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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 20, 1995

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 20th day of May, A.D., 1995, between the hours of 8:00 o'clock a.m. and 12:00 noon at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

MAY 20, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
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
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence Guittard
Franklin Jones, Jr.
Thomas S. Leatherbury
Gilbert I. Low
John Marks, Jr.
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

EX-OFFICIO MEMBERS ABSENT:

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

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CHAIRMAN SOULES: Thank you-all for coming this morning on Saturday morning at this early hour to get our work done. We are over to, what, interrogatories?

PROFESSOR ALBRIGHT: Rule No. 7, which is presentation of privileges and objections. And as I recall -- I was just trying to read the transcript and I didn't get all the way through it, but my recollection is on Rule 7 that the committee approved our two-step concept of objecting to discovery and then asserting your privileges, but the comment was, is that our rule was too difficult to understand. So we were sent back to redraft to make the concept clearer in the rule.

So we moved it around. We put the objections first, and the objection concept is that the first thing you do within the time that you have to respond to a discovery request is to object to the question itself. If something is wrong with this question, I don't have to respond to it at all, or I only have to respond to a part of it because it's overly broad, that type of objection to the

request for discovery itself.

After that has been resolved I guess it doesn't really have to be -- yeah. I guess it does have to be resolved. Then when you are responding to your request you then say, "I am responding to your request completely or partially, and here is the information or materials responsive to your request, but I am withholding particular documents or information or materials because they are privileged," and then you state your privilege. That is what we are calling a withholding statement. I am withholding on the -- the particular documents on the basis of attorney-client and work product privilege, for instance.

Then the next step would be that the party that's requesting the discovery could then ask the responding party who is withholding the documents to describe the information and materials in such a manner that without revealing the privileged information itself will enable other parties to assess the applicability of the privilege. So this would be some sort of privilege log.

It need not be a detailed document by document, but I believe at the meeting in January there was a discussion about you could lump groups of similar documents together. "Correspondence between Susman and client for over these years or these months," whatever.

The (c) on page 14, trial preparation materials, we are excluding from this entire process trial preparation materials: "Materials created by trial counsel in preparation for the litigation in which the discovery is requested need not be included in a withholding statement or a description except upon court order."

The third part of the rule is the hearing where any party can request a hearing to resolve the objection or the privileges asserted, and the testimony is either by affidavits or live testimony. Then we just -- the hearing rule is really not different from the current hearing rule. Then on page 15, No. 4, ruling, we have the court overruling the objection or granting the objection.

If there is an overruling of the

objection or withholding statement, we would require a response within 30 days of the court's action, and then the last sentence that is underlined was added in the meeting in which we discussed this rule. "If the suit proceeds to trial without a hearing on properly asserted objections and privileges, the objection or privilege is deemed sustained unless during trial the judge determines that the objection or privilege must be overruled to prevent a miscarriage of justice."

I think the best thing is for you-all to read over this rule pretty carefully and see if you think it adequately states the concept that we are trying to put into place. I think we voted on the concept, as I recall, but everybody -- a majority approved of the two-step concept of objection and then withholdings on the basis of privilege.

CHAIRMAN SOULES: Okay. Don Hunt.

MR. HUNT: Let me ask you a question in connection with 7(1) on page 13. This has to do with the exchange of language, the last sentence which was struck and the

sentence in the middle which was added after the "unless."

PROFESSOR ALBRIGHT: Okay.

MR. HUNT: It appears as if the party who has an objection can hold his own hearing and say it's unreasonable and not do anything, where the prior language at least had an obligation to respond to that to which he had no objection. Now, he can just say, "Well, I object to just about everything, or even that to which I have no objection I can't supply very easily because of the stuff to which I do have objection."

PROFESSOR ALBRIGHT: Well, I think the intent was to continue that obligation, that if you object to part of the discovery request. You have requested documents from 1950 to the present, and I just think that's unreasonable. I will agree to produce documents from 1980 to the present. In some circumstances it may be reasonable for me to go ahead and produce the documents from 1980 to the present. In other situations it may not be. If the documents from 1950 to the present are all mixed up and I would have to

do two identical searches then it makes more sense to get the objection resolved before the search is made.

MR. HUNT: Oh, I agree.

PROFESSOR ALBRIGHT: We were just trying to protect that ability in this rule.

MR. HUNT: What troubles me is the language "unless the party has determined that it's unreasonable." Perhaps if we just said that unless it's unreasonable under the circumstances. It's this power that the rule gives the party to sort of be judge and jury at that point until you go to court.

PROFESSOR ALBRIGHT: Scott, do you recall where that language came from? I think we probably put it in there so that we do have a unilateral determination so that you just say whether you are going to do it or not, and if the other party doesn't agree, they can say, "Okay. We have got to have a hearing to determine that right now."

HONORABLE F. SCOTT MCCOWN: It does in a sense do exactly what you are saying, which is allow a party to make his own

initial decision about that, but what the rule is designed to do is say that -- and I don't know if the words captured this exactly, but it's designed to say you've got to produce everything you don't have an objection to, and then like Alex said, it may be that you don't have an objection to producing it, but it's mixed in with a bunch of stuff that you do have an objection to producing, and rather than make you do two expensive searches it's reasonable to wait and go to the courthouse to have a hearing to decide what it is you are going to have to produce so you just have to do the search once.

And the enforcement, I guess, of that would be that, you know, if they ask for tax returns from '70 to '90, and you had them in chronological order, and you had an objection to everything but '90 and you didn't produce '90, you know, it would be pretty clear you would be in violation of the terms of the rules. So the reasonableness of your call is going to be subject to scrutiny by the judge.

CHAIRMAN SOULES: Well, I think Don's pointing out something a little

different from that. You wouldn't be in violation of this rule if the party -- if you thought it was unreasonable, even if it was not -- even if it was unreasonable for you to so behave objectively you wouldn't be in violation of this rule as written if you subjectively thought you were being reasonable.

MR. KELTNER: Couldn't you take out the language on that last "that party has determined"?

PROFESSOR ALBRIGHT: Right. But if I can respond, I think we put that in on purpose because we did not want to make this decision a sanctionable decision. I mean, if it's -- we wanted you to be able to make that decision fairly comfortably without having to worry about if I'm wrong, if the judge thinks, you know, I should have just made the decision a little bit differently.

We are not talking about gross abuses of discovery. We are talking about I made the decision a little bit wrong. Should that be sanctionable? And I think the reason we have put that in there is to set a standard that

was, you know, if you in good faith make this decision then it's not sanctionable, it's up to the other party to get a --

CHAIRMAN SOULES: It looks to me like this is going to build in incredible delays. David Keltner.

MR. KELTNER: Yeah. I think this is an exception that flaws the rule, and it's one of those things that a party can unilaterally take an action that appears under the rule to escape any sanction, and one, I doubt if the court is going to want to adopt something in discovery that escapes a sanction, and then two, I think the exception is a little bit too broad.

I think by the eliminating of that language a party knows that he or she is constrained to be reasonable in the withholding of documents or things, and this is a response, remember, to written discovery, and I would eliminate the language or the words "that party has determined."

CHAIRMAN SOULES: Okay. Is that a motion?

MR. KELTNER: Yes.

HONORABLE F. SCOTT MCCOWN: Can I make one more comment about that?

CHAIRMAN SOULES: Not 'til we get a second. Is there a second?

MR. HUNT: I will second it.

CHAIRMAN SOULES: Moved and seconded. Now, discussion on deleting that language?

HONORABLE F. SCOTT MCCOWN: I don't feel strongly either way. I just want to point out, though, that in terms of delaying discovery that we are imposing a new duty that you don't have now. Now you are served with the request, you respond. If you make objections to a particular request, you have no duty to do a search or to try to put on the table what you don't have an objection to or to do any unilateral offer up. So this imposes for the first time a duty of unilateral offer, and so our thinking was that that would speed discovery. It wouldn't make it worse than it is now in any case, and we wanted parties to be comfortable with assuming that new duty.

CHAIRMAN SOULES: But you

didn't intend it to be providing them with something else new, i.e., a new delay tactic?

HONORABLE F. SCOTT MCCOWN: It's not a new delay tactic because right now you have no duty to make a unilateral offer up. So it doesn't make anything worse than the present system. It improves it, and it only speeds. It would never delay because right now you have got no duty to do this at all. You can make your objections. Then you have to have a hearing. They have to get an order. Then your duty to respond occurs.

CHAIRMAN SOULES: I think we do have this duty today.

MR. ORSINGER: I do, too.

CHAIRMAN SOULES: And more and more -- I know the way we practice and more and more almost universally I see the other side practice, they make these objections. Some of them are prophylactic, and some of them are real, but subject to that objection even if it's a real one they respond to the extent they can do so without going past their real objection, and it is in the practice right now.

MR. JACKS: And they are sanctioned if they don't, commonly.

CHAIRMAN SOULES: It can be. Certainly ought to. Anyway I guess it's really do we leave the language in or out? Richard Orsinger.

MR. ORSINGER: It seems to me that we could take the language out and still protect the example that you gave, Alex, because if someone had their documents from 1950 mixed up with their documents from 1970 forward and they didn't want to have to make two passes through the warehouse, they could just object that it would be unduly burdensome for them to have to make two passes, and therefore, they don't want to make any passes until after the judge has ruled how far back they have to go.

And they could protect themselves from that unnecessary work by objecting to the more recent part because of the undue burden of having to do it twice, and you don't need this "unless" clause to protect that because you can protect yourself with an objection, but if you leave the "unless" clause in there, even

if you don't have an objection you could just arbitrarily say that I find it unreasonable, and there would be no -- nothing would happen until the court ruled, and then if it was in a bad faith assertion or arguably bad faith, there is no sanction.

CHAIRMAN SOULES: Okay. Everybody ready to vote? Those in favor of leaving the language in, leaving it as written here, leaving the language in. "Unless that party has determined" -- no. The language that we are talking about is the word or words "that party has determined."

PROFESSOR DORSANEO: "That."

CHAIRMAN SOULES: "That." Those five words. Those in favor of leaving those in Rule 7 show by hands. Two. Those in favor of it being deleted show by hands. Ten.

Now, it will be deleted by a vote of ten to two. Okay. What's next? Anything else on Rule 7, paragraph (1)?

MR. KELTNER: Yes. Yes. I have one other --

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I am a little bit concerned about the first sentence, and I intentionally am not raising this in subcommittee. The first sentence reads, "A party shall not object to an otherwise proper request on grounds it calls for the specific materials or information subject to the privilege pursuant to Rule 4." That will change our practice because unburdensome and all-encompassing, harassing, all that kind of stuff is not in a privilege and probably isn't going to be in a privilege under Rule 4, although it probably is going to be covered in the rules.

PROFESSOR ALBRIGHT: No. Okay. What this is saying is that you do not object on the grounds of privilege which are stated in Rule 4.

MR. KELTNER: Oh, that's right.

PROFESSOR ALBRIGHT: Okay. So what we are doing is we are starting out the very first sentence saying what you don't do is assert your privileges.

MR. KELTNER: I agree with you, and I know that's what we intend to do. I

think it's going to be read a little bit differently by practitioners.

CHAIRMAN SOULES: How so, David? I mean, I want to follow what you're saying because we want to avoid that.

MR. KELTNER: Well, I worry if somebody is just picking this up and reading it, and says, "Well, I don't have to object. All I have got to do is withhold, but that's only for a privilege."

CHAIRMAN SOULES: Since (2) says "if the written discovery request is otherwise objectionable"?

MR. KELTNER: Yeah. I think I am wrong.

PROFESSOR ALBRIGHT: We worked and worked on this.

MR. KELTNER: I am wrong.

CHAIRMAN SOULES: Are you satisfied now? Because, I mean, if you are confused, we are going to have a whole lot of other people confused.

MR. KELTNER: I'm satisfied. I'm sorry.

PROFESSOR ALBRIGHT: I would

really appreciate everybody reading this carefully. We have worked and worked trying to make this clearer and kept changing the order of sentences trying to make it as clear as possible, but we would gladly accept suggestions.

CHAIRMAN SOULES: Well, I appreciate your flexibility on that, and I think that's very important, and that's what we need to get about. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I am concerned with two things with respect primarily to the first sentence of proposed Rule 7 in the objection paragraph and also the first sentence in the withholding privileged information and materials paragraph. My concern essentially involves the idea of building in waiver problems unnecessarily by virtue of requiring a strict adherence to a particular method of preserving complaints.

I think the first sentence of the entire rule would work as well mechanically if its tone was changed to say that a party, you know, need not object to an otherwise proper request and if the first sentence in the

second paragraph was framed affirmatively but without saying "only in accordance with this section," you know, by just taking out the "only."

Maybe that doesn't make that large a difference to anyone, but I wouldn't want to get in a position where somebody, you know, makes an objection with respect to a matter that's privileged, and they don't exactly file a thing that's a withholding statement, and some court somewhere says, "Well, you did it with the wrong club, and therefore, even though I am completely aware of what you're saying you've waived your complaint. Welcome to Texas."

You know, I appreciate the importance of having a procedure that is the procedure to be followed, but I think we ought to provide for a little bit of play in the joints from the standpoint of how the language is crafted.

CHAIRMAN SOULES: So as I am understanding what you're proposing -- and let's put it in the form of a motion if you wish -- that we would change the word "shall," the third word in the first sentence here, "a

party shall" to "a party need not."

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN SOULES: And also that we delete in subsection (2) the word "only" from the first line after the word -- after "discovery."

"A party may preserve a privilege from discovery in accordance with this section."

PROFESSOR ALBRIGHT: If we do that, I would like to delete "may" and just say, "A party preserves a privilege in accordance with this section." Because "may preserve" sounds like it's optional.

CHAIRMAN SOULES: Okay. Is there a second, and I'm not sure exactly what the language is but the concept --

MR. LATTING: Yes. I second it.

PROFESSOR DORSANEO: I am more concerned with the concept than the specific. There may be some other only's and some other shall's in here that --

CHAIRMAN SOULES: I am trying to just get it in words so we can get it in the form of a motion, but there is a motion

and a second to the concept. At least I think we all have that. Discussion? Judge McCown.

HONORABLE F. SCOTT MCCOWN: Well, I think Bill makes an interesting point from the point of view of the responding party, but we were thinking of it from the point of view of the asking party, which is that our task was to get rid of prophylactic objections. If you allow a responding party to object and preserve objections that way as opposed to go through our regime of the withholding statement then you haven't gotten rid of prophylactic objections.

They will continue to be there. If they are there then you have got the same problem you have now, which is you have to go down, you have to get a hearing. You have to get them overruled to know with any certainty that you are getting the things you have asked for and they are not hiding behind the objections, which they are entitled to rely upon until it's overruled, and so we deliberately went in this direction to say you can't do this by objection, but you have to do it through the procedure that we have outlined. So while I

understand what you're saying, it gives us back again the problem that we were trying to fix.

CHAIRMAN SOULES: Paul Gold. Then I will get Tommy Jacks.

MR. GOLD: Yeah. I see where Bill is coming from as well, but if you put the language at the beginning that Bill is recommending, "the party need not," it's pretty much the same thing as what you have in the deposition rule right now where you can reserve objections until the time of trial and everybody proceeds with making objections during the deposition, which is what we are trying to correct as well.

This is critical, I believe, and everyone that I have talked with at seminars that I have spoken at, everyone agrees that this prophylactic objection regime is causing more wasted time than anything else, and I don't think that we should put into the rule something that will give a responding party the idea that they can preserve those objections that way, because we are just opening the door right back up again.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I am not sure I understand the full extent of Bill's proposal. Under Bill's proposal could a party object, withhold, but not file a withholding statement and still be considered to have preserved a ground of privilege?

CHAIRMAN SOULES: They don't object. You're saying --

MR. JACKS: They object just as they do now.

HONORABLE SCOTT BRISTER: They do now file a prophylactic objection.

CHAIRMAN SOULES: Yes. This proposition would allow that.

MR. JACKS: Then I'm against it, and the reason I am against it is because another of our aims here was not only to hopefully prevent prophylactic objections but also to let the requesting party know when they see an objection on grounds of privilege whether there are, in fact, documents being withheld or not, and that's the function of the withholding statement, so that you get around this game of withholding without really

disclosing that you are withholding.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I think my second was intemperate, and I now wish to withdraw it.

CHAIRMAN SOULES: Let me put this concern out, and I don't know how to fix that. It's kind of sort of maybe a silly idea about how to fix it, but what we are going to run -- we are going to change the practice absolutely, and these rules are going to come effective on some date, and how many lawyers will by that date really understand what this is all about we don't know, but certainly not all of them will. Perhaps, most of them will not.

Then a serious problem comes up because somebody uses the old practice instead of the new practice trying to preserve error. Is there any way or does it make any sense to have a grace period maybe written into this rule which we would repeal next time so that it says for a period of one year either way goes? They can do it under the old rule or the new rule. I mean, the consequence of

privilege waiver is pretty severe, and it bothers me to change this so completely and absolutely and then visit on a lot of our brothers and sisters some malpractice issues. I don't know whether that makes any sense or not, but it's my concern. Could you-all discuss that for me? Tommy Jacks.

MR. JACKS: I guess -- and I recognize the concern, and I think it's a valid concern. At the same time I would say we have got lawyers practicing today that haven't yet figured out our current discovery law even though much of it's been on the books since the 1970s. We are changing the landscape, and we are changing the landscape in other important ways as well. The limitations we're putting on discovery, I mean, the lawyer that, you know, forgets about the 50-hour rule could find himself totally screwed because there is important discovery yet to be done and then the lawyer is out of time.

It seems to me that the promulgation of these rules is going to be accompanied by such fanfare and that every CLE provider in the

state is going to be scrambling falling all over each other trying to be the first to offer definitive seminars on these new rules. All of our lawyers are required to attend 15 hours of that stuff every year, and board certified lawyers more than that, and I don't think it's asking too much.

Frankly, I think the committee has done a great job with this rule. I think when you read it, and read the comments that accompany it, it's very clear what they are doing. It's a clearer road map in some ways than trying to piece together our current discovery law when one has to consult, heaven forbid, cases as well as rules in order to figure out everything that's going on, and so I'd say a grace period is unnecessary. I think lawyers can be expected to read it and learn it.

CHAIRMAN SOULES: Well, unless somebody really disagrees with Tommy I don't think we need to pursue this any further.

HONORABLE F. SCOTT MCCOWN: Can I add one additional comment? This is actually, the way this rule functions, it's going to make the inadvertent waiver of a

privilege pretty difficult because you don't have to assert the privilege until you have actually got the materials in front of you, you know you have got them, and you are withholding them. So it's tied to specific materials you have, and so because you don't have to make any prophylactic objections to preserve the privilege, it ought to be a more gentle system than the present system.

HONORABLE SCOTT BRISTER: And playing it out, so let's say you live in a cave; you don't know the rules have been changed; you file your standard prophylactic objections; and then what happens? The other side files a motion to compel saying, "Hey, there is new rules. They haven't filed a withholding statement. They are waived." You wake up, file a belated withholding statement; and as I read Rule 6, the sanction question is going to be whether this belated withholding statement would presumably before trial cause the other side to be unable to prepare for trial. The answer to that is almost always, "No." No sanction. And now you know to do it right in the future. Right?

CHAIRMAN SOULES: I don't see how No. 6, Rule 6, address this. I thought that was --

HONORABLE SCOTT BRISTER: That's the only sanction for anything, right?

CHAIRMAN SOULES: Well, yes, but that's -- can they use something they failed to produce, not must you get something they failed to protect.

HONORABLE SCOTT BRISTER: Yeah. But the only -- so the only time limit -- if there is no -- if you have got to do this to preserve your privilege, you file it late.

