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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

MARCH 17, 1995

(MORING SESSION)

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 17th day of March, A.D. 1995, between the hours of 8:45 o'clock a.m. and 12:30 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

ORIGINAL

MARCH 17, 1995

MEMBERS PRESENT:

Luther H. Soules III
Prof. Alexandra Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Joseph Latting
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Richard R. Orsinger
David L. Perry
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Honorable Anne T. Cochran
Charles F. Herring
Donald M. Hunt
Tommy Jacks
Franklin Jones Jr.
David E. Keltner
Thomas A. Leatherbury
Gilbert I. Low
John J. Marks, Jr.
Robert E. Meadows
Harriett E. Miers
Honorable David Peeples
Anthony J. Sadberry

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
David B. Jackson
Kenneth Law
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Doyle Curry
Paul N. Gold
Honorable Doris Lange
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
MARCH 17, 1995
MORNING SESSION

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CHAIRMAN SOULES: Let's go ahead and start with this report that you were sent that says "Bring this Report to the Meeting." This is a red-line of the appellate rules through the work of this Committee at the January meeting. There are some changes that have been proposed to Rule 7 and also some changes that have been suggested to accommodate the attorney general. They're not in here, but subject to the Committee's wishes, it seems like we could probably get this to the Supreme Court with the understanding that we're going to supplement it in those two respects.

I understand from Bill that there may be some correction needed in this particular draft, so, Bill, why don't you explain or tell us what you see there. Or if anyone has had a chance to look at this and has any suggestions as to whether it conforms to our prior work then, of course, we want to hear that. Bill.

PROFESSOR DORSANEO: Well, I would just ask for people who have identified problems in this draft to bring them up at this time.

CHAIRMAN SOULES: Bonnie.

MS. WOLBRUECK: On Page 171, it's the Supreme Court order on the form of the transcript. Toward the bottom of the page, there's a line that says "separating each proceeding, instrument, or other paper one from another in a manner that each is readily distinguishable."

In previous editions of these appellate rules that we have discussed, that line had been struck. We had talked about this previously. This is -- in my court of appeals here, they require that I put a separate sheet of paper in between each instrument in a transcript because of this statement, and I would again like to see that struck.

CHAIRMAN SOULES: Bonnie, I don't -- I'm not following you.

MS. WOLBRUECK: The fourth line from the bottom.

CHAIRMAN SOULES: The fourth line from the bottom, "separating each proceeding" --

MS. WOLBRUECK: -- "instrument, or other paper one from another in such a

manner that each is readily distinguishable."

And I think in previous discussions Justice Hecht, I think, had even made the motion to strike that.

HONORABLE C. A. GUITTARD: Yes. I think that came out, didn't it?

MS. WOLBRUECK: Yes. In previous editions of these rules it had been struck, but I know that here in this form it is not.

CHAIRMAN SOULES: All right. We'll take that out out.

HONORABLE C. A. GUITTARD: Now, I think the way that we had amended it was to take that phrase out and say that each instrument shall begin at the top of a page.

MS. WOLBRUECK: Yes, I think that's right.

HONORABLE C. A. GUITTARD: Is that still in there?

MS. WOLBRUECK: Yes. The fifth line up, I think it just ends there, "or other paper beginning at the top of the page."

HONORABLE C. A. GUITTARD: Yes. That language should come out, you're

right.

MS. WOLBRUECK: That's right.

CHAIRMAN SOULES: Okay. I've got that tagged for correction. Any other corrections then? Richard Orsinger.

MR. ORSINGER: Yes, sir. On Page 161, this is a Supreme Court rule, but we borrowed the language from the court of appeals rule without, I believe, changing the word "court of appeals" to "Supreme Court." That's Rule 180, subdivision (c).

CHAIRMAN SOULES: Okay. We just say "the court" and strike "of appeals"?

MR. ORSINGER: Well, I don't see why we shouldn't say the Supreme Court. If we're going to say the court of appeals in the other rule, why don't we say the Supreme Court in this rule?

HONORABLE C. A. GUITTARD: Yeah, you're right.

MR. ORSINGER: You say Supreme Court throughout. I also notice that --

CHAIRMAN SOULES: Okay. That change has made.

MR. ORSINGER: Capitalize the

"C" too. We've been capitalizing "Supreme Court."

CHAIRMAN SOULES: Okay. That's done.

MR. ORSINGER: And I also would like to clarify on Page 85 -- this is not a suggested rule change, but it is a clarification I'm seeking on Rule 53, subdivision (g), Reporter's or Recorder's Fees. It says, "The appellant shall either pay or make arrangements with the official court reporter or recorder to pay his or her fee before preparation of the statement of facts."

Does that permit the court reporter to require full payment before they start the preparation?

HONORABLE C. A. GUITTARD: Yes.

MR. ORSINGER: Okay. Because I believe under the current law they can require full payment before they deliver, but not before they start.

HONORABLE C. A. GUITTARD: That's a change.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Anything else?

MR. ORSINGER: I've got a lot on Rule 7, but there's a whole new rule on the floor so I won't say anything about that yet.

CHAIRMAN SOULES: Right. Depending on what our progress is at this meeting, we may just excise Rule 7 from this report and send something else in.

MR. ORSINGER: Well, we don't need to. I like this version that Lee just brought in this morning.

CHAIRMAN SOULES: All right. Well, we may get that done. But I do want to get to discovery before we pick up with the other changes.

Let's get this report approved for the moment. Anything else in the appellate rules, the transcript, that you have? Is there anything else that you see that needs correction? Bonnie.

MS. WOLBRUECK: I'm sorry, Luke. On Page 173, again, on the Supreme Court order, it shows the first page of the form of the transcript. I'm just curious.

Again, in the notice of appeal, you all were quite clear on the fact that you only wanted the appellants' names to be listed in the notice of appeal, but in the form of the transcript, you have asked the clerk to list the appellants and the appellees.

Should we have the authority to make that decision of who they are in that first page of the transcript?

CHAIRMAN SOULES: Right here, Judge, is where we're talking about (indicating).

PROFESSOR DORSANEO: I don't know how to deal with it.

HONORABLE C. A. GUITTARD: Just let them guess. It won't be controlling, but it's just a label.

HONORABLE SARAH DUNCAN: I'm not sure where --

PROFESSOR DORSANEO: Right here (indicating).

HONORABLE SARAH DUNCAN: No, I understand that. If you would let me finish my sentence.

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: I'm not sure where "appellate" as modifyier came from on here, but you can fill in the attorney at least to whom the notice of appeal shows on the certificate of service.

MS. WOLBRUECK: That's fine. But I'm wondering where it says to put appellants versus appellees.

CHAIRMAN SOULES: Who is the appellee in appellant versus appellee?

MS. WOLBRUECK: Yes. I mean, the notice of appeal does not say --

HONORABLE C. A. GUITTARD: You might say appellees --

CHAIRMAN SOULES: We're going to do a little better. This meeting we're going to do better about the record. Sidebar remarks need to be avoided.

Okay. Judge Guittard, did you have a question or a comment?

HONORABLE C. A. GUITTARD: My comment had to do with in the title there, why don't you just put one person, et al.? It doesn't have to be everyboby up there.

CHAIRMAN SOULES: Yes, Ken.

MR. LAW: Ken Law. Did we zero in on what controls who the appellees are who are there? What I mean is, I know you don't mean the transcript cover controls, so I guess the notice of appeal will have to control, since we don't have a bond any more. So it has to be specific regarding appellees.

CHAIRMAN SOULES: No. We had a lot of discussion and the outcome of that was that the appellant didn't even need to name the appellees in the notice of appeal.

MR. LAW: All right. They're all going to be there for appellate purposes. Okay. Now I'm remembering some of that. Okay. So the appellate court is to assume that everyone that is named in the pleadings as whatever party the appellee happens to be is at the appellate court affected by the outcome, and that's who we notify regarding any decisions. Everybody.

CHAIRMAN SOULES: I believe that's right. Is that right, Judge Guittard?

HONORABLE C. A. GUITTARD: I'm afraid so.

MR. LAW: You know, I don't

have any objection. If that makes it easier for the appellate court, we just send everybody notice. I don't care. That means we don't have to worry it.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think that it might be more accurate to say the people who are parties to the judgement and not mention the pleadings, because you may lose a lot of parties between pleadings and judgment. If they're not recited in the judgment, then I don't think they should be in the pool of potential appellees, although conceivably --

MR. LAW: So the focus is going to be on the judgment to determine who is included?

PROFESSOR DORSANEO: Well, the difficulty there is that there's a Mother Hubbard clause there or something like that. Even though they're not named, they're all in there. So there's no way of avoiding this problem, and there's no easy way for the clerk to be sure that everyone is notified. If the people just disappear along the way, they're

gone.

MR. LAW: Don't let me backtrack if you guys covered this, because I missed the last meeting, but let's just say we've got an appellee who is not -- who has settled and we're not aware of it. And a judgment comes down that is adverse in some way to whatever he did. Does that mean he's got another shot at it? Okay. I mean, so he could settle out and the Supreme Court can rule another way and, even though he's settled, he gets another bite of the apple?

CHAIRMAN SOULES: Bonnie's problem is that she doesn't know who the appellees are and she certainly doesn't know who the appellate attorney for the appellees are and she's supposed to fill out a form that has got those blanks in it.

MS. WOLBRUECK: Right.

CHAIRMAN SOULES: All right. She can't do that because she doesn't know. And the lawyers don't have to tell her, the parties don't have to tell her, nobody has to tell her, and she doesn't know, so we've got to take the blanks out. Nobody can fill them

in. Nobody in her position can fill them in, and nobody who knows has to give her the information, which is fine, but we obviously have to delete the blanks if it's perceived to be required information. And I don't know why the Supreme Court would put it on the form unless they deemed it to be required information.

So I move we just delete -- we just say appellant, not versus -- strike out "versus appellees," take all that out. Keep "appellate attorney for appellants" or just "attorney for appellants," and then strike out "appellate attorney for appellees."

Any opposition to that? Sarah Duncan.

HONORABLE SARAH DUNCAN: In my view it doesn't matter so much what this says. As Ken, I think, suggested, I don't think this will be controlling of who are appellees or who is the appellate attorney for an appellee. In my view the clerk does the best they can filling it out and they move on.

PROFESSOR DORSANEO: I think I agree with that. The purpose of this name, the purpose of these names on the front of

this is to distinguish this statement of facts from other ones, this transcript from other ones. And it doesn't matter what the names are as along as you can tell which case this is. And a very conscientious clerk will worry about making sure that all of the appellees are in there, but my advice to such a clerk would be that you're worrying about it too much. You're not causing any problem. The purpose of this is to -- the purpose of filling in those blanks is to distinguish this document from other similar ones.

CHAIRMAN SOULES: Now, how is that fair to the clerks? No answer. Does anybody else have anything else to say about this? Richard Orsinger.

MR. ORSINGER: TRAP 57, Docketing Statement, (a)(6), requires the appellant to include in the docketing statement the names of all other parties to the trial court's judgment, so the appellate court clerk could look there. And if the appellant has done his job, you'll have the names and addresses you need for notice purposes. And so does it really make any --

is it really important for us to denominate an appellee on any cover sheet when what we're really concerned with is who is a party that's not the, quote, appellant?

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest, in line with what Bill and Sarah said, that the clerk just take some opposite party and put the name in there. If the name is -- if it's Smith vs. Jones in the trial court, maybe Smith vs. Jones or Jones vs. Smith on the transcript. It really doesn't matter. Just put somebody's name in there that's proper and it's immaterial whether all the rest of them are there or not.

CHAIRMAN SOULES: Well, let me modify this to say -- what if we put "appellants" and just a blank and below that another blank and "other parties to the trial court's judgment," and strike out the appellate attorneys part of it?

MR. ORSINGER: What if there's a dozen of them? Where do you list a dozen of them?

CHAIRMAN SOULES: Well, you

just have to list them all there in one long line.

I just think it's a duck and an easy way out to say, "Let the clerks fix it." We've got 254 -- I don't know how many county clerks and district clerks, but they're just supposed to be left out there with no guidance about what to do with this. And if that's the sense of the Committee, then that's, of course --

HONORABLE C. A. GUITTARD: Mr. Chairman, I suggest that what comes down here, "appellate attorney for appellees," just strike that. But leave the style up there above to carry whatever style it had in the trial court or whatever style the clerk thinks is appropriate. It doesn't make any difference really. Just put some distinguishing name there that would distinguish this particular transcript from another one in which the same appellant may be a party.

CHAIRMAN SOULES: Is there any problem with just putting the caption of the trial court there?

PROFESSOR DORSANEO: No.

CHAIRMAN SOULES: Why don't we just do that.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: That fixes it. That solves your problem, doesn't it, Bonnie?

MS. WOLBRUECK: That's fine.

CHAIRMAN SOULES: Okay. So what would we write here, just the caption in the trial court?

HONORABLE C. A. GUITTARD: Just say plaintiffs and defendants.

CHAIRMAN SOULES: Just plaintiffs and defendants. And then we would have attorney for plaintiffs and attorney for defendants -- or not attorney for defendants.

MR. ORSINGER: You don't need that.

CHAIRMAN SOULES: Do we need attorneys at all?

MR. ORSINGER: Yeah. I think on the transcript cover it would be advisable because there may be a telephone call because of an omission or this or that.

CHAIRMAN SOULES: Okay. So do we just say attorney for plaintiffs and strike appellate?

MR. ORSINGER: Why not appellate?

CHAIRMAN SOULES: Do we know at that point?

HONORABLE C. A. GUITTARD: No, put "appellate," because you have a notice of appeal in the transcript.

CHAIRMAN SOULES: Okay. Appellate attorney for plaintiffs.

HONORABLE C. A. GUITTARD: No, for appellant.

MR. YELENOSKY: For appellants. It might be the defendants who appeal.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: If you look on Page 177, that is the way the statement of facts appears to look, so what we need to do is the same thing as the statement of facts.

CHAIRMAN SOULES: Well, we can fix that. So what we're going to do is we're going to have a line that says blank

plaintiffs vs. blank defendants, and then we're going to have a box for appellate attorney for appellants, which will stay that same, and appellate attorney for appellees will be completely deleted. Is that agreed?

HONORABLE SARAH DUNCAN: No. I thought what was suggested was that we have attorney for defendants; that we needed something on there in case of a phone call for an omission, I believe, was the example that was used.

MR. YELENOSKY: But that's the attorney for the appellant, because it might be the attorney for the defendant who is also the attorney for the appellant, whatever the -- but, Luke --

CHAIRMAN SOULES: This one would say attorney for appellant so that -- and then you would go off the notice of appeal. The clerk would go off the notice of appeal for that. Steve Yelenosky.

MR. YELENOSKY: Luke, should we have just one more line that just says appellant, who the appellant is. I mean, the only designation we have that indicates who

the appellant is is the attorney for appellant, so it won't be readily apparent --

CHAIRMAN SOULES: Where it says SBOT number, attorney for --

MR. YELENOSKY: Well, no, I'm just saying we don't have -- it's not apparent from looking at this number who has appealed.

CHAIRMAN SOULES: Okay. See where there's a half-line there at the bottom of that box (indicating)?

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: What I'm writing in that box is going to be attorney for, blank, Appellants. Okay?

MR. YELENOSKY: Thank you.

CHAIRMAN SOULES: Anything else? Okay. We'll make these textual changes and then we'll include this in -- is there something else on this form, Judge?

HONORABLE C. A. GUITTARD: Yes.

CHAIRMAN SOULES: Okay.

HONORABLE C. A. GUITTARD: Since it won't appear from this form whether the defendant or the plaintiff is appealing, could we have a line there saying appealed by

so and so? Is that what we just did?

MR. YELENOSKY: That's what we just did.

HONORABLE C. A. GUITTARD: Good.

CHAIRMAN SOULES: Okay. Anything else on the draft that we now have to go up to the Supreme Court? Okay.

Subject to getting through the Rule 7 and the attorney general issues, this is going to go to the court regardless, but if we get through those, we can --

HONORABLE C. A. GUITTARD: Now, we have a few more items in here, you understand.

CHAIRMAN SOULES: Okay. What else?

PROFESSOR DORSANEO: The document that the Chair was just talking about, this "Bring This Report With You to the Meeting" document, we believe that this is the work product of this Committee, and it provides all of the information from all of the prior meetings about what has been approved.

We have a few additional matters that are the subject of a memorandum, a relatively short memorandum that was passed around. If you don't have one, you need to get one.

This memorandum was developed while the report that we've just been talking about was being created in its red-line form. And we believe these additional matters are mostly of a clerical character, but we want to bring them to your attention.

The first one involves Rule 4(c)(1) on Page 5 of the March 13, 1995 Appellate Rules Report, Item 2 in the additional changes memorandum. We propose --

HONORABLE C. A. GUITTARD: No, Item 1.

PROFESSOR DORSANEO: There's something wrong with this. We propose to delete on Page 5 -- and Lee Parsley, correct me if I'm wrong. The -- I need help from Lee Parsley on this. There's something wrong with Item 2 on the additional memorandum.

HONORABLE C. A. GUITTARD: It's petitions and applications that give us the trouble, because petitions and applications

could refer to an application for, what, a habeas corpus, and a petition -- or for a writ of error, and a petition would be for the other things, and there might be different provisions there for how many copies of that should be filed. So if we -- there may be some other kind of petitions or application, but if so, that would be covered by "other papers," so just take petitions and applications out. So it says "six copies of motions, briefs and other papers shall be filed."

Now, there's one other problem there, and that has to do with motions. I believe we discussed with this committee at the last meeting whether motions would require three copies or six copies. The idea of having six copies is so that the briefing attorneys -- each of the judges on the panel and each briefing attorney should have a copy. But I believe it was discussed at the last meeting here that in the case of motions, as distinguished from briefs, that only three copies would be necessary.

And I believe Judge Cornelius told us

that in the courts of appeals only three copies would be necessary, and that's my impression as well. So we would change that to three copies of motions and six copies of briefs and so forth. Isn't that right, Bill?

JUSTICE CORNELIUS: Right.

PROFESSOR DORSANEO: All right. So there isn't anything wrong with Item 2 in the additional changes. What was distracting me was three copies and then six copies. But what is meant to say is three copies of motions and six copies of briefs and other papers shall be filed with the clerk of the court of appeals in which the case is pending.

HONORABLE C. A. GUITTARD: Right.

PROFESSOR DORSANEO: And I think we can leave as in the draft on Page 5, the clerk of the court of appeals, in there as well.

So we propose that change to what is on Page 5 to correct 4(c)(1). Rusty.

