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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 21, 1995

(AFTERNOON SESSION)

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Taken before William F. Wolfe,
Certified Court Reporter and Notary Public in
Travis County for the State of Texas, on the
21st day of July, A.D. 1995, between the hours
of 12:05 o'clock p.m. and 6:30 o'clock p.m.,
at the Texas Law Center, 1414 Colorado,
Room 104, Austin, Texas 78701.

ORIGINAL

JULY 21, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon William Cornelius
O.C. Hamilton
David B. Jackson
Doris Lange
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon Ann Tyrell Cochran
Prof. William Dorsaneo
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
Harriett E. Miers
Richard R. Orsinger
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 21, 1995 - AFTERNOON SESSION

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1 (MEETING RECONVENED 12:00 NOON.)

2 CHAIRMAN SOULES: Okay. We're
3 going to start on Rule 6. Thank you all for
4 coming back promptly. Rule 6.

5 MR. SUSMAN: Okay. The
6 Subcommittee, in its redrafting Rule 6, you
7 will note that there are no major changes in
8 the words at all. We changed the title to
9 make it clear to everyone that we are talking
10 about what happens to the trial because of the
11 failure to provide timely discovery. And that
12 is not the same as what happens to the lawyers
13 who fail to do it.

14 Now, we put a note to the Sanctions
15 Committee at the bottom that we recommend some
16 sanction be imposed on parties that fail to
17 provide discovery reasonably promptly, even if
18 provided more than 30 days before trial. But
19 we leave that for the Sanctions Committee, and
20 I think maybe they have addressed something
21 like that in what they sent us on July 18th.
22 Otherwise, the rule is pretty much the way it
23 is.

24 Scott Brister, he will articulate his
25 own -- I mean, the big picture of Scott's is

1 just, again, it seems to me, a reargument of
2 the minority's positions that have been
3 articulated on our approach. Our approach, as
4 you know, has been that it may take some time,
5 but ultimately courts have got to get involved
6 in the issue of whether the other side was
7 surprised or not. Was it serious surprise or
8 not serious surprise? That should be the
9 litmus test of whether the evidence should be
10 excluded or whether the trial should continue,
11 et cetera.

12 Now, Scott makes as eloquent an argument,
13 I think, as could be made on the other side of
14 the issue, that we ought to have bright lines
15 here, clear lines. And if you don't do
16 something by a certain time or certain things,
17 tough luck. And so I think that's where --
18 that's the big debate.

19 And just again, because this rule has
20 been approved so many times in this form, the
21 only question is how many converts Judge
22 Brister picked up by his appeal in his letter
23 to us that's attached under Tab 6. Now,
24 that's for his general appeal. He's got some
25 specifics that we will get to in a second. I

1 mean, that should be the first one. But
2 that's the first issue, and we still have
3 general agreement in the way we've been going.

4 CHAIRMAN SOULES: Okay. Judge
5 Brister.

6 HON. SCOTT A. BRISTER: Well, I
7 just, as a trial judge, even if -- this is
8 going to take a lot more time for me to do.
9 I've got to decide whether it's reasonably
10 prompt. We've got to have a hearing on that.
11 We've got to have a hearing on whether you're
12 going to be unprepared by this information,
13 and I mean, you know, that may mean certainly
14 calling opposing counsel to say why -- what
15 you -- how you're going to be spending your
16 time coming up to trial and why shouldn't you
17 be spending it on this new stuff that I just
18 gave you rather than what you want to spend it
19 on; expert testimony as to whether they should
20 be prepared, be able to get prepared on this
21 information fast enough; and then whether or
22 not it will affect the outcome of trial is
23 another issue in that satellite litigation.

24 And you know, just as I say there, it's
25 real easy -- it's not an easy decision to

1 decide if the option is continue or not.
2 Look, it was within 30 days and nobody -- it
3 wasn't because somebody died or something like
4 that; you just didn't do it. And then weigh
5 how much do we really need this information,
6 how important is it, versus how important is
7 this trial setting. And those are things that
8 are not an easy decision, but it don't take a
9 lot of testimony on it.

10 The other route, where there's no bright
11 line and we go into preparedness, trial
12 outcome and stuff, is, it seems to me, no
13 easier a decision, but it's also a very long
14 hearing.

15 HON. DAVID PEEPLES: Scott, why
16 does it need to be a long hearing? Why can't
17 you, plain vanilla, get to the nitty-gritty
18 and not let people call on all those
19 witnesses?