HONORABLE F. SCOTT MCCOWN: Wait. Can I address this?

CHAIRMAN SOULES: And that's not the end of the sanctions consideration either, Judge Brister. I mean, we are going to be visiting sanctions as we go forward. Judge McCown.

HONORABLE F. SCOTT MCCOWN: We worked through this problem, and it's kind of tricky. So let me kind of take you through it because it took us a while to figure it out. But here's how Rule 6 comes into play and what

the answer is. If you file a belated withholding statement, okay, and it is, in fact, privileged, which means that the other side is not entitled to it, our reasoning was that there probably ought not be any penalty because you have filed a belated withholding statement, but the court's determined that it, in fact, was privileged which meant that the other side never should have seen it.

The problem is you file a belated withholding statement, and it, in fact, is not privileged, and you should have produced it. Well, then you are into Rule 6 because it's stuff that the other side was entitled to that you didn't timely produce.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: How can I tell the difference between a withholding statement and a set of prophylactic objections? I mean, what does a withholding statement look like? From this paragraph it just looks like it's a document that makes claims of privilege.

HONORABLE F. SCOTT MCCOWN:

There is an easy way to tell the difference. A withholding statement will always have behind it specific documents that you are not producing, and so if you file the withholding statement and the other party then goes through the procedure to put you to your proof, there will always be something that you would have to submit for in camera inspection if you got down to it.

PROFESSOR DORSANEO: But those -- when you say "it has behind it" --

MR. GOLD: Not literally.

MR. SUSMAN: It means only if there are specific documents that you have in mind at the time you give the other side a withholding statement --

PROFESSOR DORSANEO: So why would --

CHAIRMAN SOULES: Let Steve finish.

MR. SUSMAN: Because what happens is you give me a withholding statement that says, "I am withholding documents on the ground of the attorney-client privilege," which is what your statement says.

I say, "Bill, tell me" -- I write you a letter, and I say tell me -- or send a request. "Tell me what they are. Comply with the next sentence of the rule, (b)."

You have got 15 days then to identify it. So you better -- I mean, if you don't have something at the end of 15 days I am going to, you know, raise hell, go to the court, do something, say this is ridiculous. So that's the point. I mean, the point is you have got 15 days after you say, "I did it," to describe what it is you did. That's clearly not going to be a prophylactic deal.

PROFESSOR DORSANEO: People who want to make prophylactic objections when they don't need to make them will want to make them in withholding statements just as much as they want to make them now in the list of objections. They don't have to make them. It seems clear to me that they don't have to make them despite some courts of appeals decisions now.

People like to make them because it's easier to make them so they won't overlook something and they won't have to do any

thinking. Now, if you allow the withholding statement to make claims of privilege and you only get to a level of specificity when there is a "Okay. What are you really talking about" letter. Then why require the thing to be called a withholding statement?

MR. GOLD: Luke?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: What happens now -- and I sense that everybody's experience is a little bit different, but what I typically get is I will get a response that will set out a number of objections. They will just send out all the objections that they can conceivably think of, and then you have to call the person or I have to call the person and say, "Okay. You have listed all of these objections, which ones are real and which ones are virtual?" And you have to find out if they are withholding particular documents with regard to each objection.

With regard to the holding statement, the withholding statement that we are talking about, they have to specifically state that they are withholding documents now, right now.

Not in the future, not some inchoate claim. They are withholding documents now because of this particular privilege.

And the reason for that is, is when we were on the task force we explored the concept of having -- we would say we are not requesting attorney-client privileged matters, attorney work product matters, and that got to be incredibly difficult. This way you can see I am withholding documents because of attorney-client privilege. You can say, "Well, I don't care about those documents," but if the person says, "I am withholding documents because of trade secrets," you go, "Okay. I want to know what those are." But I believe it completely obviates this prophylactic objection regime that we have right now.

PROFESSOR DORSANEO: Well, I think the withholding statement paragraph should say something like current Rule 274 says with respect to charge objections about prophylactic objections are inappropriate, and it ought to be clearer that you only make an objection with respect to information or

specific information or materials that you are withholding.

MR. GOLD: We have that. That's the one that John Marks was insensed about several meetings ago, the one where you cannot make multiple objections. I forget where that is, though.

MR. KELTNER: You can't obscure.

MR. GOLD: You can't obscure the real objection with other types of objections.

MR. SUSMAN: It's in our comment. I mean, look at the comments. You know, you-all, I will say this, that --

PROFESSOR DORSANEO: That's in the paragraph on objections.

MR. SUSMAN: I mean, we are redebating at the last meeting or at our meeting in January on page 5858 of the transcript this whole notion of withholding statements as a way of asserting privileges. The whole concept was approved in a vote that was 13 to 3, page 5858.

CHAIRMAN SOULES: All Bill is

talking about is a way to do this better.

PROFESSOR DORSANEO: I am not talking about the concept.

CHAIRMAN SOULES: He's talking about a way to do it better. We have got specific language in the rule. It may need other words. Some of the words here may not be the right words.

MR. SUSMAN: Take a look at the --

MR. MEADOWS: Page 15.

MR. SUSMAN: Page 15, comment two. Next to the last sentence, "The statement should not be made prophylactically, but only when specific information and materials have been withheld."

HONORABLE F. SCOTT MCCOWN: But let me point out why I think this gets done what you want, Bill. Under the present system if a party is going to assert attorney-client and they make an objection to a specific request of attorney-client, if you call them up on the phone and you ask them what they have got and they tell you, if you take their word for it, you are not protected. If they

tell you and they are telling you the truth but subsequent events create new things that fall into the category that you don't get an update about, you are not protected, and so you are forced to go down to the courthouse and get a ruling on the objection.

Under this scheme they have to make a withholding statement, and you say, "Well, won't they just make a prophylactic withholding statement?" Well, I think the answer to that is maybe you're right that some people will, but the incentive for prophylactic statements is gone. If they do make a withholding statement, prophylactic or not, you have got a very simple way to test it, which is you demand the specificity of identification of what they are withholding. So they have got to give you that.

If they can't give it to you then that withholding statement preserves nothing because the only thing the withholding statement preserves when you make the demand for specificity is what they identify specifically. So once they identify it specifically you have now formally fixed their

privilege, and if new documents fall within your request, they are going to have to make a new withholding statement.

There is no way for anything to get away from you and fall through the cracks. Every time they are holding something back that they haven't filed a withholding statement on they have got to file a withholding statement. Every time they file a withholding statement you can tie them down without having to go to the courthouse about what specifically they are withholding. If when you see it you want to test it, you have got a procedure to test it.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I just -- I was going to say basically the same thing Scott was.

CHAIRMAN SOULES: Okay.

PROFESSOR DORSANEO: I have one other thing to say about it, and I am just going to keep quite, is that I hope we haven't gotten to a point where what you call it is going to make all of the difference in the

world if it's content satisfies the requirements of the particular paragraph that you are meant to be following.

MR. KELTNER: That's a good concern.

CHAIRMAN SOULES: Anything else on -- well, let's just take it a paragraph at a time. Rule 7, paragraph (1). Anything further on that? Richard Orsinger.

MR. ORSINGER: I have a problem with the use of the word "privilege," which I think is going to dog us throughout this whole process because we are dealing with both privileges and exemptions, and we cross-refer to Rule 4, which is entitled "Privileges and Exemptions," and the exemptions are different from the privileges. I don't know how many of the exemptions are going to ultimately survive the drafting process, but it seems to me that we need some kind of shorthand rendition word, or we need to agree to use the word "privilege" and "exemption" both so that no one comes in and says, "Hey, the privileges are in Article V of the Rules of Evidence, and they are not provided for under this rule."

PROFESSOR ALBRIGHT: I think that's a good idea, and the only thing that might change that is if we redefined something in Rule 4, but I think that's a good rule change.

CHAIRMAN SOULES: So what do you propose? We say it's a privilege or exemption?

PROFESSOR DORSANEO: Well, why don't we just use the word "privilege" instead of developing all of these separate Texas style categories.

MR. ORSINGER: The problem is the word "privilege" has a historical meaning that goes back 150 years or more, and so to just say that --

MR. GOLD: Isn't a privilege an exemption?

CHAIRMAN SOULES: Just a minute. Just a minute. Richard Orsinger has the floor now. What is it?

MR. ORSINGER: Yes. You could fold privileges into exemptions if you defined exemption to mean work product, et cetera, et cetera, plus all recognized privileges.

MR. GOLD: That's the way it's defined now.

MR. ORSINGER: Rule 4 doesn't define anything right now.

MR. GOLD: I mean in the present rule right now.

MR. ORSINGER: Yeah. If we did that, we could take the word "privilege" out of here and just use the word "exemption" instead.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think the way 166(b)(3) -- the wording of the rule is it says, "The following is privileged from discovery."

PROFESSOR DORSANEO: Right.

PROFESSOR ALBRIGHT: So it does use the word "privilege," but I think that's something we can correct in Rule 4. I think that's a valid point, but we need to be clear the discovery exemptions are privileged are what we are talking about as well as evidentiary privileges, and I think we can fix that in Rule 4.

MR. SUSMAN: Can't we drop the footnote here just to remind us that at the time we -- I think we just ought to footnote the word, put a footnote in that at the time whoever gets around to doing Rule 4 we got to make sure that the language we use here is broad enough to cover both exemptions and privileges.

CHAIRMAN SOULES: Okay. One other alternative is to use "pursuant to a privilege or exemption," put that in this right now so we don't lose it, and it will never be lost. We may take it out later if we fix something someplace else.

HONORABLE SCOTT BRISTER: I think we ought to just stick -- Bill's right, just stick with "privilege." Because, I mean, the current rule says first, 166(b)(3), "Exemptions. The following matters are protected from disclosure by privilege." So --

PROFESSOR DORSANEO: I wish I had never put the word "exemption" in there.

HONORABLE SCOTT BRISTER: They are not different. In my mind they are not

different. We ought to just -- everybody thinks something is privileges, let just call it privileges.

CHAIRMAN SOULES: All right. Anything else on Rule 7, paragraph (1)? Okay. Those in favor of paragraph (1), Rule 7, show by hands. 15. 15, right?

Those opposed? There is no opposition. That will be declared unanimous.

All right. Paragraph (2) of Rule 7. Any further comments about that? Is there any objection to Rule 7, paragraph (2) as shown on page 13? Carl Hamilton.

MR. HAMILTON: Fifth line down there is a phrase that says "and only upon compliance with the request or any part thereof." I don't know that I understand what that means.

PROFESSOR ALBRIGHT: What that means is that you don't need to do it prophylactically. Only when you respond to the request do you have to make a withholding statement. So when you comply with -- okay. You have not made an objection to the request under paragraph (1), and you are producing

your documents. You are complying with the request. Then you make your withholding statement. If you have objected to part of the request under paragraph (1), you are only responding to part of the request. Then you make your withholding statement as to the documents that you are withholding.

MR. YELENOSKY: So it's a time-limiting? Because compliance sound like if --

CHAIRMAN SOULES: Steve Yelenosky, what's your question?

MR. YELENOSKY: Well, it sounds like that -- yeah. It does sound like compliance is a question of -- it sounds like what you are referring to is clearly when to do it.

PROFESSOR ALBRIGHT: Would it improve it to put "response" instead of "compliance"?

MR. YELENOSKY: Yeah. Yeah.

PROFESSOR ALBRIGHT: "Response."

CHAIRMAN SOULES: Exactly where is the focus of this? What word, where?

MR. HAMILTON: The fifth line.

CHAIRMAN SOULES: One, two, three, four, five.

MR. YELENOSKY: And "at the time of responding" or "when responding" and only --

CHAIRMAN SOULES: What's being proposed?

PROFESSOR ALBRIGHT: We haven't decided what to propose. The problem is the word "compliance."

CHAIRMAN SOULES: "Compliance," okay.

MR. SUSMAN: What's wrong with that? I don't understand what's wrong with that, Alex.

PROFESSOR ALBRIGHT: I think they are confused about what "compliance" means, and it may be that "responding" is a better word than "compliance."

MR. SUSMAN: I don't think so because responding can include objecting. Okay.

PROFESSOR ALBRIGHT: Okay.

MR. SUSMAN: Compliance is not

objecting. I mean, I ask you to produce something. If you say, "I object to doing it," you aren't complying with it.

PROFESSOR ALBRIGHT: Uh-huh.

MR. SUSMAN: You are responding.

PROFESSOR ALBRIGHT: Right.

MR. YELENOSKY: Well, at the -- well, when do you want the withholding statement? When you produce the other documents?

MR. SUSMAN: At the time your objection gets resolved, and you have to do it. I mean, you object to producing documents prior to 1960 because it's burdensome, it's beyond the scope of the petition, et cetera. Okay. That's all you have to do then.

That gets overruled. I take it to court it gets overruled. Now you have got to go look at your pre-1960 documents and produce them. At that time you find a letter between your client and you that is privileged. You have not lost the privilege. You didn't even go look at them prior to then. Now you go look. You find the document. You assert the

privilege by that time. Now you are responding because the court has ordered you to do so.

MR. YELENOSKY: And you are complying?

MR. SUSMAN: You are complying.

MR. YELENOSKY: But it's at the same time you are producing other documents for which you have no withholding statement. Right? I mean, documents that you have no problem with producing. So it's a time when you produce.

CHAIRMAN SOULES: I think this needs more clarification.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: "If a request is both objectionable and calls for privileged materials or information in response, the responding party shall first object pursuant to section (1) of this rule on grounds other than privilege," right? That's what you're talking about?

PROFESSOR ALBRIGHT: And that's what Rule 1 -- section (1) is all about.

CHAIRMAN SOULES: Well, but

section (2) is asserting a privilege. Does that sentence and section (2) say that if it's mixed objection and privilege you have to raise your privilege objection under section (1)?

PROFESSOR ALBRIGHT: It says when you are complying with any part of the request you have to make a withholding statement if you are withholding privileged documents.

MR. YELENOSKY: How about breaking that into two sentences? In the second --

CHAIRMAN SOULES: Well, "If a request is both objectionable and calls for privileged materials or information in response, the responding party shall first object pursuant to section (1) of these rules."

"On grounds other than privilege" is what you are talking about there. Tommy Jacks, have you got something?

MR. JACKS: I have got a concern. I mean, I recognize in the example Steve gave the party could not raise the

privilege because the party didn't know that there was privileged material amongst the documents, but there could also be a situation in which I know at the time I am making the objection, hey, this is burdensome, but I also know that there is, in fact, privileged material in there that I don't ever intend to produce without getting a ruling on it. Now, shouldn't I go ahead and tell people I have got an objection under (1), and I am going to be claiming a privilege under (2) as well?

CHAIRMAN SOULES: I think that's a good point. Steve Susman.

MR. SUSMAN: I don't think -- I think what we wanted to do is objections on nonprivileged grounds are made first. Even if you know that there is something, you have got a fallback objection. Okay. I mean, that's the notion. We want you to make the objection on privileged grounds first and then dispose of, and then once it's disposed of and you -- because that should be the controlling ground on which you are initially withholding stuff. When that's overruled then you have to -- then you fall back on your second

ground, which is privileged, and you provide the withholding statement.

MR. JACKS: Well, let me give a more concrete example because I'm not sure this is something that we want to do. I mean, let's say, for example, you have requested all information of a certain kind from 1980 to date. I am willing to give you some of it because it's unprivileged and it's recent enough that it's not a big deal. I am willing to give you everything from 1990 to date. So I file my stuff. I say, "Steve, here is the stuff from 1990 to date as to which I am claiming no privilege. It's yours. I am raising a section (1) objection to the 1980 to 1990 stuff, and in addition to that, I am withholding some things because they are privileged." Now --

CHAIRMAN SOULES: In what time period?

MR. JACKS: Well, in either time period.

CHAIRMAN SOULES: Okay.

MR. JACKS: I mean, let's say some of both because there was some

attorney-client information that fell within your request, and I am hanging onto that.

MR. SUSMAN: Okay.

MR. JACKS: Now, are you telling me that the game I play with you is I first say, "Hey, Steve, I have got a section (1) objection. I am giving you some stuff, but I have got a section (1) objection."

We go down to the courthouse. We fight about that. The judge signs an order. We come back and then I send you some documents and say, "Hey, Steve, guess what? There is also some privileged stuff."

MR. SUSMAN: No.

CHAIRMAN SOULES: Let Tommy finish his example.

MR. JACKS: And now I am telling you about it. So we have got to go down there again and fight about that.

MR. SUSMAN: No.

CHAIRMAN SOULES: Okay. Steve Susman's response.

MR. SUSMAN: Let me suggest to you that, No. 1, it's obvious we are not going to finish these rules today. I think you have

hit upon a drafting problem that we can fix between now and our July meeting, which is -- and I think the intent in what you said is that for those documents you produce from 1990 forward, okay, you have got to say -- if there was anything privileged in there that you did not produce because of the privilege because otherwise it was in your time frame of '90 forward, you have got to notify me you withheld them. You have asserted an objection at the same time to pre-1990.

MR. JACKS: Uh-huh.

MR. SUSMAN: Okay. And so far as those are concerned you don't even have to look at those to know -- if you happen to know there is a privilege in there, fine. Who cares. That's not why you held it back. You held it back because of the timing. Once that timing issue is resolved then I think at that point in time if that objection gets overruled, you then file -- notify me of the withholding.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: And all I am suggesting is that if I do know that in the

materials that I am making my section (1) objection to there also is a portion of those regarding which I am going to claim a privilege, if at any time I have to produce them, wouldn't it be more efficient for me to raise that then? I have no problem with the notion that if I really don't know about it until I have seen the documents --

MR. SUSMAN: I will tell you why not.

MR. JACKS: Okay.

MR. SUSMAN: Let me give you -- the perfect example is the documents prior to 1980. Okay.

MR. JACKS: Uh-huh.

MR. SUSMAN: The fact -- and I think your lawsuit involves an allegation that begins in '85. Okay. And I don't think I ought to have to give you those documents. It's totally remote to anything. If I give you a withholding statement, and then I have to go and follow the step in step (b), which is identify within 15 days of withheld documents. Okay. I have got to -- preparing one of these privilege logs is no small task,

folks. It is a huge task.

If they call my card on that and make me prepare a privilege log, I have defeated the whole purpose of my objection. I don't have to produce the documents to you before 1980 or '60, but I have got to go look at them. I have got to find them, and I've got to identify them. That's what we are saying. So that's why we don't think you should have to do that.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: And I am not quarreling with the idea that you should not be compelled to do that. I agree that you should not be compelled to do that. I guess my point is I can envision other fact situations where I want as to a given set of documents, which I have looked at, to make a section (1) objection, but I also know at the time I make it because I have looked at them that I am going to be raising privileged grounds, too. Isn't it more efficient for the parties and the court and less costly and time consuming to dispense with all of that at the same time when that fact situation exists?

And the rule doesn't, as I understand it, accommodate that set of facts. That's all I am saying.

CHAIRMAN SOULES: It doesn't require that you --

MR. JACKS: Yeah.

CHAIRMAN SOULES: -- do both at the same time?

MR. SUSMAN: It does not --

CHAIRMAN SOULES: And the cost, I think, of requiring -- at least what I am hearing here, the cost of requiring, Tommy, that the service of a withholding statement at the time you make your rule -- your section (1) objection is going to be prophylactic objections because some judges are going to say it has to be -- if the rule has language in there dealing with that, it's going to say, well, that's where you have to do it. I mean, that's a possibility or a possible risk.

Bill, you have had your hand up. Then I will get down to Judge Brister.

