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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 19, 1995

(AFTERNOON 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 19th day of May, A.D. 1995, between the hours of 1:00 o'clock p.m. and 5:35 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

ORIGINAL

MAY 19, 1995

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Anne L. Gardner
Hon. Clarence Guittard
Franklin Jones, Jr.
Thomas S. Leatherbury
John H. Marks, Jr.
Anne McNamara
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
Carl Hamilton
David B. Jackson
Hon. Doris Lange
Hon. Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
W. Kenneth Law
Thomas C. Riney
Hon. Paul Heath Till

Also present:

Lee Parsley
Holly Duderstadt
Trey Peacock (w/ Susman)

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CHAIRMAN SOULES: Okay. We're back in session after 19 minutes. More than 15 minutes have transpired. We're on Rule 11, and we're going to finish this report before we get to discovery, so we'll do what we've got to do.

Rusty was talking about enforcement of agreements by, I guess, amendments of pleadings and going to the alleging contract, and that has to go on to judgment, and whether this affects that existing law, which I don't think by rule we can affect. And the tension there, I guess, is -- well, it can't -- an agreement can't produce a judgment if a party withdraws consent to the agreement, except through a trial on the contract issues.

On the other hand -- and this both -- this applies to agreements that are dispositive of the case. It also applies to discovery disputes.

Suppose you give me a letter that says, "I don't have to answer requests for admissions until 45 days." And then on day 35, I say, "Ha, you never did put that on record, did you? Well, now I dispute it." So

it can't be enforced because I'm -- we're in dispute, and you're deemed on day 30.

We can't put up with that. We've got to be able to -- either you have to file every agreement, or you can file them after the fact if you have a signed agreement that meets Rule 11 other than by filing it which causes it to be enforced.

But I'm assuming the committee's sense would be that if you've got a discovery agreement that extends the times, you could keep that in your file. And then if it was -- if that was the rule, that you could keep that in your file until there became a dispute about it, then you can file it then and the parties would be bound by that agreement.

So what now, Rusty?

MR. McMAINS: Well, I really -- I mean, this rule I think is extremely important. That's why I'm real sensitive to any kind of alteration of it.

The first place is where it says "Unless otherwise provided in the rules." They've recommended we delete that. Now, I'm not sure there is any place else in all of these rules

that --

MR. HERRING: Venue 86.

MR. McMAINS: What's that?

MR. HERRING: Venue 86.

MR. McMAINS: Well, there are other places in the rule, too, that deal with stipulations and agreements.

MR. YELENOSKY: Well, this isn't meant to change that. It's just that it's superfluous to say that.

MR. McMAINS: Well, I don't necessarily agree with that, because this is an absolute. This says, "No agreement between attorneys."

For instance, the literal terms of this rule is that an agreement between attorneys in chambers is not enforceable. Now, that's garbage, and I think all judges will agree with that, and so --

CHAIRMAN SOULES: Let's not fight over "unless otherwise provided in the rules." We don't have time for that. That's going to stay in. Okay? It's not worth -- the game is not worth the gander.

Okay. Now, substantively, what do we

do?

MR. McMAINS: Well, the other part that I have -- it says by the party and filed -- I guess the problem I have with the way it's been gerrymandered here is by putting the time -- we put this time of filing the written agreement. We didn't do the timing on anything else.

CHAIRMAN SOULES: I'm not following what you're saying, Rusty.

MR. McMAINS: Well, you see, we have -- actually, we've stuck the concept of timing in here that is -- whereas in reality we're saying that it's really a kind of a statute of frauds issue; and that is, it's either got to be in writing, but we do have alternatives to it being in writing, and that is it be done in open court, whatever, or deposition upon oral examination.

There's not a parallel timing thing with regards to done in open court. In other words, let's suppose you had an oral agreement and you can confirm that you had that agreement, but there's an enforcement mechanism that is now sought where basically

you have repudiated that agreement. It was never produced in writing, but you have confirmed in open court that you used to have it. Is that a belated timing issue? I mean, I would think, frankly, that if you -- under the current rules, if you don't have an agreement that is in writing and has not been made in open court prior to your seeking enforcement of it, that you don't have an agreement that's enforceable and would be remiss to assume that you did.

CHAIRMAN SOULES: Well, now, repudiated -- this says the agreement is not made in open court. It wasn't made there.

MR. McMAINS: No, I agree. It says, though, "No agreement will be enforced."

Now, also I thought we had "signed by all the parties." We never had -- I guess it doesn't say -- it never said that.

PROFESSOR DORSANEO: No. That's the attorney's contingent fee statute that you're thinking of.

MR. McMAINS: Okay.

PROFESSOR DORSANEO: And that

doesn't require that actually either under the case law.

MR. McMAINS: Okay. The other part is that the last part of it says -- has the last sentence that says "recorded by the court reporter." It's not clear whether that refers to both agreements made in open court and depositions upon oral examination. Is it intended to be both?

MR. ACOSTA: Yes, it is.

MR. McMAINS: Because there are a lot of agreements made between attorneys noted by the judge on the docket sheet relating to motions that in my judgment should be enforceable. And like if you stand there on a motion to compel and you agree with the judge that you will file the answers next Friday and there isn't anything else written down at that point, that ought to be sufficient.

MR. YELENOSKY: Is that an agreement between attorneys, or is that an agreement with the court? You don't need to have that in writing at all.

MR. McMAINS: Well, I'm not

sure either way, but I would be loathe to require that everything have a court reporter at all hearings on the off-chance that there might be some agreement reached.

MR. YELENOSKY: If the judge is present and the judge notes it, the judge can enforce it.

MR. McMAINS: That's not what this says.

MR. YELENOSKY: Well, it's not an agreement between the attorneys if the judge says you're going to --

MR. McMAINS: It says, "No agreement between attorneys or parties" --

MR. YELENOSKY: Right. That doesn't include something that the judge notes that you're going to do. You've made an agreement --

MR. McMAINS: No. If you say, "I --

CHAIRMAN SOULES: Whoa, wait, Rusty. You talk, and then I'll call on the next people.

MR. YELENOSKY: Well, I'll defer to the judges on that one.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: It's a real easy distinction to me. If the parties come up and say, "We've agreed on Items 1, 3, 5, 7 and 9," and then they come back and they haven't agreed, I've got nothing to enforce. If you say, "I agree to produce them by next Friday," and then you come back and say, "No, I'm not," I'm saying, "Sorry. You said you did, and I'll sign an order. You're doing it next Friday or you're out." I wouldn't be confused about which is which.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: Well, there are many agreements that are really between the parties done in the presence of the court with regards to producing people for depositions and that sort of thing. There are many, many things that happen in the course of the motion practice, or the pretrial practice for that matter, that are essentially agreements between the attorneys with regards to a manner of process. And to say that they are not bound by them unless they are by a court

reporter -- that there's a court reporter present during it, I think that is a deviation from current practice.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, I think we're losing the focus. This rule --

CHAIRMAN SOULES: I can't hear you.

MR. LOW: I think we're losing the focus. This rule was intended to encourage agreements between lawyers, but at the same time we wanted to do away with collateral arguments and disputes. So if the judge hears somebody agree to something, then you don't have to worry about that. The judge can say, "Okay. You all agreed to that. I'm ordering that." And that's the judge's order.

This rule was never intended to agree -- to deal with that body of law on confessions of judgment or whether you can enforce the judgment or like that agreement.

I think the rule that they've written here makes it pretty clear what lawyers need to do in order to enforce those agreements, cut down on the disputes and yet encourage

lawyers to agree. And if we start complicating everything, I think we're going to defeat our purpose.

MR. LATTING: Yes.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think the amendments are an improvement, but I would suggest that there is no reason that the written agreement ought to have to be filed with the clerk at any time. I think as a practical matter what happens a lot of times, if there is a dispute, is that people show up in court. There is a letter agreement. The lawyer pulls the letter agreement out of his file, shows it to the judge. It's never filed with anybody.

And it seems to me that the timing issue about filing is a false issue, and that it would be an improvement simply to take out anything having to do with filing. It ought to be good enough that the agreement be in writing and signed by the party to be charged.

MR. LATTING: Hear, hear.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I think that is an excellent suggestion that would take care of the problem that comes up with unfiled settlement agreements and would also make this rule consistent with Rule 76(a), which assumes that settlement agreements will not be filed in the ordinary case.

CHAIRMAN SOULES: Anyone else? Elaine Carlson.

PROFESSOR ELAINE CARLSON: Maybe in response to what Rusty suggested, we might choose the language that's existing now in Rule 166(c), so that the end, Rusty, would read "or in a deposition upon oral examination recorded in the deposition transcript."

Would that meet your --

MR. McMAINS: Well, except that I think their position is they do want it required that the court reporter record it.

MR. YELENOSKY: Well, that was our recommendation, because you could have something done in open court, I guess, that's not recorded where the judge either doesn't -- if it's not recorded, doesn't remember it, didn't hear it, and they're going to argue

about, "Yeah, I did say that."

And if it wasn't taken down by the court reporter, that's a bright-line distinction. If you had wanted to enforce that, you should have gotten it on the record. Otherwise, you have an argument about whether it was said or not in open court.

PROFESSOR ELAINE CARLSON: Well, now it reads -- the current rule reads "made in open court and entered of record."

MR. McMAINS: Yeah, that's right.

MR. YELENOSKY: And we intended it --

MR. McMAINS: And the "entered of record," obviously, I think what it was intended to mean, it's -- that there is independent, verifiable proof. That could be done by a notation by the judge on the docket sheet. It can be done by the court reporter. If it can only be done by the court reporter, then the court reporter is going to have to be present at all times if there is any kind of enforceable agreement that is -- or any potentially enforceable agreement.

MR. YELENOSKY: Well, I think I would rely on Judge Brister to enforce it if he had noted it.

MR. MEADOWS: But those docket notations are --

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: Thank you. Those docket notations can be ambiguous, and if you're coming back to them weeks later, months later -- I think this change in the rule is extremely important and useful. I think it gets right to the heart of how most agreements are made between and among lawyers, and that's at depositions or when they're confronted with some conflict that gets resolved and they've got a court reporter available. And I think that those agreements ought to be put in a form that, you know, removes the opportunity for dispute later.

So I think this is a good change. I agree with David's suggestion about not having to file the letter agreements if you enter those instead, but I think this is an important change.

MR. YELENOSKY: I don't think Alex and I have any problem with taking that out.

CHAIRMAN SOULES: Who's speaking?

MR. YELENOSKY: I'm sorry.

CHAIRMAN SOULES: Alex Acosta.

MR. ACOSTA: I think that David Perry's suggestion is a very good one, and I would like to incorporate it into the proposal.

CHAIRMAN SOULES: So that would be, what, delete "filed with the clerk"?

Judge Brister.

HONORABLE SCOTT BRISTER: If it doesn't have to be filed with the clerk, how is it reviewed upon appeal or part of the record?

MR. PERRY: If there's a hearing and there's a dispute, somebody better make it part of the record. They better mark it as an exhibit or something like that. But that would be different than filing it with the clerk.

You know, for example, maybe you show up

and you show it to the judge, and the other party objects that "Well, you can't enforce that. You haven't filed it with the clerk."

CHAIRMAN SOULES: Most likely it would probably be a part of or attached to the motion or response.

HONORABLE SCOTT A. BRISTER: Attached to the motion or offered as an exhibit at the hearing?

CHAIRMAN SOULES: Yeah. David Jackson.

MR. JACKSON: Are we talking about procedural agreements or final settlement agreements dictated to a court reporter? Because we had a problem come up with a lawyer who used the tactic of taking a deposition to beat them into submission on settlement. And at a recess he'll come back and say, "We've settled the case," and dictate a settlement to the court reporter. And then when you get it reduced to writing, it's not exactly what everybody really wanted; it's just what was said by somebody at the deposition. It gets real complicated if all you've got is what somebody rattles off during

a heated settlement discussion.

And that's the point. The lawyer wants to keep what he dictated to the court reporter. He doesn't want to allow anybody else to come in with any revisions.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I think that would be the same thing as these memorial letters that people send out. And I think there's been a recent case that said just because an attorney sends a letter saying "This is to memorialize what we have agreed to," unless there's a confirmation by signature of both parties on that, you don't have an agreement.

Similarly, if some attorney dictates a unilateral agreement into the deposition and there's no record of anybody confirming it, you don't have an agreement. I don't think that's a problem.

CHAIRMAN SOULES: Okay. Anything else? So where are we getting to? We would delete in the second line "it be in writing and signed"? We would take -- no. Would we leave that in there, "unless it be in writing and signed."

MR. PERRY: Shouldn't it be "signed by the party to be charged"?

MR. YELENOSKY: Well, that's not -- isn't "signed" implicit? I mean, if I write an agreement and sign it and try to enforce it against you --

MR. PERRY: The point is, we're getting into the argument of does everybody have to sign it. Maybe only two of us signed it and I want to enforce it against him. He says, "Well, not everybody has signed it."

MR. YELENOSKY: Okay.

PROFESSOR DORSANEO: If it's going to be a statute of frauds and if it's going to apply to contracts, and not just agreements about the conduct of the litigation or something less important, then it ought to look like a statute of frauds and speak about the person who is going to be bound in an enforcement proceeding.

HONORABLE SCOTT A. BRISTER: But isn't that -- does that make, then, a letter from opposing counsel a Rule 11 agreement? It's signed by you, and I want to hold you to what you said in your letter. I

never thought a letter from one counsel to the other was a Rule 11 agreement. If you change it to the party to be charged, it doesn't have to be signed by both sides.

I've always understood this to mean to be signed by both sides. And if you want to add it to say that, that may be necessary, but I've always thought everybody understood this meant signed by everybody in the mediation or whatever it was. If you switch it to signed by one side, it expands it greatly.

CHAIRMAN SOULES: Signed by the parties who made the agreement?

MR. LOW: But, Luke, that's not necessarily the law. If I write a letter saying -- and I've got a case that I was involved in -- saying, you know, this is our agreement and so forth, then the other side might not be bound by it, but I am. That's in writing and signed. I have agreed to it.

PROFESSOR DORSANEO: Well, if we're talking about it being --

MR. LOW: I'm talking about a Rule 11 agreement.

PROFESSOR DORSANEO: Well, if

we're talking about it being a contract, then contract law is applicable. And the only thing that you would be doing would be saying that when it's an agreement touching a pending suit, that there is a special and additional statute of frauds that must be satisfied before the contractual agreement is enforceable.

If it's not enforceable for other reasons, let's say, because there's no acceptance of the offer such that there's no contract, then it's not enforceable for other reasons. It says "no agreement will be enforced unless." It doesn't say that all writings are enforceable as agreements if they are signed by the person who prepared and sent the writing.

HONORABLE SCOTT A. BRISTER: What I'm saying is I've never read Rule 11 to be just a statute of frauds but to be a super-statute of frauds. Not just the party that signed it, but both sides, everybody has got to sign it. The statute of frauds doesn't require that. This is a super-statute of frauds.

Because if it's a lawsuit and everybody is represented by attorneys and everything is being disputed, we ought to have both sides say on the record, "Do you agree to that?"

"Yes."

"Do you agree to that?"

"Yes."

Or both of you sign on it. And if it's anything short of that, it's not enforceable, period. Bright-line, no promissory estoppel, Moraburger, statute of frauds -- you know, we've got 200 exceptions to the statute of frauds. This is -- we want a clear, bright-line rule. Everybody has got to sign it, and that's it.

CHAIRMAN SOULES: Suppose you have eight parties and eight sets of lawyers. I serve my interrogatories on you. You need 15 days, and I say "Fine. Let's reach a Rule 11 agreement between me and you. Here's your 15 days."

Do I have to get all the other lawyers and all the other parties to sign that agreement?

HONORABLE SCOTT A. BRISTER:

No. Only agreements between you and him, the parties to the agreement, just like it says, agreements between those attorneys. That's who needs to sign it.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, if you ask for and I give you 15 days and we exchange and I say, "Fine. I give you something, you give me something. Would you write the letter to me agreeing to give me another" -- you know, "I'll give you 15 days if you give me an additional deposition," and you say fine and I say fine. You write me a letter saying we've agreed to this, and then later on you don't want to give me the deposition, I can't enforce that? I should be able to --

CHAIRMAN SOULES: Not under Rule 11.

MR. LATTING: Not under Rule 11 you can't.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: I would like to endorse Chairman Soules' suggestion and say signed by the parties to the agreement, so

that in a multiparty case you can have an agreement between those who are concerned with it and not be penalized if it's not signed by those who are not concerned with it.

MR. YELENOSKY: Well, my question went to whether you have to be a signatory to it if you're concerned about it but you weren't the one with the responsibility in the agreement. I mean, you're saying a letter that's signed by one attorney cannot be enforced under Rule 11. Is that right?

CHAIRMAN SOULES: That's my practice. If the other side doesn't sign it and fax it back, I don't think we've got a deal, not a Rule 11 deal anyway.

MR. ORSINGER: What about an exchange of letters saying I agree --

MR. LOW: No. But if I --

CHAIRMAN SOULES: Buddy Low.

MR. LOW: If I write you a letter -- if you want 15 days, and I write you a letter saying, "Luke, this will acknowledge our agreement. I give you 15 days." If you don't sign that letter, do you mean just

because you haven't signed it you don't think it would be a Rule 11 agreement?

MR. MEADOWS: And if that's the case, that's not right.

MR. LOW: That's not right. You shouldn't have to send it back. You've accepted it.

MR. YELENOSKY: I mean, it's an evidentiary matter. There it is in black and white, "I agree to give you 15 days," and I signed it. And then I say, "No, I'm not giving you 15 days."

MR. McMAINS: Because you didn't sign it.

MR. YELENOSKY: That's right. And I'm saying that isn't right.

CHAIRMAN SOULES: Well, what do we do with this?

HONORABLE SCOTT A. BRISTER: Well, this rule doesn't change any of that, and that's not a problem under the current rule, so I don't think it's -- why don't we just say it's the same thing and this rule doesn't change anything and all of those problems are all taken care of.

MR. YELENOSKY: Okay. We can say that.

CHAIRMAN SOULES: Okay. Let's go to the language. Who has got -- the motion is on the floor that this be adopted as written.

MR. LOW: No, wait. David, I think, made a motion to change the report.

MR. PERRY: Didn't we all agree to take out "filed," and the Committee accepted that?

MR. LOW: Right. That's the one, and the Committee accepted that.

MR. PERRY: If that's the only change, I guess it should become "be in writing and signed."

CHAIRMAN SOULES: Okay. So it would read, Unless otherwise provided in these rules, no agreement between parties -- between attorneys or parties touching any suit pending will be enforced unless it be in writing and signed, or unless it be made in open court.

HONORABLE SCOTT A. BRISTER: No "at the time the party seeks enforcement"?

CHAIRMAN SOULES: Signed at the

time? Isn't that -- that's subsumed, I think.

MR. YELENOSKY: That's out, because it doesn't need to be filed.

CHAIRMAN SOULES: Well, it needs to be made in open court or in a deposition upon oral examination and recorded by the court reporter. Okay.

PROFESSOR DORSANEO: Make "be" "is."

PROFESSOR ELAINE CARLSON: Yeah. I mean, I don't like that either.

PROFESSOR DORSANEO: "Unless it is made" instead of "be made."

CHAIRMAN SOULES: Unless it is made.

MR. ORSINGER: That sounds less authoritative.

CHAIRMAN SOULES: Okay. Any further discussion?

MR. MEADOWS: Luke?

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: David Perry made the suggestion to the effect that it had to be signed by the party to be charged, which seems

to me to address the whole issue we were dealing with a moment ago, which is if I allow you additional time to comply with discovery, that agreement needs to be enforced against me. I'm the one who needs to write the letter. If I'm getting something in return, it seems that both of us need to sign the letter.

MR. YELENOSKY: Or you need to send the letter back.

MR. MEADOWS: Yeah. So, I mean --

CHAIRMAN SOULES: Make a motion.

MR. MEADOWS: Well, I move that we adopt David's recommended change.

CHAIRMAN SOULES: To insert what words where?

MR. MEADOWS: To insert -- I think he proposed to insert the words "by the party to be charged" after the word "signed."

CHAIRMAN SOULES: Any second?

MR. PERRY: Second.

CHAIRMAN SOULES: All in favor of that change show by hands.

HONORABLE SCOTT A. BRISTER: Wait just a minute.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: If you do that, so you have to go to mediation, and one party signs the Rule 11 agreement. The other party that refuses then can leave the mediation, change their mind, and enforce that letter agreement because the other party signed it.

MR. PERRY: No, no, no.

CHAIRMAN SOULES: Wait. Judge Brister.

HONORABLE SCOTT A. BRISTER: I know. I don't agree with that. But nobody would enforce current Rule 11 that way. Why should we add something that will suggest to somebody that you should enforce it that way?

CHAIRMAN SOULES: David Perry.

MR. PERRY: When you draft documents, the documents reflect what the nature of the agreement is. If it's a settlement agreement in a lawsuit drafted in a mediation, it has got to reflect that both

parties have agreed to compromise and settle this case in exchange for a mutual exchange of promises. And unless it's signed by everybody who is a party to that agreement, it's not going to amount to the paper it's written on.

On the other hand, if you have a letter where I have agreed to give somebody else an additional 15 days to answer discovery, it's good enough if it's signed by the guy who has given the additional 15 days. I think that we're making things a lot more complicated than they need to be.

It obviously has to be signed by whoever it is under the agreement that is going to be bound by the agreement. If you have a document that on its face reflects that it requires several people to sign it and they haven't all signed it, we all know that nobody is bound by it.

CHAIRMAN SOULES: I don't know that that knowledge is that universal, but it may be. Bill Dorsaneo.

PROFESSOR DORSANEO: I think it's even maybe more simple than that. We don't want somebody to be able to say that the

agreement is not enforceable against me because you didn't sign it, when you are the one who is trying to enforce it against me and you say that that was my agreement. That's just standard law.

And if at a mediation agreement, at a mediation, the party who wants to welch on the deal signed it, I ought to be able to enforce it against them by saying, "That was our deal. He signed it. Enforce it." And I think that's just standard law.

CHAIRMAN SOULES: Okay. Buddy Low.

MR. LOW: Let me just follow, if we just put "No agreement between attorneys or parties unless signed by the party," somebody might interpret that to mean that attorneys can't do it unless the party signs it. So we've got to be consistent and say "unless signed by the attorney or party."

CHAIRMAN SOULES: Okay. I agree with that.

Carl, did you have your hand up? Carl Hamilton.

MR. HAMILTON: Well, I only

want to add two things that read "no promise or agreement will be enforced against an attorney unless it's signed by that attorney." That covers unilateral promises as well as agreements. "No promise or agreement shall be enforceable against an attorney unless it's signed by that attorney."

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: Back to your discussion about we're not trying to write a perfect rule. These are just some suggested changes in the existing rule. Has anybody ever heard the argument that as written this doesn't mean it needs to be signed by the party to be held to it? Of course not. That's what everybody knows. Why don't we leave it just like it is? Nobody is confused about whether it has to be signed by the parties being held by it. Let's just leave it like it is.