20 HON. SCOTT A. BRISTER: Well, I
21 certainly can do that, if you'll promise that
22 I won't get reversed. But until you say this
23 is totally discretionary and can never be
24 reversed, somebody is going to say, "Brister
25 didn't give me enough time to put on my record

1 about why this would affect the outcome of
2 trial why I couldn't get prepared. I was just
3 started into my list on how I planned to spend
4 my time in the next three weeks after that."
5 And then some silly appellate judge somewhere
6 may listen to it.

7 CHAIRMAN SOULES: Judge McCown.

8 HON. F. SCOTT McCOWN: Well, I
9 don't think it needs to be a long hearing in
10 most instances. In some cases the hearing
11 might be longer than in others, but the rule
12 was written to come up with a kinder and
13 gentler regime which then we hope will be less
14 expensive. I mean, this ties straight back
15 into cost; that any time you've got tough,
16 tough exclusionary rules, then you drive up
17 the cost of litigation because lawyers have to
18 be extraordinarily diligent because there is
19 such a severe penalty. And so we tried to
20 balance the level of diligence with -- you
21 know, a reasonable level of diligence without
22 being too severe and hit that balance.

23 The other thing I would point out is, I
24 don't think Judge Brister's alternative solves
25 the problem he's identified. I think it's the

1 same under either rule. His rule is unless
2 the court makes a finding of good cause.
3 Well, you know, good cause is what the party
4 pleads good cause is, and he's entitled to
5 offer his evidence and make his bill on
6 whatever he thinks good cause is. And the
7 judge makes the call, and the appellate court
8 then has to review it for discretion. I think
9 that's the same under this rule. This rule
10 just tries to give the judge a road map that
11 will produce a balanced decision and get away
12 from the harsh exclusion of evidence.

13 CHAIRMAN SOULES: I'm not a
14 convert to Judge Brister's view because I've
15 always been there. This rule, as written in
16 many, many courts and for a few lawyers,
17 totally eliminates automatic exclusion of
18 evidence. It just ain't going to happen. So
19 should we just erase it altogether? Because
20 for a big part of this state's jurisprudence
21 it's gone. Shouldn't everybody have the same
22 advantage?

23 HON. F. SCOTT McCOWN: Well,
24 the way I would respond is --

25 CHAIRMAN SOULES: I can tell

1 you that in a West Texas county for at least
2 one or two lawyers it will never happen no
3 matter how egregious the situation is. The
4 evidence is coming in and there's not going to
5 be a continuance, because this standard is so
6 light and it does not give the judge a command
7 to exclude the evidence. And I think the
8 current rule does.

9 So we have shrunk discovery, we've given
10 tremendous latitude for gamesmanship in this
11 limited discovery that we've now imposed on
12 the bar, and lightened up the abuse at trial
13 of evidence not disclosed during a constrained
14 amount of discovery. That's what we're
15 doing. Gamesmanship is going to be rampant.

16 HON. F. SCOTT McCOWN: Luke,
17 I --

18 CHAIRMAN SOULES: And that's --
19 as long as we know that's what we're doing,
20 well, then that's -- so be it.

21 HON. F. SCOTT McCOWN: I agree
22 with the first part of what you said. I
23 disagree with the second part. I think that
24 what this does is it makes exclusion
25 discretionary. It does say to the judge that

1 under these circumstances you can exclude. I
2 don't think gamesmanship results, because I
3 think you still have the threat of exclusion
4 as a deterrent.

5 The only thing I would say on this kind
6 of in conclusion is this is a big policy
7 issue. We have fought about this policy issue
8 at three or four different meetings. There's
9 lots of people like Tommy Jacks who aren't
10 here today that have had a stake in this, and
11 I think to change the policy decision now is
12 kind of not in the spirit of things, if there
13 are drafting problems or technical problems
14 but I think we ought to stay with our policy
15 decision.

16 CHAIRMAN SOULES: Okay. Does
17 anyone have a motion on this subject?

18 HON. SCOTT A. BRISTER: I'm
19 moving to --

20 MR. SUSMAN: I move that we
21 adopt the rule that the Subcommittee has
22 presented and that has been approved by a
23 large majority at at least three or four
24 meetings.

25 CHAIRMAN SOULES: Well, we've

1 got to go through Judge Brister's --

2 MR. SUSMAN: I mean, he's got
3 specifics.

4 CHAIRMAN SOULES: -- specifics
5 before we do that, but no one has got a motion
6 on that yet.

7 HON. SCOTT A. BRISTER: Yeah.
8 Probably an up or down on my motion to
9 substitute the task force would be the best
10 way to vote on it, wouldn't it? And then we
11 would get to tinkering with the Subcommittee
12 rule.

13 CHAIRMAN SOULES: Okay. Is the
14 task force --

15 HON. SCOTT A. BRISTER: It's
16 the next page under Tab 6. The task force
17 proposal is on the right and the subcommittee
18 proposal is on the left. I put it in as small
19 a print as possible.

