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HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

JANUARY 20, 1995

(AFTERNOON SESSION)

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Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on
the 20th day of January, A.D. 1995, between
the hours of 1:00 o'clock p.m. and 5:35
o'clock p.m., at the Texas Law Center,
1414 Colorado, Room 101 and 102, Austin,
Texas 78701.

ORIGINAL

JANUARY 20, 1995 MEETING

MEMBERS PRESENT:

Luther H. Soules III
Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
David B. Jackson
Hon. Doris Lange
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

Also present:

Lee Parsley
Holly Duderstadt

MEMBERS ABSENT:

David J. Beck
Michael Gallagher
Anne Gardner
Mike Hatchell
Tommy Jacks
Franklin Jones, Jr.
Thomas Leatherbury
Harriett Miers
Paula Sweeney

EX OFFICIO MEMBERS ABSENT:

Kenneth Law
Doyle Curry
Thomas Riney

SUPREME COURT ADVISORY COMMITTEE
JANUARY 20, 1995
(AFTERNOON SESSION)

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1 MR. SUSMAN: We're back on the
2 record. To summarize what we just did, we
3 approved Rule 11 with the exception of
4 Subdivision 5, which has been sent back for
5 redrafting. And you will see, as someone
6 pointed out, you're going to get a copy of
7 these rules again, so this will not be the
8 last time you see them.

9 Rule 12, Interrogatories to Parties.
10 Again, the "during" should be changed in the
11 rule, Subdivision 1, to "at any time prior to
12 30 days before the end of the discovery
13 period" to make it consistent with the prior
14 rule. Interrogatories can be served with
15 citation, and they can be served 30 days until
16 the end of the discovery period.

17 The notion here, which you have heard
18 before and I think we have voted on before,
19 was 30 interrogatories not to exceed --
20 including discrete subparts. No limitation on
21 sets. These are concepts that have been
22 discussed before and have been approved.

23 But officially now, is there any comment
24 on 12(1)? All in favor of 12(1), raise your
25 right hand. All opposed. 12(1) passes.

1 MR. McMAINS: Steve?

2 MR. SUSMAN: Yes, sir.

3 MR. McMAINS: The deal there
4 where you say interrogatories will be limited
5 to 30, including discrete subparts, so we
6 abandon the 30 answers? We're back to
7 questions rather than answers?

8 MR. SUSMAN: Yes.

9 MR. McMAINS: Is that the
10 deal? Okay. I just wanted to know.

11 MS. McNAMARA: Steve, one
12 question. Somewhere else doesn't the court
13 have authority to vary this?

14 MR. SUSMAN: Yes. All of these
15 rules -- to remind everyone, every rule can
16 be varied by the court or by agreement of the
17 parties.

18 Rule 12(2). Nothing new here. Any
19 discussion of Rule 12(2)? Everyone in favor
20 of Rule 12(2) raise your hand. All opposed.
21 Rule 12(2) passes.

22 HONORABLE SCOTT BRISTER: One
23 quick question. Rule 12(2)(c), "The
24 provisions of Rule 14 shall not apply." What
25 is that in reference too?

1 MR. HERRING: That's the old
2 Rule 14. The attorney signing.

3 HONORABLE SCOTT BRISTER: Okay.

4 MR. SUSMAN: It's not the new
5 rule. That's the old rule. We'll probably
6 need to make that clear in the draft, that
7 it's not this new rule.

8 Okay. Subdivision 3, Scope of
9 Interrogatories. This has received a lot of
10 drafting attention. The concept has been
11 approved and discussed and approved over and
12 over again. I think we have captured the
13 essence of what you all instructed us to
14 capture. Any problem with the wording of
15 Subdivision 3? Any discussion of that?

16 All in favor of Subdivision 3, raise your
17 right hand. All opposed. It passes.

18 Subdivision 4 is nothing new. Any
19 discussion of Subdivision 4? All in favor of
20 Subdivision 4 raise your right hand. All
21 opposed. It passes.

22 Subdivision 5. I do not believe there's
23 anything new in this from existing law. It's
24 simply the option to produce records in lieu
25 of answering.

1 Any discussion of Subdivision 5? All in
2 favor of Subdivision 5 raise your right hand.
3 Subdivision 5 passes.

4 Rule 13. We were instructed by the
5 entire Committee -- and for the record,
6 Rule 12 has passed in its entirety. Rule 13.
7 We were instructed by this Committee to leave
8 in as an available discovery vehicle requests
9 for admissions. We not only did that, but
10 when we read the current Rule 169, we did not
11 think we could significantly or materially
12 improve upon it. Therefore, we will simply
13 copy Rule 169 in as Rule 13, unless anyone has
14 any objection.