MR. YELENOSKY: Well, there appears to be some confusion --

CHAIRMAN SOULES: Any further discussion on the proposed amendment?

Rusty.

MR. McMAINS: Well, I think that the reason that they put in the part about in a deposition upon oral examination was because they have taken out the part that said "unless otherwise provided in these rules." I mean, I think our Discovery Rules now have provisions for agreements, so I think once we put back "unless otherwise provided," you probably don't need the part about the depositions, which may solve this problem about whether there's a settlement dictated in the course of the deposition.

CHAIRMAN SOULES: Any further discussion on the amendment that David proposed; that is, that we insert -- or I guess it was Robert that finally made it -- "signed by the party to be charged"? Were those the words?

MR. MEADOWS: Right.

CHAIRMAN SOULES: Any further discussion on that?

MR. PERRY: I think Buddy's suggestion to make it "party or attorney to be charged," I think that's good.

CHAIRMAN SOULES: Okay. I understand, yeah. That will be taken care of.

MR. YELENOSKY: And by "to be charged," you mean against whom it is to be enforced?

HONORABLE SCOTT A. BRISTER: And you're going to have to add -- that just takes care of writing. You're going to have to add the same thing there on oral examination, depo, or recorded in court, aren't you? Aren't we going to be saying that -- we're going to make a very complicated change in a rule that's not confusing anybody.

CHAIRMAN SOULES: Only if it passes. If it passes, then we'll go to the next question, next problem or issues. If it doesn't, well, we'll see.

MR. YELENOSKY: I thought the --

CHAIRMAN SOULES: Anything else on the amendment?

MR. McMAINS: Does this include the filing part or just the signing part?

CHAIRMAN SOULES: The Committee proposal -- they accepted the amendment to

delete the filing part.

MR. McMAINS: I understand that, that they accepted that amendment. I just -- are you discussing that, or are you -- is that a foregone discussion?

CHAIRMAN SOULES: No. The amendment on the floor is to add "signed by the attorney or party to be charged," whether that goes in, or just "signed" without the words "by the attorney or party to be charged." That's all we're voting on.

MR. McMAINS: Well, but what about the filing part? Is it just -- I mean, did you just assume that everybody was in agreement that it shouldn't have to be filed?

CHAIRMAN SOULES: No. We haven't gotten to a vote on that yet.

MR. YELENOSKY: Well, the subcommittee changed its proposal --

CHAIRMAN SOULES: We haven't taken a vote yet on the whole rule.

MR. McMAINS: I understand that. But I do not want to be voting on one aspect of it and not voting on the part that deals with the filing requirement.

CHAIRMAN SOULES: Well, we haven't --

MR. YELENOSKY: Well, then you would be proposing an amendment to what we're suggesting, which would be to add the filing requirement back in, because we're not proposing it now.

CHAIRMAN SOULES: Okay. All those in favor of inserting the language after "signed," inserting the language "by the attorney or party to be charged," those in favor show by hands.

Those opposed.

Okay. That carries by a vote of 13 to eight.

Signed by the party or attorney -- I guess, the attorney for or the party to be charged. Does that make sense? The lawyer himself is not going to be charged. It's a charge against the party. The attorney for or the party. It's going to have to come back later anyway for language.

Okay. What's next on this now? Does anybody else have any proposed amendments to the rule as proposed by the Committee with the

amendments that the Committee has accepted, including the part about canceling any need to file?

MR. YELENOSKY: Would you read it?

MR. ORSINGER: What about Bill's suggestion that we change "be" to "is"?

CHAIRMAN SOULES: I did that. Rusty.

MR. McMAINS: Well, I generally have a problem with making an agreement enforceable with regards to a pending matter that is not required to be filed, for the simple reason that there are times when you will be drafting agreements or exchanging drafts of agreements, particularly now that you don't require it to be signed by all the parties, and you will have a signed agreement in the file, but it isn't the agreement that you may ultimately reach, or it may be that you even abandoned the effort to do so. To say that it is now enforceable at your option, so long as it happens to be against the other party or the party that is a signatory of it -- I mean, I think the act of filing it is

what -- you know that it is now a part of the record and you're going to be bound by it.

And this is why it talks about an agreement relating to the matters in a pending suit, which are matters of public record basically. And once it becomes part of the public record, it's there.

CHAIRMAN SOULES: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: When would you require that it be filed?

MR. McMAINS: Well, I don't think that it needs to be filed any sooner than when the enforcement is sought, from that standpoint, from a timing standpoint.

MR. YELENOSKY: That doesn't change anything, Rusty. If I just pull --

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: That really doesn't address your concern. I just pull it out of my file and file it when I want to enforce it. I mean, that doesn't provide any protection. Either you -- I mean, the timing of the filing may provide some protection

because you would have to file it at the time that you agreed to it and the other party could object at that time, but we've already decided that that's out. So if the timing is out, you can file it when you enforce it. If it's in your file, you can pull it out of your file. And if you have drafts floating around that are signed, then that's at your peril. You shouldn't have signed them.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: Well, when you file an agreement and you make it a formal Rule 11 agreement, it raises the level of scrutiny of that agreement. The parties think about it. They know that's what they want. They file it.

There are all kinds of agreement right now that people make and put in writing that they never file, kind of lower level case management agreements. And so let's say they have a falling out and a dispute and they come to the courthouse about that, and it's not filed. You know, the court still has to make an order, and the court still gets told about what the paper passing back and forth between

everybody was, and generally speaking the court's order is going to be what they agreed, unless there's some good reason for making an adjustment.

So I kind of like the notion that it gets filed, because that says to the parties, "This is a serious agreement and we're filing it."

All of the hundreds of letters that go back and forth, I don't necessarily think we want them cluttering up the clerk's file. If there's a falling out, the parties come over, they tell the court what the agreement was, why they fell out, and the court makes an order.

To go back to Luke's example, which I've had happen in court before. A guy gives you an extension of time to file deemed admissions. You don't file it with the clerk. You come over, you have a dispute about it, and you show the judge you've got an extension. Either orally he agreed or he agreed in the letter that you sent him confirming the agreement. And now he won't honor it. It's a good cause to withdraw a deemed admission. You know, the judge is

going to take care of that. So that's just kind of my perspective.

CHAIRMAN SOULES: One judge that used to preside in Kerrville said the court had no authority to withdraw deemed admissions.

HONORABLE F. SCOTT McCOWN: Well, you've got bigger problem there.

CHAIRMAN SOULES: Big problems. He's now a law professor.

PROFESSOR DORSANEO: Oh, my God.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I'm going to speak in opposition to my good friend's point, because of two things I'm thinking about. Some courts have concluded, and the controversy will continue unless it's clearly settled by the Supreme Court, that what Judge McCown just talked about couldn't really happen, because unless the agreement was filed before the dispute arose, that there wouldn't be an enforceable Rule 11 agreement, because the papers have to clutter up the file

beforehand before the agreement is enforceable to begin with.

And other courts that might not take that position as a general rule might have difficulty with agreements filed after the expiration of the court's plenary power; settlement agreements that have not been filed before the order of dismissal became final in the sense of the expiration of the court's plenary power. And I have seen several cases like that.

And I find that to be very troublesome that a written agreement between the parties, in this case signed by everyone, is not enforceable as a settlement agreement because it wasn't filed before the court lost the power to alter its judgment. I think those decisions that take those courses are wrong.

But the filing requirement contributes to those kinds of things coming up, and the easier solution is to just take it out as a threshold requirement altogether.

CHAIRMAN SOULES: Okay. Are we ready to vote? Those in favor of requiring filing show by hands. Seven.

Those opposed.

Okay. The filing fails by a vote of 13 to seven.

Okay. Now I'm going to read this, and Alex, help me and follow along if I make a mistake, or anybody else.

As I now understand it to be constructed -- unless there's somebody else who wants to offer another amendment. No other amendments? Okay.

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it is in writing and signed by the attorney for or the party to be charged, or unless it is made in open court or in a deposition upon oral examination and recorded by the court reporter.

Those in favor of the rule as just read show by hands. 17.

Those against. Two.

Okay. Alex, what's next?

MR. ORSINGER: Luke, before we go on, let me ask --

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: -- a little legislative history here. Does the "recorded by the court reporter" apply to the agreement in open court as well as to the agreement in a deposition?

CHAIRMAN SOULES: Undecided.

Okay. Next?

MR. ACOSTA: Thank you, your Honor. Rule 12 is one of the ones that was consolidated into Rule 7.

So as far as Rule 14, Affidavits by Agents, the subcommittee's recommendation is as follows: "Delete this rule. Signature by an agent is covered by agency law. This seems to suggest that attorneys ordinarily can sign a client's affidavit when the attorney has no knowledge of the matters stated therein. Case law holds that an attorney cannot sign an affidavit in support of a motion for summary judgment unless the affidavit shows personal knowledge on the part of the lawyer signing the affidavit."

And the case cited is Landscape Design and Construction, Inc. v. Warren, 566

Southwest 2nd 66, Texas Civil, Dallas 1978, no writ.

"The rule is specifically not applicable to interrogatory answers, Texas Rules of Civil Procedure 168(5). With fax machines and overnight delivery, there's no reason today to have lawyers signing affidavits for their clients in other instances where the lawyer has no personal knowledge."

And that's the extent of Rule 14.

CHAIRMAN SOULES: All right. Well, maybe I'm the only lawyer that's ever been in a bind who, having to execute a verification, relied on Rule 14 as giving me the authority to make that verification even though I don't know what the facts are. I understand that's inconsistent, but it's done.

MR. YELENOSKY: Well, the subcommittee's feeling on it was that that may be done, but the case law says that -- there is at least some case law saying that it's improper. And it may be convenient for lawyers, but we think if there's a requirement of an affidavit, then you ought to have somebody with personal knowledge signing it or

you shouldn't have a requirement of an affidavit.

CHAIRMAN SOULES: Clearly in summary judgment practice -- there are all kinds of special rules about affidavits in summary judgment practice that haven't yet, as I've seen them, slopped over much into the rest of the practice. They may be minor ones.

Buddy Low.

MR. LOW: Doesn't the affidavit itself defined in law -- you know, you've got to swear personal knowledge and so forth. Does that -- I mean, I just always interpreted this rule to mean that if I need an affidavit to state such and such a fact in connection with a hearing and I have knowledge, then I can sign one. I, as a lawyer, can sign one.

MR. YELENOSKY: But you can do that without this rule because you have personal. You don't need this rule.

The only way you would need this rule is if you don't have personal knowledge. And in those instances, it doesn't -- you shouldn't.

MR. LOW: An affidavit doesn't imply that you should sign something like

that. I agree with that.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: I have a vague recollection that this rule came into our practice in connection with pleas of privilege, because we wanted lawyers to be able to sign pleas of privilege that had to be done fast and they had to be done first. I might be wrong about that, but I think that might be the origin of this. But in any case, whether it is or is not, I can't think of any use for it any longer since we no longer have the plea of privilege practice.

PROFESSOR DORSANEO: The Task Force on Recodification also recommended its deletion.

CHAIRMAN SOULES: Any opposition to repealing Rule 14? There being no opposition, the recommendation would be that it be repealed.

Okay. What's next?

MR. ACOSTA: 14b, Return or Other Disposition of Exhibits. The subcommittee makes no change.

CHAIRMAN SOULES: Okay.

MR. ACOSTA: With regard to the Supreme Court Order Relating to Retention and Disposition of Exhibits, there's no change.

With regard to 14c, the subcommittee originally recommended no change, Deposit in Lieu of a Surety Bond. But Ms. Wolbrueck pointed out to me before she left that Texas Rule of Appellate Procedure 48, Deposit in Lieu of Bond, which I think we sent on to the Court, does have specific alternatives for that deposit in lieu of bond as set forth in the TRAP 48(1) and (2).

MR. LATTING: Do we have those in front of us handy?

MR. ACOSTA: I've got one copy of that.

MR. LATTING: Could I see it, please?

MR. ACOSTA: We can get it from the record, if you'd like.

MR. LATTING: Because we covered this ground in a discussion in this Committee, and I want to make sure we're doing the same thing in both places.

MR. ACOSTA: Why are we doing

it in both places?

CHAIRMAN SOULES: Well, 47 and 49 are supersedeas bond rules, and this is other bonds like injunction bonds, whatever, trial-level bonds.

MR. LATTING: Well, what we did in the Appellate Rules it seems to me we ought to do here too, and that is, in plain English, we said you could deposit a cashier's check. And if you did that, you didn't have to get leave of court or leave from the clerk to do that. You just bring in a cashier's check and it's just like cash. And I feel we should do that because it eliminates needless steps in that process, and I often do that.

CHAIRMAN SOULES: Let me see if I can put this rule -- we went through the discussion about the integrity of various kinds of instruments that the clerks should be willing to accept without question, and one of them was cashier's checks. We did that in Rules 47 and 49.

Is anyone opposed to using the same language in 14c that we used in whichever one it is, 47 or 48?

MR. LATTING: It's 48.

MR. ORSINGER: TRAP 48.

CHAIRMAN SOULES: TRAP 48. Is anyone opposed to that? Okay. There's not any opposition to that.

Alex, can you rewrite that so that whatever instruments other than cash that we approved or recommended in 48 will be now in 14c?

MR. LATTING: And just a question, would it be easy to put this in some place other than Rule 14c? I mean, a lot of people don't know where that is.

CHAIRMAN SOULES: That's not on the table today.

MR. LATTING: Okay. Fine.

CHAIRMAN SOULES: Okay. Alex, do you have enough guidance now to rewrite these in red-line form for final approval at our next meeting?

MR. ACOSTA: More than enough, Mr. Chairman, and we'll be glad to do so.

With that, that concludes my report.

CHAIRMAN SOULES: Okay. Bill, do you have something else on his report?

PROFESSOR DORSANEO: No. I just wanted to say for Joe Latting's benefit that the Task Force on Recodification recommended joining this 14c rule with other rules that deal -- that are spread around with costs and security for costs.

MR. LATTING: Okay.

PROFESSOR DORSANEO: That's being worked on.

CHAIRMAN SOULES: Okay. Alex Acosta, we appreciate the good work that you and your committee have done on these rules, and we look forward to your report next time.

Steve Yelenosky.

MR. YELENOSKY: At the peril of lengthening things out here, at the beginning you said we would go back to the actual letters that we got on this.

CHAIRMAN SOULES: Right.

MR. YELENOSKY: I don't know if you want to still do that or not. We have a box on Page 2 --

CHAIRMAN SOULES: We'll do that next time.

MR. YELENOSKY: Okay. If you

just read that, I mean, I think it deals with what the letters were and what our responses were to them.

CHAIRMAN SOULES: We do need to make a record letter-by-letter through this book, so we're going to have to turn through that to some extent.

MR. YELENOSKY: Okay.

CHAIRMAN SOULES: But to those -- for those that you were going to make changes, if you've got enough guidance to get that back on the table next time, then that advances the ball there on Rules 1 through 14.

And now we'll go on to discovery. Steve Susman.

MR. SUSMAN: You have before you what I think is -- I hope will be the final report of the Discovery Subcommittee. The rules were presented to you and discussed in detail in the fall and in the January meeting --

HONORABLE F. SCOTT McCOWN: Would you speak up a little, Steve. We're a long way away.

MR. SUSMAN: The rules were presented to you and discussed in the fall. They were discussed again in our January meeting in great detail and at our March meeting. And we got directions from everyone, and we took the transcripts that we got, and our subcommittee met in early April. We spent a day in Austin on a Saturday. Beginning the second week in April, we had a conference call lasting for an hour every week. And beginning last week we had a conference call for an hour every day of the week with an effort to get this done and get through these rules. I think we have now done it.

I want to again thank Alex Albright for the help. We could not have done it without Alex's help. She did a terrific job. She did all of our word processing and drafting and served as our reporter.

I want to thank all of the subcommittee members; Trey Peacock with my firm, who has helped us in the last few weeks. He's down at the end.

And we have brought with us today the transcripts of our last meetings. The

transparencies are up, because what we've found in our subcommittee meetings is that if we look at these rules without going back and reading what we discussed and decided and wanted to do the last time, you make no progress. It's impossible to go forward. So we went back, we got everyone comments, we took the votes and we went from there. And we have tried to be accurate to the directions of this Committee. So we have the transcripts, and we have a cross-reference to where we discuss the rules.

And I suggest that we begin on Rule 1, and I can explain to you as we go through these rules what we have done.

Rule 1(1), Discovery Limitations. We no longer call them tiers, but we call them claims -- this one says "Claims seeking $50,000 or less." This concept was approved at the meeting, our prior meeting in January.

There was a problem that I do not think we have corrected. You just live and learn. And that problem was, we took a vote on Page 5621 of the transcript last time to insert in this provision -- and Alex, you tell

me what happened, because I don't understand what happened -- the following language: No amendment bringing the amount above 50,000 shall be allowed at such time as to unduly prejudice the opposing party, and in no event later than 30 days prior to trial. And that was in quotes and voted on, 18 for, one against. And somehow it got omitted, and I think it needs to be inserted in 1a after the word "redeposed."

Otherwise, I think we have got it, which is -- I mean, we got everyone's sense of what we were supposed to do. I'm sorry, we just missed that.

Alex, is there any reason why we missed it?

PROFESSOR ALBRIGHT: I don't really know what you're talking about. I may be missing something.

MR. SUSMAN: It's at Page 5621 in the transcript. People were concerned with the notion of amending out of Tier 1. And you will recall that we, the group, thought that you ought to be able to amend out of Tier 1 at a reasonable time, because otherwise, no one

would go into Tier 1. People would always just say, "My damages exceed $50,000." So we say you can amend out of Tier 1 prior to 30 days before trial. We cover that.

It then gives you -- converts you to what's now -- to what was Tier 2 and 3. But we don't say what happens if you try to get your amendment above 50,000 within the 30-day time period. So I think we need to fix that.

And then there was not much we had to do, as I recall, with the limitations of (b). Now, you're seeing a lot of red lines here, because what we have done is simply moved concepts around rather than changed ideas.

For example, we thought all of the major time limitations and concepts of being in Tier 1, or now claims seeking 50,000 or less, should be set out in subdivision (b), "Limitations," and they are.

Total time for depositions, six hours per party. We have inserted the words "The court may modify the deposition hours so that no side or party is given an unfair advantage."

Interrogatories, a limit of 15, as we had approved before, except we again insert here,

just like we have with the 30 limit in the other cases, that interrogatories designed to identify documents or authenticate documents are unlimited in number.

And finally we have inserted in subdivision (c) of this Tier 1 kind of case what I think was suggested to us at the last meeting by Justice Hecht, that there should be a limitation beyond which the parties cannot agree without court approval. There's an interest here that's more important than the lawyers' interest, and that's the interest in the -- or of the other parties' interest, and that is the interest in the justice system of keeping the cost down and getting discovery handled quickly and expeditiously, and that's what subdivision (c) is designed to do.

Can I -- the other thing Alex and I have seen as we have read through -- as you read through them very carefully, is we do need to define -- and you will recall in these Sub-tier 1 cases, we decided to have limitations on the length -- on the amount of hours that could be spent in depositions. But we limit them so severely that we felt there

was no need to limit the calendar months of the discovery period, as we do in what was then Tier 3 cases, or Tier 2 cases and now Subdivision 3 cases. We need to provide an ending of the discovery period, Alex, because our other rules tie in to a discovery period.

PROFESSOR ALBRIGHT: So like 30 days before trial?

MR. SUSMAN: I think that's it. Just say that the discovery period for these cases ends 30 days before trial, and that will cover it.

So that's all I have on that. I think we ought to -- do you want me to get through the whole rule before we --

CHAIRMAN SOULES: Can you get through just Part 1 or Subdivision 1? Let's go through Subdivision 1.

MR. SUSMAN: That is Subdivision 1.

CHAIRMAN SOULES: That's Subdivision 1?

MR. SUSMAN: I have covered Tier 1 now.

CHAIRMAN SOULES: Okay. In

Subdivision 1 we need a sentence in paragraph (a) restricting amendments inside of 30 days, right?

MR. SUSMAN: Correct.

MR. PERRY: Luke, if you will look on Page 2, there is a subparagraph (e) on amendments. And I think the sentence you need is the last sentence that was stricken out there, but I think the language there is what needs to be used.

MR. SUSMAN: Come again?

HONORABLE F. SCOTT McCOWN: Page 2.

MR. PERRY: On Page 2 at the top of the page, there's a paragraph on amendments that was red-lined out, but it looks like what we voted to keep is really the last sentence of that.

CHAIRMAN SOULES: No, it's not exactly that. I think it's -- read it again, Steve, from the transcript.

MR. SUSMAN: Well, the transcript reads "No amendment" -- and we all voted. This is a quote. "No amendment bringing the amount above 50,000 shall be

allowed at such time as to unduly prejudice the opposing party, and in no event later than 30 days prior to trial."

MR. PERRY: Yeah. We need to add the "in no event" if it's going to be made a part of 1a.

CHAIRMAN SOULES: Correct. It just needs to be added at the end of 1a. And then you're going to put it in the discovery cutoff 30 days prior to -- what do you want?

MR. SUSMAN: And we will add as a subdivision on (b), similar to what we have on Page 3, Discovery Period, All discovery shall be conducted in the discovery period. The discovery period shall begin on the earliest of blankety-blank and end -- yes?

PROFESSOR ALBRIGHT: As I recall, I'm not really sure what the issue is on that language, but if the issue is -- is the issue the "unduly prejudiced" language?

CHAIRMAN SOULES: There's not an issue. It's all been voted on. It's just not here.

PROFESSOR ALBRIGHT: I just want to say the reason that the "unduly

prejudiced" language was taken out, and this is what we discussed at a meeting after the January meeting, is that the amended -- is that "unduly prejudiced" is the standard for allowing amendments, which is the same standard as our amendment of pleadings rules allow. So we didn't want to insinuate that there were two different standards for amending pleadings, so that's why the "unduly prejudiced" language is not in 1a, because the amending pleadings then goes to the standard for when you can amend pleadings, which is when there is no surprise or prejudice.

We may all be talking about something different, because I don't understand what's going on with this.

MR. SUSMAN: Well, I just think we need -- it was so clear, our directions, to put something in here to make it clear as a bell that if you wait until 30 days before trial and you have been operating on a regime under this Tier 1 case up until that time, it is too late. It is too late to increase the ante. You're stuck.

CHAIRMAN SOULES: We voted to

have a different standard and a different pleadings cutoff under Subdivision 1. That needs to be put in Subdivision 1 because that's what we voted. And although the subcommittee may disagree, this whole Committee voted 18 to one to do that.

MR. SUSMAN: I don't think -- I mean, my recollection is that we didn't -- I don't know why it got left out, and we'll fix it.

CHAIRMAN SOULES: Okay. So that will go back in.