MR. McMAINS: I just have one question: Do we have anything specifically in

mind by what is meant by "other papers"? I mean, we have rules dealing with the various types of instruments when you're talking about writs of habeas corpus, mandamus, applications for writ. This rule deals with motions and briefs, so I'm just curious if there is any other thing or does that --

PROFESSOR DORSANEO: We have nothing specific in mind. And those other things that we do have in mind are dealt with in Rule 4 and other places.

MR. McMAINS: I'm sorry?

PROFESSOR DORSANEO: Those things that you're thinking about as other papers, like papers filed under original proceedings, are dealt with in other --

MR. McMAINS: I know. That's what I'm saying. What I'm trying to figure out is what would it include.

CHAIRMAN SOULES: Something we can't think about today. We do not know what it is.

MR. McMAINS: So anything that might be foreseeable, file six of them?

CHAIRMAN SOULES: There might

be something, a letter or something. There might be something. Pam.

MS. BARON: I don't know if Lee has discussed this with the Court, but on Page 6 it seems like we could make a parallel change to the number of motions filed in the Supreme Court. Filing 12 copies of a motion for extension of time the way the court procedures work makes very little sense. It's just really wasting paper. Has that been discussed, Lee?

MR. PARSLEY: Well, I have received a memo from Justice Hecht to that effect, yes, previously. And he suggested that that many motions really is a waste of paper, but it's one of those things that the committee process has had so much to do that it just never really made the agenda, I don't think.

PROFESSOR DORSANEO: Well, the Committee would like to go to 4(d)(4) now.

HONORABLE SAM HOUSTON CLINTON: Wait, before you leave that, please, it just caught my eye that added in that same thing is "Only one copy of the record is required to

be filed in accordance with these rules."

If you mean that to be applicable to criminal cases, you're changing the procedure. Criminal cases have two copies, if "record" by definition here means not only the transcript but the statement of facts, and two copies are filed. The original is retained in the trial court, and a copy is sent up on appeal.

CHAIRMAN SOULES: Are there two transcripts and two statements of fact that come to your court?

HONORABLE SAM HOUSTON CLINTON: No.

CHAIRMAN SOULES: Just two statements of fact?

HONORABLE SAM HOUSTON CLINTON: No. The original of the record stays in the trial court.

CHAIRMAN SOULES: Okay.

HONORABLE SAM HOUSTON CLINTON: And a copy goes up on appeal.

JUSTICE CORNELIUS: Only one record is filed, though, in the appellate court. Only one copy is filed.

HONORABLE SAM HOUSTON CLINTON: Well, that's true.

JUSTICE CORNELIUS: Maybe that's what it refers to.

HONORABLE SAM HOUSTON CLINTON: If they're just talking about the appellate court, then there's no problem.

PROFESSOR DORSANEO: It is just talking about the appellate court.

HONORABLE SAM HOUSTON CLINTON: Let me ask you another question about it. I suppose this thing that's red-lined is just an explanatory note, you know, just like here where it says "2 from former rule so and so," so you're just trying to help explain where that came from. That's not going to be in the rule, is it?

CHAIRMAN SOULES: That's right. What you said is correct.

HONORABLE C. A. GUITTARD: What if you have here "Only one copy of the record is required to be filed in the appellate court in accordance with these rules," would that help?

HONORABLE SAM HOUSTON CLINTON:

Well, apparently that's what it means.

CHAIRMAN SOULES: I don't know what "in accordance with these rules" means.

HONORABLE SAM HOUSTON CLINTON: It's talking about the appellate court.

HONORABLE C. A. GUITTARD: Well, I don't know what "in accordance with these rules" means either.

CHAIRMAN SOULES: Why don't we just say in the appellate court.

HONORABLE C. A. GUITTARD: Okay.

JUSTICE CORNELIUS: Take out "in accordance with these rules"?

CHAIRMAN SOULES: Yes, sir. Okay.

PROFESSOR DORSANEO: I think we hope that everything that is done in accordance with these rules is done in accordance with these rules.

CHAIRMAN SOULES: Okay. Let's go on then to --

PROFESSOR DORSANEO: -- 4(d)(4). This has been reworded to eliminate ambiguity, and the Committee moves its adoption.

CHAIRMAN SOULES: What page is that on? Page 8?

HONORABLE C. A. GUITTARD: The main change there, of course, is that instead of giving a certain number of days to file the corrected brief, it says "shall state a date on which a conforming brief shall be filed."

CHAIRMAN SOULES: Any objection to substituting the subcommittee's (4) in place of the (4) that's on Page 8? Steve Yelenosky.

MR. YELENOSKY: No objection, I just have a question. And maybe there's an obvious answer to this that I'm missing. What happens when you have a nonconforming brief in terms of time lines? Does that affect -- it doesn't affect it at all in terms of a responsive brief? Or am I confusing it with the federal -- I had situation recently where a Fifth Circuit brief was sent back to the other party and then they had to file it again. And it wasn't a problem, but I'm trying to remember whether the appellee's brief deadline changed.

HONORABLE C. A. GUITTARD:

Well, I would suppose that the result of it would be that if the clerk specifies a certain time and the corrected brief was filed within that time, then the appellee's brief would be due 25 days after the appellee's brief -- corrected brief, the appellant's corrected brief was filed.

MR. YELENOSKY: That's what I would assume too. But I think I'm recalling in that case in the Fifth Circuit that a clerk had said that the time line was still running from the original brief because it was a nonconforming technicality. I'm not sure of that.

CHAIRMAN SOULES: Okay. We're going to skip No. 4 now and Rule 7 and come back to that after we deal with Steve's agenda.

Are there any other items that are basically housekeeping items that we can get to quickly, because we very definitely need to get Steve's issues resolved today. Chip Babcock.

MR. BABCOCK: On Item No. 7, Rule 22(b)(3), it seems to me that the

change here is not a technical change but substantively changes the rule significantly.

CHAIRMAN SOULES: Let's see, are you looking at the materials themselves?

MR. BABCOCK: No. I'm looking at the memo that was handed out. Item 7.

PROFESSOR DORSANEO: Well, we're not up to that yet.

MR. BABCOCK: Oh, I'm sorry, I thought he asked for any other substantive areas.

CHAIRMAN SOULES: No. We're going to have to get back to this in detail. I just wanted to be sure that we get -- Steve has circumstances where he has to leave at 1:00 o'clock today. In order to keep his subcommittee moving, we need to deal with his issues before then, and then we can come back. We obviously are going to work through this and complete it today or between today and tomorrow.

PROFESSOR DORSANEO: We can yield now.

CHAIRMAN SOULES: Okay. Let's go on, Steve, to your issues.

MR. SUSMAN: Thank you.

CHAIRMAN SOULES: I'll count on you to make a statement on what those are.

MR. SUSMAN: Yes. I appreciate you accommodating my schedule, which I have to leave and go to Washington this afternoon, which also works out with the timetable of the subcommittee.

We have not completed our redrafting of the rules. That has become a more difficult, time consuming process, but we hope to be through it in a few weeks, and it is our commitment to get you out a new draft by the end of this month of the new rules.

The one -- and we have a pretty good direction from this Committee on what you want, because we now have a transcript of the last meeting, and we're going over it trying to be consistent therewith.

The one rule that did not get discussed last time where we have no guidance is Rule 10, our expert rule. And that's why I would like to turn you to that today so that we can have some discussions on it and again get a kind of vote sense of this Committee on

what you want to do with it.

Our expert rule begins in Paragraph 1 with the notion that all expert discovery is available upon request. I mean, if you don't want it, the other side -- there's no automatic procedure for disclosing experts. It's all based on request.

Does anyone have any problem with that notion, that either side can request the disclosure of experts, but if neither side does, it doesn't happen? Do I sense by your silence that -- well, maybe we ought to take a vote for the record. I'm sorry.

CHAIRMAN SOULES: Well, that's no change from today's practice.

MR. SUSMAN: I think that's right. I think that's the same as today's practice.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: I haven't read the entirety of the rule, but there are, of course, a lot of courts that operate on pretrial orders where they've ordered you to disclose it whether anybody has requested it

or not. I'm wondering if this is an attempt to change that practice when it says "only as set forth in this rule."

MR. SUSMAN: Well, it's not -- remember, again, I don't want to go back to it all, but remember to the extent that a court issues a pretrial order or a Discovery Control Plan, as we refer to it, that changes everything in these rules. This is if you're in a court that has no pretrial order or Discovery Control Plan. And that does conform with today's practice. I mean, in the absence of a --

MR. McMAINS: I'm not saying that's not what you're intending. But what I'm saying is that this rule says a party may request another party to designate, and disclose information concerning, expert witnesses only as set forth in this Rule.

CHAIRMAN SOULES: Why don't we strike that, after "only."

MR. McMAINS: No, I'm just wondering what --

PROFESSOR ALBRIGHT: Can I respond to that?

CHAIRMAN SOULES: Okay. Alex Albright.

PROFESSOR ALBRIGHT: This is meant to be a request for standard disclosure concerning experts. What we don't want is people asking a bunch of interrogatories about expert witnesses. If you want information about expert witnesses, you make a request for expert witness disclosure under this rule and then you get the information that is contained in this rule. If you want additional discovery from experts, you take the expert's deposition or you can get a court to order a report.

The way the Discovery Control Plan rule is worded is that if you have a Discovery Control Plan that does not address a particular issue, then the default position is these particular rules. So I understand your concern here and I appreciate it, but I think maybe that is an issue that we can take up when we do some of the redrafting.

MR. McMAINS: The only thing I'm concerned about -- I mean, I understand what I think your concept is, which is this

rule is not intended to limit the court's ability in the Discovery Control Plan to require disclosures without anybody going through any of these things. It's just that first sentence seems to me that it could lead one to believe that you can't do it any other way other than in this rule.

MR. SUSMAN: You could add "only as set forth in this rule or as ordered by the court." You could add something like that or to that effect.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: So with that kind of addition, "or as ordered by the court," is everone happy with Subdivision 1? Can we have a show of your hands?

CHAIRMAN SOULES: Are we all happy with Subdivision 1?

MR. YELENOSKY: Can I just add one thing?

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, if we start saying "or as ordered by the court" here, we're going to have to say it everywhere

else. If you really think you need to change something, change something where you have the Discovery Control Plan and it says that this can modify the default. But you don't have to repeat it every time.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: That is already in the new Discovery Control Plan rule.

MR. YELENOSKY: Then we don't need to add it here.

CHAIRMAN SOULES: Okay. That's understood. Any opposition, then, to Paragraph 1 of proposed Rule 10?

There's no opposition to that, Steve.

MR. SUSMAN: Okay. Subparagraph 2. We've already found some drafting problems here. It should begin reading "When requested, the plaintiff shall designate any witness who is expected to offer expert testimony at trial no later than 60 days before the end of the discovery period or five days after receipt of the notice of the first trial setting, whichever is" --

change "later" to "first." Is someone saying no?

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Well, I do, just because so many courts -- let's say you have a notice of trial setting when you file your complaint, so then you have five days or ten days to --

MR. SUSMAN: Well, what are we trying to do here?

CHAIRMAN SOULES: Just a minute, we're trying to make a record. Talk one at a time. Paula, go ahead and finish your statment.

MS. SWEENEY: I'm sorry. To better articulate that "um-hm" statement, a lot of courts automatically are computerized now. And you file your complaint, and either the day the answer comes in or sometimes even before the answer, you get a scheduling order with a trial setting, which would give you an expert designation deadline, you know, of 10 days after you file your lawsuit.

CHAIRMAN SOULES: Steve and

then Alex, or Alex and then Steve. Your choice. Speak up, Alex. Let's hear what you're saying.

PROFESSOR ALBRIGHT: Okay. I think this was put in the rule, this notice of first trial setting, when we had our version that had a discovery window that ended on the date of the first trial setting. That is probably what happened here. I think what we're trying to do is figure out what to do when the case -- when you get 45 days' notice of the trial and so you can't identify your experts 60 days before trial. I think that's the problem that we're trying to fix here. And maybe what we need to do is just go back to the committee and get another fix.

MR. SUSMAN: All right. I think we need to. I'm confused myself.

CHAIRMAN SOULES: Well, I think it is a real issue. No question about it. It's not one we can skate by. We have had so many -- we've spent a lot of time talking about how difficult it is to tie any deadline to notice of a trial setting because of the way that is handled. It's so varied across

the state.

On the other hand, we've got a situation where a judge might set a trial setting before the discovery period is cut off or before 60 days before the discovery period is cut off so you never get a chance to get the experts. So it's a real issue. It's a sticky one. If you all would rather just take it back to work on it, that's fine.

MR. SUSMAN: I think we ought to take it back to committee because it is a problem. I mean, there are two issues here. One, the fake notice of trial setting that comes out very quickly after you file the case; and the second -- which we do not want to be used as a vehicle of depriving people of their time -- and a real trial setting that occurs during the discovery period, which we don't want our rules to interfere with that real trial setting, and yet we want full discovery, and the time is going to have to be shortened because there, my God, is a court that can hear the case earlier. Those are the two problems.

And we will take that back and deal with

it. I mean, we understand that problem and we will try to fix it.

But in the normal case, I mean, the theory is in a normal case, which we will talk about now, we felt that the designation of the experts should occur 60 days before the end of the discovery period, that is, again, seven months into discovery. And then the defendant is expected, is required to designate 15 days thereafter, after the plaintiff's designation.

And we have a little drafting problem here, we know. Well, what happens if the plaintiff doesn't designate because he's not requested to? Does the defendant still have to designate? We've got to work on the timing here.

But the general -- our general theory is that assuming both plaintiff and defendant have been requested to disclose and designate their expert witnesses, that the timing should be 60 days before the end of the discovery period, and that 15 days thereafter the defendant needs to designate, that's the scheme of the rule.

And then everything else in the rule is designed to accomplish all the discovery that you need of experts during the remaining, in the case of the plaintiff, 60 days and in the case of the defendant, 45 days. We pushed it back as close to the end of the discovery period as we could to get the work accomplished. So any discussion on that?

MS. SWEENEY: Can I raise one?

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: One thing you might want to fold in as you're drafting, depending on what the legislature does with the malpractice statute, is they now have a provision that the plaintiff is required, when filing their lawsuit, to designate an expert as to whom discovery will be allowed, which would be -- there's no time contemplated for that or provided for that. But that perhaps needs to be considered in here, because you wouldn't want to start all your other timetables running, or maybe you would, I don't know, but I think you need to take that into consideration.

MR. SUSMAN: That is in the products bill?

MS. SWEENEY: Med mal. Senate Bill 30.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Can I ask a general question? Is the notion here that you can't ask them to give their experts any earlier than that?

MR. SUSMAN: Yes. That's the notion.

PROFESSOR ALBRIGHT: Unless you have agreement of the parties or a court order.

MR. McMAINS: I understand that if the parties agree, that's not a problem. But if somebody knows they've got an expert from day one that they've been blandishing, it just seems to me --

MR. LATTING: They're talking it up on the street.

CHAIRMAN SOULES: Again, sidebar remarks have become too common. We cannot get a record if we continue that.

MR. McMAINS: I mean, it just depends on the nature of the lawsuit. A lot of times the lawsuit is about expert testimony by and large, and the courts have had great difficulty distinguishing between what are fact witnesses and what are expert witnesses.

I just have some concern about saying that we're not -- that even if you request day one who are your experts, they don't have to do it until 60 days before trial, which means that you have conducted discovery for however long it is in the dark over what the expert is going to say, which may well be critical, and that just seems to me to be as a norm not a proper norm.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Which seems out of kilter with our attempt to make discovery faster and easier. It seems backwards to me.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Could we accomplish the same purpose by allowing disclosure to be required in answers to interrogatories? And then those answers would

be due, but then make this the supplementation deadline, so that if someone knows their expert early, they disclose it early, but they're not cut off early. However, they are cut off no later than 60 days before the end of the discovery period.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: What our worry was as a practical matter was that, I mean, it's not just knowing the existence of the expert, it's having all the information you need about the expert to make a deposition of that expert meaningful. I mean, just to get the name, Dr. Smith is going to be my expert, early on in the case doesn't do the other side much good unless they're able to depose Dr. Smith and get from him his opinions and they don't have to re-depose him continuously.

And so we thought that in the interest of keeping down expense, making this as streamlined as we can be, and this is again the default rule, that at the time you -- and the next rule says that at the time you disclose, at the time you designate your expert, you have an obligation to provide all

this kind of information, seven pieces of information about him including everything that he's reviewed, relied on or prepared, plus dates when he's going to be available to be deposed. All that happens contemporaneously with the designation of the expert.

I think in most cases it would be unfair to require that earlier and not very productive. People would typically, I know I would, simply say, you know, "I'm consulting with Dr. Jones but I haven't determined if Dr. Jones is going to be my testifying expert until the deadline." So what have you really accomplished?

I mean, I think if you really had a case where expert testimony was critical, you wouldn't want to rely on these default rules. You would have to go to court and say, Judge, this case is all about expert testimony. That's all the witnesses are going to be on both sides. We need a different timetable where the different kinds of things in Rule 10, Subdivision 3, must be disclosed at a much earlier date. We think it should be

disclosed in the first 60 days or three months.

That's kind of our thinking. I mean, that was our thinking, that it's better to have a time certain.

This same kind of thing can be used in the supplementation rules basically. You know, rather than require this constant supplementation with arguments about, you know, is it timely or not, what do they know, is he really retained, it's better to have a time certain. That was our thought process.

CHAIRMAN SOULES: That is this Tier 2 default rule?

MR. SUSMAN: Yes, sir.

CHAIRMAN SOULES: Okay. Joe Latting.

MR. LATTING: It seems to me that Richard Orsinger's suggestion covers that because it just -- I hear what you're saying, Steve, but in cases where someone knows who an expert is and the other sides asks the question, "who are your experts," I don't see that our rules ought to put impediments in the way of a simple answer to a simple question.

I think what Richard said satisfies me that it would be a better way to go.

CHAIRMAN SOULES: Any other comment? Richard Orsinger.

MR. ORSINGER: Perhaps we could preserve what Steve is saying by maintaining this concept of full disclosure by a certain deadline date, as is presently drafted, but permit the revealing of the identity of the expert, if they're not still consulting. And if the other side wants to do a preliminary deposition, they can, but we haven't deprived them of that opportunity by not requiring their identity to be disclosed. I don't know how it hurts.

I guess it may be that some opposing parties would abuse the deposition process by taking the deposition three or four times, but probably a lot of times it would be productively used. And if we withhold -- if we permit people to withhold the information on the identity, then we take away the option of an early deposition.

On the other hand, I don't think it would be smart to require this complete development

and disclosure 60 days into the case, so maybe you could permit the identity to be disclosed for ones who are decided to be testifying but still maintain this posture that by 60 days before the end of the discovery period you must make this full and complete disclosure if you haven't already.