15 Any discussion of that proposal? All in
16 favor, then, of Rule 13, which will be a
17 verbatim copy of Rule 169, raise your right
18 hands. All opposed. Rule 13, as I have
19 described it, passes. Rule 14.

20 MR. LATTING: Steve?

21 MR. SUSMAN: Yeah.

22 MR. LATTING: A question about
23 the numbers of these rules. Is it proposed
24 that these will actually be the numbers of the
25 rules?

1 MR. SUSMAN: It is really -- I
2 think that's a question we'll have to take up
3 with Justice Hecht. I mean, Lee -- I mean,
4 someone will tell us what you all want to do.
5 I mean, it was easier for us to renumber
6 them. It will probably be easier for the bar,
7 but whether they want to do that for us or not
8 I don't know.

9 Depositions Upon Oral Examination. The
10 one -- every time you read these rules, you
11 learn that -- I mean, we do, when we go back
12 and read them all the time -- you learn that
13 we've missed something that -- we've left out
14 something that's important.

15 I think what we have left out in Rule 1
16 is that depositions -- this sentence, which
17 should be added at the end of Rule 1: "Leave
18 of court, granted with or without notice, must
19 be obtained if a party seeks to take a
20 deposition prior to the appearance day of any
21 defendant." That comes right out of
22 Rule 200(1). We just inadvertently left it
23 out, and it needs to be put in so no defendant
24 gets deposed or there's no effort to depose a
25 defendant prior to --

1 PROFESSOR ALBRIGHT: Nobody
2 gets deposed.

3 MR. SUSMAN: Huh?

4 PROFESSOR ALBRIGHT: Nobody
5 gets deposed. There are no depositions
6 without --

7 MR. SUSMAN: Right. Right.

8 PROFESSOR ALBRIGHT: -- court
9 order.

10 MR. SUSMAN: No one gets
11 deposed, correct. It's the existing provision
12 that we have put into Rule 1.

13 Any problems with Rule 1 as I have
14 modified it? All in favor of Rule 1 as
15 modified.

16 MR. LATTING: Rule 1?

17 MR. SUSMAN: I mean
18 Subdivision 1 of Rule 14. Forgive me.

19 All in favor. All opposed. That
20 passes.

21 Subdivision 2, Notice and Subpoena. I do
22 not believe, correct me if I'm wrong, Alex,
23 that we did anything to the existing law
24 here. Did we?

25 HONORABLE C. A. GUITTARD:

1 Steve, then it has Subdivision (b), and it
2 seems to me that the second sentence there and
3 the third are repetitive. If they're not, I
4 don't understand it. I would suggest that --

5 MR. SUSMAN: Oh, it's just --
6 it's a typo. You're absolutely right.

7 HONORABLE C. A. GUITTARD: --
8 the second one should be stricken and the
9 third probably should be kept.

10 MR. SUSMAN: I think they're
11 identical.

12 HONORABLE C. A. GUITTARD: Not
13 quite, but --

14 MR. KELTNER: The leading
15 phrase isn't.

16 MR. SUSMAN: You want to strike
17 which one?

18 HONORABLE C. A. GUITTARD: The
19 first one.

20 MR. SUSMAN: "In that event"?

21 HONORABLE C. A. GUITTARD: "In
22 that event," yes.

23 MR. SUSMAN: Strike that one
24 and leave "In response"?

25 MR. LATTING: What page is this

1 on?

2 MR. SUSMAN: Page 29. Okay.
3 Any other comments? That's a good catch. Any
4 other comments on Subdivision 2? All in favor
5 of Subdivision 2 as recommended by the
6 subcommittee and amended -- yes, Scott.

7 HONORABLE F. SCOTT MCGOWN: No,
8 I was voting.

9 MR. SUSMAN: -- by Judge
10 Guittard, all in favor raise your right hand.

11 MR. LATTING: What is being
12 stricken precisely? The second --

13 MR. SUSMAN: The second full
14 sentence of Subdivision 2(b) is being
15 stricken.

16 MR. LATTING: "In the event"?

17 MR. SUSMAN: Right.
18 Subdivision 3, as I recall, there's no change
19 from the existing law.

20 HONORABLE F. SCOTT MCGOWN: (3)
21 should be read in conjunction with (4).

22 MR. SUSMAN: Read (3) in
23 conjunction with (4). We have made it clear
24 here that if you ask for the production of
25 documents, the same 30-day requirement of

1 Rule 11 of these rules applies, so no one can
2 use a notice of a deposition to shortcut the
3 document request as to a party.