PROFESSOR DORSANEO: Well, in one of the many cases in this area that I have lost -- I think it's a Hyundai case involving

a Judge O'Neill -- the exact problem that's being discussed here came up. There was a controversy about whether the discovery request was a good request partially because it was unclear what the request was, and there was a debate about its scope and its contures. The lawyer, the trial lawyer, at Jones, Day interpreted it one way and concluded that there were no documents to produce, but objected to it because it was worded in an obscure manner, and he wasn't exactly sure what the hell it meant.

Ultimately it was determined that it covered documents that the client had and that the privileges with respect to all of those documents had been waived because the privileges hadn't been asserted, and there hadn't been the preservation with respect to the claims of privileges made at the threshold. Of course, the lawyer said, "I didn't even know what we were talking about until after the scope of the request got clarified, and our entire energies were directed toward the propriety of the request rather than the privilege question."

At least in that context it seemed absurd to me that the cart had gotten way before the horse, and I think in a great many cases involving that kind of client it would be much better to resolve the objection first and then to have the objection practice with respect to the specific things that you are talking about work thereafter. It might be just a little bit less efficient in some cases, but my instincts based on my own experience suggest to me that it would be more efficient if it was done in the order that I suggested and I think the order that the chair of the subcommittee suggested initially.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Just briefly, as a trial judge I think that two steps makes sense because the scope objections are ubiquitous, contentious, and rarely outcome determinative. On the other hand, the privilege objections are few, far between, usually taken care of by agreement, but may well be very outcome determinative, and it makes more sense to focus on those few things

if we ever get to that point, but save that for the first step and get all the scope stuff out of the way. So I agree with that.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I have to say two things. First, I think that the committee should give a shot at trying to draft this rule to accommodate the problem that Tommy has raised, because as I understand what Tommy's complaint is, if someone is responding with a body of documents, they have obviously gone through this body of documents and know what the privileges are. It's a waste of everyone's time to have to wait 'til the second step to hear the privileges on those. Whether or not we can efficiently draft a rule to accommodate that, I don't know.

The second part of that is if we can't, I would be willing to sacrifice the -- waive the deferral of the privilege to the second step to keep the integrity of the rule that we presently have. And the other thing I was going to say is if you want to see how this plays out, there is a case out of Tyler called Ford Motor Company vs. Ross, which sites I

think Hyundai vs. Chandler, which I think is the case that you are talking about, Bill, where the Tyler court of appeals goes through this two-step process. It also talks about Tommy's argument about preserving all the privileges and objections at the time of the response, but that case talks about this two-step process, and I think it's a good way of doing it. I would like to try and accommodate Tommy's complaint, though.

CHAIRMAN SOULES: Let me see if I understand how this all works. Taking Tommy's example, somebody says, "We want to go back to 1980." Tommy says, "I will give you '87 forward but not '80 the through '86," and I file a -- and he files a section (1) objection to '80 through '86. At that point he hasn't made an objection to '87 forward. So he has to file a withholding statement for '87 forward.

MR. SUSMAN: If there is anything there.

CHAIRMAN SOULES: If he is withholding anything. But '80 through '86 he doesn't because until he gets a ruling from a

court that some of that has to be produced, '85 and '86 or '80 through '86. At that point then he's got to go through the '80 through '86 and determine whether there is anything privileged, and when he complies with the court's order, at that time he objects to the '80 through '86, any part of that that he's had to produce. Is that the way this --

HONORABLE F. SCOTT MCCOWN: Yeah.

CHAIRMAN SOULES: -- is supposed to work? I'm not sure the language is exact, but that's what this is supposed to do, right?

HONORABLE F. SCOTT MCCOWN: That is the way it's supposed to work.

CHAIRMAN SOULES: Well, what's wrong with that?

HONORABLE F. SCOTT MCCOWN: I don't think anything, and let me point out the language if you want to focus on the exact language. You have to put subdivision (1) with subdivision (2), and in subdivision (1) we say, "A party shall comply with so much of the request as to which the party has no

objection unless it's unreasonable under the circumstances."

So you have to comply with so much -- like Luke was saying, what you don't object to, you have to comply with. Then in subdivision (2) when a party actually withholds specific information you have got to file your withholding statement. So Luke has described it exactly right, that if you have got no objection -- it's overbroad, but you have self-narrowed it, so to speak, and you got no objection to the part you have self-narrowed it to, then you have got to file your withholding statement. So you don't have the two-step process. So I think we can meet Tommy at least halfway. There is no two-step process for what you self-narrow.

CHAIRMAN SOULES: All right. As a matter of policy, are we in agreement that if the rule works the way I tried to describe it a moment ago and Scott has confirmed, that that's the policy we want to establish? Is there any disagreement with that? There is no disagreement that that's the policy that we want to establish.

MR. SUSMAN: And let me give you some language that will clarify the procedure. I think I can just right here -- it should read, "If a request calls for privileged materials or information in response but is also otherwise objectionable, the responding party shall first assert objections -- shall first assert other objections pursuant to section (1) of this rule, and only upon resolution of such objections and compliance with the request for any part thereof withhold responsive privileged materials or information pursuant to this section." Something like that. I think we can draft it more efficiently in committee, but it will be something like that to indicate more clearly what steps we are talking about.

MR. JACKS: Another way of saying it would be "if the objection is overruled, then upon compliance."

MR. SUSMAN: Right. Right.

PROFESSOR DORSANEO: Your idea is when the objection covers the same territory as the claim of privilege?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: May I also suggest that you give a concrete example in the comment to guide one through this maze.

MR. SUSMAN: Good idea. We will accept that. Example in comment.

CHAIRMAN SOULES: Okay. As far as number (2) is concerned then we have got a declared policy, but we are not, I think, today prepared to --

MR. SUSMAN: I understand.

CHAIRMAN SOULES: -- act on language.

MR. SUSMAN: Right.

CHAIRMAN SOULES: So that needs to be revisited.

MR. SUSMAN: We will fix it up.

CHAIRMAN SOULES: But that doesn't mean we can't go on to the other sections of the rule, does it? We can go forward to section (3).

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

CHAIRMAN SOULES: David Beck.

Yes, sir.

MR. BECK: Yeah. This has to do with (2). Steve, can you explain to me, I'm a little bit concerned about the timing of the withholding statement. What does this mean where it says "either when making the original response or thereafter when making an amendment or supplemental response"?

MR. SUSMAN: Let's see. Where are you?

MR. BECK: Eighth line.

CHAIRMAN SOULES: Eighth line on page 13?

MR. BECK: Right.

PROFESSOR ALBRIGHT: That means when you are producing additional documents that you have found -- you have found more documents responsive to the request; therefore, you have to amend or supplement according to our amendment rules. You can make a withholding statement at that time.

You say, "I found a stack of documents that are responsive. I am producing them to you, but I am withholding specific documents on the grounds of work product, party

communication." It's, again, to keep you from having to make your prophylactic objections. We make clear that you don't have to make a prophylactic withholding statement at your first response, but you make a second one when you produce the second group of documents.

MR. LATTING: Well, it shouldn't be either --

MR. YELENOSKY: It should be clarified.

MR. BECK: I guess what I am saying is that the way this rule reads would it allow a party to file a withholding statement saying, "I have got four documents," and then three months later say, "Oh, by the way, here are some more documents."

MR. SUSMAN: You're right. We have got to make it clearer, and we are trying to make it clearer. The duty to provide a withholding statement arises at the time you subjectively know that there are documents that you can look at and you are intentionally withholding them. So the answer is you can't parcel them out over time if you know the documents exist.

On the other hand, suppose you find another file in your vice-president of sales office that was not even searched at the original time. There are some documents in there that certainly have got to be produced as part of your duty to supplement or amend, and you supplement or amend a document request by producing the documents. At the same time in the vice-president of sales office you find some privileged documents. You have to assert a withholding statement as to those documents then. You didn't earlier because you didn't know about them, and I guess, I mean, that's what we are saying.

MR. BECK: But, Steve, you know how this normally happens. When you are looking through thousands of documents somebody always pulls them and says, "Look, we don't know whether these are privileged or not. Put them in this stack over here."

And the way this reads, it would allow somebody to just ignore that stack for some appreciable period of time and then come in later and file an amended response, and I assume that's not the intent.

MR. SUSMAN: That's not the intent.

MR. LATTING: I have got a suggestion to the language.

MR. BECK: Then you need to clarify that on the language.

CHAIRMAN SOULES: Everybody agree with that? Okay. So, Joe, if you could -- you have got a suggestion. This is going to have to be rewritten.

MR. LATTING: It's real quick.

CHAIRMAN SOULES: All right. Real quick.

MR. LATTING: Just take out the word "either," take out the word "or," and substitute "and," and take out the word "when" and put "if." So it would read, "When a party actually withholds specific information and materials responsive to a request on the ground of privilege and when" -- no. "When making the original response and thereafter if making an amended or supplemental response."

MR. SUSMAN: I got you. We will do it.

CHAIRMAN SOULES: Okay. We

will consider that language. Okay. Anything else on Rule 7, paragraph (2)(a)? Anyone want to give the committee any further guidance on how to redraft that? Okay. Then that's back to the committee. Rule 7, paragraph (2)(b) on page 14, any comments on that?

HONORABLE DAVID PEEPLES: Luke, before we get to that I want to raise a more philosophical problem.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: We are focusing on the conduct of the responding party here, and I want to ask the committee if the rules or if in your discussions there is any focus on the requesting party because it's been my experience that a lot of times, a lot of times, requests are made that are obviously excessive on the understanding that you can always go to court and the court will carve it down.

And I want to raise -- I have been looking at Rule 215 sub (3), which does say that if someone abuses the discovery process in seeking discovery you can levy sanctions.

I don't think it happens very much, but I want to raise the question of whether we ought to focus also on the requester because, you know, a lot of these problems could be obviated if the requesting party instead of asking for everything back to 1960 would make it more reasonable.

CHAIRMAN SOULES: Well, Joe's subcommittee has been -- it's good that this continues to come up from time to time to remind us, but it has come up in several of our meetings that it's very important to do exactly what you are suggesting, Judge Peeples, and Joe's subcommittee has the responsibility of drawing the sanctions rule to address overreaching by the requesting party or excessive requesting by the parties.

MR. LATTING: I sure would like to hear from everybody, and particularly the judges, about that because I don't know exactly how to write that because of the problem that you have. Sometimes when I am making a good faith request for documents I don't know exactly what to ask for. So I tend to ask for more than I need to. I don't want

to get into that but --

CHAIRMAN SOULES: We are not going to because we need to give Steve's group as much guidance as we can by the end of today so that we can keep making progress.

MR. LATTING: Well, let me hear from you is all I'm saying.

HONORABLE DAVID PEEPLES: That's a different committee, your answer is.

CHAIRMAN SOULES: Sanctions.

MR. SUSMAN: Let me respond to that briefly.

CHAIRMAN SOULES: Don't take a lot of your own time.

MR. SUSMAN: We began with the premise that there was not a lot of abuse in document request, that there was a discovery device unlike depositions and unlike interrogatories which really produced valuable things that we needed in litigation, and really the burden of looking at the stuff was almost on the person who requested. If I request a warehouse full of documents, the burden is on me.

So I am going to be tending to shoot with

the rifle rather than a shotgun anyway because it could be -- you could say, "Come see it, Susman. You know, bring your hordes of people." I don't want to go to Detroit to see it. That's the beginning, and so we have not really tried to curb through our rules by limiting the scope, the number of document requests.

Now, if one thought -- I have struggled with this a lot because I know Justice Hecht has talked to me about it. You know, we need to do something with document requests. He's talked to me about it frequently, and I have struggled in my own mind.

How do you do that? About as close as I could come conceptually, which is a totally new direction for us to go in but would be a way you would go, would be to say that when you make a document request on the other side the other side has an -- the other side can produce it just like currently, or they can give you back what's very similar to what we have on electronic data, essentially an environmental impact statement -- an economic impact statement.

"This request is going to cost me, Item 1, to search all of my sales offices nationwide, and it's going to take about a thousand hours of manpower, X amount of money. Request No. 2 is going to cost me" -- in other words, to respond by saying, "I can do it but it's going to be real burdensome, and here's how much it's going to cost you," and then allow the requesting party to somehow pay for the job of going to find the documents.

Now, that's about the only concept I have thought of, and it's kind of close to what we do on electronic data right now, where we recognize that it's got to be discoverable and yet you can't just say, "Give it to me willy-nilly" because for the producing party to produce that is a huge burden. So that's kind of the procedure.

I don't know of any other procedure, I mean, as long as lawyers are operating in good faith. You know, if somebody just makes a stupid request and a frivolous request, you ought to sanction them, but I could ask you for something. I could say, "I want any correspondence you have regarding this pen,"

and if you have a thousand sales offices, that might be a hell of a burden on you.

CHAIRMAN SOULES: Let me interrupt. Do we want to spend today talking about this philosophical issue, or how do you want to use your time, Steve?

MR. SUSMAN: I would rather go on, but I mean, if anyone has any idea of a rule that ought to be in the discovery rules, I mean, think about it, and let's send them to the subcommittee.

HONORABLE DAVID PEEPLES: Luke, we don't want to spend the rest of the day talking about it, but I think it needs to be raised, but I have some question about whether the only place to deal with it is in sanctions. We need to tell lawyers that it is not right just to ask for every damn thing that you can think of, knowing that you can put the other side through a drill and the burden is on them to come in and whittle it down. Now, I just want to raise the question of whether we want to throw all of that on sanctions or whether the rules ought to let people know, you know, you have to carve it

down some. I just wanted to raise it because I didn't know when to raise it, but obviously we need to move on.

HONORABLE F. SCOTT MCCOWN: By way of moving on and drawing us back to the rules at the same time, just think about this thought: The real problem with overbroad requests is not what's asked for. It's what's compelled by the judge. What's asked for is only a problem in a harsh exclusionary rule regime or in a difficult privilege regime.

These rules that we are laying on the table to a large extent solve the exclusionary problems from overbroad requests, solve the privilege assertion problems both from the point of view of having to make prophylactic responses and a simple way to test the privilege. If those two problems are solved, I don't know that broad requests are as much of the difficulty.

HONORABLE DAVID PEEPLES: If. That's a big "if," and I hope you're right, Scott, but I am not as confident about that.

MR. SUSMAN: David, let me just suggest that if you have the inclination to

draft up something, I mean, we would be glad to entertain it. Anyone that has anything, please send it to us. This is a very difficult problem of what you do to limit the cost of responding to a request for production of documents without really allowing someone to hide things that are relevant.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I don't want to belabor this, but let me say that I think the practice that exists now, at least in 99 percent of my cases, works pretty well; and that is, sure, the original requests are broad because the requesting party is having to shoot in the dark. You don't know the circumstances of the other side by and large, and you're afraid to narrow your request too much because then the responding party, you know, parses each word as narrowly as they can and concludes they don't have to produce anything because you didn't word it in the right way, but what happens is that good lawyers get together and they work it out, and they narrow things down to practical.

MR. SUSMAN: Let me point out

also that --

CHAIRMAN SOULES: Time out. Let me tell you something here that the chair feels pretty strongly about and then we can spend as long as we want to talking about this. We have got to get these discovery rules to the court. We have got nothing on the table for sanctions right now. We have got appellate and we have got the charge rules out there.

We got maybe 25 percent of the way through the discovery rules yesterday afternoon and today. We either have got to focus on getting these discovery rules out, or we are going to be holding every other month meetings in 1996 as well as 1995. We don't have very many more meetings. So now, everybody that wants to talk hold up your hand and tell me what you want to talk about, and when we get done with that we will get back to Steve.

MR. JACKS: If I can finish what I was going to say --

CHAIRMAN SOULES: Okay. Tommy Jacks.

MR. JACKS: And I will make it brief. All I would suggest is that if there is a practical way of putting in the rule what good lawyers are doing already, and that is to make it permissible post-request for the parties to agree upon a narrowed request, I think that's a real sensible approach. You know, under our rules now if people really were doing it by the book and I have sent out a broad request, they could object, get it sustained, and then we would start the whole process over, but we don't do that. We agree that you can read my request a different way to be narrower, and they respond to that, and it's done informally, and if that process can be concentrated somehow or blessed, well, it might make some sense.

CHAIRMAN SOULES: Okay. Go around the table. Anybody else have anything you want to say before we go to Rule 7, paragraph (2)(b)? Okay. Let's talk about Rule 7, paragraph (2)(b). Any comments about that?

MR. SUSMAN: There were no real -- no. In this rule there were no real

changes.

CHAIRMAN SOULES: Okay. I'm sorry. I didn't see your hand, Harriet.

MS. MIERS: I just wanted to ask Steve a question in light of an earlier remark he made and certainly in my own experience. Steve, this 15 days is pretty absolute, and it seems to me in some cases that are huge document cases you are going to have to start preparing your privilege log without having received the request to do so because, you know, 15 days isn't going to be enough, and you have three paralegals working on a privilege log. So this 15 days is sort of absolute as it is currently written. So is there --

MR. SUSMAN: I would respond to that that we know it can be tight. I would say this for sure. In most cases, certainly in most cases I am in, I mean, you can anticipate when you are going to get a request. That doesn't exactly come out of the blue that you are going to -- and you know you have got to -- as the documents are identified during the collection period is the time to

make your log rather than waiting until the end. We think it can be complied with, and because we have limited this discovery period to nine months, we just think we have got to compress some of these tasks so we can get it done.

CHAIRMAN SOULES: Well, and also everything can be changed by court order or by agreement.

MR. SUSMAN: Right.

CHAIRMAN SOULES: The 15 days is not something the judge can't move or the parties can't move by agreement. I don't know if that helps. Carl Hamilton.

MR. HAMILTON: What happens when the party responding says, "I claim all my privileges. Here is a room full of documents. I am not going to go through them all and list all the privileged documents that I am claiming, but I am still claiming my privilege"? Is it waived if they don't provide the description of the material withheld?

MR. SUSMAN: Well, are you going to show it to me?

MR. HAMILTON: Yeah. I am going to show it to you. I am going to let you look through this room full of documents, but when you come to anything that I think is privileged I am going to take it back from you and not give it to you.

CHAIRMAN SOULES: Who wants to respond?

MR. GOLD: It's gone.

CHAIRMAN SOULES: Who wants to respond to Carl's question?

MR. GOLD: It's gone. It's not privileged.

CHAIRMAN SOULES: Hold a hand up. Paul Gold.

MR. GOLD: The privilege is gone. There is no privilege.

MR. HAMILTON: The rule doesn't say that it's waived if they don't produce the list.

MR. MEADOWS: But if you've seen it.

MR. GOLD: But if you see it, it's gone.

MR. HAMILTON: Well, I know,

but there are some courts that say if you don't produce it intentionally --

HONORABLE SARAH DUNCAN: The first sentence says, "A party may preserve a privilege in discovery only in accordance with this section."

MR. HAMILTON: Okay. "Only." That's an "only." Well, but that's on section (2). We are talking about section -- we are talking about the descriptive section now.

HONORABLE SARAH DUNCAN: Well, that's a part of the section (2).

CHAIRMAN SOULES: Well, it is ambiguous, and we need to say "in accordance with this section (2)" so that all of its subparts are swept up. Would that be clearer in your judgment, Carl?

MR. HAMILTON: If it applies to all of section (2).

CHAIRMAN SOULES: Yes.

MR. HAMILTON: If it does.

CHAIRMAN SOULES: Okay. Well, let's be sure that it's written so that it's clear that we are talking about the entire section (2) and all of its subparts. Bill

Dorsaneo on (2)(b).