MR. SUSMAN: Well, my view of that is that that's -- I mean, I don't think that's harmful. I mean, I would be delighted to do it. I'm not sure what good it's going to do.

If you want to simply say that parties may request the others to, you know, disclose who their experts are and that they've got to do so when they know who they are, that's fine, but then all this other information comes at the 60-day -- I mean, I don't see that that's going to be harmful. I don't think you're going to get any disclosures very much, though.

CHAIRMAN SOULES: A way this could be fixed logistically, if we want it to, is to put under Rule 12, interrogatories, that they can discover the identity of experts

only, and then Rule 10 would cover information concerning the experts. Then you could tee up the identity at any time if you want to ask interrogatories, but you can't get the rest of the information. You could go ahead and take the deposition, I suppose.

MR. LATTING: How about the general subject on which they're going to testify? You can say he's an expert about tires or about vertebrae or something like that.

CHAIRMAN SOULES: Sarah, you had your hand up. Then I'll get to Mike.

HONORABLE SARAH DUNCAN: I thought part of what we were trying to do was streamline the process and reduce the number of things that we can litigate. And one of the things that we have litigated ad nauseum is when do you have to disclose your experts. What does "as soon as practicable" mean? What is the boundary between deciding in your mind they're going to be a testifying expert and deciding on paper? And if all we're going to provide for is a name, I guess I agree with Steve. What's the point? If we're going to

create all this litigation about "as soon as practicable" just to get a name, why is that a good cost benefit analysis?

CHAIRMAN SOULES: Mike Gallagher has got the floor.

MR. GALLAGHER: Mike Gallagher. I do not think our rules should impose on any litigant a time period within which discovery is precluded as to something which is as important as an expert's deposition. If I understand what we're saying, disclosure is not mandated until 45 days or 60 days before trial, and then you have the benefit of two days on which to take that deposition. That imposes some difficulties from the standpoint of just logistics, as I can see it.

I understand what we're trying to accomplish. But as a litigant I should have the option of being able to determine when and at what point during the discovery I choose to take that expert's deposition and not wait until 45 days before trial, Luke or Steve, in order to find out exactly what their testimony is going to be. If I want to take their deposition early on in the litigation, I

should be permitted to do that, I think.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Well, would you accept a rule that -- I don't have any problem if you want to do it early on, but can I keep you from doing it again?

MR. GALLAGHER: Yes, sure.

MR. SUSMAN: In other words, I could put in that you get one bite of the apple, and if you really want to go depose my expert before he's formed opinions, before he has prepared any documents or reviewed anything, that's your option. He is free to tell you as he's sworn in that "I haven't formulated any opinions yet. I've been hired, I've agreed to do it, and I've agreed to the pay." But that's your last shot at the apple.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, I would not agree to that. I think that can be taken care of by a motion to suppress or to quash or a notice for a second deposition of that expert where you can go to the court and say this isn't fair.

It seems to me that what you could do is

have an interrogatory which says, "Who are your testifying experts?" And the party receiving that, if he knows, would have to say, "Here is the name of the expert and the general subject on which that expert is to testify."

Then if Mike wants to take his or her deposition, he can do so. He may or may not get anything very valuable from that. Then we have the committee's fall-back or deadline beyond which it cannot be postponed.

But it makes no -- let me -- I'm almost finished. It's just not in the spirit of what we're trying to do to say that in a situation, and there are many of them, where a litigant knows who the experts are, it just doesn't make sense to say, "We don't have to disclose that in a proper interrogatory." That slows down the process.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Isn't the concern that you asked about, Mike, taken care of, again, on the default basis; that you limit the depositions of experts to six

hours? I mean, isn't that right? Isn't that what our rules do as they're proposed?

MR. SUSMAN: Six hours.

MR. McMAINS: So from the default norm standpoint, he's only got six hours to take that witness anyway. So if he takes him for three hours early, then he's only got three hours left after he's formulated his opinions, unless he can get some more time by leave of court.

CHAIRMAN SOULES: Richard Orsinger. Excuse me, I didn't mean to interrupt. Were you through, Rusty?

MR. McMAINS: No, that's all I'm saying. I don't think there's any need to say one bite and you're out.

CHAIRMAN SOULES: Richard Orsinger and then back to Steve.

MR. ORSINGER: I just had the same comment that Rusty did.

MR. SUSMAN: I don't have any problem with you all's suggestion. I mean, I would readily accept them on behalf of the committee. To me it's not harmful. I question whether anyone would use it in

practice, because I don't see it in my practice, people taking depositions, you know, when -- I mean, when you have a pretrial order that says experts shall be designated by a certain date, I have never gotten the other side to designate before that date, nor have I ever been willing to do so myself, so -- but I have no problem with what -- I mean, if people feel strong about it, we will rewrite the rule. So with that revision, can we have a vote?

CHAIRMAN SOULES: Okay. With this observation: We're trying to make a rule as flexible as possible to take care of a big basket of cases, the biggest -- we hope the biggest basket of cases that are suspending across the whole spectrum of what cases are about. And if it adds some flexibility to say the identity and general subject matter of the expert in the interrogatories -- for example, in a family law case that needs to get up and go in 120 days or 180 days or less, that may be something that's important. In another case it may not be at all because, as you've indicated, you don't designate before the

pretrial order tells you to and neither does the other side, but at least it does add some flexibility.

And we need to keep in mind that we're talking about this 80 percent of all cases that would come -- that would be subject maybe to this rule.

Okay. How many are in favor of -- I believe it was initially Sarah's suggestion that we add to the interrogatory information the identity and general subject matter of experts. Show by hands. Okay. Those opposed. Well, I'll have to count.

Let's see, three opposed -- no. Two opposed. Let me see those for again. 11. 11 to two it carries.

That means that there would have to be some revision to Rule 10 because the "only as set forth by this rule" is not accurate as far as that piece of the information, so you need to work through that to fix it.

MR. SUSMAN: That's no problem.

CHAIRMAN SOULES: All right. Paula Sweeney.

MS. SWEENEY: Well, something

was just said that was very concerning to me, which is, well, you've got six hours, you can just finish it later. I've never understood the six-hour period to be a time certain which allows you to start, take an hour, come back next month, take another hour, and sort of divvy up your time with the expert however you want.

I mean, you get an expert deposition. It can't be longer than six hours, but it's one depo. And to the extent that -- I think that Rusty may have been the one that made that comment. I would ask that you all clarify that or make it clear in a comment that this isn't a fixed time which can be parceled out at the opposing party's whim. It's just a maximum.

CHAIRMAN SOULES: Okay. Does anyone else have any comments? Steve, back to you.

MR. SUSMAN: Well, I mean, I'd be delighted to do that. I mean, if you want to say you get -- it would be -- I mean, we have not provided but can easily provide, if you want, and I think it's probably a good

idea, that the time limits on depositions, both fact and expert witnesses, are considered time limits for one setting. We are not -- you can't take a fact witness and take an hour today, two hours next week or an hour every month, nor can you divide up an expert. It must be one sitting. That's fine. Can we have a show of hands on that?

CHAIRMAN SOULES: Just a minute. Judge Brister, and then we'll get to that.

HONORABLE SCOTT BRISTER: I think that would be a big problem. That would send a lot of people in to ask to do the supplement, because it's a very frequent occurrence, especially in cases that take a long time to get a trial. You took the deposition two years ago before discovery closed, and sure enough, when the real trial setting finally comes around two years later, you need a short deposition to find out if plaintiff's back has gotten better in two years, and you have to do it. And I don't want every sore back case coming in having to get an order from me to extend it just on

something that's as standard as that.

I agree that you can't bust it up in five different times to harass somebody, but to take a deposition and a supplemental one shortly before trial is about as standard a request as I get.

MR. SUSMAN: Now that I hear about it, I tend of agree with Scott. I mean, very few lawyers are going to try to divide it up and come back intentionally two or three times. I mean, I've never had that happen in my practice, I mean, you know, so it ain't going to happen.

CHAIRMAN SOULES: I don't think the rule suggests that you can or suggests that you can't. If it gets to be an issue in a particular case, it's something that has to be handled by the judge.

MR. SUSMAN: We've accomplished so much -- we've diminished so much abuse by limiting fact witnesses to three hours and experts to six that, you know, there's just a limit to what you can do. And if someone really felt "I want to take a fact witness right now for an hour and find out something

important and come back later in the discovery after I've got documents and spend two hours," that's not necessarily stupid.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I was just going to say that I don't think this is a problem in practice now and I think the best practice would be not to say anything about it in the rules.

CHAIRMAN SOULES: Any other comment on that? Okay.

MR. SUSMAN: Without any other strong feeling, I think we'll just leave it the way it is then.

CHAIRMAN SOULES: All agreed? Okay. All agreed. Next.

MR. SUSMAN: The next is Subdivision 3, which is disclosure of general information.

Did we get a vote on Subdivision 2 as fixed? I think we did.

PROFESSOR ALBRIGHT: It's not really fixed.

CHAIRMAN SOULES: No. Subdivision 2 is back to you for all the

things we talked about.

MR. SUSMAN: No, but the notion is in the general case there is going to be a time period, 60 days before the end of the discovery period, where you've got to make these disclosures if you haven't made them before. That's the concept that we need approval on so we don't have to redraft that.

MR. LATTING: On request.

MR. SUSMAN: On request. And the defendant goes 15 days after the plaintiff. Okay. That's the thing I'd like approval on. Any opposition to that?

CHAIRMAN SOULES: Any opposition on this? Rusty McMains and then I'll get back to Bill.

MR. McMAINS: I don't have any opposition to the notion of doing it on request, but I noticed in the rule there's nothing that says when you need to request it. I mean, my concern is that suppose if you just said "upon request," then if you make a request 61 days before, then you've got one day to do it. I mean, it seems that there should be a timing rule requirement to make

the request.

CHAIRMAN SOULES: Put a fuse on it. 30 days.

PROFESSOR ALBRIGHT: There is a general timing rule that says you have to make your request so that there's time to respond within the discovery period.

MR. McMAINS: Well, I understand. But you're already in the discovery period. And the problem is, again, that thing at the beginning says you've got to do it under this rule, and I realize that's going to be modified too. But when you say you've got to do it under this rule, this rule has to be self-contained with a request mechanism and timing that gives somebody sufficient notice to get this together.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: But if you have a general rule that says any request for discovery has to be made so that the response can be made within the discovery period, then I think that satisfies the problem. That means that you have to respond in the

discovery period, right?

MR. SUSMAN: No, it doesn't, Alex, because of this reason: That was put in there for the person who serves interrogatories or requests for production, you know, 15 days before the end of the discovery period. That will not suffice because the 30 days comes outside of the discovery period.

But that's different from something that requires action the next day. Rusty is right. If you made a request on day 61, conceivably you have time to the comply. It's not fair to have a person go find the expert and get all this information from the expert in 24 hours' notice. We can solve that and we will do so.

CHAIRMAN SOULES: We need a fuse on the request so that these deadlines that we have that the producing party has to meet are reasonable after that party receives the request to do so.

MR. SUSMAN: We'll do that.

CHAIRMAN SOULES: And we use 30 days on virtually everything except

depositions and I'm always reticent to change periods to have some weird unusual period of time that we're not accustomed to thinking about, but we'll be guided by what you decide to do.

Richard, did you have something else you needed to say on that? Bill Dorsaneo.

PROFESSOR DORSANEO: The last sentence in Paragraph 2, when it says failure to timely designate shall be grounds for exclusion, is that meant to mean that the judge has discretion or doesn't have discretion?

MR. SUSMAN: I think we need to take that out. I think what has happened is that's an old sentence that got -- we have now written our exclusionary rule separately. We have an earlier rule, and I don't see why this should be a different sanction exclusionary rule than our other rule for failure to designate someone with knowledge of relevant facts.

I mean, one would think that the failure to designate the identity of an expert witness in a timely fashion would usually result in a

surprise that would affect the outcome of the case and therefore result in the striking of the evidence or a continuance. But one could conceive of a situation where you had known of the expert, you've even deposed the expert, but it just didn't get reduced to some formal designation in the 60-day period of time. I think we should go back to our exclusionary rule on all failure to make timely discovery rather than have a special one here.

CHAIRMAN SOULES: I think the way it's left in the exclusionary rule is broad enough to cover this already. It encompasses it.

MR. ORSINGER: Which rule is that, Luke?

CHAIRMAN SOULES: It's Rule 6 on Page 12 of the January 16 material.

MR. SUSMAN: Right. Now can we look at --

CHAIRMAN SOULES: So all in favor, then, of deleting the last sentence of Paragraph 2 in proposed Rule 10 show by hands. Okay. Opposed. That's unanimous that we delete that sentence.

MR. SUSMAN: Subdivision 3.

MR. ORSINGER: But we never really adopted that concept of Paragraph 2, did we?

CHAIRMAN SOULES: It's so broad I don't know what a vote will indicate, but I'm happy to take a vote.

In concept, as we've discussed through today and as will be reflected in the transcript, those in favor of Paragraph 2 of Rule 10 as proposed in concept show by hands. Okay. Those opposed. No opposition.

MR. SUSMAN: Paragraph 3. In Paragraph 3 we have indicated that at the magical time, the deadline for designation of the experts, that contemporaneously with the designation you need to disclose the following information, and there are seven: The identity of the expert; the background including a current resume and bibliography; the subject matter on which the expert is expected to testify; the general substance of the expert's mental impressions and opinions and a brief summary of the basis thereof; documents prepared by, provided to, or

reviewed by the expert in anticipation of his or her testimony; at least two dates within 45 days following the date of designation on which the expert will be available to testify; and if there are consulting experts whose opinions or impressions have been reviewed by a testifying expert, then the identity, background and general substance of the opinions of the consulting expert.

Those are the seven compulsory mandatory disclosure items when it comes time for experts. It's a lot more information than is provided right now at the time experts are designated, a whole lot more. If it is complied with, lawyers should have no trouble taking the expert's deposition very promptly after receipt of this material. There is a tight time frame. That's why we made it comprehensive. And because you're going to be deposing someone, whose identity you may have just learned, within the next 45 days, you need the information right then, not later.

And then, of course, we have added a sentence at the end of the rule on Page 21, the end of this paragraph, that exempts from

the mandatory disclosure certain items, (b) and (e), the current resume of the expert; the documents prepared by or reviewed by the expert where you're dealing with an expert who has firsthand knowledge of facts but is neither an employee or within the control. That is, a treating physician is what we had in mind here, someone who you can't make provide those things because he's not a paid gun, hired gun, and he's not an employee.

So that's the rule. Basically this is not really new in this version of the rules, which dates back to the January 20th version. It was something we have had similar throughout. The one addition it seems to me that we made to the January 20th particular edition was the general substance in response to, I think, Luke's request at one of our prior meetings. I seem to recall that that was something, and so that's that. Any comments on that?

CHAIRMAN SOULES: Okay. We'll start going around the table here. Bill Dorsaneo.

PROFESSOR DORSANEO: In the

"however" sentence, why does it say "if the expert has firsthand knowledge of relevant facts"? Why is that necessary?

CHAIRMAN SOULES: Alex, do you have an answer to that question?

PROFESSOR ALBRIGHT: That was in response to, I believe, Tommy Jacks and Paul Sweeney's question about experts who are not really within the control of a particular party. They're going to render expert opinions, but they are really fact witnesses as well.

CHAIRMAN SOULES: Bill's question deals with these words, if the expert has firsthand knowledge of relevant facts.

PROFESSOR DORSANEO: I think all experts will have firsthand knowledge of some relevant facts, so I think that's meaningless.

MR. SUSMAN: I think I have the solution. Why wouldn't you just say here -- isn't the real test to see if they're within the control?

PROFESSOR DORSANEO: Right. That's my point.

MR. SUSMAN: So if you just say if the expert is not within the control of the party, the party need not provide this information.

CHAIRMAN SOULES: If the expert is not an employee or otherwise under the control of the party.

MR. SUSMAN: If you just say "not within the control," you cover the whole panoply, both employees and specially hired experts.

CHAIRMAN SOULES: Any response to that particular issue? Okay. Then, Bill, are you suggesting that we take out the words "has firsthand knowledge of relevant facts and is not an"?

MR. ORSINGER: Leave "is not within." It should read "if the expert is not within."

CHAIRMAN SOULES: Okay. Is not within the control of a party. Let's see, so we delete down to "within" and put "not." Okay. We delete "has firsthand knowledge of relevant facts and is not an employee of or otherwise" and insert "not" so that the

sentence now reads, "However, if the expert is not within the control of the party, the party need not provide" and so forth?

MR. SUSMAN: Fine.

CHAIRMAN SOULES: Okay. Any discussion on that particular point? Rusty.

MR. McMAINS: Well, the problem is that that exemption -- when you say "not in the control of the party," I'm not sure exactly what that means. I mean, if you hired somebody that's an expert that's outside, are you saying that is in the control or not in the control?

CHAIRMAN SOULES: That is.

MR. SUSMAN: I'd say that is in the control.

MR. McMAINS: Well, I mean, if we don't say that -- I mean, unfortunately, I've heard lots of experts that I haven't had any control over. I mean, I'm not sure that I -- I mean, I understand about the nonemployee part, but this thing that says any document or tangible -- (e), one of the exempted parts, and document, tangible thing, reports, models, or data compilations that

have been prepared for or provided to, now, what difference should it make whether I have control of him or not? Why shouldn't I have to produce that stuff, because this is talking about stuff I have provided to him or that he has prepared for, or reviewed by the expert in anticipation of the expert's testimony.

MS. BARON: Keep reading. Read the "however" clause.

MR. McMAINS: It says -- the "however" clause says the party need not provide the information required in subsection (b) or (e) except the information within the party's possession or control.

MS. SWEENEY: So if you provided it --

MR. SUSMAN: He's providing it --

MR. McMAINS: I mean, if he's got his own data compilations but he hasn't sent them to you yet, I mean, you're saying that the witness doesn't have to produce them based on the assumption that you're in control of -- I mean, I'm just trying to figure out -- well, he can do data compilations, he can do a

model, he can do a work-up, and as long as he's, quote, not in control --

CHAIRMAN SOULES: Time out. New issue. That's a different issue. I want to get to the first piece of this first and then we'll get to that last part.

If the expert -- how about is not employed by or within -- is employed --

MR. SUSMAN: Or retained by. If the expert is not retained by or within the control. Will that do it?

CHAIRMAN SOULES: Okay. That's what I'm trying to get at. Retained by, employed by, it means the same thing to me but maybe not to others. "Retained" is better.

MR. McMAINS: Yeah. I don't have a problem if that's what you want to do.