4 Any other discussions of Subdivisions 3
5 and 4? All in favor of Subdivisions 3 and 4
6 raise your right hand. All opposed.

7 Subdivision 5 --

8 HONORABLE C. A. GUITTARD: It
9 passes. It passed.

10 MR. SUSMAN: It passes. Thank
11 you, Judge.

12 Subdivision 5, Time and Place. Alex,
13 correct me, same as existing law?

14 PROFESSOR DORSANEO: Can we
15 back up to Subdivision 4 for a second?

16 MR. SUSMAN: Only if you get a
17 three quarters vote. No, go ahead.

18 PROFESSOR DORSANEO: Well, this
19 is worded like our current rule is worded, but
20 there are a number of significant problems
21 with figuring out who a person subject to the
22 control of a party is. The companion sanction
23 rule in our rules talks about this same
24 matter. It was borrowed from the federal
25 rule, which itself is not all that well

1 drafted. But the concept of managing agent
2 and the identification of an officer and a
3 director as being within the category of
4 persons that an organizational deponent, you
5 know, would have to produce, you know, would
6 clarify things tremendously. So I'm saying
7 our current rule, when it talks about a
8 deponent who is a party or a person subject to
9 the control of a party, would be improved, as
10 recodified, if it added in "officer, director
11 or managing agent," which I think is general
12 law.

13 MR. SUSMAN: No, no. How about
14 an employee? How about the lowliest employee
15 who is certainly in my control?

16 HONORABLE F. SCOTT MCGOWN:
17 What's the question? I'm having trouble
18 hearing it. What's the --

19 MR. SUSMAN: The question, I
20 think, is under (4). When the deponent is a
21 party, or a person subject to the control of a
22 party, service of the notice upon the party's
23 attorney will have the same effect as a
24 subpoena served on the deponent.

25 PROFESSOR DORSANEO: Well, the

1 issue is, who are persons subject to the
2 control of a party. And I probably stated it
3 badly. The normal statement of who those
4 persons are includes, among others, managing
5 agents, officers and directors.

6 I had a case that involved Wal-Mart. The
7 argument was made that Sam Walton, may he rest
8 in peace, was not subject to the control of
9 Wal-Mart because he was in control of
10 Wal-Mart. I thought that was a pretty silly
11 argument, but the trial judge didn't.

12 MR. SUSMAN: Anne.

13 HON. ANNE TYRRELL COCHRAN: It
14 is so -- I mean, there are so many things. I
15 mean, just while you were talking, I was
16 sitting here thinking, well, there are, you
17 know, contractual agreements that give one
18 entity control over the employees of another
19 entity. I mean, it's so factually
20 determinative that there's no way you can
21 define it.

22 PROFESSOR DORSANEO: All I'm
23 saying is in normal jurisprudence, discovery
24 jurisprudence at the federal level and in our
25 own sanction rule right now, those other three

1 types of persons subject to control are named
2 specifically, and there is a lot of litigation
3 about this.

4 HON. ANNE TYRRELL COCHRAN: But
5 that's a lot different, though, than who can
6 you make come to the deposition because
7 they'll fire them if they don't show up. I
8 mean, for sanctions it's still very
9 different. And as far as who you have the
10 ability to make show up for a deposition, it's
11 too factually specific.

12 MR. SUSMAN: Paul Gold.

13 MR. GOLD: When I drafted the
14 proposed draft of this rule, I had used the
15 federal rule. This one that has now gotten in
16 has now changed it again. And I did it for
17 the reasons that Bill has talked about.
18 Number one, it tracked the federal cases; and
19 then, number two, what another issue is, in
20 the federal cases, is if someone is a manager,
21 director or executive, they are automatically
22 considered a representative. They're already
23 someone who can bind a corporation whether the
24 defendant designates them as a representative
25 or not. And that was something that I wanted

1 to point out.

2 MR. SUSMAN: Joe Latting.

3 MR. LATTING: I don't think we
4 clarify things or make things easier by
5 specifying some particular classes. And I
6 think we would be better off to leave it just
7 like it is.

