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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 22, 1995

(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 22nd day of July, A.D., 1995, between the hours of 8:00 o'clock a.m. and 12:45 o'clock noon at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

ORIGINAL

JULY 22, 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:

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

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CHAIRMAN SOULES: It is 8:00 o'clock, and we are on the record for rule -- where do we want to start? Scott, you-all were doing some redraft. Why don't we start with that?

HONORABLE F. SCOTT MCCOWN: We are not ready. We have got to get it printed out.

CHAIRMAN SOULES: All right. Is anybody ready on any of the sort of corrective work that we were doing? All right. Then we will start with Rule 22. Alex, you want to give us Rule 22?

HONORABLE F. SCOTT MCCOWN: Luke, it might be good if I gave you Rule 22.

CHAIRMAN SOULES: Okay. Give us Rule 22, Judge.

HONORABLE F. SCOTT MCCOWN: All right. Rule 22 is physical and mental examinations, and I don't think that the content or form of the rule is the least bit controversial. What we have, if you will look behind Tab 22, we have a policy difference between the committee and Judge Brister, who is making a suggestion. Judge Brister wants

to go to a request and response system for physical and mental exams because -- and I will let him explain and tell why, but basically because they are routine, and it would be more efficient, and he makes the same suggestion with regard to entry on property. So it will be the same issue when we get to the entry on property rule.

The committee considered and rejected that suggestion because of two reasons. These rules in part are designed to curtail discovery and set a standard, and if you go to a request system, it suggests or sets the standard that they ought to be pretty routinely granted, and we thought that when you are saying that the court is going to order somebody to go in a room with a doctor and take off their clothes and be physically examined or when the court is going to order somebody to let other people onto their property to inspect or take a video camera, that there ought to be a heightened standard, and so we stayed with the present formulation of motion, good cause, court order.

Even though we recognize that that's

often going to be routinely negotiated by the parties or routinely granted by the court, we thought that the standard nevertheless ought to be motion, good cause, and court order. Once you decide whether you want a request and response system or whether you want a motion, good cause, court order system then you have made all the decisions because I don't think -- and correct me if I am wrong, Alex -- that really we have made -- I don't see any redline changes on either of these rules.

PROFESSOR ALBRIGHT: No.

CHAIRMAN SOULES: So these redlines that we are looking at on Rule 22 and Rule 23 are the present rule except for the changes shown; is that correct?

PROFESSOR ALBRIGHT: No. I think that's not correct.

HONORABLE F. SCOTT MCCOWN: No. They are the rules as we approved them last time.

CHAIRMAN SOULES: Oh.

PROFESSOR ALBRIGHT: We did not talk about these rules last time, and I think that's a redlined draft from -- yeah. That's

a redlined draft from the last meeting. At the last meeting in the main meeting you got a redlined draft from the current rule, and I have it in front of me right now, and there are virtually no changes except adding the "at no time later than 30 days before the end of the applicable discovery period" at the very beginning and then just changes to the numbers and letters.

CHAIRMAN SOULES: Same on 23? In other words, the alterations of the existing rule are really timing so that they fit the discovery window?

HONORABLE F. SCOTT MCCOWN: Right.

PROFESSOR ALBRIGHT: That's exactly right. That's the only change that this has from the current rule.

CHAIRMAN SOULES: From the current rule. Okay. Judge Brister, response?

HONORABLE SCOTT BRISTER: Well, I think Scott said it fairly. I mean, these are routine. At least they are in Houston. I mean, an IME is an IME, and they do it in every case. Entry on property just doesn't

come up that often, but when you say, well, we think it ought to be more difficult, what you're really saying is we think it ought to be more expensive and time consuming. Why should we make something more expensive and time consuming? If somebody has a problem with it, you just object.

The problem with -- I would assume most people in this room on most of your cases do it in exactly the form. A request and response system would be involved or maybe even less formally where you just call up and say, "When can we come out and look at it?" But as we all know, there is 25 percent of the Bar who have an office policy they don't return phone calls, period.

Now, you can call them up and try to set the deposition and an IME up 'til you are blue in the face. You can send them the motion. They will not respond, and you will not find out if they have a problem until you go down to the court to get the order and then they will say something like, "That's fine. We will be happy to do it," and you have just spent hours and thousands of dollars, and

there is no reason to do that when you can simply send them a request. If they don't respond, then you do it.

CHAIRMAN SOULES: Anything else, Judge Brister?

HONORABLE SCOTT BRISTER: No.

CHAIRMAN SOULES: Okay. Joe.

MR. LATTING: Scott McCown, I have a question for you based on something that Judge Brister said. I think that in my practice that a motion and an order costs $500 at least by the time you get -- and I can defend that. It probably costs more than that, but my question is could we put -- would it satisfy your concern if we put a footnote or a comment that said that this ought to be a serious matter, and because I am concerned about having to go to court if you don't have to go to court.

HONORABLE F. SCOTT MCCOWN: Well, maybe the motions and orders you are filing cost $500, but it wouldn't cost $500 to file this kind of motion.

MR. LATTING: Not to file it, but to set it, to talk to Robert, to find out

when you can find a judge, to go over there to wait 'til a court's available to order it, to get back to your office. By the time you have done that you have burned up a lot of time.

HONORABLE F. SCOTT MCCOWN: Okay. Well, I think my response to that would be, though, that most of these, either IME's or entries on property, most of these are negotiated now. Part of what makes it possible to negotiate those is that the requesting party knows that they have got to cut the responding party some pretty good terms as in who the doctor is going to be or when we are going to go on your property, because if they can't get a deal then they have to go to court to get an order.

When you shift to a request system you lose that nuclear deterrent, if you want to call it that, that helps negotiate those deals; and part of what this committee has been about is cutting costs, and so I recognize that maybe there is a little extra cost here, but a big part of what we are also about is that the public has felt that discovery is too intrusive; and in this day of

property rights to say that we are going to have a new rule that to go on a person's property all you have got to do basically is request and then they have got the burden, and this applies to nonparties, too, by the way.

They have got the burden of going to court if they have the objection, is to me to shift the cost in the wrong area, the wrong way, that when you are talking about searching property, when you are talking about searching a body, that you ought to have to file a motion and get an order. If you can't work it out, you ought to have to go to court.

HONORABLE SCOTT BRISTER: Let me just --

CHAIRMAN SOULES: Since we are on a -- the system today requires court invention absent agreement. You have to go get an order from the court. Could we hear from the district judges and maybe the lawyers who actually are in the personal injury field, how often is one of these motions denied outright? Does it ever happen?

HONORABLE DAVID PEEPLES: Seldom.

HONORABLE F. SCOTT MCCOWN: They are seldom denied, but they are often -- you often pick between what kind of doctor, which doctor; or with entry on property, the judge often is making decisions about when, where, what kind of cameras, who's going to be there. Entry on property --

CHAIRMAN SOULES: I asked about personal injury.

HONORABLE F. SCOTT MCCOWN: Well, it's true with both. It's the same with both.

CHAIRMAN SOULES: Okay. Could I get a response on personal injury first? John, what's your experience, Marks, on IME's? Are they generally granted even though you resist or granted in your favor even though the plaintiff --

MR. MARKS: Usually I get one when I want one.

CHAIRMAN SOULES: Judge Peeples, what's your experience?

HONORABLE DAVID PEEPLES: Almost always granted but there is almost always an issue about who the doctor is going

to be. That's the reason they are there.

CHAIRMAN SOULES: Now, that issue, if that's driving the court hearing process, we would at least by a notice provision get rid of those hearings where who the doctor is going to be is not an issue. Or not?

HONORABLE F. SCOTT MCCOWN: Well, if who the doctor isn't going to be is not an issue, they send in an agreed order.

CHAIRMAN SOULES: Whether there is going to be an IME is never an issue. It's always who the doctor is. Is that what you're saying?

HONORABLE SCOTT BRISTER: I think that's right.

HONORABLE F. SCOTT MCCOWN: Well, I wouldn't quite go that far.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: I want to say that that's not my experience at all. The only time that I have found that trial judges will grant an IME is in a circumstance in which the plaintiff has in effect had an IME

by the plaintiff's -- by a doctor to whom the plaintiff was referred by the plaintiff lawyer; and in the circumstance in which I have treating doctors that I did not refer the plaintiff to, I resist strongly any -- because it's not an IME to begin with, but and my experience has been that the trial judges in Harris County do not routinely grant them unless they feel, well, okay, the plaintiff got examined by the plaintiff's doctor, and now they need to be examined by the defendant's doctor.

HONORABLE DAVID PEEPLES: Luke, I find that the issue of good cause is asserted by the plaintiff a lot of the time. I mean, what's the good cause for this request? I mean, it's just an ordinary case, and why do they want to examine my client? So that's an issue in addition to who the doctor is going to be.

CHAIRMAN SOULES: Okay. Judge Brister.

HONORABLE SCOTT BRISTER: To me this -- I mean, it used to be you had to do that for depositions. You had to have good

cause and a court order. I am just suggesting we bring this out of the Forties into the Eighties and Nineties. Then you may want to put other limitations eventually on it, but I mean, it used to be all discovery was that way, and yes, it's intrusive, the IME or the entry on property. A lot of people don't like oral depositions either, where you have got to sit there and be grilled for hours and days, but we don't allow them to just say, "Oh, well, I don't want to." It's discovery, and if we want to go back to court order only, yeah, we could cut a lot of discovery if you have to get my order on all depositions and on all interrogatories, but that's all I am going to be able to do.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Well, the assumption it seems is that because you have a motion practice that you are going to have hearings. That's not my experience either.

MR. GALLAGHER: No.

MR. MCMAINS: A lot of times they are just submitted in writing anyway. I mean, the judge will not give you a hearing on

such things. So if you don't have any genuine basis for contesting it, it's kind of routinely granted anyway. So I don't know that it saves that much to go through request. You don't have oral hearings on all of these, do you?

HONORABLE SCOTT BRISTER: Sure.

MR. MCMAINS: Oh, do you?

HONORABLE SCOTT BRISTER: Sure. And the reason I do is because the judges that don't have a submission docket that they have to wait a month to make sure they have got all the responses up from downstairs in the clerk's office, or they are not playing with a full deck; and my experience is if you want me to rule one something within a week or ten days of when you filed it, you have to have an oral hearing because submission I have to wait a couple of weeks to make sure I have got all the papers.

MR. MCMAINS: Well, that just may depend on the particular county that you are in. I mean, in the smaller counties in South Texas we don't have that.

CHAIRMAN SOULES: Well, we

looked at this ten years ago, or I guess before because these rules became effective in '84, when we changed -- see, document request used to be on court order only, and that was changed in the mid-Eighties, and these were not changed for the very reasons that Scott McCown is talking about, but that doesn't mean it's not time to change them now, but this very issue has come up before, and it's an important issue. Which is less costly, which is less offensive, I think is probably the issue. Scott McCown.

HONORABLE F. SCOTT MCCOWN: Well, keep in mind that with IME's we have included now already in the present rules psychiatrists and psychologists. So you are talking about getting inside people's heads as well as getting inside their bodies, and I agree with Judge Brister that we have a general policy of open cheap discovery, but any policy carried to its complete logical conclusion begins to cut against other important policies, and you have to balance; and when you are talking about getting in a body, getting in a head with the shrink,

coming onto property, I think the public would be shocked to know that we had abandoned the motion, good cause, order practice.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, the other problem is that I don't think, as Scott points out, certainly the entry on property motion is one that can be done to nonparty, and there just isn't any way in the world we could have it noncourt intervention in trying to go on somebody else's property. I don't see how that's an acceptable procedure.

CHAIRMAN SOULES: Just give notice you are going to trespass.

MR. MCMAINS: Yeah. Notice to trespass.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: With respect to mental and physical examinations, I don't know if you want to address this problem or not, but you might want to consider it. We recently had an application for writ of mandamus seeking to require the trial judge to

allow the plaintiff to take her lawyer with her to the examination, and the trial judge refused to so order, and we refused to change his order, but it's a matter that is not addressed in the rules, and it's probably something that's going to be more frequent, you know. So I don't know if you want to consider that in connection with that rule or not.

CHAIRMAN SOULES: Okay. Anyone else? Let's get a show of hands. Those who feel that we should go to -- stated either way, that we should retain motion and order on one hand and just talking about -- let's take them one at a time, on the IME rule first, or go to a notice.

HONORABLE F. SCOTT MCCOWN: Luke, if it would be more official, why don't I just move the adoption of the committee's Rule 22?

CHAIRMAN SOULES: All right.

MR. MCMAINS: Second.

CHAIRMAN SOULES: Moved and seconded. Any further discussion on this?

HONORABLE DAVID PEEPLES: Luke,

I might want to talk about the good cause requirement. I'm inclined to vote for the proposal, but I think maybe good cause is a little more than you ought to have to show, but I do think going to court is a good idea on this, and I will just tell you, I am concerned about the idea that you can just send out a request for a "jillion" documents going back to the year one, and the burden is on the other side to come in and whittle it down, but we have got a different regime on this and property.

And maybe, you know, the exam of a person and property is different from the right to just rummage through documents, but I am not sure it was a good decision that was made 10 or 15 years ago to go from a motion and order practice to just request and response on documents. We may need to revisit that sometime, but this right here I think is good.

CHAIRMAN SOULES: Okay. Well, if the current rule is on motion for good cause shown, make a different motion. Let's take this a piece at a time, Scott, because apparently there is some other issues, and we

are not ready to pass on the rule yet.

HONORABLE F. SCOTT MCCOWN: I think with maybe the exception of Judge Peeples' comment if I could just address it and see if I could satisfy his concerns. We have got a body of jurisprudence about what good cause is, and so it's pretty clear. I don't think we need to change the standard, and if we change the standard, we might create unintended consequences with that jurisprudence.

HONORABLE DAVID PEEPLES: I think you're right.

CHAIRMAN SOULES: Okay. Here is the question. Here is the question. Motion and order or notice only? Those in favor of motion and order show your hands. 14. That's 14. Those in favor of notice, show of hands. Four. 13 to 4 to retain the motion and order practice.

MR. SUSMAN: We have a motion on the floor. There is a motion on the floor seconded, to adopt the rule now.

CHAIRMAN SOULES: That's right.

MR. MEADOWS: But we were

discussing it, and I think the vote would be different if there was some sort of -- if there was a distinction between the issue as it relates to parties and as it relates to nonparties. I mean, I think it's a very good point about not being able to go onto someone's property without jumping through some hoops.

CHAIRMAN SOULES: We are only talking about 22, physical and mental examination at this point.

MR. SUSMAN: Of parties.

MR. MEADOWS: Of parties. I am wrong then. The vote would not be different.

CHAIRMAN SOULES: Now, Judge Peeples' question about good cause and retaining the standard of good cause --

HONORABLE DAVID PEEPLES: Luke, you know, Scott McCown makes a good point. There is a lot of discretion there, and there is jurisprudence on it, and in the final analysis courts are going to decide if they think it's right or not if we change the standard, and I take back what I said. I am not for changing it.

CHAIRMAN SOULES: Okay. Any other discussion on Rule 22? Judge Brister.

HONORABLE SCOTT BRISTER: Yes. The subcommittee rule says you can only request a psychologist IME if the other side has designated a psychologist, and I have had folks who don't designate a psychologist but are going to admit the psychiatric records from the doctor saying whatever they are going to say about the emotional anguish and trauma. Do we mean to say you can't -- you're, in effect, admitting the testimony of a psychologist, but you are not designating him as an expert. The other side can't respond to that? It seems to me it ought to be if you are presenting psychological expert opinions, whether by records or by designation, the other side ought to be entitled to rebuttal.

MR. MARKS: Or alleging a psychological injury.

HONORABLE SCOTT BRISTER: Well, I am not ready to go that far just every time you say emotional anguish you ought to --

HONORABLE F. SCOTT MCCOWN: Judge, which provision of the rule is that?

HONORABLE SCOTT BRISTER: Last sentence of the first paragraph.

CHAIRMAN SOULES: We are looking at the last paragraph of sentence one. This is the Franklin Jones sentence.

HONORABLE SCOTT BRISTER: It just seems unfair to -- okay, I am not going to call the expert, but I am going to admit 40 pages of narrative reports and et cetera from the expert, and the other side can't rebut it.

CHAIRMAN SOULES: This is just talking about independent medical examination by a psychologist.

HONORABLE SCOTT BRISTER: That's right.

CHAIRMAN SOULES: You can still call your psychologist to testify about what the records say.

HONORABLE SCOTT BRISTER: And what's the first problem with that witness going to be? You never even talked -- you couldn't point to who they are in the courtroom, could you? That's not going to be very effective.

CHAIRMAN SOULES: Just as long

as we have got it said. John Marks.

MR. MARKS: I would move we delete the sentence. Is that in the rule now? That's not in the rule now, is it?

CHAIRMAN SOULES: Yes.

HONORABLE SCOTT BRISTER: Yes. It's there.

MR. MARKS: I think it ought to be taken out because I think any time that a psychological injury of any kind is alleged I think it becomes fair game, and you ought to be entitled to get an examination by a psychologist under the same terms that you can get a physical examination.

CHAIRMAN SOULES: Well, there is the debate, and we have had it before, and that's why it's in here because it was voted to -- John Marks' position was voted down years ago, and this was put in to protect against that very thing, but we have got a different -- our committee is differently constituted now, and it may be time to make a change, but that's exactly the debate we had, and John, are you making a motion?

MR. MARKS: I move that we

delete that sentence.

CHAIRMAN SOULES: Is there a second?

MR. LATTING: Second.

CHAIRMAN SOULES: Moved and seconded. Okay. Discussion. Judge McCown.

HONORABLE F. SCOTT MCCOWN: I disagree with John Marks, and I think this is a very important cost issue in family law in particular, that in every family law case, you know, you could be asking for a psychological examination, and this was put in there to say only if the other side is making that an issue. I do, however, agree with Judge Brister and think that we could modify it, and instead of saying "as an expert who will testify," change it to "who has identified a psychologist whose opinions may be offered into evidence," so that whether they come in through testimony or come in through report, if you are offering their opinions into evidence. So I'd like to vote down John Marks and vote up Judge Brister.

CHAIRMAN SOULES: Further discussion? Steve Susman.

MR. SUSMAN: You know, I mean, there is -- I mean, I think we have kind of a due process issue here because these rules have not -- the last few rules we did not change because we didn't see anything wrong with them basically. There has been very little publicity about even talking about changing them and very little opportunity for people to comment on them. I mean, I don't know what the family lawyers would say about that rule or personal injury lawyers or anyone would say about that rule because no one has known anyone is trying to change it until this very moment.

In fact, there were no comments received on that rule in connection with your procedure. So I am just reluctant to see us go change these rules where obviously there was a debate at some other time. I don't really care. I never get involved in this practice. It's just someone is going to say this wasn't a fair process.

CHAIRMAN SOULES: Rusty, and I will go around the table.

MR. MCMAINS: Well, I think

that there is a significant difference to me between the intrusion that a psychologist does into the head of an individual just because they have alleged mental anguish or something, as distinguished from when somebody is trying to offer evidence of a psychological injury, and I believe that you get into the judge's comments about, you know, when the psychologists who want to put somebody on the couch and ask them a lot of questions and then share that with their -- share their observations with the opposing lawyers that they are going to say, "I want a lawyer there."

Now, that's one thing about having a lawyer there when somebody is taking their clothes off or when they are doing some kind of objective physical testing, but when all you are doing is getting a hired gun to ask questions of the other side outside the presence of their lawyer, that to me implicates a lot of things that unless the person has essentially voluntarily put that in issue in terms of the issue of psychological injury or psychiatric injury and to the point

where they have expert opinion on it, I don't think it's appropriate, and that's why we rejected it before. In addition to which there was a lot of questions about whether psychologists ought to be in there at all. I mean, this was actually moved -- psychologists were never in there before, per se. People primarily were using psychiatrists only and then they moved to psychologists, but they had this limitation.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I agree with Rusty, and I guess the only other thing I have to say is, why do we make the distinction here between psychiatrist and psychologist? Up above we say "physician or psychologist," and physician, M.D., would include psychiatrist. Down here we say that you can't get a psychologist except when they have designated that expert, and I am unclear on why that doesn't also say "psychiatrist" and why the next section also doesn't say "psychiatrist."

CHAIRMAN SOULES: Well, I think Rusty's statement is the real response to

that. Psychologists were put in. It had to be a physician before putting in psychologist, and there is -- the committee has not regarded psychologists as equivalents to psychiatrists in terms of examinations historically in the past. So they put more strings on getting a psychologist IME.

MR. YELENOSKY: Well, I guess what I'm asking, if we are protecting and making it harder to get an examination by a psychologist does somewhere in the rule make it equally hard to get an examination by a psychiatrist?

CHAIRMAN SOULES: No.

MR. MCMAINS: No. There is still a good cause requirement.

CHAIRMAN SOULES: Mike Gallagher, did you have your hand up?

MR. GALLAGHER: I think Rusty has already said what I wanted to say.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: The rule draws a distinction between psychiatrist and psychologist for a reason, because psychiatrists -- and this won't be true in

every case, but generally speaking psychiatrists make true diagnoses of true mental illnesses, and psychologists talk about personality and feelings, and so the thought was that, you know, good cause for a psychiatrist, you are getting somebody to talk about whether a person is schizophrenic is different than a psychologist to talk about whether they are a good person or a bad person.