CHAIRMAN SOULES: Okay. If the expert is not retained by --

MR. GALLAGHER: Excuse me. Has not been at any point during the litigation, or however you want to --

CHAIRMAN SOULES: Okay. Mike, I want to get that down right now. The first part of the concept is if the expert is not

retained by or in the control of the party. Does that take care of the first issue you raised, Rusty, in your opinion?

MR. McMAINS: Mike's concern is with the floating designation problems that we have under the existing practice; that is, that they would be consulting an expert and all of a sudden -- expect him to be a trial expert, and then they would revoke him and designate him as a consulting --

MR. GALLAGHER: Or de-designate him. I agree with what's trying to be done here. I just think it's a matter that the devil is in the details. But this doesn't get to what -- I don't think the problem has been answered yet.

CHAIRMAN SOULES: Okay. The first thing was, is an expert who has been hired by a party within a party's control?

MR. McMAINS: Right. That was my concern.

CHAIRMAN SOULES: Okay. Now, if we say "is not retained by or within the control," does that speak to the hired expert question or problem that you were concerned

about a moment ago?

MR. McMAINS: The general problem, yes.

CHAIRMAN SOULES: Okay.

MR. McMAINS: The specific problem of has he ever been is not.

CHAIRMAN SOULES: All right. Now, that's a new issue, so let's talk about that one now. Mike.

MR. GALLAGHER: Well, my concern on that point is that if someone has been retained during the course of the litigation or prior to the litigation but at a point in time when information was developed, it's going to be relevant. I think we need to reach to that expert. You don't want to permit by the rule to give someone the right to not disclose information that may have been provided to them by an expert. That's all I'm trying to get to.

MR. SUSMAN: I didn't really understand that we were.

CHAIRMAN SOULES: Are you talking about consulting experts?

MR. GALLAGHER: No. I'm

talking about an expert that's been designated as a consultant who becomes a testifier or is de-designated, and you can de-designate under the case law.

CHAIRMAN SOULES: I understand that. Steve.

MR. SUSMAN: My point is, I don't understand what's going on. Let me just clarify, Mike, if I can. Let's say you have an expert and you expect him to testify. Now, the 60-day time limit comes and you decide, "I'm not going to use him as a testifying expert." And by de-designating him -- I mean, by essentially not using him, you do, you remove him from discovery and from having to produce all this stuff. That happens in every case. Why should that be any change? I mean, unless he's currently expected to be a testifying expert at trial, he should not be subjected to all this stuff.

MR. GALLAGHER: Okay.

MR. McMAINS: I mean, I understand where you're coming from. I don't have that much of a problem with the rule, with this concept.

MR. SUSMAN: I think we solved that then.

CHAIRMAN SOULES: Okay. I think that's resolved too. Now, we have not gotten to (b) or (e) -- or do you have something else in the first two and a half lines of the "however" clause, the "however" sentence?

MR. SUSMAN: No.

CHAIRMAN SOULES: Okay. Now we get to Rusty's issue of exempting (e) from the "however" sentence, except that information within the party's possession, custody or control. Articulate your concern, Rusty.

MR. SUSMAN: I think it's been solved.

MR. McMAINS: Well, I think we actually solved it by -- I mean we were solving the other problem. What I was concerned about was this thing that said if you've got an expert outside your control, which could easily be just an independent contractor type analysis, that he wasn't going to have to produce the data that was going to be the substance of his expert testimony. Now

that we have clarified that "within the control" means the somebody that you have hired to testify or that you have retained, you know, then he doesn't qualify for that exemption so it probably doesn't make that much difference.

CHAIRMAN SOULES: Okay. Anything else on the "however" sentence? Alex Albright.

PROFESSOR ALBRIGHT: I think Rusty did raise -- that issue is still alive. What if that expert that you don't have control over has a bunch of documents that you want to look at, so what if we add that the expert may be served with a subpoena duces tecum for his deposition?

CHAIRMAN SOULES: Well, we know how to fix that. That's in the deposition rule.

PROFESSOR ALBRIGHT: Well, when you're taking the deposition of that expert, you can require that expert to bring documents. It's not that you're limited to the kind of documents that the other side provides you. You can require the expert who

is not retained to bring documents to the deposition. I think that would solve the problem.

CHAIRMAN SOULES: How many feel that we need a clarifying sentence that states just what Alex said?

HONORABLE SCOTT BRISTER: Like in a comment.

CHAIRMAN SOULES: Pardon?

HONORABLE SCOTT BRISTER: Put it in a comment rather than the rule.

CHAIRMAN SOULES: In a comment or a rule. Okay. How many feel it should be a comment only? Seven. Those who feel it should be in the rule. One. Those who feel it should be in neither place. One -- two.

PROFESSOR DORSANEO: Well, I'm not -- I just wonder if when we finish this rule whether it's going to be necessary to say with respect to discovery from experts, it can be only as follows. We've just identified at least two things that are not in this rule. The federal rule and our Texas rule now talk about discovery from experts can be obtained only as follows. I frankly don't think that

form of engineering is necessary. And if that's not in there, then we don't need to worry about extra sentences.

CHAIRMAN SOULES: You see Bill's point here, don't you? I mean, an expert --

MR. SUSMAN: I would just as soon take it out.

CHAIRMAN SOULES: If you've got a 702 expert, you may or may not be able to get the guy to do anything except under subpoena.

MR. SUSMAN: I have no problem with taking the "only" out and just saying if you can figure out a different way to get discovery within your nine months, 50 hours, 30 interrogatories, go get 'em, tiger. You know, we have contained the harm by limiting the time and the use of devices in my view.

CHAIRMAN SOULES: All right. That's a pretty significant change in approach, what you and Bill are talking about right now, and I think we need to talk about that, because we have up until now talked about getting this information, to the extent

it's available under this rule, that this is the only way you can get it.

There are experts, 703 experts, that you can't reach their information under this rule. We've already seen that, so those kinds of experts can't be controlled by Rule 10. There's got to be some other way to get to them.

But are we still going to say that the experts that are subject to Rule 10, you get the information only under Rule 10? Because that has been the approach so far. Now we're getting it -- now we're identifying exceptions to that that have to be dealt with somehow, but does that mean we're going to open up Rule 10 experts to anything other than Rule 10? I don't know if I've been able to say -- I've tried to say it two or three ways to make it clear, but I may not have gotten it done. Alex Albright or Steve.

PROFESSOR ALBRIGHT: I think we should leave it where you discover your experts this way, because I think this is a standard disclosure situation and it is -- I think it's a good place to have a standard

disclosure. Because if you have people starting to figure out interrogatories and document requests to ask for expert information in different ways, then we're going to have people objecting to it that it's not proper and we're going to have motions to compel and all sorts of discovery hearings that we want to try to keep from happening.

If you have this as a standard disclosure, and my concept based on the last discussion is that you say from the beginning of the lawsuit "I want standard disclosure of your expert information and then we have to figure out a time for supplementation," then you know you have to disclose this information about your experts. And if we add interrogatories and document requests to that, then I think we're adding additional problems that aren't needed.

CHAIRMAN SOULES: Well, one way to approach this may be to put right in the first sentence expert witnesses are -- a party may request another party to designate and disclose information concerning retained and controlled experts.

MR. SUSMAN: That's fine

MR. GALLAGHER: Let me just point out a practical problem.

CHAIRMAN SOULES: It's just an idea. I'm laying that out for you all to think about, because we do have a certain class of experts that Rule 10 fits, and then we've got some others that it doesn't fit, so we have to recognize that and deal with it somehow. Mike Gallagher.

MR. GALLAGHER: If we could just dispense with one thing, and that is the necessity of proving an expert is within the control of a party before you can get discovery. This exception here, the one that keeps haunting me, the "however, if the expert has firsthand knowledge and is not an employee or within the control," Rusty is right. Experts are independent contractors, whether they're testifying experts or not, and it just -- I think you said a while ago "has been retained by." That's all I'm trying to get to, something where we can eliminate -- we're trying to simplify discovery. Let's eliminate the necessity for showing control, Steve. I

mean, we --

MR. SUSMAN: I think what we want to do is put in the first sentence here that this is a rule that applies to expert witnesses who are retained by or under the control of a party.

MR. GALLAGHER: Okay.

MR. SUSMAN: Either way, this rule would govern. If it's some expert who is neither retained by nor under your control, you better figure out some other way to get discovery.

MR. GALLAGHER: Right. But if you say "retained by," that's fine.

CHAIRMAN SOULES: It's basically third party discovery.

MR. SUSMAN: That's correct.

CHAIRMAN SOULES: No party really controls that. That's another process.

MR. SUSMAN: That's true.

CHAIRMAN SOULES: Okay. So you all are going to address that in the next meeting.

MR. SUSMAN: I mean, that's a good suggestion. That solves a lot of the

problem.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I have a question about that. What about if a party is going to use expert testimony from a treating physician, for instance, shouldn't they still have to say, "I'm going to rely on this person to give expert testimony in the following particulars"? If you exclude that from the request for standard disclosure, then I have to ask an interrogatory in every case that says, "What other experts are you going to use in this case that will render opinions, and give me all that information."

That's why I think we still need -- it may be that what we need to do is draft this rule in two different parts, one part concerns retained experts, one part concerns experts who are not retained, rather than having "however" clauses.

CHAIRMAN SOULES: I think that's a great observation. That's a good point.

Okay. Any other ideas now that we want

to get to Steve and Alex on their redrafting of this particular concept? Elaine Carlson.

PROFESSOR CARLSON: I just have a point of clarification. I think we voted a moment ago that interrogatory inquiries would be permissible for the identity of an expert. Does that now mean, under proposed Rule 10, subsection 3, that when you answer an interrogatory, that constitutes designation for purposes of triggering providing the rest of that information at the time you answer the interrogatory?

CHAIRMAN SOULES: That needs to be drafted also.

PROFESSOR ALBRIGHT: Can the committee take all of these ideas under consideration and come forward with another proposal?

CHAIRMAN SOULES: Please. That's exactly what we want to get to, and that's why I want to gather up all the comments and thoughts that we have on this so that you will have some guidance from the record. Richard Orsinger.

MR. ORSINGER: Just at a purely

philosophical level, I understand why in my view this expert disclosure is tilted toward the end of the discovery period. Maybe that's wrong, but that's the way it seems to me. And at a philosophical level, I question that. I know that the reason for that is because frequently your case isn't developed perhaps enough for your experts to even have opinions. But we're pretty much going to require everybody to prepare their case almost entirely before they find out what the experts are going to say. And maybe that's the thing to do.

But it seems to me that the earlier that someone takes a real litigation position where their expert testimony tells you what the real contentions are is the first time that you're going to have a reasonable shot at settling the case; and that if you have most of your factual discovery on non-expert witnesses occurring before the experts take a position, then basically we're slanting this approach toward fully developing facts before we even seriously have settlement postures or litigation positions on the table for

settlement talks.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: The response of the subcommittee is -- I mean, our response would be the order suggested by this rule parallels that in place in 99 percent of the existing pretrial docket control orders that we've ever seen in state or federal courts. I mean, expert designation always comes at the end of the process, close to the discovery deadline, not at the beginning. I mean, most people handle litigation that way. They don't hire experts right at -- and you're right.

One could make an argument for changing the way we do things, but it would be such a revolutionary change in the way we do things that we opted to kind of codify what we viewed as existing practice. And that's what this does, Richard. I mean, it is the current practice that experts get designated towards the end of the discovery cutoff date, whatever that is, and yes, that makes it somewhat difficult to really evaluate a case early on and to some extent to conduct factual discovery. But it's just kind of the way

things are done, and I think it's basically a pretty good idea, the way things are done.

CHAIRMAN SOULES: Any other discussion on this point? Does anyone want a division of the house on that issue? Okay. Then we'll go to Rusty.

MR. McMAINS: This is really kind of -- it's within the subparts of the tangible things and things that are supposed to be produced. Since this rule is supposedly self-inclusive or self-enforcing or whatever and kind of doesn't look to the other rules theoretically, does the use of the term "any document provided to the expert or reviewed by the expert" -- I mean, I'm just interested now about the interaction with privileged or notions of privileged or attorney work product.

Are we basically saying that if the attorney wants to, you know, have discussions, give him notes, or you know, say, "I want you to look for this or look for that," do you get the part that says "I want you to look at this, I want you to look at that"?

MR. SUSMAN: Absolutely. I

mean, I've always assumed that's always discoverable. Yes.

MR. McMAINS: You think so even if they are a party expert?

MR. SUSMAN: If they're a what?

MR. McMAINS: If they're a party expert. I mean, you can have multiple roles with regards to -- I'm talking about an expert who is an employee of a party or who works for a party, which is frequently the case, and they may have various liaisons with an attorney work product notion. I don't know. I'm just asking if we're convinced that that's not a problem in attorney work product, because this rule basically says you've got to give it to them.

CHAIRMAN SOULES: Bill Dorsaneo.

MR. SUSMAN: I see what you're saying. I mean, we hadn't thought of that. I mean, I don't think we intended to do away with the attorney-client privilege where the plaintiff, the named plaintiff or defendant, is testifying as their own expert. I mean, if that's the situation you are positing, where

the plaintiff is --

MR. McMAINS: I mean, it's possible that --

CHAIRMAN SOULES: One at a time. One at a time. Steve.

MR. SUSMAN: I mean, we do not intend and would not want to have that provision cause a blanket waiver of the attorney-client privilege for the client who is testifying as his own expert. You know, the rule was written with the retained outside expert in mind.

MR. McMAINS: But as a classic example, suppose that you want to testify about your own attorneys' fees. You're testifying as an expert. Now, are you supposed to turn over all the information you have? I mean, obviously a lot of the information you have is privileged. And I'm just saying, you know, this rule is pretty wide open about mandatory disclosure about what you're supposed to give. And if you read it with that view in mind, you would say, "Oh, well, I just need to give the other side my file."

CHAIRMAN SOULES: Bill Dorsaneo first, and then we'll go around the table.

PROFESSOR DORSANEO: Well, I actually think this is a little developed area of our jurisprudence. I only know of one, perhaps two, cases that address it. And I think the Committee does need to -- and I don't recall the names of the cases right now, although they are readily obtainable. I think the Committee does need to address this and decide whether all means all, or whether there's a difference depending upon -- I think one of the cases said whether the expert relied on it, which we don't want to get back into that game. And then I think another one of the cases does talk about a client or someone employed by a client. And if I can help provide the information, I'll be glad to look it up and give it to you.

CHAIRMAN SOULES: Would you do that for Steve's committee?

MR. SUSMAN: That would be great.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: You've got to consider the defendant doctors, for example, who may testify that they didn't commit professional negligence, so they're going to be a testifying expert, and yet you can't say that everything they looked at, including their attorney-client correspondence, is going to be subject to disclosure. But at the same time, you don't want a hired expert selectively hiding adverse information by saying, "I don't have to mention that I saw this negative information because I'm not considering it in arriving at my opinion."

I mean, to me, the evil of letting the expert decide what they relied on versus what they saw is that experts will selectively rely only on things that support their position. And then you will never get out of them in cross-examination the things that go against their own opinion.

CHAIRMAN SOULES: Okay. Sarah, and then we'll continue around the table.

HONORABLE SARAH DUNCAN: This brings up a situation I mentioned earlier. I think it's a capacity question where, in a

case that we had, a defendant said, "Here is our expert. He is a testifying expert as to Topics 1, 2 and 3, and he is a consulting expert as to Topics 4, 5 and 6." And it's that capacity problem that I think is the root of this.

CHAIRMAN SOULES: Okay. Steve Susman.

MR. SUSMAN: Isn't the solution to say that this rule is not intended to overrule or wipe out otherwise privileges? I mean, we are not going to rewrite the attorney-client privilege rule. That's not what we're supposed to be doing, rewriting privilege rules. I mean, we said keep away from that. So if you just say that, I mean, if the stuff is otherwise privileged, simply because it's subject to disclosure doesn't wipe out the privilege.

PROFESSOR DORSANEO: You don't want to do that for the trial preparation privilege, because this is an exception to trial preparation privilege law. So if you're going to say attorney-client privilege or some privilege in the rules of, I guess, evidence,

rather than civil evidence pretty soon, that would make some sense to me.

But I don't like the idea -- I like the idea of being able to ask the expert, you know, what they were provided in terms of trial preparation materials by counsel, whether that's oral or not. Now, maybe I'm troubled by how far the attorney-client privilege goes.

MR. SUSMAN: I have never --

CHAIRMAN SOULES: Just a minute, let Bill finish.

PROFESSOR DORSANEO: I guess I am finished. I end up being confused about the extent of the attorney-client once I get as far along as that.

CHAIRMAN SOULES: Okay. I promised to go around the table. Any hands up on the right-hand side? Coming back. Paula Sweeney.

MS. SWEENEY: The dilemma you all are discussing exists in current law. This rule doesn't affect the current situation. We have this rule for disclosure as to experts now that applies to party

experts, so I think, to me, we just leave it as it is and let the current practice continue to handle it.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Well, I think it's somewhat solved in the rule because we say you have to provide things that are reviewed by or provided to the expert in anticipation of the expert's testimony. We're not saying relied upon. So I think if you had a party expert, you could use that as a handle to say, "Okay, we had a lot of attorney-client discussions or work product discussions, but in anticipation of this testimony, this is what was there, and so this is all the information in anticipation of this particular testimony."

So I think it is a problem under the current rule, and perhaps we can solve it, perhaps we cannot, but I think this does give you a handle to say, "I don't have to give you every single bit of information that is protected in this case only because I'm testifying as to my own attorney's fees. I'll

give you the information concerning my attorney's fees, but not everything else."

CHAIRMAN SOULES: Rusty and then Bill.

MR. McMAINS: I understand it is not true to say that you do not exacerbate the problem if you try to do a self-contained rule which is a mandatory disclosure globally, whereas our current rules, the way they are designed, are all subject to being able to file motions for protection. You have all the privilege stuff in there as well. This doesn't interact with that.

If you're trying to design a self-contained concept here, it is a different track. It will get you different results in the appellate courts on mandamus because of the notion that this is what we're talking about, experts. Don't look at any of our other rules.

Now, if we're going to subject them to the other rules in regards to the privilege areas, then we're in the same malaise that we're in now, I agree. But you have exacerbated the problem when you have tried to

take this out, make it definitive, and ignore all of the privileged work-product type notions that have been developed in discovery globally in the past.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: My thoughts have crystallized on this a little bit more at this point. If you look at your privilege rule, your trial preparation privilege rule now, I think it says except as provided in this expert rule, so -- and if that's true, then what's been created is an endless path around a circle, because the issue that has to be decided, and I think it's important enough to not leave it undecided, is whether a work product claim can be made in order to shield information provided during the preparation for trial by counsel to the expert. My personal view is that that should not be permissible.