8 MR. SUSMAN: Scott.

9 HONORABLE F. SCOTT McCOWN: I'm
10 going to echo Joe's comment, and just add to
11 it that the language suggests a high degree of
12 control. So if you put the added language in,
13 it tilts the rule toward the trial judge
14 finding that they're not within control. If
15 you leave it the way it is, it's a very
16 practical test. It's not going to matter,
17 because if there's a fight about it, the trial
18 judge is going to decide it, and so I think it
19 ought to be left the way it is.

20 MR. SUSMAN: Okay. Is there
21 any motion to reconsider our approval of
22 Section 4? Okay. Hearing none, we move on to
23 Section 5.

24 Section 5, I do not believe represents a
25 change in existing law. Does it, Alex?

1 PROFESSOR ALBRIGHT: No. 5, no.

2 MR. SUSMAN: I think you would
3 have put something if it was. Section 5, time
4 and place of a deposition. Any discussion?
5 All in favor of Section 5 raise your right
6 hand. All opposed. Section 5 passes.

7 And I am pleased to announce that Rule 14
8 has now been passed in its entirety.

9 Rule 15. Rule 15(1). Subdivision 1.
10 Nothing new here to my knowledge.

11 HONORABLE C. A. GUITTARD:
12 Steve, in order to make explicit what seems to
13 be implied here in the last line of
14 Subdivision 1, it doesn't say -- it might be
15 better to say, "the officer, who shall open
16 the envelope and propound the questions to the
17 witness," to make sure that he's the person
18 who has the authority to open the envelope.

19 MR. SUSMAN: Any problem with
20 that addition?

21 MR. LATTING: Where is it?

22 MR. SUSMAN: It's the last, the
23 next to the last line of Rule 15(1), "who
24 shall transmit them to the officer who shall
25 open the envelope and propound them."

1 HONORABLE C. A. GUITTARD: The
2 questions.

3 MR. SUSMAN: Propound the
4 questions.

5 HONORABLE C. A. GUITTARD: Yes.

6 MR. SUSMAN: Any problem with
7 that? Alex, did you get that?

8 PROFESSOR ALBRIGHT: I got it.

9 MR. SUSMAN: As thus modified,
10 all in favor of Subdivision 1 of this Rule 15.

11 MR. YELENOSKY: Steve, just one
12 minor point. What about non-stenographic? I
13 mean --

14 MR. SUSMAN: All opposed. It
15 passes.

16 Now I'll take your question.

17 MR. YELENOSKY: Okay. I may be
18 missing something, but you don't have an
19 officer at a non-stenographic deposition, so
20 who is responsible for --

21 MR. LATTING: Well, you have to
22 send an envelope anyway.

23 MR. SUSMAN: Well, it doesn't
24 have to be in an envelope.

25 MR. YELENOSKY: No. I mean,

1 who is the officer that's going to propound
2 the question?

3 MR. SUSMAN: Well, there has to
4 be someone there. Doesn't there, David?

5 MR. JACKSON: Well, it's
6 whoever you hire to go take it. It's usually
7 not -- it doesn't even have to be a CSR. They
8 usually don't -- a lot of times they don't
9 even take a stenograph machine. They take a
10 typewriter or a word processor with the
11 questions in it, fill in the answer, and then
12 have it printed out and have the person sign
13 it.

14 PROFESSOR DORSANE0: Not if
15 this is an oral deposition.

16 MR. YELENOSKY: Yeah. What if
17 it's an oral deposition?

18 MR. JACKSON: Okay.

19 PROFESSOR DORSANE0: Yeah, an
20 oral deposition.

21 MR. YELENOSKY: And it's a tape
22 recorded deposition, and it's another party
23 who wants to ask questions. Who do they give
24 the questions to?

25 PROFESSOR DORSANE0: There has

1 to be a CSR there. You can't do that.

2 MR. JACKSON: I'm sorry, I
3 missed that.

4 MR. YELENOSKY: Under these
5 rules, or under the current rules?

6 PROFESSOR DORSANEO: Under
7 current rules. Under the statute. There are
8 some minor limitations on that, but not very
9 many.