MR. YELENOSKY: Yeah. But you could ask a psychiatrist to examine somebody and talk to them about their emotional life.

HONORABLE F. SCOTT MCCOWN: Right. But the reason --

CHAIRMAN SOULES: Just a minute.

MR. YELENOSKY: How do you protect against that?

HONORABLE F. SCOTT MCCOWN: The reason that's not a problem is because psychiatrists cost an incredible amount of money, and psychologists are a dime a dozen, and so it doesn't matter.

CHAIRMAN SOULES: Okay. Judge

Brister.

HONORABLE SCOTT BRISTER: Yeah, a couple of things. No. 1, I am not convinced -- at least most of the psychological IME's I order are this couch thing. I mean, most of the ones I see are, "We want to give them the MMPI test." Basically we want to sit them down, do a bunch of fill in the blanks, the kind of tests you took in seventh grade to see whether you got in accelerated classes or not, and then they are going use a computer to read and say, "Oh, well, you are a depressive" or you are whatever.

It is by no means routinely that invasive. "Tell me about your childhood and your sex life." Now, that's not to say somebody might not misuse it at that, but I do think this needs to be addressed. This is a growing area, and correct me if I am wrong, Mike, but I think the plaintiffs Bar more and more designates these people because of the cases out there that are seeming to say emotional anguish is more than just being embarrassed or something like that. You have

got to do more than that, which then puts the pressure on the plaintiffs attorneys to have somebody with a license say, "This is more than mere embarrassment," et cetera, but then the defendant is -- you can't let one side call a psychologist and not the other.

To say this person has been terribly injured emotionally and tell the defendant, "No, sorry. You can look at the records and make a few guesses." I think it's got to be addressed. It's going to be a growing problem, and you know, I mean, I knew this rule was in play. I read the rule. If you want to just flush it out of the subcommittee report completely, that's one thing, but if we are going to discuss it and pass it, we need to address this issue.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: It seems like the fix has been suggested, that being one in which if one side is going to call a psychologist, the other side has the right to have an examination of that nature inquiring as to those matters is appropriate, and I do

not believe -- I agree with Rusty, and I said I wasn't going to echo what he had said, but in every case in which someone claims mental anguish as a component of a personal injury claim that you are entitled to a psychological examination, but if you do claim some psychological injury of a specific nature or even of a general nature, if it goes beyond that in your allegation, then one is called for.

But unfortunately my experience has been when someone is submitted for a psychological examination, the psychologists generally go far beyond just an inquiry as to the relationship, say, between an injury and a psychological response, and it does get to be sort of a very broad type of examination, but I think the fix that we have been talking about is far better than what my friend, Mr. Marks, has suggested.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Well, thank you, my friend Gallagher. Okay. What if you have got a bunch of medical records and you have got a physician saying Mr. Jones came in highly

distraught today, very angry, very upset, you know, and something -- I think this all goes in with his injury and the problems he's having. Well, this is not a psychologist saying it. It's not a psychiatrist saying it, but it is evidence of a psychological injury, and that happens a lot. I mean, that is not just out of the air. That happens quite a bit, and what happens then?

You have got these medical records. You have got a physician testifying about this in the medical records, and yet, you have no recourse. Also, I think that a psychologist needs to go into background. I think a defendant -- if somebody is alleging a psychological injury and psychological mental emotional problems arising out of an accident, you need to know what his background is; you know, was he molested as a child, you know, that sort of thing. All of that stuff you need to know because that goes into his psychological makeup, and if you are not entitled to get that evidence then you are left bare, and the plaintiff is just going to have a field day with you.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I was going to ask, does everybody agree that if psychological records are coming into evidence that the party against whom they are coming in ought to have the recourse that Scott Brister asked for; that is, are we all at Scott Brister's point? Scott McCown said he was against John Marks, but he was for Brister. Is everybody in agreement with that?

MR. KELTNER: Yes, I am in agreement with that.

MR. SUSMAN: Could we have Judge Brister state it again?

MR. LATTING: Yeah. Brister, could you state that again so we could see what --

HONORABLE SCOTT BRISTER: Well, McCown had it correctly.

HONORABLE F. SCOTT MCCOWN: In paragraph (1) where it says "as an expert who will testify," the last words, "as an expert who will testify," delete those words and instead have it read, "identified a psychologist whose opinions may be offered

into evidence."

CHAIRMAN SOULES: Okay. Well, anything else?

MR. GALLAGHER: "Whose opinions or records."

CHAIRMAN SOULES: Okay. Anything else on Marks' motion? John Marks' motion is to delete the last sentence. Those in favor show by hands. Five. Those opposed? 16 to 5 it fails. Okay. Now, is there --

MR. SUSMAN: Second Scott's motion.

CHAIRMAN SOULES: State your motion, please, Judge McCown, in the form of a motion.

HONORABLE F. SCOTT MCCOWN: Okay. I would move that on paragraph (1) we delete "as an expert who will testify" and add "a psychologist whose opinions may be offered into evidence," and I wouldn't want to go any farther than "opinions maybe offered into evidence" because I don't want to get in a fight about what is or isn't a record, what is or isn't psychological. If there is some psychologist whose opinions are somehow going

to get in front of the jury then you could make the motion for good cause to get your own psychologist to do anything.

CHAIRMAN SOULES: Is there a second?

MR. LATTING: Second.

CHAIRMAN SOULES: All in favor of --

HONORABLE DAVID PEEPLES: Luke, there is a distinction we need to talk about, and that's whether plaintiff, let's say, offers the psychologist's records, but there aren't opinions in there, but you can tell good and well where the psychologist comes out by looking at it, but there are no Loden V. Andrews opinions in there, and frankly, I think that if records of a psychologist are coming in, the other side ought to have a right to an IME. You have got good cause of the court that's still standing in the way of it, and I don't think people are going to run rampant on this. It seems to me if they are offering anything on the records, we shouldn't get into the opinions.

CHAIRMAN SOULES: Judge

Peeples, can you put that in the form of a motion to amend?

HONORABLE DAVID PEEPLES: I would either use the language that's in Judge Brister's paragraph (2), which says "or introduces a psychologist's records," or I would say if they want to do it the way Judge McCown does, "identify the psychologist whose" -- yeah. I think the way Judge Brister has it would be better.

CHAIRMAN SOULES: Where is that language in Judge Brister's?

HONORABLE SCOTT BRISTER: It's my paragraph (2), the second sentence.

CHAIRMAN SOULES: Okay. "Examination by a psychologist may be requested only when the party responding to the motion has identified a psychologist or a psychologist's records that may be used at trial." Okay. Is there a second to the --

MR. LATTING: I've seconded it.

CHAIRMAN SOULES: -- substitute motion?

MR. LATTING: Well, is that the substitute motion?

CHAIRMAN SOULES: Yes.

MR. LATTING: Then, yes, I second that. I have already seconded it.

CHAIRMAN SOULES: Okay. Those in favor of using then the second sentence of Judge Brister's recommendation show by hands.

HONORABLE F. SCOTT MCCOWN: Could I speak just briefly against it before we vote on it?

CHAIRMAN SOULES: Yes.

HONORABLE F. SCOTT MCCOWN: I guess I don't feel strongly, but there is just lots of things in records that may not open the door in any way for opinion or diagnoses, how many office visits there were, for example. It seems a little broad to me, but I guess if you have got good cause, maybe that's enough.

CHAIRMAN SOULES: Okay. Any other discussion on this? Those in favor show by hands.

MR. YELENOSKY: Could you please restate what we are -- what Judge Brister said?

CHAIRMAN SOULES: We are

proposing to amend the last sentence of the committee's Rule 22 by deleting -- by substituting for the last sentence in paragraph (1). So that would be taken out and in its place --

HONORABLE SCOTT BRISTER: Well, if you wanted it.

CHAIRMAN SOULES: Except as provided in Rule 4. Well, we have got -- it's got to have this "except as provided in subparagraph (4) of this rule" because that's family law.

HONORABLE SCOTT BRISTER: If you wanted to make it psychologist's records you would just leave the last sentence as is except drop the last six words, "as an expert who will testify" and substitute in "or a psychologist's records that may be used at trial." So it's a psychologist or a psychologist's records that may be used at trial.

CHAIRMAN SOULES: Okay. Those in favor show by hands. 18 for. Those against? To two -- three. We have Marks and Gallagher voting --

HONORABLE SCOTT BRISTER: Together?

CHAIRMAN SOULES: -- together on it.

MR. GALLAGHER: Together again.

CHAIRMAN SOULES: Okay. Now, anything else on Rule 22? Those in favor show by hands. 22. Those opposed? Opposed, one. Motion carries by a vote of 22 to 1. Let me just get my notes straight here.

MR. MARKS: He just forget to take down his hand is what he was doing.

MR. GALLAGHER: I was answering the question. I wasn't opposed.

CHAIRMAN SOULES: Oh, okay. The vote was 22 to nothing. So let me get my records straight here. The last sentence will read, "Except as provided in subparagraph (4) of this rule, an examination by a psychologist may be ordered only when the party responding to the motion has identified a psychologist" --

HONORABLE SCOTT BRISTER: "Or a psychologist's records."

CHAIRMAN SOULES: "Or a

psychologist's records."

HONORABLE SCOTT BRISTER: "That may be used at trial."

CHAIRMAN SOULES: "That may be used at trial."

MR. KELTNER: Luke, I am not -- I may have a problem there. How do you identify a record that may be used at trial other than in the provision of proving them up through a records custodian?

MR. MCMAINS: I think it's a standard disclosure.

HONORABLE SCOTT BRISTER: You are going to have to go to court on this anyway, remember. That's what you have already voted, and if your deal is so when you see the psychologist's records you say, "I want to do one" in your motion. The other side says at the hearing, "but I'm not going to use them at trial," is how you find out.

CHAIRMAN SOULES: That will work.

HONORABLE SCOTT BRISTER: Remember, you have got to go through the step of going to court anyway with this.

MR. KELTNER: Close enough.

CHAIRMAN SOULES: That will work. Okay. Close enough. Rule 23. Steve Yelenosky.

MR. YELENOSKY: Excuse me. We have just printed out the new rule that you asked me to put down the writing that relates to medical records of nonparties, and it segues nicely with what we just finished if you would want to consider it now. Otherwise, whenever you want to. It's very short.

CHAIRMAN SOULES: Okay. Have you got it distributed, and where will this go? This goes in Rule 25?

MR. YELENOSKY: Well, it's No. 25, but logically it would probably follow what we just finished, but obviously the number isn't of concern, at least not for us right now, and I guess I could -- if you do want to consider it now, I could speak to it while it's being handed out.

CHAIRMAN SOULES: Just a moment. Let Alex and I get our records straight here.

MR. YELENOSKY: Okay.

CHAIRMAN SOULES: Okay. Now, where are you suggesting that this go, so we can get it in context?

MR. YELENOSKY: It would be new Rule 23, I guess, or it should follow what we just did or just before what we just did on physical and mental examination, or it could follow 21. It would precede the motion for entry upon property. Yeah. Since we eliminated (e), it establishes only a procedure. As it said, nothing in the rule authorizes a court -- although a statute might or good cause might, but the rule is not an authorizing rule. It's just requiring service upon a nonparty.

We just got done saying that you might require an order before you could get a psychologist to do an IME of someone. Yet, if a psychologist had already examined someone and had such records or a psychiatrist did and the person were a nonparty, you might be able to get those records without them even knowing it under current procedure.

In a case I am in right now involving an insurance company I could issue subpoenas on

Monday against large insurers around the state compelling production of possibly your medical records without you knowing it. There is no requirement that I give you any notice that I am looking for your medical records, and there are only so many insurers. You might be able to get them just by guessing who insures someone.

MR. LATTING: I have a question.

HONORABLE SCOTT BRISTER: Question.

MR. LATTING: Luke, can I ask a question?

CHAIRMAN SOULES: Just a moment. Let me see something. This was a part of 24, and it was 24(e) that we rewrote.

MR. YELENOSKY: Well, 24(e) was broader. It didn't address just medical records, and the discussion was there were a lot of problems with, well, people won't know whether the records you are requesting or what you are requesting is, in fact, confidential. Everybody knows medical records have some confidentiality protections. That was what I

was most concerned about. So rather than have the whole thing tabled I suggested that we at least address a rule to medical records in the way that we address a rule to entry upon property and the way that we address a rule to IME's by psychologists and psychiatrists.

CHAIRMAN SOULES: Okay. Did your committee rewrite anything for a rule like bank records, something other than medical records?

MR. LATTING: No.

CHAIRMAN SOULES: We are just going to drop that. Okay.

MR. LATTING: I have a question, Luke.

CHAIRMAN SOULES: So why doesn't this just go down where (e) was?

PROFESSOR ALBRIGHT: It also requires a request.

CHAIRMAN SOULES: It what?

PROFESSOR ALBRIGHT: It also requires a request.

CHAIRMAN SOULES: Oh, okay.

HONORABLE SCOTT BRISTER: It really would be part of Rule 11 or something

like that, wouldn't it, production of records?

PROFESSOR ALBRIGHT: Yeah. We could -- it probably would be a section of Rule 11 and Rule 21, but we can figure that out after we have talked about the concept.

CHAIRMAN SOULES: Okay. Well, let's talk about the concept first. Looks to me like this is pretty much what we directed you to do. Who's got a different view on this?

MR. LATTING: I have a question.

CHAIRMAN SOULES: Joe.

MR. LATTING: Steve, what is the idea of including the phrase "that are in the possession of a party"; that is, "Before requesting the production of medical records of a nonparty that are in the possession of a party."

MR. YELENOSKY: Yeah. You could take that out. I just thought it was -- because the rule combines both request for production and a subpoena of the custodian of records.

MR. LATTING: But you would

want to cover a situation where Parties A and B, Party A may want to get Nonparty C, who is the custodian of records of D, and you would want this to cover that, wouldn't you?

PROFESSOR ALBRIGHT: And that's the second phrase.

MR. LATTING: That's the second -- what did you say?

PROFESSOR ALBRIGHT: That's the subpoena.

MR. YELENOSKY: Yeah. It's a subpoena.

MR. LATTING: But don't you want the notice of the subpoena to go to the person we will say whose records are being subpoenaed?

MR. YELENOSKY: Yes.

MR. LATTING: So don't you want to take this out, this "that are in the possession of a party," and just make this apply across the board? "Before requesting production of medical records of a nonparty," whether or not those records are in the possession of a party or nonparty.

MR. YELENOSKY: Okay. Yeah.

Yeah. That could go out unless somebody else sees a problem with that.

CHAIRMAN SOULES: Okay. You are agreeing to that deletion?

MR. YELENOSKY: Yes.

CHAIRMAN SOULES: Anybody opposed to that deletion? Okay. That comes out. "That are in the possession of a party," those words are deleted in the second line.

Okay. Any further discussion on this rule? Judge Brister.

HONORABLE SCOTT BRISTER: The problem I see with this is the way this is normally handled -- let me give you an example. You are suing the employer saying you were terminated because you filed a worker's comp. claim. Now, what the plaintiff normally wants on that, they want to prove a pattern, and so they want the records of other people who filed worker's comp. claims and were fired within a year or two.

Normally, employers will agree to that with the names X'd out, especially in companies that hire lots of temporary workers, you know, high turnover rate, unskilled labor,

folks that don't have addresses. This appears to me it's going to require them to say, "No, sorry, plaintiff. You can't gets those records because you have got to contact every one of those people even if you are whiting their name out, and we don't know who it is, you have got to get their approval before you can get any of those." It's really going to -- the vast things where you are wanting to see what the party is doing, and you don't care who the individuals are, that the records are --

MR. LATTING: Couldn't we correct that?

CHAIRMAN SOULES: Let Judge Brister, please.

HONORABLE SCOTT BRISTER: You are going to put -- which is handled pretty routinely without really violating the rights in my view of the people involved since nobody knows who they are. You are going to put a stop to all of that because you just won't be able to find all of those folks and get their consent.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Would you take a friendly amendment to make an exception for that when you can't tell who the parties are?

MR. YELENOSKY: Yeah. I would, but the good cause exception may encompass that. I would think that general good cause would apply there, but I would certainly accept an amendment if people don't think the good cause language is sufficient.

CHAIRMAN SOULES: Okay. Anyone else? John Marks.

MR. MARKS: This sort of points out what I was talking about yesterday. This hasn't really been thought through, and it should be, and it seems to me that we ought to table this and not make it a part of what we are sending up to the court right now and have somebody look at it and come with some recommendations at a later time.

MR. YELENOSKY: Okay. Then I am going to subpoena your records.

CHAIRMAN SOULES: Motion to table.

HONORABLE SCOTT BRISTER: I would second that. I would like to think

about this some more and get some feedback from people about it.

CHAIRMAN SOULES: Those in favor of the motion to table show by hands. 14. Those opposed? To two. Okay. Tabled by a vote of 14 to 2. What are we -- who's going to work on this for the next meeting?

MR. YELENOSKY: I think somebody needs to work on it who disagrees with me.

CHAIRMAN SOULES: John Marks, you're in charge.

MR. MARKS: I was thinking Judge Brister.

HONORABLE SCOTT BRISTER: No, no, no, no.

CHAIRMAN SOULES: It's your motion to table and think about it. Think about it and bring us something next time. Make some phone calls and try to get some input from Steve and Judge Brister, and anybody else who wants to be on John's list to give some input?

MR. LATTING: Make Gallagher be on it so they can work this out.

CHAIRMAN SOULES: Okay. Gallagher has 24 hours to return your call. Is anyone else interested in this so that you want to be a part of the drafting? If so, put your hands up so John can make a note of it.

Okay. That will go to the court behind probably the other rules, the other discovery rules, but we will get it there in time for it to catch up.

MR. SUSMAN: Rule 23, motion for entry on property. The only comment was from Judge Brister. We have already crossed that bridge. I move the adoption of subcommittee Rule 23 as written.

CHAIRMAN SOULES: Subcommittee's motion needs no second.

HONORABLE F. SCOTT MCCOWN: Second.

CHAIRMAN SOULES: Those in favor show by hands. 13. Is that right? 13. Those opposed? To two. Rule 23 is approved by a vote of 13 to 2.

MR. SUSMAN: I now call your attention to Rule 166.

CHAIRMAN SOULES: Could I ask a

question first? Are any of the specifics of existing Rule 166 omitted from this proposal?

HONORABLE F. SCOTT MCCOWN: I thought we were just going to take 166 out of this package. We haven't changed anything. It's the present rule, and it ought not to be on the table.

HONORABLE SCOTT BRISTER: Second.

MR. SUSMAN: Is this the present rule?

PROFESSOR ALBRIGHT: This is the present rule.

MR. SUSMAN: Fine.

HONORABLE F. SCOTT MCCOWN: Yeah. It shouldn't have been in the package. Our mistake. Never mind.

PROFESSOR ALBRIGHT: The reason it was in the package is because I thought people might want to know that we had withdrawn the original 166.

MR. SUSMAN: All right.

MR. LATTING: You had withdrawn the original?

PROFESSOR ALBRIGHT: We had

drafted a shorter version of Rule 166.

MR. SUSMAN: We took it back.

PROFESSOR ALBRIGHT: And there was discussion that it was too short, that it wasn't detailed enough. So it was sent back to Scott McCown to consider, and he recommended that we just leave the rule as is, and that's what we decided to do.

CHAIRMAN SOULES: The committee recommends no change to Rule 166. Any opposition to that? Okay. 166 will stay as is, unanimous.

MR. SUSMAN: Rule 63, the committee on Rule 63 which is before you which has been discussed before, we have done very little changes since our last discussion of this rule. It basically says that you can amend a pleading at any time within 60 days, before 60 days of the end of the applicable discovery period, and thereafter you need leave of court or agreement, and leave shall be granted unless there is insufficient time to complete discovery that will be made necessary by the amendment, in which case leave shall be denied or the discovery period

extended. Leave shall not be granted if it would unreasonably delay the trial.

The only comments on this rule come from Alex Albright, our fifth column, who has written a commentary that she has some comments on the rule. Alex, you want to say what you have done?

PROFESSOR ALBRIGHT: Well, what I did, we have talked about this a little bit in connection with Rule 1 is I rewrote Rule 63 so that it follows the same procedure that is available under the current rule, and Steve has just told me that he would prefer not to have the same procedure that we have under the current rule. So I think that's one of the basic differences.

The procedure under my version of Rule 63 would be that you can file new pleadings any time up to 60 days before the end of the applicable discovery period. Then the opposing party can file a motion to strike, which will be granted unless discovery made necessary by the new pleading cannot be completed within the applicable discovery limitations and the new pleading will

otherwise prejudice the opposing party in maintaining its action or defense upon the merits."

I think I said that wrong. This would retain the same presumption under the current rules in favor of allowing pleadings and not striking pleadings. So the party filing the motion to strike would have the burden to show surprise and prejudice to not allow the pleading. Then within 60 days before the end of the discovery period the party who wants to amend the pleadings has to file a motion for leave to file the pleadings, and then that motion would be allowed unless the opponent could show surprise or prejudice.