PROFESSOR DORSANEO: Well, the language here at the end, "will enable other parties to assess the applicability of the privilege," is comparable to language that we have had in various formulations over the years with respect to enabling the requesting party to identify and locate the individual documents, at one point in time picking up a suggestion that was made at the federal level that actually was never part of the federal rules but I believe proposed by John Frank of New Mexico.

Now we have language that talks about enabling the party who is making the request to be in essentially the same position as the party who has the documents. This new language, "enable other parties to assess the applicability of the privilege," is a little bit opaque to me. I heard what Professor Albright said about what kind of information needs to be provided, individual documents or categories of documents. This needs to be tightened up and made relatively clear with respect to what the responsibility is because

we don't want to have a rule that doesn't explain to counsel what kind of a log or identification is satisfactory.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Yeah. I agree with that, that the expensive part of the logs is listing each and every document, but if you mean by -- we call them Peeples' logs in Houston in honor of David, but we have to have Bates stamp numbered, date, author, label it on each one for hundreds of stacks, and that's very expensive.

HONORABLE DAVID PEEPLES: Good name of them.

HONORABLE SCOTT BRISTER: On the other hand, if you could put "trial counsel litigation file" or "correspondence with attorney-client," you ought to make that clear because I think that will be a lot less resistent.

MR. SUSMAN: Well, we don't --

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Insofar as trial counsel's preparation file, it never has to

be -- under paragraph (c) we exempt that. So you don't have to worry about that.

HONORABLE SCOTT BRISTER: That's one other question I had. What else is going to be in (a) and (b) if nothing -- neither withholding statements nor descriptions apply to attorney-client or work product?

PROFESSOR ALBRIGHT: Party communication.

CHAIRMAN SOULES: (C) is only trial counsel's --

MR. SUSMAN: Preparation.

CHAIRMAN SOULES: -- trial file.

MR. SUSMAN: And preparation.

HONORABLE SCOTT BRISTER: That's not what it says.

CHAIRMAN SOULES: Well, okay.

MR. ORSINGER: Let's debate that in a minute.

CHAIRMAN SOULES: Yeah. We are going to be getting to (c) unless we need to do it in connection with (b).

HONORABLE SCOTT BRISTER: Yeah. I am just trying to -- I don't -- when I read

(c) I don't understand what (a) and (b) are talking about, what the concern is, if none of this -- if all of this is just but don't worry about any attorney-client or work product stuff or none of that is being covered by this rule.

CHAIRMAN SOULES: Okay. Assume that (c) is talking about trial counsel's trial file, and if it doesn't do that, we are going to make it do that. Okay. So working with that assumption as to the meaning of (c), let's talk about (b).

PROFESSOR DORSANEO: In fact, the more I look at (b) I don't know how you do that. I don't know how you assess the applicability of the privilege without looking at the thing.

MR. SUSMAN: My point is that what we really want is a privilege log. Lawyers are doing that all the time today, and we don't have any dispute about what they all look like. It's not creating any problem for lawyers. I don't understand what the real problem is, and I can work it out with opposing counsel in almost every case because

if I am going to make them list every document, they are going to make me do it. The expense is reciprocal, and we know what we have got to do. "Letter from Luke Soules to Joe Blow, general counsel, dated so-and-so" is a privilege.

HONORABLE SCOTT BRISTER: Yeah. They are doing it on your cases, but not on car wrecks and slip and falls, which this is going to apply to. Those people don't do privilege logs ever.

CHAIRMAN SOULES: David.

MR. KELTNER: Yeah. I think that's the point. I think we ought to make this fairly broad because the kind of suit is going to make a difference. In 95 -- well, I won't go that far because family law is documentary, but other than family law cases in 95 percent this ain't going to be an issue. It's going to be done on interrogatories, and the truth of the matter is only in extensive and cutting edge litigation are documents that important anymore, and when they are, they are very important.

But nonetheless, when you look at this

rule, so far almost everything we are talking about has to do with documents and documentary information from computers. The truth of the matter is this ought to be broad and let the trial judge do it. There may be a time where you have to have a privilege log, but I hope it's not every case because if it is, the expensive litigation will have increased dramatically, and I thought that's one thing we didn't want to do.

HONORABLE F. SCOTT MCCOWN: And to follow up on that, it seems to me every problem in every case will seek its own level. So if you have got a tiny case and what you are withholding is your file, you are going to write back and say, "I am withholding my attorney file," and that's going to be the end of it.

If you have got a big case where you have got critical documents then the other party is going to engage you in some dialogue for something that looks more like an extensive privilege log, but every case, every problem, is going to pretty much seek its own level as counsel work it out. But keep in mind that so

what if you can't work it out, that what you submit to them they are not happy with in the adequacy of the description, what happens? What happens is that you gather up the specific documents; you take them to the judge; and you have an in camera inspection. That's the test.

And so you really don't have any practical problem if they are not happy with your description. Their leverage on you is you don't want to go to the expense of an in camera inspection so you are going to work reasonably hard to get it described and satisfy them, and your leverage on them is they don't want to go to that trouble either.

MR. SUSMAN: Would it fix it by putting in "enable the other parties to determine the need for a hearing" or something like that? That's basically what you are doing. I think Bill is right. You can't assess the privilege necessarily by seeing one of these descriptions, but isn't that really what we are saying? Would that solve the problem sufficiently, to describe it sufficiently to enable the other parties to

assess whether they need a hearing pursuant to paragraph section (3)?

CHAIRMAN SOULES: Well, the individual that assesses the applicability of the privilege is the judge.

MR. SUSMAN: No, no. The point we are --

CHAIRMAN SOULES: I understand, but what we are talking about here is enough information to enable the requesting party to challenge the privilege.

MR. KELTNER: Or identify the withheld information.

PROFESSOR DORSANEO: It's the understanding challenge is the claim of privilege.

CHAIRMAN SOULES: And to do that, to make the claim of privilege, are we changing the law that to make the claim of privilege you have to articulate the elements of your privilege claim and the basis of your privilege claim, or can you just now say "attorney-client," and that's it?

And if we are still going to require that the party claim a privilege or articulate the

basis of a privilege then that's what ought to be done in the withholding statement. "I am withholding this because it is a letter from general counsel to management giving legal advice," and then we are requiring the party to articulate the basis of the claim or privilege and then the judge -- first of all, the requesting party can look at it and decide whether or not they think it's probably right, and if they decide to challenge it then the withholding statement would be the predicate for the judge deciding whether or not to sustain the privilege.

MR. SUSMAN: I mean, in practice, Luke, the way you'd do it -- I mean, on a privilege log the way I'd do it is in practice you look through this log of 20 pages, and you highlight what strikes you as being questionable, maybe one highlighting every page because it's clearly -- a document from you to general counsel, I don't care what you say. I am not going to challenge that. That's clearly privileged, but if it's you to general counsel with six copies to other people or other people's lawyers, I might

challenge that, or if I can't recognize the name of a lawyer, is really what you are trying to do is provide the other lawyer enough information to determine what is it worth asking you to bring to court to fight about and show the court in camera and make a stink about.

CHAIRMAN SOULES: But to do that --

MR. SUSMAN: And on those three documents or six then I would want you to be very specific about who it is, why you claim this is privileged, what does it involve, et cetera, et cetera. Some of them I am not even going to have any question. On their face just knowing it's Luke to a general counsel, forget it, I am not going to argue about that. You don't have to tell me what's in it. I don't even care about the date it's written. I guess that's the kind of process.

CHAIRMAN SOULES: Well, that won't work because there has to be some standard information.

HONORABLE F. SCOTT MCCOWN: That's in part (3). This withholding

statement is a formal -- it formalizes the process Tommy was talking about earlier. We have formalized what counsel now do informally, which is work out whether they really want to look at this stuff. If they say, "We want to test the privilege," then in part (3) we set out the process that at or before the hearing the party seeking to avoid discovery has to produce the evidence necessary to support the objection or withholding statement, and he either does that by affidavit served seven days before the hearing, or he does it with live testimony at the hearing.

So the establishment of the privilege for the judge to test is done by this hearing process. The withholding statement is a step between the lawyers, and it's going to be based on a level of reasonableness, specificity, and trust for them to decide do we want to go to the next step and test this privilege, or are we satisfied that this is privileged stuff that we don't need to see?

CHAIRMAN SOULES: But let me ask -- maybe I can put it more directly. Is

the withholding statement the pleading on which the claim of privilege will be tested?

MR. SUSMAN: Never.

CHAIRMAN SOULES: I thought it was.

MR. SUSMAN: The withholding statement is simply a notifying the other person. I am withholding documents --

PROFESSOR DORSANEO: It's a description.

MR. SUSMAN: -- on the ground of attorney -- no, no, no. That's not.

PROFESSOR DORSANEO: No. I mean, the description is the thing that you are going to use to challenge it.

MR. SUSMAN: That's right. (B), the next step of that, I'll tell you, it's just that --

CHAIRMAN SOULES: Okay.

MR. SUSMAN: The idea that we are formalizing what's an informal process. The next step is I tell the other side, "Okay. Now, tell me what it is" --

CHAIRMAN SOULES: Okay. I asked the wrong question. I asked the wrong

question. Is the description the pleading on which the claim of privilege is going to be tested?

MR. SUSMAN: No.

HONORABLE F. SCOTT MCCOWN: Not by itself.

MR. SUSMAN: It's only --

CHAIRMAN SOULES: The pleading?

MR. SUSMAN: No.

HONORABLE F. SCOTT MCCOWN: It identifies the privilege. It identifies the documents withheld under the privilege, but the elements of the privilege are established at the hearing that's held in subdivision (3).

CHAIRMAN SOULES: And you don't have to assert the elements of the privilege in the description?

HONORABLE F. SCOTT MCCOWN: No.

MR. SUSMAN: I guess one of the questions is suppose you assert the wrong privilege. I mean, suppose you have the description statement that says I am withholding this letter on the ground of work product. Am I free then at the hearing to change grounds and say, "Well, no, this is

attorney-client"? I mean, I don't know whether we dealt with that.

CHAIRMAN SOULES: If it's from me to general counsel do I have to say no copies were sent to outsiders?

MR. SUSMAN: No.

MR. KELTNER: I hope not.

MR. SUSMAN: No.

CHAIRMAN SOULES: That I didn't send out copies to outsiders.

MR. KELTNER: That's right, and I would say that the thing I would worry about here is getting to that step before we have to. I think it ought to be a -- in a withholding statement it ought to be a statement generally of the information that's being withheld.

CHAIRMAN SOULES: Now, I am talking about the description. We are over on (b).

MR. KELTNER: Yeah. And that is what I am talking about as well.

CHAIRMAN SOULES: You said "withholding statement." We are differentiating between those two.

MR. KELTNER: I'm sorry. I meant the description. I think it needs to be broad, but I don't think -- Luke, in answer to the question you asked just a second ago, I don't think we anticipated that you would have to demonstrate every aspect of the privilege at that stage. You would just be labeling what it was in the withholding statement. Then you get to the description, and you're saying, "Here's what's withheld," and the other side gets to make a determination of whether that's important to them or not. If it is, then you go to the hearing and you have to prove the privilege.

CHAIRMAN SOULES: If I don't disclose that I sent no copies of my letter to general counsel to outsiders, how does my opponent assess the applicability of the privilege?

MR. KELTNER: Luke, that's the problem.

MR. GOLD: Luke, can I address that?

CHAIRMAN SOULES: Good. That's what I have been trying to do. David Beck.

MR. BECK: Yeah. I'm sure there are very good conceptual reasons why we are using different terms like "withholding statements" that our lawyers have never dealt with before, but I want to make sure I understand. Is the withholding statement the functional equivalent of the privileged document log?

MR. SUSMAN: No.

MR. BECK: All right. I think that's important that that's been made very, very clear, and the only point I would make is there is a body of law out there which tells us which should be and need not be in a privilege log, and is it the intent of this rule, Steve, that, for example, I can send you a withholding statement that says I am withholding 38 documents that represent correspondence between in-house counsel from XYZ Company to four individuals? Is that sufficient or not?

MR. SUSMAN: Absolutely sufficient and maybe more than you need to do. I think it's more than you need to do.

CHAIRMAN SOULES: Even though

he doesn't say who the individuals are or whether they have any connection to XYZ?

MR. SUSMAN: All he needs to do is tell me, "I am withholding documents on the ground of attorney-client privilege." Okay. That's all you need to -- that's simple. It protects your privilege.

Now, it's up to me to ask you, "What is it you are withholding, David?" If I don't care, I may trust David. It may be a case not worth fighting about, a small case, but if it's a big case, I might say, "David, tell me what it is you are withholding."

MR. LATTING: Would you trust him then, if it's a big case?

MR. SUSMAN: Now, it is your time to get into (b), subdivision (b), descriptions. That is what we had in mind, kind of like a privilege log, but Scott says, you know, it should be -- what we really mean is tell me enough information about what it is you have withheld so I know whether it's worth taking you to court on a motion to compel and fighting -- what we are going to fight over.

MR. BECK: Is the subdivision

(b) requirement, the description, is that the functional equivalent of the privileged document log?

MR. SUSMAN: Yes, it is. It is, but I think we got -- we want to make clear that not in every case would you have to do a complete privilege log. It's kind of a function of giving the guy enough information to know whether you need to go to court. Now, if I say I want to take you to court, at that time the burden is on you, and you have got to then file your pleadings saying which documents it is, identifying them, offering to produce them in camera, et cetera, et cetera, whatever it is. But that's the process. It's a three-step process.

CHAIRMAN SOULES: The bottom line is I don't have enough information to really know whether to challenge your privilege until I set a hearing and cause you to file hearing papers. Because until that time I don't know whether other people have got copies of this or not, outsiders have got copies of this or not.

MR. GOLD: You are not going to

know then either, because even if they file their pleading there is nothing in that pleading unless you have asserted waiver causing that switching the burden to them to have to show there hasn't been voluntary waiver, there is not going to be any obligation on them in the pleading to negate waiver. All they have to do is establish the privilege.

CHAIRMAN SOULES: Okay. Well, I know how to do that, and I am doing it.

MR. GOLD: The first time you are going to be able to challenge that is at the hearing, or you can do it in a responsive pleading.

CHAIRMAN SOULES: Right. So I have got to go one step further. I have got to also assert waiver, and now, that I have asserted waiver --

MR. GOLD: Then it's on him.

CHAIRMAN SOULES: Then I'm finally down through all of this to hearing where I claim waiver, and I finally get the information that it wasn't sent to any outsider. That's the first time I could find

it out.

MR. GOLD: As I understand the rule, yes, and it may not be great, but it's better than what we have got right now.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I would interpret that differently. In my court if you are supposed to tell them in the description in a manner that will enable them to assess the applicability of the privilege, and you have got ten attorney-client letters, nine of which was just between the attorney and the client and the tenth was circulated to the Houston Chronicle as well, and I find that you did not tell in your description, "Oh, by the way, and one of those ten was circulated to the Houston Chronicle," I am going to sanction you because you did not -- you knowingly did not give the information to enable the party to assess the applicability of the information.

You knew that was a waiver, and you knew if you disclosed it to them they would allege waiver, and you intentionally did not tell

them in your description that it was circulated and shown a carbon copy to the Houston Chronicle, and that would be sanctionable, and you have to include that. So I would interpret it differently and say, no, that's part of the thing that you have to do, and I like the idea of putting it broad like that and letting cases find their own level.

MR. SUSMAN: I would agree with that. I mean I think --

CHAIRMAN SOULES: Wait just a minute. We have got hands up. Alex.

PROFESSOR ALBRIGHT: You-all have been talking about pleadings for the hearing. There is no requirement that any additional pleadings be filed before the hearing. I would -- you know, you are going to have your privilege log or your description and then somebody is going to set a hearing on the objections, either the party that wants the documents produced or the party that wants to protect the documents.

CHAIRMAN SOULES: There is not an objection.

HONORABLE F. SCOTT MCCOWN: There is not an objection.

PROFESSOR ALBRIGHT: I mean, not an objection. There is either going to be a hearing to test the statement of privilege -- somebody is going to set a hearing to test the statement of privilege.

CHAIRMAN SOULES: And that statement is made in some pleading on file.

PROFESSOR ALBRIGHT: And that statement is made, one, in the withholding statement, and two, in the description. So I think that hearing is going to be based upon, one, what you stated in your withholding statement, and two, what you stated in your description, and then three, at the hearing you may have additional evidence and the in camera inspection of the document itself, but you-all were saying something about additional pleadings, and there is no requirement for additional pleadings where you have to set out your privilege again.

CHAIRMAN SOULES: Well, some of the draftsmen said that neither the withholding statement nor the description were

going to be the pleading on which a hearing would be based. So what is that pleading?

HONORABLE F. SCOTT MCCOWN: If I could address that --

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: Okay. I think where the confusion is, that it takes all three in the final analysis, that you make a withholding statement. If you don't make a withholding statement, you don't preserve a privilege, but you make a withholding statement. A withholding statement merely says what privilege you are asserting. You have to say what privilege you are asserting, but the failure to say more is not waiver at that point.

Then the other side wants to put you to a test, and they ask you for a description. At that point you have to provide a description, and the inadequacy of that description as it were isn't going to work a waiver. The purpose of the description is merely to allow the other side to make a decision about whether they want to set your privilege for hearing or whether they don't want to set your

privilege for hearing, and that's what I meant by every problem in every case will seek its own level.

The lawyer will take that description, will consider the lawyer that's giving it to him, will consider the case, and make a decision about whether it's -- he ought to set a hearing or he ought to just let it go. If he decides to set a hearing then at the hearing you are going to have to prove the privilege. You will still have the burden of proving the privilege. If you can't prove the privilege then it's not there, and you will be ordered to compel production.

If you do prove the privilege then it's privileged, and so I think where we are getting off track is this middle step of the description and how adequate or inadequate that has to be, and I think what we have done is just leave it broad, let the lawyers work it out because the ultimate test if you are not satisfied that you are passing by things you don't really need then the ultimate test is to set it for a hearing and make them prove the elements of the privilege, submit the

documents for in camera if you want the judge to look at them.

CHAIRMAN SOULES: Okay. Well, this language, "other parties to assess the applicability of the privilege," is what's in the Federal Rule 26. So I suppose if we use that, we will be developing a parallel --

PROFESSOR DORSANEO: Mr. Chairman?

CHAIRMAN SOULES: -- body of law on that, but -- Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think each case should seek its own level in the process that you described, but in our precedent now I perceive that there is a split of authority with respect to this question that we are talking about. It comes up in the context of how specific you need to be in making objections now.

I think Green vs. Lerner says you don't need to identify the documents, the individual documents, but I think that Hyundai case out of Dallas says the opposite. So expecting the courts of appeals to, you know, look to cases they have decided already, we might have

different consequences for trial court behavior on the basis of geography that would not advance the ball any and would not achieve your objective.

I think with respect to this description of withheld materials that we might do well to follow the federal rule in its entirety. It has the "assess the applicability of the privilege" language, but it also has a bit more information about what you would need to say in or what you will be required to say and permitted to say in your description, and it captures, I think, what the committee is saying the right approach should be explicitly while at the same time making us parallel the other system, and I think there is some virtue in that as well.

HONORABLE F. SCOTT MCCOWN: But let me tell you what -- the only disadvantage I see to that, Bill, is that the minute you require this descriptive statement to meet any standards, all right, and if the penalty for failing to meet the standard is a waiver of the privilege --

PROFESSOR DORSANEO: I don't

mean that.

HONORABLE F. SCOTT MCCOWN: Okay. Well, then we will need to say that that's not the penalty because we don't want to create a step here where the penalty is waiver so you have to be very careful about it, and that means very costly.