10 MR. SUSMAN: Shall we go on?

11 HONORABLE F. SCOTT MCGOWN:
12 Well, wait. Hasn't he raised a problem that
13 isn't solved here?

14 PROFESSOR ALBRIGHT: I think
15 what happened is that in our redrafting last
16 weekend we didn't -- I think it was
17 originally said that this person shall be
18 placed under oath by an officer who can do so,
19 and we deleted that. And so that's where you
20 first have an officer, and then it's there
21 again, so that makes it --

22 MR. SUSMAN: I mean, the real
23 question is, where you have a non-stenographic
24 deposition do you still need an officer to
25 administer an oath?

1 PROFESSOR ALBRIGHT: Well,
2 that's not where we are. We are in an oral
3 deposition where someone has chosen to send
4 written questions to that oral deposition, so
5 what I can do is send written questions in a
6 sealed envelope. The court reporter is then
7 authorized to open the envelope. I think what
8 Justice Guittard is saying is you can't open
9 the envelope. But the court reporter can open
10 the envelope, read the questions, and then the
11 person who is being orally deposed then
12 answers those written questions. Isn't that
13 correct?

14 MR. SUSMAN: Yes. And I
15 thought Steve's question was what happens if
16 you don't have a traditional court reporter
17 because it's not being recorded
18 stenographically; in fact, it is going to be
19 recorded with a tape recorder. As I
20 understand the rules being written, an officer
21 still has to administer the oath.

22 MR. YELENOSKY: Well, they're
23 saying that's the current rule. All I know is
24 the practice very often at Legal Aid was to do
25 a non-stenographic notice and walk in there

1 with a tape recorder. And what would happen
2 is a notary would come in and swear the
3 witness and leave.

4 HON. ANNE TYRRELL COCHRAN: Now
5 you have to bring the notary back in to open
6 up the envelope.

7 MR. YELENOSKY: Okay. Okay.

8 PROFESSOR DORSANEO: I don't
9 want to be an obstructionist, though, but is
10 this the first paragraph of 201 right now?

11 PROFESSOR ALBRIGHT: I can't
12 remember.

13 PROFESSOR DORSANEO: Because if
14 it is the first paragraph of 201, the first
15 sentence of that first paragraph says that the
16 certified shorthand reporter can be the
17 deposition officer. When 201 was amended
18 effective April 1, 1984, that was the first
19 place that it said that a CSR could administer
20 oaths. I think now the government code has
21 caught up with that, or else the Civil
22 Practice and Remedies Code. But I'm not
23 completely sure that it isn't 201 that still
24 carries the freight with respect to who can
25 administer oaths for an oral deposition. It

1 used to have to be a notary public, remember?
2 And then we changed it to certified shorthand
3 reporter, and it says that in 201 right now.
4 We put it in there.

5 MR. SUSMAN: All right. You
6 have flagged a problem, and we will check it.

7 PROFESSOR DORSANEO: Okay.

8 MR. SUSMAN: David, you're
9 responsible for checking that problem and
10 reporting to the subcommittee.

11 MR. JACKSON: In 25 years of
12 court reporting, I have never done this
13 process.

14 MR. SUSMAN: Well, check
15 Rule 201 or whatever it is.

16 We've passed now Subdivision 1.
17 Subdivision --

18 HONORABLE F. SCOTT MCGOWN:
19 Well, wait. Are we committing the
20 subcommittee to study and fix this problem
21 that Steve has brought up?

22 MR. SUSMAN: Yeah.

23 HONORABLE F. SCOTT MCGOWN:
24 Okay.

25 MR. SUSMAN: We'll look at it.

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HONORABLE F. SCOTT MCGOWN:

Okay.

MR. SUSMAN: Subdivision 2, Time Limitations. This has been something which has been controversial but, as you know, discussed and approved. So I don't want to revote this. These time limits were approved at our last meeting.

MR. MARKS: They were?

MR. SUSMAN: Yes, sir.

MR. MARKS: I don't remember that.

MR. SADBERRY: At the last meeting where they were discussed.

MR. SUSMAN: At the meeting where they were discussed. I will get that for you.

MR. MARKS: But even if they were, I think we ought to discuss it again. I move that we reopen the discussion.

MR. SUSMAN: Is there a second to the motion to reopen the discussion?

Hearing no second, that motion fails.

MR. MARKS: Thanks a lot.

MR. KELTNER: I'd second it,

1 except I've tried too many times on this one.

2 MR. SUSMAN: Yes, sir.

3 MR. GOLD: And just so it's
4 clear, I've talked with Alex about it, just to
5 clarify in the first sentence of (a), change
6 "their" to "the opposing party's" control,
7 because it's not clear.