Then at the end it says that "If discovery made necessary by the new pleading cannot be completed within the applicable discovery limitations or if the new pleading will otherwise prejudice the party in maintaining its action or defense upon the merits either, (1), the pleading should not be allowed or, (2), specific additional discovery shall be allowed if it will not unreasonably delay the trial." So I tried -- I was putting

into the rule the same standard that we have under the original subcommittee version.

CHAIRMAN SOULES: I hate to break here, but they are telling me that they are going to move a crane into the parking lot on the west side of the building to do some construction work, and there are about ten cars sitting out there. If anybody has got a car on the west side of the building, you need to move it. So we will stand at ease for about ten minutes.

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

CHAIRMAN SOULES: While we are settling down here, listen to something here on Rule 166 and just see if we can get it up or down without debate. Judge Guittard suggests that we add another item for the court to consider, which is the verbiage that starts the long list that now goes through to (p). He would add "reference to mediation or other method of nonbinding alternate dispute resolution." Any problem with putting that in 166? Any opposition? Okay. That's done.

MR. MARKS: Excuse me. I'm sorry, Luke. Could you repeat that?

CHAIRMAN SOULES: "Reference to mediation or other nonbinding alternate dispute resolution" will be (p). The old (p) is "such other matters made," and this being the case, that would be the last one. So we will have a new (p) that will read "reference to mediation or other nonbinding alternate dispute resolution," and the old (p) will be relettered to (q). Okay. And can you send me sort of a redline on that and then we will send it to the Court accordingly?

PROFESSOR ALBRIGHT: Well, I have it here. I have it on my computer. So I can do it.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I mean, you just want us to now include this as part of our package?

CHAIRMAN SOULES: Right.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: "Reference to mediation or other nonbinding alternate dispute resolution." Send a copy of it to the

chair of the subcommittee on Rule 166 so it will go in their package, too.

Okay. Back to 63. Alex had spoken about her reasons for wanting her suggestions considered by the committee. Further discussion on Rule 63? Steve.

MR. SUSMAN: Let me just give you -- let me just go back to where we came from on this and remind everyone. When we began out our discussions of limiting the amount of time that would be available for discovery there was a feeling that -- well, by a number of people, and I am not sure I like that, and I certainly don't like it if the plaintiff is constantly changing his or her theory of the case, and the quid pro quo that we thought that probably the plaintiff had to give as the price of limiting the amount of discovery, the plaintiff could be subjected to was the willingness to come forward at some time and say, "This is what my case is about, period. I am not going to change it again."

And so that's why we felt that we had to do something as part of our discovery rules with the amendment of pleadings to make it

fair. After all, discovery cuts off in the default situation, Tier 3 cases, in nine months after it begins, and typically that will be -- or typically it may well be a while before or months before the case is set for trial. Clearly the pleadings under the rule that allows amendments up to seven days before trial would be unfair. Discovery has ended five months ago and then someone is still amending their pleadings.

We originally picked a time, the 60-day time period from the end of the discovery period, which as you know could be a long time before trial, was picked because we thought that would give people enough time to engage in written discovery vehicles, many of which take 30 days to get a response; and those discovery vehicles our rules make clear have to be served at such a point in time within the discovery period so they can be responded to within the discovery period, not served within the discovery period so they can be responded to outside the discovery period. So we picked the 60-day time period.

The way the subcommittee drafted its

rules was it said up to 60 days until the end of the discovery period you have carte blanche to amend your pleadings. After that time you have got to get leave of court, but the standard for getting leave of court under the subcommittee's draft is, I think, fairly relaxed in that leave should be granted unless there is insufficient time to complete the discovery, in which case you either deny leave or extend the discovery period.

And I would assume in most cases where someone wants to amend their pleading after the 60 days that someone is going to first suggest to the other side and second suggest to the court if you can't reach amendment that as a condition of changing my theory within the 60-day time period I am willing to accord to the other side an extension of the discovery period, which is going to be no problem where there is no trial set right at the end of the discovery period. Yes, I want to amend, but I am willing to give you another 30 days or 60 days to engage in any necessary discovery. So that's the way the subcommittee draft is set up, and now Alex.

PROFESSOR ALBRIGHT: Steve and I have talked, and I have looked at my proposal and the subcommittee's proposal, and what I would like to do is withdraw my amendment that is in your package and work from the current version of Rule 63, but I do have some specific suggestions for it.

One, I would delete the language that's -- where it says "no later than 60 days before the end of the applicable discovery period or five days after receipt of the notice of the first trial setting, whichever is later," I would delete "or five days after receipt of notice of the first trial setting, whichever is later" because that was in connection with an earlier version of discovery limitations. At one time we were talking about a discovery period that ended 30 days before the first trial setting. So delete that.

CHAIRMAN SOULES: Okay. Let's just talk about that specific. Any opposition to that? Mike Gallagher.

MR. GALLAGHER: Yes. As a trial lawyer it's been my experience in the

limited number of circumstances that while I generally have a pretty good idea of what the case is about before I really begin the discovery, there are times when I discover the identity of new parties, and frequently, I will wait until I have completed my discovery before I file and prepare the pleading on which I intend to go to trial; and the language that is sought to be deleted, "or five days after the receipt of the first trial setting" is what I think is the saving grace of this rule.

This rule presupposes that discovery is driven by pleadings. That's not the case in all circumstances. There are at least equally as many circumstances in which pleadings are driven by discovery by responsible lawyers. We are taught and told and admonished not to file pleadings that are frivolous in nature and to file pleadings that are based upon evidence or at least upon a firm conviction and belief as to what the evidence is going to be, and in this circumstance what you are telling trial lawyers to do is file your last pleading -- and you may have 20 depositions to

take before the discovery is completed, and we want you to file your last pleading in this circumstance, and I don't care about the good cause exception.

I agree with Judge Brister. There are too many times we are having to go to court and have a hearing and argue over basically very petty differences that should not require the court's intervention, and Steve's deal here that "or five days after the receipt of notice of the first trial setting" at least gives you a later time period in most circumstances in which to deal with that.

PROFESSOR ALBRIGHT: Mike, if I could respond?

CHAIRMAN SOULES: Okay. You respond and then we will go around the table.

PROFESSOR ALBRIGHT: I don't think notice of the first trial setting gets where you want to go because the reason we don't deal with the notice at the first trial setting anymore is because people were talking about in places like Dallas County you get a notice of the first trial setting ten days after you file your lawsuit. So that's not

going to help you. It may --

MR. GALLAGHER: If that's the experience in some counties then I would recommend that something else be done that we give someone at least until the completion of discovery as a period of time within which to file an amended pleading.

CHAIRMAN SOULES: Okay. David Keltner and then we will go around the table.

MR. KELTNER: Mike, I understand your concern, and I think it was well-taken in most instances, but part of the problem that occurs is we have a discovery window that is open for nine months. This would force you to have to amend at the seventh month after you have done most of your discovery. If you amend and have something I have got to do discovery on as a defendant, I can't do it if it's much later than that.

And I understand what you're saying in terms of filing frivolous pleadings and the like, and I think that's well-taken; but there has got to be some time fairly far out in the discovery period. One of the problems with the rules that we have always had with the

discovery window has been that it's not backed up to the trial setting. In fact, it's likely to be in most counties way before the trial setting. So what happens is I don't get to do discovery based upon your trial pleadings, and that's what bothers me because you can get something new in there that I really don't have a realistic opportunity to discover.

CHAIRMAN SOULES: Okay. Rusty, you had your hand up.

MR. MCMAINS: Yeah. In the first place, that isn't a new issue because with our current rules allowing pleading as a matter of right ten days before trial, you basically have conducted the entire case with the absence of the specific pleadings. So that really is not any kind of a new complaint and a new justification. The problem that I have with it is that you don't even -- you don't even know what the other side's experts are at the 60-day time limit if you are the plaintiff.

CHAIRMAN SOULES: We are really talking about, unless we need to talk about them together, the five days after the trial

setting.

MR. MCMAINS: Well, I think that we are still talking about the same issue, which is the date. I mean, I think we should broaden it. The real issue is whether there is a real date and what that date should be, and from the standpoint of should that date be 60 days before the end of the discovery period, we have already gone through this about the designation of experts and when that occurs and whatever, and basically you're not even going to know whether there are experts on the other side. You are not going to have done, as a practical matter, complete expert discovery of any kind, and then you are locked into trial pleadings in terms of as a matter of right, and you are subject to the discretion of the court as to whether they are going to allow you to amend it.

In fact, the way the rule is drawn, it appears that if they don't allow you the discovery then they ain't going to allow you the amendment; and that's before any of your experts have testified; and your expert, even though you may have designated him in 60 days

if you're the plaintiff, he may change his mind before he testifies as to exactly what his theory is; and you are sitting there; and if you have been answering special exceptions or something and then pleadings specifically about what the theory is and your expert changes his mind, you are stuck with it. Now, that really is an outrageous thing which is not going to -- it's not a surprise to anybody as a practical matter.

MR. KELTNER: I will admit that that part on experts is a problem that we need to take into consideration. I think Rusty is right about that part.

CHAIRMAN SOULES: We need to pick a date to freeze the pleadings within the discovery window at some time, and it has to be late enough that people have a pretty good understanding at least of what the proof is going to be but early enough that if there are any surprises in the pleadings discovery activity can be conducted still within the discovery window without an extension by the court to fix the surprise. That would be our default rules, and the judges can give relief

where that can't work. The rules now say that the paper discovery has to be served in time for the responses in time to file to occur within the discovery window. In other words, paper discovery has got to be filed 30 days before the end of the discovery window or 31. I don't know how it would be calculated, frankly, but --

HONORABLE SCOTT BRISTER: But the responses aren't due.

CHAIRMAN SOULES: Responses are due within the discovery window, not later than that. 60 days is 15 days after the affirmative experts are designated but not within the 30 days that you have to give some deposition dates for them, and 60 days is before the rebuttal experts even have to be designated. So it seems to me that it's going to have to be a shorter period before the discovery window closes than 60 days; but whether it should be 30, which is the same day -- which is the last day for serving paper discovery is a problem, too. I am just trying to put these timetables, time deadlines, that occur towards the end of the discovery period

in sequence so that we have those in mind for this debate. Joe, and then I will go around the table. Joe Latting.

MR. LATTING: I think that --

CHAIRMAN SOULES: It's a tough issue.

MR. LATTING: It's a tough issue because we are trying to do something that is not a good idea, in my opinion. I have a case going to trial the 31st of this month on Monday, July 31st. It arose out of events that happened in December of 1992. Under what we are talking about here I calculated that I would have had to have my discovery completed in August of '93 and my pleadings finished in, what would that be, July of '93.

We're in Texas state court, oddly enough, against the FDIC, and they week before last amended their pleadings, and I amended mine yesterday. Now, what we are talking about is a whole new world for the lawyers and the litigants in Texas, and this Rule 63 points up in my judgment the basic policy mistake that we are making in this whole proceeding, and I

don't mean to be a Luddite, and I don't mean to be a fifth columnist, but this just isn't going to work, I don't think; and I think that the reason we are having trouble with this issue is that we are going to -- this is just the least of our troubles.

When we start trying to prepare cases months and even years before they are set for trial and expect that that's going to save the people of this state money and our clients money and make the jurisprudence run more smoothly, I wish I didn't say this because I don't guess it's popular among certain quarters, but I don't think I would be a responsible member of the committee if after having practiced law for 29 years I didn't make -- at least, I feel better about saying it. I think we are headed in a wrong direction, and I don't think it's a matter of 5 days or 30 days.

I think we have got a much more serious problem here. So having said that, I think that this Rule 63 just shines a spotlight on what we are really about here, and I would ask you lawyers who are practicing law and those

of you who have practiced law and who may again some day practice law to think about what this really means in terms of what you have to do and how much of your clients' money you have to spend and when you have to spend it.

It's the notion that -- it always reminds me that people say that if you get to Federal Court they have this good system where everything is more ordered, and the worst thing that happens to my clients from the standpoint of spending money is to land over there, and with all of our foibles I think the state court system -- myself, I think it works pretty well. I want to say this, and that's all I am going to say about it, but I think that the problems that we have with discovery and pleading deadlines are pretty well drying up.

I think if you look at the litigation that goes on around the state you will see that over the last several years I think we have had a lot of problems, but I think they are getting pretty well worked out, and I think the cure that we are proposing here in

general is much worse than the disease, and it's a bad idea. So there, I said it.

CHAIRMAN SOULES: Okay. No response to that. The chair is not going to entertain any response to that. We are going to pass these rules to the Supreme Court approved as we did yesterday. The issue now is what is this pleading cutoff. That's what's before the committee on Rule 63. Does anybody want to propose a different pleading cutoff than we have before us in the subcommittee draft? Mike Gallagher.

MR. GALLAGHER: Yes. I propose that the date for the cutoff for pleadings be ten days after the completion of the defendant's experts. The normal order of discovery, Luke, in cases of the type that we're talking about, that people who try products liability cases and other complex personal injury cases engage in, is that you take the fact witnesses and the corporate depositions first. Then you present the plaintiff's experts for deposition, and the last depositions that are taken in a case when you are preparing it for trial in significant

litigation is that of the defendant's experts.

And I think I should have, until I find out what their experts are going to say, the right to amend my pleadings based upon something that I discover during the course of those depositions, and I don't see that that impedes our desire to get cases ready two or three years before they go to trial. To do that in Harris County, which is what this committee has voted, then we are going to do it, but let us at least have the right to get a pleading on file after the discovery is completed.

CHAIRMAN SOULES: All right. Your deadline is 15 days. That's what you're talking about?

MR. GALLAGHER: All right. Yes.

CHAIRMAN SOULES: Because you're saying the defense or the rebuttal experts -- it could be either way. It could be counterclaims, but anyway, the rebuttal experts are designated 45 days before trial and have to give you two days for depositions within 30 days of that. That 30 days expires

15 days before trial. I said trial. Before the end of the discovery period is where that ends. Is that what you are suggesting?

MR. GALLAGHER: After I have whatever that date is. I wasn't here yesterday, but whatever that day is.

MR. MCMAINS: That's it.

MR. GALLAGHER: Okay. That's it. Yes.

CHAIRMAN SOULES: The affirmative experts have to be designated 75 days before the end of the discovery period, right?

MR. SUSMAN: Uh-huh.

CHAIRMAN SOULES: The rebuttal experts, 45 days before the end of the discovery period, and in both of those cases the designation has to include two suggested dates for depositions within 30 days.

MR. SUSMAN: It doesn't say "within 30 days." We could add it.

CHAIRMAN SOULES: All right. I thought it said that.

MR. SUSMAN: No. I think we took that out at one time.

CHAIRMAN SOULES: Okay. Assume that's in there or would get in there, but your date would be 15 days ahead of trial because by then you have had an opportunity to take the rebuttal expert's deposition. Is that what you are proposing?

MR. GALLAGHER: Yes.

CHAIRMAN SOULES: Okay. Any other -- let's go around the table. John Marks.

MR. MARKS: Would there be something wrong with amending after the close of the discovery period and take care of any surprises that might occur by allowing additional discovery for a period of time after the close of the discovery period?

HONORABLE SCOTT BRISTER: It will never close.

MR. MARKS: Never close? I mean, if you amend after the close of the discovery period, after you have got everything, and then if there was something new that had to be responded to, you could go to the court and say, "Look, they have amended something that's new. I haven't had an

opportunity to do any discovery on it. I need an additional period of time to complete that discovery."

CHAIRMAN SOULES: Rusty and then we will come around the table.

MR. MCMAINS: Well, I want to make primarily a comment with regards to the assumed structure of the committee's attack on Rule 63; that is, it assumes that all pleadings are alike, you know, that all of them have an impact on discovery, which I think is garbage. Most of the time they don't. If they add new causes of action, they bring in new parties, there are certain things obviously in which it has an impact. When you are cleaning up stuff, any kind of amendment, any kind of supplementation, anything that may be responsive to stuff that you have that's new that is produced in response to supplementation, that doesn't change anything with regards to discovery, and you shouldn't have to be going to the courthouse and ask for leave to do it.

That to me is so that -- the first problem I have with the rule is treating all

amendments alike. They are not alike in my judgment, and you do need to concern yourself. This does not decide the issue of the other rules either. There are other rules implicated. There are joinder rules that we have. We have intervention rules, and these rules allow you to intervene automatically. One could intervene in a lawsuit after the discovery period is over under our current intervention rules.

We don't treat that at all in these rules, and you have the class action rule. The class action rule, the court on its own may change who the representatives are, and if you previously had representatives of parties that were the class representatives and the court decides to change who the class reps. are then that makes a difference as to who your discovery is directed to because under the current rules with regard to the absent class members, they aren't subject to discovery.

If some of those who are absent all the sudden become parties -- and they don't require an amendment. That's done by the

court. The court just can do it. We are implicating a number of rules when we are talking about changing the structure of the lawsuit, and it's not just the amendment of the pleadings. So I don't think that a discussion of an absolute date in which the lawsuit is put in a can makes any sense unless we are talking about precisely what issues are impacting discovery, and then we have to focus on all the rules that that relates to, and this isn't all of them.

CHAIRMAN SOULES: Well, we have to start somewhere.

MR. MCMAINS: I don't disagree with that, but you tell me that I am not going to be able to file an amended pleading when, as is frequently the case, the Supreme Court changes what the components of the pleadings are in the interim, and you tell me I have got to rely on a trial judge to be able to do it, and I have got to go to a trial judge to get leave to do it, and that's garbage. If they change the components of the pleading requirements, it doesn't change a damn thing with regard to discovery. I ought to be able

to replead. Period.

CHAIRMAN SOULES: Okay. Come around the table. Anyone else? Alex Albright.

PROFESSOR ALBRIGHT: I'd like to echo some of what Rusty said because I had just thought about that there is a difference between an amendment that conforms a pleading to the discovery that's been taken and a pleading that introduces new areas upon which you need new discovery, and that's why I like the structure of the current rule because it allows amendments for a long period of time, but then gives a party, the opposing party, an option to file a motion to strike if it is one of those amendments that brings up new situations, new areas upon which you need to do discovery.

I would think we could have a pleading deadline that says you can plead without leave of court 'til 14 days, 7 days before the end of the discovery deadline but give an opportunity for a motion to strike. So you can say, if you are at the end of the discovery period, you can say, "My God, here

we are seven days before the end of the discovery period and they have completely changed the lawsuit on me." You either allow that amendment and give us a whole new slew of discovery, or you don't allow the amendment, and that's the way that issue then is addressed.

Then after the discovery period or after this deadline the party has to have leave to amend. Okay. That's what you do right before trial now. Your motion for leave to amend might say, "This doesn't change anything that has to be discovered. All I am doing is refining my pleadings." Probably there won't be any opposition to that, but if you do add new causes of action upon which you need new discovery, it makes sense to have to have a motion to do that because the court needs to address or the parties need to address what new discovery is going to be needed.

So then you would allow the amendment with specific new discovery that's going to be allowed or don't allow the amendment because it would unreasonably delay the trial, and so I think we can work with our rules to allow

what everybody wants to allow.

I think we do need to just pick a day where we shift the burden as to when you have to file a motion for leave as opposed to having the burden on the opposing party to file a motion to strike, and then that's really then all we are talking about, is at what point the burden is on the party to file a motion to strike and what point the burden is on the party to file a motion for leave.

MR. MCMAINS: But in the current rule, Rule 63 has things in it like motions for suggestions of debt, other representatives, change of executors, for instance. All of those things, they are all gone out of this rule. Now, that's just -- you know, we just say, "Well, we will take care of that another day." I am not prepared to just say, well, we are going to start someplace; and we are going to start, therefore, with this rule. We will just drop out all of this other stuff and hope that we can catch it later.

PROFESSOR ALBRIGHT: Well, I think the reason that was dropped out is

because it was -- Lee Parsley and I talked about that and decided it was probably just a pleading. We can add that back in. I don't think that's the major problem.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: Present Rule 63 is on page 24 of the red book if you have got it, and I wonder why it wouldn't work just to keep present Rule 63 as it is and add a comment that says that in assessing surprise that the court has to consider whether additional discovery is going to be necessary, you know, where we are at in terms of the discovery window, whether there is sufficient time to conduct additional discovery, and make an appropriate order so that the discovery window, really to me, the issue about the discovery window is just a subset of surprise.

If the amendment is coming at a time that it merely conforms what's already been done to the evidence, no problem. If it's coming at a time where it's going to necessitate additional discovery then the question is, is there enough time to do additional discovery?

If it's coming at a -- if the answer to that is, no, there is not enough time to do additional discovery then the judge has to decide, well, am I going to extend the discovery window? Am I going to provide additional time for discovery, or am I not going to allow the amendment? So I think Rule 63 works as long as we make clear what the decision tree is under the term "surprise."

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Scott, that may work. I am not sure that a comment completely gets that done, but I think what Rusty and Mike Gallagher said makes sense in that most -- very many pleadings at the last minute are to conform the discovery to the things that will go in at trial.