And then a cutoff of -- it will just say discovery cuts off 30 days before trial?

MR. SUSMAN: It will define the discovery period. And the discovery period shall end 30 days before trial. It will be defined in the same way as defined on Page 3 under (b)(1).

CHAIRMAN SOULES: Well, you don't really need a start if all you're really talking about is a stop, under (1).

HONORABLE F. SCOTT McCOWN: Right. But we need the words "discovery period," Luke, because the rest of the rules

are tied to that word and concept. So you're right, it wouldn't have a start, but we would still use the words "discovery period," because that's going to trigger some things in the rest of the rule.

CHAIRMAN SOULES: Okay.

MR. PERRY: In other words, all we need to do is say there's a discovery period that ends 90 days before trial.

MR. SUSMAN: 30 days before trial. Correct.

CHAIRMAN SOULES: And then make that period, whatever it is, 30 days or whatever number it is, fit the rest of the rules and work from this small-case context, both. Both things.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Can we have a vote?

CHAIRMAN SOULES: Okay. With those two things yet needing to be done, those in favor of Subdivision 1 -- just a minute, let me -- Subdivision 1, which was the old Tier 1, which begins on Page 1 and ends about

a third of the way down on Page 3, is there a discussion about -- is there further discussion about this?

Bill Dorsaneo.

PROFESSOR DORSANEO: I only have two comments. In 1a, in two places, when it says this section shall no longer be applicable, "this section no longer applicable," don't you really mean to say that the limitations contained in this section are no longer applicable? Maybe it doesn't trouble people to say that what you're just reading is not applicable, but it troubled me.

And the second thing, in (b)(2), I think it's completely unnecessary to talk about "as contemplated by Article IX of the Rules of Civil Evidence," which probably won't be the Rules of Civil Evidence anyway, and it's perfectly clear what we're talking about. And those Rules of Civil Evidence don't actually really do more than contemplate authentication.

MR. SUSMAN: I will gladly accept -- I will gladly accept both amendments

on behalf of the subcommittee.

So in Paragraph 1a, we will say that the limitations of this section shall no longer apply.

MR. PERRY: Well, excuse me, Steve. I think the problem that Bill raised there is dealt with by the last sentence of 1a.

PROFESSOR DORSANEO: I think it does.

MR. SUSMAN: It's not really a problem. He just feels it's a drafting problem. I mean, it's an artistic problem. I think we understand what it means. But I don't have any problem putting in "the limitations of this section shall no longer apply to the suit."

I think the next language is superfluous, "when a timely filed pleading renders this section no longer applicable." What if we said, "The limitations of this section shall no longer apply to the suit, discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule, and any person previously deposed maybe

redeposed," period?

HONORABLE F. SCOTT McCOWN: Steve, I think Bill is right about "as contemplated by Article IX of the Rules of Civil Evidence." I mean, that can go out, it seems to me.

But on his first point, it seems to me that statutes and rules are often written to say if "X" happens, this rule no longer applies. I mean, that's a pretty common formulation. I wouldn't want to change it to "the limitations no longer apply," because the truth is, nothing about the rule applies, either its advantages or its disadvantages or its limitations. I mean, I think we just ought to be clear that if this happens, this section is out.

MR. SUSMAN: That's fine.

HONORABLE F. SCOTT McCOWN: So I would go with Bill's second suggestion and forget his first one.

MR. SUSMAN: Okay.

PROFESSOR DORSANEO: I can withdraw the first one, rather than take time on it. It's just a matter of taste. Suit

yourself.

MR. SUSMAN: Can we vote?

MR. ORSINGER: Well, Luke, you misstated the scope of the motion, because it stops at the top of Page 2. It doesn't stop on Page 3.

CHAIRMAN SOULES: That's right.

MR. PEACOCK: I have a question; that is, if you remove the language on Article IX asking someone to identify a document, doesn't that mean you're also going to be opening the door for depositions on written questions that say "Identify all documents which support this claim"?

HONORABLE F. SCOTT McCOWN: No. It says "identify or authenticate specific documents are unlimited in number," so I think that gets it.

CHAIRMAN SOULES: Okay. Anything else?

MR. HUNT: State what we're voting on, please.

CHAIRMAN SOULES: Okay. What we're voting on is to approve or not approve

Rule 1, I guess it's section 1(a), (b) and (c), actually it's all on Page 1, with the understanding that there's going to be a provision for discovery cutoff and a provision limiting amendments as passed by this Committee 18 to one in a previous session. That's what we're voting on.

Don Hunt.

MR. HUNT: Isn't the 30 days in 1a now the limitation? How does that 30 days in the limitation differ from what we voted on?

PROFESSOR DORSANEO: I don't think it does either.

MR. HUNT: If the limitation is already incorporated into the rule, aren't we really creating a problem if we add back the language of "unduly prejudiced the opposing party"? Doesn't the 30-day limitation establish the prejudice?

CHAIRMAN SOULES: Well, the way this vote was taken, when you hit 30 days, you cannot opt out. You can't get any more than 50,000. That's it. You're through. You're stuck with your pleading.

MR. HUNT: Well, isn't that what this language says the way it's written right there?

CHAIRMAN SOULES: Where? So that we can follow you.

MR. HUNT: "If by a claim, amendment, or supplement filed more than 30 days before trial." A party is permitted more than 30 days before trial to opt out.

MR. SUSMAN: But we would -- I think the view of -- I mean, I sense that the view of our last discussion, where we've adopted the exact language we're talking about inserting, is that there could be situations where a party tries to opt out, plead 50 million rather than 50,000 on the 35th day before trial. Now, if that --

CHAIRMAN SOULES: 25th.

MR. SUSMAN: 35th. Because under the -- the question suggested that would be, per se, lawful. Okay? I mean, you could do it. The language we are proposing would make -- would give the court discretion to say, "Huh-uh. I'm not going to allow you to do that. That will be -- that's done at such

time as to unduly prejudice the other side, even though it's more than 30 days before trial." So that was the notion. There are two grounds on preventing it.

MR. HUNT: Okay. And that's what we're voting on?

MR. SUSMAN: Yeah.

MR. HUNT: Okay. I understand. Let's vote.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: Before we vote, I just want to be sure that we all agree that since this only applies to suits seeking exclusively monetary recovery, that Tier 1, or what is now Claims Under 50,000, will not apply to divorce cases, custody cases, termination cases, paternity cases, anything involving status or division of property.

MR. HUNT: Injunctions?

CHAIRMAN SOULES: No. Only monetary recovery. That's the only thing you can seek and get categorized in this category.

PROFESSOR DORSANEO: So it would apply to enforcement of agreements.

MR. ORSINGER: If it was less than 50,000. Okay. If it was monetary damages and not specific performance.

CHAIRMAN SOULES: "Monetary recovery" is what it says here. Whatever that embraces.

MR. ORSINGER: Well, specific performance like the delivery of property is not monetary recovery.

CHAIRMAN SOULES: Okay. Any other questions or comments before we vote?

Okay. Those in favor show by hands. 13.

Those opposed. There's no opposition to that, so it's unanimous.

MR. SUSMAN: Tier -- Subdivision 2. There has been simply a rearrangement here. I mean, there have been several things done. Subdivision 2, Discovery Control Plan, is what used to be Tier 3 cases.

To refresh your recollection, that was voted on in the following way: "I would propose that we adopt the concept of a Tier 3 where a Discovery Control Plan would be made

by agreement of the parties or imposed by court order that is going to be contained in the Discovery Control Plan -- what is going to be contained should be referred back to the committee for their recommendation. The committee should be directed to consider how that impacts the other limitations of the other rules that we have adopted."

And that, of course, passed. That passed unanimously.

Now, what we have done here is provided that the court may address anything that is provided in Rule 166. It may change any of the discovery limitations set forth in these rules.

We have provided further that the court must, however, provide in the Discovery Control Plan for the following things: A trial date, Rule (a); a discovery period during which all discovery shall be conducted; and deadlines for joinder of parties, amending or supplementing pleadings; disclosing expert witnesses pursuant to Rule 10.

We have provided that a Discovery Control Plan is either a function of the parties'

agreement or it can be ordered by the court; and that unless you have -- unless a Discovery Control Plan speaks to some of the limitations of the rule, those limitations elsewhere in the rules apply. That, I think, is consistent with our discussion in January.

CHAIRMAN SOULES: Any opposition to this? Okay. That stands unanimously approved.

MR. ORSINGER: Wait a minute. You're talking about Rule No. 2?

CHAIRMAN SOULES: Rule No. 2. Well, it's actually Subdivision 2 of the main Rule 1.

MR. ORSINGER: Excuse me, I've got to say something about that.

CHAIRMAN SOULES: Yes, sir.

MR. ORSINGER: There's a concern among the family law bar about the cutoff date of discovery in divorce cases, with community property and debts continuing to be accumulated up until the time of trial, and in custody cases where sometimes the more recent events are more important than the events that led to the filing of the lawsuit.

And some of the family law judges are concerned that if there's a discovery cutoff on divorces or custody cases, that lawyers are going to be doing discovery of what has happened since the discovery window closed during the first part of the trial.

And there's also the concern that dedicated family law courts would like to be able to have local rules that govern family law discovery that apply across the board. And this language says the Discovery Control Plan has to be for a specific suit. So that's going to mean that every case of consequence in the family law court is going to require a specific motion, hearing and order.

And the Family Law Council adopted a resolution at our last meeting generally saying that they wanted a rule that would say that these limitations would apply only upon a hearing and an order by the court. So that for divorce cases, custody, termination, paternity or whatever, presumptively your discovery window wouldn't apply and the deposition limitations wouldn't apply unless the court ruled that they would apply.

If you leave it the way it is right now, it's going to apply in every case and it's going to create a problem in every sizable case, and the problem can only be resolved under the current language of (2) by having a hearing and an order specifically tailored, and apparently that order still has to have a discovery cutoff date anyway.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Let me make a response on behalf of the subcommitte, because I suspect that the speech we just heard was meant for the record, and I'll give one for the record also.

The family lawyers of this state have just been heard for the first time after a year of deliberation on these rules. Where have they been for the last 12 months while we have been working our hearts out to come up with rules that will apply fairly to all lawyers and all cases in this state?

I do not say that you are not making points that deserve consideration. Maybe the Legislature is the place to go to get it considered, or the Supreme Court separately.

But I think it is a disservice to other litigants in this state for family cases to come in at this time and make what is essentially a plea that says -- and maybe that's the way we ought to handle it. Just say, "Cut them out completely. They are not governed by any of these rules." I understand some family lawyers might be happy with that.

But to go back now and try to revise these rules to -- and I have no objections -- frankly, I personally have no objection to doing that.

HONORABLE F. SCOTT McCOWN: Steve --

CHAIRMAN SOULES: I thought you were a member of this Committee trying to make statewide rules.

MR. SUSMAN: I'm trying to.

CHAIRMAN SOULES: Then you should have an objection.

MR. SUSMAN: Okay. Well, then, I do.

HONORABLE F. SCOTT McCOWN: Steve, Steve. Wait, hold on.

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT McCOWN: This is no problem at all, because everything that Richard said is already accommodated in our rules. And let me explain how.

Rule 2 says that the procedures and limitations set forth in these rules may be modified by the court for good reason. So, for example, in Travis County, we have some standing orders regarding discovery in family law cases. We have some specific requirements for inventories and for exchange of pretrial documents literally the week before trial regarding an update on financial fixture. All of those rules, all of those kinds of standing orders can be made under Rule 2 without being in conflict with the Discovery Control Plan Rule.

The Discovery Control Plan Rule will only happen if you've got a particular case that needs it, and that's why it is tailored to the particular case. So in a particular family law case where the family lawyers ask for a Discovery Control Plan, then all of their special needs with regard to family law can be addressed in the specific Discovery Control

Plan.

Then in addition to that, when we get to our rules on amendment and supplementation, in every area of the law, including family law, there are problems about information that occurs after the cutoff date, and that we've addressed in the Amendment and Supplementation Rule.

So I -- about a fourth to a third of what I do is family law, and as we've worked on these rules, I've consciously thought about how does this work for family law. I may have missed things, and we may need to talk about things as we go, but the comments that Richard just made, I think once he sees the full set of rules, he'll see it's completely compatible with the family law practice.

MR. ORSINGER: I still need to ask him some questions.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: Scott, if you would look at Subdivision 2, the first three lines, doesn't that say that a Discovery Control Plan has to be tailored to the

circumstances of the specific suit, and wouldn't that exclude a standing order that applied to all Family Code cases?

HONORABLE F. SCOTT McCOWN: No, no. You've got it backwards. Let me explain. You don't have a Discovery Control Plan in every case. If you've got a Discovery Control Plan, then it's going to be tailored to the suit, but before you get to the Discovery Control Plan, you're going to have local orders.

CHAIRMAN SOULES: Well, if you just go back to the Rule 166 practice, it was the same thing. When this Committee expanded Rule 166, the record that was made was that there couldn't be broad standing pretrial orders like there are in federal court. That's what we thought, or what we discussed.

But -- and it says: In an appropriate action, to assist the disposition of a case without undo expense or burden of the parties, the court may, at its discretion, direct the attorneys for the parties and the parties or their duly authorized agents to appear before the court in conference to consider all these

things.

It was thought that that meant that standing pretrial orders were not authorized and that every case that was going to get this kind of treatment had to come before the court individually.

Well, there's been a proliferation since then, this was some time ago, of standing pretrial orders and standing schedules at the local level, and the Supreme Court has approved those local rules. So what it establishes to my mind is a precedent that rules that say what a judge can do in an individual case don't limit what the county, as a local administrative area, can do with standing orders, as long as they don't directly violate or directly conflict with the Rules of Civil Procedure.

HONORABLE F. SCOTT McCOWN: I agree, Luke. And I think I've identified the source of Richard's confusion.

When we presented this the first time, we presented it as Tier 1, 2 and 3. Now we've got 1, 2 and 3 --

MR. SUSMAN: -- reversed.

HONORABLE F. SCOTT McCOWN:

-- reversed.

Richard, this is the old Tier 3, see, and we've confused you by the reorganization. The original Tier 1 is the $50,000. The default that's going to govern everything else is now Subdivision 3. So your family law cases, presumptively, like every other case, are going to be in Subdivision 3.

Subdivision 2 is your Discovery Control Plan, which you won't have in all cases. You only have that if the court or the parties invoke it. So it's the reorganization that has misled you.

MR. SUSMAN: It's still -- I mean, it still doesn't solve the problem. His problem is that now his cases are going to be -- family law cases are going to be in Subdivision 3. And the way out of them is by a standing order entered under Rule 2. We have Rule 2, which provides that the court may for good reason change any of these limitations, and that's how, I think, you would get around it.

MR. ORSINGER: Well, I have

another problem. But before I go on to that, let me say, then, that that means that unless we can have standing local rules that will apply under Tier 3, what is now Tier 3, this third category, then it's going to require a motion and a ruling on a case-by-case basis. Is that right?

HONORABLE F. SCOTT McCOWN: Well, that's right.

CHAIRMAN SOULES: Yes.

HONORABLE F. SCOTT McCOWN: Except that we do have in family law, I think in probably all the major counties, you've got either local rules or standing orders that set out the scheme. Nothing in these rules prohibits that. In fact, it's expressly authorized in our big Rule 2. So those local orders or those local rules still exist. And then you would process your family law case under Subdivision 3 of Rule 1.

MR. ORSINGER: Consistent with your local rules?

HONORABLE F. SCOTT McCOWN: Consistent with your local rule or your local standing order.

If you had a big family law case that you wanted a specific Discovery Control Plan for under 1(2), you could get that plan. It wouldn't necessarily be inconsistent with your local plan, but it would be tailored to the problems of the case. So I think we've got you covered.

MR. ORSINGER: Now, my last question, Scott, is under Subdivision 2b, where you have the discovery cutoff, does the court have the power to eliminate that discovery cutoff so that discovery can continue all the way to trial?

CHAIRMAN SOULES: By local rule or in a particular case?

MR. ORSINGER: In a particular case.

HONORABLE F. SCOTT McCOWN: Let me answer that two ways. First, I don't think you're going to have to change the discovery period as often as you might fear once you look at our supplementation rule.

Secondly, to the extent that you do need to change the discovery period, the court could do that by an order in the case.

CHAIRMAN SOULES: Okay. David Perry.

MR. PERRY: I don't want to interrupt this discussion, but I want to bring up another point, if we're through with this discussion.

MR. ORSINGER: I'm through.

MR. PERRY: In (2), at the end of the first set of lines that goes all the way across the page just above where little (a) is, there is language that says that once a Discovery Control Plan has been entered by agreement of the parties, it may not be modified except by court order. And I did not recall that having been our -- I thought that it had been agreed that you could continue to modify the Discovery Control Plan by agreement.

CHAIRMAN SOULES: Now, where is that, David?

MR. PERRY: Well, the last sentence of the introductory part to (2), the last sentence reads, "The following provisions must be included in a Discovery Control Plan, may not be excluded from a Discovery Control

Plan by agreement of the parties," and then the part I have a problem with is this, "and once set forth in the Discovery Control Plan, may not be modified except by court order."

CHAIRMAN SOULES: Steve Susman.

MR. PERRY: I had assumed that they could be modified by agreement.

CHAIRMAN SOULES: I see your issue.

MR. SUSMAN: The issue is -- what we have done here, again, is we have in several places provided that there are some things that can't be modified except with court consent, and of course, having agreement of the parties helps you get court consent.

One is to extend the amount of hours in depositions in Section 1 cases beyond 10. Another would be to extend the discovery window in Section 3 cases beyond 12 months. Here, too, is a place where we think that once a Discovery Control Plan is entered, particularly since it usually will involve a setting and must involve the setting of a trial date, okay, that is a mandatory provision, parties should not have permission

to change that trial date or pretrial deadlines that are dependent upon that trial date without going to the court and saying, "Judge, is it okay?"

I mean, that would allow parties to pass cases automatically whenever they want to. So because of the subject matter that's included in there, we thought that it would be best to send the parties back to the court to get a modification of its Discovery Control Plan once it had been entered.

MR. PERRY: But let me point out --

MR. SUSMAN: And Alex -- yes, excuse me.

MR. PERRY: Let me point out that some of the things that we are saying you cannot change by agreement would be the deadlines for disclosing experts, deadlines for amending pleadings, deadlines for joinder of parties. I don't see any reason why people shouldn't be able -- you know, we agree to change those deadlines all the time by agreement.

HONORABLE SCOTT A. BRISTER:

Because all three of those are the main reasons people ask me to continue trials. Those are the three, especially adding parties. That's the guaranteed buster, and you've got to -- I've got to have some say on this.

CHAIRMAN SOULES: Has this Committee passed on this issue before?

HONORABLE F. SCOTT McCOWN: Yes.

MR. PERRY: I thought that the Committee had voted that we were going to allow any modifications that the parties could agree on at any time. I thought we had already taken that vote prior.

CHAIRMAN SOULES: That was my impression. I'm just trying to find out if we voted on this limitation, these limitations at any time.

MR. SUSMAN: No, we have not on this express one. We have not on this one.

HONORABLE F. SCOTT McCOWN: Could I explain how this works?

CHAIRMAN SOULES: All right. Judge McCown.

HONORABLE F. SCOTT McCOWN: The Discovery Control Plan is a court order, so it's just like any scheduling order that you enter into by agreement, and most scheduling orders are first hashed out by counsel. You may agree to it, but once the judge signs it, it's a court order. You may agree to change it, but you're going to have to get it changed by an order signed by the judge, so this is no different than present practice.

And so all we've said is that once a plan is tailored and it's signed by the judge as a court order, then to get it retailored, it's got to be signed by the judge again.

And different judges in different jurisdictions -- just like now, in some places the agreement of the lawyers is going to get it signed like that; and in other courts, where they're controlling their docket a little more closely, they may scrutinize it a little more. So that's just like present practice.

CHAIRMAN SOULES: Well, it's very different from present practice, because we don't have a Discovery Control Plan in

present practice, and we can agree all over the ballpark, except we can't change the trial date.

HONORABLE F. SCOTT McCOWN: No.

CHAIRMAN SOULES: Now, then, we get at some point into the case a fix which can't -- some parts of which can't be changed by agreement without court approval. And that fix is not in the current practice.

HONORABLE F. SCOTT McCOWN: No. Luke, a Discovery Control Plan won't be present in every case. It's only going to be present when either the parties or the court have asked for it. So it is exactly like a pretrial order, a scheduling order, a discovery order, whatever you want to call it, and you cannot change those by agreement. Once the judge now makes an order, you can't change it by agreement.

MR. SUSMAN: Could I suggest a compromise? Scott, you're not -- you're almost right. Our rule as presently drafted provides that there can be a consensual Discovery Control Plan that has no court involvement whatsoever. Read the first

sentence.

HONORABLE F. SCOTT McCOWN: Well --

MR. SUSMAN: In any suit, the parties may agree that discovery be conducted in accordance with a Discovery Control Plan. It doesn't say the court has to enter or sign any order. It's simply a consensual discovery plan.

And of course, it doesn't set a trial date under (a), it requests one, "a requested trial date, if by agreement."

I would kind of agree that if it's consensual to begin with, I see no harm in the parties amending it by agreement. I also agree with you that if it's pursuant to a court order to begin with, you ought to go back and get the court involved in changing it.

In the federal court that's done all the time. The judges routinely sign the pretrial orders. The parties submit agreed orders, and I have never had a federal court decline.

Now, is it worth giving them the courtesy? I don't know. Judge Brister thinks

he wants the opportunity to look at it. And so, you know, some judges may want the courtesy of being able to say, "No, I'm not going to let you do this. It's getting too close, and I planned my vacation around this June trial, and I know you guys are going to come in at the last minute and cry and scream that you didn't get his expert discovered."

Should we not give the judge that prerogative? I don't see any harm, nor do I see, David, that it really interferes with lawyers who can reach agreement reaching an agreement.

MR. PERRY: Well, I think the harm is --

CHAIRMAN SOULES: Okay. Let me just set this up, because we seem to have lost some of our institutional memory.

The old Tier 2 was the general catchall for all cases. Then we voted that people can opt out of Tier 2. Then we voted that they can only opt out of Tier 2 with certain baggage before -- there had to be certain court involvement for a lawyer to get out of Tier 2 and get into Tier 3, and -- because it

wasn't just going to be an unlimited authority. It was going to have to be something in -- the court was going to have to become proactive to some extent.

Now, that's probably what is intended by this language, David, that you've identified. The question probably is, is this too much proactivity on the court to get into Tier 3 or is it too little?

But we do have a structure. 50,000 and under, catchall, you can opt out. But when you opt out, the court has to be proactive. No question. That's a policy that was set here for us to go forward.

Now, that means that if you come out of Tier 2 and you go into Tier 3, you're going to have a Discovery Control Plan. And it's not going to be agreed to, as Steve may have inferred, I'm not sure that's what he meant, altogether. It's going to be the subject of a court order. So at that point, then what happens? Can you change the court order by agreement or not? If you can't, have we got too many things here that we don't want to be unable to change without a court order? I

don't know. But that's where we are with this, I think.

