll fax it to you.

CHAIRMAN SOULES: Okay. Good. Rule 21.

MR. SUSMAN: When are we going until, 6:30?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: Rule 21 I don't think is going to be that controversial if you want to do 24. It's basically the vehicle rule which allows you to get production from a nonparty without taking a deposition. It says you can do it at any time during the discovery period. It says you serve -- you've got to give notice in a subpoena just as you had to do with a deposition to get documents under the old regime. The place must be reasonable. We've already confronted that, time and place, a reasonable time and place.

And the last provision, subsection 4, deals with the inspection and copying; that is, if some party gets -- the party who gets the documents has to make them available to everybody else.

CHAIRMAN SOULES: Okay. Judge Brister.

HON. SCOTT A. BRISTER: Yeah. My proposal was that all of this rule can be eliminated by two sentences in Rule 24, which is that you just say the subpoena -- the part I read earlier. If it's a subpoena for a deposition, it's got to meet the provisions of Rule 14, which state these identical time and place restrictions, identical date restrictions, and then say the same thing with regard to producing documents, say it's got to meet the notice for producing documents, and the subpoena has got to meet Rule 11. The first paragraph is almost word for word Rule 11(1). The second paragraph is almost word for word Rule 11(2). And the third paragraph is exactly word for word Rule 14(2)(a).

CHAIRMAN SOULES: So it has redundancy?

HON. SCOTT A. BRISTER: No question about it.

CHAIRMAN SOULES: Okay. Alex Albright.

PROFESSOR ALBRIGHT: I think we need a separate rule, because we need to make it clear to everybody that this is a discovery vehicle and the limitations upon it. Also part 4 does not appear anywhere, and that's why I think we need it.

CHAIRMAN SOULES: It will draw attention to a new tool, we're adding a separate rule, for whatever benefit that may be. Judge Peeples.

HON. DAVID PEEPLES: Is there no express time limit? I mean it says time and place shall be reasonable.

HON. SCOTT A. BRISTER: No, there's not.

HON. DAVID PEEPLES: The oral deposition rule, Rule 14, has the same provisions, but it has a protective order provision that says if you get hit with this, you file your motion and that gets you 10 days, if it's fewer than 10 days, unless there's an earlier hearing. In other words, you file a motion that buys you 10 days. Do we want to put something like that in here?

CHAIRMAN SOULES: That's in

here too.

PROFESSOR ALBRIGHT: Then you go to the subpoena, and the person subpoenaed makes an objection and they never have to do anything.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I have a question. If the case is set for trial, and three days before the trial I want to subpoena some nonparty to bring records to the trial, is that okay?

PROFESSOR ALBRIGHT: Then they have to go -- they make their objections at trial.

MR. LATTING: Well, but this says here that at any time no later than -- I'm reading from section 1 -- at any time no later than 30 days before the end of an applicable discovery period or 30 days before trial, whichever occurs first.

MR. SUSMAN: This is not intended to be a trial subpoena.

MR. LATTING: But don't we need to say that then?

MR. SUSMAN: If it's not clear,

we need to make it clear.

PROFESSOR ALBRIGHT: This would only be for inspection and copying.

MR. SUSMAN: Right.

MR. LATTING: Well, it just says "Compelling Production from Nonparty, When production may be compelled." And oftentimes I know of situations where no deposition or discovery has been done where you say to somebody, "Come on down to the courthouse with that stuff and we'll take a look at it at the trial."

PROFESSOR ALBRIGHT: What if you say "Compelling Production from Nonparties for Discovery"?

HON. F. SCOTT McCOWN: How about if you say "Compelling Production from Nonparties other than at Time of Trial"?

MR. LATTING: Or hearing.

HON. SCOTT A. BRISTER: How about "Discovery of Documents from Nonparties"?

CHAIRMAN SOULES: Except it's not just documents.

HON. SCOTT A. BRISTER: Yeah.

MR. SUSMAN: How about just "Discovery of Documents"?

CHAIRMAN SOULES: Okay. Have we got it?

HONORABLE DAVID PEEPLES: Can somebody tell me again how the poor person who gets one of these, a nonparty, knows that the filing of a motion for protection will stall everything, the 10-day provision that's in Rule 14, which I like?