In specifics, though, it seems to me that everybody's comments indicate two things. First off, perhaps the five days after notice of the trial setting is illusory time. It's going to be different every place, Mike, and I'm not sure that's workable. I agree with

you that 60 days before the cutoff of the period is not workable given the designation of experts, and that makes great sense to me.

The thing that I think most of the defense Bar has a real problem with is the fear that they won't be able to amend later to meet the plaintiff's amendment, and in some instances that's a problem because new affirmative defenses come up. You have to allege certain things, and that needs to be taken care of, and that would be a change in Rule 63, I think.

The other thing is -- and, Alex, I think this is important. The suggestions of death and changes in representatives of parties will not be anywhere in the rules if it's not in this rule, and that's important. We got to have that in or we lose that jurisprudence.

PROFESSOR ALBRIGHT: That's no problem.

MR. KELTNER: So but I think that's easy to put back in. So my suggestion would be that we get -- as you suggested a moment ago and I think we have talked this out enough where we are ready to do it, is get a

date certain by which an amendment can be done by right, and I would suggest that it can't be 60, but it also can't be tied to a trial setting because that's going to be something we can't control.

Second, that we have a determination in some easier standard for the court if the court finds that it is going to necessitate additional discovery, that the court can make the appropriate orders to do that and extend the discovery period for a period of time.

We also need to make sure that any pleading can be responded to within the period because that's going to be important to the next to last person to amend. If we get those under consideration, we have got this deal licked, and we are really not too far from it. I think some of the fear of this rule has been although we have discussed it tangentially, we haven't gone fully into it, and I think it's something if we get those four things down, we have got this deal done. Now, that's sort of the concept without specific suggestions, but I think we are getting closer.

HONORABLE F. SCOTT MCCOWN: I

have a motion. I have a motion. I move that we take Rule 63 in its present form and add the following language at the end of the rule: "Surprise includes insufficient time to complete discovery made necessary by the amendment. If the court finds that the amendment would leave insufficient time to complete the discovery, the court may allow the amendment and extend the discovery time."

MR. SUSMAN: Second.

CHAIRMAN SOULES: Well, we are not ready to do this. This is too complicated. This is going to have to be worked on awhile. I do think we are ready to do one thing, though. I think experts are designated too late. Once we get to these pleading issues, 75 and 45 is too late in the discovery period. Some few days earlier is going to have to be done before we can work out these other issues. We just don't have enough room in the discovery period left after that to work out these problems, and it's a good thing we talked about them today to come to that reality. How many days earlier than the 75/45 should we make this? This is going

to be a change to Rule 10 that we have already passed. Don Hunt.

MR. HUNT: I want to suggest we look at 90 and 60, and going back to Alex's draft. As I have heard the discussion here and listened to all the various arguments both ways, what Alex had drafted, it seems to fit if we move this to 60 and 90 for the experts and then maybe go to 30 for the amendments. I don't offer that in the form of a motion, but I would like to know why Alex withdrew her amendment.

PROFESSOR ALBRIGHT: I withdrew my amendment because Mr. Susman was so persuasive, and now I disagree with him again. Now I remember why I made the changes I did in the first place. That's what happens when you work on too many of these rules at one time.

CHAIRMAN SOULES: At the conclusion of this meeting we are going to send the discovery rules to the Supreme Court. So and these rules are not going to go with them. The pleading, intervention, joinder of parties, those things are going to have to get worked out. David Beck is the chair of that

subcommittee. I am going to need another volunteer because we all know how consumed David is with what he's doing today. So I am going to work on that in a little while, but we have got a few things left in the discovery rules that we have not fixed, some things that were left over from yesterday.

One of those things which was not left over from yesterday but has become clear here in this discussion is that we need to change the expert designation dates. Let's get that done first now and then deal with the other issues that spread into discovery and then we will come back to these other issues in a minute. Okay. How early should experts be designated? Don Hunt says 90 and 60 rather than 75 and 45.

PROFESSOR ALBRIGHT: I second that.

MR. LATTING: 90 what?

CHAIRMAN SOULES: 90 days for affirmative, 60 days for rebuttal experts, before the end of the discovery period.

HONORABLE SCOTT BRISTER: Understanding that the parties and the court

can agree otherwise.

CHAIRMAN SOULES: 90 and 60. Any other ideas on that? Carl Hamilton.

MR. HAMILTON: I think plaintiffs ought to designate 60 days after the beginning of the discovery period and then give the defendant 60 days after that.

MR. GALLAGHER: The only comment I have is that I would agree that we need to try to get things expedited as quickly as possible, and then the problem you have is that it varies so much from case to case. Often times you don't get discovery completed or even partially completed in complex litigation, which maybe this is not going to apply to, and there are other circumstances in which it may. I just don't agree that the 60-day time limit is sufficient.

CHAIRMAN SOULES: Okay. Don, is your proposal on these time limits in the form of a motion?

MR. HUNT: No.

CHAIRMAN SOULES: Let's make a motion.

MR. SUSMAN: Wait a second.

CHAIRMAN SOULES: Somebody make a motion and then we will talk about it.

MR. MARKS: Well, I move that we do 60 days after the beginning of the discovery period.

MR. HAMILTON: I second it.

MR. MARKS: We have got a second.

CHAIRMAN SOULES: Moved and seconded.

MR. SUSMAN: I thought we had already passed over this.

CHAIRMAN SOULES: It won't work, so we have got to fix it.

MR. SUSMAN: Why are you saying it won't work?

CHAIRMAN SOULES: Because we can't get these other amendments and interventions and joinders.

MR. SUSMAN: How do you know? How do you know?

CHAIRMAN SOULES: We tried to do the amendment, and it won't work.

HONORABLE F. SCOTT MCCOWN: Well, Luke, I think I offered a solution and

got a second. When you say it won't work I think what's happened is that we have worked on these rules a long time, and now we have got a slightly different group here than we have had here in the past, and it's a group, as Joe said, that has some fundamental problems with the concept, and now we are unraveling it and unweaving it from the back, and what we are going to be left with is we are not going to have a packet at the end of the day.

CHAIRMAN SOULES: Yes, we are. Well, maybe not at the end of this day, but by Monday morning we will. Rusty.

MR. MCMAINS: Luke, I don't disagree that the joinder rules and all of the other rules that have not been thought about perhaps need some more work, but the fundamental issue, it seems to me, still needs to be resolved by the committee before we send a discovery packet up if you are not going to carry these rules with it because the joinder issue, for instance, which the joinder rules aren't affected, has always been to me one of the biggest problems with these rules because

they allow gamesmanship.

It allows people in the middle of the discovery period after one, quote, "side's" amount of discovery has been used a lot up to bring in the real defendant late, and I mean, in essence gang bang them in such a way that they realize that they have been had. They have very little discovery time. I know that everybody says, well, you can go to the judge, but that's of very little comfort to a defendant who comes in with 30 days left or 40 days left in the discovery period and 10 hours left in the discovery that he could do and that he has to be bound by all the discovery that's been done by everybody else. Those are fundamental to whether or not this system makes any sense and works, and to send these up on the assumption that we can make it work I think is wrong.

CHAIRMAN SOULES: Okay. Let's try to do our cleanup work on the rules of discovery and then we will get back to this. We were going to define "written discovery" under Rule 3. Let's get that done. Is it now all discovery except oral depositions? We

have got to finish these rules.

MR. MARKS: Made and seconded but not recognized.

CHAIRMAN SOULES: Well, we have got a command from the Supreme Court to get the discovery rules done today or before Monday morning anyway, and we are going to do that except for Steve's --

MR. MARKS: It was a friendly inquiry.

CHAIRMAN SOULES: Except for Steve's point that's going to be carried over. That will catch up. We will get that done next time. Okay. Under Rule 3 is written discovery all discovery except oral depositions?

HONORABLE SCOTT BRISTER: No.

CHAIRMAN SOULES: What else?

HONORABLE SCOTT BRISTER: IME's and entry on property.

PROFESSOR ALBRIGHT: I think we leave it like it is.

MR. SUSMAN: I do, too.

CHAIRMAN SOULES: All right. We say, "Written discovery as used elsewhere

in these rules means request for standard disclosure."

MR. SUSMAN: "Standard request for disclosure."

CHAIRMAN SOULES: "Standard request for disclosure, request for production of documents and tangible things, interrogatories to a party, and request for admissions." Now, Judge Brister was concerned that didn't work.

HONORABLE SCOTT BRISTER: And again, I don't think that's necessary if the concern is -- if the whole reason for this structure of separating written discovery, creating two new concepts, written discovery and nonwritten discovery is so you don't have to supplement deposition answers, that's real easy to say on the supplementation rule or the deposition rule. On the supplementation rule you say, "This doesn't apply to oral depositions." On the deposition rule you say, "notwithstanding anything in Rule 5 concerning supplementation."

There is no sense in saying supplementation doesn't apply to entry on

property. There is nothing to supplement, or supplementation needs to not apply to IME's. There is just -- we are heading off on two different kinds of discovery. If the whole purpose is just to say you don't have to supplement depositions, just say that. Don't create two categories of discovery which may have differing rules or cases that apply to them, et cetera.

CHAIRMAN SOULES: But we have got a structure here that we have already passed on.

MR. SUSMAN: Right.

CHAIRMAN SOULES: And --

HONORABLE SCOTT BRISTER: Luke, you asked me for my opinion. I gave it to you. If you don't want my opinion, don't ask.

CHAIRMAN SOULES: I do want your opinion. I apologize to you. Okay. Is there -- does anyone want to make a motion to change this sentence defining "written discovery" to say something else?

HONORABLE SCOTT BRISTER: Yeah. I -- well, we voted on whether to drop it before. So, no. I mean, unless you want me

to raise it again I am not going to.

CHAIRMAN SOULES: Okay. No motion. Okay. It stays as is.

MR. SUSMAN: Rule 4.

MR. KELTNER: Luke, we did have another deal with Rule 3.

CHAIRMAN SOULES: What was that?

MR. KELTNER: That was the expert witness issue that Rusty had raised that you asked us to look at on 3(2)(e), and I think we have got a proposal. Let me pass it out.

While this is being passed out let me tell you basically what we were asked to do and what we tried to do. In the scope of discovery rule at 3(2)(e), unlike the other ideas in the scope rule we just merely said -- didn't say what expert witnesses were. It's no place else in the rule. So we expanded it to say that basically you can get discovery of an expert witness, and what you can get are facts known, mental impressions, and opinions. That's nowhere else in the rule, and that needed to be in.

Then we defined basically what a testifying expert is. That's the only place that's in the rule. Consulting expert is a privilege in Rule 4, and we refer to that definition, and then we dealt with the problem that is in the current rules of the expert that has knowledge of relevant facts that they didn't get in preparation for trial or in anticipation of litigation.

In other words, it's an expert, but the expert has factual knowledge, and remember, we had put "personal knowledge," which had caused a problem. So we redefined that that he didn't get it, he or she didn't get the knowledge in anticipation for the lawsuit, and that could either be a testifying expert or a consulting. That would be a person with knowledge of relevant facts, and to that extent that knowledge would be discoverable, and then finally, the determination of the status is controlled by Rule 9 and 10, and we indicate that here, and I would move adoption of this as a replacement for current 3(2)(e).

CHAIRMAN SOULES: Okay. Let us take time to read it for a minute.

PROFESSOR ALBRIGHT: I second. So that's done.

CHAIRMAN SOULES: Moved and seconded. Let's take time to read it and understand it and then we will talk about it.

Okay. Is everybody ready to start talking about this? Okay. Who wants to start?

Okay. Let me ask a question. David, in (e)(2) --

MR. KELTNER: Yes, sir.

CHAIRMAN SOULES: We say in the fourth line "who will not be called to testify." What you mean is who is not a testifying expert --

MR. KELTNER: Right.

CHAIRMAN SOULES: -- as defined in (1).

MR. KELTNER: Yes.

CHAIRMAN SOULES: So we should change that "who will not be called to testify" to say he's "not a testifying expert."

MR. KELTNER: I think that's a very good change.

CHAIRMAN SOULES: On the next sentence, "A consulting expert's identity, mental impressions, and opinions are not discoverable." Why not just stop there, period? Because they are not discoverable, are they?

MR. KELTNER: No, they are not, and that's what 4(2)(a)(3) says. That's fine.

PROFESSOR ALBRIGHT: Well, I think we need to refer to the privilege rule, don't we?

CHAIRMAN SOULES: Okay.

MR. KELTNER: That's fine. It makes no difference either way.

PROFESSOR ALBRIGHT: Or I guess we could put the consulting expert privilege here and not --

MR. KELTNER: No. It needs to be -- people are going to look at the privileges. They need to see a list of those. They are used to doing that, and I think that's important.

PROFESSOR ALBRIGHT: And I think it's important then to refer to that rule.

MR. KELTNER: Either way.

HONORABLE F. SCOTT MCCOWN: It should be under the new Rule 4. It's in 4(2)(c). So instead of (a)(3) it would be (c).

MR. KELTNER: Is that right?

CHAIRMAN SOULES: I just wonder if that suggests that they are discoverable some other way.

MR. LATTING: Yeah. That's my concern.

CHAIRMAN SOULES: David, what I am concerned about, we say it's not discoverable pursuant to this rule. Does that suggest that they may be discoverable some other way?

MR. KELTNER: That's how I read your comment.

CHAIRMAN SOULES: That's why I would say period.

HONORABLE F. SCOTT MCCOWN: Easy fix.

CHAIRMAN SOULES: What?

HONORABLE F. SCOTT MCCOWN: Say "Pursuant to Rule 4(2)(c), a consulting

expert's identity, mental impressions, and opinions are not discoverable," period.

CHAIRMAN SOULES: I don't know if that helps it.

HONORABLE SCOTT BRISTER: Yeah, it does.

MR. PRICE: Yeah, it does.

MR. KELTNER: Actually, it does.

HONORABLE DAVID PEEPLES: You could just add the words "or otherwise" at the end of that sentence.

MR. LATTING: That really fixes it if you say "or otherwise." Why don't you do that? That way you don't need to know how they are not discoverable. They are just not.

CHAIRMAN SOULES: Okay.

HONORABLE F. SCOTT MCCOWN: Well, wait. I don't think you can do the "or otherwise" because they are discoverable under 4(2)(c) if a testifying expert has reviewed the consulting expert's work.

CHAIRMAN SOULES: Judge, we have defined that consulting expert as not a consulting expert anymore.

MR. LATTING: That's a testifying expert.

HONORABLE F. SCOTT MCCOWN: Okay.

MR. KELTNER: And actually interestingly that's the way the rules currently read, too.

HONORABLE F. SCOTT MCCOWN: Well, you want to just take it out of 4 altogether then?

MR. KELTNER: I see Luke's concern, and it's a good concern.

CHAIRMAN SOULES: I think if we just put a period after "not discoverable" that gets it.

MR. KELTNER: I think that's fine.

CHAIRMAN SOULES: That will eliminate the confusion and just take out "pursuant to." Okay. And then in the paragraph (3), one, two, three, four, five. It's essentially the same issue, "location and a brief statement of the expert's connection with the case are discoverable." Why not just say period instead of "upon proper request

from a party retaining experts."

MR. KELTNER: Let me tell you why it's there.

CHAIRMAN SOULES: Is that a new request?

MR. KELTNER: And I'm not saying that that's -- we have to have it one way or the other. You ought to be able to get from a party if they have a consulting expert who has knowledge of relevant facts the same information you get from a person with knowledge of relevant facts the same way, and that's what you can do. You can only get that discovery from the party. Anything more you want to know about the details of the facts you are going to have to depose or otherwise get discovery from the consulting expert him or herself, but if you don't like that distinction, that's fine, and I would be happy to cut it off there.

CHAIRMAN SOULES: Well, what we are saying is they are discoverable, period. Is this some new different kind of request that's not someplace else?

MR. KELTNER: No. In fact,

this mirrors what is in the scope rule for persons with knowledge of relevant facts. It just takes the same definition or the same matters to be discoverable. I have got some issues with that, but that's another issue for another time.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: David, I don't see what this adds. I mean, a consulting expert who has knowledge of relevant facts is a person with knowledge of relevant facts.

MR. KELTNER: Except, Robert, you're right except that the way we had the rule in rule -- both 10 and in 3 there was an indication that was not the case, and we are trying to cure that.

MR. MEADOWS: Well, I mean, if I have an engineer who worked on a project, built a platform, and then that platform explodes ten years later, that engineer is a person with knowledge of relevant facts by virtue of his employment on that project.

MR. KELTNER: That's right.

MR. MEADOWS: I have got to

list him as a person with knowledge of relevant facts.

MR. KELTNER: That's right. And there are cases that would back that up.

MR. MEADOWS: So I don't see what this adds other than the fact that I now have to make some sort of determination of how I am going to describe that person's involvement with the case.

MR. KELTNER: Well, here's the issue. In a number of relatively recent cases the Supreme Court has noted that you can have a dual capacity witness, one that is providing expert testimony and one that also has personal knowledge -- and let me use that as a term of art -- of facts involving the case, and the discovery from those witnesses takes two different tracks.

Under the proposal that we currently have adopted the inference is, no, if he's a testifying expert, you get a different type of discovery. You get to designate them later and the like. That was the fear that this group mentioned yesterday and wanted change. My thought was let's say we never had in the

rules what's testifying, what's consulting, and let's put that in, and let's also acknowledge that somebody could be a little bit of both, which cases hold, and just say so. If they do have knowledge of relevant facts, let's disclose them.

MR. MEADOWS: Here is my problem with it and then I will turn it over, but the way this works now and the way that it works best, I think, is I am representing a construction company on the very issue that I have described. I list that person among those with knowledge of relevant facts in the initial discovery. The plaintiff or the opposing side is on notice that this person -- you know, of these people who have knowledge. If I want to use that person as a testifying expert to give opinion testimony, I have to then designate that person under that category. That sort of lifts the importance of that particular witness.

MR. KELTNER: That's right.

MR. MEADOWS: And if the plaintiff wants to conduct a different kind of discovery or more extensive discovery with

that person, they are on notice that I am going to use that person not only as a person with knowledge of relevant facts but also as an expert, but I mean, I think that's the way it ought to work.

MR. KELTNER: It is, and I think everybody agrees with that. Under the current rule that we discussed yesterday, that might not be the result. That's the reason that we spelled it out.

MR. MARKS: But it seems to me that if you did exactly what you said, it would comply with this rule. If you identified the person as a person with knowledge of relevant facts, that would comply with the rule.

MR. KELTNER: John, it would, but the part that we adopted yesterday, the sentence in Rule 10 and the provision that's current Rule 3(2)(e) that has the U-turn that you come back to it, would indicate that if they are an expert, they are an expert, and that's it. They have to have personal knowledge, and that's not appropriate, and that's not what the case law is.

MR. MEADOWS: Well, I think we ought to look at those points to see whether or not it's a problem before we -- I mean, this way I have got to -- if I am receiving advice from someone in the company of an expert nature but I don't intend to call that person as an expert, so he is a consulting expert at least as far as I am concerned, but I have identified him as a person with knowledge of relevant facts, that ought to be enough.

MR. KELTNER: I agree with that, and this doesn't change that.

MR. MEADOWS: Except I have got to give a -- I have now got to highlight that person as someone who has --

MR. KELTNER: Knowledge of relevant facts.

MR. MEADOWS: No. I have got to give a statement of that expert's connection with the case.

MR. KELTNER: Here is the reason for that. That's what we voted on yesterday to do for persons with knowledge of relevant facts. It's no different than what

you would do with a person with knowledge of relevant facts. I disagree with that personally, but we voted on that yesterday, and to make it -- if it's a person with knowledge of relevant facts, it's a person with knowledge of relevant facts, and you have got to give a statement of their connection with the case.

MR. MEADOWS: But is this person to be somehow designated as a consulting expert?

MR. KELTNER: No.

MR. MARKS: Would you say he worked on the platform?

MR. KELTNER: Yes.

MR. MARKS: That would be it, period.

HONORABLE SCOTT BRISTER: Question.

CHAIRMAN SOULES: Let's see if maybe we can get this articulated to where it just says he's a person with knowledge of relevant facts in that capacity.

MR. KELTNER: That would be fine.

CHAIRMAN SOULES: Let's try this. "When a person who is a testifying or consulting expert," and we will just call him a person, "has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation, the identity, location, and a brief statement of the person's connection with the case" --

MR. KELTNER: That's good for me.

CHAIRMAN SOULES: -- "are discoverable as a person with knowledge of relevant facts."

MR. KELTNER: I think that's better.

CHAIRMAN SOULES: Period.

MR. KELTNER: And then end it and not have anything after that, Luke.

MR. MARKS: Now, what are you doing, Luke?

CHAIRMAN SOULES: Before I answer that, if I could, we still probably need the last sentence so that we don't limit -- it's not taken as a limitation. That's where it stops for that type of person

with knowledge of relevant facts.

MR. KELTNER: We probably ought to go back and do that for persons with knowledge of relevant facts in Rule 4 as well because we indicate the only thing you can get discoverable on that is the statement of their connection when obviously you can depose them, but I mean, this comes directly from the -- I will give it to you. So everybody will know where we are, if you will look at current Rule 3.