MR. PERRY: Well, Luke, I think that -- I think it was clear from -- my memory is that it was clear from our discussion before that the Discovery Control Plan could be entered into by agreement or might be entered into by court order, either one. And I think that in that respect, the draft that we have here reflects the discussion that was had before.

It is my recollection, and frankly I have not reread the transcript, but it was my recollection that we had a lot of discussion and we all agreed that essentially anything could be modified by agreement except for very specific prohibitions that we might put in there. And part of what we put in there is a requirement that there should have to be certain deadlines. And I think it's good that there have to be those deadlines. But we have under Rule 2 the general provision that the parties by agreement can modify what their deal is.

Now, we've got this particular language

here that says, well, once it's in a Discovery Control Plan, you can no longer modify it by agreement. You have to go get a court order signed. I think that that -- first of all, my memory is that that's contrary to our previous vote. But secondly, as a practical matter, I think it has a lot of very unfortunate problems, because I think that attorneys are accustomed to making Rule 11 agreements to change various deals by agreement. They're accustomed to relying on those agreements, and they're not accustomed to having to go get the court to bless those agreements.

And I think we all know that once an order is signed, you're likely to have to go get an order to modify it, and a lot of times we protect ourselves by going and doing that. But one of the points of the Discovery Control Plan was to try to avoid having people run down to the court all the time and having the court sign off on agreements.

And it seems to me that it creates a trap for the unwary if we create a situation where people are likely to have Rule 11 agreements and then turn around and find out, well, even

though he signed it, it's not incorporated into a court order; therefore, it's unenforceable; therefore, the agreement that everybody agreed to doesn't apply, and I don't have an extra 30 days to join this party, for example.

HONORABLE F. SCOTT McCOWN: Well, let me kind of --

CHAIRMAN SOULES: Well, understand, David, we got past where you -- well, I'm kind of hearing you saying two things there. One, we can do anything wide open by agreement. That was sort of the way this got started. We could get out of Tier 2 and agree to anything. But we got past that, and the Committee said or decided that you couldn't do that without some engagement of the court.

Now, I'm not sure we ever defined all of the engagement of the court that we would have to have. But it was clear that you only got out of what was old Tier 2 if you engaged the court and got some definition for handling the case from the court.

MR. SUSMAN: The way the rules

are --

CHAIRMAN SOULES: Now, how we then thereafter deal with the definition I'm not sure we've ever talked about.

MR. SUSMAN: The way the rules are presently drafted, there are three circumstances under which -- under Rule 2, except where specifically prohibited, the three cases where you are specifically prohibited from agreeing out of something are more than 10 hours of depositions per party per Subdivision 1 cases, old Tier 1; more than 12 months of discovery for Subdivision 3 cases in that old Tier 2; and a modification of the Discovery Control Plan under Subdivision 2 cases, which was old Tier 3.

PROFESSOR ALBRIGHT: It's just these provisions (indicating).

MR. SUSMAN: What?

PROFESSOR ALBRIGHT: It's just these provisions of the Discovery Control Plan. You can modify --

MR. SUSMAN: Yeah. And just the provisions, as she points out, that are listed that are mandatory provisions: a trial

date; a discovery period during which discovery shall be conducted which will end 30 days prior to the trial date; and deadlines. And the deadlines -- there are three deadlines.

Again, I think -- I mean, I would kind of be of the view that we could solve some of the problem by saying that if it's totally consensual to begin with, if it doesn't involve a court order to begin with, let the lawyers do whatever they want.

CHAIRMAN SOULES: We're past that, unless we back up.

MR. SUSMAN: Well, on this one, I mean, I don't --

MR. PERRY: It seems to me that it's fairly simple to say that whatever the lawyers can agree to the lawyers can agree to change; and whatever the court has embodied into an order requires the court's agreement to change.

CHAIRMAN SOULES: You may recall what stimulated us putting limitations on the parties being able to agree without limitation to opt out of the old Tier 2, and

that was a suggestion from our esteemed member that the Court wasn't going to permit the lawyers to just, as they choose to do so, run their cases.

MR. SUSMAN: You're right.

CHAIRMAN SOULES: And that's what took us to the point of having the judge become engaged if we're going to get out of old Tier 2. And then how much engagement is there going to be? And I think our directive from the Supreme Court is if you're going to get out of old Tier 2, you've got to engage the judge. And that means we're going to have some kind of order from the judge.

To go back and rehash that, I think, is -- I mean, we can recommend something that the Court is not inclined to do, but I don't think that's going to help us that much or going to help them that much.

We're going to have to work within what the Court feels is a broad general policy, and I think that's been given to us as their broad general policy. And we can't exceed that or else we're not going to get probably the ear that we want and our work product is not going

to sell and we're going to have a work product that we didn't have that much input into and we're going to have some outcome that we didn't have that much input into. And so I don't mean to be putting -- restating something that --

MR. SUSMAN: You have persuaded me.

CHAIRMAN SOULES: I may have said it wrong, but I think that's what Justice Hecht told us at one point, that we --

MR. SUSMAN: You've totally persuaded me, because I think I just -- I'm wrong, because, in fact, if you let parties agree on these Discovery Control Plans, they could circumvent the 12-month limitation of Subdivision 3 cases by simply agreeing from the beginning, "Let's ask for a trial date in 2002, and we will continue discovery until 30 days before that trial. That will be our discovery period." And they would enter into that kind of a consensual discovery plan and there would be no limits on that. I do think you run counter to the limitations that we have in Subdivision 3 by doing that, so I

think we ought to stick with what we have probably.

CHAIRMAN SOULES: We're not going to have Tier 3 without engagement of the court. That's not going to come through our bosses, if what we've been told is accurate, and I'm satisfied -- or if what I've been told is the current disposition that prevails forward. And I'm satisfied that it's going to prevail forward, so we've got to deal with this.

Okay. Anything else on Section 2 of Rule 1?

MR. GOLD: Yes, Luke.

CHAIRMAN SOULES: I'm sorry, is that Paul Gold?

MR. GOLD: Yes. On (2), mainly because of something that Steve said, and I think it just needs to be clarified, I don't have an opinion one way or another on it, but on this first phrase, it says, "In any suit, the parties may agree or the court may order that discovery be conducted in accordance with a Discovery Control Plan."

It seems to be somewhat vague in that two

different interpretations could be applied to that. One, can the court order the parties to enter into a Discovery Control Plan when the parties haven't sought one by agreement? Or does it say that the parties can agree, and if they agree, well, then they can keep changing this all they want, but if the court orders it, they can't?

Now, that's the interpretation I heard a moment ago. But I think this first sentence is just a little bit vague in what it means by "the parties may agree or the court may order."

CHAIRMAN SOULES: If you read the whole thing, it says the court can order you to do whatever the court wants you to do, period, no agreement necessary.

Number two, you can agree, but that requires the engagement of the court, and after that, you can't change by agreement (a), (b) or (c).

And that's pretty close to what -- I don't know whether -- I know (a) was one, and (b) was a part of it. How much (c) was a part of it I can't remember. But that's pretty --

this was pretty close to what this Committee has reached as we've proceeded along. It was either court order or agreement to change any of these.

MR. SUSMAN: The old language is there that you approved the last time. There was no dissent on the language. "A Discovery Control Plan may be entered by agreement of the parties, or imposed by order of the court." That's the way it was worded the last time.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke, I think we can fine-tune this, I think, to accomplish exactly what the Court is after us as to having court control but also allowing parties not to bother the court about things that don't make any difference.

I think everybody would agree, and I think we've agreed before, that (a), the trial date, should not be changed without involvement of the court.

And second, I think that Judge Brister is right, the joinder of additional parties ought

to be allowed, too, because the additional party doesn't have a say about what happens later once they're joined.

But the other issues regarding disclosing of experts, supplementing of pleadings, and in (b), the discovery period within some reason, ought to be something you agree with as long as you don't bother the court with the trial date.

And it seems to me, and I think Judge Brister agrees by the nodding of his head, that those are things we ought not to have to go back to the trial court to bother them with if we're not bothering the disposition of the case in accordance with the discovery plan.

And so what I'm saying is, just the scope of it can change slightly and we accomplish two great things: One, the court has ultimate control; and two, the court doesn't have to micromanage if the parties agree.

CHAIRMAN SOULES: As I recall, what you're talking about right now is something that we have not ever completely resolved in this Committee, and that is to what extent are the parties, once they have

agreed and been ordered, subject to only being able to change that with a court order.

MR. KELTNER: That's right.

CHAIRMAN SOULES: And I think if we can get through that right now, we can probably resolve most of your concerns.

MR. KELTNER: And I think the Committee, the subcommittee, and especially Alex and Steve in drafting this, have done a very good job with it. Mine is only a fine-tuning.

I think we could eliminate (b), and that might be an issue. But I certainly think under (c), the (2) and (3), the amending or supplementing pleadings and the disclosing of expert witnesses, if the parties agree to that, that would not affect trial date, and, see, if everyone agreed, it wouldn't affect anything else that was the disposition of the case. And I think the judges would want us to do that.

CHAIRMAN SOULES: Okay. With that -- (b) may be more -- I don't know which of these is going to be more controversial because I never know until the can is open.

MR. KELTNER: Well, I was going to start with (c)(2) and (3), because I thought those were easy.

CHAIRMAN SOULES: Yeah. Let's start with those. We're going to have a division of the house or a division -- differences of opinion, I'm sure, as to whether or not these are the kinds of things that the parties ought to be able to consent to without getting the court involved; and that their consent wouldn't be disregarded because they didn't get the court involved.

Actually, there are kind of two things here. Can we agree to it? Then, if we do, can the judge just ignore it because we didn't get his blessing? Can we do it at all, and then can it be ignored? Are (2) and (3) so important that we should say that you can't agree to it without the court's help; and if you do, it either will or may be disregarded by the judge? Are they that important?

Tommy.

MR. JACKS: If that's a motion, I second it. I think these are matters that can be made the subject of an agreement by the

parties without disrupting the court's trial schedule.

CHAIRMAN SOULES: We'll get a motion after we get a discussion.

Does anybody feel different about that? Buddy Low?

MR. LOW: I don't -- philosophically, I agree. But our whole purpose here is to -- they say that the lawyers by agreement have cost people a lot of money with the cost of litigation. So it's not just a question of the court controlling the trial date and not interfering with that. I think we need to focus on the items and not just let the lawyers agree on the items that may increase the cost of litigation. So I'm not saying which of those do and don't, but we need to keep focused on that because it is the cost of litigation which is our charged plan that was given to us by the Court.

CHAIRMAN SOULES: Let me get to Richard, and then I'll go around the table.

MR. ORSINGER: I'm troubled by (1) and (2) because neither of them have anything to do with discovery other than

indirectly. And we already have existing rules on the joinder of parties and the striking of joint parties. And we also have existing rules on when pleadings can be amended with or without the permission of the court.

CHAIRMAN SOULES: Well, the discussion right now is just (c)(2) and (3).

MR. ORSINGER: Well, I'm talking about (c)(2). But my comment is -- if it's impermissible for me to say as a footnote that it applies to (1), then I guess I won't say that.

CHAIRMAN SOULES: You can say it, of course. I just don't want to get too many things balled up because when we do, then it tends to, I think, lengthen the debate.

MR. ORSINGER: What I'm saying is, is that it seems to me that (2) and parenthetically also (1) really are procedural rules that are governed by completely separate stand-alone rules regarding joinder and severance and regarding the amending of pleadings. And I really question whether it ought to be part of the discovery timetable

rule. It seems to me that we should address those in the rules that govern the joinder of parties and amendment of pleadings.

CHAIRMAN SOULES: Anyone else?

MR. KELTNER: I'll respond to that, if you don't mind.

CHAIRMAN SOULES: Well, I was going to go around. Tommy, you had your hand up.

MR. JACKS: Yeah. I was just going to respond to Buddy's comment. It seems to me that -- and I agree, we are called upon, I think, to look at whether we are adding to or subtracting from the cost in the system. I think that when you just look at the aggregate statewide over any given year's time the reams of papers that are going to be used sending things to the judges and the judges sending things back to us saying "Judge, can we?" and the judge saying, "Yeah, you can," in itself is a good argument for David's proposed amendment.

These are things lawyers can handle. They're not going to affect the business of the court and they're not going to affect the

disposition of justice.

CHAIRMAN SOULES: And then David Keltner, you had your hand up.

MR. KELTNER: Oh, that's all right. The only thing I was going to point out is one thing to Richard. Both the State Bar Rules Committee, Carl's committee, and the Discovery Task Force always thought that pleadings were an integral part of the system and affecting discovery in a number of ways. So I think there's always been some crossover of those rules, and I think it's appropriate to have them here.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yes. Two things. Number one, in response to Richard's question about the pleadings as well, one of the major problems is that you've got amendment of pleadings up to 14 days or seven days before trial. People amend their pleadings, and it changes the whole scope of discovery at that point, so the two are interrelated.

The other thing I wanted to respond to was Buddy's statement. I believe that by allowing the attorneys to fine-tune with

regard to supplementation, amending of pleadings and experts, it plays into this cost saving because you're not into some arbitrary decision. You're not locked in. There may be a time period that you lock into at the beginning, but you find that it would be more cost effective to move that date up or move it back to where the parties aren't spending money and you don't want to have to go to court.

The only thing the court wants to make sure is that its docket isn't screwed up by those machinations. And I think that by allowing the flexibility of these two modifications that David has recommended, I think that you would not mess with the court's scheduling and that you would play into saving money as well and saving time as well.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: I'll ditto what's been said about pleadings and experts as long as it doesn't affect the trial date. Joining additional parties always affects the trial date. The others don't, as

long as everybody understands the trial date stays the same.

Two things. Number one, make sure, however, it does -- this does two things. It says it has to be in the discovery control order and the parties can or cannot change it. I think on these kind of cases, the designer cases, the supplementing pleadings date and the disclosing experts dates ought to be mandatorily in the agreed order or court order or whatever it is, because that is a big scheduling problem. But I don't have any problem saying that items (2) and (3) could be changed without getting the judge to resign the order again.

And I also want to join with Paul's earlier comment about -- as I read the first sentence of this paragraph, I think something does need to be done about having to make it clear that this has to be signed by me, even if you all agree to it. That's fine, but then I do need to sign it. It does need to be in an order, and that's not -- that's not how I read the first sentence of Paragraph 2 or Section 2 or whatever.

CHAIRMAN SOULES: Okay. So in summary there, you feel --

HONORABLE SCOTT A. BRISTER: David, I might also add --

CHAIRMAN SOULES: You feel that we should make it clear that a Discovery Control Plan has to be signed by the judge or approved by -- well, signed by the judge?

HONORABLE SCOTT A. BRISTER: You know, the idea being that it's either on the court's order, can order it sui sponte, or upon agreed motion of the parties.

CHAIRMAN SOULES: And that you want -- you're suggesting that the order --

HONORABLE SCOTT BRISTER: I agree with David's motion to drop (2) and (3) as far as things that can't be changed, but not to drop them as far as things that have to be in every discovery plan.

CHAIRMAN SOULES: Okay. They're an essential part of the Discovery Control Plan, but they can be changed by -- those can be changed by agreement without court approval.

HONORABLE SCOTT A. BRISTER:

Without court order, right.

CHAIRMAN SOULES: Okay. That's a pretty comprehensive approach to it.

MR. SUSMAN: Can you read what we have now?

CHAIRMAN SOULES: Well, let's get around the table, because it may change. Buddy Low.

MR. LOW: I didn't mean to imply that saving money would only be to get the court involved. I include it. So it may be more costly to get the court involved. Sometimes things can be done simply. I didn't mean which way would cost more money. I just think we need to stay focused on the cause.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: In light of Judge Brister's comment, when do you have to file, if you have to file it, the Discovery Control Plan? When can you do it?

CHAIRMAN SOULES: Anytime.

MR. HERRING: So you're under default on No. 3, you don't like the way No. 3 is going, so you come up with a plan and you

present it to the court?

CHAIRMAN SOULES: I think that's been hashed out, too, and that was pretty much what was intended, as I recall.

Bill Dorsaneo.

PROFESSOR DORSANEO: This relates to the first sentence, so --

CHAIRMAN SOULES: But you have to engage the court at that time.

MR. HERRING: At that time.

CHAIRMAN SOULES: Yes. If you're way down the road and the judge thinks you ought to be in better shape, you may or may not get away with it.

MR. HERRING: Okay.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: From working on the first sentence, I just have a question as to whether the three little words at the beginning, "in any suit," means that?

MR. SUSMAN: Yes.

PROFESSOR DORSANEO: Even in a Tier 1 $500 case?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: I think we talked about that, too. You can get out of any of these constraints. You've got to get the judge involved, but you can get out of it.

MR. SUSMAN: If the court wants to let you out.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: Luke, you keep saying there that you've got to get the judge involved. But the way it's written now, you don't have to get the judge involved, I don't think.

MR. SUSMAN: I was about to read the modification that I think will -- just try this modification that I think covers the views that are being expressed. It will read -- the first sentence will read: "In any suit, the court may order that the discovery be conducted in accordance with a Discover Control Plan." Eliminate the words "the parties may agree or."

The last sentence will now read, before you begin with (a), "The following provisions must be included in a Discovery Control Plan,

may not be excluded from the Disovery Control Plan by agreement of the parties, and, as to (a) (b) and (c)(1) below, may not be modified except by order of the court."

CHAIRMAN SOULES: Now, that captures Judge Brister's suggestions.

MR. GOLD: Could you say that one more time, the last one more time?

CHAIRMAN SOULES: Read it for us, Steve.

MR. SUSMAN: "The following provisions must be included in a Discovery Control Plan." I don't think you need to put the next sentence in maybe, because -- well, it's got to be included. Maybe we -- "The following provisions must be included in a Discovery Control Plan, and, as to (a), (b) and (c)(1) below, may not be modified except by court order."

HONORABLE SCOTT A. BRISTER: Now, did David's proposal include (b) or not (b)?

MR. KELTNER: It did not.

CHAIRMAN SOULES: We haven't debated (b) yet. We've got to get to that.

MR. SUSMAN: And then (a) would be just "A trial date," because the rest of it doesn't make any sense.

CHAIRMAN SOULES: "A trial date," and just strike "if by court order" and so forth?

MR. SUSMAN: Yeah. Because it's going to be by court order now. It's not going to be consensual. It can be consensual to begin with, but the court has got to get involved.

CHAIRMAN SOULES: Okay. Now, we have not discussed (b), and I'm not asking for discussion on (b) right now because I want to cover that next. But does anyone else have any discussion on the concept that Judge Brister kind of brought to focus and that Steve has now written into this proposal? Any further discussion on that?

Okay. Then let's go to (b) and whether that is something that should be changeable by the parties' agreements and not ordered by the court, or whether it has to involve the court; or if the parties agree to it, the court can enforce it.

HONORABLE SCOTT A. BRISTER: Rubber stamp it. I don't care if you quit five days before trial or 30 days before as long as it doesn't affect the trial date.

CHAIRMAN SOULES: So you would put that right in there with --

HONORABLE SCOTT A. BRISTER: I would only except out in Steve's proposal (a) and (c)(1). I would --

MR. SUSMAN: Let me tell you why I -- it impinges on -- I mean, the only problem you've got is it impinges on what we've talked about. We've already said that in a regular case you can't by agreement get more than 12 months of discovery. That was something that was a suggestion from Justice Hecht, that we ought to have some outer limit that requires court intervention. And it seems to me that if you let it -- if you have a Discovery Control Plan but then you allow the lawyers to agree to whatever -- take as much time as they want in discovery without going to the court, that would be a mistake. What's the harm of going to the court?

HONORABLE SCOTT A. BRISTER:

This doesn't do that, though. This -- I mean, if I set it for trial years from now and say you have until 30 days before the trial --

MR. SUSMAN: No, it doesn't. Because let's say you set it for trial two years from now but you want discovery to end in a year. We could keep it going for another year without going back to you.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I agree with Judge Brister. I think in the real word judges don't set a trial two years from now and say end all your discovery 12 months from now, because that's a foolish notion and they know better. Judges do -- and Judge Brister says, in fact, rubber stamp. And it's silly, you know, if your cutoff is 30 days out but your experts ended up all testifying in another trial somewhere and can't be available until 15 days out, to go -- to have to run to the judge and get the judge to say, "Yeah, that's all right," and then come back.

You know, we've even had in Houston with some discovery control lawyers ridiculous results, but the parties by agreement have

extended the time, and then later come up to trial and have the court sui sponte disallow the testimony. You know, it makes no sense at all. It certainly doesn't save any cost to the system.

This strikes me as being something that should be in the same category as (c)(2) and (3), and it should be something that the lawyers ought to be able to do as long as it's not affecting the trial date.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I can't see any problem, even given Justice Hecht's position that the shorter the time frame the less expense. I think if the parties are in agreement that the discovery can proceed up until time of trial, they can be saving -- the parties may be saving -- you know, you can get a trial set off for two years. The parties may agree, "Well, look, we're going to save expense by not doing discovery until a certain period just before trial, unless we just cannot get this thing settled, and then we'll take these depositions just before trial and get it ready."

I think that there isn't a cost to the general public or to the administration of justice if the parties agree to this. I mean, if you wanted to add to it, you know, that the parties themselves could sign off on the matter of this agreement to extend the discovery as well, so that there isn't this thought that the attorneys are the ones that are running amok, but I don't see any problem with that.

MR. SUSMAN: I withdraw what I said. I accept that modification. I mean, I'm thinking about it, and it's okay.

CHAIRMAN SOULES: The parties part?

MR. ORSINGER: Drop (b).

MR. SUSMAN: I'm agreeable. I would say the only things -- I'm fine with saying the only things that can't be changed are (a) and (c)(1), that everything else can be changed by the parties' agreement, and let's get on with it, because --

CHAIRMAN SOULES: Well, we'll get on with it when everybody is comfortable. We need eveybody to think this through.

MR. SUSMAN: I'm the only one that spoke against it.

CHAIRMAN SOULES: Does anyone else have anything to say on this?

Okay. So it will be (a) --

MR. SUSMAN: That's (a) and (c)(1).

CHAIRMAN SOULES: Okay. So (a) and (c)(1).

Any further discussion on Subdivision 2 of Rule 1? Richard Orsinger.

MR. ORSINGER: Well, I may be having a reading problem here, and I want Steve and Scott to listen to what I'm saying.

This last sentence that leads into (a) and (b), the one we've just amended, says to me that the trial court cannot keep the discovery going up until the trial, because it says, The following provisions must be included in a Discovery Control Plan: (b), a discovery period ending not later than 30 days prior to the trial date or the requested trial date.

That seems to me to tie the hands of the court and say that your Discovery Control Plan

must end no later than 30 days prior to trial or the requested trial date. So it seems to me you're not giving the trial judge the discretion, which would be important, particularly in a termination case or a custody case or a divorce.