PROFESSOR ALBRIGHT: Rule 24.

HON. DAVID PEEPLES: But how do you know to even look at Rule 24?

HON. SCOTT A. BRISTER: Hire a lawyer.

HON. DAVID PEEPLES: How does he know?

PROFESSOR ALBRIGHT: Or what we can do, what the federal rule does is it requires that the provisions of -- the equivalent provisions of our Rule 24(3) be stated within the subpoena, and we could require 24(3) and (4) to be stated in the subpoena.

MR. SUSMAN: That's a good

idea.

HON. F. SCOTT McCOWN: Yeah. That's the only way to do it, because it doesn't matter what you write in the rule. They're never going to necessarily know what's in the rule. The only way to do it is to state it in the subpoena. Wouldn't that solve a big problem?

PROFESSOR ALBRIGHT: 24(4) concerns how they protect their privileges, individuals, and designated persons when the subpoena is issued to an organization.

CHAIRMAN SOULES: You mean the federal subpoena has all this language and requires all that language?

PROFESSOR ALBRIGHT: This is much shorter than the federal rules.

CHAIRMAN SOULES: And all that language has to be on the subpoena?

MR. PEACOCK: It's a long back page of stuff on there.

MR. MEADOWS: The federal rules also permit 14 days for making objections, don't they, Alex.

PROFESSOR ALBRIGHT: I can't

remember.

MR. MEADOWS: I believe they do.

PROFESSOR ALBRIGHT: That may be correct. I can't remember.

CHAIRMAN SOULES: Does anybody have any motions relative to Rule 21?

MR. SUSMAN: I move the adoption of Rule 21.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I move we require the language of Rule 24, part (3) or whatever part it is, to be included in the subpoena so that nonparties who are nonlawyers have some chance of conferring with their Aunt Mabel and figuring out what they're supposed to be doing.

MR. SUSMAN: I second that motion.

MR. MARKS: Well, are you talking about restating the whole rule in there?

MS. BARON: No. Just the nonparty provisions.

HON. SCOTT A. BRISTER:

Shouldn't that be in Rule 24?

MR. SUSMAN: It should be in Rule 24(1).

MR. MARKS: How about doing a little plain language something there, don't rewrite the whole rule, but have something in there that says you have the right to do thus and such.

MR. SUSMAN: Okay.

MR. MARKS: That would be better.

CHAIRMAN SOULES: Your motion, Pam, is to require a legend on a subpoena to a nonparty only, a Rule 21 subpoena, to recite Rule 24(3) and (4) on the subpoena?

PROFESSOR ALBRIGHT: On any subpoena.

CHAIRMAN SOULES: Any subpoena to a nonparty?

MR. SUSMAN: Yes. We're going to put it on any subpoena to a nonparty.

CHAIRMAN SOULES: So there will be, I guess, something added to Rule 24 saying --

MR. SUSMAN: 24(1), which is

"Form."

PROFESSOR ALBRIGHT: All subpoenas should have on the back of them, "If you are a nonparty, read this:"

HON. PAUL HEATH TILL: What about for people who are pro se? Why don't we have that on there for all people as well?

PROFESSOR ALBRIGHT: But these are only protections for nonparties.

CHAIRMAN SOULES: So we're going to end up having to put this on every subpoena even to a party?

MR. LATTING: Is this a problem with our state's jurisprudence?

CHAIRMAN SOULES: I'm just trying to define what the motion is. Please, please, please. Pam Baron.

MS. BARON: I don't see a need to put it on a subpoena to a party. I'm just saying that nonparties should have to fair fighting chance.

CHAIRMAN SOULES: So Pam's motion is that 24(3) and (4) be put on the subpoena to the nonparty, and that something in 24 should say that.

MS. BARON: Right. I would be willing to accept a shorter plain language version of those, if there is sentiment for that, but I think there does need to be something that says, "All you have to do is say 'I object' and send it to this address."

CHAIRMAN SOULES: Doris Lange.

MS. LANGE: I would like to see it on all subpoenas, and that way we wouldn't have to have two different kinds of things and decide if they're a party or not a party. If I issue a subpoena now, it's a subpoena. And that way I wouldn't have to decide which one I'm sending.