Now, with respect to the attorney-client privilege, whatever the contours of that privilege are, I may have a different attitude, although I am generally not one who

likes privilege, period, but I like that one better than all the others for obvious reasons, perhaps we could just make the attorney-client privilege pertinent to expert discovery without having the circle about the trial preparation privilege, and perhaps the Committee could explore that just basically deciding what we want. Do we want to be able to ask the expert what the lawyer told him or not? I would vote yes.

CHAIRMAN SOULES: Well, so far, I've been successful in arguing to trial judges that they can't ask what the lawyer and the expert talked about, because right now the rule doesn't reach that. It talks about papers. If you read the rule, it's all papers. It's not oral communications between the lawyer and the expert. And that's a step beyond where I've been going, and I've always felt free to talk to the expert, musing about a lot of things, because those discussions are not subject to being discovered. However, anything I give him in writing, they are.

MR. SUSMAN: Well, that does seem to exalt form over substance. I mean,

that doesn't make any sense, okay?

CHAIRMAN SOULES: It does to me. As a matter of practicality, it makes a lot of sense to be able to sit down and have discussions with somebody about their testimony.

MR. SUSMAN: That may make sense, Luke, but why wouldn't it make sense to be able to write him a letter and do the same thing? I mean, the distinction between whether it's in writing or oral doesn't make any sense.

CHAIRMAN SOULES: Well, this rule certainly is directed to papers, as is the present rule. There's not anything in this rule that says you can find out what the lawyer communicated orally or what the witness communicated orally back to the lawyer. That's not in Rule 10 and it's not in the existing rule, and I think there's a reason for it.

MR. SUSMAN: I have never -- I mean, it's never even occurred to me that I would be able to instruct a witness, an expert, during a deposition, when asked, "What

did you and Mr. Susman" -- "What did Mr. Susman ask you to do? What did he tell you" --

CHAIRMAN SOULES: I do it every time.

MR. SUSMAN: I would think that would be go-to-jail time. I mean, I never -- Scott, how would you rule on that? I mean, how is that protected?

HONORABLE SCOTT BRISTER: I mean, that's a good question. To me, it's especially difficult with the in-house expert, you know, the guy that designed the seat belt or whatever else, because you really do run up against -- I mean, if he's going to testify about it, fair game, but then what if you want to go into some other things like attorney contact stuff? Then you really do start butting up against some very tough attorney-client questions.

MS. SWEENEY: But that's another tension that exists in the current practice. I've had exactly the same argument you all are having a bunch of times, where one party decides, "No, what we talked about is

privileged" and the other side thinks it's not. I agree with Steve. I don't think it is at all, period, once you've designated him to testify as an expert.

But that tension, that dilemma, that unclarity exists in current law in Texas state practice, and I don't think this rule does anything to that tension to change it one way or the other. It leaves you to argue your position and Steve to argue his.

CHAIRMAN SOULES: I agree with that.

MS. SWEENEY: And I don't think we can fix that in the rule either without rewriting 200 years of practice.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I go along with everything Paula just said except for her conclusion. I agree that anything an expert sees or has said is discoverable, but I agree that you can't prove that by case law or by rule. I think that's something we ought to consider, because the appellate courts have not given us a clear answer on that. If we

don't do something in the rule, ultimately the courts will, but they haven't, and they've had years to do it.

And so this tension continues to exist where some of us are practicing on the assumption that everything the expert sees is discoverable. Others are just not putting anything in writing. And we're just going to have further litigation, motions, mandamuses until finally the Supreme Court tells us. And maybe this Committee is the best place where we ought to try to reconcile those principles.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I don't have any problem with it. I mean, I would like to know what the rule is. Can I talk to an expert freely and be immune from that being discovered? I don't think we should distinguish between writing and oral, but can I talk to him and write him and have that be immune, or is that all subject? It certainly would be a great help to me.

I mean, I would just as soon have a vote on that here and have everyone agree to be bound by it. If Luke wins, great. Then I

know I can do it, because I haven't been doing it. If he loses, well, then he better be careful on that issue.

I have no problem. I think that's a good idea to vote on it. I think it's great. I would just like to know what the rules are too.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: The issue to me, I guess, is -- you know, I'd say I would vote yes for it, but I would worry about voting yes, that it should be discoverable, as to whether I would be getting accurate information from the expert when I ask the question. And I would recognize that in some circumstances I would be getting the answer that the expert was told to give when I asked that question. And maybe that would mean that this written/oral distinction does make operational sense because of potential abuse problems. I'm obviously not suggesting that anybody who speaks to experts is abusing anything, but maybe we can't get there by making it all subject to discovery.

MR. SUSMAN: All you're just saying is that there's a big tendency to perjure yourself or lie about what Luke -- the expert is not going to tell you the truth about what Luke told him, so -- but that doesn't seem to me to be any kind of rational basis for writing the rule, if in fact you ought to be able to find that out.

PROFESSOR DORSANEO: That's the whole basis for work product, I think. The whole basis for work product is that we'll have slippery practices unless trial preparation privileges are -- you know, they are needed to protect the adversary system. Otherwise, there will be shark practices.

MR. SUSMAN: I've never heard of that. That's news to me.

CHAIRMAN SOULES: For example, in construction --

MR. SUSMAN: Shark practices?

CHAIRMAN SOULES: In construction cases frequently you spend days with an expert at a construction site talking about all kinds of things, looking at a lot of things, which he is supposed to remember and

talk about. But your questions -- I may not have a clue what this concrete issue is. I can see we've got a concrete problem. I don't know whether it's cement, aggregate, steel, curing, and the days that you spend going through the structure with the expert eventually brings to focus what the issues are. And I've always protected those oral dealings with the expert until things begin to come to focus. And then there might be writings. There may be a list of questions. There may be all sorts of things that are exchanged, but they all come to light because the expert has seen them and reviewed them.

MR. SUSMAN: Why don't we just kind of get a view of what the group thinks and then -- I mean, can't we take a vote, just kind of a straw vote here now to see what most of the people here -- I mean, the choice between -- I mean, we need to talk at least initially about a retained expert, I mean, so we're not talking about the client as the expert, but a retained expert.

The choice is everything that the lawyer says or gives to him, either orally or in

writing, is discoverable. Or do you make the oral versus writing distinction? Or you can say everything oral or in writing that a lawyer talks to him or gives to him is not discoverable. I mean, it seems to me you've got three choices, and we're going to have three things to vote on. Does that make sense? Let's just see what the group thinks. Have we not covered it all?

CHAIRMAN SOULES: One last thing before we go to that, are we going to open up deposing the lawyer to prove whether he or she told the expert what the expert said? That's another thing that writing fixes.

HONORABLE SARAH DUNCAN: Can I have a clarification?

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: In the -- I just completely lost it. When we were talking about the third option that Steve gave, the everything oral and everything written, with the exception, of course, of documents that aren't correspondence, they're

documents in the actual litigation. So by "writing" do we mean only correspondence between the attorney and the retained expert?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Whatever has been shown to the expert, whatever is on paper.

HONORABLE SARAH DUNCAN: No, not whatever has been shown. That's the distinction I'm trying to make. What has been shown to the expert that is not correspondence between the attorney and the expert or their agents is discoverable. Only correspondence between the experts and attorneys and their agents would be nondiscoverable.

CHAIRMAN SOULES: If that's shown to the expert?

MR. SUSMAN: I think --

HONORABLE SARAH DUNCAN: That may be the third option.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: You don't clothe with any protection a document that someone else prepared, a learned treatise or whatever the hell it would be, and accident report,

simply by having the lawyer go to the expert's office and say "I want you to look at this. What do you think?" That doesn't make the underlying document privileged in any way.

On the other hand, that's different from a letter that I write to the expert saying, "I want you to consider the following three things and remember this and go check this out."

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I'm not sure where I come on this, but I just want to mention before we vote on it that I do agree that maybe there's a distinction between the retained expert and the employee expert.

But keep in mind that if those rules are different -- in a products case, for instance, the plaintiff's expert is usually going to be a retained expert. The defense's expert is usually going to be an employed expert. And if the rules are different and one side either has to show more or hide more than the other, then that's a problem to consider.

CHAIRMAN SOULES: Elaine

Carlson.

PROFESSOR CARLSON: I guess what we're saying is that if everything is discoverable that's been told to the expert by counsel, if that involves a privileged matter, would that necessarily be a waiver of the privilege?

CHAIRMAN SOULES: Whoever is speaking on the left-hand side of the table is interfering with the court reporter getting Elaine's comments.

MR. SUSMAN: My view -- yeah, I think that's the sense of the first motion. I mean, I would just want to argue for the vote for Prong 1, because I think that everything you show the expert or talk to him about is discoverable. A, I think it's more consistent with existing law; and B, I think it's more consistent with the current mood of this country, which is to curb junk science and curb the misuse of experts.

And I would suggest to you that lawyers -- if you hide or cloak in some privilege what a lawyer is telling an expert including how you're training them and how

you're grooming them and how you're putting them in front of a video camera to act nice, you are simply adding fuel to that fire of misuse of experts.

I think we ought to treat experts as people who are experts and have some degree of independence and are not going to be able to get on the stand and give their expert opinions after having being pumped up by Luke or Steve Susman to say what we want them to say and how we want them to say it. And if we say that, it should be subject to discovery. I think that's what the law ought to be. I do not think there ought to be a distinction between written and oral.

CHAIRMAN SOULES: Okay. I obviously disagree with Steve pretty strongly, not just because of what my practice has been in the past, but for some fundamental reasons. And I disagree with Sarah to some extent as well.

I think that anything that the expert is given in writing should be discoverable, whether it comes from the lawyers, from the parties or from whatever source, even if it's

correspondence with the expert saying what you want or what you don't want.

If we cross that line, though, from what's been -- and there's not any question what those say. They come from a lawyer. There they are. No lawyer needs to testify, "Yes, I provided that to the expert," because there it is in writing, Luke Soules to Ramon Carrasquillo. There's no doubt about it. It doesn't require any discovery from me.

Now, once you cross the line and you say as well the oral communications between the expert and the lawyer are discoverable, that makes me a witness, because if they're discoverable, I can be deposed to find out what those communications were just as well as the expert can be deposed to find out what those communications were.

And I think that the line is there for that reason, and I think it needs to be there for that reason. Otherwise, I think the practice is going to get really bogged down into everybody deposing everybody's lawyers about what the lawyers told the experts because they think the expert is lying.

And in response, what is the expert going to say? "Yeah, Soules and I were together out there at these seven 100,000-square-foot each warehouses for about five days over three weeks. I can't remember everything we talked about." So then you can't get from the expert what Soules talked to him about. Now, if you're entitled to that information, you've only got one place to go. Me. So my deposition is -- you can just see coming to the judge and saying, "Well, the expert can't remember, but he can." You're going to get to depose Soules because that's discoverable information.

I would urge that we don't cross that line and that we keep the oral communications between the lawyers and the experts nondiscoverable. And there has never been a rule in Texas that has said that oral communications between lawyers and experts are discoverable. If you read the rule the way it's written, it talks about exceptions to work product privileges. And the exceptions to the work product privilege that you are able to get from experts never discusses oral

communication.

Richard Orsinger.

MR. ORSINGER: I like the rule proposed by Steve except for the evil of deposing lawyers. And as an example, if you orally tell the expert that you want certain changes or certain things to appear in the report or for them to rephrase something a different way before they put it in writing, under a purely oral rule, you could never force the expert to say that they changed what they said or the way they said it because the lawyer requested them to do. Yeah, I think that's pretty relevant information.

On the other hand, I think it would be horrible if we started deposing each other. Couldn't we adopt Steve's rule and then specifically say that you can't depose or discover the attorney directly about those communications; that you're limited to just the experts and whatever documents may exist?

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Just two quick points. One, the notion that Steve has about trying to draft a rule that allows oral stuff,

this rule as it's currently formatted is a mandatory disclosure rule. The idea of mandatorily disclosing oral communications seems to be silly to me. I mean, it's kind of a reduce to writing what you remember of something and so you've got a script to go by. That seems to do too much. I mean, you shouldn't be required to explore that.

Whether it's off limits for other reasons is, I guess, frankly the office of another rule, it would seem to me. If you're trying to make the rule that this is the information you routinely give, it just doesn't make any sense to attempt to routinely give information about oral communications. That's just -- because they may or they may not be relevant and they're likely going to be like "We didn't have any oral communications, I never talked to him," or you know, something like that, which is kind of silly.

The second observation is that the notion of a retained expert does not satisfy the problem of the lawyer who testifies about his fees. And this rule, I mean, you know, as it applies to the expert witness, this rule does

in my judgment essentially say "turn over your file." And if it's not subject to any other rules, they probably are, you know -- maybe we should just say lawyers ought not to testify about their own fees. I don't know. But I think you're a retained expert in the sense that you obviously have an interest in the outcome of the litigation if you're testifying about your fees and your fee interest.

But I don't think that opens up everything that you have reviewed in anticipation of your testimony or everything that you've been provided by the party, which obviously will include attorney-client communications and work product. So that's a discrete problem that I'm not sure how to fix in the context of retained expert.

CHAIRMAN SOULES: Mike Gallagher.

MR. GALLAGHER: Our objective here was to try to simplify discovery and to expedite the discovery process. And if we permit examination of experts on oral communications between lawyers, we frustrate that purpose. And while I don't necessarily

agree that there's a public hue and cry in opposition to junk science or closing the patent office, I do think that we need to try to keep this as pure and as simple as possible.

And oral communications, Steve, imposes a virtually impossible burden on experts. It's just impossible.

CHAIRMAN SOULES: Joe Latting. Paula, I'm sorry, I skipped you. I didn't see your hand.

MS. SWEENEY: The rule as it currently exists has always been, I think, that you can discover everything we're talking about from the expert. What I have always objected to, when it comes to designation, is when the other side, under the current practice where you have to supplement, expects me to send them everything I send to the expert, because then when you start with "as soon as practicable" it means carbon copy them every time I send something to the expert, literally, is the reality of that rule if you follow it to its logical conclusion.

What the rules mean is that you get

discovery from the expert. Thereby you learn from the expert what has gone into his or her decision making process, not from the lawyer, but from the expert. So if I have sent a bunch of stuff to the expert along the way in my own due time, I don't have to send that to you. But when comes time, you get it from him.

Similarly, I don't have to tell you by deposition or otherwise what I told the expert, but you can ask the expert what we talked about because it may have informed his decisions.

And if that distinction is made and intellectually we think about it clearly enough, then you don't have all of these problems that we're talking about with deposing lawyers and people making up things or not telling the truth about what they were told. You just ask the expert, "Well, what else has gone on in your work in this case? Who else have you talked to? What else have you learned? If you learned something from the lawyer, tell us."

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, I think the law ought to be the Susman rule with the Orsinger amendment, which means that you can't depose the lawyers.

But I would like to disagree that it has ever been the law that there's anything protected about what a lawyer told an expert. I think one of the first questions that I ask an expert is "What did that lawyer tell you when you started forming these opinions? What did he tell you?"

And if there's an objection to that, well, what's the basis of that privilege? The expert certainly doesn't have any work product privilege and there's no attorney-client, so if there's any ambiguity about this, I think we should make it clear that whatever the expert has heard is considered discoverable.

But the lawyer's deposition ought not be taken. If they can take your deposition, Luke, I assume they can take a look at your notes that you made out at the warehouse and the bills that you sent. And if we're willing to get into all that, I think it will be a hard place to stop, so I don't think lawyers

ought to be deposed.

I think the rule should be if there is any difficulty about the law, it ought to be clear that you can ask the expert what everybody told him, period.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I just looked up the rule, the current rule, and I think the way you get to "what did the lawyer tell you" is you can ask the expert about facts known to the expert regarding when the factual information was acquired.

So I can ask you about the facts that you knew, and you may have learned some of those facts through communications, so I can ask you about those communications. But that doesn't then open the door to asking the lawyer about that.

MR. YELENOSKY: How do you ask, then, "Did the lawyer tell you to change something," based on that rule?

PROFESSOR ALBRIGHT: You ask them as an individual, "Would that be a fact?"

MR. YELENOSKY: That's my

question.

PROFESSOR ALBRIGHT: Would that be a fact which relates to or forms the basis of the mental impressions held by the expert? I don't know. I mean, I guess the question is whether we should leave it like it is or do we want to address the problem. Do we think it's enough of a problem that we want to change the law?

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Well, I mean, this is really fun and interesting, but I think the whole discussion is kind of outside what we're doing, because I agreed with Paula at the beginning that, I mean, you're going to have the same dispute under these rules as you do under the current rules, whether or not Luke is right on what the law is or whether I am right on what the law is about whether a lawyer's communications with an expert is subject to any protection whether oral or in writing. It's interesting. I mean it's an interesting area.

But I don't think we have to deal with it here, because what we're really saying here is

that documents of the expert, of the retained expert, at least --

MR. LATTING: I thought you wanted us to vote on how we should do it.

MR. SUSMAN: Oh, I was having fun only because I thought maybe I could win a vote against Luke and he would be sorry that he raised it and lost. But the truth is, I don't think we can resolve it.

I mean, I love to see it debated, because I was going to ask how you, you know, what about a fact witness, Luke? I mean, if you say things to a third party fact witness, if you go -- I mean, O. J. Simpson, my God, the whole nation is learning that what Furman was told by these prosecutors and what they rehearsed in the testimony is subject to disclosure; that it was relevant. F. Lee Bailey developed this rehearsal on racial slurs and how they all sat around and rehearsed a fact witness.

Now, why should an expert witness -- why should that communication be more sacrosanct? Every deposition you take of a fact witness, I mean, you can ask them, "What did the lawyer

tell you? What did he give you? What did he show you? Did you rehearse your testimony with him?"

CHAIRMAN SOULES: That's California law.

MR. SUSMAN: And never, Luke, in spite of that fact, and never has the ability to inquire about those things led to any wave of discovery against lawyers. I have never been deposed by the other side saying, "Well, did you really not tell him to slant it your way?" I mean, that doesn't happen.

CHAIRMAN SOULES: Is this something we need to fix in Rule 10?

MR. SUSMAN: I don't think we need to fix it.

PROFESSOR DORSANEO: Well, the circle problem needs to be fixed.

MR. SUSMAN: There's Mike Gallagher's point about the lawyer as the expert witness on fees. Let's take an example.

CHAIRMAN SOULES: That's Rusty and Mike's problem.

MR. SUSMAN: All right. Rusty,

ask me -- where is Rusty?

MR. GALLAGHER: He is in the bathroom.

MR. SUSMAN: Well, Mike, why don't you ask me. I'm the lawyer and let's say you want me to turn over -- I don't think I need to turn anything over.

CHAIRMAN SOULES: We're going to take a break so Rusty can come back and state his proposition. Let's take about 10 minutes.