20 CHAIRMAN SOULES: So Judge
21 Brister, you're moving what?

22 HON. SCOTT A. BRISTER: To
23 substitute -- actually it's the first
24 paragraph -- to substitute the task force
25 proposal for paragraph 1 of Rule 6 for the

1 Subcommittee's paragraph 1 on Rule 6.

2 CHAIRMAN SOULES: The text of
3 which says, "Exclusion or continuance. Unless
4 the court makes a finding of good cause, the
5 party that fails to make or supplement a
6 discovery response in a timely manner should
7 not be entitled to present evidence that the
8 party was under a duty to provide or to offer
9 the testimony of a witness other than a named
10 party who has not been properly designated.
11 The burden of establishing good cause is upon
12 the party offering the evidence or witness,
13 and good cause must be shown on the record.
14 Notwithstanding the foregoing, the court may
15 in its discretion grant a continuance to allow
16 the" --

17 HON. SCOTT A. BRISTER: And
18 that's just -- the intention of the task force
19 was just to write the rule to follow current
20 law given as Alvarado vs. Farrah and the named
21 party exception. It wouldn't change the law.

22 MR. MARKS: I second the
23 motion.

24 CHAIRMAN SOULES: John Marks
25 seconds. Those in favor show by hands. 10.

1 Those opposed. Eight.

2 Let's counts them again. Those in favor
3 of Judge Brister's motion show by hands. 10.
4 Those opposed. Eight.

5 It carries by a vote of eight to 10.

6 HON. F. SCOTT McCOWN: Luke,
7 can I move, and I don't know if this is
8 appropriate or not, but I'd really like us to
9 send both versions up to the Supreme Court,
10 and I think that would be a fair thing to do.
11 We're having a meeting in the middle of the
12 summer with a fair number of people absent.

13 HON. SCOTT A. BRISTER: I
14 second that. That makes sense. I mean, I was
15 going to propose that when I anticipated
16 losing this vote, to be honest.

17 MR. LATTING: Your generosity
18 is an example to us all.

19 CHAIRMAN SOULES: Okay. Then
20 we will submit Judge Brister's amendment
21 substitute as the vote of the Committee by a
22 vote of 10 to eight, and then the alternative,
23 which is, what, Rule 6, paragraph 1, to
24 indicate what the eight voted for. Okay. Can
25 we do that? Will you handle that, Alex?

1 PROFESSOR ALBRIGHT: Uh-huh.

2 CHAIRMAN SOULES: Okay. Now
3 then, let's get to the specifics. Judge
4 Guittard.

5 HON. C. A. GUITTARD: I'm not
6 sure in paragraphs 1 and 2 of our Rule 6 what
7 "continuance" means. Does it mean any
8 delay? Does it mean to say, well, we'll put
9 this case off until Thursday or until next
10 week? Is that a continuance? I can foresee
11 under subdivision 2 where there's the question
12 of taxable costs, the party could say, "You
13 can't tax the costs against me. You just had
14 a brief delay here. It was not a
15 continuance."

16 "Continuance" means the case goes off
17 the docket and has to be reset or something
18 like that; whereas what we're really talking
19 about is a postponement.

20 And I suggest to you that although we all
21 may think it's different -- or that it means
22 the same, there are a good many lawyers who
23 wouldn't think so and there might be some
24 satellite litigation or unnecessary hearings
25 because of the use of the word "continuance."

1 Therefore, I move that instead of the
2 word "continue" we substitute the word
3 "postpone"; and instead of the word
4 "continuance" we substitute "postponement."

5 CHAIRMAN SOULES: Is there a
6 second? No second. It fails for lack of a
7 second.

8 Okay. Judge Brister, you've got -- since
9 there will be an alternative going to the
10 Supreme Court, we need to go ahead and take
11 your specifics on it.

12 HON. SCOTT A. BRISTER: With
13 the Subcommittee I had the three. One was the
14 split infinitive, which is just a personal
15 offense, but I also just wanted to focus, and
16 maybe you all -- is "timely" the same as -- is
17 that when the 30 days after the request is
18 sent, is that when the supplementation
19 occurs?

20 MR. SUSMAN: Let me -- I mean,
21 you raised a good point. I mean, one of the
22 problems that we have on what we mean -- one
23 of the problems of adopting the alternative is
24 that when the Subcommittee dealt with what we
25 mean by "timely supplementation or amendment,"

1 we were content to leave it kind of vague,
2 "reasonably prompt," because the consequences
3 of what they really mean by "reasonably
4 prompt" did not seem to be very draconian.