MR. JACKS: I think Steve's language takes care of that.

CHAIRMAN SOULES: No, it doesn't, Tommy. He's talking about that the court can't approve a plan that would end discovery less than 30 days prior to trial.

MR. McMAINS: But that doesn't mean that the court can't modify the plan. It might require as it approaches, I mean --

HONORABLE F. SCOTT McCOWN: Well, it might, because of the way Rule 2 is phrased. I think Richard has identified a drafting problem, because I think he's right.

Rule 2 says, "Except where specifically prohibited, the procedures and limitations set forth in these rules may be modified by the court for good reason." And I think Richard has identified a drafting problem where we have specifically prohibited something that we

would in fact want to allow the court to do. I think we need to fix that.

MR. SUSMAN: I agree. I accept that readily. I would agree that we would eliminate -- just simply put "A discovery period during which all discovery shall be conducted" and put a period. Eliminate the rest.

CHAIRMAN SOULES: Any opposition to that?

MR. ORSINGER: A semicolon.

MR. SUSMAN: Yeah, whatever.

CHAIRMAN SOULES: Okay. Any other discussion of Subdivision 2 of Rule 1 as proposed?

MR. PERRY: Could you read back the one we just did? I didn't get it.

CHAIRMAN SOULES: Well, let me get Carl's comments first.

MR. HAMILTON: Do I understand that this plan will apply even to cases below $50,000? Because that rule says if it's below 50, discovery shall be limited. But now we're saying that this can also apply?

MR. SUSMAN: Yes. Just like

it -- it was clearly always our intent that you can have a Discovery Control Plan that trumps both Subdivision 1 and Subdivision 3. It can trump the small cases; it can trump the other cases.

PROFESSOR DORSANEO: Both Paragraphs 1 and 2 begin "In any suit," and that as a drafting problem bothers me. They both cannot be applicable to any suit since they're different.

CHAIRMAN SOULES: If in any suit the plaintiff's pleadings seek monetary recovery of $50,000? Are you talking about --

MR. ORSINGER: No. The first one starts "if," not "in." So the "in" trumps the "if."

MR. SUSMAN: Are we about ready to vote on this?

CHAIRMAN SOULES: Well, I don't know.

MR. SUSMAN: Can we vote on this now?

CHAIRMAN SOULES: Are we ready?

MR. GOLD: I second it.

CHAIRMAN SOULES: Okay. There

being no further discussion on Subdivision 2 of Rule 1, all those in favor show by hands.

Those opposed.

The vote is 19 to one. It's approved.

MR. SUSMAN: You don't like the words "In any suit"?

PROFESSOR DORSANEO: No. I'll tell you later.

MR. SUSMAN: Subdivision 3.

MR. KELTNER: Steve, excuse me, before we get to that, there's just one other item we might want to revisit.

Is there a reason for taking out subdivision (e) in Item 2 and not making it part of the plan? It seems to me that that's --

MR. SUSMAN: I don't want to revisit that. We've gone back -- I think the Committee -- I think we -- those are all things that are not mandatory provisions, but are "may" provisions. They can be included in an order, but they don't have to be included in an order. That's the difference.

Subdivision 3.

HONORABLE SARAH DUNCAN: Wait,

can I make one suggestion that's really small?

CHAIRMAN SOULES: Sure.

HONORABLE SARAH DUNCAN: Rather than just entitling that section "Discovery Control Plan," could you call it "Suits Governed by a Discovery Control Plan"?

HONORABLE F. SCOTT McCOWN: Call it what?

HONORABLE SARAH DUNCAN: Suits Governed by. The title of the first one is Claims Seeking 50,000 or Less, and to be -- it's a little confusing.

HONORABLE F. SCOTT McCOWN: That's fine. That's a good idea. Just call it Suits Governed by a Discovery Control Plan.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: I need to ask a question about -- yeah. I think that's a good suggestion. Do you have any opposition to that?

HONORABLE F. SCOTT McCOWN: Paul had a good modification to that. Why don't we call it Discovery Control Plan Suits?

CHAIRMAN SOULES: How about

that, Sarah?

HONORABLE SARAH DUNCAN: Okay.

MR. SUSMAN: Okay. Then we can go on to Subdivision 3.

CHAIRMAN SOULES: I need to ask a question. When did we change No. 1 from -- my memory is that that was something that the parties could elect to do or not do in 50,000 and under cases. I didn't think that was something that was mandatory.

MR. SUSMAN: No, it is mandatory.

PROFESSOR ALBRIGHT: But you can agree to opt out.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: With court approval.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Okay. Can we go to Subdivision 3?

MR. McMAINS: Or by amending your pleadings.

MR. YELENOSKY: Yeah. I mean, you could ask for more money.

MR. SUSMAN: Subdivision 3, All

other suits. All other suits are those suits where you can't get the parties to agree or the judge doesn't want to take time to propose a Discovery Control Plan. Those are the cases that we called our old Tier 2 cases.

What we have done here basically is -- there's no change in substance or concept which was approved by a vote of 16 to three at our last meeting or at our January meeting.

You have listed in this subdivision the various limitations. The discovery control period, which lasts for nine months or until -- it begins on the date of the first deposition, or the first response to written discovery other than requests for standard disclosure. It ends in nine months or 30 days before trial, whichever is earlier. Old material.

Time for oral depositions. No change, except simply some cosmetic changes here. The notion is we wanted to define people who are under a party's control. We think we have done that by saying if you're under their control, you're under their control.

We have put the deposition time limits in

here. Three hours for fact witnesses -- no. We didn't put that in here. But we do have in here two experts, and the time for the depositions is later on.

Interrogatories. 30 interrogatories. And again, (c) says "Limitation on modification by agreement." You may not agree to extend the discovery period beyond a 12-month period except under a Discovery Control Plan.

Okay. Now, discussion of this. Sarah.

HONORABLE SARAH DUNCAN: I propose moving subsection (c) up to subsection (b)(1), and make it -- stating it affirmatively.

MR. SUSMAN: Subsection what?

HONORABLE SARAH DUNCAN: Move "The parties may not agree to extend the discovery period beyond a 12-month period except under a Discovery Control Plan," move that to the last sentence in subsection (b)(1) on the preceding page, and say, "The parties may agree to extend it up to 12 months," or however you want to phrase it, "but no longer absent a Discovery Control Plan." State it

affirmatively.

Because the way it's written right now, (b)(1) is written as an absolute limitation. But then we've got (c), which seems to imply that you can extend the nine-month period by three months and longer under a Discovery Control Plan. And (c) is actually an extension provision for (b)(1) of three months.

MR. LOW: No, because it doesn't come within it.

CHAIRMAN SOULES: Speak up, Buddy we can't hear you.

MR. LOW: No, it doesn't really, because it doesn't come within it. This doesn't cover -- these cover plans that are not within discovery, and it's absolute when it gets down and says that the limitations -- what the limitation is, unless you want to go with this plan. I mean, I don't see why it would be moved there then.

MR. SUSMAN: Anything else?

CHAIRMAN SOULES: Well, I don't think we can blow right by that more than anything else. I think we have to look at

this, because --

HONORABLE SARAH DUNCAN: Wherever it's located, it seems to me that we need to tell people and not just imply that they can agree to extend the discovery period up to 12 months but no more without a Discovery Control Plan. And the way it's written now, it's just sort of implied that they can do that.

MR. SUSMAN: Well, the statement that they can do it is, of course, in Rule 2. I mean, basically Rule 2 says you can agree to change things except where you can't agree, so the rule limits you. And now we have built in these three circumstances.

MR. LOW: And it tells you the limit unless you want to go to this other plan, and then you can go to that.

CHAIRMAN SOULES: Okay. Anything further? Any further discussion on that?

HONORABLE SCOTT A. BRISTER: Do we need to drop Article IX on interrogatories again?

MR. SUSMAN: Yes. Thank you.

MR. GOLD: Can I get an interpretation on what Sarah was saying?

CHAIRMAN SOULES: Well, I heard from one voice. I didn't hear anyone else talking beyond that, and what interest is there? I mean, to me, I think this is ambiguous. It says no more than nine months, and then it says we can't agree to more than 12, so somehow there's not a connection between those two things for me. But a lot of things don't connect, and I've found fewer and fewer of them sometimes that connect. You know, they just don't fly like they used to.

Bill Dorsaneo.

PROFESSOR DORSANEO: I'm just trying to understand here, but I gather that if you can't get a Discovery Control Plan for whatever reason, then you're over here in (3) unless you have an under $50,000 case. If you're over here in (3), then basically anything goes by agreement, except extending the discovery period beyond the 12-month period. And that's the system?

CHAIRMAN SOULES: That's what it looks like to me.

PROFESSOR DORSANEO: Okay.

CHAIRMAN SOULES: I'm not sure that it's very easy to understand. And we're talking to 50,000 people or more, I don't know how many there are now, 55,000 people, who are going to be trying to read these things and figure out what they say.

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT McCOWN: Well, Luke, I think it's pretty easy if you explain it this way, that the default provision is nine months. You can agree to go to 12. If you go beyond 12, you've got to get a Discovery Control Plan that's tailored to the specific case.

CHAIRMAN SOULES: All right. What you're saying is exactly what I think Sarah was saying, and that is, it ought to be in Rule (b)(1) so that it's nine months, but you can agree to 12, but not more than 12 without a Discovery Control Plan. And that all ought to be in one rule and somehow connected. That's what Sarah is saying.

MR. ORSINGER: Just add a sentence in there.

HONORABLE SARAH DUNCAN: Thank you, Luke.

MR. GOLD: Luke, wouldn't it be --

CHAIRMAN SOULES: I'm not trying to put words in your mouth. Is that more or less what you're saying?

HONORABLE SARAH DUNCAN: Yes. I feel heard and understood. Thank you.

MR. GOLD: Is the "nine months" word the problem in drafting? Why not just say no more than 12 months, and then you don't have to go into the other one.

CHAIRMAN SOULES: Because we've already said nine months, and nine it is.

HONORABLE F. SCOTT McCOWN: We can redraft that.

MR. SUSMAN: We can fix it.

CHAIRMAN SOULES: All right. Somebody do that, so that it's one, two, three. It's nine months unless extended by agreement up to 12, but you can't go past that without a Discovery Control Plan. And that will all be in one section, I guess, section (b). Rule 1, section 3(b)(1).

Okay. Richard Orsinger.

MR. ORSINGER: I would suggest that we add a new sentence onto the end of (b)(1) that says, "The parties can agree to extend the discovery period up to 12 months, and it cannot be extended any further except under a Discovery Control Plan."

CHAIRMAN SOULES: Consider that language.

MR. SUSMAN: All right.

MR. GOLD: Would you say it one more time?

CHAIRMAN SOULES: And any other language that -- we'll have a transcript of this pretty quick.

PROFESSOR DORSANEO: Another thing is, probably all of these letters and numbers are going to change, so that it's No. 1(1) rather than 1(a), and that will make for wonderful reading.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: This is on a different part of this.

CHAIRMAN SOULES: Okay. Let's

go to a different part.

MR. ORSINGER: And I would like Scott to pay attention again. It's my understanding from Scott's explanation that it is expected that family law courts or courts that have family law jurisdiction may adopt standing orders that would alter some aspect of these discovery rules as applied under the Family Code, that that would be permitted. Is that true?

CHAIRMAN SOULES: No.

MR. ORSINGER: That's not true?

HONORABLE F. SCOTT McCOWN: No. That is true.

MR. ORSINGER: What is true?

CHAIRMAN SOULES: You can't change the time -- you can't alter the time, any fixed time limits. If there are any fixed time limits, they cannot be modified by local rule. You can't say that, you know, 45 days from the first trial setting can't be made 15 days by local rule. It cannot be. That's what the general rule says.

HONORABLE F. SCOTT McCOWN: But that wasn't -- I don't think that was

Richard's question. I think what Richard's question was, if you're a family law case under Subdivision 3, all other suits, so you don't have a Discovery Control Plan, can a jurisdiction by local rule or by a local standing order adopted under our Rule 2 make provisions that would govern family law cases? The answer to that is yes, except under Rule 2 we say "except where specifically prohibited."

So if there are specific prohibitions in these Discovery Rules, those could not be altered by local rule or by local standing order, as Luke said. But there isn't any prohibition under these rules that would prevent the court from allowing discovery -- as we just talked about a moment ago, which you pointed out we had a mistake, a court could allow discovery up until the day trial started, if that's what the court wanted to do.

MR. ORSINGER: Okay. But we fixed that.

CHAIRMAN SOULES: Wait a minute. Let me correct something. The court

has no power to make local rules under Rule 2. None. This rule says in a specific case the court can do something, just like Rule 166. But the courts go on and make local rules that govern some of the same things, but they're not doing it under 166 and they're not doing it under Rule 2 here, because Rule 166 and Rule 2 are case-specific rules.

HONORABLE F. SCOTT McCOWN: No, Rule 2 is not. There is nothing in Rule 2, Luke, that makes it a case-specific rule. We have drafted it --

CHAIRMAN SOULES: Well, Judge, I just differ with you, because that's what it says.

HONORABLE F. SCOTT McCOWN: Well, would you point out the words that say that to me?

CHAIRMAN SOULES: Yes, sir. "In any suit." Those three words.

HONORABLE F. SCOTT McCOWN: I'm looking at Rule 2 on Page 5.

CHAIRMAN SOULES: Okay. I don't see it there.

PROFESSOR DORSANEO: It says

"in any suit" in all the other places.

CHAIRMAN SOULES: That's right. These rules are not authorizing local rules. These are rules governing specific cases.

HONORABLE F. SCOTT McCOWN: I didn't say these rules were authorizing local rules, Luke. Local rules are authorized by the Local Rule Provision in the Rules of Procedure and do have to be approved by the Supreme Court. But if you've got a local rule that develops a specific family law disclosure or a specific family law set of interrogatories or timetables, as many of our jurisdictions have, then that is going to trump, if you will, this "all other suits" provision, which is what Richard was asking about.

MR. ORSINGER: Well, I would like to propose a sentence that will do that or a phrase. Right here at the beginning, right after it says, "Unless the suit falls under Section 1 or is governed by a Discovery Control Plan," I would propose that we say "or by standing rule or local rule pertaining to actions originally arising under the Family

Code."

That would specifically permit courts to have particularized discovery requirements in divorce or custody cases without affecting the rest of the law practice.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: It is because of that kind of local rule that Rule 3(a)(2) was adopted, which prohibits local rules altering any time period in the rules, and that was because of fairness concerns and abuses, frankly.

CHAIRMAN SOULES: And if the -- I heard Tommy Jacks, until we got pretty far down the road here, talking about some pretty serious things that happen in personal injury cases that are going to be troublesome under these rules, and there were some other conversations about that. But in the spirit of having -- of meeting some of the public policy issues that our Court and this Committee are addressing today, they have, as I'm perceiving it, decided to try to work within this framework and to make it work, if

it can work.

And if the family bar wants to go to the Legislature and get exempt from our rules, as they have over and over and over again, that's okay. But I don't think we should make specific rules for the family law bar. If the rest of you, and that's the majority of this Committee, want to do that, we'll vote on it and send it upstairs.

But these rules should apply to all cases, and family law cases don't have any more issues that are going to be hurt by this than a lot of other categories of cases.

In business cases, economics change daily. In family and in personal injury cases, the conditions of the people change daily. They can go bankrupt. They can die. All kinds of things can happen. Yeah, there are a lot of reasons why we need discovery up until the day of trial and even in trial. But as a general rule, let's make rules that work and try to make them work together for everybody.

HONORABLE F. SCOTT McCOWN: Luke, could I give the flip side of that? The

flip side of that is that most of the litigation in the state courthouse is family law. Most of the cases that get tried are family law. The main kind of case that the average citizen is going to be in is family law. Family law cases cost a ton of money, and what every jurisdiction has done is to develop procedures to process those cases as fast and as cheap as possible.

Our Rules of Procedure, I don't mean any criticism of anybody, but I think it's just an historical fact, our Rules of Procedure have been written primarily with personal injury cases and business litigation cases in mind, and there hasn't been a lot of thought about family law or a lot of involvement by family lawyers.

And what I'm trying to say to Richard is that these Discovery Rules, the way they're written, do apply to family law cases and don't interrupt the family law regime of litigation that we have in our jurisdictions. We don't really have a problem here with the way these rules are written, and that's all Richard is trying to establish and all I'm

trying to reassure him about.

MR. ORSINGER: But, see, the problem I'm having is that Luke Soules is reading the same words and comes to the opposite conclusion. And I'll have to admit that reading this language here, unless you specifically permit the family law courts to establish rules that are going to have their own tailored discovery requirements on when inventories are prepared, et cetera, et cetera, or like in Austin where you require everyone to fill out their sheets for trial, unless you expressly say that right here in 3(a), I think you can't do it. You just can't.

I agree with Luke. I don't agree that that's the way it should be. He and I are different on policy. But on wording, Scott, I think that your practice in Austin about making everybody file their sheets on the previous Thursday before you go to trial, that's history. And I think that the standing rules in Houston about how there's going to be a list of documents that are going to be exchanged within 45 days, that's history.

HONORABLE F. SCOTT McCOWN: Well, let me put it to you this way: Under the words of Rule 2 on Page 5, that would not be history. Under that express rule, under those express words.

MR. ORSINGER: I disagree. Because Paragraph 3(a) says, "Unless," first choice, "the suit is under Section 1, or," your second choice, "is governed by a Discovery Control Plan, discovery shall be conducted in accordance with this section."

HONORABLE F. SCOTT McCOWN: Right.

MR. ORSINGER: And there's no exception in there for any kind of standing rule for family law cases.

HONORABLE F. SCOTT McCOWN: But then you have to go to Rule 2. Rule 2 says, "Except where specifically prohibited, the procedures and limitations set forth in these rules," which include the one you just read to us, "may be modified by the court for good reason."

MR. ORSINGER: But it refers back to 3(a), which says the only time you can

deviate from these norms is if you're under Tier 1 or you have a Discovery Control Plan. It does not permit a third option of a standing court order or a local rule that would deviate from the norm in Paragraph 3.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: If that is the way Rule 2 is being interpreted, then I would like to see a clarification of Rule 2. Because if that's true, we have created a direct conflict between the new Rule 2 and the existing Rule 3(a)(2).

CHAIRMAN SOULES: I haven't heard one specific thing why this won't work in family law cases. There's nothing in these rules that says that a local rule can't require an exchange of specific information.

MR. ORSINGER: But there is a limitation here on when discovery shuts off, Luke, and I would like to speak to why that's not appropriate in a family law case.

CHAIRMAN SOULES: Unless it's changed by the court or by agreement of the parties, it's 30 days before trial. You're

living right now with the supplementation rule.

MR. ORSINGER: The problem that you're going to get is that the family law judges are upset because that means every family law case of any consequence is going to require them to entertain this argument between lawyers as to whether a special exception ought to be made for this particular case. And whoever has all the information is going to be arguing there shouldn't be any change from the norm.

Now, just think of this: In most litigation, I don't care whether it's commercial or tort, there was some historical wrong that occurred on some date over some period of time that gave rise to the lawsuit. The only thing I can imagine that continues after the cause of action arose is the damages may somehow be lessening or getting greater with the passage of time.

In a marriage, you continue to earn community property up until the day your trial is finished and you continue to incur community obligations up until the day your

trial is finished. In a custody case, events happen to the children up until the day the trial is finished, and frequently the recent events are more imoportant than the events that occurred a year and a half ago that led to the filing of the lawsuit.

In a parent-child termination case, which has constitutional dimensions, the things that are done by the parent to the child that might lead to the termination of the parent-child relationship are continuing to happen up until the trial is concluded. And the evidence on what is in the best interest of the children, including whether the parents rehab, whether they've been in therapy or whatever, all of that may happen after the discovery window closes.

We think, those of us who practice family law think that family law is unique in Texas litigation in that the facts never do stabilize. You can't do like Steve Susman says, discover your case and put it in the can and then pull it down after six months, because our case never is in the can. It's not even in the can when we're submitting our

proposed divisions or whatever to the court.

And, you know, I understand the policy that we don't want to say, well, family law is going to have this area where all the lawyers can abuse their clients and have unlimited depositions and do discovery up until the time of trial. But on the other hand, we have to do discovery up until the time of trial because what happens in the last three months or six months before trial is very important. And if we don't allow discovery to be done on that, I'll guarantee you, as lawyers we're going to have to do the discovery during trial. If you don't let us find out what happened during the last four months of this marriage, we're going to find it out during the first week or so of our trial. And then we're going to start in on the real trial based on the discovered information plus what we found out at the beginning of trial.

HONORABLE F. SCOTT McCOWN: Richard, does this solve your problem: On Page 5 of our packet, under Rule 2, if you said, "Except where specifically prohibited, the prodedures and limitations set forth in

these rules may be modified, 1, by the agreement of the parties; or 2, by the court, by order, or by local rule for good reason." Does that solve your problem?

MR. ORSINGER: I'm inclined to say yes, unless there's some language in one of these other rules that somehow impairs that.

MR. SUSMAN: There is not.

MR. ORSINGER: There is not? Then I think that would solve the problem, and that would allow the courts to continue to have their special agreed-upon procedures they need to try to handle this type case.

CHAIRMAN SOULES: How many members of this Committee are willing to write into these Discovery Rules that they can be modified by local rule? Let's see, show by hands. How many are willing to write that in?

How many are opposed to that?

Okay. So that is not going to fly.

HONORABLE DAVID PEEPLES: It sounds like the language Scott proposed will allow local rule that just opts out of a lot

of this in all cases. I'm kind of persuaded that there might even be something -- that we ought to allow jurisdictions to opt out in family law cases to a certain extent but not in every other kind of case.

CHAIRMAN SOULES: Without ever giving this a chance to work?

HONORABLE DAVID PEEPLES: Well, I'll tell you, I'm concerned about what Richard says about if you don't get discovery, a lot of times you get it in trial with a bunch of fishing questions that wouldn't be there and wouldn't be lengthening my trial if they had had some discovery.

CHAIRMAN SOULES: Okay. Steve Susman.

MR. SUSMAN: I mean, I have a lot of sympathy for what Richard is saying. I mean, I'm upset that it's coming at the 11th hour, at the last minute, when we have done all this work on these rules. I mean, I'm upset that this Committee is not more balanced, that we don't have some family lawyers, or that the ones that are on this committee have kept their comments to

themselves while we've been working for the last 12 months.

So the policies that you've been talking about so vehemently cannot and have not been fully and fairly debated, which they should be, because there may be other -- I mean, I would be very happy if I were persuaded that as a policy matter you are right, and I believe what you're saying. I don't understand it, but if I were persuaded that that's the way it goes, and this is not just some trick of the family lawyers to keep the clock running, keep billing their clients by the hour, and keep, you know, just abusing the system, I think your point makes very good sense, and I'm very sympathetic to it.