CHAIRMAN SOULES: What is the penalty for the sharp practitioners who use this to hide information because they don't have to describe it very well, and I can describe it in a way that you probably won't recognize that you have got a valid challenge. What's the penalty for that, judge?

HONORABLE F. SCOTT MCCOWN: If I am getting a crumby description from you or a sharp description from you and I have perhaps gotten it before, I set you for a hearing, make you prove it.

CHAIRMAN SOULES: And there is no waiver? Is that the intent?

HONORABLE F. SCOTT MCCOWN: If you can prove it at the hearing then I never should have gotten it to begin with. If you can't prove it at the hearing, you don't have

a privilege.

CHAIRMAN SOULES: Isn't this going to encourage people to hide documents?

MR. LATTING: But you can't have it both ways. If you don't allow some of that danger to exist then you go back to the old cure, which is worse, which is having to object to everything that comes in so that you don't miss it.

CHAIRMAN SOULES: No. I am just talking about how much information has to be in the description before you are -- and if it has to be just rudimentary information then maybe that tends to cause some lawyers to hide information that ought to be discoverable. Okay. Go around the table one more time. Steve Susman.

MR. SUSMAN: Can I read the language of the federal rule? I think the point was we could adopt it. When you just say, "The withholding party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that without revealing information itself

privileged or protected will enable other parties to assess the applicability of the privilege or protection." Something like that. Could we adopt that, and at least we have got the same body of jurisprudence to deal on in an area that seems to be working? Would that satisfy you?

CHAIRMAN SOULES: David Beck.

MR. BECK: Just two comments. One, I guess we have a policy question here, and I have got a little bit of concern about whether or not the way this rule is presently framed we are going to spawn a whole new level of hearings over whether or not this is adequate or inadequate. You are going to have people that are playing games, which means you are going to have a motion to compel the filing of a more adequate description.

So it seems to me the policy question is whether or not we have got to leave it general like it currently exists or you want to add something to the effect that "such description shall include at least" and then have certain specifics in there to avoid people playing games. So I think that's a policy question.

CHAIRMAN SOULES: What do you propose on that?

MR. BECK: Well, I guess, you know, I have lived under the privileged document log for so long. I mean, we all know what that means. You have got to be very specific, but I guess what I am troubled by is the automobile accident case and those kind of cases that, you know, where you may have a couple of documents. So I guess I am really kind of torn, Luke, and I just want to raise the policy issue by figuring out whether or not we are better off going general or are we better off adding some specifics?

MR. JACKS: I would argue -- I agree with David a hundred percent, and I would argue for using the words "privilege log," and I think it does take care of itself because in the car wreck case, I mean, you may have -- you know, say you have got some psychiatric records. The plaintiff wants to claim a privilege. You can -- you have a very short privilege log, you know, "report of Dr. Smith dated such and such about psychiatric condition of the plaintiff,"

period.

You're a friend of the plaintiff's lawyer, and that's it, and in the document intensive case, the cases that Steve deals with or David deals with, they know what a privilege log looks like in their case, and I don't think you are creating needless cost. You don't have complex privilege logs in car wreck cases or the garden variety divorce cases.

CHAIRMAN SOULES: Joe Latting. I'm sorry. Were you through, Tommy? Finish up, please.

MR. JACKS: I am through. I mean, I think it's essential that this description be adequate to serve the purposes that you are concerned about, and that is that the other side isn't burying and hiding stuff. I think it has to be complete enough to let the requesting party know whether there is really privileged material there or whether Luke's distinction.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: If we want to try to save the people of Texas money we are going

to have to make it where we don't have to make many objections. I have got that many objections to make to every document request that's on our word processer because I'm afraid if I don't make them somebody might say I have waived them, and that just costs my clients money. I think if a lawyer is going to try to hide documents, he is going to do so anyway, and I don't think we can have this both ways, and so I hear your concern, and I am concerned about it, too, but I am for the committee version of this because I think we need to get away from making a bunch of prophylactic objections if we are trying to save people money and move discovery along.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I agree that giving a privilege log is a lot of work, David, I will admit. It's going to be the legal assistant welfare act of the 1990s because that's what we are going to be doing in cases that don't justify that, and I think that's where the real expense is, and Joe, I disagree. I'm not sure that it is in making

objections. I think it is in terms of doing those things, and I think few cases -- now, I will give you an example. A 50,000-dollar DTPA may be as document intensive as some larger litigation, and all the judges we have talked to, at least on the task force, said that's where they saw the abuse and problems, were those kinds of cases that didn't justify spending huge sums of money. That's why some of the awards of attorneys' fees ended up being so high. I would suggest we leave it more broad and, as Scott says, let every case find its level.

MR. LATTING: Well, we are not disagreeing, are we?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: David and I have disagreed on this since the task force, and I believe the privilege log is an important part of all of this, and I think that the trade off is we are spending an inordinate amount of time right now arguing at the court level. No one is engaging in the legitimate conferences under Rule 166(b)(7), and this process requires that. You have to identify what the

specific documents are that are privileged rather than just taking the lazy way out and saying, "This group of documents over here contains privileged documents."

First you have to look at it. They have to make the determination of what the privilege is and then go through a process, and I think that will weed out a lot of frivolous claims of privilege, and I think the recommendation to add the wording from the federal rule to make it more clear what should be in that log should be in there, and I think this complaint about those smaller cases that will froth the cost is unsupportable. I just don't think there are going to be that many documents in those types of cases that will increase the cost. I just don't see it.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I think it would be a mistake to require a privilege log automatically upon the request of a party. It seems to me that if you are going to require people to individually itemize documents, you should have to show the court that there is

enough of a basis to penetrate that claim, to warrant that expense, and then permit the court to make the decision, well, if you want this information bad enough you need to pay for the other side to do the privilege log you want, have them to do an estimate of the cost, and then if it's worth it to you, do it; but I have seen privilege logs be a way for lawyers to inflict expense on the other side, particularly when it's a big law firm against a sole practitioner, which is a situation I frequently find myself in, and I don't think that this is just a legal assistant's job.

If a legal assistant screws up on privilege, it's going to be malpractice for the lawyer, and I seriously think that most lawyers are going to do their own privilege logs. They might have a legal assistant go in and yellow tag everything in the file, but the lawyer is still going to have to look at every document, in my view, and we have really raised an automatic procedure here that's going to add a lot of cost to cases when we have the opportunity to get a safeguard from a judge, and say, "I don't think it's worth it"

or "If you think it's worth it then you can pay for it." We don't have that under this proposal.

CHAIRMAN SOULES: Let me try to get a consensus of those that feel that the more specific language of the federal rule should be in paragraph (c) and those who don't. Those who feel that the more specific language of the federal rule should be -- and I'm sorry, in (b), should be in paragraph (b), show by hands.

PROFESSOR ALBRIGHT: Can you read that language again, please?

MR. SUSMAN: I will read the language. Our rule would read, "The withholding party shall make the claim expressly and shall describe the nature of the documents, communications, or other things withheld in a manner that without revealing information itself privileged or protected will enable the other parties to assess the applicability of the privilege."

PROFESSOR DORSANEO: That's not much different.

CHAIRMAN SOULES: Okay. Those

who feel like that language should be in paragraph (b) show by hands.

HONORABLE F. SCOTT MCCOWN: Could I ask one question before we take that vote? Because when we say that language, when I hear that language, I don't envision a privilege log automatically. I have no problem with that language, but I am wondering if that language brings a body of federal case law that I wouldn't want.

CHAIRMAN SOULES: Well, it's since 1993. There is some body of case law out there, I imagine. Since December of '93.

MR. SUSMAN: Right.

CHAIRMAN SOULES: Okay. Those who favor putting that language into paragraph (b) show by hands. 15. Those opposed? Five. That carries by 15 to 5 that that language will be added into paragraph (b), and with that language those in favor of paragraph (b) show by hands. 22. Those opposed? One. Carries by a vote of 22 to 1.

MR. MEADOWS: Luke, I had a question.

CHAIRMAN SOULES: Robert

Meadows.

MR. MEADOWS: The question I have is -- while that language suits me just fine, what does it do to David's question? I mean, it seems to me that the language very much conveys the concept or the point that's in the rule already, which Judge Brister stated, which is that he reads that to say you have got to give this information that David wants. I am just curious as to what we have done by adopting this language.

MR. SUSMAN: My response is that we will never finish if we take votes and then ask what we have done.

MR. MEADOWS: No. I voted because I like -- I just want to know what we have accomplished.

MR. SUSMAN: I don't think we have really done more -- in my mind, you have done nothing more than we already had there, except you have now made it possible to use all federal cases as precedence for our state cases because it's now identical, but in my mind you have done nothing. That was our intent.

CHAIRMAN SOULES: There is more words and more definitions, but that's probably what the committee intended anyway on getting. Okay.

MR. SUSMAN: (C). (C) is, by the way, something that was voted on and approved on in January with no problem. I don't think we have changed this at all except to just clarify the language a little. Withheld information --

HONORABLE SCOTT BRISTER: Yeah. The way it's written -- it's written is either, No. 1, withheld information, or No. 2, materials created by trial counsel in preparation for the litigation which discovery is requesting.

MR. SUSMAN: Oh, I'm sorry. That's a mistake. We are dealing with materials created by trial counsel. Okay. That is the thing. So I guess we need to say material -- "information or materials," comma, "created by trial counsel" -- would a comma do it?

HONORABLE SCOTT BRISTER: What is "withheld information other than the

materials" -- what do you include in there other than materials created by trial counsel?

MR. SUSMAN: No, no. "Created by trial counsel" modifies the "withheld information and withheld materials."

CHAIRMAN SOULES: But the question, though, is what does "information" add?

HONORABLE SCOTT BRISTER: Why not drop the first three words?

CHAIRMAN SOULES: To "materials."

MR. SUSMAN: Perfect. You're right. "Withheld materials created by." Is that okay?

HONORABLE SCOTT BRISTER: Just "materials created by trial counsel." Just start at "materials."

CHAIRMAN SOULES: Any objection to that? Okay. We will start with "materials."

MR. SUSMAN: Perfect.

CHAIRMAN SOULES: Okay. So (c) now reads, "Materials created by trial counsel in preparation for litigation in which the

discovery is requested need not be included in a withholding statement or description except upon court order in appropriate circumstances."

MR. SUSMAN: Perfect.

HONORABLE SCOTT BRISTER: Let me make sure I understand it then. I have got a -- gone out, interviewed all the witnesses to the fire. I don't say anything about that in the objection. I don't say anything about that in the withholding statement, and I don't say anything about that in the description. How are you going to know you need to ask the court to order it to happen?

CHAIRMAN SOULES: I think this is talking about some probably very extraordinary circumstance where something pops up along the way through discovery that causes you to believe there has been some kind of an abuse here.

HONORABLE SCOTT BRISTER: Well, there is never any dispute about -- in my court about materials created by trial counsel other than the interviews of -- you know, in investigation has gone and asked people who

saw the fire, you know.

CHAIRMAN SOULES: But in other courts on the fifth floor they sometimes order that the notes of the lawyer be produced because it really only recites fact information.

HONORABLE SCOTT BRISTER: That's right.

CHAIRMAN SOULES: Okay. Let's go around the table. Bill Dorsaneo.

PROFESSOR DORSANEO: Yeah. I hate to be a --

CHAIRMAN SOULES: Oh, let's take a break here. Our court reporter needs a break. Let's take about ten minutes.

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

CHAIRMAN SOULES: Okay. Paragraph (c) on page 14. Discussion? Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I am not sure how broad or narrow this is meant to be, but if it's meant to be very broad then it should say "materials created by trial counsel

need not be included in a withholding statement," leaving out "in preparation for the litigation in which discovery is requested." If it's meant to be narrowed in some sense, I think it ought to be narrowed differently by saying, perhaps, "in preparation for trial," rather than "in preparation for the litigation in which discovery is requested."

That at least suggests, to me, that we are talking about a period of time before the litigation is filed, leaving in doubt the meaning of this paragraph after litigation has been filed. Now, if you want to just keep trial counsel -- and I am assuming we could identify at some point who that would be without a big discussion here -- protected, if trial counsel is going to be protected then just protect trial counsel without this limiting language that is ambiguous.

MR. SUSMAN: Let me just respond here. No. 1 is the issue here is not whether we are protecting or not protecting obviously. The issue here is whether it's got to be identified.

PROFESSOR DORSANEO: Right.

MR. SUSMAN: Okay. I mean, we have not dealt with the privilege issue. That's for another day. This is a little different. You would say, "materials created by trial counsel in preparation for trial"?

PROFESSOR DORSANEO: If it's going to be limited to the stuff he's doing for trial, do it that way. If it's not going to be limited then don't limit it because we would assume that somebody wouldn't be interested in, you know, if I'm trial counsel what I am preparing for my kid's baseball game.

CHAIRMAN SOULES: So, Bill, you're saying if we are going to limit this, what?

PROFESSOR DORSANEO: If you are going to limit it, use the standard language "in preparation for trial," and the trial preparation materials are thought of as being in two categories, materials prepared in anticipation of litigation or in preparation for trial. Now, anticipation of litigation is one period of time, and preparation for trial

is a later period of time, although it could look backwards.

I could start preparing something for trial, although it's not likely that I would, okay, for use at trial, you know, before the case was filed. Okay. But if we are talking about stuff that I am preparing for the trial process, my exhibits, my materials of that type, let's talk about that. If we are talking about everything, just talk about everything. Just say everything, materials prepared by trial counsel.

MR. SUSMAN: I think we were -- I mean, I'm not sure. If I get a case in the office and I am representing the defendant and when I get the complaint, the petition, I have an associate do a legal memorandum evaluating the strengths and weaknesses of the plaintiff's petition and suggesting kind of a discovery game plan, now, is that -- I mean, that will be something that certainly we don't want the lawyers to have to go to the trouble of identifying.

PROFESSOR DORSANEO: Right.

MR. SUSMAN: I'm worried about

saying that's just in preparation. If it's only the materials in preparation for trial that I can avoid listing, I'd want to include that. So I think use of the word "for trial" is too narrow.

MR. ORSINGER: What about mediation? Mediation is the same problem, preparation for mediation. Is that excluded from --

MR. SUSMAN: I don't know why the current language doesn't cover it. "Materials created by trial counsel," that's me or my firm, "in preparation for the litigation." That's part -- mediation is part of that process.

PROFESSOR DORSANEO: Why not use standard language that we are familiar with that's in Federal Rule 26(b) and has been? I'm about to check myself to make sure it hasn't been adjusted in any way by the 1993 amendments. It's meant to be broad. Just say, "in anticipation of litigation or in preparation for trial," and that is the trial preparation materials standard language, and that way we don't leave anything out that's

prepared by trial counsel.

MR. SUSMAN: Well, because -- go ahead, Alex.

CHAIRMAN SOULES: Alex.

PROFESSOR ALBRIGHT: The reason we drafted it the way it is because -- I think David Perry is not here today, but he was adamant that he did not want to say everything created by trial counsel in anticipation of the litigation doesn't have to be discussed because he felt like that was too broad. And what Trey Peacock just suggested, which may be the way to do it, is just draw a line that says "from the time the litigation -- the suit was filed," and then that way you say, okay, anything that we did before the suit was filed we do have to go through this statement stuff, but anything afterwards we don't.

I think it was intended to be somewhat limited, and then also I think we need to add -- when we deleted "withheld information or," I think we need to say "privileged materials created by trial counsel" because one decision we have made is that we want statements not to be privileged. So if we

have a statement that was taken by a lawyer after a suit was filed then it wouldn't have to be identified, or one, it's not privileged and has to be produced. I think we need to modify it by "privileged."

MR. SUSMAN: In other words, Alex, are you saying we could use as a bright line the time the suit was filed as being the -- that might be a good idea.

MR. MEADOWS: I'm opposed to that.

MR. JACKS: I am, too.

MR. MEADOWS: Yes. Absolutely opposed to that.

MR. SUSMAN: Why is that?

MR. MEADOWS: There is an explosion at Shell, and I get called that night to go investigate the accident. I know there is going to be litigation. I mean, I think that what I am doing for my client should be protected, and it should fall within the --

PROFESSOR ALBRIGHT: It's protected.

HONORABLE SCOTT BRISTER:

That's not privileged, just saying whether you have to go into the discussion about whether it's privileged or not.

MR. MEADOWS: I understand. And I think it's just as much the character of information as that which you do once the suit is filed. I mean, I don't -- I mean, I don't see any reason to treat that differently.

MR. SUSMAN: Well, but it seems to me that one of the problems if you treat it -- I don't know how you do it, but I guess you could, I mean, have a big law firm, Vinson & Elkins, that does corporate work for IBM. IBM gets sued for some kind of fraud or something like that, some kind of tort. You could say that, well, Vinson & Elkins is their trial counsel, although someone in a different department. It's not the same individual, and they did do this work long before any particular lawsuit was filed in preparation for a lawsuit. You get definitional problems, it seems to me there, that maybe we avoid by putting a clear line since we are not talking about what's withheld. We are just talking about what needs to be identified.

PROFESSOR ALBRIGHT: And there has to be -- there is going to be fights in some instances as to what is in anticipation of litigation, and you need to get the information on the table to have that fight.

MR. SUSMAN: And since we are in -- and let me add another reason to draw the bright line, I think. Since this identification needs to be done in 15 days, which is a very tight time frame, it seems to be very useful to have some category of documents you can tell your legal assistants, "You do not have to put these on a privilege log, period. If it occurred since May 1st, forget about them, and they are in our files, forget about them, but anything prior to May 1st, go ahead and list them on the privilege log."

It's an easy, bright line, mechanical test it seems to me that will reduce some expense without sacrificing -- not sacrificing any privileges. Wouldn't that work?

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I really disagree with the idea of making the filing date the

bright line. Everything I do for a client from the day they walk into the door is in preparation for their lawsuit as a plaintiff's attorney. I never met these people before, and I have interview notes with the client. I have legal memoranda that my law clerks have prepared or that I have prepared outlining the basis. I have drafts of the petition. I may have some rough drafts of -- I have got a whole file of stuff here, none of which any lawyer could ever make any colorable claim is discoverable, and you are telling me that I am going to have to go through and do a log. I may have corresponded with my client. You know, there is just all kind of stuff, and none of it even remotely discoverable.

MR. SUSMAN: I agree.

CHAIRMAN SOULES: Okay. Who's next? Alex Albright.

PROFESSOR ALBRIGHT: I will withdraw my suggestion then. I thought I was helping you-all. I thought you-all would be the ones who would be complaining about the --

MR. JACKS: I don't see that --

PROFESSOR ALBRIGHT: -- in

anticipation of litigation.

CHAIRMAN SOULES: Let Alex finish. What now?

PROFESSOR ALBRIGHT: I was trying to express what David Perry was talking about in the committee since he's not here, but if plaintiffs' lawyers aren't worried then I think let's leave it alone.

CHAIRMAN SOULES: Okay. Tommy Jacks, clarification.

MR. JACKS: I think the addition of the word "privileged" helps a lot because we do have case law which says there is a fairly narrow range of prelitigation work materials of an attorney that may under fairly rare circumstances become discoverable, essentially following the federal approach to the discovery of prelitigation investigation where there is no other way to get the information.

And we know that stuff is not privileged, and adding the word "privileged" -- and then I think adding the comment saying that we put the word "privileged" because we know there are some things that may be in a lawyer's file

that aren't privileged such as witness statements and such as certain prelitigation investigation materials, see such-and-such case, and there we have pretty well laid out what we are doing, but we are not making lawyers do needless work to list stuff in their files which everybody knows is not discoverable.

CHAIRMAN SOULES: Okay. The language, where would you put it?

MR. SUSMAN: "Privileged materials."

CHAIRMAN SOULES: Where?