8 MR. HERRING: Where?

9 MR. GOLD: It should say "shall
10 have 50 hours to examine and cross-examine
11 opposing parties and persons subject to the
12 opposing party's control," so it's clear who
13 "their" refers to.

14 MR. MEADOWS: Isn't that in
15 there, Paul?

16 MR. GOLD: "Their" is just
17 somewhat ambiguous. We can spell it out
18 better.

19 HONORABLE DAVID PEEPLES:
20 Steve?

21 MR. SUSMAN: Yes, sir.

22 HONORABLE DAVID PEEPLES:
23 What's the court supposed to do when
24 defendants who genuinely have some adversity
25 can't agree on who gets how much time? That's

1 not a hard question for me when they really
2 are aligned and they just seem like one in the
3 case. But sometimes defendants really have
4 some difficulties among themselves in addition
5 to being adverse to the plaintiffs. What am I
6 supposed to do? And they can't agree on who
7 gets how much time.

8 MR. SUSMAN: By the way, I just
9 wanted to interject so no one thinks I'm
10 taking liberty with the record, at our meeting
11 on July 15th, the vote was 15 to seven for a
12 time limit of 50 hours, and 15 to seven for
13 additional per deposition limits. That was
14 the vote.

15 Now, I think you may be right, we did not
16 discuss at that July meeting (b). I mean, I
17 think we, the committee, came back after the
18 meeting -- you wanted a per deposition limit;
19 there was some discussion. We may not have
20 all agreed on the three hours on the lay
21 witness. I don't remember without looking at
22 the actual transcript.

23 HONORABLE F. SCOTT MCGOWN:
24 Steve, in answer to the question that's been
25 posed, I think under this rule, if the

1 defendants cannot agree, you've got to keep in
2 mind that this rule can always be changed by
3 agreement. If they can't agree, then the
4 court -- they're going to have to go to court
5 and the court is going to have to hear them
6 all out and the court is going to have to set
7 the limits. This rule would be a kind of norm
8 against which the Court would look in setting
9 a limit. But you know, I think what most
10 judges would do is increase the number of
11 hours from 50 to something else and divide it
12 up between the defendants accordingly.

13 MR. SUSMAN: Any other comments
14 or questions?

15 MR. McMains: Steve, is this
16 rule designed to be the second tier --

17 MR. SUSMAN: Yes, sir.

18 MR. McMains: -- in the
19 discovery process?

20 MR. SUSMAN: Yes, sir.

21 MR. McMains: I'm just
22 wondering because it doesn't say that.

23 MR. SUSMAN: Oh, then I'm
24 sorry, Rusty. Forgive me. What we intend to
25 do, I think it's a drafting matter, is take 2a

1 and move it -- it is already, if you will
2 look, in Rule 1.

3 MR. McMAINS: Right.

4 MR. SUSMAN: If you look back,
5 it's in Rule 1. We just did not delete it
6 from this rule. Dave Perry wrote us a letter
7 after our meeting suggesting we should delete
8 it because it's now redundant, and he's right,
9 so I think it will be deleted here because it
10 appears, as you can see, at the top of Page 2.

11 MR. McMAINS: So it's in the
12 tier approach?

13 MR. SUSMAN: Right.

14 MR. McMAINS: That's fine.
15 That's why I was -- the problem I had was
16 that it was in the general deposition rule but
17 then it didn't relate back.

18 HONORABLE F. SCOTT MCGOWN:
19 That's just a drafting problem.

20 MR. SUSMAN: Time per
21 deposition --

22 MR. LOW: Steve?

23 MR. SUSMAN: Yes, sir.

24 MR. LOW: I think if you're
25 saying third-party defendants share the

1 defendants' 50 hours regarding issues common
2 to the defendants, you mean the third-party
3 defendant has common to the defendants,
4 because as you go down and pick it up,
5 third-party defendants have an additional
6 10 hours regarding issues on which they oppose
7 the defendants. So I don't think it's just
8 issues that they're in -- that the defendants
9 have in common, but third-party defendants
10 have in common with those defendants.

11 Well, if you don't get it, that's fine.
12 Do you know what I'm talking about? Maybe
13 someone else can --

14 MR. LATTING: Buddy, say that
15 again.

16 MR. LOW: Okay. The
17 defendants -- it says third-party defendants
18 share with defendants hours with regard to
19 issues common to defendants. Common to
20 third-party defendants and defendants. In
21 other words --

22 HONORABLE F. SCOTT McCOWN: It
23 should be common to them and the defendants.

24 MR. LOW: Yeah.

25 MR. SUSMAN: Alex, did you get

1 that? Common to them and defendants.