You know, someone once -- I mean, I've heard within the last few weeks, someone said, "Well, we're going to have to go to the Legislature because Susman and the Discovery Subcommittee will not listen to the family lawyers."

The fact is -- and my response is, where were they? They haven't even talked to us.

HONORABLE F. SCOTT McCOWN:

Well, wait Steve.

CHAIRMAN SOULES: Well, this has been discussed. Richard has already discussed this.

HONORABLE F. SCOTT McCOWN: Wait a minute. Wait, though. I spend more time on family law, perhaps even more than Richard in litigation, and I've thought about family law all the way along, and it never occurred to me that anyone would take the position under these rules that they preempted the local rules regarding family law that we already have. And so the only reason this hasn't been put on the table by those who are concerned about family law is because this is a startling interpretation.

Now, perhaps it's my fault that I didn't know that's what people were thinking, but that's the reason it hasn't been on the table.

MR. SUSMAN: Well, obviously, you know, I mean, I was on the Committee and have been very active, and I didn't even know there were local rules, for example. This wasn't a subject that we even thought about. All this discussion is brand-new. This is the

first time I've heard anything about local rules or some policy against local rules, special rules --

MR. ORSINGER: Well, we can easily accept the rules if -- the problem that's being raised does not torpedo your work. All I'm advocating, and I think Scott agrees and I think David agrees also, is that the courts should have the power to opt out of that in family law litigation because of the peculiar nature of it.

Now, the problem that that causes is, do we take the approach that Luke espoused, that it has to be done on an ad hoc, case-by-case basis, which then requires a lot of hearings in front of the judge, or are we going to let local judges say, "We've got a set of rules here that we think work, and we'd like to put them in place, and they'll apply only to family law cases, and if anybody has a problem with this norm, we'll opt out of our local norm."

CHAIRMAN SOULES: If you ask any husband who has got -- who thinks that he's responsible for having developed his

family's wealth and the 30 days continues to accrue community property and that's right up to the date of trial, probably he kind of thinks that's increasing damages, that his damages are changing, just like in a commercial case where the damages -- and I'll say this: If we're going to start making reasons why the family cases have special treatment, I think we need to go back to the personal injury lawyers, because they have some real problems with applying these rules to them.

And I want to hear some business lawyers talking too, because these rules work the same for everybody. I've tried divorce cases, and I don't have a problem with applying these rules to a divorce case.

I think they can work, and I think to just say that we're going to preempt these for family law cases, I imagine that the personal injury lawyers are going to want to be a part of that caucus and get themselves preempted.

And I certainly want to get my commercial cases preempted. I want them set aside. I don't want these rules applying to me because

they're too harsh. They're just too tough to deal with.

We don't need -- tell me one piece of this -- the discovery period cuts off at nine months or 30 days before trial. Rule 245 says 45 days' setting in a family law case. So you know when the discovery window is going to cut off. It's 30 days. And then everybody in every case who wants more discovery than that has to go to the court and get leave to supplement.

We've got cases that say you can tweak your numbers. If you're an expert, if you get inside 30 days, you can tweak your numbers. You can make an explanation at trial of why you tweaked them.

There's -- if you look at these rules, what about these rules won't work in a family law case? What specifically?

Bill Dorsaneo.

PROFESSOR DORSANEO: I have some questions for Richard. I did family law and worked in a family law firm for an extended period, and I don't share the same point of view. But I haven't done it for a

while, and maybe I'm unaware of the state of the practice at this point. But is it the case that family lawyers will not agree with each other such that a docket control order could be signed? Would it always be controversial?

MR. ORSINGER: No. But there will be some people who will know that they will gain an advantage by having the discovery window closed, and if they're represented by certain kinds of lawyers, they will do everything to keep that window from staying open.

PROFESSOR DORSANEO: That's no different from any other kind of practice.

MR. ORSINGER: I know. But the difference is that, you know, the husband and wife own these assets jointly. Their liabilities are joint. These events are occurring and their rights are changing every single day whether the discovery window is closed or not. This is not just an historical event that occurred and gave rise to a lawsuit. This is a continuing status of change and ownership and liability and

everything else, and that's without regard to the kids and the termination cases and everything else.

So what do you do to us when we say, "Okay. Our discovery window closed, but it was another six months before we were able to get to trial"? Now I don't have the faintest idea what the community estate is. I don't know what kind of child care arrangements there are for these children. I don't know whether these parents have rehabilitated the grounds that led the state to file a termination case to begin with. And I can't get the other side to agree to do that, so I'm going to have to go back to the court on all of those cases, or else, if the court won't give me that discovery, I'm going to have to do it by subpoenaing everybody and subpoenaing records and doing it at the beginning of trial.

CHAIRMAN SOULES: Now, how does that differ from Carl Hamilton defending a personal injury case? I mean, discovery cuts off in nine months and all sorts of conditions may change. In the meantime, now he's got to

go to trial to figure out what's happened.

There will be late supplementation. We've got rules for additional discovery after supplementation, and you can go to the court and you can get an agreement.

Carl, you had your hand up. I didn't mean to pick on you with that comment, but --

MR. HAMILTON: Well, I guess maybe I don't understand, but it seems to me that if there are local rules like Judge McCown says, wouldn't the court be able -- under Rule 2, where it says that parties may agree or the court may order, couldn't the court under the Discovery Control Plan on his own order whatever is needed for the family, without any agreement by anybody and just order that those plans are put into effect?

MR. SUSMAN: I do. I mean, Carl, I frankly think that the rule reads like you say it does and like Scott says it does and like Richard would like to interpret it. Luke is opposed to reading it like that. I mean, I think it would allow -- I don't -- we never discussed making the rule read in a way that it would prohibit a court from adopting

some blanket rule or order. That never came up.

PROFESSOR DORSANEO: But there's a reason for that. Blanket rules and orders involve no thought whatsoever with respect to individual cases, and for that reason they are bad.

CHAIRMAN SOULES: Sarah Duncan.

HONORABLE SARAH DUNCAN: They also frequently involve no notice. There is nothing in Rule 3(a) -- unlike the Appellate Rules, in Rule of Civil Procedure 3(a), you only get a copy of the local rules if you ask for them. Just because you've got a suit pending in Judge McCown's court doesn't mean you get a copy of his local rules. And that's why the provision was put in 3(a).

CHAIRMAN SOULES: Look, I have read every local rule in the State of Texas. You may not believe that, but I have. 230 some-odd counties have local rules. The others don't, and they confirm it in writing if they don't have any. And they are wild and crazy, some of them; some of them are very specific. And they vary all over the

ballpark.

And this Committee and the Supreme Court, back when it made these changes to Rule 3 some time ago, drove hard to limit the impact of those local rules on the outcome of litigation. It even said that no local rule can have a determinative effect.

If I'm supposed to provide a schedule in the Travis County local rule and I don't, that cannot affect the outcome of my case. Now, if I'm ordered to do so by the judge in my case, that's quite different, because that's under Rule 166. But just because it's a standing local rule, it cannot affect the outcome of my case, because the Rules of Civil Procedure say it can't.

So to just say the local rules can trump these rules, that is absolutely against the policy that the Court has stood for for a long time and that this Committee has stood for for a long time. If that's an easy answer to this problem, that's just going the easy way. It's going counter to statewide policy.

Now, there's not anything in here that preempts or says that Travis County can't have

rules. That's not foreclosed by this, because it's not even covered by this. There can be that sort of thing.

But these rules, whatever we do with them, either are going to apply to family law cases or not, and then they're going to have their own -- I guess they'll have 254 different ways of doing things unless they can get all the courts to pass a uniform set of rules.

Judge Peeples.

HONORABLE DAVID PEEPLES: If I am a judge and I, like Judge McCown, want to have a uniform way of treating family law cases and you tell me I can't do it, what is to prevent me from saying -- just putting out the word that in family law cases I am going to sign orders letting you do discovery up until three days before trial routinely unless somebody opts out of that system? You can't keep me from doing that, can you?

CHAIRMAN SOULES: No.

HONORABLE DAVID PEEPLES: So why can't we let courts say, "This is the way I'm going to treat these cases that are

40 percent of my docket. If you don't like it, opt out. But my default rule is going to be that in family law cases you can deviate in particulars (a), (b) and (c)." What's the difference?

HONORABLE SARAH DUNCAN: Luke, I don't think anybody has ever had any objection to any judge doing an order in a specific case. But when you do that, the parties and their counsel have notice. When you pass local rules that you don't have to give to anybody, frequently people don't have notice and they don't know to comply.

MR. GOLD: Luke.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I must be missing this. This all sounds like semantics to me. A moment ago Buddy Low, I think, as I understood it, pointed out that -- and as I hear it, you can have these local rules. All that these rules require is that the judge say in a particular case, "I'm following these local rules." Everybody in the case knows it. It's there. It's an edict there in their case. It doesn't offend either the Local Rule

Provision. It doesn't offend the Discovery Rules, and everybody in the case knows what's going on.

Why don't we just adopt that as a matter of principle and move on. I think that's -- I don't think that offends what you're saying, Luke, and I don't think it offends what Judge McCown or Judge Peeples are saying. It sounds like we're engaged in semantics here and we're all saying the same thing just differently.

MR. YELENOSKY: Well, it does offend the notion of minimizing the variety of rules that we might have to deal with. I know certainly practicing in federal court that, you know, I mean, you go look at your district and you go look at your division and then you go look at your individual judge. And there aren't 254 of those. So there's that issue, which is separate from the notice issue.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: But what Paul is saying is that it's not like a local rule you might not get a copy of. When you file that divorce case, then that judge says, "Okay, everybody, if you don't know it, now

you know it, and I'm giving you a copy of this, because I have a Discovery Control Plan."

And if you start treating those differently than you do -- I'm representing Boone Pickens in a takeover, and every day is quite a bit of what's happening and so forth. And in an oil and gas case in production, with the production each day, or an antitrust case, or the family lawyers or like the maritime lawyers, they all think they're so different. We all think everything we do is so different, but maybe it's not.

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT McCOWN: Can I give the flip side of this on local rules? Because I've long been in disagreement with this Committee's approach to local rules, and let me just state it real briefly. We aren't going to resolve it today, but I feel compelled to state it.

And that is, in reality, everything you're saying, it seems to me, is just backwards, which is local rules, in fact, give you more notice, not less notice. Because

what a local rule does is it forces the judges of the county to agree on a uniform way they're going to handle things, so that when you practice law in that county, you know what the uniform way of handling it is going to be, and you're not subjected to the idiosyncratic differences of each court that develops an order that it enters in each case and culls a tailored order for that case.

Nobody sends out the Texas Rules of Civil Procedure to you when you file your lawsuit. But you know that that's what the rules are, and that's the advantage of local rules adopted by the judges.

The reason that those counties denied to Luke that they have local rules, the ones that are denying it, is because they've got them but they don't have them in writing. And that's what happens when you make it difficult for a jurisdiction to have local rules, is that they go underground. And they've got the rules, but the only people that know about them are the judge and the lawyers who practice regularly in front of the judge.

And I think local rules get a bad rap.

They need to be consistent with the rules of procedure, but it's far better to let courts develop rules and lay them out there for the litigants.

And one last point on that is that when you've got a local rule, it actually is given a whole lot more thought than an idiosyncratic order, because the judge sits down often with the bar that's concerned and hammers out how we're going to handle it. And if it's a local rule, he not only has to hammer it out himself, but he's got to get the agreement of the other judges he works with.

And in family law, which is probably the best example, jurisdictions have developed some local rules to handle huge blocks of cases as quickly and inexpensively as we can.

And so I just wanted to stick up for the much maligned and much misunderstood local rules.

CHAIRMAN SOULES: Okay. Let's take 10 minutes and give the court reporter a break, and then we'll be back.

(At this time there was a recess.)

CHAIRMAN SOULES: Okay. We're back. What I want to do is get a show of hands. Let's get a show of hands. How many feel like we should make a rule that is specific that in family law cases, local rules can trump these rules?

We had a vote a while ago about local rules in general trumping these rules, 18 to two against.

Now we're going to take the same show of hands on family law cases. How many feel in family law cases the rules should provide that local rules can trump these rules that we're making? Show by hands. Two.

Those opposed show by hands. 10.

That fails by 10 to two.

Now, we'll go on with the rest of it.

MR. SUSMAN: Did we get an approval on Subsection 3? I don't remember whether we did or not. I think we need to get a vote now on Section 3, which I think we have discussed to death, of Rule 1.

CHAIRMAN SOULES: Section 3?

MR. SUSMAN: Of Rule 1.

CHAIRMAN SOULES: Of Rule 1.

That's on beginning on Page 3 and 4.

And we voted on Sarah's suggestion, so it's going to be --

MR. SUSMAN: We're going to move (c) to 3(b)(1), as we discussed. We're going to add at the end of 3(b) of Rule 1 the statement that "The parties may agree to extend the discovery time allowed up to 12 months, but may not agree to extend the discovery period beyond 12 months without obtaining a Discovery Control Plan." That's what we're going to put there.

CHAIRMAN SOULES: And delete from some subparagraph, I guess it's (3), "as contemplated by Ariticle IX of the Texas Rules of Evidence."

MR. SUSMAN: Right. Can we get a vote on that?

CHAIRMAN SOULES: Okay. Those in favor show by hands. 11.

Those opposed. Okay. That's unanimous.

MR. SUSMAN: On to Rule No. 2. Rule No. 2, as written, we've simply combined the two subdivisions, but they're the same basically, was approved unanimously on

Page 5690 of the transcript from January.

CHAIRMAN SOULES: Any objection to Rule 2 as shown on Page 5? Sarah Duncan.

HONORABLE SARAH DUNCAN: I'd like a clarification on the local rules.

MR. SUSMAN: A what?

HONORABLE SARAH DUNCAN: A clarification in the rule on the local rule issue, "By the agreement of the parties or by court order in the specific case for good reason."

MR. SUSMAN: You mean you want to cram it down their throats, right?

HONORABLE SARAH DUNCAN: No. But I'd like to --

CHAIRMAN SOULES: Sarah made a motion that we -- that in any suit --

HONORABLE SARAH DUNCAN: Okay. I move that in subsection -- in what is now -- I assume it's going to be deleted --

CHAIRMAN SOULES: May I just suggest something, that we put -- that we begin that sentence with "in any suit." Make that your motion and then it makes it suit-specific, and then we'll take a show of

hands on it. All right? "Except where specifically prohibited in any suit" --

HONORABLE SARAH DUNCAN: I think it still needs to be by order.

CHAIRMAN SOULES: By court order. Okay. You say it.

HONORABLE DAVID PEEPLES: May I suggest this: The procedures and limitations set forth in these rules may be modified in any suit, (1), by the agreement of the parties, or (2), by the court for good reason.

CHAIRMAN SOULES: Or by court order for good reason.

What do you want to say, Sarah?

HONORABLE SARAH DUNCAN: That's fine. By court order for good reason.

CHAIRMAN SOULES: Okay. So the motion is that after the word "modified" in line 2 we say "in any suit," and then in the last line we drop "the" and add "order," so that it would read: "Rule 2, Modification of Discovery Procedures and Limitations. Except where specifically prohibited, the procedures and limitations set forth in these rules may be modified in any suit, (1), by the agreement

of the parties, or (2), by court order for good reason."

Okay. Those in favor show by hands. 11. 11 for.

Those against.

11 to one.

MR. ORSINGER: I have another question.

CHAIRMAN SOULES: Okay. And I'm assuming, unless anybody disagrees with this, that that vote was to approve Rule 2 as modified in that manner, not just the amendments. Okay. Rule 2 stands approved by a vote of 11 to one.

Richard Orsinger.

MR. ORSINGER: Is the footnote that's part of Rule 2 in the rules, or is it just for our purposes?

PROFESSOR DORSANEO: It should say "11."

MR. ORSINGER: Well, I don't think it should say anything. Why are we footnoting a Rule of Procedure?

HONORABLE F. SCOTT McCOWN: The footnote should come out. That was a comment.

MR. SUSMAN: Take it out.

CHAIRMAN SOULES: The footnote is gone. Any objection? No footnote.

Rule 3, Page 6.

MR. SUSMAN: Rule 3. The first paragraph was approved at our January meeting, Page 5690 of the transcript. We simply renumbered some things because now we have kind of reclassified some discovery devices. Requests for designation of, and information regarding, expert witnesses are handled by standard disclosure, which you will see later on.

Any problem with Rule 3, Subdivision 1?

MR. PERRY: Just as a matter of drafting --

CHAIRMAN SOULES: David Perry.

MR. PERRY: -- there is another reference to requests for designation of experts in Line 7 of Section 1, which also I assume needs to come out.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: What words come out?

MR. SUSMAN: "Requests for

designation of, and information regarding, expert witnesses."

CHAIRMAN SOULES: All that comes out? Is that what you're suggesting, David?

MR. PERRY: Right.

MR. SUSMAN: Yeah. It was a drafting error.

CHAIRMAN SOULES: Okay. With that change, those in favor of Subsection 1 of Rule 3 show by hands.

Okay. Those opposed. No opposition. That's unanimous.

MR. SUSMAN: On our next rule, Rule 2, there was -- let me just run through it and tell you where we made changes, because it was approved on 5697.

So up through paragraph (c), well, there are no real changes there.

Okay. So now you go to (d), Trial Witnesses. That was approved too. So the only change we added there was to add in the underlining on (d), "other than rebuttal or impeaching witnesses."

Drop out the footnote; we simply thought

we should parallel the current Rule 166.

CHAIRMAN SOULES: That was voted on last time?

MR. SUSMAN: Yeah. This was voted on. On expert witnesses, we have inserted the word "only." That was voted on last time on Page 5709 of the transcript.

And let's see, going down, Witness Statements, there was a great deal of discussion on that, and we now think -- we hope we have it.

There were several ideas there. One was to make it clear that a lawyer's notes, a lawyer's interview notes are not a witness statement. We do that on Page 8.

And otherwise, we make a witness statement something that someone has signed, something that they adopted in writing, or essentially a verbatim recording, the transcript of a verbatim recording of the witness' statement. As we said in our subcommittee, it's something that the witness, if he took the stand, could be impeached with. And obviously, a lawyer's file or memo notes could not be used for that purpose.

Finally, we added subdivision (h) simply because we thought it was part of the existing rules. There was no reason not to allow it to be included. We didn't see any harm with it. You haven't seen (h), but I can't imagine that it's controversial.

That's all of this rule. Now, are there any questions or discussion of Rule 3(2)?

CHAIRMAN SOULES: Discussion. Sarah Duncan.

HONORABLE SARAH DUNCAN: I was just looking at present Rule 167. We've introduced into (2)(b) that they have to be relevant. But "relevance" has a particular meaning, I think, in discovery, and that is that it's reasonably calculated to lead to the discovery of admissible evidence, not that it has to be relevant in an evidence, a Rules of Civil Evidence sence at the time.

MR. GOLD: Where are you?

HONORABLE F. SCOTT McCOWN: Well, we say that in (2)(a), the second sentence.

MR. PERRY: Sarah, where are we?

HONORABLE SARAH DUNCAN: (2)(b).

MR. SUSMAN: I don't understand.

MR. PERRY: I thought that (a) and (b) were supposed to be unchanged from the current rule.

MR. GOLD: They are.

HONORABLE SARAH DUNCAN: No. 167 says "Documents or tangible things which constitute or contain matters within the scope of Rule 166(b)."

PROFESSOR ALBRIGHT: Well, that's 167. This is from 166(b)(2).

MR. GOLD: Yeah. This is taken right from the present rule.

PROFESSOR ALBRIGHT: 167 is the tool that you use to --

HONORABLE SARAH DUNCAN: Oh, okay.

PROFESSOR DORSANEO: They're fine.

HONORABLE SARAH DUNCAN: Never mind. Sorry.

CHAIRMAN SOULES: Okay.

Anything else on subdivision (2) of Rule 3?

HONORABLE SARAH DUNCAN: But wait a minute, it's not the same.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Steve, the provision about a lawyer's notes taken during a conversation is not a witness statement, that means that you can't discover it as if it's a witness statement, but we don't know yet whether it might be discoverable under that necessity exception to work product. So it's not your intent to make them nondiscoverable --

MR. SUSMAN: Absolutely.

MR. ORSINGER: That's a bridge we have not yet crossed?

MR. SUSMAN: We have not yet crossed that bridge. Not today.

CHAIRMAN SOULES: Any other questions or comments to subdivision (2) of Rule 3? Is there any opposition to subdivision (2) of Rule 3 as proposed by the committee? We're just taking out the footnote.

MR. SUSMAN: It passes.

CHAIRMAN SOULES: There being no opposition, that stands unanimously approved.

Rule 4 on Page 9.

MR. SUSMAN: As I said, not today, Kemosabe. On Rule 4 we have --

HONORABLE F. SCOTT McCOWN: -- punted.

MR. SUSMAN: -- punted on. We have said that we would like an opportunity to continue to study and meet together and talk, not about these other rules, but about this particular subject. We think we have something to add, but we did not consider this as integral to the other Discovery Rules. We did not think that the opportunity to save the litigants in this state a lot of money through discovery abuse should be delayed pending an academic debate over the scope of the Texas rules involving work product and party communication privilege and how they compare with the federal rules. So we would suggest that this rule be passed on to the Supreme Court with this comment, and we will keep

working.

CHAIRMAN SOULES: Don Hunt.

MR. HUNT: Assuming that we adopt these rules, Steve, and the Court immediately adopts them and puts them into effect, what rules are we left with to judge privileges and exemptions? Would that be back with the Rules of Evidence?

MR. SUSMAN: The existing rules.

PROFESSOR ALBRIGHT: 166(b)(3).

MR. HUNT: Thank you.

CHAIRMAN SOULES: We'd have surviving the Texas Rules of Evidence Rule 166(b)(3) unchanged until we propose some modification.

MR. HUNT: Let's vote. Or I guess we don't need to vote.

CHAIRMAN SOULES: Rule 5.

MR. MEADOWS: Are we going to press ahead on this, though? Is that the idea?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: Rule 5, subdivision (1), unchanged and approved on

Page 5767 in the January transcript.

Subdivion (2), let me tell you what we've done here. This was approved at the January meeting on Page 5780 of the transcript, but we have made the following changes: You will recall that we debated the necessity of supplementing or amending a prior discovery response in writing, and would it be good enough to amend it by just telling someone in a deposition or writing them a letter, which is what our first proposal had.

Some of the people -- there was a vote at the last meeting that said, well, that's okay, except for the identity of witnesses or -- I think it was documents or something like that. There were some exceptions.

When our subcommittee met, we decided, you know, what's the harm, let's make people supplement or amend in writing. So we have taken out all exceptions, which should satisfy everyone. So now there's no such thing as an informal amendment or supplement. It needs to be done the same way the original thing was done.

And that's the only change we have made,

except we now make it clear that documents -- if you find documents that weren't produced, you've got to produce them. It does not suffice just to say to someone, "I've found some documents that haven't been produced before." You solve that problem by producing the documents. And that's why we have "document productions" in here, to make it clear that there's a duty to supplement those.