(At this time there was a recess.)

CHAIRMAN SOULES: All right. We wanted to address the next issue, which is your concern about attorneys' fees testimony. I don't know that it's necessarily restricted to the lawyer that did the work. It may be also a problem with the opinion lawyer who gives an opinion. I know we've got one court of appeals case that says you can't be an opinion witness under the DRs. You've got to have an extra witness if you're going to have an opinion as to reasonableness and necessary. So we've got one court of appeals

that's held that, so maybe that's right.

MR. LATTING: Say that again.

CHAIRMAN SOULES: One court of appeals has held that under the DRs you can testify about your attorney's fees but you can't give opinion testimony because that crosses the line, so you have to find another lawyer to come in and give an opinion as to reasonable and necessary.

MR. LATTING: What court held that?

CHAIRMAN SOULES: Oh, I don't know. It's been in the green books in the last six months.

HONORABLE SCOTT BRISTER: That sounds like a great way to make litigation more expensive. You have to hire an attorney to testify in every attorneys' fee case.

CHAIRMAN SOULES: That's right, because you have to pay them.

MR. McMAINS: And attorneys are being unemployed regularly, so that's --

CHAIRMAN SOULES: Anyway, so it probably doesn't make any difference whether it's the opinion lawyer, if you have an

opinion lawyer, or the lawyer that did the work who also gives the opinion. So we're really just talking about attorneys' fees testimony and then what happens in that area, so state your concernt so we can try to get to that.

MR. McMAINS: Well, similarly is the party testimony. The question basically being, if we started out talking about this or refining this to say "retained experts," that this is a rule for retained experts, I think one way perhaps out of it is to take parties and attorneys employed by the parties out of the notion of being a retained expert. You'll want to do that. But then you have -- then they're somewhere else and then the question is where else are they, you know, because the problem I have is the mandatory disclosure concept here.

This says you have to give all things I have reviewed. If I'm going to testify as an expert on attorneys' fees or if my party is going to testify on, for instance, valuation of property he owns that he's entitled to testify as an expert on, you know, does that

mean he's supposed to turn over stuff that he's looked at that's obviously attorney-client privilege in a different context?

And all I'm saying is that the rule in those two contexts, and possibly the one refinement we talked about earlier, too, about the employee of a party, you know, and at what time does he become -- does his anticipation of testimony -- I'm not sure how that continuum works. There may be attorney-client communications legitimately or work product legitimately with the person before you realize he is going to become an expert. Is that protected? Do you have to disclose that, not have to disclose it, or whatever?

CHAIRMAN SOULES: Steve.

MR. SUSMAN: There are basically two approaches we could take in drafting this rule. One is to say that this rule, folks, is not designed to deal with what is privileged and what is not privileged. I mean, when we say it's got to go turned over, what we really mean here is that non-privileged stuff has got to be turned

over. This is not intended to affect the privilege, and so then that leaves Luke and I free to argue about what goes on between him and me and our retained expert. It leaves everyone free to argue about what goes on when the client testifies on value of the attorney. I mean, if there's a privilege, it's a privilege and this rule doesn't deal with it.

Or the other approach is to say we ought to deal -- that this rule ought to be so detailed that it deals with all those issues. It ought to say that communications, oral or in writing, with an expert, either retained expert or employee expert or a party expert, are subject to discovery.

Now, the latter is a lot more ambitious task than we undertook, and I think we can go back and undertake the latter task, and maybe it would be more useful to the bar, but it's not what we intended to do.

MR. McMAINS: Steve.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: My concern, though, is that the timing with your first

option, that is to say, this rule doesn't deal with the question of privilege, your entire timing problem, I mean, your timing choice here was we're going to deal with experts real quick at the last so that you really can't afford to have any privilege fights at that stage of that consequence. I mean, it seems to me that the notion that this seems to be, the notion of the mandatory disclosure stuff, you've got that; therefore, you should be able to get ready to take the expert within 45 days. If you're going to have, you know, a bunch of privilege hearings in order to determine whether you can do that, that makes the first choice of the 45 days or 45/60 days unrealistic.

MR. SUSMAN: My only response to that is that we kind of have that situation under existing law. I mean, obviously, there's a dispute between Luke and I under existing law as to what must be turned over.

Certain things would be turned -- and we have pretrial orders, as I pointed out, that are late in the game with the experts. I just mean -- I mean, as a subcommittee, we are

willing to take your direction to go either direction. But the rule was drafted as not to speak on the subject of what is and is not privileged and not to attempt to override or to overrule any privileges.

Now, that leaves a lot of questions. How about the party who testifies as to the value of his own property? What did he prepare or provide? I mean, there are some issues there. I mean, obviously, I personally would prefer leaving that to someone else, the privilege thing, because we can finish our rules quicker and leave that issue open. But we would be glad to undertake it if that's the sense of the Committee and with some guidance from it.

I mean, I think the guidance we would need is to go through -- I mean, we would then have to regenerate the vote that we did not take this morning of the various possibilities. Do you want to distinguish between written and oral? Do you want to distinguish between retained experts, lawyers as experts, parties as experts, employees of parties as experts? And we would have to go

through each of those scenarios and discuss the kinds of stuff that would be discoverable and what wouldn't be discoverable.

I mean, what's the sense of the group? I mean, my proposal would be -- I mean, obviously, the subcommittee's proposal is to leave it alone.

PROFESSOR ALBRIGHT: No.

MR. SUSMAN: It's not? Okay. That was a minority of the subcommittee.

PROFESSOR ALBRIGHT: There's a smaller group of the subcommittee that is working on the discovery rule -- I mean, on the privilege rule, and I think what we're going to end up with are some alternatives that we will then present to the entire subcommittee and then to the big Committee.

CHAIRMAN SOULES: Okay. Well, for now, is it the Committee's position that Rule 10 itself is not to be used to enlarge or diminish any privilege, Rule 10 itself? Is that the Committee's intent?

MR. SUSMAN: I would so move.

CHAIRMAN SOULES: Alex, would you support that?

MR. SUSMAN: We will not do it in Rule 10.

PROFESSOR ALBRIGHT: Right. Will Rule 10 make it the same as it is under existing law, the existing rule?

MR. SUSMAN: No. He said it first. It's not intended to enlarge or diminish any existing privilege.

CHAIRMAN SOULES: This particular rule is not intended and should not be construed so as to enlarge or diminish any privilege, any existing privilege. We could do that, I think, with a comment.

MR. SUSMAN: I'm in favor of that.

CHAIRMAN SOULES: Okay. And then we could get on past Rule 10. And we may deal with these issues later, but we do have a huge docket and we want to get everything resolved, but there are probably some things we don't get resolved between now and the end of the year. But maybe that's one we want to prioritize too. I'm not trying to park it in any particular place. Bill Dorsaneo.

PROFESSOR DORSANEO: So are you

by that meaning to extend your rule about what you can do in dealing with an expert to include the documents you send the expert?

CHAIRMAN SOULES: No. This rule says documents and tangible things. I think the rule includes that.

PROFESSOR DORSANEO: So it's not intended to impair the law of privilege except to that extent?

CHAIRMAN SOULES: Well, if that is the law now, it's not changed. If it's not the law now -- I mean whatever the law is today on privilege, this rule doesn't change. It's not intended to enlarge or diminish existing privilege.

MR. YELENOSKY: That was my question, because it was unclear to me if you were saying that you're not intending to change current law, which, as Bill Dorsaneo points out, this rule does have a privilege element to it right now as to written documents; or if you were saying it's not intended to touch privileges, in which case current law would have to be rewritten.

And if you mean to shift all the

privilege issue to some other section that this minority of the subcommittee is working on, then that minority subcommittee section would have to address distinctions for experts whether it be just as to written or oral.

CHAIRMAN SOULES: Well, there are different words used here than in 166(b)(e)(2), but they seem to me to say the same thing, except for facts known, which you've taken out of here because I guess you want to go through a long dissertation, mandatory dissertation of all of the facts that he knows.

But the rule says "documents and tangible things prepared for an expert" right there in 166(b)(e)(2) right now. I mean, that's basically what Rule 10(3)(e) says as proposed.

Okay. So for now is there a consensus that we can suggest that as far as Rule 10 is concerned that there be a comment that it is not be intended nor should it be construed to enlarge or diminish any privilege?

MR. SUSMAN: So moved.

CHAIRMAN SOULES: Is there

anyone opposed to that? One against. Those in favor show by hands. 10 in favor and one opposed.

Do you understand that does not dispose of the issue that Alex has raised. That can come back and we will look at it then.

Richard Orsinger.

MR. ORSINGER: Can I say two things? One is it seems to me that if an expert sees something that was previously privileged, then it becomes unprivileged because someone who was outside the privilege saw it. So it seems to me that that problem cures itself regardless of what we say in this rule.

The other thing that I'd like to ask is on a different subject. Can I change it? It's in subdivision (e), but it's a different slant on it. Can I change it?

CHAIRMAN SOULES: Sure. And then Carl has got some concerns about going back to Rule 10(2), and we want to talk about those too, so let's get your issue and then his.

MR. ORSINGER: Okay. On

Page 20, subdivision 3(e) in Rule 10, my question would be, Steve, when it says documents and tangible things shall disclose -- the parties shall disclose, does that mean that you list the things, or does that mean that you produce the things?

In other words, do you list what they saw and read and prepared, or do you produce what they saw and read and prepared?

MR. SUSMAN: We clearly meant produce.

MR. ORSINGER: Then we better be careful that we say that, because I would interpret "disclose" to mean "identify." You know, you disclose the subject matter, you disclose the general substance. If you disclose the documents, that doesn't mean to me that you produce the documents.

MR. SUSMAN: We need to change that then. I mean, I thought there has been now sufficient jurisprudence in the federal system with their mandatory disclosure rules in which some lawyers have stupidly contended, "Well, we don't have to produce it, we just have to tell you about it." I mean, I thought

that the courts had hammered that pretty good, but maybe not. Maybe it's different. But it has led to that argument in the federal system. I know I've been in cases where it has. But we should make that clear. We mean produced.

CHAIRMAN SOULES: Okay. But that changes Texas law. There's only one that I know of, only one court of appeals that has ever held that a party who disclosed documents by identifying them couldn't use them at trial because they weren't produced, and that's a recent case.

But what about a situation where they have reviewed two boxes of documents that have already been Bates stamped and produced to you, can we identify those by Bates stamp numbers and not produce them again, or do we have to copy them and produce them again?

MR. SUSMAN: I think those documents have been produced. I think you identify -- I mean, that's a game. I don't think you have to reproduce something.

CHAIRMAN SOULES: I don't think it's a game. The issue clearly is identify

what he's looked at that's been previously produced, and anything that hasn't been previously produced, produce it.

MR. SUSMAN: That's what we mean.

CHAIRMAN SOULES: The new stuff.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: Now, if you can just say that, it would take care of it. Okay. Sarah.

HONORABLE SARAH DUNCAN: I would like to speak against reproducing but in favor of specifying what the expert has seen. I don't want -- I would not want -- if I had rooms full of documents, I would not want opposing counsel to tell me, "Well, he may have looked at anything in these rooms full of documents." I want to know what he's been provided. I want to know by deduction what he hasn't looked at. I want to be able to figure that out.

CHAIRMAN SOULES: Well, wouldn't it work if we said "Identify the documents that he's seen that have been

previously produced" --

HONORABLE SARAH DUNCAN: Absolutely. But I didn't get a chance to --

CHAIRMAN SOULES: -- "and produce the documents that have not been previously produced"?

Is there any opposition to that being in the rule? Okay. There's no opposition to that, so we will work that in.

MR. SUSMAN: Now, Sarah is suggesting that she would like a distinction.

CHAIRMAN SOULES: She's just saying "Say what he's looked at. Identify what he's looked at."

MR. SUSMAN: Right. Which of those documents he has reviewed. Do you all want us to segregate out what he has prepared? It may not be obvious. I think that's probably a good idea too. I mean, it may not be obvious that he prepared -- you know, someone hands you a bunch of computer runs, and it may not be obvious whether that was something he looked at, something he was just provided and didn't look at, or something he prepared. It could be in any of those

categories. So that's what you want us to -- I think that's a good idea. I see no reason not to have it done.

CHAIRMAN SOULES: Okay. With that and with the discussion that we've had before, and of course, understanding that the committee has got to rewrite Paragraph 3, but given that we will do a rewrite and we've had our discussion, is the Committee now in favor of the concepts that we've expressed on Rule 10, Paragraph 3? All those in favor show by hands. Those opposed. Okay. It's all in favor.

MR. SUSMAN: Next issue.

CHAIRMAN SOULES: Now, I need to go back. Carl raised an issue about Paragraph 2, Steve, and it's the 15-day fuse for the defendant to designate experts after the plaintiff designates. And he needs to say something about that because he and the members of the State Bar Court Rules Committee have concerns about that time period.

MR. HAMILTON: I didn't hear any discussion about that, and I think at least from the defense standpoint it seems

patently unfair that the plaintiff has from the cause of action time period up until 60 days before the end of the discovery period to get experts and designate them and then the defendant only gets 15 days after that designation to designate experts, which oftentimes it's impossible to even decide who the defendant wants until the plaintiff's experts have been deposed. And to give the defendant only 15 days doesn't seem to be quite fair.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: I don't see anything here that precludes the defense from starting to consult experts during the course of discovery prior to the plaintiff's designation. Is that the sense of the rule, Steve, that they can't start?

MR. SUSMAN: No, of course not.

MS. SWEENEY: I mean, that doesn't make any sense.

MR. SUSMAN: No, of course not. I mean, Carl, this has been discussed from the very beginning. There was an objection the very first time we discussed

this, a strenuous objection from segments of the defense bar that said, "We need a lot more time than 15 days to pick our experts once we know the identity of the plaintiff's experts." I mean, that's virtually the position of defendants in many cases.

Now, our response to that was, number one, as we practice today, there are many pretrial orders, in fact, most or many pretrial orders that require contemporaneous simultaneous designation of experts on both sides, not even a phase designation. Most of the pretrial orders do not have -- it's not separated by more than 30 days and many of them as little as 15 days; and that since we were putting time limits on the discovery period, nine months, there was a question as to how much we could push the plaintiff forward to designate. We did not want to enlarge the nine months.

So the next question was what you can fairly do with the plaintiff to push him then to make an earlier designation. And our thought on that was that, you know, it would be very, very unfair or difficult to push the

plaintiff beyond where we've got them right now, which is after they've had seven months of discovery they're required to designate, particularly since we intend for designation to bring with it all this other -- all the other discovery, so that's really the issue.

I guess there are a lot of people -- I mean, there's a lot of argument and thoughts on our committee, a lot of discussion, but I think the ultimate notion was that in virtually every case the defendant has a pretty good idea of the kind of experts they're going to need and they know the kind of experts that they need and they choose their experts long before the plaintiff designates their experts anyway, and that was the feeling.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: It seems to me that depends on two things. It depends on the case. Products case, yes. From the start, the machine malfunctioned or did something wrong. Everybody go look at the machine, and everybody can figure out what

they want done right.

At least in medical cases, when I handle them, you could not possibly imagine what was going to be the criticism of the doctor until you got the plaintiff's report, usually because it's based on a stack of medical records this high (indicating) and it's on a nurse's note on some day or something that they saw in the doctor's note. I mean, literally in plenty of cases you could not guess, you could not figure it out. You could hire somebody to say that everything the doctor did was fine and they died from something else, but whether they knew anything about arterial blood gases or whatever that was going to show up suddenly is a problem.

The second point, at least in our discussions with the Harris County Civil District judges, I think everybody was pretty used to 30 days' difference. And politically speaking, I've never in pretrial conferences had anybody vociferously object to 30 days' difference, and I'm wondering if you might get any less, because I would predict there will be a big hubbub about "I've got 15 days." And

considering how many other things we're suggesting to change, some hubbub might be -- if you do it 75 days before the end and 30 days later, that hubbub disappears, in my opinion, or largely does.

CHAIRMAN SOULES: Anyone else on this? Carl.

MR. HAMILTON: Just one other comment. If the plaintiffs, presumably, when the lawsuit is filed, if it's going to be a suit that requires expert testimony, have some idea at that point who their expert is going to be and what they're going to testify to, I think it was Rusty that pointed it out earlier, why wait? Why wait until 60 days before the end of the period to designate those experts? If they could be designated immediately, then that gives the defense even more time. If you want to run it down to 30 days before the end of the discovery, they will then have 60 or 90 days in which to obtain experts.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, in that regard, I think they did accept an alteration

to say that if they could identify them earlier and it didn't preclude deposing them earlier, I mean, it's ameliorated to that extent.

MR. HAMILTON: But is there a requirement? Was it made a requirement?

MR. McMAINS: No, there's not a requirement. But you're permitted to ask.

MR. SUSMAN: Yeah. If I've got an expert and he's formulated his opinions, you're entitled to ask any time you want to. I don't have any problem with that. And frankly, I don't much have a problem with changing the 60 to 75. I mean, it's not a big deal.

CHAIRMAN SOULES: Scott.

HONORABLE F. SCOTT McCOWN: I was going to say 90 and 30.

MR. SUSMAN: I think we ought to just -- I think we ought to try to do the 75 and 30.

HONORABLE F. SCOTT McCOWN: 75 and 30. But 15 I'm convinced is too short. You can't hardly do anything in 15 days.

MR. SUSMAN: 75 and 30. Can we

have a vote on that?

CHAIRMAN SOULES: All in favor show by hands, 75 and 30. Those opposed. That passes unanimously.

Now, I want to be sure that we responded to Carl's question about is it required accurately.

MR. SUSMAN: No.

CHAIRMAN SOULES: I think what Carl was asking is, can the opposing party force the deposition early. And I believe our answer to that is, yes, you can.

MR. McMAINS: If he knows him.

CHAIRMAN SOULES: If he knows him. You can force through interrogatories the identity and general subject matter of the experts early on. You can't get this mandatory information until these times show up, but in the meantime, you can take a deposition. It may be wasted effort because the opinions may not be formed yet, but you can do so simply by sending out a deposition notice. Isn't that where we are?

MR. SUSMAN: Yes.

PROFESSOR DORSANEO: But you

can't ask interrogatories about all this stuff?

MR. SUSMAN: No. You can't make the expert lift a finger until the 75 days if he doesn't want to.

CHAIRMAN SOULES: Okay. So this is going to be 75 and 30, and there may have to be some adjustment in the early time periods to accommodate that.

Okay. What's next, Steve?

MR. YELENOSKY: Luke, just a point of order on this.

CHAIRMAN SOULES: Okay. Steve Yelenosky.