MR. SUSMAN: Right at the beginning of the sentence. "Privileged materials created by trial counsel in preparation for the litigation in which the discovery is requested."

PROFESSOR DORSANEO: If you put "privileged," you don't need to say "in preparation for the litigation in which discovery is requested" because you have got -- "privileged" covers whatever it covers.

PROFESSOR ALBRIGHT: Right. Uh-huh.

PROFESSOR DORSANEO: And you don't need this separate, limiting or different language from whatever the privilege thing is.

HONORABLE SCOTT BRISTER: Then you just wiped out everything you are doing. You don't even disclose or withhold privileged information. You don't mention it.

PROFESSOR ALBRIGHT: Only that created by trial counsel.

CHAIRMAN SOULES: Well, the suggestion is, as I am understanding it, is that we say, "privileged materials created by trial counsel." So you would insert "privileged" and then strike "in preparation for the litigation in which the discovery is requested," and then pick up "need not be included" and so forth.

MR. GOLD: Luke, can I --

CHAIRMAN SOULES: That's what the suggestion is. Paul Gold.

MR. GOLD: Can I reply? Just so it's out there for the debate, I think that what we are really interested in protecting is the attorney's core work product. The problem

I have got with "created" and I think creates a loophole is if the attorney says, "Well, why don't we go out and get witness statements" or "Why don't we go out and do this?" The attorney is technically causing the creation of those things, and I don't want to get into that esoteric argument. I think all we are wanting to protect here are the attorney's mental impressions, the attorney's trial strategies, the attorney's memos. All of that has been defined as core work product, and I think if we said that in here, I think it would clarify things.

PROFESSOR DORSANEO: Well, what you are saying is we can't talk about this until we talk about the privilege section because that's going to say "core work product" or something, but it doesn't say anything now.

MR. GOLD: I just throw that out. I think that helps clarify a lot.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: We took out that "withheld information." The first part of the

rule seems to contemplate the withholdings of both materials and information, but now we are only going to exempt materials from that disclosure. Is that an intended, that we just exempt materials from that disclosure or information also?

MR. SUSMAN: No. I am not following -- the intent here, I mean, the intent of this whole provision is to create some category of documents which is so obviously privileged, okay, that you shouldn't even have to go to the trouble of having to list them unless the court orders you to do so. That was our intent, and what we thought about, which no one could have any question about, was what the lawyers who are actually trying the lawsuit do as part -- and Tommy's stuff is included in that, precomplaint investigation or prepetition investigation.

Bobby's stuff is included in that obviously, but it seems to me we wanted -- and this does not say what is privileged or not, at all. It doesn't even speak to that subject. It just says if you have got stuff in the trial lawyer's files that he created,

you don't have to go to the trouble of identifying that unless the court orders you to do so.

CHAIRMAN SOULES: David Beck.

MR. SUSMAN: Let me just add one thing to what I was saying.

I do not want to eliminate the notion that it has to be trial counsel or it has to be in preparation for litigation because if it's just privileged materials created by counsel in counsel's file, that's a big mistake because there is a lot of times privileged material created by counsel in counsel's file, even the same law firm that ends up trying the lawsuit, that clearly I want to know the existence of.

MR. JACKS: It needs to be tied to this case.

MR. SUSMAN: Yeah.

MR. JACKS: You're right.

MR. BECK: That really is the point I am raising here. I know there are good reasons why you limit this to trial counsel, but I want to make sure that we know exactly what we are doing. So the example you

gave, Steve, is if somebody else in your firm has done something and they are not trying the lawsuit then that has to be included, right?

MR. SUSMAN: Uh-huh.

MR. BECK: Does that include also another law firm who initially handled the lawsuit and was fired and then you're trying the lawsuit, so the information created by those lawyers who were initially retained to try the lawsuit could not be -- it would have to be included in the withholding statement or description? Does it include, for example, the work done by in-house counsel who are initially going to be -- who initially were going to try the lawsuit? Do you see what I am saying?

CHAIRMAN SOULES: In other words, is trial counsel just the lawyer that winds up being there at the time?

MR. BECK: Exactly. If you have two lawyers going over there trying the lawsuit, is this too limited? I mean, the thing I hate more than anything else is getting a very broad discovery request which arguably includes stuff in my file which I

have created, and I know there are good reasons for limiting this to trial counsel, but I want to make sure we know exactly what we are doing because we are excluding any law firm that had done work like this before trial counsel were actually retained. We are including the work done by in-house counsel which clearly were in preparation for the litigation for which discovery is requested, et cetera. Is that the intent here?

CHAIRMAN SOULES: Can we really resolve this until we get to -- is it Rule 4?

MR. ORSINGER: I think we can. Sure.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay. Sarah Duncan.

HONORABLE SARAH DUNCAN: Related to what David just said, does trial counsel include appellate counsel who's not going to try the case, never going to show up in the courtroom?

PROFESSOR DORSANEO: It should include everybody but house counsel. That's what I was interpreting it to mean. Trial

counsel is outside counsel.

MR. BECK: Bill, why is that? Because you have got a lot of companies whose lawyers try lawsuits, and what happens in my instance or what happens to me frequently is that you will have a case that is handled by in-house counsel and then maybe three months before trial they decide to farm it out to a private law firm. Well, under this rule as it's presently listed the files or materials created by that lawyer in preparation for litigation would have to be included in a withholding statement or a description given, and is that the intent of this rule?

MR. SUSMAN: The intent -- I mean, my intent would be to exempt in-house counsel who's going to prepare the lawsuit, the former counsel who was at one time trial cousel, anyone who is trial counsel, because to me those categories of documents are again -- if they are prepared by someone who is going to try the lawsuit in preparation for trying the lawsuit, they are so obviously privileged that you shouldn't make someone go to the trouble of listing them.

What I want to make sure that we don't cover here is the large law firm that is going to try the lawsuit but in the past time was advising the client on a business transaction. Someone in the firm drafted a contract that is very pertinent. You need to know that that contract is in the file. It may be privileged, but it may not be as something prepared by a lawyer.

MR. MEADOWS: But, Steve, that document would not have been prepared in preparation for the litigation, and I agree with David's concern, but I also was reading this to mean anyone who ever carried the status of trial counsel. I mean, that can be a mechanic thing.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Can I make a motion that we amend this so that (c) reads, "The privileged materials created by counsel in anticipation of litigation or preparation for trial in the litigation in which the discovery is requested need not be included in a withholding statement or description except

upon court order in appropriate circumstances."

MR. SUSMAN: Second.

CHAIRMAN SOULES: Okay. Motion seconded. Discussion?

PROFESSOR DORSANEO: Third.

MR. ORSINGER: Okay. I would strongly oppose that because the thing that I like about this and what I think is so essential about paragraph (c) is that it does not require anyone ever, unless the court determines in advance, to have to inventory their litigation file or to surrender it to the judge for in camera.

The minute you start forcing someone to go through their litigation file and segregate out what's privileged from what's not privileged, all of the sudden they are going to start to have to list all of the letters they received from the opposing lawyer, all of the ancillary information that they received while they were in the case, and here we are back to having to file a description about what's in our litigation file as to those things that are not privileged.

To me it's important to say that you can't be put to the automatic requirement of filing a description about your litigation file, that it's going to take a district judge to make you do that; and under your amendment, now all of the sudden we have got to go through and fair out what's privileged from what's not privileged in our litigation file.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: But in response, if we don't limit it to privileged materials, if we just say "materials created by trial counsel in anticipation of litigation," you don't have to identify. Then that means lawyers can take nonprivileged materials and stick them in their file, and they never have to identify them, or they can claim that they are privileged because they are in the litigation file, which they are not privileged.

MR. ORSINGER: No, no. It doesn't say that because it's in your file. It says that it was created by you in connection with the trial or preparation of

litigation, and to me that says you can't take a document that previously exists and cloak it just by putting it in your file.

MR. SUSMAN: Richard, you are still going to have to check your file because it never has said anything other than -- it's always been limited to something created by a lawyer. If you get something from your client, it's not created by you. If you get something from a third party, it's not created by you. You have got to identify that.

So we have always limited it to something created by the lawyer. So that's -- you are going to have to go through your file paper by paper, piece by piece, anyway and make sure that if there is anything in there that you didn't create, it gets up on the log. Now, if we want to make it broader, that's a policy issue, but I don't know how you do it without cloaking the things which clearly are not privileged and clearly should be identified.

MR. ORSINGER: Can I ask this, Steve? Do you have to log all of the letters you receive from your client as opposed to the ones you send to your client?

MR. SUSMAN: Yes.

MR. ORSINGER: If so, why? If the lawyer and client are corresponding about the case, why should we have to log what we receive, letters from our client?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: We could also broaden it to attorney-client communications concerning the litigation.

MR. ORSINGER: That will almost never be discoverable unless there is a fraud exception or a waiver, and I would support that a lot, and I would also support -- what about a memo from a legal assistant to a lawyer? It's not created by the lawyer, but it's created by a representative of the lawyer in connection with the lawsuit. So I would think you shouldn't have to list what your legal assistant did for you as opposed to what your associate attorney did for you. There shouldn't be a distinction in the way they are treated.

PROFESSOR ALBRIGHT: Created by counsel. Okay. So we would say, "Privileged

materials created by counsel in anticipation of litigation or preparation for trial." So that would be (1), little (1).

Little (2) would be attorney-client communications, and then both (1) and (2) would be modified by "in the litigation in which the discovery is requested."

MR. ORSINGER: Does that mean then that a legal assistant's work has to be logged?

MR. YELENOSKY: No. That's the counsel.

PROFESSOR ALBRIGHT: I think created by counsel -- but we could have in a comment that created by counsel means by counsel or at the direction of counsel.

MR. GOLD: I think there are cases that discuss the fact that legal assistants, associates, are all considered to be the attorney.

MR. ORSINGER: Well, you're cases are great, except that there is not a case that exists on this rule. This rule has never been adopted yet.

MR. GOLD: I understand, but I

am just talking about what a definition of attorney is.

CHAIRMAN SOULES: Well, those cases really derive from the attorney-client privilege rule, which talks about representatives and agents, and it extends --

MR. GOLD: And attorney work product decisions.

CHAIRMAN SOULES: It extends beyond the lawyer. Pardon me?

MR. GOLD: And attorney work product.

MR. YELENOSKY: Right. And if your law clerk writes a letter to your client, you consider that under the attorney-client privilege. You don't have to add in there attorney-law clerk privilege.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to focus on the word "created." Lawyers gather information that they don't create, but they gather it, and it seems to me -- and I'd like to hear someone make the case that that kind of information -- it may be research, it

may be that I have talked to a lawyer that has a similar case and have gotten a lot of things in my file. Why should I have to log that, if I'm a lawyer?

Can somebody make the case? In other words, I am having trouble visualizing what might be in a lawyer's file that he would have to log under this rule here. I mean, why shouldn't everything in my file I not have to log? If it's independently discoverable, of course, it's not sheltered by the fact that it was in my file.

PROFESSOR DORSANEO: I don't see how we can finish this until we do the privilege.

MR. SUSMAN: Well, I will respond to that. The reason we make you do the log is so you don't cheat. I mean, the reason to make the log is, you know, so it is possible that there were only one document, and it happened to be in your file, clearly not privileged. Okay.

HONORABLE DAVID PEEPLES: What's an example?

MR. SUSMAN: Huh?

HONORABLE DAVID PEEPLES: What's an example of something in my file that you couldn't otherwise get if you described it right in your request for production?

MR. SUSMAN: A draft of a contract that existed. There was only one copy of it, and it was handed to the lawyer at the beginning of the litigation and said, "Put this in your file." The client gives it to you and says, "This is something you might find very useful because this is a draft of the contract." You put it in your file. Now, it's not privileged. Okay.

HONORABLE DAVID PEEPLES: True.

MR. SUSMAN: But the point is I never -- as the opposing party I never even find out you have got it because you have not had to log your files. Everything in your file, you just haven't taken any effort to go through your files and log it.

HONORABLE DAVID PEEPLES: It seems to me that in order to get at that document we are giving up a lot by making it impossible for Lawyer Orsinger to -- you know, for making him have to log his file for that

thing, that's not worth it.

MR. ORSINGER: Steve, why can't you get that document by requesting all drafts of the contract and then if it's in your safe, if it's in your pocket, if it's in your home, you're going to have to disclose it, or if it's in your file? In other words, rather than saying someone might have taken a discoverable document and put it in their file, so let's make them inventory their entire file, just if a discoverable document is requested, you have got to give it to them, no matter where it is, whether it's in your file or not, but why do we have to inventory what's in our file if it's not discoverable or narrow it.

MR. SUSMAN: Because my position, Richard, is that that draft is privileged. Okay. You might think and there may be cases against me, but the draft was created by a lawyer at some time. I think the draft is privileged. Okay. As privileged as anything in my file. You actually disagree. Actually, there are some cases that disagree with me. Okay. But I haven't even disclosed

the existence of it because I have as the judge made the determination that it is a privileged document, as privileged as anything else I have, and therefore, I am not going to log it.

MR. ORSINGER: How can you justify not logging it unless it was created for the lawsuit, because this rule only applies to documents that were created for litigation? How do you justify not logging it just because you put it in your file?

MR. SUSMAN: Well, now I am going to have to look through my files and pick out things that are created for the lawsuit and things that aren't created for the lawsuit, and I mean under your rule.

MR. ORSINGER: Under this rule. Created by the trial counsel, yeah.

MR. SUSMAN: Well, I guess what I am trying to figure out, is there a way I can prevent -- I mean, we began with this thinking, is there some way we can alleviate, take off trial counsel the task of going through their file piece by piece of paper and logging things.

CHAIRMAN SOULES: You can't take off -- you can't take the burden off of trial counsel going through his file to determine whether or not he has got some evidence in his file that has to be disclosed. That has to be.

MR. ORSINGER: That's right. That's right.

CHAIRMAN SOULES: We all agree with that. So you are going to have to go through your file. Now, what else besides evidence?

MR. SUSMAN: Well, basically what you're saying is if there were a category of documents that's clearly privileged in my file, maybe I don't have to log it. I mean, it's not the rule we adopted, the stuff in the client's files. If it's clearly privileged, they still have to log it, right?

CHAIRMAN SOULES: Correct.

MR. SUSMAN: Because they aren't the judge and jury. They still have to log it.

CHAIRMAN SOULES: Right.

MR. SUSMAN: But for stuff in

my file you are going to say I am able to make the decision that's clearly privileged; therefore, I don't even have to log it. Now, maybe that's fair, but what are we going to put in that category of clearly privileged?

MR. ORSINGER: Only things that are created in connection with the lawsuit, not things that are part of the transaction originally. All we are trying to do is to keep lawyers from having to constantly put at issue their own litigation work, litigation-related work, because that's not going to be discoverable. That's being created after the fact in connection with representation.

MR. GOLD: Luke?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: There is two issues here, and one is definitely dependent on how we draft the privilege rule because what we are talking about is what attorneys consider to be work product, party communications, attorney-client privilege. I think what was originally contemplated when we started discussing this provision was the request for

an attorney's file. I mean, there are cases out there where people have requested the attorney's file, and we wanted to say, "Wait, when you request the file we shouldn't have to go through the file and tell what is privileged and what is not. That request should just be prima facie bad."

PROFESSOR ALBRIGHT: But that is an objection under (1).

MR. GOLD: Okay. Hold on. Hold on. I am just saying how this all developed, but the thing about it is we have to hash out -- and I am asking this to kind of move on here. We are going to have to hash out what attorney work product is because that's really what this discussion is about.

If you have got a contract that's been given to you and you put it in your file, is that attorney work product? Is that a party communication? Do you have any basis for protecting that? It doesn't go to the issue. Should I have to inventory my file? I just -- I think we are going to have to clear up the issue of privilege before we can meaningfully discuss this much more.

CHAIRMAN SOULES: Well, it seems to me like we are defining privilege. We are trying to define privilege in order to pass on paragraph (c), and that's what a lot of the discussion here has been.

MR. GOLD: But we have deferred that.

CHAIRMAN SOULES: And we have deferred really the definition. So we are trying to do here what we have deferred, and that was the reason I asked earlier whether or not we felt we could really deal with this subparagraph (c) before we conclude Rule 4.

HONORABLE SCOTT BRISTER: Let me make a suggestion, Luke.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Most of the discussion we have had about is of things that people would like to add to be covered in this. The, for instance, trial counsel. Now, you may want to add to that the associate, the former counsel, the in-house, but everybody agrees trial counsel, the actual person that tries the case, matters prepared

for trial should be excluded.

It seems to me like we could vote on the limited trial counsel with the understanding that may need to be expanded to include additional persons later, but if you just leave it completely out, you have added nothing. If you add something that everybody agrees on, you may want to add to it later.

CHAIRMAN SOULES: Response? Justice Duncan.

HONORABLE SARAH DUNCAN: This isn't a response, but it seems to me that there might be a basic disagreement not as to how much -- I mean, obviously there are going to be disagreements as to how much should be logged, but can we get a vote first on whether any of it should be logged? I mean, is that already decided?

CHAIRMAN SOULES: Restate your question again. I didn't quite follow it.

HONORABLE SARAH DUNCAN: From what I here Richard saying and Judge Peeples saying, nothing in the lawyer's file should be logged. Then there is another side of the debate, which is if anything is going to be

logged, how much should be logged? Has it already been decided that something is going to have to be logged? Has that already been decided?

CHAIRMAN SOULES: I don't know. I mean, we have had a lot of debate on that, but I don't know whether anything has been decided on it. Steve Yelenosky.

MR. YELENOSKY: Yeah. I just ran this by Alex. I have a specific suggestion here that doesn't require us to define the privilege and defers that to where it's defined and just says, "Materials in a counsel's file which are privileged as attorney work product or attorney-client communication need not be included" and goes on from there.

CHAIRMAN SOULES: As long as the attorney-client communication is limited to communications in this case.

MR. YELENOSKY: So it doesn't define those terms.

CHAIRMAN SOULES: I think what you are saying is right.

MR. YELENOSKY: It describes

the areas that we all agree need not be logged and then it leaves the definition of what's within those areas for the appropriate place in "definition of privilege." So it's materials in a counsel's file which are privileged, and then you look to the other rule to see which are privileged under attorney work product or attorney-client communication.

PROFESSOR ALBRIGHT: And add the qualification that it has to be in preparation for this litigation.

MR. YELENOSKY: Yeah. Uh-huh.

PROFESSOR DORSANEO: Why is that limitation in here since that's not a limitation in the law of privilege?

PROFESSOR ALBRIGHT: Because those are privileges that someone might want to fight at some other time.

PROFESSOR DORSANEO: Fine. All right. That makes sense. It's in there because it's -- not because it's part of the law of privilege but it's part of the law of testing privileges.

PROFESSOR ALBRIGHT: That's

part of the fight to --

MR. SUSMAN: What we were trying to do here --

CHAIRMAN SOULES: Wait a minute. Steve, go ahead and then I will get to this side over here.

MR. SUSMAN: There is privilege and nonprivilege, and I suspect that the line between them is going to be gray. It is gray, and that's what we are going to deal with when we go back to Rule 4, where you draw the line between privilege and nonprivilege. Now we are trying to find out whether there is a part on the privilege side that is so clearly away from the line and so dark and so indisputably privileged that we can all agree on that it's not even worth the time and trouble to have to describe it so the other side can evaluate is it close to that line or not.

That's why in my view this decision could be made before we draw the line because what we are trying to do here is say is there something -- I think it could be done before we draw the line. Is there something that is so far away from that line that just to

mention it establishes it's privileged, and there should be no burden of having to identify it?