2 MR. LOW: And then it clarifies
3 it down there later.

4 MR. LATTING: Well, but that
5 will actually be included in Page 2, because
6 what we're talking about is redundant.

7 MR. SUSMAN: The same
8 language. We're going to just fix the
9 language and put it in one place.

10 MR. LATTING: Okay.

11 MR. SUSMAN: Now, can I focus
12 your attention briefly on time per
13 depositions. The concept here is one fact
14 witness, you can burn all 50 of your hours if
15 you want to. But after the one, you are
16 limited to three hours per fact witness and
17 six hours per expert. And third-party
18 defendants may examine -- well, the
19 limitations are in here.

20 Now, you know, Alex, there's a mistake
21 here that we did not catch. I don't think we
22 intended to allow one expert deposition to be
23 unlimited in time, which is -- it could be
24 that way now the way it's written, couldn't
25 it?

1 PROFESSOR ALBRIGHT: Well,
2 don't you think -- can't you choose? Does it
3 matter?

4 MR. SUSMAN: Huh?

5 PROFESSOR ALBRIGHT: Does it
6 matter?

7 MR. SUSMAN: Well, let's
8 discuss that. I think the intent here was to
9 have a fact witness be unlimited. Like if you
10 were deposing the president of the other side,
11 the named plaintiff, it would be -- you could
12 use as much time as you want with one
13 witness. The question is whether we want that
14 one unlimited deposition to be also put on the
15 other side's expert. Any feeling? We can
16 leave it.

17 PROFESSOR ALBRIGHT: I would
18 say I wouldn't care.

19 MR. LATTING: Let's leave it,
20 because --

21 PROFESSOR ALBRIGHT: Because
22 what if you --

23 MR. LATTING: -- he might be
24 the main man in the case.

25 PROFESSOR ALBRIGHT: -- want

1 to take the treating doctor. He may be the
2 treating doctor.

3 MR. SUSMAN: Okay. Any -- as
4 thus clarified, which we will leave, that's
5 fine, any problem with -- I mean, any further
6 discussion of (b)?

7 MR. HUNT: Do (b) and (c) stay
8 with 15(2)?

9 MR. SUSMAN: (B) and (c) stay
10 with 15(2), that's correct, because it applies
11 even to the depositions that are in Tier 1.
12 Yes.

13 All in favor, then, of Rule 15(2) in its
14 entirety raise your right hand.

15 MR. GOLD: Steve?

16 MR. SUSMAN: All in favor raise
17 your right hand. All opposed. That passes.

18 Now go ahead, Paul.

19 MR. MARKS: I opposed it.

20 CHAIRMAN SOULES: By what vote?

21 MR. GOLD: All I need to
22 clarify is --

23 CHAIRMAN SOULES: We didn't get
24 the vote recorded.

25 MR. SUSMAN: The vote has not

1 been recorded on any of this. Why do you want
2 the vote recorded on this one?

3 PROFESSOR ALBRIGHT: It's the
4 only one we had a dissent.

5 CHAIRMAN SOULES: You told me a
6 while ago that you were not recording votes
7 because if there were no votes against, it was
8 considered passed. Well, there were some
9 votes against that.

10 MR. SUSMAN: All right. Let's
11 record the votes on this.

12 MR. LATTING: Who is that guy
13 that just talked? We were moving along so
14 fast.

15 MR. SUSMAN: All in favor of
16 15(2), raise your right hand. Who is going to
17 count?

18 CHAIRMAN SOULES: 15.

19 MR. SUSMAN: All opposed raise
20 your right hand.

21 CHAIRMAN SOULES: Three. Three
22 opposed.

23 MR. SUSMAN: Okay.

24 MR. GOLD: Can I get a
25 clarification now?

1 MR. SUSMAN: Yes, sir.

2 MR. GOLD: For instance, if you
3 were to take a deposition of an individual who
4 at the time was not designated as an expert
5 witness and then they were subsequently
6 designated as an expert witness, I would
7 imagine you would get your three additional
8 hours with that individual or however many
9 hours you have left. Does that make sense?