MR. YELENOSKY: When we're making a record, I think the last vote was totally innocuous in that probably everybody did vote, but a lot of times you're indicating that there's a unanimous vote when there are only like six or seven people voting and nobody votes against it. But some people are not voting because they don't understand it or they don't have an opinion, and I don't think the record should reflect that it was a unanimous vote if that later becomes an

important vote.

CHAIRMAN SOULES: Well, everybody vote. Eveybody vote that wants to be counted. If nobody votes against it, it's all one way as far as the Chair is concerned. We're here to get your view, and unless somebody opposes something, then the Committee, as far as I'm concerned, is deemed in favor of it altogether.

Okay. Rusty, have you got something before Paragraph 4 on Rule 10?

MR. McMAINS: Well, actually it's related to what we've already been voting on, but nobody has mentioned the little definitional problem or potential unless it's covered elsewhere in the rule.

These are one set of rules, of course, where we have differences depending on whether somebody is a plaintiff or a defendant. Now, we, of course, have counterclaims, cross-claims; we have other folks involved. And my concern is that -- I understand this is, you know, kind of a normative thing, but it seems to be that it's also normal that we have counterclaims and cross-claims or third

party claims, and that we need to identify or define some place what "plaintiff" means or what "defendant" means for purposes of designations, disclosures when they make a difference, because we have operated on the assumption that there's only two parties to a lawsuit, and that ain't true; and one side is winning -- one side is going to win something and the other side wants to not lose something. That's not it. Everybody knows that, and we need to adjust that, it seems to me.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Well, number one, I don't think under current practice -- I mean, we have the same problem in the current practice because most people will say that plaintiff shall designate on this date, the defendants on this date. In other words, it doesn't have a special date for counterclaims or things like that.

I've tried to -- I mean, I just did a pretrial order in a case in federal court, a patent infringement case, where we did -- we had an agreement, which the court has

approved, which basically said you must designate -- each side must designate on April 14th the experts on issues on which they have the burden of proof. So we've got to designate -- the plaintiff designates on infringement -- actually here it's a declaratory judgment, so it turns out the defendant is designating on infringement and the plaintiff, my client, is designating on invalidity and unenforceability. And then 15 days later we designate -- we respond to that, you know.

And so it's really difficult, I think, to draft a rule to deal with this problem. I don't know exactly how to do it, Rusty.

MR. McMAINS: Again, I'm just saying I think it's just a choice that needs to be made. I'm not saying that we have to solve every problem. If you want it to be the person who initiated the lawsuit is the one who has to disclose at this time and the person that's responding to -- or everybody else designates at this time, that's fine. But if you don't do that, then drafting a rule with the notion that there is a plaintiff and

a defendant identifiable within every lawsuit is a misnomer and is silly and is going to cause problems that we don't need to cause.

I mean, we could just say for purposes of this disclosure "plaintiff" is the person who initiates the lawsuit, "defendants" means everybody else. But you need to know when you're going to do something.

When you talk about having tailored pretrial orders, of course, you have tailored pretrial orders. Our tailored pretrial orders in Corpus deal specifically with third parties, they deal with counterclaims, they deal cross-claims, they deal with third party actions, so I mean, we can deal with them in a specific context, but all I'm saying is if you have a general rule that assumes that lawsuits are composed of a plaintiff and a defendant, that's a false assumption.

CHAIRMAN SOULES: Is it that hard to change this rule to say that the time, the 75-day period, is the time to designate experts on the parties', plural, affirmative claims?

MR. McMAINS: Claims for

affirmative relief?

CHAIRMAN SOULES: Claims for affirmative relief.

MR. McMAINS: That's one possibility.

CHAIRMAN SOULES: I mean, it's really not that hard to fix. The words are fairly easy to define and understand. And then opposing experts would be designated 30 days later. That takes care of all parties, third parties, cross-actions, counterclaims, original actions.

MR. SUSMAN: Do you mean designate experts on issues on which you are seeking affirmative relief?

CHAIRMAN SOULES: Yes, sir.

MR. SUSMAN: I mean, that's basically what we did in this federal court thing.

MR. McMAINS: But now you're actually talking about claims. I mean, I think there's a distinction between experts and claims.

MR. SUSMAN: Experts on claims on which you're seeking affirmative relief.

MR. McMAINS: You're not trying to characterize defenses or things like that, you're just saying -- for instance, if you've got two people counterclaiming for declaratory judgment and you're going to produce experts. I mean, one is claiming for declaratory judgment; the other is counterclaiming for the opposite declaratory judgment. Under Luke's scenario, they both actually have to designate at the same time on their affirmative assertion.

MR. SUSMAN: Right.

MR. McMAINS: And then they both would be responding to their initial designations at the second period of time insofar as they were defending it.

MR. SUSMAN: I think that's fine.

MR. McMAINS: They may want to identify new experts.

CHAIRMAN SOULES: With one additional tag, and probably just so no one gets in a trap, but designate on a claim for affirmative relief, and then 30 days later you're designating opposing experts, unless

they're the same ones.

PROFESSOR DORSANEO: It's probably unnecessary to say "under the pleadings," but it might be helpful.

CHAIRMAN SOULES: Claims for affirmative relief under the pleadings?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: Well, that would make this generally apply to a wider range of cases.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: Okay. Good suggestion.

Now we go to Paragraph 4.

MR. SUSMAN: Okay. I'd like to do Paragraph 4 and 5 together because they go together. Okay. The notion on 4 and 5 is basically that -- the notion of 4 is that the only additional discovery you get after this mandatory disclosure is by oral deposition, but the caveat at the end of 4 is unless the court orders the expert to prepare a report. I guess that would have been enough to stop there, and 5 is somewhat superfluous because 5 simply says the court may order the

preparation of a report in addition to or in lieu of a deposition. Now, maybe we can put these together and use fewer words, is what I'm saying, on these two subdivisions.

CHAIRMAN SOULES: Now, we've really beat this to death in previous discussions. I don't know if we need any further discussion on these two paragraphs. If we do, show by hands, but if not --

MR. SUSMAN: I think we can combine them a little, but --

MR. ORSINGER: Well, I've got some comment I'd like to make on this language.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: On Paragraph 4, it is written just as Steve characterized it, as if it's going to be done after the mandatory disclosure. But in light of our previous discussions today, someone may be taking a deposition before the mandatory disclosure. And I think we ought to use the word "other discovery," that a party may obtain other discovery, rather than additional

or further, because additional and further kind of imply later in time.

MR. SUSMAN: Right.

CHAIRMAN SOULES: Any opposition to that? No opposition.

MR. ORSINGER: Can I make another point?

CHAIRMAN SOULES: Yes, sir.

MR. ORSINGER: Okay. I want to clarify that this is meant -- this rule is meant to preclude getting the expert's documentation through a request for production. Is that true? That's intended?

MR. SUSMAN: Yes.

MR. ORSINGER: Okay. And then on 5, if the discoverable factual observations -- and I'm wondering why we're using the word "discoverable." Are there any that are not discoverable, and if so, what are they?

MR. SUSMAN: That's a good point.

CHAIRMAN SOULES: Do you suggest we delete the word "discoverable"?

MR. ORSINGER: Unless

there's --

MR. SUSMAN: I agree.

CHAIRMAN SOULES: Is there any opposition to that? No opposition. That's done. Anything else, Richard?

Okay. Does anyone else have any comment on that? Anne Gardner.

MS. GARDNER: This is a concept comment. I'm just wondering if this rule is intended to preclude an indirect method of obtaining the identity or opinions or mental impressions of an expert, that is, by filing a motion for summary judgment and forcing the other side to produce their expert witness' affidavit and opinions early?

CHAIRMAN SOULES: I don't think we're intending to do that.

MR. SUSMAN: That's not discovery. That's -- I don't view it as --

CHAIRMAN SOULES: 166(a), of course, has its own safety valve; that if you need more discovery, you can ask for a delay in a hearing to get that. And then the court may have to give a pretrial order of some kind to accelerate what you get. I can't really

think it through, but we're basically not intending to change any practice under 166(a) in the discovery rules other than -- not as I understand it. Isn't that right?

MR. SUSMAN: Right.

CHAIRMAN SOULES: Does that answer your question, Anne?

MS. GARDNER: I think so, yes.

CHAIRMAN SOULES: Anything else on 4 and 5, other than they may be combined if you see fit? Okay. All in favor show by hands. All opposed. None opposed. That's unanimous.

MR. SUSMAN: No. 6.

CHAIRMAN SOULES: No. 6.

MR. SUSMAN: No. 6 is something which we have had in here virtually from the beginning. We have softened it periodically.

You will recall at one time we provided that the failure to call at trial the expert that you had designated and put the other side to the expense of deposing would be a punishable, sanctionable sin. Scott objected to that on the ground that he didn't want to put any pressure on lawyers to call more

experts than they really needed. I think that's been taken out.

Now we provide that you've got to make the experts available in the county of suit during the 45-day period. Obviously, that just got -- that refers as a whole rule to experts under a party's control or retained by. But whether you control them or retain them, they should be made available for deposition within the next 45 days in the county of the suit; and that the time for deposing these experts, which is six hours per expert, up to two experts, is within the 50 hours you're allowed; but if the other side designates additional experts beyond two, it gives you another six hours for each expert added to the 50 hours.

That seemed to us to be kind of a carrot out there to encourage lawyers not to designate more than two, but at least if they did, to give the other side a way out of the 50-hour limit. And that's that.

CHAIRMAN SOULES: Okay. Any comment on 6, Paragraph 6? Richard Orsinger.

MR. ORSINGER: Steve, does the

first sentence preclude you from deposing the expert in their own office prior to the 45 -- I mean, prior to whenever they're voluntarily made available in county?

Like, let's say, for example, I've got 30 days -- I now have 30 days to counter-designate my expert if I'm the defendant. Say I want to depose the plaintiff's expert before I designate and I want to try to take that deposition within, say, a week or 10 days of when they tell me who it is. Am I permitted to do that, or am I required to try to comply with the voluntary production date?

MR. SUSMAN: No. I assume that if you actually notice the expert's deposition for, you know, 10 days, for example, after the plaintiff disclosed it, there's nothing in the rule that precludes you from doing it, even though it is not on one of the two dates that were provided for you at the time of the mandatory disclosure. You are free to do so. Those two dates are mainly a convenience for you so you don't have to call a bunch of lawyers and get dates lined up. So no, you're

entitled after -- you're entitled during that 45-day period to depose the expert. That's what we intended.

CHAIRMAN SOULES: You're entitled -- you'll get the expert two days in the county of suit under this rule, but that doesn't foreclose you from doing it somewhere else at some other time, right?

MR. SUSMAN: Well, wait a second. What did you say?

CHAIRMAN SOULES: Okay. This rule requires the expert to be available two days in the county of suit or on two occasions.

MR. SUSMAN: No. It just says you have to give them two days that you would be available during the next 45 to come to the county of suit.

CHAIRMAN SOULES: But that's not the only way you can take it.

MR. SUSMAN: I'm sure it does not preclude you from noticing it up on another day in the county of suit.

CHAIRMAN SOULES: Or elsewhere.

MR. SUSMAN: Or elsewhere.

CHAIRMAN SOULES: Okay. Does that answer your question?

MR. ORSINGER: Yes.

MS. SWEENEY: You all just confused me. Could you say that again? I'm sorry. It was about you could do it some other time or some other place?

MR. SUSMAN: If I wanted to notice your deposition for New York City rather than the county of suit because your expert lives in New York City and I want to spend a weekend with my wife in New York City, I would not be precluded by this rule from doing so. It is intended to protect your expert, not -- I mean, it's really -- the rule that you have to produce him in Houston or Dallas is to protect me, not your expert or you, so I can notice it at his residence somewhere.

I don't have to do it on the days he gives me, but obviously it's going to be -- you know, if you give him two days and then it's noticed on a different day, I go to court and say, "You know, we gave him two days, Your Honor." It would be an argument.

You can do it on some other day. You do not have to accept the two days that are tendered to you, nor do you have to accept the county of suit. If you are taking the deposition, you can notice it somewhere else and on some other day.

MS. SWEENEY: Okay. Now I understand.

MR. SUSMAN: That's what we're trying to provide.

MS. SWEENEY: Is there a way to build in flexibility so that -- I mean, there are an awful lot of circumstances where it's just not feasible to get the expert to the county of suit for deposition. Either there's stuff where the expert is that you want to go look at with the expert, or the expert, you know, has time to come down for trial, if he needs to, but he sure doesn't want to haul down twice or whatever. Is there some way to build in that kind of flexibility in the rule? I think it's harder on the expert to haul him around than it is on the lawyer.

MR. SUSMAN: I would think in that case, if your expert were noticed for the

county of suit on one of the two days that you gave that the expert will be available, and you opposed it and said, "Look, I will pay your way to go to New York to take the deposition of the expert," I think you could get a protective order to do that and a judge would change it. I think the judge would change it under the rules for good reason. I just think it's -- yeah, I mean, it seems to me reasonable.

But the notion is, if you're going to have your expert deposed somewhere other than the county of suit, you ought to pay the expense of the lawyers having to go there, right? Okay. Now, that's kind of the notion. I don't see how the other side could object if you were willing to pay their expense.

CHAIRMAN SOULES: Anything else on 6? Carl.

MR. HAMILTON: Speaking of expense, have you provided anywhere for who pays for the expert? Like in federal court, it's generally the opposite from the way it is in state court. In state court we're getting

arguments at trial now of, well, who is going to pay the expert, the person who takes his deposition, or the person whose expert he is?

MR. SUSMAN: Well, I think what we intended without expressly saying it, obviously, is that you pay your own expert. You pay your own expert to come to trial. You pay your own expert's expenses to come to trial. As a condition of introducing expert testimony at trial, you have to be willing to pay your expert for a six-hour deposition and coming to the county of suit before trial to make himself available for six hours. You pay it. The party whose expert it is pays it. That's the way we have it. Maybe we haven't said it clear enough, but that's certainly what we intended.

CHAIRMAN SOULES: Okay. Anything else on 6? Rusty.

MR. McMAINS: Yeah. Just to -- grammatically, you start out with each party will make its experts reasonably available. I'm not sure we didn't have that sentence structured somehow differently, but to make him reasonably available doesn't --

MR. SUSMAN: Let's just put "available."

MR. McMAINS: I mean, I could understand if you said "make reasonable efforts to make him available" or something, but "reasonably available" is just --

MR. SUSMAN: Okay. Available.

CHAIRMAN SOULES: Okay. Drop "reasonably." Any opposition to that? There's no opposition to that.

Anything else on 6? All in favor of 6 as changed by our discussions show by hands. Those opposed. 12 to two. 12 to three. The vote is in favor of Paragraph 6 by a vote of 12 to three.

Okay. Next is Paragraph 7. Richard, do you have your hand up?

MR. ORSINGER: Yeah. In the first line the word "subsequently" troubles me. I mean, I thought initially that "subsequently" would mean subsequent to when your disclosure was due, but now I realize that "subsequent" means subsequent to your previous disclosure, even if it was supplemental. In other words, this

"subsequent" does not just mean subsequent to the disclosure, the original disclosure date, but if you have had some supplementation and then something new comes up or something else changes. I'm not real comfortable with just the word "subsequently." And I don't have a suggestion to make, but maybe that doesn't bother anybody else.

On the second line, "reviewed by the expert must be provided as available," I would think you should say "must contemporaneously be provided," because if it's made available to your expert, it's obviously available to be given to the opposing parties. So why not just delete "as available" and just say that you contemporaneously provide it to the other parties when you provide it to your expert, because otherwise, I don't know what "as available" means.

CHAIRMAN SOULES: Okay. Steve.

MR. SUSMAN: Well, our response to that -- we debated this greatly, and "contemporaneously," we said, does that mean like at the same time you drop one in the mailbox you've got to drop the other? It's

got to be done on the same messenger run? You know, what we -- the intent, Richard, is very quickly, almost contemporaneously, substantially contemporaneously.

I mean, the notion is we have a short period of time. The first disclosure has been made. The expert is continuing to work like crazy either up to his deposition or even after his deposition prior to his trial testimony. And the notion is at that point in time what you give the expert and what the expert prepares ought to be made available as soon as possible.

MR. ORSINGER: Well, then I would go with that word, "as soon as possible." But "as available" to me is really meaningless. It doesn't tell me whether it's one day, one month, three days before trial. And maybe I'm just dense, but I don't see any kind of time frame on "as available."

MR. SUSMAN: What was the debate on that, Scott?

HONORABLE F. SCOTT McCOWN: Well, the debate is not so much what you give to the expert, but what the expert gives back

to the lawyer. And if the expert types it up some weekend and gets off doing something else and then two or three days later he sends it to the lawyer, then the lawyer needs to send it on to the opposing party. But we didn't want the expert creating things, getting them to the lawyer after some time lag, and then have an argument that they didn't go to the opposing side as soon as the expert created them. That was the issue.

I would suggest that we say something like as soon as practicable or practical.

MR. SUSMAN: Fine.

HONORABLE F. SCOTT McCOWN: But as soon as possible -- we want to try and not have satellite litigation and experts examined about, you know, when did this document come off of the laser printer and when did it go to the lawyer and when did it go to the opposing party. We need some kind of rule of reason.

PROFESSOR ALBRIGHT: How about "reasonably promptly"?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Maybe this

isn't allowed, but I could conceive of a situation where somebody could give me something, if I were an expert, where my response to that would be, "Your case has just turned very sour." And where counsel's response to me as the expert would be, "You're fired."

Have you thought about that at all, I mean, that kind of a problem? Is that something that's supposed to be discoverable, or could that turn back in to work product or something like that, if the expert got de-designated?

MR. SUSMAN: Well, we had --

HONORABLE F. SCOTT McCOWN: The rule provides "unless the expert designation is withdrawn."

PROFESSOR DORSANEO: But if it's as soon as practical or contemporaneously, then there's not enough time for all of that to happen.

MR. SUSMAN: As soon as practical means as soon as I can withdraw his -- I mean, it gives you that magic window of time to look at what the expert prepared

and say, "I don't need this guy. Send him to the farm." I mean, what we want to do is give the lawyer that window of time, that short window of time, to look at what the expert prepared before the expert has to send it by messenger or drop it in the mail to the opposing counsel. And that magic window of time is enough time to decide "There's no way I want this guy testifying for me," and get rid of him.

CHAIRMAN SOULES: Now, you just said something I want to go back to. You're saying before the expert sends it to the other side? The expert has a duty to send information to the other side?

MR. SUSMAN: We didn't want -- if you say contemporaneously, that the expert must provide the other side things that he prepares contemporaneously, that does suggest the same time my expert sends it to me he's got to send it you, if we're on the opposite sides of the lawsuit. We wanted to give me an opportunity to look at it and me an opportunity to send it on to you.

CHAIRMAN SOULES: The expert

doesn't send anything to the other side. The expert sends it to me, and I send it to the other side, right?