Subdivision (3) was discussed and approved at the last meeting, Page 5785 of the transcript, with the following caveat, as I recall. People were concerned about what happens -- we have always dealt with the un-underlined parts of this rule, which is that if you supplement or amend after the conclusion of the discovery period, then there's a reopening and it's an automatic reopening. But suppose you supplement or amend during the discovery period but at the end so that the other side doesn't really have a fair opportunity to complete the discovery.

We have now provided that if you supplement or amend during any applicable

discovery period, the opposing party may seek from the court departures from the discovery limitations imposed under the rule upon a showing that the opposing party was unable to complete discovery relating to the new information during the discovery period, so that's the change.

We felt we had to deal with it in two sentences to solve the problem. And there's a distinction between a supplement and an amendment occurring after the discovery period, which entitles you to an automatic reopener without court intervention, and one that occurs during the discovery period where you should go to the court and try to get some discretion exercised on whether you in fact have been prejudiced by not -- by having the information too late to use it within the limitation.

That covers Rule 5.

CHAIRMAN SOULES: Discussion of Rule 5. Richard Orsinger.

MR. ORSINGER: Steve, if there's a disclosure of something after you've been through most of the discovery period, is

that a basis at which to get the court to give you more deposition time, or is your only option to try to exclude it or get a continuance of the trial? In other words, we have a 50-hour deposition limit, and let's say you've used it up or almost all up, and then all of a sudden something pops up and you need more time. Can you get more time?

MR. SUSMAN: Oh, absolutely. But you have to ask the court for that. I mean, I would think that would be part of the good reason.

CHAIRMAN SOULES: Anything else? Sarah Duncan.

HONORABLE SARAH DUNCAN: We have been over the subject matter of footnote 3 at least five times.

MR. SUSMAN: What, now?

MR. LATTING: We had extended discussions on this point. And the full Committee expressed its views as stated here in this footnote. And then we now are told that upon further reflection the subcommittee believes this rule should apply for all, and I'm curious as to know why you just --

MR. SUSMAN: That's right. What I was explaining is that we began thinking about what else could it be. You all voted that you wanted formal supplementation of the identification of persons with knowledge of relevant facts, trial witnesses, expert witnesses, and the production of documents.

MR. LATTING: Well, the way we got there, Steve, was that we really voted that we didn't want to have to have formal supplementation for anything but that. That's how we got to that language. And we had extensive discussions about that in the Committee. And I think that's what you made reference to, Sarah.

HONORABLE SARAH DUNCAN: Yes. We have discussed this over and over and over again, and each time the full Committee seems to reach an accord, and each time it seems to go back to the subcommittee and comes out.

CHAIRMAN SOULES: What Sarah is referring to is the discussion that we've had at length on several occasions about supplementing interrogatories. Is that

essentially it, Sarah?

HONORABLE F. SCOTT McCOWN: And what Steve is saying, and he may be wrong and we stand to be corrected, but what Steve is saying is that the list of exceptions swallows the rule, and that there's not anything we can imagine, and correct us if we're wrong, that you could informally supplement under the rule. And so therefore, since there was nothing we could imagine that you could informally supplement, we just said everything has to be formally supplemented.

MR. LATTING: Well, I can give you an example.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: The example is you file an answer to an interrogatory. You say, "I have an expert. He's going to testify to A, B, C and D." He is extensively deposed, and in his deposition he says A, B, C, D, E and F. You get to the trial of the case, he starts to testify about E and F, and the objection is made that there has not been a supplementation to the interrogatories and therefore he ought to be precluded from

testifying about E and F, subjects on which he has been extensively deposed. And that's what we discussed earlier.

HONORABLE SARAH DUNCAN: As well as the documents reviewed by.

MR. PERRY: That's the reason the change was made.

CHAIRMAN SOULES: David Perry.

MR. PERRY: The reason the change was made, Joe, is that the Committee also changed the exclusionary rule to where you can't exclude something unless there's a showing of surprise. And in the kind of example you make, you can't possibly show surprise because he's been deposed on it. And it ends up being that by the time you consider the list of exceptions on the one hand and the effect of revising the exclusionary rule, it becomes a whole lot more trouble than it's worth to say that you can formally supplement some stuff but you can informally supplement others. And as a practical matter, there is no longer any penalty for informal supplementation unless you can show surprise, which is going to be very, very hard to do.

MR. LATTING: Well, I'm not necessarily unless arguing against that, I'm just pointing out that we had the discussion and the vote earlier, and so I wanted to --

MR. SUSMAN: Well, the footnote discloses it. I mean, of course, we discussed it and voted on it.

CHAIRMAN SOULES: This underlined or stricken-through language in the middle of Page 10 has got, I think, two things in it. It's got "not otherwise been made known to the other parties in discovery." I think that means formal discovery, like a deposition or a document that was produced. You give them a new report from the expert but you don't supplement your interrogatories, so you've got a report.

And then you say "or in writing." That's, to me, informal. I think if you stop with the word "discovery," period, and leave it in, then you don't get into the informalities of how else you might discover something. And I don't know whether that reaches Sarah's concern, but I have the same concern, and it to some extent satisfied me.

Sarah Duncan.

HONORABLE SARAH DUNCAN: I can read the brief right now. It goes something like "There is a duty under Rule 5(2) to formally supplement as to the expert's opinions. They didn't formally supplement. I am surprised. Why would I think that they were going to introduce this at trial, and I have to go out and get another expert rebuttal witness, when they haven't fulfilled their responsibility under Rule 5(2)? Judge, this is governed by an abuse of discretion standard. You just can't say that this trial judge was clearly wrong, arbitrary or unreasonable in excluding these opinions by this expert that were not supplemented in accordance with Rule 5(2)."

And I thought in the discussions we had about this previously that that's what we were trying to avoid, because a lot of the cost of litigation in my view has been trying to figure out what's been made known in discovery and making sure that all your interrogatory answers track everything that's been made known in discovery so that it doesn't get

excluded.

CHAIRMAN SOULES: Sarah, the concept that I thought that we had was that discovery -- the universe of discovery made at disclosure, that that information was usable at trial whether or not somebody had gone back ticking and tying to their interrogatories. Now, I thought that the policy and the consensus of this Committee was that. Is that correct as far as you're concerned, Justice Duncan?

HONORABLE SARAH DUNCAN: Yes.

CHAIRMAN SOULES: Okay. Now, I think if we leave in this stricken language except for the words "or in writing" --

MR. MEADOWS: But, Luke, I don't think you want to take that out.

PROFESSOR ALBRIGHT: We've redrafted -- I think we've redrafted language in accordance with the subcommittee. I think Sarah has made a very valid point. We were wrong. Shoot us. Put it back in.

HONORABLE SARAH DUNCAN: No, it's not shoot you.

PROFESSOR ALBRIGHT: But just

look at this language that we drafted on --

MR. SUSMAN: You have the language. Just put the language back in. I mean, it's not worth fighting over.

CHAIRMAN SOULES: Hold on.

PROFESSOR ALBRIGHT: Look at footnote 3, Luke.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Look at our language in the footnote. "Formal supplementation is required for the identification of persons with knowledge of relevant facts, trial witnesses or expert witnesses, the production of documents, or if other additional or corrective information has not otherwise been made known to the other parties in discovery or in writing." That will, I think, do it.

It was just a judgment call on whether it was -- you know, whether it really added anything. And I think you all have made a very good case in my view of what the other is that could be informally supplemented because it's informally known and need not be formally supplemented. I have no problem inserting the

footnote line.

MR. PEACOCK: And removing the last sentence.

MR. SUSMAN: What last sentence?

MR. PEACOCK: Of Section (2).

MR. SUSMAN: No, no. The amendment or supplement still has got to be in writing. But you don't have to amend or supplement if the other side has the information in an informal way, certain kinds of information.

MR. MEADOWS: But, Luke, I think the "in writing" refers to a letter.

CHAIRMAN SOULES: Right.

MR. MEADOWS: So I don't think you want to take that out.

CHAIRMAN SOULES: I do, because we've now gone to formal supplementation.

MR. MEADOWS: I mean, a letter is no different than -- if you inform somebody informally by a letter, it's no different than informing them on the record in a deposition, which you're allowed.

MR. SUSMAN: I mean, on behalf

of the Committee, we will put the language back in, because it is consistent with what you all did. It was a judgment call to take it out.

Now, if you all want to debate further, you are expanding well beyond what we agreed to do.

CHAIRMAN SOULES: Okay. I need some definition about what goes back in. Is it the stricken language that's shown --

MR. SUSMAN: No, no.

CHAIRMAN SOULES: Excuse me. Is it the stricken language that's shown on the face of (2) and the footnote? Because that looks to me like it ought to all be in there.

MR. LATTING: I think so too.

HONORABLE SARAH DUNCAN: My understanding was that everything -- that the first sentence in (2) would come out. The sentence in quotation marks in footnote 3 would be put in its place. And then we would continue with "An amendment or supplement filed or documents produced less than thirty days," and then the last sentence.

HONORABLE F. SCOTT McCOWN: No. I think what we've got is --

HONORABLE SARAH DUNCAN: Oh, yeah, you're right. I'm sorry. I'm wrong about that.

MR. SUSMAN: The first sentence stays. I think in lieu of the crossed-out words you put in the footnote statement.

HONORABLE F. SCOTT McCOWN: And then the last sentence.

MR. SUSMAN: And then the last two sentences.

MR. KELTNER: Are we keeping in "or in writing" or not?

HONORABLE F. SCOTT McCOWN: Yes. We're just taking the quoted portion from (3) and putting it where the stricken language is in (2).

MR. SUSMAN: Correct.

CHAIRMAN SOULES: Thank you.

HONORABLE SCOTT A. BRISTER: With regard -- Judge Brister here. With regard to the footnote information, what does "other parties in discovery or in writing" modify? Is that formal supplementation, A, B

and C, or is that additional or corrective information?

MR. SUSMAN: Additional or corrective information.

HONORABLE SCOTT BRISTER: Okay. I think that needs to be made clear, because the last in your string, "the production of documents," has no conjunction in front of it, so it appears to be 1, 2, 3 or 4, rather than 1, 2 or 3, formal, or informal.

MR. ORSINGER: Could you put an "and"? "And the production of documents" and a comma? Wouldn't that eliminate that?

CHAIRMAN SOULES: Okay. Does that work?

HONORABLE SCOTT A. BRISTER: Okay. I bring it up because, if I understand what the concept is, formal supplementation is for the important things, who the experts are, trial witnesses; informal supplementation is okay for tweaking.

MR. SUSMAN: Everything else.

HONORABLE SCOTT A. BRISTER: Yes. I would just put it in two different sentences, but that's just fine.

The second point I wanted to make is, remember we had the discussion about whether if you give a huge pile of documents with doctors' names in it -- so if they're separate sentences, formal supplementation is required if you're designating a new doctor. I just want to make sure that's what was intended by that sentence.

HONORABLE SARAH DUNCAN: That's what I was just mentioning to Alex. Maybe it would work better if the quoted sentence in footnote 3 was the first sentence of subsection (2), so then we're defining the limited instances in which there is a duty to supplement. And then we tell you when that duty arises, incomplete or incorrect when made or no longer complete and correct, and then how to do it.

CHAIRMAN SOULES: Any objection to that? Alex Albright.

PROFESSOR ALBRIGHT: Well, I think we need to have as the first sentence that you are under a duty to amend or supplement prior to discovery, period. Whether you have to do it formally or not

would then be the second concept, because I don't think we want people to think, "Well, I don't really have to supplement."

CHAIRMAN SOULES: Do we define "formal supplementation" somewhere?

MR. YELENOSKY: No. That's the issue now, because is it supplementation if your expert during the deposition starts testifying. I don't think of that as supplementation. I think it came out during the deposition and therefore I don't need to supplement. So it may be semantics, but we need to be clear on what we mean.

I think perhaps you really aren't under a duty to supplement if it's come out in the deposition. So maybe we need to start out by saying that you have a duty to supplement if it hasn't come out, or you don't have a duty to supplement unless -- but that's where it is.

MR. SUSMAN: Can I suggest that we will come back in the morning with another draft of this? I mean, seriously, if we can come back, we will have it. Okay?

PROFESSOR ALBRIGHT: You draft

it.

MR. SUSMAN: Okay. I will. I'll do it on the plane.

HONORABLE F. SCOTT McCOWN: And before I forget, I think this addresses the point. Instead of "formal supplementation," if we just say "supplementation in the form originally provided is required for the" -- you know, for these things. And then, as Judge Brister said, break it down into a separate sentence to say that other additional or corrective information that has not been made known to the other parties in discovery or in writing. Just break that into two sentences.

CHAIRMAN SOULES: Does everybody agree with that? Does anybody disagree? Okay.

HONORABLE F. SCOTT McCOWN: Instead of using the word "formal supplementation," which has no definition, just tie it back with "in the original form."

CHAIRMAN SOULES: It's okay with me just to say "supplementation" without "in the form originally provided," but that's

up to you all.

Okay. We're on Page 11, and I think this is the intent of the rule on line 3, "the opposing party may reopen discovery." Does that mean without leave of court?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Then I think we ought to say so. "May reopen discovery without leave of court." Otherwise, it may just be permissive and the judge may refuse you.

MR. SUSMAN: That's fine.

CHAIRMAN SOULES: Any objection to that? Okay. We're going to get a new look at paragraph (2) in the morning, so we can leave that for the moment.

Rule 6.

MR. SUSMAN: Rule 6, as you'll recall, and we deemed this to be probably one of our most important rules, was approved conceptually in our meeting in January, Page 5816 in the transcript, but it was inartfully drafted.

The concepts that were approved are, in lieu of the automatic exclusion rule, we need

to return to a rule where things get excluded only if they are a surprise and only if the surprise is such on a matter that might prevent you from getting a fair trial. That was approved as a concept.

It was also approved that the burden of showing that the other party -- the burden should be on the party that failed to make the proper disclosure during discovery. That was a burden to prove a negative. You need to prove that the other side is not going to be surprised in such a manner as to prevent a fair trial.

And then we -- after having voted in favor of those concepts, we didn't like our drafting, so we presented to the Shakespeare of the Discovery Subcommittee, Scott McCown, who redrafted it. And here is his work product, and I think it does make sense now.

We state the burden clearly in the first sentence. If you don't catch it there, we repeat it again in the next to the last sentence of Section 1.

PROFESSOR DORSANEO: You have a typo.

MR. SUSMAN: Where is that?

PROFESSOR DORSANEO: A-f-f-e-c-t, third line, not e-f-f-e-c-t.

MR. SUSMAN: Thank you.

CHAIRMAN SOULES: Well, we're going to come back to this in Joe's work, too, because this is really going to go under sanctions, if it -- it's there now.

Carl Hamilton.

MR. HAMILTON: On the cost and expenses, are you talking about the attorneys' fees incurred in preparing for trial and all that, including bringing witnesses, all of that? Is that what's included in expenses of delay and attorney's fees?

MR. SUSMAN: Everything. It would include everything, the expense of the delay.

MR. HAMILTON: But from what point to what point is it?

MR. SUSMAN: I just think the court has got to look at it. It's got to be a court decision, what expense did this delay really cost.

MR. PERRY: It would be the

expense of the delay as opposed to the expense of getting ready for trial.

MR. SUSMAN: Of course, it's the expense of the delay.

MR. HAMILTON: Expense of the delay and not the expense of having to prepare for trial twice?

MR. SUSMAN: Right. We say the expense, "impose the expense of the delay."

CHAIRMAN SOULES: How about "any expense caused by the delay"? Isn't that what you're saying?

HONORABLE F. SCOTT McCOWN: I think you could make the argument for your fees to get ready for trial the second time, the way we've worded it. I don't know if we want it that way or not, but I think the way it's worded is that that would include preparing twice.

MR. SUSMAN: I think that would be a fair interpretation, although I think you would have to persuade the court that in fact it was all duplicated effort, you know, and I'm sure there is some duplicated effort.

HONORABLE F. SCOTT McCOWN:

Yeah. You have to explain what you had to --

CHAIRMAN SOULES: Don't you mean "caused by"? Any expense caused by the delay?

MR. SUSMAN: Sure. Do you like that wording?

MR. LATTING: Yes, I like that.

CHAIRMAN SOULES: The court may impose any expense caused by the delay.

MR. LATTING: Yes.

CHAIRMAN SOULES: Which would include all of those things that Carl was just talking about. If the judge wants to award it, then he ought to be able to do that.

Okay. Judge Duncan.

HONORABLE SARAH DUNCAN: I just realized that I probably have had a misunderstanding of the difference between prejudgment interest and postjudgment interest, and I'm told that Steve can put on the record how that should be interpreted; that it actually is a -- it's not just -- well, you say it.

PROFESSOR ALBRIGHT: As I remember, when this concept was first stated

about a year and a half ago, "any difference between prejudgment and postjudgment interest" is intended to mean that if the trial is put off for six months and the plaintiff gets a judgment, the plaintiff will have six months of prejudgment interest that, if you had gone to trial six months before, would have been postjudgment interest. So that is a difference that should be taken into account as an expense of the delay.

HONORABLE F. SCOTT McCOWN: Right.

HONORABLE SARAH DUNCAN: But you don't just -- I think what you were saying to me earlier is that you don't just get six months' prejudgment interest because you had a six-month delay. You get the difference between six months' prejudgment and six months postjudgment.

HONORABLE F. SCOTT McCOWN: Right.

MR. LATTING: That's what it says, including any difference between prejudgment and postjudgment interest.

MR. HAMILTON: The rule doesn't

cover this, but suppose the plaintiff gets socked with an award of $5,000 for delaying the trial. He doesn't pay that. Should that be a condition to the next trial setting? How is that ever collected?

MR. LATTING: Or could it be a condition?

MR. HAMILTON: Could it be a condition?

MR. LATTING: Should the trial judge have the power to make that a condition?

HONORABLE F. SCOTT McCOWN: I don't think you would want it to be a condition. It may create an offset against any judgment that's taken.

MR. HAMILTON: What if there isn't a judgment taken?

HONORABLE F. SCOTT McCOWN: Well, then you've got a judgment back against the plaintiff, and it might not have any value, like many judgments don't.

CHAIRMAN SOULES: Well, I think you've got general rules. Carl, see if this is -- you've got general rules that the court

can require a sanction to be paid immediately unless it prejudices the party's ability to go forward with the trial, in which event it has to be assessed at the time of judgment. You've got that rule now. This is a sanction, and we've got the case law out there that says that's what the court must do.

The court can't say, for example, "You've got to pay $100,000 today."

"We don't have 100."

Case dismissed for failure to -- as a sanction. But if it's 5,000 and if they've got 5,000, then the court can require them to pay it.

HONORABLE F. SCOTT McCOWN: And keep in mind, in a way that sounds pretty draconian. But keep in mind that if you're talking about evidence that you failed to disclose, you could always opt to toss the evidence aside and not continue your case and move forward. If you're talking about evidence that you were actually hiding that your opponent wants to use, well, then in that case, the sanction is probably proportional to the crime.

MR. SUSMAN: Are we ready to vote on this?

CHAIRMAN SOULES: Well, no, because this is going to be a part of the Sanctions Rules, so we -- I mean, we can vote on it as a matter of principle, but we've got to see how it works with the other Sanctions Rules when they come out.

HONORABLE SCOTT A. BRISTER: Does this mean if I don't designate myself as an attorney's fee witness, but of course, you always argue, "He knows I'm going to testify, they know I'm going to testify on attorneys' fees," and any attorney is always ready for cross-examining the value of attorneys' fees on a case, in other words, does this eliminate the need to ever designate as an expert yourself as an expert on attorneys' fees?

CHAIRMAN SOULES: It depends on the judge. It's the judge's call.

HONORABLE F. SCOTT McCOWN: Luke, can I address one point --

CHAIRMAN SOULES: That would be my response. Does anyone have a different response to that? Scott McCown.

HONORABLE F. SCOTT McCOWN: Yes. Can I address one point that you just spoke to?

For me, Rule 6 is pretty important as to whether I want to buy in to the discovery package as a whole. And that's the way the Committee has drafted it. Now, I realize that we're going to have a Sanctions Rule and a Sanctions Committee Report, but I would not personally want to see these rules go up to the Supreme Court without Rule 6, because Rule 6 is our notion of what you're going to do when there's a failure to disclose, and that is integral to the rest of the rules such as amendment and supplementation and the time limits and everything else. So I don't want personally to see this dropped out as a piece of it.

The Sanction Committee, we're going to get their report, and the Supreme Court may want to hold this until they get their report, but this is part of the package.

MR. SUSMAN: I think that's right. It was impossible -- for the record, it is impossible to review these rules and to

draft them fairly without keeping in mind what are the consequence of an expedited, quick-track, lean and mean discovery program. If the consequence are lawyer-unfriendly to the extent that the sanctions are draconian and terrible for failure to dot all i's and cross all t's, people would have a lot of different thoughts about whether it's fair to make lawyers do it so quickly and so fast.

And so I think we all felt -- certainly the subcommittee felt that at least this part, this particular sanction for the failure to make a disclosure in discovery, was an integral part of the Discovery Rules.

Now, you can sanction -- we by all means welcome sanctions on the -- this should not be the exclusive sanction. I mean, if you want to take a lawyer's bar card away or put him in jail for life for other things he does, that certainly should be --

MR. LATTING: Let me jot these down so we can --

MR. SUSMAN: I mean, but what we don't want is the exclusion of evidence as a sanction rule.

HONORABLE F. SCOTT McCOWN: And I know that the Committee had some hesitation, particularly the Chair, about this rule at the outset, but we really have gone through and taken every suggestion the Committee had and incorporated it, and I think it works. I think it's what the Committee bought off on, and I would like to see us vote it up or down.

CHAIRMAN SOULES: Okay. Well, we've now hopefully addressed the concerns that Sarah expressed, and we all -- or most of us agree, on the problems with supplementation. And now we're talking about we don't have to supplement just doing busy work. We've got to supplement where it is substantive, where supplementation is really an issue and not just busy work.

Given that the supplementation doesn't occur or the disclosure in discovery doesn't occur of something substantive and not just a trip-up or not just a failure to do busy work, is this as strong as we want to get?

I'd just like to ask that question one more time, because I think, you know, "Off with your head," if you get to this point.

HONORABLE F. SCOTT McCOWN: This allows -- this allows --

CHAIRMAN SOULES: Just automatic, an automatic "Off with your head." Because we have given the bar, some members of the bar, a big incentive to engage in discovery concealment at -- as a strategy to win a lawsuit thinking -- knowing that there's going to be a finite amount of probing into information and that there's some possibility that maybe, I don't know whether it's small or large, depending on the case, that this will never surface because they'll never ask the right question in the limited amount of time that's given or they perhaps won't get to that question and cause this to surface. I mean that's there, that incentive is there in the constraints that we've put on discovery.