HONORABLE SCOTT BRISTER: Yeah. You're right.

CHAIRMAN SOULES: 3(2)(c).

MR. KELTNER: 3(2)(c). We left out -- if you read this literally, it would mean that the only thing you can get from a person with knowledge of relevant facts is a statement regarding their connection with the case.

HONORABLE SCOTT BRISTER: That's true.

MR. KELTNER: That's probably true when you ask the party for that, but obviously you can get additional discovery.

HONORABLE SCOTT BRISTER: Defining the scope of discovery.

MR. KELTNER: Right. This is defining the scope. I think we left that out unintentionally, and we ought to go back and change that.

HONORABLE SCOTT BRISTER: That's right.

CHAIRMAN SOULES: All right. Well, let's go ahead and look at 3, and, John, now I will answer your question. It would read, "When a" -- insert "person who is a," and then pick up "testifying or consulting expert has acquired knowledge of relevant facts not in preparation of trial or in anticipation of litigation, the identity, location, and a brief statement of the person's" -- instead of "expert's" -- "connection with the case are discoverable as a person with knowledge of relevant facts."

MR. MARKS: Would you want to insert "who" between "expert" and "has" on the first line?

CHAIRMAN SOULES: Say that again.

MR. MARKS: "When a person who is a testifying or consulting expert" -- no. Okay. I'm sorry. Disregard that.

CHAIRMAN SOULES: And then "The facts known by the person, not acquired in preparation for trial or anticipation of litigation are discoverable." We say "by deposition from the person."

MR. KELTNER: I personally think you can put a period after "discoverable," but I think probably "deposition" doesn't hurt.

CHAIRMAN SOULES: Because that's the only way.

MR. KELTNER: Yeah. It pretty much is.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Well, David, is the problem that you are trying to fix that consulting experts whose only knowledge of relevant facts was obtained in anticipation of litigation or in preparation for trial? You don't want those people's knowledge to be discovered, right?

Because the problem is, is we have a person with knowledge of relevant facts is someone whose only knowledge is even hearsay knowledge, but if you have a consulting expert whose only knowledge of relevant facts was obtained in anticipation of litigation you don't want the other side to be able to discover the facts known by that consultant as a person with knowledge of relevant facts.

MR. KELTNER: No. That's not the only thing, and let me explain. We left out testifying expert in the scope of discovery as a defined term. That's the suggestion Scott made yesterday, and after looking at it, it's no place else in the rules in the way that we have defined. So we have to have that in.

PROFESSOR ALBRIGHT: No. But I am talking just about No. 3.

MR. KELTNER: I understand, but your question I think was more directed in what was the problems we were trying to solve, and that certainly is one. The second problem I think that you were zeroing in on is additionally we have to indicate that an

expert, whether it be testifying or consulting, that had knowledge outside of his expert retention of the facts of the case -- in other words, outside of anticipation of litigation and preparation for trial -- whether that knowledge be personal or otherwise, that person becomes a person with knowledge of relevant facts, and that is happening more and more in litigation, and we had to have that as an exception to the rule somewhere, and that's the reason for 3.

PROFESSOR ALBRIGHT: Let me see if this does it. Okay. "When a consulting expert whose knowledge of relevant facts was acquired only in preparation for trial or in anticipation of litigation, that expert is not a person with knowledge of relevant facts under," 3.2 point whatever. "The facts known by an expert not acquired in preparation for trial or in anticipation of litigation are discoverable."

MR. MEADOWS: Let me tell you why that's important, David. Let's say in my example I list John Doe as the engineer expert who worked on the platform. The platform

explodes. That's my only contact inside the company with what happened so I can understand the issues in the case. I list that person as a person with knowledge of relevant facts. Plaintiff takes his deposition.

Under this rule he's entitled, as he would be under our current system, to explore what he knew about the construction of the platform and get his opinions about that. Then he gets into discussions he's had with me about his opinions about the cause of the accident and so forth, and I tell him not to answer. He's a consulting expert. I could be confronted with the fact that this last sentence says he has to answer those questions because those facts which were not -- let's see.

MR. SUSMAN: He got them from you.

MR. MEADOWS: If he's got them from me, the facts known by the expert not acquired in preparation for litigation are discoverable.

PROFESSOR ALBRIGHT: But the ones that you-all talked about --

MR. MEADOWS: Well, that's a different privilege. Okay. But he has opinions. He has opinions about the cause of the accident because he's an expert, and he's acquired those opinions in preparation for the trial as my consulting expert. He's got to disclose those.

MR. KELTNER: No. I think the result is absolutely different under the proposed rule, but if Alex's version makes you feel better, there is not a substantial difference between Alex's version and mine. It just reverses the way you go at it. So either one is fine.

CHAIRMAN SOULES: Let me hear what you said again, Alex.

PROFESSOR ALBRIGHT: What mine does is it --

CHAIRMAN SOULES: Just read the words.

PROFESSOR ALBRIGHT: "When a consulting expert whose knowledge of relevant facts was acquired only in preparation for trial or in anticipation of litigation, that expert is not a person with knowledge of

relevant facts."

CHAIRMAN SOULES: But that doesn't answer the question. That doesn't get to the problem of separating. Suppose you have got a consulting expert that has both.

MR. MARKS: How about a "nothing herein" statement? "Nothing herein shall require the consulting expert to give opinions," blah, blah, blah.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: "A testifying or consultant expert who has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation is a person with knowledge of relevant facts and subject to discovery in accordance with Rule 3(c) and these rules as to the knowledge and facts not acquired by the expert in preparation for trial or in anticipation of litigation." I think that separates out only that which is discoverable.

MR. KELTNER: I will accept that as a friendly amendment.

HONORABLE SARAH DUNCAN: But it

says that they are a person with knowledge of relevant facts, which they really are.

MR. LATTING: Does that suit you, Robert?

MR. MEADOWS: Yeah. Is that all right, David?

MR. KELTNER: Yeah. That's fine with me.

CHAIRMAN SOULES: Okay. Read it back again so that we get it on the record, and Alex gets it down. Slowly.

HONORABLE SARAH DUNCAN: "A testifying or consulting expert who has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation is a 'person with knowledge of relevant facts,'" in quotes, "and subject to discovery in accordance with Rule 3(c) and these rules as to the knowledge and facts not acquired by the expert in preparation for trial or anticipation of litigation," and you might want to add instead of just "as to" but "only as to."

CHAIRMAN SOULES: That's fine. Second to that?

PROFESSOR ALBRIGHT: Can you read it one more time?

HONORABLE SARAH DUNCAN: Uh-huh. Why don't I just give it to you?

PROFESSOR ALBRIGHT: Oh, okay.

CHAIRMAN SOULES: Is there a second for that motion?

MR. LATTING: Yes. I second it.

CHAIRMAN SOULES: Okay. Joe seconds it. Any further discussion? Rusty McMains.

MR. MCMAINS: Is the purpose of that to still preclude the disclosure of facts acquired during the preparation?

CHAIRMAN SOULES: Yes.

MR. MCMAINS: I mean, because facts in terms of like observations like measurements, testing results, test results, those things, those are discoverable.

HONORABLE SCOTT BRISTER: Not from the consulting expert.

MR. MCMAINS: From a testifying expert they are. Hers, a testifying expert doesn't get to give those. Well, that's

ridiculous.

MR. MARKS: Yeah, but they do under a new rule.

MR. MCMAINS: No. We don't have a scope rule on that.

CHAIRMAN SOULES: I really think what Sarah has dictated, that really deals with consulting experts. It doesn't have anything to do with testifying experts.

MR. KELTNER: That's right. This is all a very good point. Here's how we can cure it, though, and it's pretty simple, but what we are trying to deal with now is the idea of the dual capacity expert, whether they be consulting or testifying, who also have knowledge of relevant facts just because of their connection with the events of the case.

Rusty has got a good point. The testifying expert is going to have to disclose everything he or she knows no matter how they know it, whether it be in anticipation of litigation or independently. We have got to make that distinction and then we have got it.

MR. LATTING: Yes. Yes. Yes.

HONORABLE SARAH DUNCAN: Can we

just take out "testifying or"?

HONORABLE SCOTT BRISTER: But doesn't that get you back to the problem originally? Then you have got an expert with knowledge of relevant facts that you don't have to do anything 'til 75 days before trial.

MR. KELTNER: Give me a couple of seconds, and I think I can figure that one out.

HONORABLE SCOTT BRISTER: Let me ask one more thing while you are figuring that. Do we have a problem with which trial that we have in work product cases with preparation for trial? In other words, this is the doctor or expert we have used in five previous trials that, oh, we are not going to go into their knowledge of preparation because it wasn't preparation for this trial, how they found out things. I just raise that.

MR. KELTNER: If you will look at Rule 10, 10 deals with that issue to some extent, Scott, and I think makes clear that you can get biographical information, background, and things like that, but I think that's an excellent point.

CHAIRMAN SOULES: Okay. So we are going to substitute at 3, and I guess it would be "Consulting Expert with Knowledge of Relevant Facts," would be the title of it, wouldn't it?

MR. MARKS: Do we now have the problem we were talking about yesterday?

MR. KELTNER: We may have a cure on Rusty's concern. He is going to look at it quickly.

MR. YELENOSKY: Luke.

CHAIRMAN SOULES: Let Rusty and David work through this because we have something on the table.

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

MR. KELTNER: Yes. He agrees that it solves it.

CHAIRMAN SOULES: Okay. So we say, (3), Consulting Experts with Knowledge of Relevant Facts," colon, and then Justice Duncan's language is what?

MR. KELTNER: Alex has that, and it would be now 3(2)(e)(3), same heading,

we put Sarah's comments there or version there.

CHAIRMAN SOULES: 3(2)(e)(3), the heading is "Consulting Expert with Knowledge of Relevant Facts," and the substance that follows the colon --

MR. KELTNER: No. It would be "Expert Witnesses with Knowledge of Relevant Facts."

PROFESSOR ALBRIGHT: It would be "expert witnesses"?

MR. KELTNER: Yeah.

CHAIRMAN SOULES: We really are only talking about consulting experts, aren't we?

MR. KELTNER: Not really.

CHAIRMAN SOULES: All right.

MR. KELTNER: Sarah, would you come up, and I will show you what -- we are going to make one small change.

HONORABLE SARAH DUNCAN: I'm sorry?

MR. KELTNER: Would you come up and take a look at this for a minute? You have great credibility.

HONORABLE SARAH DUNCAN: It's just the grammar that's driving me crazy for the last two days.

CHAIRMAN SOULES: Okay. This will be 3(e)?

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

CHAIRMAN SOULES: 3(2)(e)(3), and it reads as follows. Go ahead, Alex.

PROFESSOR ALBRIGHT: "Expert Witness with Knowledge of Relevant Facts. An expert who has acquired knowledge of relevant facts not in anticipation of litigation or preparation for trial is a person with knowledge of relevant facts and subject to discovery in accordance with Rule 3(c) and these rules only as to those facts."

CHAIRMAN SOULES: Okay. Is there a second?

MR. SUSMAN: Second.

CHAIRMAN SOULES: Moved and seconded. Further discussion?

MR. LATTING: What about opinions? Do you mean to leave those out?

PROFESSOR ALBRIGHT: That's right.

MR. MCMAINS: Yes. Out of that rule, yes.

MR. KELTNER: Out of that rule because they are generally discoverable under a previous one.

HONORABLE DAVID PEEPLES: Do we want the word "is" before "subject"?

CHAIRMAN SOULES: Okay. We took out the word "only" and we add "is" before "subject."

Okay. Here it comes again. "Expert Witness with Knowledge of Relevant Facts. An expert who has acquired knowledge of relevant facts not in preparation for trial or in anticipation of litigation is a person with knowledge of relevant facts and is subject to discovery in accordance with Rule 3(c) and these rules as to those facts." Those in favor show by hands. 19. Those opposed? Okay. That's unanimous. That is the new 3(2)(e)(3).

HONORABLE SCOTT BRISTER: Wait, wait, wait. Let me just make sure. And we are agreed preparation for trial is preparation for any trial?

HONORABLE C. A. GUITTARD: Yes.

HONORABLE SCOTT BRISTER: It seems like it has to be if the in-house engineers helped you on two previous cases but wasn't involved in the design. That's not a person with knowledge of relevant facts. So preparation for trial would include preparation for prior trials.

MR. GALLAGHER: How about in "anticipation for litigation"?

HONORABLE SCOTT BRISTER: And again, does anticipation of litigation have to be before it was filed?

HONORABLE F. SCOTT MCCOWN: Can't we leave that?

CHAIRMAN SOULES: Yeah. This gets into a --

HONORABLE F. SCOTT MCCOWN: That's a big problem. Can't we leave that?

MR. KELTNER: Scott, I will tell you I left that intentionally that way because that is an issue that is currently still alive with the consulting expert that has not been resolved by the Court.

MR. SUSMAN: Yeah. I would

leave that.

MR. LATTING: This is the proverbial can of worms.

CHAIRMAN SOULES: Okay. Does this get the U-turn completed now that we were going to make?

MR. KELTNER: Yes.

CHAIRMAN SOULES: Okay. That takes care of that problem. And then Rule 4.

HONORABLE F. SCOTT MCCOWN: You have a copy of Rule 4 in front of you, and let me walk you through it and the changes that were made yesterday. Big subdivision (1) just sets out the general rule that any matter protected from disclosure by any privilege, that's not discoverable.

Then big subdivision (2) sets out the specific work product privilege. Subdivision (a) defines work product. Then subdivision (b) sets out the protection of work product. Subdivision (1) says that an attorney's mental processes are protected, period. You cannot get attorney mental processes even if you can prove undue hardship and substantial need. Protection of other work product then is

protected, and we took Luke's suggestion to make it parallel and say "may not." So a judge may not order discovery of any other work product except on a showing of substantial need and undue hardship.

Now, paragraph (3) is the difficult one because it's a concept that could itself go up in paragraph (1) or could be a separate paragraph, and we have had it both places half a dozen times, but we decided that the easiest way was to put it as its own paragraph because what paragraph (3) is, is when (1) and (2) interact together. In other words, you can't get attorney mental processes. You can get other work product if you show substantial need and undue hardship. When you make that showing, there may consequently be attorney mental processes that you can figure out from the stuff you are getting. That's the Occidental situation.

And so what we say is notwithstanding subdivision (1) if you have disclosure ordered pursuant to subdivision (2), that it may incidentally disclose by inference attorney mental processes that would otherwise have

been protected under subdivision (1), but then we make clear that in such a circumstance the judge shall protect against the incidental disclosure of attorney mental processes to the extent possible. We don't try to define it because there may be all kind of things, limited disclosure, redaction.

And then paragraph (4) says that any time you're ordering discovery of work product you shall to the extent possible protect against the disclosure of any mental impressions opinions, conclusions, or legal theories even of a party or a party representative. So that would be nonattorney. So that's protection of work product.

Then I would recommend we take subdivision (c) completely out because now we have the consulting expert, and it really doesn't fit here, and then (d) would become the exceptions, and that will actually have a much better organization. So then you have the exceptions to protection of work product, and we have gone back and done what Steve Susman asked. We have made them all parallel nouns, and they are the eight exceptions

listed. It's a hard rule to write, but I think that gets it, and I would move the adoption of Rule 4 as before you.

MR. SUSMAN: Second.

CHAIRMAN SOULES: Moved and seconded. Discussion? Judge Guittard.

HONORABLE C. A. GUITTARD: In (b)(1) -- on (b)(2), "a judge may not," that indicates that a judge may or may not. Should it say "a judge shall not"?

HONORABLE F. SCOTT MCCOWN: Okay.

MR. SUSMAN: Yes.

HONORABLE F. SCOTT MCCOWN: I will accept that friendly amendment.

CHAIRMAN SOULES: In (1) and (2)?

HONORABLE C. A. GUITTARD: Just in (2).

HONORABLE F. SCOTT MCCOWN: Well, we could do it in both, couldn't we, Judge?

HONORABLE C. A. GUITTARD: Yeah. Both. Both, "shall."

HONORABLE F. SCOTT MCCOWN: I

will accept that friendly amendment and change the "may" to "shall" in both (1) and (2).

MR. LATTING: Scott, would it be a good idea to modify (4) in some way to make it clear that that was for other than attorney mental processes?

I was a little confused when I read that because I guess now that you have explained it, it's clear enough, but when you open this rule book three years from now in Goldthwaite it may not be quite so clear. No offense to Goldthwaite.

HONORABLE F. SCOTT MCCOWN: You want to say "nonattorney mental processes"?

MR. LATTING: Well, I am just asking the question of you and the rest of the committee. Would that be a good idea? Would that make it clearer what we are trying to say and trying to do?

MR. KELTNER: I'm afraid that might give a different meaning than you intend because it could mean that it is the thought processes of others, not attorneys, even though they work closely with the attorneys, and we have gotten away from that.

CHAIRMAN SOULES: Judge McCown, would you explain? I missed apparently something in your explanation. What's the difference between the last sentence in (3) and all of (4)?

MR. LATTING: Yeah. That's it.

HONORABLE F. SCOTT MCCOWN: That's a good question. You could theoretically take out the last sentence of (3) because (4) does include the last sentence of (3), but the reason we had that in is because of the committee's desire to do everything we could to protect attorney work process, but you are right. (4) subsumes the last sentence of (3). It's going to be very rare that -- here is the situation you have to have to use (4) for nonattorneys, and it's just not going to come up much, but No. 1, it's going to have to be a communication that wouldn't already be protected by attorney-client privilege. Attorney-client privilege is going to protect most of that.

No. 2, it's going to have to be one where you show that you have got substantial need and undue hardship, which is a rare showing,

and then, No. 3, you are going to have to have a client who somehow has some mental impressions, opinions, conclusions, or legal theories that get tied up in what you are producing through substantial need and undue hardship that weren't preserved by attorney-client privilege. I mean, it's kind of hard to imagine what that would be, but we have protected it if it comes up.

But I would accept, Luke, if you want to take that last sentence out in (3), we could do that if you think that makes it clearer.

MR. SUSMAN: In fact, is the law such that mental impressions of a nonattorney are entitled to any special protection?

HONORABLE F. SCOTT MCCOWN: If they come into (a). It's mental impressions that are prepared in anticipation of litigation or for trial.

MR. MCMAINS: Mental impressions isn't in (a).

HONORABLE F. SCOTT MCCOWN: "Work product is any communication or material..."

MR. SUSMAN: You're saying that mental impressions and facts are treated differently even when a nonattorney is involved. We protect -- we give some special protection to a mental impression like the light was green or, you know, some impression. He was angry. The person was mad.

HONORABLE F. SCOTT MCCOWN: Let me tell you what I can do on this, and then I will let Alex speak to it. You can either take the last sentence out of (3) and have only (4). That's fine with me. Or you can delete (4) entirely and leave the last sentence of (3) in. That's fine with me, but Alex can explain why she thinks it's important to have (4) for nonattorney.

PROFESSOR ALBRIGHT: It's important because think about Flores V. Fourth Court of Appeals in that that was a party communication opinion. The Supreme Court put into the party communications rule the need -- in the need and hardship exception that applies to party communications the distinction between mental impressions and opinions and facts. In that case they didn't

apply it in that case, but that was an insurance adjuster's pre -- let's call it a prelitigation report.

Let's assume that that one wasn't done in anticipation of litigation, but let's assume we have an insurance adjuster who is reporting to his or her boss about the litigation preparation, and part of that is the reserves that they are holding, that the insurance company is holding. Well, reserves are a mental impression and opinion because it says, "This is what I think this case is worth."

Or if the vice-president of -- let's say if it doesn't apply to that for insurance, let's say that you are a vice-president reporting to the CEO, and so what you have to do is report how much you think the potential liability is in a particular lawsuit. That's a mental impression and opinion about the lawsuit that is prepared in anticipation of litigation or preparation for trial that would not be discoverable, should not be discoverable. So it is a -- I think there are particular situations. They may be rare, but you do want to protect these people's mental

impressions and opinions.

MR. SUSMAN: If that's the case -- I mean, I will accept that that's the law. I am not even arguing against it. If it is the law, if it is in protection, I think the last sentence of (3) ought to come out because it's confusing. It is accomplished in (4).

HONORABLE F. SCOTT MCCOWN: Okay. I agree. Done.

CHAIRMAN SOULES: Okay. If we do that then I had a couple of questions still about (4). Beginning with the first sentence, "If a judge orders the discovery of work product," we are talking about pursuant to subdivision (2), right?

HONORABLE F. SCOTT MCCOWN: Or (1). No.

Yeah. Yeah. Pursuant to (2).

CHAIRMAN SOULES: Why don't we say "subdivision (2)" instead of "this rule"? We use that style -- well, really the order is under (2), not (3).

HONORABLE F. SCOTT MCCOWN: Yeah. You're right. And then --

MR. MCMAINS: Luke, on that issue, the problem is that (1) is a general rule that applies to any privilege that protects something from disclosure. Well, one of the ways that it ain't protected is if it's waived, and you can waive work product just as you can waive anything else. So if you leave -- you leave (1) out if you are not referring to the total rule, or at least not referring to Rule 1, then in a situation where there has been a waiver of any privilege then really (2) doesn't come into play. So, I mean, it seems to me that it is the issue.