MR. SUSMAN: That's right. That's what we wanted to do. That's why we said "as available." I mean, we wanted a word that meant quickly but not immediately. I think "as soon as practicable" is fine. I have no problem with that.

MR. YELENOSKY: Why don't you just say the lawyer sends it?

CHAIRMAN SOULES: Paula.

MS. SWEENEY: We had the discussion about asking the lawyer at the -- I mean, asking the expert, "What did the lawyer tell you?" All right. And regardless of the status of whether or not you can do that, if it's done, and then you talk to the expert again, you have another conversation with him, this rule says then you have to call the other side or write the other side a letter and say, "There's more stuff now that answers the deposition question because we've had another conversation."

We don't mean that to happen, I don't

think, but that's what it says, because it says, "If the answer was incorrect or incomplete when made, or if it was, it's no longer correct and complete," it's no longer correct and complete if you talk to him some more after the depo.

All right. You tender your guy for deposition. He's asked, "What did you talk to the lawyer about?"

He says, "Well, you know, we talked about these following three things," and he gives his answer.

And then he finishes his deposition. You talk to him again. Okay. Well, we're going to go to trial. And at trial here is what I'm going to do: I'm going to want you to help me make this exhibit and I'm going to want you to make a time line for the jury and we're going to want to do these things.

This rule says that right about the time you do that, you have to call the other side or write them a letter and change -- yeah, because the expert in his depo gave a response which is now no longer correct and complete, because something new has happened.

We don't mean that, I hope, so we need to draft around that.

MR. SUSMAN: We don't mean it. We need to draft around it. What you're basically saying is --

CHAIRMAN SOULES: Steve, see if you can articulate that a little better.

MR. SUSMAN: Okay. What you are basically saying is that there are subsequent things that happen after an expert is deposed that are not meaningful, that do not relate to the substance of his testimony, his opinions or the substance of his testimony, that are -- you know, if it, for example -- I mean, here is another example: Another example would be you ask an expert at a deposition, "How many times have you been deposed before?"

He says, "Five times."

And then a week later he's deposed a sixth time. That would literally here make his answer of five times no longer correct and complete. He does not have to pick up a phone then and call the other side and say, "Oops, that answer was incorrect."

We've got to somehow -- see, our problem here was this was the one area of the rules where we require the actual correction of deposition testimony. In all other discovery, deposition testimony is immune from having to be corrected or supplemented. I mean, it is what it is. You change it when you sign it, but you don't have to go back and constantly say, "Well, that answer in the deposition has changed." Here we felt with experts that it was important enough to make experts who change their --

HONORABLE F. SCOTT McCOWN: Well, I think the solution to this is to limit the requirement to supplement deposition testimony to opinions. If you just limit it to opinions, then you've solved the problem, because that's what you want to get, is changes in opinions.

CHAIRMAN SOULES: And the basis of opinions.

MR. SUSMAN: Yeah, and the basis.

MR. McMAINS: The problem is that there may be data that you're getting,

you may get results, and maybe you're not going to change your opinion because you've already been paid, but by God, if your result in an experiment has changed, I want to know the facts.

HONORABLE F. SCOTT McCOWN: So opinions and the basis.

MR. SUSMAN: So the opinions and the basis of the opinions. I think we ought to make it pretty simple.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: We ought to say basis of the opinion and the facts known --

MR. SUSMAN: No, not facts known. The opinions and basis of the opinions.

MR. McMAINS: And I may be wrong, but isn't the current usage of the "as soon as practicable" here what got us into the problems we have? I mean, isn't that where our current discovery supplementation is at, with as soon as practicable?

PROFESSOR ALBRIGHT: But that's

before the deadline. This is only after the deadline.

MR. SUSMAN: Rusty, I don't know that we will ever cure this, because it is -- we are at a crucial period of time. There are 75 days left until the end of discovery, or it could be as little as 45 days left until the end of discovery. You've got to make people be forthcoming with this constant churning that experts do after they already get designated, sometimes already get deposed, reworking, rethinking, running different studies, making charts. We want it turned over quickly.

HONORABLE F. SCOTT McCOWN: But the problem is --

CHAIRMAN SOULES: Well, let's see, let's take these one at a time. We're kind of running all over this rule here and changing subjects. In order to get to the specific issues, let's take them one at a time. I don't care in what order. What do you all want to take first?

HONORABLE F. SCOTT McCOWN: Well, I was just going to make one comment

about "as soon as practical," and then we can do the deposition supplement. But the problem in the present rule with "as soon as practical" is not that "as soon as practical" doesn't capture or say what we want it to say, it's that we've learned that what we wanted to say in that context isn't in fact what we wanted to do. We didn't want as soon as practical. Here we want as soon as practical, and it's a concept that ought to work.

CHAIRMAN SOULES: Okay. We've got -- at one point in this rule, which is just about dead in the center of Paragraph 7, at some time in our discussions in the past we decided to use the words "reasonably promptly" in place of "as soon as practical." Now, that was after a good bit of debate. I don't know whether that will work in another place in the rule or not, but it's apparently something we've decided would work in one place.

HONORABLE F. SCOTT McCOWN: "Reasonably promptly" is fine.

PROFESSOR ALBRIGHT: That was my comment. Is "reasonably promptly" any different from "as soon as practical"? So we

have "reasonably promptly" as our regular supplementation requirement, so maybe instead of imposing separate supplementation requirements, we should just say "reasonably promptly" for everything.

MR. McMAINS: Is there a distinction between "promptly" and "reasonably promptly"?

CHAIRMAN SOULES: Let's try another one. How about "provide to the other side when available" as opposed to "as available." Does that make any difference?

HONORABLE F. SCOTT McCOWN: Well, we wanted to indicate that there was a slight, an acceptably slight time gap between when you got them and when you had to produce them, because in that time gap we wanted you to be able to read them, digest them, decide to de-designate, and we also wanted a time frame just to cover the mechanics of life in terms of getting them and sending them out. I think "reasonably promptly" works perfectly.

MR. SUSMAN: I agree.

CHAIRMAN SOULES: All right. Those in favor of "reasonably promptly" show

by hands. 11. Those opposed. 11 to two in favor of "reasonably promptly" in the second line.

Okay. Now let's go, Richard, to your concern about "subsequently" in the first line. How do we deal with that?

MR. ORSINGER: Do we need that entire first sentence, or is it part of the second sentence too? I mean, can we get by with just the second sentence, or does the first sentence add something that the second one doesn't?

CHAIRMAN SOULES: I think one deals with documents, and the other one deals with the supplementation of the previous information given. As I'm reading it, the first sentence is new information, and the second sentence is supplementation of information already given.

MR. SUSMAN: Right.

MR. ORSINGER: If you make a disclosure of 35 documents at the time of your mandatory disclosure and then three more come into existence or are acquired, doesn't the second sentence make you produce those three

additional ones?

CHAIRMAN SOULES: I don't know. But the first one does.

MR. ORSINGER: Well, I think it would make more sense to me if we had one rule on this that applied to documents and testimony, and then we're not going to have to worry about "subsequently."

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Since we have made the supplementation standard the same for all of these, we can also change the standard for deposition testimony. This portion of the rule needs to be redrafted to reflect those new distinctions that we're making.

MR. ORSINGER: So that can be treated the same way?

PROFESSOR ALBRIGHT: As I understand what the Committee has voted on, all documents and the disclosure of general information and designations have to be supplemented reasonably promptly. Deposition testimony also has to be supplemented

reasonably promptly, but it only has to be supplemented if opinions and mental impressions or the basis of those opinions and mental impressions have changed. Is that correct?

CHAIRMAN SOULES: Right.

HONORABLE F. SCOTT McCOWN: Right.

PROFESSOR ALBRIGHT: So the rule just needs to be redrafted to reflect that clearly.

MR. ORSINGER: So do we need to deal with "subsequently" now, or is that going to be rewritten?

HONORABLE F. SCOTT McCOWN: It will be gone in the redraft.

MR. ORSINGER: Then we don't need to deal with it.

CHAIRMAN SOULES: Okay. With what Alex has said, are we ready to pass on No. 7 or something else? Richard Orsinger.

MR. ORSINGER: Just a few words down in the second line, "reviewed by the expert must be provided," I think "to the other side" is problematic in the multiparty

cases, and we probably should say something like "to opposing parties."

CHAIRMAN SOULES: How about "to the other parties"?

MR. ORSINGER: Or to the other parties.

CHAIRMAN SOULES: What line is that, Richard?

MR. ORSINGER: That's the second line of Paragraph 7.

CHAIRMAN SOULES: To the other parties. Okay.

MR. ORSINGER: And then I'd like to ask again a philosophical question. If we are having our own supplementation rule that applies to experts, are we going to have -- we do not have our own sanction rule for the failure to observe the supplementation deadline. Are we comfortable that this is a self-contained rule in terms of deadlines and in terms of duty to disclose and in terms of supplementation, but that we're falling back on the general sanction rule to enforce all of that? Or should we have some sanction rule that's tailored to hired experts?

CHAIRMAN SOULES: I think the rule is general enough. We looked at it a moment ago, but I don't remember where it is now. It says information not provided can't be used at trial and so forth. It's on Page 12.

MR. SUSMAN: My feeling is that we should rely on our general exclusionary rule and sanction rule and not try to write something special for experts.

And frankly I'm not even sure we need this special supplementation rule for experts except the deposition testimony.

See, this began in an entirely different way. I mean, we began with the notion that normal discovery would be supplemented at a time certain in the discovery period. I think it was 60 days before the end. You didn't have to supplement before then on normal discovery. But we wanted expert discovery supplemented as you go because there's so little time. That's the way we began. That's why we had two supplementation rules.

Now that we have, I think, required normal discovery to be supplemented reasonably

promptly, I'm not sure that we even need a separate supplementation rule. The one thing that I fear is that by what we are doing is that we are not sending a strong enough signal to the bar that what goes on in the last 45 or 75 days is much more crucial than what's going on for the seven or eight months, where -- and maybe you capture the notion of reasonably promptly; that is, it's one thing to be prompt if it involves something during the first three or four months and another thing to be prompt if it's during the last 45 or 10 or 15 days of the possibility of discovery. And the case law will just fill that out.

But certainly -- I mean, the reason we had two different supplementation rules to begin with is that we were dealing with different kinds of urgency, we thought, and we would treat them a different way. Now we're going to treat them the same way and combine them together, if that's agreeable.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think the only real question is whether we want to have a special rule for the expert deposition,

because with regard to the other stuff it can all be mashed in together.

MR. SUSMAN: Right. That's fine. If no one objects to that, then that's what we will do.

CHAIRMAN SOULES: Okay. Now, with those comments and with the understanding that Paragraph 7 will be tailored, then, to meet the discussion that we've just had, those in favor of Paragraph 7 show by hands. Okay. Any opposition? No opposition. That's unanimous. Now, No. 8.

MR. SUSMAN: Well, this obviously needs to be rewritten in view of our earlier discussion that you are going to allow the discovery of the identity, at least the identity of an expert and the substance of his opinions, if he's got any, as early as -- or whenever, as soon as you -- I mean, you're free at any time to seek by interrogatory the identity of the other side's expert and the substance of his opinions.

MR. McMAINS: Now, if you don't want to do it -- from what I hear of your discussion about what you just said could be

done, you want to limit it, so that while they can notice the deposition, you're talking about you don't want a request for production?

MR. SUSMAN: Right.

MR. McMAINS: For instance, you would prefer an interrogatory. It seems to me that if some of the vehicles are off limits, you need to say that somewhere, I mean, you know, either in the interrogatory rule or here in the expert rule, and say the only thing you can do additional to this is interrogatories, if that's what your position is, you know.

But if your position is that everything else is okay, it's just you might not get anything else as a result of it, that's a different deal, because in response to one question a little earlier, the question was, were you supposed to be able to get any of this by request for production, and the answer was no.

CHAIRMAN SOULES: So this No. 8 has just got to be rewritten in view of all of the discussion we've had today.

MR. McMAINS: I mean, if you're

going to limit the discovery vehicles that you can use, then we need to identify which vehicles can be used, or we need to put in the vehicle information themselves that they can't be used for experts.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Honestly, what do you think should be available early on in the discovery period?

MR. McMAINS: I think that clearly, if you're going to send out some standard interrogatories asking if they have experts, if you're entitled to do that, I mean, it seems to me that you should be entitled to do that.

And the other side, if they have them, know about them, and want you to know that I've got them, although I'm not going to tell you what they're going to say, then you should be entitled to at least the identification information. And then you can make the decision whether you want to wait until they've worked on the case or not.

CHAIRMAN SOULES: We already passed on this earlier, that you would get

their identity and the substance of their testimony.

MR. McMAINS: And if they have been chosen -- if they want to have some gamesmanship, then that's fine too. But by and large, a lot of times people are touting their experts early on.

MR. SUSMAN: Well, you know, that's a different thing obviously.

MR. McMAINS: Yeah. And so there may be reasons to find out that information early. And a lot of times just by identifying an expert you can tell who it is you need to hire. I mean, it helps everybody.

CHAIRMAN SOULES: Is there anything else on this particular issue? No. 8 is going to have to be rewritten in view of our discussions about oral depositions at different times and what limited information you can get by way of interrogatories. We've already passed on that. And that really takes No. 8 out as it's presently written and requires something to go in its place to accommodate what we've already passed on.

Is there anything else really on this

other than referring it back to the committee? David Perry.

MR. PERRY: The one thing that I don't think we want to lose accidently, unless we intend to get rid of it, is that there is a concept imbedded in here that you cannot in interrogatories try to force the other side to give the details of a witness' opinion. And I assume that we want to preserve that concept.

CHAIRMAN SOULES: That's right. And that should be expressly stated in what you can and can't get in interrogatories, if you want to articulate that somehow. Does everybody with that? Does anybody disagree? No disagreement. Richard Orsinger.

MR. ORSINGER: I'd like to get calrification on this inability to get information concerning expert witnesses. It occurs to me, for example, that I may be deposing fact witnesses who have been interviewed by experts before the disclosure deadline for experts, and I would think that I should be able to ask them on deposition "What conversations did you have with the expert?

What questions did they ask? What information did you give them?"

But if you read this rule literally, I can't even ask a fact witness about any interviews they may have had with an expert, and I don't think there's any basis for that. And unless that's intended, I think that we shouldn't preclude information concerning experts if they come from sources other than the party or the expert.

CHAIRMAN SOULES: Okay. What about that? Does anyone have a comment? Judge Brister.

HONORABLE SCOTT BRISTER: Well, I wouldn't -- I mean, there are some things that I consider discovery, which are interrogatories and requests for production, and there are some things that I consider investigation or shoe leather or whatever.

For instance, does this mean you can't go -- and I know this is a hot one, but that's why -- can you go talk to the doctor that treated -- can the defendant go to the plaintiff's doctor and ask him "What happened? What's your opinion about things?"

No deposition, no et cetera.

My feeling would be, just thinking about it, that that's not discovery, that's investigation, and not prohibited by this. If the doctor will talk to you, he'll talk to you. If he doesn't, he doesn't. And we all know about Munter vs. Wood and what that may or may not mean, but I wouldn't consider this as barring, and wouldn't want it to be considered, the cheapest method, which is investigation, not discovery. Just go ask the people.

MR. SUSMAN: Nothing in here controls investigation. This is all discovery.

HONORABLE SCOTT BRISTER: That's my interpretation of it.

CHAIRMAN SOULES: Okay. Anything else? We'll just leave 8.

MR. SUSMAN: Thank you.

CHAIRMAN SOULES: And what's then next, Steve? I know you have a deadline.

MR. SUSMAN: That's all we have. I mean, that was the only rule of our suite of rules that was not fully discussed

and debated at our last meeting; we just ran out of time. And that's all we need to come back to you, and we will try to come back to you by the end of the month.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Luke, I know we dealt with all the rules before, but there was one thing that kept bothering me and we never got to the place to bring it up, and I just don't want to be accused of lying behind the log or anything.

But the problem with the standard track or the Track 2 track that you're talking about in the rules, to me, there is potential there for one person suing one party, and then deciding very early that they need to get another party or that it's another party that's going to be principally -- and then start the discovery stuff running and then have it wind down before joining this other party. This partly relates to questions we had about joinder or whatever.

But it also has to do with -- remember, we basically designated sides. And depending on who joins that party and if he's in common

with the defendant, then this defendant has already used two thirds of the time. And those are just standard things, and there's just nothing in here that is prophylactic to that kind of a gang bang, for want of a better term.

And there will be people exploring the rules for this kind of activity in my judgment, and that is something that runs throughout. These rules operate on the initial assumption that you know who you are going to sue, they're all in the lawsuit early, and everybody is playing the same game. That ain't the way it works either in real life or probably once people know that there are other ways to do it. And that concerns me about that kind of Track 2 problem.

It just -- I'm not -- don't ask me. I don't know what to do about it, but if that's not something that has come up in the Committee or discussed, I -- if there's some way that you can figure out what needs to be done, because it would concern me if I were a defendant.

I mean, we operate on the assumption that, well, the trial judges will take care of us; they won't let this happen. Well, we all know that if three parties in the lawsuit are saying it's fair and one party is screaming, then there's no question who the gattee is. But he may not persuade the judge very well, and there he is with no time to take depositions, the plaintiff's expert has already been deposed, I mean, all kinds of things. And he's just kind of joined the party; he's invited to come in.

HONORABLE F. SCOTT McCOWN: And the poor old trial judge is just too dumb to figure that out.

MR. McMAINS: No. But there are other accusations that have been raised.

HONORABLE F. SCOTT McCOWN: Well, no rule can cure that problem.

CHAIRMAN SOULES: Okay. Anything else on discovery? Our committee is going to go back to work and bring us a turnkey or attempt to bring us a turnkey set of rules next time for us to plow through once again. Does anyone else have any comments

they want to make about discovery?

Okay. The only thing I'd like to say is, Steve, I really commend you on all the work you've done, you and your committee. I know all the people, not just you, you're the Chair, but everybody has done great service, Alex and everybody else on the committee. I personally thank you and thank you all on behalf of the Court and the Committee for all that you've done. It's been outstanding work and I think we've made a tremendous amount of progress. We've still, as they say, got work to do. It's not done, but it's way, way down the road.

And nothing that we've acted on yet is fixed in stone. This is something that your committee and all of us and the Court want most of all to work for the benefit of the bar and the courts and the public. It's a great job, and I thank you.

Okay. Let's take a lunch break, and we'll come back and go to work on appellate rules.

(At this time there was a recess.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 17, 1995, Morning Session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,262.00.

CHARGED TO: Soules & Wallace.

Given under my hand and seal of office on this the 27th day of March, 1995.

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