10 MR. SUSMAN: I guess.

11 MR. GOLD: Okay.

12 MR. SUSMAN: No. 3.

13 MR. HUNT: Before we go on to
14 that, let me ask about (c). I know we've
15 passed this, and it's fine, but I thought we
16 were going to have something else to help the
17 court reporter charged with the time about how
18 some of that was to be done. All that's said
19 here is that breaks don't count.

20 MR. YELENOSKY: We also have
21 the non-stenographic issue there as well. So
22 just flag that, because there's no officer, or
23 there may not be.

24 MR. SUSMAN: Well, you have an
25 officer there.

1 PROFESSOR ALBRIGHT: You have
2 to have an officer.

3 MR. HERRING: To sit there
4 through the whole depo?

5 MR. MARKS: Yeah. How are they
6 going to certify the times?

7 MR. YELENOSKY: Yeah. I was
8 only there for five seconds.

9 MR. MARKS: Could I ask for a
10 clarification? This is intended to apply to
11 Tier 2 and Tier 3 cases?

12 MR. SUSMAN: No. It applies to
13 Tier 2 cases. Tier 3 cases, make your own
14 rules.

15 MR. MARKS: Okay.

16 MR. McMains: But if you didn't
17 specify otherwise, it would be applicable
18 during the discovery period, right?

19 MR. SUSMAN: Yes, sir. If you
20 can't get an agreement from the other side or
21 get a judge to order otherwise, you are stuck
22 with the limitations of Rule 15(2).

23 MR. MARKS: Even if you go to
24 Tier 3? Or if you go to Tier 3, everything is
25 off?

1 MR. SUSMAN: No, sir. You
2 can't go to Tier 3 unless it's by agreement
3 between both parties or by order of the court.
4 That's how you get to Tier 3.

5 HONORABLE F. SCOTT McCOWN:
6 Steve, I think the confusion is Tier 3 is
7 custom designed. So you've got Tier 2, and
8 Tier 3 is a customization, so anything that's
9 different from Tier 2 is, by definition,
10 Tier 3.

11 PROFESSOR ALBRIGHT: But --

12 MR. GOLD: I discussed this --
13 I think that the problem is, and I discussed
14 this with Alex just before the meeting and I
15 think we need to get to it when we get to the
16 discovery plan issue, is if the discovery plan
17 does not specifically address the deposition
18 time and the time per deposition --

19 MR. SUSMAN: -- these are the
20 rules.

21 MR. GOLD: -- does it default
22 to Tier 2?

23 MR. SUSMAN: Yes. These are
24 the rules.

25 MR. GOLD: Because there's

1 nothing in the discovery plan rule that
2 specifically says the court must structure a
3 discovery -- a deposition time schedule. And
4 that's what -- I think that's what the issue
5 is.

6 MR. SUSMAN: Well, we have an
7 interesting question raised about timekeeping,
8 and I guess there's a mechanical problem
9 there. I'm not exactly sure --

10 PROFESSOR ALBRIGHT: What's the
11 problem?

12 MR. SUSMAN: -- how we make it
13 better. Do you have any ideas?

14 MR. HUNT: Well, do we want to
15 give the court reporter more help? That's
16 just a comment. I felt like if when we get
17 the final draft, is there anything more we can
18 say that will help those who must be charged
19 with the duty of saying "you used this amount
20 of time" and "you used that amount of time"
21 and avoid petty fights over timing?

22 MR. SUSMAN: Dave, is it a
23 problem, much of a problem?

24 MR. JACKSON: No. I think it's
25 just going to be a matter of the court

1 reporter writing down when he starts and when
2 he stops and putting the time limit there, and
3 then you can do your own subtracting. But I
4 think the court reporter on his certificate
5 ought to put what his tally is on there
6 according to what's in the record.

7 And there are computer programs now that
8 a lot of reporters are going to that, if you
9 want to, you can have the minute and second
10 that you said every word, so you could have
11 that, too.

12 MR. SUSMAN: Alex.

13 PROFESSOR ALBRIGHT: Is that
14 your only problem?

15 MR. HUNT: I don't have a
16 problem with the concept; I'm wondering if we
17 want to say more to help the court reporters
18 later on. And if it's solved, we may not need
19 to.

20 PROFESSOR ALBRIGHT: Okay. I
21 just misunderstood the problem.

22 MR. SUSMAN: Now can we turn to
23 Subdivision 3, Conduct during the deposition.

24 HONORABLE C. A. GUITTARD:
25 Steve?