CHAIRMAN SOULES: Well, waiver is not addressed in here anyway.

MR. MCMAINS: It is addressed implicitly in the sense that (1) says that the way that privileges work is it's protected from disclosure. Your argument is it's not protected from disclosure because it's been waived, and we have all kinds of waiver law, and that comes in under (1), and so you don't want to put in a prohibition under (2) because that elevates the work product privilege to twelve other privileges.

HONORABLE F. SCOTT MCCOWN: Right. But Luke's still absolutely correct because what it says is if a judge orders discovery of work product pursuant to little subdivision (2), the judge shall protect. If he is ordering it pursuant to waiver then he doesn't protect because it's been waived. So I will accept that suggestion.

CHAIRMAN SOULES: Okay. And then going on from there, "The judge shall to the extent possible protect against the disclosure of mental impressions, opinions, conclusions, or legal theories."

I would add "not otherwise discoverable" because there are -- if we are talking about the breadth of everyone who may have mental impressions, opinions, conclusions, opinions or legal theories and not just lawyers, a lot of those are otherwise discoverable. So just three words at the end, "not otherwise discoverable."

PROFESSOR ALBRIGHT: What is otherwise discoverable?

CHAIRMAN SOULES: Mental impressions, opinions, conclusions, or legal

theories. So we are saying that (4) not only protects lawyers' mental impressions but all protectable mental impressions.

PROFESSOR ALBRIGHT: Oh, okay. I thought you were adding it to (1).

CHAIRMAN SOULES: No. Just at the end of (4).

HONORABLE F. SCOTT MCCOWN: Okay. I will accept that, too.

CHAIRMAN SOULES: That's all I have. Justice Duncan.

HONORABLE SARAH DUNCAN: 2(a), it concerns me that it's just a communication made --

CHAIRMAN SOULES: I can't hear you. I'm sorry.

HONORABLE SARAH DUNCAN: It concerns me that it's just a communication made or the material prepared. What about things before it's the subject of a communication or reduced to some material? I mean, a mental process or a conclusion that is only in my mind is not a communication, and it's not material.

HONORABLE C. A. GUITTARD: Is

it work product?

HONORABLE SARAH DUNCAN: Is this going to authorize deposition of the attorneys? I mean, obviously it's not intended to because we have got a whole subdivision (b), but it just seems to me the definition of work product needs to be expanded.

CHAIRMAN SOULES: I think that's right. If that's where we are going to define work product, we need to push some of the language in (b)(1) up repeated in (a).

HONORABLE F. SCOTT MCCOWN: Well, wait. Rather than do that why not just say, "work product is anything" --

MR. PRICE: "Made or prepared."

HONORABLE F. SCOTT MCCOWN: "Made or prepared."

PROFESSOR ALBRIGHT: At one point we had "is anything including a communication or material."

HONORABLE F. SCOTT MCCOWN: If you just say "Work product is anything made or prepared in anticipation of litigation or for trial."

CHAIRMAN SOULES: Is a mental impression made?

HONORABLE F. SCOTT MCCOWN: Sure. You make up your mind.

CHAIRMAN SOULES: Is it formed or made?

MR. PRINCE: Speculated.

HONORABLE F. SCOTT MCCOWN: Well, I think "anything made or prepared."

MR. MARKS: How about mental impressions? Could you put that there? Work product is any --

MR. SUSMAN: How are you going to discover it without forcing lawyers to give compulsory psychological exams. I mean, how are you going to discover a mental impression that hasn't been reduced to writing?

CHAIRMAN SOULES: I think it ought to say, "Work product is any communication made or material prepared or any mental impressions, opinions, conclusions, and legal theories," I think. I haven't got the grammar, but it seems to me like those words ought to be pushed up into (a), 2(a), as well.

HONORABLE F. SCOTT MCCOWN:

Well, I think 2(a) is a very clear definition of work product.

CHAIRMAN SOULES: But it's not all-encompassing.

MR. SUSMAN: It is.

HONORABLE F. SCOTT MCCOWN: If you say, "Work product is anything made or prepared in anticipation of litigation or for trial," what could possibly exist that wouldn't fall within that definition?

PROFESSOR ALBRIGHT: You could say "made, prepared, or developed."

HONORABLE F. SCOTT MCCOWN: Well, I mean, at some point common sense has to operate.

MR. LATTING: We need three words where one will do always.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: One of the problems I have with even trying to allude to mental impressions in the (a) part if you are talking about other than lawyers, if you are talking about parties' mental impressions, I mean, somebody observes an event or investigates an accident in terms of taking

down physical data and whatever, all of that stuff is clearly intended to be and always has been -- it's not work product with regards to that, and yet you want to say "anything prepared." I mean, our work product has been in terms of communications and material that is prepared in anticipation of litigation, but it has not included the original investigation. It has not included observations of the scene, and if you start expanding it to do that, you are basically just saying, "Okay. You don't get to talk to the eyewitnesses, you know, who are employees." That's silly.

MR. GALLAGHER: More importantly the experts.

MR. MCMAINS: Well, true.

HONORABLE F. SCOTT MCCOWN: Yeah. I think just "Work product is anything made or prepared in anticipation of litigation or for trial," and then (b) sets out the steps in protection.

MR. MARKS: I move that we add the language that Luke is suggesting.

HONORABLE C. A. GUITTARD: Or

"formed or prepared." "Developed."

MR. MARKS: I guess it failed for a second.

CHAIRMAN SOULES: I'm sorry. I'm trying to think on this, John, at the same time you are making your motion. Is there a second?

HONORABLE SARAH DUNCAN: I second it.

MR. MARKS: I have got a second here.

MR. SUSMAN: Why isn't it broad enough the way it is? I mean, it --

CHAIRMAN SOULES: Okay. Discussion? Steve has got a question. Somebody answer it.

MR. SUSMAN: I mean, my question is what else -- I mean, this is what you are discovering, the communication, the material. Why doesn't that cover it to avoid making it so broad that someone can come in and say, as Rusty does, I mean, the plaintiff in the accident as soon as the car ran through the intersection, looked over, and that was an observation formed in preparation for what she

knew was going to be a lawsuit. I mean, someone will make that argument, that it's, therefore, work product and I don't have to disclose it.

I mean, I am just worried that we are expanding it beyond any possible -- the danger of having to produce something is something that's become material or communication. That's where you are going to have to produce it.

MR. MARKS: The concern on the other end is that it would be too restrictive.

MR. SUSMAN: Well, explain to me how it could be too restrictive. How are you going to get something that's not material or communication?

MR. MARKS: I think your analogy is -- I mean, maybe somebody would argue that, but I don't think anybody would get very far with that, but there are certainly situations where somebody in anticipation of litigation working with a company, communicating back and forth, comes up with ideas and thoughts about liability and exposure that shouldn't be discoverable even

though he's not an attorney.

MR. LATTING: But it's not work product. It doesn't exist anymore.

CHAIRMAN SOULES: Let me try this. "Work product is" and then say "an attorney's" or "an attorney's" -- no. Start over again.

"Work product is an attorney's mental impressions, opinions, conclusions, and legal theories," and now that's just the lawyer, you see. "And anything made or prepared in anticipation of litigation or for trial for a party or a party's representative, including a party's attorney." So that the mental impressions, opinions, conclusions, and legal theories that we are adding up there is just the lawyer's.

It would just be -- if you look at No. (1), (b)(1), in the second line, the last two words, "the attorney's," down to the end. Insert that, leave it where it is, but also put it after the word "work product is."

"The attorney's mental impressions, opinions, conclusions, and legal theories, and..." And then do what Judge McCown said,

"anything made or prepared" and then to the end of (a).

HONORABLE F. SCOTT MCCOWN: Luke, I will tell you why I have real trouble with that. Work product is a real hard thing to teach lawyers and for lawyers to work with day in, day out and apply the rule. The way this rule is written -- and we worked on it a long time -- it seems to me you can teach it. You can learn it. It's real clear.

"Work product," and if you want to say "is anything made or prepared," that's fine with me; but "Work product is anything made or prepared in anticipation of litigation or for trial by the party," et cetera. Now, that definition is simple. It's clear.

Then we set out the protection of work product. You automatically know that subdivision (a) includes the attorney's mental impressions, opinions, conclusions, and legal theories because the very first thing we say in (b) is "A judge shall not order discovery of the work product of an attorney that contains the attorney's mental impressions, opinions, conclusions, and legal theories."

So you already know that that's work product and then in (2) set out the substantial need and hardship for everything else.

Subdivision (3), I agree with you we need to take out the last line, but that's the Occidental point. Then subdivision (4) says if you are going to order discovery of work product under this rule then the judge to the extent possible will protect against that disclosure. I think that's understandable.

CHAIRMAN SOULES: Let me see if I understand John Marks' motion that was seconded because we didn't put the words down, and that's what I was trying to do, too. That would be to insert the words "the attorney's mental impressions, opinions, conclusions, and legal theories" after "Work product is," and then "anything made or prepared" until the end of the definition of work product. Is that what you are proposing? Is that what you were seconding?

MR. GALLAGHER: I would like to have that in a little more concise form on something this important because I can envision circumstances in which things that

are obviously not work product become -- it becomes an issue in the litigation, and I just want to make sure I understand what amendment we have got and what the language is if we are going to suggest --

CHAIRMAN SOULES: All right. Get your pencil out.

MR. GALLAGHER: I have got it.

CHAIRMAN SOULES: And go with me. "Work product is..." Insert "an attorney's mental impressions, opinions, conclusions, and legal theories, and anything" --

MR. GALLAGHER: And anything?

CHAIRMAN SOULES: Yes, sir.

MR. GALLAGHER: Anything?

CHAIRMAN SOULES: You are supposed to be writing, not thinking.

MR. MCMAINS: Just like Luke did.

CHAIRMAN SOULES: "Anything." Strike "any communication." Leave in "made or." Strike "material."

MR. GALLAGHER: Obviously somebody else was writing and not thinking.

CHAIRMAN SOULES: Now you have got it. Now you have got what the proposal is.

MR. GALLAGHER: Okay.

MR. MARKS: "Any communication made or prepared"?

CHAIRMAN SOULES: "Anything."

MR. MARKS: "Anything made." Okay.

MR. GALLAGHER: But may I address this by way of example?

CHAIRMAN SOULES: Okay. That's a motion that's been seconded. Discussion?

MR. GALLAGHER: Okay. By way of example, my good friend Mr. Marks stated, for instance, an internal memoranda that was prepared before the explosion ever occurred relative to some problem with a particular operating unit of if we don't get this thing fixed, it's going to blow up. If anything is intended to extend to and include that kind of documentation or that kind of information then I would object to it, and I think that using the word "anything" in this context certainly broadens attorney-client privilege beyond what

Judge McCown was referring to as our common sense understanding of what it means.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: It's my understanding that the old rules were based upon -- okay. Everything in the world is work product. Here are the aspects of work product that you can discover. You can discover all this stuff about experts. You can discover party communications, et cetera, et cetera, and I don't mean to say everything in the world. I mean that it was a broad definition of work product, but then there were specific exceptions made, and it seems to me that we have made exceptions to the protection of work product, for instance, with experts and their reports, and that needs to be incorporated in this definition, and to say that anything made or prepared in anticipation of litigation is protected work product on the face of these rules is wrong.

HONORABLE F. SCOTT MCCOWN: No, no. It doesn't say protected work product. That's the work product definition. What's

protected is in subdivision (b) and then we expressly set out the exceptions. "The following are discoverable, even if made in preparation" --

HONORABLE SARAH DUNCAN: Oh, I see. I see.

HONORABLE F. SCOTT MCCOWN: And then the exceptions are listed, and experts is Exception No. 1.

HONORABLE SARAH DUNCAN: I gotcha.

HONORABLE F. SCOTT MCCOWN: So the structure is (a) is merely a definition. (B) is what gets protected, and (c) lists the exceptions, and everything you-all have talked about so far, the examples are in the exceptions expressly.

CHAIRMAN SOULES: Steve, and then I will get to Joe.

MR. SUSMAN: Well, my problem is that, I mean, striving to protect an attorney's mental impressions, opinions, et cetera, it seems to me that in the first place if it has not been reduced to writing or not communicated or in material, how in the world

is it discoverable anyway? I mean, I wished in the world that the associates in my office would reduce their, quote, "work product" to tangible form, and I would not have to pay them or compensate them for these ideas that are in their mind but never get reduced to writing, but now we are going to protect that from discovery. That to me is kind of silly. I mean, what we are concerned about is tangible work product.

The second thing is the way you have got it written, Luke, an attorney's opinions and conclusions and impressions not in connection with litigation are not protected. Lawyers are parties in a lot of lawsuits. Okay. They are parties because they are advising S&L's or they are handling stock transactions, or simply because a lawyer has an opinion or impression does not immunize it from discovery. Okay. It's got to be tied in to something he's doing to get ready for a lawsuit. So you have got a drafting problem right away in your version. I just don't see why it's not covered fully the way Scott wrote it.

HONORABLE F. SCOTT MCCOWN: Well, now, don't say Scott. That may drag it down. This was the work product of Lee Parsley and Alex Albright, and we had Paul Gold and Richard Orsinger. We have been over this thing a thousand times with a lot of people and thought of every example you could think of.

HONORABLE C. A. GUITTARD: Mr. Chairman?

CHAIRMAN SOULES: Okay. Anything else on this, on the motion? Judge Guittard.

HONORABLE C. A. GUITTARD: Mental impressions are not work product because they are not a product.

MR. LATTING: That's right.

MR. SUSMAN: Right.

MR. KELTNER: That's, I think --

MR. LATTING: So are we voting on your --

CHAIRMAN SOULES: Isn't that the classical definition of work product, mental impressions of a lawyer?

MR. KELTNER: Yes.

CHAIRMAN SOULES: I mean, that's exactly the way we define it.

MR. KELTNER: Luke, if we get away from mental impressions, thoughts, and processes it will emasculate Occidental. We can't do that. We are going to have to stay within those terms as the court has been using them in recent years.

CHAIRMAN SOULES: And doesn't the court use the word "mental impressions"?

MR. KELTNER: Heavens, yes.

MR. MCMAINS: But there is --

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, there is protection for the attorney-client privilege independent of the work product. Work product is almost subsumed in the attorney-client privilege, period. I mean, we have -- this is merely an expansion beyond the attorney-client privilege. You already have the attorney-client privilege protection.

MR. KELTNER: I would disagree with that, Rusty.

MR. MCMAINS: And the attorney work product is a species of the attorney-client privilege, as far as the attorneys are concerned.

MR. KELTNER: Well, I think maybe at one time in historical development that was the case. I think the truth of the matter is now it is maybe almost exactly the opposite way around. What we want to do and, Luke, what your point was and what Steve points are both well-taken. There is a way to do them.

What Steve is saying is you can't get -- yeah, mental impressions are protected, but quite frankly, they are not in a way that you could discover them until they are communicated or made in some tangible way, and that's what Steve's saying, and he's right, and I think we probably ought to look at it that way in terms of protection.

The question comes, can you be compelled to give your mental impressions if a lawyer testifies, lawyer Steve, not a party testifies, and that's simple. The answer is "no," but there is no product there to protect

because it's not made or communicated. So and I think that Steve is sort of on the right trail, but it has to include the mental impressions, conclusions, opinions, and thought processes of the lawyer.

MR. LATTING: I have a question.

CHAIRMAN SOULES: Let's see if we have got anybody else on the motion. Carl Hamilton.

MR. HAMILTON: Is this to vote on the whole Rule 4?

CHAIRMAN SOULES: No. This is just the changes to 2(a). Anything else on 2(a)? Alex Albright.

PROFESSOR ALBRIGHT: Well, first I want to respond to Mike Gallagher's concern about the word "anything." What he described was a prelitigation memorandum investigation. So it is anything, but it was not prepared in anticipation of litigation or for trial. So it would not be work product under this rule.

MR. GALLAGHER: I disagree with you. It could be prepared in anticipation of

litigation that might be foreseeable even though the event out of which the litigation arises has not yet occurred.

CHAIRMAN SOULES: But we have got case law that deals with that.

PROFESSOR ALBRIGHT: But that's not the problem with "anything." That's the problem with "in anticipation of litigation," but in any event, I think for the reasons everybody said I think including an attorney's mental impressions, opinions, and legal theories should not be included here because it is clearly included elsewhere. I think a work product is anything a lawyer does in anticipation of litigation, and I consider my ideas being something I do. So nobody can take my deposition and get them, but I think if we say, "Work product is anything made or prepared in anticipation of litigation or for trial," I think we are in good shape.

CHAIRMAN SOULES: Okay. Let's vote on the motion. Those in favor show by hands.

MR. MCMAINS: What motion?

CHAIRMAN SOULES: We are voting

on the motion that Marks made and Sarah seconded that I just had Mike write down.

MR. LATTING: Your language.

MR. MCMAINS: The one that has the attorney mental impressions and stuff in it?

CHAIRMAN SOULES: Yes.

HONORABLE SARAH DUNCAN: Can I withdraw my second?

CHAIRMAN SOULES: Okay. Withdraw it. Anybody else want to second it?

HONORABLE SARAH DUNCAN: Can I offer an alternative that I think gets to the same place?

CHAIRMAN SOULES: Okay.

MR. MARKS: Let's see if I have got a second. Is anybody going to second my motion?

CHAIRMAN SOULES: Fails for lack of a second. Okay. Any other motions on 2(a)? Justice Duncan.

HONORABLE SARAH DUNCAN: "Work product is: (1), an attorney's mental impressions, opinions, conclusions, and legal theories developed in anticipation of or for

trial; and (2), any communication made or material prepared by" and continue with the present content of subdivision (a).

CHAIRMAN SOULES: Is there a second?

HONORABLE DAVID PEEPLES: Second.

CHAIRMAN SOULES: Moved and seconded. Those in favor show by hands. Nine. Those opposed? Eight. Right?

Okay. Let's count them again. Those in favor show by hands, in favor. Ten. Those opposed? Ten. Did everybody vote?

MR. MEADOWS: At least once.

HONORABLE DAVID PEEPLES: May I ask, the people that voted against that, what are you for?

MR. LATTING: I am for Scott McCown's version of this rule.

HONORABLE F. SCOTT MCCOWN: "Work product is anything made or prepared in anticipation of litigation or for trial by or for a party or a party's representative."

MR. SUSMAN: Second.

MR. LATTING: Second.

MR. SUSMAN: Let's have a vote on that, see if we get the votes.

CHAIRMAN SOULES: Okay.

HONORABLE F. SCOTT MCCOWN: All that is is a definition. The protection of work product is set out in (b), and the exceptions are set out in (c).

MR. SUSMAN: Let's see if we get the votes on that.

HONORABLE DAVID PEEPLES: Luke, can I --

CHAIRMAN SOULES: Okay. I am going to try to take your deposition and find out what your trial theories are because I don't think it's covered. I don't think it's covered.

HONORABLE F. SCOTT MCCOWN: Well, it's protection of attorney's mental processes. "A judge shall not order discovery of the work product of an attorney or an attorney's representative that contains the attorney's mental impressions, opinions, conclusions, and legal theories."

CHAIRMAN SOULES: Okay. Because that's not work product after "or."

PROFESSOR ALBRIGHT: Yes, it is.

CHAIRMAN SOULES: Anyway. Those in favor of -- how did you write it again?

MR. MCMAINS: Judge Peeples wants to have a discussion.

HONORABLE F. SCOTT MCCOWN: "Work product is anything made or prepared in anticipation of litigation or for trial."

CHAIRMAN SOULES: Okay. And then the rest of it. Judge Peeples.

HONORABLE DAVID PEEPLES: I am genuinely curious, okay, about what anybody would want from a lawyer by discovery other than what Mike Gallagher said, and I think Alex answered you on that. That's not in anticipation of litigation. Why are we afraid to protect a lawyer's mental processes just generally? Now, somebody here who is voting against all of this stuff is worried about it. What are you after?

HONORABLE F. SCOTT MCCOWN: I am after clarity, ease to teach, and ease to understand.

HONORABLE DAVID PEEPLES: Okay. That's one answer. Anybody else?

MR. LATTING: All right. I have got another one. I have got another one.

HONORABLE DAVID PEEPLES: Okay.

MR. LATTING: What Steve Susman said about lawyers being in lawsuits not in their representative capacity but as either house counsel or lawyer/litigant. That's another reason. Another reason is it bothers me to have it in here when we say that you can't discover legal theories as it relates to contention interrogatories.

HONORABLE F. SCOTT MCCOWN: But that's an exception.

MR. LATTING: But the main reason is that this rule as written by Lee Parsley and Scott McCown and others will work. It will be just fine. It will get us right through all of this stuff, and it's no big deal. So let's pass it.

HONORABLE DAVID PEEPLES: What's your problem with it, Luke? Why don't you like the "anything" language that Scott has?

CHAIRMAN SOULES: Well, it sure concerns me that we have a record now that we are rejecting as a part of a definition of work product the attorney's mental impressions, opinions, conclusions, and legal theories developed in anticipation of litigation or for trial.