MR. LATTING: If there's a shorter plain language version that we can put on the subpoena, I move we use that in the rules.

CHAIRMAN SOULES: Well, we don't have it.

PROFESSOR ALBRIGHT: We can work on the drafting.

MR. LATTING: Why don't we use the short plain language in the rule?

CHAIRMAN SOULES: So the back

side of the subpoena would say "Notice to Nonparties" or something like that, and you would use it -- or "Parties and Nonparties," Doris? I'm asking Doris.

MS. LANGE: I would just -- even on the face of it, I mean, you can refer to Rule 24 or whatever it is, and within the body of it. But why have two different kinds of subpoenas where I have to be sure I'm picking up the right one to get out?

CHAIRMAN SOULES: Okay. You understand this notice is only for the benefit of nonparties, though, don't you?

HON. PAUL HEATH TILL: But it takes the burden off the clerk having to make the decision which one to pick up and put out.

MS. LANGE: I understand that.

CHAIRMAN SOULES: Okay. So you want something like a notice to nonparties that would be used on all subpoenas even if it's going to parties?

MS. LANGE: Yes. A standard subpoena form.

MR. SUSMAN: Right. It doesn't hurt the party to have the notice on the back.

CHAIRMAN SOULES: I just wanted to be sure I understand. Pam, you had your hand up?

MS. BARON: Well, I was just wondering if we can avoid putting it on the back of the subpoena. I'm just trying to look for alternative ways to make it easier. I think really the burden shouldn't be on the clerk. The burden should be on the party that wants the subpoena, and maybe in some way they could be required to serve with the subpoena or send or serve at the same time a copy of the Rule 24, you know, subsections 3 and 4 or something. I'm not sure it has to be in the the subpoena, but it needs to be there with it so they know what to do.

MR. MARKS: Do they get a copy of the notice, of the subpoena?

MS. BARON: Who?

MR. MARKS: The nonparty.

CHAIRMAN SOULES: Okay. Those in favor of Pam's motion show by hands.

HON. PAUL HEATH TILL: Putting it on all or just --

CHAIRMAN SOULES: Putting it on

all subpoenas. 15. Anyone opposed. 15 to one it carries.

MR. SUSMAN: Back to Rule 21, please.

CHAIRMAN SOULES: Okay. Now, that will be something that will be added to Rule 24, Pam's motion.

Okay. Rule 21. Now, those in favor of Rule 21 show by hands.

HON. SCOTT A. BRISTER: Well, why don't we do a vote on my proposal to combine it into 24 with this group, even though you've deserted me on that, Luke.

CHAIRMAN SOULES: Okay. Those in favor of folding 21 into 24 show by hands. Four. Those opposed. Eight. It fails by a vote of eight to four.

MR. MARKS: The only reason I didn't vote is because I'm brain dead right now.

CHAIRMAN SOULES: Okay. Now, all those in favor of Rule 21 show by hands. 19. And those opposed. None opposed, so that's unanimous.

MR. SUSMAN: Mr. Chairman,

could I summarize the work that we have to do tomorrow?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: We have for tomorrow the following tasks: We've got 22 and 23 for tomorrow, right?

CHAIRMAN SOULES: Right.

MR. SUSMAN: We've got 166 for tomorrow, we've got 63, and that's it. Oh, I'm sorry, Rule 66, 67 and 170.

CHAIRMAN SOULES: And then we've got three or four rewrites.

HON. SCOTT A. BRISTER: Do you anticipate we're going to come back on Sunday or finish tomorrow?

MR. SUSMAN: I think we will be finished in a couple of hours tomorrow.

CHAIRMAN SOULES: Right now I think we're coming back Sunday. But if we finish by noon, we'll be finished by noon.

MS. DUDERSTADT: Are we off the record?

CHAIRMAN SOULES: We're off the record.

(MEETING ADJOURNED 6:30 P.M.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 21, 1995, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,720.00.

CHARGED TO: Soules & Wallace, P.C.

Given under my hand and seal of office on this the 9th day of August, 1995.

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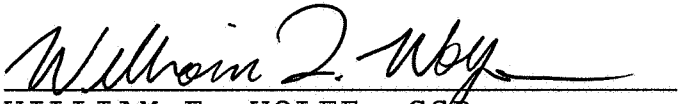

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