PROFESSOR DORSANEO: I second Steve Yelenosky's motion.

MR. ORSINGER: With Alex's suggestion that it's limited to the lawsuit.

MR. BECK: Could I make a comment here?

CHAIRMAN SOULES: David Beck.

MR. BECK: I just wonder if we are coming at this the wrong way. To be honest about it, I don't want to have to go through my file and determine whether every piece of information in there is discoverable, nondiscoverable, privileged, not privileged, and so on. If the concern is that somehow a piece of evidence is in my file, the cases are legion that say you cannot make a document otherwise discoverable privileged or exempt from discovery simply by giving it to the lawyer.

Now, if that is our concern, that somehow there is going to be a shielding of evidence, relevant evidence, from discovery, why don't

we just simply say that evidence or information otherwise discoverable cannot be made exempt or privileged simply by putting it in the lawyer's file? Otherwise, every time you get one of these requests the burden it puts on trial counsel is to literally go through that file and see whether or not it is privileged or exempt in any way, and you start raising all kind of questions.

Supposing I discuss a case with a colleague outside my law firm, sends me a letter, says, "I found this case." I mean, is that discoverable? I didn't create it, but it's something that's certainly relevant to the case I am trying, and a friend of mine sends me a case and says, "This looks like it may answer your question." I don't want to have to make that analysis, and it seems to me we may be coming at it the wrong way.

MR. GOLD: I would suggest --

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: -- regardless of whether -- I agree with what David is saying. Regardless of whether we leave the rule as is, (c) as is, or modify it, I think a sentence

should be added to it stating exactly what David has just said, saying that materials that are otherwise not privileged do not become privileged by putting them in an attorney's file, and I think that would satisfy this concern that both Judge Peeples and I have raised about this ambiguity about the term "created." Because I think if you leave "created" in there without any further direction, attorneys are going to disagree about what creation means, whether they gathered it, whether they requested someone else to generate it, or whatever. So I would move to put a sentence in (c) stating what David Beck has recommended.

MR. YELENOSKY: My language didn't have "created" in it, if that makes any difference.

MR. GOLD: Well, then I think the motion for yours was on the table first. So I don't know.

CHAIRMAN SOULES: Let me hear that again, Steve, your language.

MR. YELENOSKY: My language? Was -- you're going to have to help me, Alex,

where you added your part.

"Materials in a counsel's file which are privileged as attorney work product or attorney-client communication" and then you -- where did you want to put your clause, Alex?

PROFESSOR ALBRIGHT: "In preparation" -- "and prepared in anticipation of litigation or preparation for trial in the litigation in which the discovery is requested."

MR. YELENOSKY: I'd have to see that.

PROFESSOR ALBRIGHT: Yeah. We are going to have to look at it altogether.

MR. YELENOSKY: Yeah. Maybe we need to write it out.

CHAIRMAN SOULES: Judge Peeples.

MR. GOLD: Is there any way we can put the overhead on and write it up here so everybody can see it?

HONORABLE SCOTT BRISTER: Why does -- "in the file" is not related to any privilege anywhere. I mean, "created by

counsel" I understand. I may agree or disagree with it, but created -- I mean, "in the file" is no help.

MR. YELENOSKY: Well, that's what everybody is talking about, and that's what the issue is. I have got a file, and I don't want to have to catalog it.

MR. KELTNER: I'm not sure that is the issue, and I think that's part of the problem.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I think it seems to me that where it is makes little difference if counsel has it.

MR. YELENOSKY: Possession.

MR. KELTNER: And it seems to me that we are headed the right way as long as we don't have "created," and I think that does what Steve Susman wanted the rule to do initially. So I think we are -- I worry about it being "in the file," too, because I can see someone reading that, and all of the sudden dumping.

MR. YELENOSKY: What about "in

possession"?

MR. KELTNER: "In possession" is fine.

MR. YELENOSKY: "Materials in a counsel's possession which are privileged as attorney work product or attorney-client communication," and then your clause will --

PROFESSOR ALBRIGHT: "Prepared in anticipation of litigation or preparation for trial."

MR. JACKS: That's even more extreme than the concern David was raising.

PROFESSOR ALBRIGHT: It may be that this needs to go back to the subcommittee for redrafting. I think we have some direction but not much.

CHAIRMAN SOULES: We are talking about -- a lot of these same materials are going to be in the client's file. Do they have to be inventoried?

MR. ORSINGER: The attorney-client communications all will be both places.

CHAIRMAN SOULES: That's right.

MR. KELTNER: That was my

point, Luke. There are going to be a whole lot of things that are duplicative. So in an attorney's possession may be not necessarily discoverable, but if they are someplace else they may be, but what David Beck's point was happens not infrequently. If I go to Atla or DRI and get some case analysis, I ought not to have to list that or put it in any kind of log. Those are the kinds of things I think we are talking about, and I think we are close to getting it, but I think we are also doing an awful lot of drafting around the table that maybe the subcommittee could do.

CHAIRMAN SOULES: Aren't we really talking about work product, litigation work product both anticipation and preparation, that kind of litigation work product, and we have got a safety valve down here. We already say the judge can order it. So that takes care of the kind of work product that a judge may penetrate, witness statements and that sort of thing. That's here in (3), and attorney-client communications in this case, in anticipation of and preparation for trial of this case.

Now, that is going to take us to Rule 4, but does that get at what we are trying to do with Rule 3, work product, attorney-client communications. Forget it's in the trial -- what file it's in. It's work product and attorney-client communications in anticipation of this litigation and in preparation for trial of this litigation.

MR. MEADOWS: So are you saying the work product would have a bigger umbrella than the particular litigation?

CHAIRMAN SOULES: No. Not in terms of not listing it.

MR. MEADOWS: Right. Okay. That's fine. Because I think we dealt with it in (4), but for this particular part of the rule both would be under the smaller umbrella of the case in litigation?

CHAIRMAN SOULES: That's right. Work product in this litigation and attorney-client communication in this litigation --

MR. MEADOWS: Right.

CHAIRMAN SOULES: -- doesn't have to be listed.

HONORABLE DAVID PEEPLES: Can I ask this?

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: The idea of work product, what -- okay. We know that things lawyers do, for example, witness statements and photographs, we have expressly said you have got to give those up, communications from the client and so forth, but if we grant what Paul Gold and David Beck said, which is otherwise discoverable information that finds its way into the lawyer's file does not become shielded from discovery, and there are a couple of items and maybe more that are always discoverable, statements and photographs, isn't everything else that I do as a lawyer to help get my case together, work product?

If I get something from DRI or Atla and I know I am facing Dr. Jones and I have got five depositions or five transcripts from where he testified before, do I have to list that in my log?

CHAIRMAN SOULES: Well, I think

that's work product.

HONORABLE DAVID PEEPLES: If we are sure what work product means, why don't we say, say so?

CHAIRMAN SOULES: Well, I think we are going to go back to this rule where we say work product when we do Rule 4, and we are going to say work product, Class A work product. Because Class B, which is a witness statement, can be discovered, and that's going to have to be disclosed as being in the lawyer's file.

Otherwise we don't know it's there, and we don't -- and we don't know whether we start trying to exhaust the predicates for getting that statement out of the lawyer's file. So we are going to have a Class A, Class B, Class C, kind of work product or some definition in Rule 4 on that. So then we are going to have to come back to this, and doctor it some, I guess, if we choose to do so.

MR. BECK: Luke, may I --

CHAIRMAN SOULES: Okay. David Beck.

MR. BECK: May I suggest that

the subcommittee consider an approach instead of saying what we don't want in the trial lawyer's file that we come at it the other way and say what we do want out of the trial lawyer's file. I just think it's an approach that may make this drafting a little bit easier.

CHAIRMAN SOULES: Well, but then you get to the trial lawyer's file and by saying --

MR. BECK: Well, I'm not -- I don't mean file physically.

HONORABLE F. SCOTT MCCOWN: Luke?

CHAIRMAN SOULES: Okay. Judge McCown.

HONORABLE F. SCOTT MCCOWN: I don't want to extend the problem of trying to draft around the table. I think it needs to go back to subcommittee, but I do have something I have written. Does this solve the problem?

"Anything protected from discovery under Rule 4 and created or assembled to prosecute or defend the litigation in which discovery is

requested need not be included in the withholding statement or description except upon court order in appropriate circumstances."

MR. SUSMAN: I like it. Second.

HONORABLE DAVID PEEPLES: Could we hear it again?

HONORABLE F. SCOTT MCCOWN: "Anything protected from discovery under Rule 4," we don't know what that is, but "Anything protected from discovery under Rule 4 and created or assembled to prosecute or defend the litigation in which discovery is requested need not be included in a withholding statement or description except upon court order in appropriate circumstances."

CHAIRMAN SOULES: I just think that's too broad. I think that's going to eat up what you have to disclose. I think that's pretty broad.

HONORABLE F. SCOTT MCCOWN: Well, what -- if you had attorney-client but it wasn't done to prosecute or defend the

litigation, it would have to be disclosed. I mean, this would catch your -- this would -- No. 1, it would have to be inside Rule 4, and No. 2, it would have to have been specifically created or assembled to prosecute or defend the litigation.

MR. SUSMAN: The only other thing you might want to add to that is whether you want to limit it to the trial lawyer's file. I mean, this all began by us talking about our files.

HONORABLE F. SCOTT MCCOWN: Well, I think the problem with that, Steve, is that the concept of trial lawyer files -- I mean, what the house counsel has is part of the trial lawyer's files, you know, in a real sense. If you try to limit it to what -- if you try to limit it to what's only physically actually in the trial lawyer's files then all of these law firms are just going to be buying a lot of storage space because everybody is going to get it in the trial lawyer's file.

MR. SUSMAN: I suggest we take this back to the committee and move on since we are coming back here.

MR. JACKS: I agree.

MR. SUSMAN: We have Scott's language, and we can move on, or we will never go anywhere. (3).

CHAIRMAN SOULES: Bill Dorsaneo had his hand up. One last thing maybe.

PROFESSOR DORSANEO: After listening to all of this discussion and trying to sort this out, I gather for the record at least that if the claim is made that the information requested is not privileged but that it's irrelevant from the discovery sense that we don't have any withholding statement. We don't have any description of the materials withheld under those circumstances. All we have is an objection which satisfies the requirement of the objection. Is that right?

HONORABLE F. SCOTT MCCOWN: Right. Just like now. And you have got to set it for hearing, and if it's overruled, you produce, and if it's not, you don't, and you can rely on it until it's overruled.

CHAIRMAN SOULES: Okay. Three. This (c) will go back to the committee, and you have got an hour and a half transcript

here or so and no consensus that any language is the right language. So you-all understand that's where it stands.

MR. JACKS: Yeah. Back where we started.

MR. SUSMAN: (3).

CHAIRMAN SOULES: Okay.

MR. SUSMAN: This is not new. You have seen it before.

HONORABLE SCOTT BRISTER: How does it work that you produce before the hearing live testimony?

PROFESSOR ALBRIGHT: At or before.

CHAIRMAN SOULES: At or before.

HONORABLE SCOTT BRISTER: Well, but affidavits --

HONORABLE F. SCOTT MCCOWN: You have to file your affidavit seven days before. At first we thought about just doing this on affidavits but then a lot of people obviously are going to want the right to cross-examine and call witnesses in opposition.

HONORABLE SCOTT BRISTER: Why do you have "or before"?

PROFESSOR ALBRIGHT: I think that should be --

HONORABLE SCOTT BRISTER: "At the hearing the party seeking to avoid discovery shall produce" --

MR. SUSMAN: I see. You want to eliminate the first three words, beginning "the party seeking to avoid."

CHAIRMAN SOULES: I think what Judge Brister is saying is by oral testimony at the hearing or by affidavits filed at least seven days before the hearing you have to prove the privilege.

HONORABLE SCOTT BRISTER: Prove it up at the hearing. That's what you do at the hearing.

PROFESSOR ALBRIGHT: If we delete the first clause, begin, "The party seeking to avoid discovery shall produce any evidence necessary to support the objection or withholding statement either by affidavit served upon opposing parties at least seven days before the trial or live testimony at the hearing."

MR. SUSMAN: Perfect.

CHAIRMAN SOULES: That will work.

MR. KELTNER: Are we eliminating deposition admissions?

MR. ORSINGER: No. It should just say "testimony." It shouldn't say "live testimony."

MR. KELTNER: Because I don't think we intend to do that.

HONORABLE F. SCOTT MCCOWN: Yeah. Just "testimony," scratch "live."

PROFESSOR ALBRIGHT: Another question is back to this leading issue here. We are talking about evidence necessary to support the objection or withholding statement. David Beck and I were talking at the break, and David Keltner, about requiring a motion specifying what part of the description or objection is being contested. So at some point in time having to file a motion to focus the dispute that's going to be presented at the hearing. Okay. You have given me your description, and I accept part of it, but there are five documents that I want to fight over. Then should I file a

motion to compel and specify in that motion the five documents that I want to fight over?

HONORABLE F. SCOTT MCCOWN: No. Well, I don't think so. I think you do it -- right now a lot of lawyers conceptually think you either have to have a protective order or a motion to compel, but in fact, you can merely have a notice setting objections, and I think that's what this envisions, that your notice would have to say what you're setting for hearing, which of their objections you're setting or which of their withholding statements. So you only set for hearing what you want heard.

CHAIRMAN SOULES: No. It's either an objection or a description that you are setting.

MR. KELTNER: Yeah.

CHAIRMAN SOULES: That's the pleading.

MR. KELTNER: And therein lies the problem, and we also in Harris County, if I am not mistaken, David, and certainly in Dallas County you are going to have a pleading to get to the court to be heard. I think we

ought to engraft that here. I think that's important to have, and it's not a difficult step. It requires the party seeking the discovery to say what I want, which is what we have been leading up to to this step.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. To pick up on what's just been said, for instance, I have got this very situation in Houston right now. I have filed a notice of hearing on the defendant's objections. I wrote the defendant. I told him all the objections that I wanted to challenge. They, of course, ignored it. So I have put all the objections into issue, and so we are going to go down to court on Monday, and everything is an issue.

The responding party should be required, the person making the objections, to file some document with the court framing what the issue is, saying why they are making these objections or whatever. Otherwise you do all of this in front of the court, and that's what the waste of time is. I think there needs to be some sort of motion response of you can attach these documents, the withholding

documents, privilege log, whatever, but I think there has to be some sort of document that frames the issue for the court. Otherwise, you waste the court's time. Because right now all I do is put everything in issue.

MR. SUSMAN: If I might address this, this may be a good idea of something we have not addressed at all. The word "motion to compel" does not appear in our rules.

MR. KELTNER: Right.

MR. SUSMAN: And maybe -- it goes beyond just privilege. It goes to other objections, too. Maybe we need to specify a procedure or write a rule for a procedure dealing with how you handle motions to get around -- you know, to compel. What needs to be done? This would be just like any other objection, that you would test any other objection. Do you-all want us to write something like that?

CHAIRMAN SOULES: Well, some document on file with the court has to be the predicate to the hearing.

MR. KELTNER: Right.

CHAIRMAN SOULES: And I have been told that it's not the withholding statement, and I think that has to be because that's so general it probably doesn't help anybody as a predicate to a hearing, and I have been told it's not a description. That's not it because we don't want to make that so specific that it would under the current practice serve as a legitimate predicate for the hearing. So at this point if all of that's true then we don't yet have a filing with court, whatever you want to call it, that predicates the hearing, and it seems to me like our practice is such that some filing with the court is going to have to serve as a predicate for the hearing. Justice Duncan.

HONORABLE SARAH DUNCAN: I think that's right, but I think the responding party should also be required to go through item by item and say either, "I admit that it's privileged, and I will produce it" or "I deny it's privileged and I want -- and here is why I am fighting it," maybe not in great detail, but it does seem like -- or at least the hearings that I go to on these kinds of

things, most of it can be done by agreement if people will just pay attention, but they don't pay attention until they get in the hearing and then the judge sits there while the parties talk at one another, and I think the judge frequently starts feeling fairly superfluous.

HONORABLE SCOTT BRISTER: Angry.

HONORABLE SARAH DUNCAN: Angry. Angry. That's much better.

CHAIRMAN SOULES: Well, I guess we are past this point, but you know, which is going to make more work, causing the description to have to be sufficient to predicate a hearing or taking that a step further and the challenge has to become the predicate for the hearing and so -- okay. Judge Brister, you had your hand up and then I will get Tommy Jacks.

HONORABLE SCOTT BRISTER: It seems like the description is pretty specific and as well as fairly broad, and so it seems to me it ought to be the person -- like in line with McKinney the person that wants the

stuff requests the hearing, says which parts, which items listed on the description.

"Attached is the description that I got from the other side. I want a hearing to compel on Items 1, 5, 10, and 20." That would be a pretty easy motion to file.

CHAIRMAN SOULES: Tommy, did you have a comment on this?

MR. JACKS: Well, I guess I just wonder if we aren't getting really too hung up with the elaborate pleadings practice in connection with discovery. I mean, as a practical matter, what harm is it if I have got your objections and then, you know, your description and it's adequate so that I can tell pretty much what you're holding onto and why. Why can't I just say, "Okay. I am going to set your objections. Let's go down to argue them." We get to the hearing and the judge says, "All right. Which ones, Jacks, are you complaining about?"

"Your Honor, Nos. 1, 5, 7, and 15."

"All right. Let's talk about those."

Why later again still another pleading stage at which I have to file a motion saying

these four items and then set that?

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I agree with Tommy a hundred percent. I mean, I think we should not build in formalities and extra steps here that are unnecessary. I think the courts are perfectly capable of when they get the parties before them deciding what the dispute really is about. It's all there, and I don't think we ought to require a motion.

CHAIRMAN SOULES: You think what now?

MR. SUSMAN: I do not think we ought to require a motion.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: My comment is on a different aspect of this. We have gotten real focused on the written discovery, but this also applies to interrogatory answers, and I don't see why the same procedures shouldn't apply to privileges in depositions. I looked at the deposition rule, and there doesn't appear to be any hearing resolution process for the invocation of a privilege

during the deposition, and it seems to me that if you guys are going to look at this rule again, you ought to consider the fact that there may be a privilege as to an interrogatory answer or to a deposition question, and you may want to have this hearing procedure apply to that because under our current Rule 166(b), for example, the court might order you to answer in camera to a court reporter, submit the written answers to the judge, or something like that.

PROFESSOR ALBRIGHT: Well, this does apply to interrogatories.

MR. ORSINGER: Well, I don't see -- I mean, the language appears to me to talk only about the production of documents when you actually get down into the hearing.

PROFESSOR ALBRIGHT: Well, the rule applies to written discovery, which is defined to include interrogatories and requests for admissions.

MR. ORSINGER: I know, but when you actually get down to the hearing language I see a lot of words that relate to documents, and I don't see any words that relate to

testimony. Now, maybe I am missing it.

PROFESSOR ALBRIGHT: Well, it doesn't apply to depositions.

MR. ORSINGER: Well, let's not talk about depositions just yet. Let's assume that it's an interrogatory that I have objected violates the attorney-client privilege. I am not seeing language here in paragraph (3) that gives us some parameters on how we go about doing that. Like, for example, in 166(b) one of the options is for the court to order that testimony be given in camera to be reviewed by the court or something. I am just saying that this is our procedure for hearings to resolve privilege invocations, and let's be sure that we tell them how to do it not only as to documents but also as to answers to interrogatories.

PROFESSOR ALBRIGHT: Well, it says you can have in camera inspection or some of all the requested discovery. You could have an in camera inspection of how you would have to answer the interrogatory, if that's what you are saying.