HONORABLE F. SCOTT MCCOWN: We are not rejecting it.

MR. LATTING: We are not rejecting it.

HONORABLE F. SCOTT MCCOWN: We are just saying that that definition subsumes that concept and that it clearly is expressed in (b)(1).

CHAIRMAN SOULES: Not in my mind and not in the minds of at least half of this committee.

MR. PRINCE: But as somebody who voted against what you said I think it's included in definition in subpart (a). I think it's made in anticipation of trial. That's it. That was the reason for my vote. I want that on the record.

MR. MARKS: What's the problem

with clarifying it?

HONORABLE C. A. GUITTARD: Mr. Chairman, the problem with it is that still you get down to subdivision (1) which has absolute prohibition. You still have work product. If mental -- in other words, work product that contains the attorney's mental impressions, opinions, conclusions, and legal theories, there is still no language that deals with asking a lawyer, "What was your impression?" That's not work product as this subdivision (a) is originally written.

HONORABLE F. SCOTT MCCOWN: Well, but --

CHAIRMAN SOULES: Well, we have beat this horse to death. I mean, if the committee is not inclined to clarify it then I guess it will go unclarified then. Those in favor of Scott's proposal show by hands. Eight. Those opposed?

HONORABLE F. SCOTT MCCOWN: I got nine.

CHAIRMAN SOULES: Okay. I will count again in a minute. 11, I think. I will get to take a recount. Recount, those in

favor of Scott's proposal show by hands.

I can't count because the hands are moving. Ten. Those opposed?

MR. PARSLEY: I got 11 that time.

CHAIRMAN SOULES: You got 11. I got 10. Sorry. I apologize for the imposition on you. One more time, those in favor of Scott's position. 10.

HONORABLE F. SCOTT MCCOWN: That's a vote for going home by noon, too, guys.

CHAIRMAN SOULES: 11.

MR. PARSLEY: Yeah.

CHAIRMAN SOULES: Okay. 11. Those opposed?

MR. LATTING: You-all want to stay?

MR. GALLAGHER: This is a vote to go home now.

CHAIRMAN SOULES: 11.

MR. PARSLEY: I get 12 that time, Luke. I'm sorry.

MR. GALLAGHER: Why don't only one of you count?

CHAIRMAN SOULES: One thing that's happening, everybody is waving their hands and talking, and I can't count. I apologize to you. Hands high those who oppose it. You put your hand up late.

12. Fails. Fails 12 to 11.

HONORABLE DAVID PEEPLES: Luke, I'm embarrassed to admit it. I thought I voted twice on that, and I was talking when you called it for the third time, and I was for it, and my vote didn't count.

CHAIRMAN SOULES: It still fails.

MR. MARKS: He counted it.

HONORABLE DAVID PEEPLES: No, he didn't. My hand wasn't up.

CHAIRMAN SOULES: Well, even if we add you to the list, Judge, it's still 12 to 12.

MR. MARKS: Where are we on my vote? What happened to my motion? Well, did it pass or fail?

MR. GALLAGHER: It failed because no one wanted to second it.

MR. KELTNER: Could I make a

suggestion that we take about a five-minute break and see if we can fine tune this enough because I think you are going to get the votes to pass it. There are two reasons that people are voting against it. One of that is the second is going to lose. My theory is we can probably fine tune this, have this done in five minutes if we take a break.

CHAIRMAN SOULES: Okay. Take ten minutes.

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

HONORABLE F. SCOTT MCCOWN: We have a compromise worked out that I think satisfies people's concerns. Go back to "work product" defined the way it's typed. So forget everything. Go with it the way it's typed and make the following change. "Work product is any communication made or material prepared or mental processes developed in anticipation of litigation or for trial." So the addition would be after "material prepared" you would insert the phrase "or mental processes developed."

CHAIRMAN SOULES: Mental impressions or processes?

PROFESSOR ALBRIGHT: Processes.

MR. SUSMAN: Second.

CHAIRMAN SOULES: So we are just going to look the other way, to Hickman V. Taylor.

PROFESSOR ALBRIGHT: This includes Hickman V. Taylor.

CHAIRMAN SOULES: Hickman V. Taylor says "mental impressions."

HONORABLE SCOTT BRISTER: All right. Change it to "impressions."

HONORABLE F. SCOTT MCCOWN: Or "mental impressions." That's fine.

MR. GALLAGHER: Why don't we say "see Roget"?

HONORABLE F. SCOTT MCCOWN: That's more eloquent, Luke, and so I am going to go with that, "mental impressions."

"Work product is any communication made or material prepared or mental impressions developed"?

MR. KELTNER: Yes.

HONORABLE F. SCOTT MCCOWN:

"Mental impressions developed in anticipation of litigation or for trial."

CHAIRMAN SOULES: Okay. That's a motion. Second?

MR. KELTNER: Second.

CHAIRMAN SOULES: Any further discussion?

HONORABLE DAVID PEEPLES: Is the word "developed" -- why that word instead of "made"?

HONORABLE F. SCOTT MCCOWN: Mental impressions developed, I mean --

HONORABLE C. A. GUITTARD: Do you develop an impression, or do you receive an impression?

MR. SUSMAN: More elegant, Pretty. Sounds better.

HONORABLE F. SCOTT MCCOWN: "Mental impressions developed."

CHAIRMAN SOULES: Those in favor show by hands.

MR. LATTING: This is an anti-Spam vote.

CHAIRMAN SOULES: 16. Those opposed? Okay. Unanimous.

MR. SUSMAN: With that change, Mr. Chairman, I move the adoption of Rule 4 with the changes as we have made it in Rule 2, 4(2)(a), the addition of "shall" in (b)(1) and (b)(2) in lieu of "may"; the elimination of the final sentence of little (b)(3); the elimination of (c) in its entirety; the changing the "exceptions" in section (d) to (c); and correcting a typo in little (c)(8) on page 2.

CHAIRMAN SOULES: Did you make the change here in (4)?

HONORABLE F. SCOTT MCCOWN: Yeah. We have got that change.

MR. SUSMAN: Right. Right. And the change in (4).

HONORABLE F. SCOTT MCCOWN: I have got it in mine.

MR. SUSMAN: I'm sorry. The change in (4) should be "If a judge orders discovery of work product pursuant to subdivision (2)," and at the end, "legal theories, not otherwise discoverable."

CHAIRMAN SOULES: Okay. All in favor show by hands. Let me just do it the

other way. Is there any opposition? No opposition. It's unanimous.

MR. SUSMAN: Great.

CHAIRMAN SOULES: Now then --

HONORABLE DAVID PEEPLES: Luke, may I say on the second page, facts, "relevant facts, however acquired."

HONORABLE F. SCOTT MCCOWN: We got that.

HONORABLE DAVID PEEPLES: Did you get that?

HONORABLE F. SCOTT MCCOWN: We got that.

CHAIRMAN SOULES: We talked about on Rule 10 where we have to suggest the dates for the expert to be deposed two dates within 30 days. Rusty McMains.

MR. MCMAINS: Luke, before on this Rule 4 in the exceptions where it talks about experts, once again, we say they are "discoverable under Rule 10" when in reality we now have the three point whatever part on the experts as well.

HONORABLE F. SCOTT MCCOWN: So it should be "discoverable under Rule 3 and

Rule 10."

MR. MCMAINS: Right.

HONORABLE F. SCOTT MCCOWN: Okay. We will add that.

MR. KELTNER: Actually it should be 3, 9, and 10, Scott.

HONORABLE F. SCOTT MCCOWN: 3, 9, and 10.

CHAIRMAN SOULES: Did you get that, Alex?

PROFESSOR ALBRIGHT: No, I didn't.

CHAIRMAN SOULES: All right. Tell me where you are in Rule 4.

HONORABLE F. SCOTT MCCOWN: We are on the top of the second page, experts, "The information concerning experts discoverable under Rules 3, 9, and 10."

CHAIRMAN SOULES: Okay. Any opposition to that? Okay. Any other cleanup here?

MR. SUSMAN: Where was that? I'm sorry.

CHAIRMAN SOULES: It's down at the bottom of the first page. "3, 9, and 10."

HONORABLE F. SCOTT MCCOWN: If I go to the john, you-all won't repeal Rule 4 while I'm gone, will you?

MR. PRINCE: Do you want us to?

CHAIRMAN SOULES: Are we going to -- in an effort to try to accommodate some of the later amendment, pleading amendment and that sort of thing, require that the dates for the expert deposition be within 30 days or not? We talked about that, making a change in Rule 10 at paragraph (3)(a)(4).

MR. SUSMAN: I have no problem with that. I mean, I don't think that that was -- we thought about it. I don't know what's ever happened to the idea. Do you remember? Did we discuss it?

PROFESSOR ALBRIGHT: I don't remember.

MR. SUSMAN: I have no problem with "within 30 days."

MS. GARDNER: Within 30 days of what?

MR. MCMAINS: Of your designation.

HONORABLE SCOTT BRISTER: Of

your response.

CHAIRMAN SOULES: Okay. Now, I guess we can --

MR. SUSMAN: "Two days, within the next 30 days," comma.

CHAIRMAN SOULES: Okay. Without trying to reopen everything about the amendment rule at this point, do we want to go ahead and change the expert designation days to earlier or just let it go to the court at 75 and 45?

MR. SUSMAN: I would urge that we let it go to the court at that, and let them wrestle with the amendment rule.

CHAIRMAN SOULES: Okay. I mean, we are going to wrestle with the amendment rule.

MR. SUSMAN: I mean, we will but --

PROFESSOR ALBRIGHT: It can be changed with the amendment rule if necessary.

CHAIRMAN SOULES: Okay. Is there anything -- do we have anything else then on any of the discovery rules, any housekeeping, any place to go back to that we

may have overlooked?

MR. SUSMAN: Yes. Mike had a -- remember Mike was going to consider on Rule 18 --

PROFESSOR ALBRIGHT: I said I would draft some language, and I just haven't had time to.

MR. SUSMAN: Okay. We had some language to draft on 18.

MR. MCMAINS: That's on the notice?

MR. SUSMAN: What happens when you get the transcript by this nonstenographic thing, making it like another deposition?

MR. KELTNER: Alex, did you have an opportunity to review my 7, Rule 7, problem with McKinney V. National Union?

PROFESSOR ALBRIGHT: Yeah. David raised a question about whether we had provided for the situation -- what was your -- the issue being what is your obligation in responding to a request for discovery when you had made an objection or filed a withholding statement and there had been no hearing. If there is no ruling on the

objection or withholding statement, were you safe as you are now in just proceeding without responding to the request?

MR. KELTNER: And the importance of that is once you object or file a withholding statement then you are relieved of the obligation to answer. I think that part probably is in the rule. The problem comes, though, in sanctions at trial by exclusion of the testimony, and McKinney V. National Union held that as long as you have filed an objection then the party seeking the discovery has to get that resolved, or otherwise the objection stands, and you can put on evidence from behind the objection if you wanted to.

McKinney V. National Union is a pretty important case. The language in the current rule that it is based upon and is interpreting has been removed from this rule, not a real problem except for the fact that the basis now for McKinney is no longer in the rule.

PROFESSOR ALBRIGHT: Except it is -- that concept is still in the rule because we have changed the whole way you make

objections. If you look at 7(1), it says, "A party should comply with so much of the request as to which the party has made no objection unless it is unreasonable under the circumstances to do so before obtaining a ruling on the objection." I understand that as saying that you have no obligation to respond to the portion of a request that you are objecting to unless that objection is overruled.

MR. KELTNER: I agree with that, Alex.

PROFESSOR ALBRIGHT: And then that is also in No. 4, which says, "If the court overrules the objection, the objecting party shall respond to the request."

MR. KELTNER: And that's not my problem. I agree with that. There is no problem with that. The problem is when you go to trial and you have objected and no one has forced the objection, the current law is that the objecting party can put on evidence that would have been responsive to that discovery request, and it's not excluded based on 166(b)(6) and 215(5). That's important to the

rules for a whole number of reasons because it sets the burdens of who does what. That's the part that I don't think that is addressed in McKinney V. National Union.

PROFESSOR ALBRIGHT: Well, I think it's addressed, but if you have some specific language that you want to include, I think that's fine.

MR. MCMAINS: What's the part that drops out, that you complain drops out?

MR. KELTNER: Oh, Rusty, I would have to look back and tell you the precise part. Let me tell you how I would fix it. I would have a new Rule 7(d). That's probably easier. I think it's down -- let me make absolutely sure. It would be 7(2)(d), and I would put it that "an objection or withholding statement" -- and I would put it in a way -- that probably is not the way we want to say it, but holds the responding party's obligation to disclose the information to that part of the request objected to or for which there is a withholding statement until the court rules or the parties resolve the dispute.

Do you think that that's clear in the rule already? If you do, there is no need to put that in.

PROFESSOR ALBRIGHT: I think it's clear in the rule already.

MR. KELTNER: All right. If you think it's clear in the rule already, I just -- I'm worried about that.

MR. HAMILTON: The part that says "obtaining a ruling" sounds like the one making the objection has to obtain the ruling in paragraph (1).

MS. GARDNER: Sounds like it's the opposite.

HONORABLE SCOTT BRISTER: Well, but (3) says "Any party may at any reasonable time request a hearing."

MR. KELTNER: And that part is part that National Union relied on. I withdraw my concern.

CHAIRMAN SOULES: Do we have this language: "The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion does not waive the motion or waive the objection"?

HONORABLE SCOTT BRISTER: Which part?

CHAIRMAN SOULES: "The failure of a party to obtain a ruling prior to trial on any objection to discovery or motion for protective order does not waive such objections or motions."

MR. KELTNER: No. That's not in the rule.

PROFESSOR ALBRIGHT: We could insert that sentence after the first sentence of (3), and instead of saying "protective order" say "objection or privilege."

HONORABLE SCOTT BRISTER: Why is it you want that back in?

CHAIRMAN SOULES: Because that was McKinney 1, McKinney 2, and --

MR. KELTNER: Right.

HONORABLE SCOTT BRISTER: What part of McKinney?

CHAIRMAN SOULES: Well, oh, let me see if I can remember. I think McKinney 1 said that if a party did not get a ruling on its objection prior to trial, when trial commenced the objection was waived; and this

committee was in session at the time that McKinney 1 came down and had a good bit of debate about it, and then McKinney 2 came down --

HONORABLE SCOTT BRISTER: Changed.

CHAIRMAN SOULES: -- and said this, what's in the rule now; and we, I think, had already voted to put this in the rule between McKinney 1 and McKinney 2 because we were concerned about the policy of McKinney 1.

MR. KELTNER: And it keeps the burden, Scott, on the objections correct. The language suggested by Luke should go in, and Alex, if I understand where you want to put it, that was 7 --

PROFESSOR ALBRIGHT: 7(3) right after the first sentence. So --

MR. KELTNER: That would be fine. That works.

PROFESSOR ALBRIGHT: And then you had also raised that issue, David, with depositions, and I think we do not ever have a provision that talks about --

MR. KELTNER: It's fine. I

went back and checked that. I understand why we don't have to resolve that.

PROFESSOR ALBRIGHT: So we would insert in Rule 7(3), it would read, "Any party may at any reasonable time request a hearing on an objection or privilege asserted in accordance with this rule. The failure of a party to obtain a ruling prior to trial on any objection or privilege asserted in accordance with this rule does not waive such objection or privilege."

MR. KELTNER: That cures my concern.

CHAIRMAN SOULES: Okay. Anything else on any of the other rules of discovery?

MS. WOLBRUECK: Mr. Chairman?

CHAIRMAN SOULES: Yes. Bonnie Wolbrueck.

MR. SUSMAN: Can we vote on this?

CHAIRMAN SOULES: Yeah. Is there any objection to those changes? No objection. They are done. Bonnie.

MS. WOLBRUECK: Just for the

record I would be remiss sitting here representing all the clerks of Texas if I did not request this committee's consideration that interrogatories not be filed with the clerk.

CHAIRMAN SOULES: I doubt there is anybody on this committee that disagrees with you. This committee voted and the Supreme Court passed a rule not to file an amendment. There was pressure from the district judges, some of whom said that that's where they got their information about the case. They actually read the interrogatories, and if they weren't in the file, they couldn't figure out what the case was about, or it was more difficult. So the Supreme Court -- I don't think we --

HONORABLE SCOTT BRISTER: You would also be surprised by the number of people that -- I mean, 50 percent of my cases, "Well, I object. They didn't designate them."

"Yes, I did."

"Well, let me see it."

"We didn't bring it, Judge."

I mean, literally 50 percent of the cases

where I have an objection they didn't bring the interrogatory, and I cannot look it up, except I call my clerk in, and we go through our own file. Here, let me do it. I will find it. You-all just sit there, and I will find out whether you have done it. All the time.

CHAIRMAN SOULES: Well, that's easy enough to fix. You don't have the proof you didn't, then you did. So you have got no record, huh?

HONORABLE SCOTT BRISTER: Well, they don't have it today, but by the time they want to call that witness then they will get around to bringing it finally in. I would rather go ahead and just have it in the file and get it done with.

CHAIRMAN SOULES: Okay. So is that a motion, Bonnie, or how do you want to --

MS. WOLBRUECK: Yes, sir. I would make that motion.

CHAIRMAN SOULES: She makes a motion that interrogatories and responses to interrogatories not be filed with the district

clerk. Is there a second?

MS. LANGE: Second.

HONORABLE SARAH DUNCAN: Second.

CHAIRMAN SOULES: Doris Lange seconds? Okay. Any further discussion on this? Judge McCown.

HONORABLE F. SCOTT MCCOWN: Can I just make one point on that? In addition to what Judge Brister says, a lot of times there are even disputes about whether the interrogatories were sent, whether they were obtained, and if the interrogatories are in the file, it's at least some pretty good evidence that they were actually sent, and the interrogatories are what exclusion of evidence is premised on, and I think the reason the district judges felt strongly about having them in the file is that if you are going to premise excluding evidence and one side is going to say they weren't sent and one side is going to say they were, having them in the file is pretty good.

CHAIRMAN SOULES: Anything else? Those in favor of the motion show by

hands. Three. Those opposed? 16 to 3, was it?

MS. DUDERSTADT: Yes.

CHAIRMAN SOULES: 16 to 3 it fails, but it's on the record.

MS. WOLBRUECK: That's right.

CHAIRMAN SOULES: Anything else on the discovery rules? Don Hunt.

MR. HUNT: Luke, are we attempting to close by noon?

CHAIRMAN SOULES: We are probably going to work -- we are going to have sandwiches, and we are probably going to work a little bit because I want to get at least a preliminary report on sanctions.

MR. HUNT: Okay. Before we stop I would like to request -- and I will do the appropriate motion for an up or down vote -- that in order to send a complete package to the Court that at every place where it has 70 and 45 we change it to 90 and 60 and that we adopt Alex's amendment, the 63 with the 30 instead of 60; and if we are going to have two hours of discussion, let's leave it as you had suggested. If there is some sort

of surprising majority then we have the complete package to go to the Court because we have solved 63. 67 and 70 don't need any solving or 166 because of the current rule with one amendment.

CHAIRMAN SOULES: Is there a second?

MR. SUSMAN: Second.

CHAIRMAN SOULES: Moved and seconded. Those in favor show by hands.

HONORABLE SCOTT BRISTER: In favor of -- one more time.

CHAIRMAN SOULES: In favor of making the experts 90 and 60 instead of 75 and 45 and making the Rule 63 Alex's version of 63, the same as it reads, except 30 days.

Those in favor show by hands. Eleven. Those opposed? Nine. It passes by a vote of 11 to 9. Pardon me.

MR. KELTNER: You-all stuck me by surprise. I would have probably voted against it.

CHAIRMAN SOULES: Somebody want a recount?

MR. KELTNER: No.

MR. GALLAGHER: I want a reconsideration.

MR. MCMAINS: Earlier you said Rule 63 was going to be discussed in Beck's --

CHAIRMAN SOULES: Well, I think it needs to be -- well, at least this version has now been passed.

MR. KELTNER: I have a little concern there. Well, I wasn't paying attention, and that's my fault.

CHAIRMAN SOULES: I don't know why you didn't vote it down.

MR. MARKS: Uh-oh. We have got a walk out.

CHAIRMAN SOULES: It's probably justified on that vote,. Not near enough consideration has been given to that amendment.

MR. KELTNER: I would ask that we reconsider that. I think we really are going to have to look at the issues of Rule 63, which we have talked in and around but haven't dealt with. I am not opposed to the idea of especially tying the amendment rules to a different like 90 and 60 days process for

designation of experts.

In fact, I had intended to vote for that, but I will tell you that I think we need to look at Rule 63 in much greater detail because there are some other safeguards we might build in. I ask everybody to remember that we are changing the idea of the trial date radically so that the concept of X before trial no longer makes sense, and it's going to be -- we are really going to be dealing with the discovery period. That has a whole lot more concerns that we are going to have to look into, and I think the court probably understands that and will appreciate it.

HONORABLE F. SCOTT MCCOWN: Could I propose a compromise that I think will solve everybody's problems? I think what Don wanted to do, and I agree with him, is to get a complete package, get it approved, send it to the Court, but I think that perhaps we could say to Luke in his transmittal letter that he ought to say that Rule 63 is included to tie up this package but that it's going to have to have further consideration in David Beck's committee and --

MR. KELTNER: That's fine with me.