And that's going to be played out by some number of lawyers. We read about some of them in the Texas Lawyer from time to time, and I think that to not think about that and to not give it a big enough hammer is a big -- would be a substantial disservice.

This may be a big enough hammer. Obviously, there is going to be disagreement about that, because I don't think it is, but that's neither here nor there, what I think.

But is this a big enough hammer given that this is talking about substantive disclosure and not trip-ups? We're probably talking about concealment. We can be talking about concealment given the constraints that we've put a discovery.

Paul Gold.

MR. GOLD: Whether it's a big enough hammer or not put to the side for a moment. The Supreme Court in, I think, Alvarado vs. Farrah, I think in the last paragraph of that opinion said that although they weren't going to redraft 215(c), that the court should consider continuing the case rather than striking witnesses. And that case seemed to announce a retreat by the Supreme Court from the draconian, automatic, off-with-the-head approach to a more reasoned approach of saying, "If something has been concealed but it's been provided late, well, then you postpone the trial, but you let all

of the evidence in and you require the party that produced that information late to pay for the inconvenience."

And all this rule really does, Rule 6, is institutionalizes that philosophy announced in that case really.

CHAIRMAN SOULES: That's not all it does. Number one, that case was written against a different backdrop of discovery where there were really no real constraints. And number two, this rule permits the evidence to be used in a trial that starts the same day in some circumstances, and Alvarado doesn't say that.

MR. SUSMAN: This is -- I mean, I don't mean to stop us, but this is -- this whole discussion -- I can almost read you verbatim the discussion that begins on Page 5816 in the transcript.

It began with a vote in favor of this concept of -- let's see, the vote was announced by the Chairman, 15 to one. Okay? Then we continued to discuss it for a point, and then our Chairman says, "Just so we understand, when we get to sanctions, the way

that goes could undo all this because we have so tightened up on discovery."

I mean, we had the same discussion. I mean, it's virtually the same discussion, but I think the sense of this group -- and I think at the time Mr. David Keltner said, "I think it was better put on our side. We were looking at this as being a replacement for Rule 166(b)(6) when we went over 215(5). And I understand that they need to be all in one place, but that's the reason it was put in here, because we couldn't give you a good sense of the system without it."

HONORABLE F. SCOTT McCOWN: Steve, I think --

CHAIRMAN SOULES: That's all absolutely right. And then towards the end of that, I advised the Committee we would revisit this issue when we had the discovery constraints defined. And that's what I'm doing here. We talked about that, and that's what I want to get done.

HONORABLE F. SCOTT McCOWN: I'm sorry, Buddy had his hand up.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: I was just going to say that, as I remember, we were concerned about somebody excluding just because -- I mean, the deposition was taken, but you didn't name him, you know, and all the technicalities. So then if you try to divide it, you get into the question of whether he knew it or it was just an oversight or is it concealment.

And then when you start getting into the proposition of trying to see whether it's a real concealment or a trick or something, then you have to draw on two rules. I don't know that we can personally improve on what they've done in my own opinion. I agree with you.

CHAIRMAN SOULES: Scott McCown, and then --

HONORABLE F. SCOTT McCOWN: I just want to emphasize one point Steve made. To sell change as dramatic as these rules are, it's going to be a big assistance if we don't have an automatic exclusion.

So you can look at it on two levels. One, what policy do you want, and I favor the rule as policy; but two, this is going to

help, I think, get these adopted and get them supported by the bar.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: To me the perfect example is a party does not list herself -- the plaintiff does not list herself as a person with knowledge of relevant facts or as a person who will testify at trial. Her deposition was taken for a week. Now, do we really want automatic exclusion of that person's testimony?

CHAIRMAN SOULES: That can't happen under these rules. Even if it said automatic, it couldn't happen because you don't have to identify. I mean, you've the information. Don't you otherwise disclose?

HONORABLE SARAH DUNCAN: I think it needs to be a harm analysis in every case, and I think this is a good standard.

CHAIRMAN SOULES: Okay. Carl Hamilton and then David Perry.

MR. HAMILTON: Just for whatever it's worth, the Court Rules Committee is working on this rule too, but we view it as

that the party that fails to disclose has to show good cause why there was no disclosure, and in the absence of that, then these sanctions apply.

Now, if good cause is shown, then the court can put the case off and so forth. But this doesn't have any provision in it except that you have to show the other side is not surprised or unprepared.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think we need to all recognize that we are making very, very major changes in the rules that are going to take all litigation in Texas in the state courts a large step back towards the opportunity for a trial by concealment. And I think that we all need to remember that there have been a number of prominent cases like Sarah Duncan mentions where the automatic exclusionary rule yields silly results. And everybody agrees that the automatic exclusionary rule should be abolished in those cases.

And I think that we all need to remember what the world was like before HEB vs.

Morrow. And the routine before HEB vs. Morrow was a failure to disclose key or secret witnesses that people wanted to call at trial.

Now, I don't believe it is necessarily an easy thing to write a rule that strikes the correct balance. I think that everybody in this room agrees that we do not want to go back to trial by concealment. And I think that everybody agrees that we do not want to continue to have the foolish kind of results that have been yielded in some cases by the automatic exclusionary rule.

Now, I think that the question that Luke raises is a very important question, because I think we should all recognize that this particular rule -- and it may be the thing we ought to adopt -- but I think we all have to recognize that the result of the docket is going to be that there will be a substantial incentive on lead counsel on any side on any case to hold back important witnesses or important documents or important evidence in the cause in every case. If they don't disclose it or if they disclose it late, the

other side will have to go through this discretionary test. And it may turn out that the evidence will come in, that there will be no continuance; and it may turn out that the result will be worth the game, and I think we have to recognize that the games playing and the concealment will be resurrected in large part, and we should all understand that and we should all expect that, if we adopt the rule the way it is written here.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke, I am concerned that that would be a problem. But there are several changes elsewhere in these rules where we changed the practice from before.

For example, under our current rule, there is literally no duty to respond to written discovery. There's a consequence if you don't, but there has never been an obligation to respond on time and fully, interestingly. It's in there now.

The supplementation rules are tighter. Remember, if you withhold stuff now from

discovery, you have to say why. So we built in some safeguards that weren't formerly in the rules that I think will be helpful. But nonetheless, this rule is one of the most important rules that we've got, and we do have to run that analysis.

But I think we have drafted already other safeguards, even though we've limited discovery, that will help us ensure that this exclusionary rule works well, but it is, unfortunately, a judgment call on the continuum of where you draw the line, and this one is terribly important.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Well, in the first place, David, let's look at federal practice today. There is no automatic exclusionary rule governing trials in federal court. Most federal judges use pretrial orders, and you are supposed to list your witnesses. You can frequently, if you make an appropriate showing to the judge, add a witness at trial, amend the pretrial order, and tell the judge, "Judge, I need to call a witness that's not on my pretrial order." The judges are called

upon to exercise discretion, and simply because federal judges have to exercise discretion does not mean that trial in federal court is any more trial by ambush than it ever has been in state courts.

So I think the notion that giving judges discretion to determine whether this is really surprise or really harmful is going to incentivize people to play games, because it hasn't happened in the federal system.

I wouldn't have a problem with even amending what we have here to say that the burden on the party who failed to timely disclose something is not only to show that it didn't surprise the other party but to show that he didn't do it intentionally. That doesn't give me much of a problem. I mean, I think if I can't convince you that it wasn't intentional on my part, then maybe it should be kept out.

So I'm not -- maybe we want to put something in that to prevent the intentional game playing. I would have to show that it was just a mistake, "I made a mistake, Judge," or something like that.

I don't think we want to go to the good cause thing because it bears too much baggage under current law, what good cause is. A real honest mistake is not good cause. There's no question about that under existing cases.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: Steve, various things. You just have a bright-line rule, not designated name calling, that's the easiest way. That's what I'm in favor of. But that has problems, like all -- anytime you have a rule, it creates some injustice, so you're going to create exceptions. You can look at the state of mind of the counsel that didn't disclose. That's "Did I do it intentionally or was this just an accident?" You can look at the opposing counsel's mind. Is she surprised or is she just saying she's surprised? My problem with both those is I have to have a hearing with counsel on the stand for both of those, and I don't think you want that and I don't want that either.

I think the focus of this rule is right,

because it -- as Paul says, what the court has indicated that they want me to ask is, okay, this is new. How long does it take you to get ready for trial? And if the answer to that question is, you know, "Well, I can take a deposition in an hour," I don't even have to grant a continuance. But understand, it is going to be -- and I think I would be satisfied with this if there was also a comment, that if I didn't go into -- I didn't need to go into surprise, I didn't need to go into whether it was intentional or not. I've got other sanctions rules, assuming those still survive, if I think somebody is lying. And we can handle that as a separate problem, not as a whether-we're-going-to-go-forward-with-trial or as a supplementation problem.

But if "unprepared" just means if it is somebody who all of a sudden is going to say, "I was an eyewitness" and you've known about it all the time, "and the light was red," it doesn't take you long to take that deposition as long as you understand "prepared" means if the whole case is mistried, the continental case where all of a sudden you've also got a

Mexican policeman who investigated it who is going to show up at trial, it doesn't take that long to find out what he's going to say. But what you need is not to get prepared for trial but to rethink everything, because you may have to change settlement offers and all those others things.

I think this is the right focus. But the question is, how much -- what's the harm from being late? How much time does it take to prepare? And I'm concerned about focusing on who knew what and why they did what, because that's satellite litigation.

MR. SUSMAN: Well, I wonder, Scott, though, when we add the words "unprepared in a way that may affect the outcome of the trial." I would imagine that in 75 percent of the cases or maybe even more you will say it doesn't matter whether you're surprised or not. It doesn't make a damn bit of difference.

HONORABLE SCOTT A. BRISTER: That's correct.

MR. SUSMAN: Okay. Or it doesn't matter whether you're surprised at

this problem, because I'm going to give you a deposition tonight, so it's not going to affect the outcome of the case.

I mean, I think there -- there would be a very -- I don't really think this rule requires you to put the lawyer on the stand on the surprise issue. I really don't, unless it is a dramatic main thing and you get into a squaring match by what the lawyer knew. But I think in most of the cases you won't have to do that.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Steve, if you would entertain an amendment to have the lawyer make a showing that he did not intentionally withhold the information, then I would be happy to vote for this rule as written.

CHAIRMAN SOULES: Another note on the plane, Steve?

MR. SUSMAN: I would be happy to do that. But you would also have to show what intention.

MR. LATTING: Yes. And I think we ought to require that. And I feel pretty

strongly about that, because at least it gives the court that tool to deal with that kind of conduct by a lawyer who is intentionally withholding something just to make it worth the outcome.

MR. SUSMAN: You would insert it after the word "failure" in the second line, "was unable to show that such failure was not intentional and" --

MR. LATTING: "And," yes.

CHAIRMAN SOULES: Buddy, you had your hand up. Buddy Low.

MR. LOW: I was just going to say that another reason I think that we're headed in the right direction, I've been in a situation where the witness was kind of not listed. I mean, they knew about him and so forth. And we were getting ready to go to trial, and we're talking about, you know, giving the names of witnesses they had, you know, before. And the judge said up front they can't call him because he wasn't listed. And, well, you've taken his deposition or something like that, but the judge says, "Well, I've got nothing to do but continue

the case." In other words, he can still -- you know, the judge has the discretion to continue. I think it gives him more discretion, and I favor it along with Joe's modification.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I remember that the intent was in the rule at some in point time and taken out. And as I recall, the discussion was, one, do we want lawyers to be testifying as to their intent in failing to disclose; and then also, isn't everybody just going to put themselves on the stand say, "It was a mistake"? Who is going to get on the stand and say, "Yes, I did it on purpose."

MR. LATTING: Well, I've got an answer to that.

CHAIRMAN SOULES: David Keltner had his hand up, and then I'll get to you, Joe.

MR. KELTNER: Alex, that was -- we did discuss that. And if you recall, that was when we were thinking about intention as really the sole factor. And we also said in

that same conversation that it could hurt just as much if it were unintentional than it would if it were intentional.

I think if you throw it this way, where if it's intentional, you're going to get hurt; if it's not intentional, then you get into this, and the judge gets the opportunity to do a discretionary review. That makes sense to me, and I think it undoes part of the problem that Luke was talking about and David was talking about.

PROFESSOR ALBRIGHT: But then don't you have the problem that Scott had, that in every case you're going to have to have a hearing on the lawyer's intent, which is what Scott doesn't want to do.

MR. SUSMAN: Alex.

CHAIRMAN SOULES: Let Alex finish, please. Alex.

PROFESSOR ALBRIGHT: I'm finished.

MR. SUSMAN: I would think that in 99.9 percent of the cases it would be easy for a lawyer to say it was not intentional. I mean, what are you going to do, take my

deposition? You know, it's kind of a warning. Okay? It's a warning to the bar, don't mess around. I mean, only in a case where, you know, my secretary quit, a disgruntled secretary left the law firm and said, "Susman was holding this document back." I can't imagine there would be many cases where the other side would be in a position to prove there was an intentional deep-sixing of documents or a failure to disclose.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Just for the sake of discussion here, could we consider also conscious disregard, because that would tie in to the same standard that you have with regards to a default; which is that you would have to show that the failure to respond was not a result of conscious indifference. I mean --

CHAIRMAN SOULES: Was not intentional or the result of conscious indifference? You're just saying to add that, that it was not intentional or the result of conscious disregard?

MR. GOLD: Or one or the other. The only reason I think that is because there are cases that talk about what conscious indifference is, and you've got a standard on that in the default judgment cases, I believe.

CHAIRMAN SOULES: Bill Dorsaneo and then David Perry and Richard Orsinger.

PROFESSOR DORSANEO: In this second sentence, "if the failure to disclose does not cause," my understanding of it is that the court may admit the evidence or not admit the evidence, and I think that's enough for me; that the judge can see who is there and consider in deciding whether to admit the evidence or not to admit the evidence, all of these matters about, you know, what was the reason why this wasn't disclosed without having to find somebody guilty of intentional misconduct or gross professional negligence or whatever.

If I were a trial judge in this context, I might decide not to admit the evidence anyway, even though the opposing party was probably not unprepared in a way that may

affect the outcome of the trial, just because this doesn't look right to me and I'm just not going to do it. But I may not want to have a whole big inquisition about it. So I think it will work okay in practice without loading in an evaluation of whether there's been a mortal sin or some sort of a sin that only gets you some time in purgatory or an inadvertence.

HONORABLE SCOTT A. BRISTER: As long as everybody agrees that negative precedent was there.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I just don't want to go back to the days that David is talking about and the days that Luke is talking about. And I think it's worthwhile for this Committee to say that part of the burden you bear, if you fail to do something you should have done, is either to state in your motion or on the stand that "This was not intentional on my part." I think it doesn't hurt us to require the bar to make that representation to say, "Judge, please admit this evidence that I should have brought forward but I didn't, and I'm representing to you it was an

unintentional inadvertence on my part."

I just think it's a statement of policy from the Committee that I'd like to put in there. If we're going to loosen it up, let's at least not loosen it any more than we need to.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think we might want to consider it, and I don't think we have considered it before, that we have adopted an additional rule that we did not used to have, which is the rule that we are now supposed to disclose in advance of trial who our trial witnesses are going to be. In the past we have in disclosed in voluminous detail persons with knowledge of relevant facts. But we are now supposed to disclose the more limited list of who it is we are going to call at trial.

And it may be that that puts a little bit of a different light on things, because in the past it's understandable that somebody could accidently leave off of this long list the party plaintiff or something like that. But when you sit down to make out the list of the people that you are going to call at trial,

you would think that the lawyer would be more focused and make sure that that list is complete. And it might be that we want to consider a more strict sanction for leaving somebody off of that list.

CHAIRMAN SOULES: Richard Orsinger, and then I'll get to Tommy Jacks.

MR. ORSINGER: Before I go away from it, do I understand that what's being debated is that if there's an intentional failure to disclose, there is an automatic nondiscretionary exclusion of the evidence? Is that what we're debating here?

CHAIRMAN SOULES: We haven't really gotten it that focused. We're really talking about the rule and what should be the factors to consider in it.

MR. ORSINGER: So it might be broader than that. If there's an intentional nondisclosure, we may still have a harm analysis to decide how to deal with that intentional nondisclosure?

MR. SUSMAN: No. The proposal I was proposal making, which Joe Latting agreed with me on, foolishly, I agree, because

I may change my mind, because I think maybe Bill is right, that it's taken care of in the rule, is that I don't think it's terribly harmful to just say that if you can't prove it was unintentional, if I can't prove that what happened was unintentional, then it's automatic. But that's going to be easy to prove in 99.9 percent of the cases. You can just cite them, file an affidavit, or offer to get on the stand.

MR. ORSINGER: And then it's up to the judge whether he believes you or not.

MR. SUSMAN: Yeah. And maybe there are some, you know, sleaze-bag cases where lawyers play games or the people or sides play games, and the judge says, "Well, I just don't believe it."

MR. ORSINGER: Now, this would not apply if someone makes a discovery objection, like privilege or scope or whatever, and then the trial judge rules that it's discoverable. That would not trigger intentionally withholding, if you didn't make a disclosure that you were objecting to based on privilege?

MR. SUSMAN: No.

CHAIRMAN SOULES: Okay. Tommy Jacks.

MR. JACKS: I had the same question that Richard asked, but I surmised the answer was going to be the one that Steve gave, so that satisfies that.

I'm not certain that I agree with everything David said about the shorter list. I agree that changes things, but in some ways it might be easier to make the mistake of leaving a name off of a shorter list, because if you're really in the spirit of this and are trying to make it your real trial list, you're going to be making in some cases a close judgment call. I don't think we need this witness, so I'm not going to put him on there. If you don't do that, well, then you're going to be back where we are now where you're going to have to call the other lawyer and say, "Now, all right, I've got this list of 35 people. Who are you really going to call?"

And I'm not entirely -- I've got some of the same reservations that Judge Brister

stated about having to have this inquiry, although I agree with Steve that it's a fairly simple thing for a lawyer to say, "I really didn't intend to do this, Judge."

I guess my overriding sense is that in some ways I'm less concerned about what we're trying to sanction here than I am about another kind of failure to disclose. Here we're talking about "I don't disclose until the last minute something I want to use." We haven't even talked about -- our Sanctions Committee is going to have to talk about when you conceal something that you sure as hell don't intend to use because it hurts you, and you're hoping to hell the other side won't find out about it. And then what comes to mind is, what do we do to punish them? And Transamerica says damn little. But that was written in a context in a word of unlimited discovery, and now we have a world of confined discovery.

And the question arises, you know, are we going to need to -- I guess on the balance, I like the rule as written, because it leads to something objective. And if the judge thinks

that the party really did do it intentionally, I think the judge is going to have to handle that. And I think they can do that under this rule as it's written.

CHAIRMAN SOULES: All right.

MR. SUSMAN: Why don't we vote on the rule as written and see if we've changed a bunch of minds. I mean, I think we're entitled to get a vote on the rule as written. Everyone has discussed -- I mean, we might as well vote on it and see, if it doesn't pass, how we're going to add some other things to make it palatable. I mean, I think that's where we ought to begin.

MR. LATTING: Well, I'm going to offer as an amendment the requirement that the lawyer certify or testify, and I don't care how we do it, that it was not intentional conduct on his part or the result of conscious indifference.

MR. SUSMAN: Okay. You're offering that as an additional rule?

MR. LATTING: To this No. 6, yes.

CHAIRMAN SOULES: Is there a

second?

MR. KELTNER: I second it.

CHAIRMAN SOULES: Moved and seconded. Discuss that.

MR. LATTING: I've already discussed it.

CHAIRMAN SOULES: Any other discussion on that? Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: "Intentional" is fine, but "conscious indifference" does really increase the satellite litigation.

MR. LATTING: Okay. Let me remove that. Just intentional, let's just leave it at that. That's cleaner.

CHAIRMAN SOULES: Okay. We're discussing "intentional" then. Anything else on that? Okay. Those who feel like that should be added show by hands. Six, I think. Hold them up one more time. Six.

Those opposed show by hands. Eight. It fails.

Okay. Those in favor of Rule 6 --

MR. GOLD: Luke, can I --

CHAIRMAN SOULES: Oh, yeah.

Paul Gold.

MR. GOLD: Particularly in light of what Tommy was saying, I think the title of it needs to be changed to Failure to Provide Timely something. "Timely" needs to be in our title somewhere, because it does not address the situation that Tommy is talking about where you just don't provide the discovery at all. This is failure to timely provide discovery. So I would move to add the word "timely" somewhere in the title.

CHAIRMAN SOULES: Okay.

MR. JACKS: I would rather actually -- that doesn't cure my problem.

MR. GOLD: No. I'm not meaning for it to cure your problem. I'm saying that someone could look at this rule and think that this rule addressed your problem, and it doesn't.

MR. JACKS: Well, that concern still exists under your wording. I would rather say Failure to Provide Certain Discovery, because we're really only dealing with the kind of discovery that I fail to provide that I want to use. We're not dealing

with failure to provide timely or untimely. I'm talking about the kind of discovery that I'm not providing because I don't want to use it and I don't want you to use it either. In other words, this rule does not deal with sanctioning all instances of failure to provide.

MR. SUSMAN: You're right. It's sanctioning the failure to provide the information which you intend to use, or something like that. We can come up with a title. What it is -- it's really the failure to provide what you want to use at trial.

HONORABLE DAVID PEEPLES: Why would someone intentionally fail to disclose evidence that he wanted to use?

MR. SUSMAN: To surprise the other side.

MR. JACKS: Ambush.

MR. GOLD: I'll gave you an example, San Antonio vs. Fultcher, a case at first impression -- the only case that's ever held it. They didn't list people with knowledge of relevant facts, and the court, the San Antonio Court of Appeals said, "How

did you deal with a situation there where someone has failed to provide you the identity of someone who has knowledge of relevant facts?"

HONORABLE DAVID PEEPLES: Tommy was saying another part of the rules deals with when you're hiding something that hurts you. But this deals with when you don't disclose something that helps you. Why would you intentionally hold that back? To ambush and take a chance on it being excluded, that's just -- I mean, I just think that --

MR. SUSMAN: Well, we've voted on this, didn't we?

CHAIRMAN SOULES: Okay. Without regard to what it's titled, those in favor of the rule as proposed with the following changes --

MR. SUSMAN: "Affect" spelled right; and then in paragraph (2), just change "the" to "any." "Any expense caused by the delay."

CHAIRMAN SOULES: Okay. Those in favor show by hands. 18 in favor. Those opposed. It's unanimous.

I guess we're done for the day. Okay. We'll start -- be here at 8:00. Alex will have the floor in the morning on Rule 7. We'll start at 8:00 o'clock.

(HEARING ADJOURNED.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 19, 1995, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,323.00.

CHARGED TO: Soules & Wallace.

Given under my hand and seal of office on this the 30th day of May, 1995.

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William F. Wolfe

WILLIAM F. WOLFE, CSR
Certification No. 4696
Certificate Expires 12/31/96

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