MR. ORSINGER: All right. If

you don't see the need for the language, maybe it's just me. I would also say, though, that whatever procedure you describe for answering interrogatories that have been objected to, the same procedure would work for deposition questions that are objected to, and you ought to either merge them here or have a duplicate procedure tacked onto your deposition rule.

HONORABLE SCOTT BRISTER: If you change "inspection" to "review" does that make it clear that you are not talking about just looking at documents?

MR. YELENOSKY: Well, it's got "sealed wrapper" in there, which wouldn't apply. Somehow you have got to deal with "sealed wrapper."

HONORABLE SCOTT BRISTER: I have deposition answers filed under sealed wrapper.

MR. KELTNER: Yeah.

HONORABLE SCOTT BRISTER: Sure.

CHAIRMAN SOULES: Well, what about Judge Brister's suggestion?

HONORABLE SCOTT BRISTER: Change "inspection" to "review" so to make it

clear it's not just looking at documents. Paragraph (3).

CHAIRMAN SOULES: Richard, this is your concern. Does that address it?

HONORABLE SCOTT BRISTER: Paragraph (3), one, two, three, four, five, fifth line, end of the line.

MR. ORSINGER: Oh, Judge, let me ask you this: Is it apparent to you that by segregating you mean that you should go ahead and answer certain interrogatories under seal with the court? Does that follow without saying it?

HONORABLE SCOTT BRISTER: It is to me. Now, some judges don't like to order that, but I do order that procedure, and it's clear to me I can do that under this.

MR. ORSINGER: So that means if I have invoked a privilege in answer to an interrogatory then I have got to go ahead and do my answers that are subject to the privilege and submit them in camera in advance of the hearing, right?

HONORABLE SCOTT BRISTER: Well, on a deposition?

MR. ORSINGER: No. On an interrogatory.

MR. YELENOSKY: Interrogatory.

MR. ORSINGER: Or is it only after the hearing that I have to --

HONORABLE SCOTT BRISTER: After the hearing. At the hearing I determine I want to look at the answers to the interrogatories in camera. So then I order you withheld it and filed your description, and we have the hearing, and I determine I want to look at the answer to the interrogatories that you haven't answered.

MR. ORSINGER: I don't have to do that until you tell me to?

CHAIRMAN SOULES: Then you send him to prepare that answer and submit it to the court in camera.

HONORABLE SCOTT BRISTER: That's the way I read this.

CHAIRMAN SOULES: And then you would not need another hearing because you could always --

HONORABLE SCOTT BRISTER: I almost always want a second hearing because I

want the attorneys there to explain to me what I am looking at, but that would be the option of the judge.

MR. ORSINGER: Just for informational purposes, would you use the same procedure if it was a deposition question as opposed to an interrogatory?

HONORABLE SCOTT BRISTER: Yeah.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Unless you already have the answer under seal, in which event you could look at it at the same time.

HONORABLE SCOTT BRISTER: Right.

MR. GOLD: Luke?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I would like to go back to the motion to compel procedure for just a moment. I don't know if this is a problem that everyone else has, but I have been -- and Bill Dorsaneo can attest to it because he was the master in the case -- where we would go and have hearings on these discovery matters that would last all day, and I mean, I see this as a waste of time. People

go down to these objection hearings and for the first time put on testimony.

The other side then says, "I am unprepared to challenge this testimony or engage in cross-examination there in the court," all because the issue has not been properly framed before they get down there, and if we are really interested in cost savings, I think some attention should be given to the waste of time that takes place in having to troop down to the court and conduct these hearings on these objections because there isn't a framing of the issue before you get down there.

Now, I don't want to engage in an archaic pleading process, but by the same token, I may be mistaken, and I guess the judges can address that better than I could, but it seems like every hearing I go down to, it seems like a waste of my time on these issues. So I imagine it is multiplied many times by their experience.

PROFESSOR DORSANEO: Well, we had a lot of prophylactic objections, and it wasn't identified before the hearing which

objections were actually the objections in question. Now, you said that earlier, that you put all of them in controversy when you don't get this response. That struck me as interesting. Why wouldn't it be enough to say it's 1, 2, 3, 4, and 15?

MR. GOLD: It's the evidence in support of the objection. Someone says I am going to bring a witness down here to prove up my privilege. Well, you have no idea what the evidence is going to be before you get down there. So you have to cross-examine this witness. The judge is ticked because you are having to do that in the courtroom at that time.

HONORABLE F. SCOTT MCCOWN: But, Paul, when you are talking about privileges you have got -- the way most hearings go even if you have a motion to compel, I mean, you shove the motion to one side. Nobody looks at that. They lay down in front of you what their request is, what their interrogatory was, what their request for production was. That's what you look at and then you look at the objection, and if the

objection is a privilege then you ask for the evidence, and it's true that the party seeking the discovery has been at a disadvantage, but you will always be with a privilege because a lot of the evidence for privilege you will never see because it's in camera, and the judge goes back and thumbs through it and comes back out and announces a ruling, and you never know. And so what Paul is in essence saying is we should have more discovery about the discovery, and it just gets -- I don't think it's a practical problem. It just gets too expensive.

MR. GOLD: I don't know how you ever challenge a privilege, and this is going back to what Luke was saying. You know, what do you do? Do you just automatically have a motion that says, "I believe you have voluntarily waived the privilege" just to put it in issue every time, I mean, or how are you going to meaningfully challenge the privilege if what you are saying is all that one has to do is raise the privilege. You go back and look and see if they have raised it, and the other guy is just sitting there playing blind

nillo all the time. I do resent that process.

CHAIRMAN SOULES: Okay. Tommy Jacks.

MR. JACKS: Okay. It seems to me that we are stuck with that problem, and there are ways of dealing with it. I do sometimes take discovery -- if I know there are privileged documents that I think are important, and I know there is a witness who knows about them, I will before setting a hearing go depose that witness and probe more about the documents and make a record so that when I come into court -- either I can or I can't at that point, but I have made a record upon which the judge can rule.

I do have a concern, though, because Scott talked about the fact that the hearing the judge hears the arguments, goes and takes the documents, looks at them, comes back, and makes a ruling, and yet, when I read this section (3) it seems to say that the only way the judge gets to look at the documents is sometime after the hearing, and I wanted some clarification from the subcommittee about that because that seems to me to be appropriate in

some cases but inappropriate and inefficient in others. Can someone explain that to me?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, this language is taken from 166(b)(4) when we discussed this and tried to work on it the last time around, and what it's responsive to is the cases that initially suggested in very strong terms that the only way to establish the applicability of the privilege was to show everything in camera to the judge, and judges reported to us that they did not want people being told at CLE conferences, et cetera, that they are supposed to be delivered all of this material to evaluate when probably no one should look at most of it.

So the idea was to say, well, if you have a few documents, you could probably show those to the judge in camera. If you have a whole bunch of stuff then the judge has to decide, does he want to see or does she want to see some of it or all of it? And at the same time counsel sometimes decides that they don't want to show the judge any of it, and sometimes

that makes good sense because if the judge would see it, the judge would say, "This is contrary to the position you are taking testimonially from the witness stand."

And that's what takes up all the time, is if somebody doesn't want to show the documents to the judge, any of them, and they want to have somebody come in and testify about the documents and then be cross-examined without being required to disclose the contents of the documents, and that's just stupid, but probably our Supreme Court cases which don't let things be done in camera hearingwise contribute to that as much as anything else.

MR. SUSMAN: Could I just -- I mean, all of this is very interesting. All of these war stories are very interesting, and we keep going around the table getting comments from people like on our committee, Paul Gold, who's very concerned about a problem, and he's been at all of these meetings, and it hasn't even come up.

MR. GOLD: Yes, it has.

MR. SUSMAN: Well, we haven't done anything about it.

MR. GOLD: I know.

MR. SUSMAN: My point is at this point in time we need to begin, I think, to move forward. A, I am losing interest of everyone on the subcommittee very quickly because we have been working really, really hard, and I am just thinking about what the transcript is going to look like on this discussion. I don't even have any direction on where to go now on the hearing part.

PROFESSOR DORSANEO: It's fine.

MR. SUSMAN: I have got kind of a problem, okay, of what to do with it when we meet again. I mean, I do think and I think that the court, the court and Justice Hecht -- when do you-all want this done? When would you like to get it finished?

JUSTICE HECHT: I was going to save this until the end, but one thing that I have become convinced of after dealing with the task force for a long period of time and the study that went into these problems before that and then the hard work that this committee has done, and the subcommittee particularly, is that if we had the rest of

our lives to devote to this project we could easily spend all of that and still not have a product, and at some point I do think we need to bring it to closure, and I say that without meaning in any way to cut off the discussion that even in the meeting today and yesterday has been helpful in making this a better product.

I think everybody feels that way every time they come away from these discussions, but it does have to come to an end at some point, and we are getting pretty close to that point. I will visit with my colleagues on Monday, but I imagine -- and I will communicate this with the chair, but I imagine they will want to have your best effort by the end of the July meeting, and we have spent -- there has been a lot of work done on this. We won't be quite at the end of it even when we get the product. We will still have to be hammering on some problems, but I do think we need to get the committee's best judgment on the whole thing, all 61 pages, which is the remaining 47 pages after the 14 that we have done almost so far, by the end of the July

meeting.

MR. SUSMAN: And that being the case, let me suggest this as a way of proceeding, if I may, Mr. Chairman.

CHAIRMAN SOULES: Sure.

MR. SUSMAN: Our discovery subcommittee will have one more meeting on June 17th, a full-day meeting in Houston. It's a Saturday. Any of you who are interested in attending can attend because I will send notice to this entire committee of where we will be, but I urge you to take the remaining rules you have and read them carefully. What?

PROFESSOR ALBRIGHT: I can't come June 17th.

MR. SUSMAN: You can't come. You are almost essential. What is your --

PROFESSOR ALBRIGHT: My eight year old is going to be at camp for the first time in his life, and that is the day we pick him up at camp.

MR. SUSMAN: How about the next day?

PROFESSOR ALBRIGHT: Sunday I

can do it. I mean, that's Father's Day, but today is my husband's birthday, and he took all three boys to a baseball game. He can do it on Father's Day as well.

MR. JACKS: How about Friday the 16th?

HONORABLE F. SCOTT MCCOWN: Well, why not another weekend? I mean, those of us who are out of town can't come to Houston on Father's Day.

MR. SUSMAN: All right. Let me find out, and I will see what we can do meetingwise, but there will be a meeting. I will get you a notice out next week, before our July meeting, but what I ask you to do is take these rules and read them, read them real carefully and write us a letter, address a letter to me which I will share with the -- copy and send to the subcommittee as I get these letters or memos from you on corrections and things that need to be done to these rules so that we can really move through it.

And let me spend just a few minutes, if I may, Mr. Chairman, telling them what the rest

of these rules do so you can see it, and make your notes. Protective order, Rule 8, the whole concept was approved last time. There is nothing new here. We have simply moved section (2) of protective order to another place later on.

Rule 9, request for standard of disclosure, there has not been much discussion on this rule nor can I find any reference even in the transcript to a vote on this rule, but please look at Rule 9 and see whether we have covered it in a way that is satisfactory.

Rule 10 on expert witnesses, this was approved. This rule, again, how it works was approved at our prior meeting, the March meeting. Each subsection was approved almost unanimously, if not unanimously almost unanimously. But we have struggled with how to do it, and basically the one problem we had at our last meeting was some people said that there ought to be -- you ought to be able to get certain information about an expert before the drop-dead date for disclosing that information, which is now 75 days before the end of discovery period for those experts

on -- experts on issues on which you have the burden, which could be the plaintiff or the defendant, and 45 days before the end of the discovery period for those experts -- opposing experts. It could be either the plaintiff or the defendant.

You will remember a big discussion at our March meeting about someone wanted to discover things earlier. We have allowed you to discover things earlier like the name of the witness, the expert, and the subject matter of his testimony through the standard disclosure vehicle, if it's available, and so we have struggled with that. I think we have accomplished it in this Rule 10. The expert information other than the deposition is discovered through the standard disclosure request. Some parts of that request need only be complied with on the timetable that we suggested. Look at the timetable there and see if we have accomplished that.

Request for production, Rule 11 was approved at our January meeting, page 5424 of the transcript, except for section (5), electronic or magnetic data, and we have

rewritten that in an effort to clarify it. There was a wordsmithing problem, but I think we have tried to accomplish. Rule 5 -- section (5) on page 25 is the area.

The interrogatory rule, Rule 12, has no changes, and it was approved at our last meeting, and I am not going to worry with reading that. It should be taken off the table.

Request for admissions, 5427, we agreed to keep it the same. That's Rule 13, approved at page 5427 of the transcript the notion of keeping it the same as the current rule, and that's what he have with done.

Rule 14, depositions upon oral examination, nothing in here is new. It was all approved. There has been a relocation on page 33 of some information that appeared elsewhere. Okay. The protective order portion, subsection (7), was moved. The deposition by telephone was moved into this. Each were approved separately.

Rule 15, the way you conduct a deposition. This entire rule was approved except for subdivision (5) again. We had

problems with subdivision (5) on page 35, terminating the deposition. That was referred back to us primarily because people were concerned about the language that we have now eliminated to see if we could do better, and we have tried mainly by eliminating that language.

Rule 16, there is a lot in Rule 16 which is new. The concept of non-stenographic recording of a deposition or by any means at the whim of any party was approved, leaving to the other party the option of bringing a court reporter if they so desired. When we got into the mechanics of how it works, who swears the witness, where is the tape kept, what happens if you eventually have to have the tape transcribed, who does it, what kind of certificate must the transcriber make, what opportunity should a witness who has been videotaped and the videotape is then transcribed have to correct the transcript of the videotape.

These became problems for us, and we have tried -- and you can see that our Rule 16 and Rule 18 and Rule 19 and Rule 20 deal with

those problems, and they are all new. Look at these rules. One of the main features of the rules is that we allow you if you are going to use a -- if you are going to use a non-stenographically recorded deposition at trial or at hearing on summary judgment you have got to get the whole thing transcribed, but if you are going to just use it for a other type of hearing or motion, you can transcribe it selectively. Look at that.

Now, we wanted to make it fair but inexpensive, and that's basically what we have done in those rules, but there was a great deal of discussion, and we ran into many more mechanical problems than we dreamed. It will be very helpful if you read these rules particularly because these are the ones which we had to do in a hurry at the end, and we need some -- may need some draftsmen comments from you.

The deposition upon written questions, Rule 17, not many changes here except in the timetable which we found under the current rule to be an impossible timetable, which we have changed, and those changes appear over

on -- where do those changes on the timing appear? The dates were wrong. They are now in here.

On page 42 there is a notice by publication we have eliminated entirely because no one ever had any idea of why it was there or what it was there for, and so it's gone, but maybe there is a reason for putting it back, and someone can write us a letter about a war story. I mean, it's how you depose someone who is dead by notice of publication. As best I can figure it out, how you take a deposition in a case where the other party is dead and their lawyer is dead, too. Obviously someone thought that there was a need for such a discovery vehicle at some time in the distant past, and we have eliminated it.

If you look over and then you look at rule -- as I said, 18 and 19 and 20 are rules created -- the changes we had to make by allowing non-stenographic recording of depositions.

PROFESSOR DORSANEO: That's for notice to other people, not the deponent.

MR. SUSMAN: Okay. Well, I'm sure you will explain to us that subdivision at the appropriate time. Rule 21 is a new rule on page 50, and it's how you compel production of a document from a non-party. You don't want to take their deposition. You just want to get their documents and how the non-party responds.

Rule 22, physical and mental examinations, as you can see, very few changes there. Rule 23, motions for entry on property, not many changes. Some changes but not too many.

Rule 24 is a brand new rule. It's all new. We thought we needed such a rule to put in one place what subpoena is, who issues it, how it's served, and what a non-party does to seek protection from a subpoena.

And then we have, of course, Rule 63 that is the pleading amendment rule which sets the deadline of 60 days before the end of the discovery period, which we all thought was very important to adopt as part of this package to make the escalate or telescope discovery fair. The Rule 66 is -- I don't

know if this is new or not, but we have never really discussed it, and we probably ought to deal with it, too.

CHAIRMAN SOULES: 66?

MR. SUSMAN: 166. Maybe it's --

CHAIRMAN SOULES: We discussed that last time and decided to leave it alone.

MR. SUSMAN: Maybe it's left alone.

CHAIRMAN SOULES: I mean left alone as the current rule is, not the way this is drafted.

MR. SUSMAN: Is that right?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: Take it out. Then so what I would suggest is that why don't everyone shoot to get comments to me by June 9th? Okay. I mean, and really help us do this. We cannot come back here and get through all of these rules in a day and a half in July if we begin just kind of generally debating this. We have got to really -- if we have got a real serious drafting problem that you-all don't understand, that doesn't express

the intention, we need to deal with it in subcommittee before we come back here because it's going to be too late to come back here and then discover we have got a real big problem with some drafting thing.

So help us do that. We will pick a date. Everyone will get notice of it, at a convenient place hopefully, and anyone who can help us on it will be appreciated. When is our next meeting?

CHAIRMAN SOULES: The next meeting is Friday, July the 21st, and Saturday, July the 22nd, and it will be, I believe, in this room.

MS. DUDERSTADT: Yes.

CHAIRMAN SOULES: Yeah.

PROFESSOR DORSANEO: Steve, for every hour we spend here we save thousands and thousands for people out there.

MR. SUSMAN: I don't get frustrated at all as long as I sense that we get it to a point at these meetings where I can go back and read the transcript and figure out what to do. The problem we have is where the discussion in here begins drifting, and we

go back and read the transcript, and we scratch our heads because we have a big dispute in our subcommittee then about what was said in here, and we read it, and no one gets any direction. So that's the only problem I have got. So is that all?

CHAIRMAN SOULES: Well, I think so. We are going to have to come back -- if we are going to finish this on the 21st and 22nd, we are going to have to come back, come to this meeting with propositions for specific changes, not just philosophical issues. And I am certainly cognizant of the fact that whenever -- in many cases when the chair starts pushing it's counterproductive because people start resisting that and wanting to talk, and it doesn't work, but I feel like that we are going to have to -- if you have got something specific, come with it, propose a specific change or deletion or addition, and we will try to function a little bit more under Robert's Rules at that meeting.

Given the deadline, I think that's the only way we can finish it, unless somebody has got some other suggestion on how we could

possibly get through this in a day and a half. I want to accommodate everybody, but we can't debate the philosophy of these rules and get done with them, in my judgment. Does anybody disagree with that?

Okay. So we are going to conduct the next meeting if you have something specific to propose by a motion, we will debate it. If not, amusing sort of suggestions, we are just going to have to blow by that and get to specifics. Does everybody agree with that?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Anybody disagree with it?

Okay. Thank you very much.

MR. MEADOWS: Luke, I have a question.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: With this new focus on the discovery rules and the deadline we have got for July do you still want the sanctions subcommittee report by next meeting?

CHAIRMAN SOULES: Yes, I do.

MR. JACKS: Can you tell us the

date of the July meeting?

CHAIRMAN SOULES: July 21 and 22. 8:30 on the 21st. We will probably work 'til 6:30.

PROFESSOR ALBRIGHT: 8:00 o'clock on Friday?

CHAIRMAN SOULES: 8:30 on Friday. We will probably work 'til 6:30. We will start at 8:00 o'clock on Saturday, and we work 'til we get through, even if it's Sunday. We are not going to stop 'til the discovery work is done sometime between July 21st and July the 23rd. Okay.

(Whereupon the proceedings were adjourned.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on May 20, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,086.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 31st day of May, 1995.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas
Highway, Suite 110
Austin, Texas 78746
(512) 306-1003

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/96

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