HONORABLE F. SCOTT MCCOWN: There is obviously going to be additional dialogue between the Court and the group, and --

CHAIRMAN SOULES: It passed.

HONORABLE F. SCOTT MCCOWN: -- between the Court and the public.

CHAIRMAN SOULES: It passed. It's passed. It's been passed by the committee unless somebody who voted for it wants a reconsideration.

HONORABLE F. SCOTT MCCOWN: Well, I voted for it, and in fairness to my colleagues like Dave Keltner would move that we adopt that compromise.

CHAIRMAN SOULES: Do you want to move to reconsider the vote?

HONORABLE DAVID PEEPLES: Second.

HONORABLE F. SCOTT MCCOWN: And I have got a second.

CHAIRMAN SOULES: Okay. Those in favor of Don Hunt's motion show by hands.

HONORABLE F. SCOTT MCCOWN: No, no.

CHAIRMAN SOULES: Yes. That's what we have to take up first because it's already passed. If we are going to unpass and do something else --

HONORABLE F. SCOTT MCCOWN: Well, aren't we going to vote -- wouldn't the correct procedure be to --

HONORABLE C. A. GUITTARD: You have to vote on the reconsideration of the vote.

HONORABLE F. SCOTT MCCOWN: -- vote on my suggestion to the amendment?

CHAIRMAN SOULES: No. We have got to vote on the reconsideration first because if it stays passed, it's passed. So those in favor of Don Hunt's motion.

HONORABLE C. A. GUITTARD: No. Those in favor of reconsidering Don Hunt's motion.

CHAIRMAN SOULES: Okay. Those in favor of reconsidering Don Hunt's motion hold up your hands. 15. Opposed? Two are opposed. Or three are opposed.

HONORABLE F. SCOTT MCCOWN: Then at this time I would urge my motion.

CHAIRMAN SOULES: No. We haven't reconsidered it yet.

HONORABLE C. A. GUITTARD: Yes, we have.

CHAIRMAN SOULES: Those in favor of Don Hunt's motion.

HONORABLE F. SCOTT MCCOWN: I move to amend Don Hunt's motion.

CHAIRMAN SOULES: We have got to undo it first. Those in favor of Don Hunt's motion show by hands.

HONORABLE SCOTT BRISTER: No, Luke. That is not -- we don't have to vote -- and then you are not going to allow him to reconsider it because we have already voted on it, aren't you?

CHAIRMAN SOULES: Well, I don't think that's appropriate.

HONORABLE SCOTT BRISTER: Why don't we vote on what he wants to vote on and all of us want to vote on?

CHAIRMAN SOULES: Okay. What do you want to vote on?

HONORABLE SCOTT BRISTER: His proposal.

HONORABLE F. SCOTT MCCOWN: I move that we -- and maybe Don will even accept it as a friendly amendment, but I move that we approve the discovery package, that we take Rule 63 that Alex had as amended by Don to include in that package to tie it all together so the Court can see the system but that we have our chair say in the transmittal letter that the amendments of pleadings is a tentative matter that's going to have to be considered by the amendment of pleadings committee and needs some further work, but we are putting it in here to close up the system and meet their deadline.

CHAIRMAN SOULES: Well, what about the 90 and 60?

HONORABLE F. SCOTT MCCOWN: And the 90 and 60 like Don said.

CHAIRMAN SOULES: Okay. Any further discussion on that? Steve.

MR. SUSMAN: I mean, I supported Don's because, I mean, I think there is a relationship between the pleading cutoff

and the expert. I mean, I think there -- you know, when your pleading cutoff and when your experts are deposed, I think there is a relationship.

I think in the ideal world 90 days before the end of the discovery period or six months after discovery begins is usually too short a period of time to require the party who has an affirmative issue designate experts. It's much shorter than most pretrial orders that are spread over a nine-month period of time. It usually comes later in the day.

That's why we actually began -- you will recall we originally began -- this committee originally adopted the first couple of go-arounds a 60/30-day time frame and then we moved to 75/45, and the only reason I supported Don's moving it to 90/60 was to accommodate getting a complete package, and if everybody wants to do that and we get a 30-day pleading cutoff rule that works together, fine, but I don't think there is any justification for moving the experts.

I would rather try to get a pleading thing that deals with a later designation of

experts. We are only talking about a 15-day difference, but it is a short period of time. The experts are the most expensive part of the case. Under our rules we require a lot of information to be given, more than the current rules, when that expert trigger date occurs. He has got to give everything he has prepared, everything he has looked at, all of his resumes, his old bibliography.

I mean, there is a whole slew of material that gets delivered, and I think to require in the usual lawsuit, one not controlled by a docket control plan, that material to be required six months after discovery begins is too early. I mean, I think the way we have it now, which is six months and 15 days, is pushing it; but at least it gives you another few weeks. I would hate to see us move that up.

PROFESSOR ALBRIGHT: So what's your proposal?

MR. SUSMAN: Well, my proposal is if we are going to punt on the amendment rule and not firmly adopt an amendment rule, that we leave the discovery rules exactly like

we have got them and let the people who are working with the amendment rule try to get an amendment rule that will accommodate a later designation of experts because I think it makes sense. I mean, we are trying to cut down the expense, and that's the most expensive part of litigation. To have them ready so early, I think is not -- it's a great departure from current practice.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: But the standard case 90 and 60, No. 1, it's not that much difference; No. 2, it's not that early. That's what I do about that deal on all discovery scheduling orders. I do it without any problem. Most experts in the standard case are the doctors, the police officer, that we know the first month. It's not that early, 90 days before the end of discovery. The ones that are complex where we really have to figure all this stuff out are probably going to have discovery control plans anyway where you can negotiate what those dates are.

I do want to further study the amendment matter, though I am leaning toward 30 days before trial because -- but, you know, there is other ways that could be done, and I do want to study that more; but the 75/45, the reason we extended it to 75/45 was because it's going to be very controversial that you can wait that late to say who your experts are and what they are going to say; and so 90 and 60 just makes that less objectionable, I think.

CHAIRMAN SOULES: Anything else? Joe Latting.

MR. LATTING: Do I understand from the way you phrased the amendment, Scott, that if we vote for this motion -- you used one phrase that caught my ear. You said that we are voting to approve the entire discovery package and send it to the Court; that is, we are endorsing it as a committee?

HONORABLE F. SCOTT MCCOWN: Well, what I understood --

MR. LATTING: I just want to understand what I am voting on.

HONORABLE F. SCOTT MCCOWN:

Okay. Well, let me understand what Don's motion was. I thought that Don's -- the Court has asked us to put a package on their desk so they can start working on it. So I understood Don's motion to be a vote to send this to the Court. He wanted to send Rule 63 so it would be a complete system and they would have in mind when they were reading our discovery rules that it interacted with amendment rules and you had to think about that, and he wanted to take Alex's version of 63 with the time dates that he put in them, and I agree with all of that, but I wanted to add only -- did I understand your motion right, Don?

MR. HUNT: Yes.

HONORABLE F. SCOTT MCCOWN: Okay. I agree with all of that, but I wanted to add only that in fairness to those who have a lot of problems with the amendment system that our chairman say in transmitting it that there are problems with how you work amendments.

HONORABLE SCOTT BRISTER: And interventions and --

HONORABLE F. SCOTT MCCOWN:

This interacts with amendments, and our amendment committee needs to give that further study, and we may have further specifics on amendments. So that would be my motion.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I did not understand Don Hunt's motion that way, and I want to reconsider it again. I didn't think I was voting on the whole package. I thought I was voting on 90/60 plus Rule 63.

MR. HUNT: Well, that's correct, but we have voted on the whole package.

HONORABLE SARAH DUNCAN: No. No.

HONORABLE DAVID PEEPLES: Well, I did not know that.

CHAIRMAN SOULES: We have not voted on the entire package. That's why I keep asking if there is anything else, any other loose ends, because when we get to the point where everybody agrees there is no further input that needs to be brought then we will vote on the package as a whole.

MR. HUNT: Well, I had understood we had voted on everything piecemeal.

MR. SUSMAN: I did, too.

MR. HUNT: And so this was the last piece that hadn't been approved, and if we approved the last piece, we had approved it all, but if we want to take an up or down vote on the total package after we vote on Scott's motion, that's fine. I don't care.

CHAIRMAN SOULES: Okay. State your motion. Oh, Ann, go ahead.

MS. MCNAMARA: If you don't send 63 with whatever qualifications that Judge McCown is talking about, the discovery time caps are going to seem to be terribly radical to people because I think right now the saving grace to the discovery time caps is that you get to figure out what the case is before discovery is over. So, you know, I would urge Judge McCown's proposal just because it will make the rest of it make more sense to people who read the discovery rules.

CHAIRMAN SOULES: Okay. Any further discussion? Okay. State your motion

again, please.

HONORABLE F. SCOTT MCCOWN: Okay. I take it that the way the group wants to do it is have a separate vote on whether the whole package goes or doesn't go. So what I would be moving then is to say that we send Rule 63, Alex's version of Rule 63 with Don's times, but that we do it with the transmittal letter from the chair that this is enclosed so that you have a complete package, and there is going to need to be further work on amendments and that he has delegated that to the amendment group, but that way the court will have the whole thing in mind. They will know that this piece of it needs some further work, and that group can go to work on it, and then I would limit my motion to that so that if you approved that motion then we could have a separate vote on the whole rules so that those who wanted to vote for them could vote for them and those against them, against them.

MR. PRINCE: Second.

CHAIRMAN SOULES: I don't see that that -- let me see if I can state the motion so that it will be on the record

succinctly. The motion as I understand it is to change Rule 10(b) so that affirmative relief experts are designated 90 days before the end of the discovery period.

HONORABLE SCOTT BRISTER: It's actually 10(3)(b) and 10(2)(b), both.

CHAIRMAN SOULES: 10(2)(b) and 10(3) --

HONORABLE SCOTT BRISTER: (B).

CHAIRMAN SOULES: (B). And that those same paragraphs be amended to provide for opposing experts at 60 days instead of 45 days before the end of the discovery period, and that Alex's version of Rule 63, changed from 60 days to 30 days, be sent with the discovery package to the Supreme Court as a tentative concept from this committee as to what the pleadings amendment will look like; is that right?

HONORABLE SCOTT BRISTER: Yeah.

HONORABLE C. A. GUITTARD: Tentative recommendation.

CHAIRMAN SOULES: I don't think it gets to -- I don't think it's a recommendation yet. A tentative concept of

what it may look like. All right. Scott, is that your motion?

HONORABLE F. SCOTT MCCOWN: Yes.

CHAIRMAN SOULES: Scott McCown. Is there a second?

HONORABLE F. SCOTT MCCOWN: I had a second a minute ago.

HONORABLE DAVID PEEPLES: I will second it.

MR. PRINCE: I second it.

CHAIRMAN SOULES: Any further discussion? Okay. All in favor show by hands. 18. Those opposed? Three. 18 to 3 that carries.

HONORABLE F. SCOTT MCCOWN: And if it's appropriate, I would move that we send these rules to the Supreme Court with our recommendations.

MR. PRINCE: Second.

CHAIRMAN SOULES: Okay. That's been moved. Let me ask to be clear one -- it is appropriate if there is not anything else to be done, and I want to be sure that no one sees anything else that needs to be done.

HONORABLE SCOTT BRISTER: That we haven't already tried to do.

CHAIRMAN SOULES: Yeah. That you haven't already tried to do. Well, I am talking about issues that were left open --

HONORABLE SCOTT BRISTER: Right.

CHAIRMAN SOULES: -- as we went along. Are there any other issues anybody recalls being open as we went along that we need to close now?

PROFESSOR ALBRIGHT: We have talked about the addition to the nonstenographic recording rule, which is really pretty much mechanical. I don't think that's going to be a problem.

HONORABLE SCOTT BRISTER: Yeah. That's a draft.

CHAIRMAN SOULES: Will you just write that?

PROFESSOR ALBRIGHT: I will just write that.

CHAIRMAN SOULES: And then we will at the next meeting look at what you wrote, but we will send it to the Court.

Whatever you write we will send to the Court, and if anybody has got a problem with it, we will follow up later with it.

MR. HUNT: Ratify it.

CHAIRMAN SOULES: Ratify it. That's right. Or unratify it, as the case may be. Anything else?

PROFESSOR ALBRIGHT: I do have one more.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: On Rule 3(2)(h).

CHAIRMAN SOULES: 3(2) --

PROFESSOR ALBRIGHT: (H). Witness statements.

CHAIRMAN SOULES: Witness statements. Okay.

PROFESSOR ALBRIGHT: "A witness statement regardless of when made is discoverable unless privileged." I would like to add "unless privileged under a privilege other than work product" or something. I think this is very confusing because it is specifically excepted from the work product rule. So I think this could be very confusing

to lawyers who are trying to figure out when a witness statement is privileged.

A witness statement is privileged if it is an attorney-client privilege or privileged under some privilege other than the work product privilege, and I think we need to put that in the rule.

MR. PRINCE: I didn't understand what you said, your first sentence, and that is a witness statement now is not work product, is not privileged under the work product rule?

PROFESSOR ALBRIGHT: Correct.

MR. PRINCE: I mean, as the work product rule is now written?

PROFESSOR ALBRIGHT: Correct.

MR. PRINCE: So it would not be privileged?

PROFESSOR ALBRIGHT: It's privileged if it's an attorney-client communication, for instance.

MR. PRINCE: No, I understand, but the naked words of this sentence as written now is still correct in the way the words are written, isn't it?

PROFESSOR ALBRIGHT: It's correct. I just think it's confusing.

MR. SUSMAN: I don't think it really is.

HONORABLE F. SCOTT MCCOWN: I don't think it's confusing, and I think we need to come to closure.

PROFESSOR ALBRIGHT: Okay.

CHAIRMAN SOULES: Well, we don't need to come to closure if we have got an open issue. So let's talk about whether it's confusing or not, and whether or not we ought to come to closure is a different issue.

HONORABLE F. SCOTT MCCOWN: Then let me address whether it's confusing. I don't think it's confusing because the work product rule in the exceptions lists witness statements and cross-references this rule as an exception. So I don't think it's confusing.

PROFESSOR ALBRIGHT: Well, I withdraw -- I never made a motion. I withdraw my comment. If somebody else wants to make a motion, go ahead.

CHAIRMAN SOULES: Anything else

on this? Okay.

MR. KELTNER: Luke, at the peril of not moving completely to close I have got one additional matter that a number of us have been discussing and I discussed with Alex as well. We do not have in Rule 14 or 15 regarding depositions a mechanism for hearing of any objections at the court. Therefore, all the things that we put in Rule 7 regarding objections don't apply because it's totally a written discovery rule.

When Scott had made the suggestion that we tie -- not make a distinction between written and other discovery we briefly discussed that and indicated that we would think about doing -- that we would handle it when we got to depositions, but we didn't. You can basically take Item 3 on Rule 7(3) and (4) with some small cosmetic changes and put in (a) in either Rule 14 or 15 and cure the problem, and I think it would go in Rule 15.

PROFESSOR ALBRIGHT: It would be 15(7).

CHAIRMAN SOULES: You want to move -- I mean, you want to include at Rule 15

a new paragraph (7)?

MR. HUNT: It would be (6) now. No, it would be (7).

CHAIRMAN SOULES: New paragraph (7).

MR. HUNT: (7).

CHAIRMAN SOULES: Provisions for hearings and orders?

PROFESSOR ALBRIGHT: David, I wrote a draft of it that you could read.

CHAIRMAN SOULES: Comparing the rulings --

MR. KELTNER: Yes, you did.

CHAIRMAN SOULES: -- similar to that in Rule 7, right?

MR. SUSMAN: Can we read this to everyone?

CHAIRMAN SOULES: Okay. So we have got a new paragraph (7) to Rule 15, is it?

"Any party may at any reasonable time request a hearing on an objection or privilege asserted in accordance with this rule. The party seeking to avoid discovery shall present any evidence necessary to support the

objection or claim of privilege either by testimony at the hearing or by affidavits served upon opposing party at least seven days before the hearing.

"If a judge determines that an in camera review of some or all the requested discovery is necessary to rule on the objection to the privilege, the objecting party shall cause answers to deposition to be made in camera or to be made in an affidavit to be produced to the judge in camera to be sealed in the event the claim of privilege is sustained."

Is there any opposition to that? Being no opposition, it's done.

MR. SUSMAN: Wait, wait, wait. Wait a second. There is a mistake here. I think there is a mistake because it doesn't make sense to talk about rulings and objections during a deposition. What are you-all talking about?

MR. KELTNER: We are talking about taking it to the court.

CHAIRMAN SOULES: This goes to the court.

MR. SUSMAN: How do objections

during a deposition -- objections during a deposition do not stop the testimony.

MR. KELTNER: And that's covered elsewhere in the rule.

MR. SUSMAN: Huh?

MR. KELTNER: That's covered elsewhere in the rule, but the situation is if I direct a party not to answer, which the rule provides for, then I have to wait --

MR. SUSMAN: That's not an objection.

MR. KELTNER: Okay. That's a good change.

MR. SUSMAN: I want to say that the objection is "objection; leading."; "objection; form." Okay. That's an objection, and typically the witness answers. So I don't have -- I don't bring on for hearing anything. I'm just saying --

MR. KELTNER: Steve, it's the instruction not to answer, and that's what's bothering me.

MR. SUSMAN: Instructions not to answer or assertions of privilege is what you have got to limit it to.

MR. KELTNER: Well, the only way you can assert the privilege under our current Rule 14 and 15 is an instruction not to answer.

MR. MEADOWS: Right.

PROFESSOR ALBRIGHT: Or suspension of the deposition.

MR. KELTNER: Or --

MR. SUSMAN: Okay.

MR. KELTNER: Okay. Then we are in accord.

MR. SUSMAN: It's okay. She can fix it real quick. It's just changing -- "objection" is not the word you want to use. Okay. It doesn't make sense that you are objecting in a deposition.

CHAIRMAN SOULES: Are we going to put a ruling paragraph in here, too, similar to paragraph (4)?

MR. KELTNER: That was my intention.

CHAIRMAN SOULES: That would be No. 8, paragraph (8). Okay. That fixes that problem.

Is there anything else that anyone sees?

Okay. We are ready to vote now then on the discovery package as a whole.

MR. SUSMAN: Can I first ask you, is this really necessary?

CHAIRMAN SOULES: Yes. From Discovery Rules 1 through 24 and -- 1 through 24 with the appendix of Rule 63 in its conceptual form at this time. Okay.

MR. HUNT: Do you want to include the 166 amendment?

PROFESSOR CARLSON: That didn't change.

CHAIRMAN SOULES: I think we will send it up later because it really doesn't have anything to do with discovery. It's just an ADR issue.

Okay. Any discussion? Those in favor --

MR. LATTING: Yeah. The speech I made this morning I would like to put in right now against this motion.

CHAIRMAN SOULES: Those in favor show by hands. 17. Those opposed? 17 to 6 is the vote to refer the matter to the Supreme Court of Texas with our approval.

Well, I want to thank Steve and Alex and

all the people on their committee. Scott McCown, David Keltner. I don't want to leave anybody out. They have really worked literally hundreds of hours on these rules. What we have seen of their work in this committee and in the meetings of this committee is just the tip of the iceberg.

They have had dozens of meetings -- and Scott Brister. Dozens of meetings at various places in the state for long sessions where they have worked extremely hard to clarify and follow our guidance, our wishes as to how these should be constructed, these discovery rules, and I want to thank all of you for this committee and for the Court for all that work and, I think, a splendid job of pulling together a lot of difficult concepts.

I know there is some disagreement about the approach to discovery that this takes, but it has for the most part over several months been the wishes of the majority of the committee to bring this to closure in the way that it has now been brought to closure. So with that, I thank you, and I wanted to make sure that we get that on the record, Steve.

MR. SUSMAN: Thank you very much, and I thank my committee members for all of their help and this committee for its patience with our work. It's been a fun project, and I think we have prepared something which if the Court adopts it will quickly and dramatically reduce the cost of litigation in this state, which is something I think the public deserves.

CHAIRMAN SOULES: Okay. We are going to get a short report on sanctions before we leave. We have got sandwiches out there. If we could do the same thing -- oh, I'm sorry.

JUSTICE HECHT: Let me say on behalf of the Court, too, how much we appreciate your time and energy. These meetings have gone on over a year. I think this is by far the longest session that the committee has met in regular sessions, bimonthly for well over a year. The Court is aware of your service, each and every one of you. You were selected because we felt like you were suckers -- I mean, willing enough to devote the kind of energy that it would take

to work on some of these problems and not just problems in Texas but problems around the country, and we are very grateful for all of your efforts and look forward to working on the problems that remain. Thank you, Luke.

CHAIRMAN SOULES: Thank you, Judge.

Let's get a sandwich and get a short report on sanctions so that we can -- it will probably take us about an hour. Spend about an hour on sanctions.

(At this time a recess was taken, and the proceedings continued as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 22, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,177.00 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 7th day of August , 1995.

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