5 Under the task force proposal that you
6 have now adopted, you have made the
7 consequence much more draconian. Do we want
8 to go back and consider with more specificity
9 when these things need to be done, is my only
10 question. I mean, what is meant by
11 "reasonably promptly"? I mean, don't we need
12 to put more teeth in that now?

13 HON. SCOTT A. BRISTER: I don't
14 see why that's really changed.

15 CHAIRMAN SOULES: Does anybody
16 have a motion on that subject?

17 MR. LATTING: I'm trying to
18 think through what Steve said. I'm trying to
19 think about this.

20 CHAIRMAN SOULES: While he's
21 doing that, Alex, put the word "timely" after
22 "information." "If a party fails to disclose
23 information timely during discovery."

24 PROFESSOR ALBRIGHT: Well, I
25 think you need to talk to Scott McCown about

1 that. That's Scott McCown's language and he
2 has a reason for it.

3 HON. SCOTT A. BRISTER: He
4 likes split infinitives.

5 HON. F. SCOTT McCOWN: I'll
6 send you a brilliant article on how split
7 infinitives are actually part of the logical
8 structure of language and the rule is
9 artificial from Latin, and that in fact we
10 ought to split infinitives to be clear about
11 what we're doing, but -- and Sarah agrees.

12 HON. SARAH DUNCAN: I like it.

13 CHAIRMAN SOULES: "If a party
14 fails to disclose information timely during
15 discovery" is a bad idea. Okay. Then back to
16 the question of Steve's issue. Rusty.

17 MR. McMAINS: The question I
18 have, Steve, is I don't see that there's a
19 different result from the rule as drafted by
20 the Subcommittee, because the rule drafted by
21 the Subcommittee, which is what I thought that
22 the judge was talking about, actually says if
23 a party fails to timely disclose information.
24 And wherever you put the "timely" doesn't
25 matter. If they didn't disclose it initially

1 and when the response date was due, that is a
2 failure to timely make a response.

3 HON. SCOTT A. BRISTER: Right.

4 MR. McMAINS: Now, whether or
5 not it causes a problem is the other thing
6 that is addressed by this rule. But the
7 burden, of course, is on them to show that
8 they didn't cause any problem. One would
9 assume that what you're trying to say is that
10 if they got the information later on while the
11 discovery period was still going on that
12 somehow that should satisfy any of the
13 obligations that they might otherwise have
14 about the prejudice.

15 But we don't really say how this rule is
16 implemented anyway; that is, kind of who moves
17 or when and what your burdens are. You could
18 theoretically be sandbagging and taking the
19 position they didn't timely respond to the
20 discovery, even though you know about the
21 information from some independent source. And
22 that's possible under the rule as drafted by
23 the Committee as well, it seems to me.
24 There's nothing in here that just refers this
25 to supplementation material. This is a

1 failure to disclose information timely, and
2 that can be either supplemented or just not
3 supplemented; it's done. And it's like the
4 cases we have where they leave out the phone
5 number of the witness.

6 HON. SCOTT A. BRISTER: I
7 guess, yeah, do we mean failure to -- if you
8 fail to disclose information when due, or do
9 we mean if you fail to disclose information
10 reasonably promptly?

11 HON. F. SCOTT McCOWN: When
12 due.

13 HON. SCOTT A. BRISTER: When
14 due.

15 HON. F. SCOTT McCOWN:
16 "Reasonably promptly" relates to your duty to
17 supplement.

18 HON. SCOTT A. BRISTER: If you
19 say "when due," that takes out any confusion
20 about which one you're talking about, and I
21 think that is what you ought to mean to say in
22 that.

23 MR. LATTING: Well, excuse me,
24 but the task force report says, "A party who
25 fails to make or supplement a discovery

1 response in a timely manner." Now, I'm
2 looking back over at Rule 5, and it tells me
3 that I have to amend or supplement my prior
4 responses reasonably promptly. So if there's
5 a hearing, and it will be a quick one in your
6 court now, and --

7 HON. SCOTT A. BRISTER: They're
8 all quick.

9 MR. LATTING: -- and I didn't
10 supplement reasonably promptly, then you will
11 be commanded by the motion that you carried to
12 keep all the evidence out, right?

13 PROFESSOR ALBRIGHT: And even
14 if --

15 MR. LATTING: Am I right about
16 that?

17 PROFESSOR ALBRIGHT: And even
18 if it's six months before trial.

19 MR. LATTING: Yeah. Now, that
20 doesn't seem like a good idea.

21 PROFESSOR ALBRIGHT: And that's
22 the difference between the two proposals.
23 Under our version it's only excluded if it
24 matters and you didn't have time to conduct
25 discovery on it. But under the task force

1 strategy it's excluded, period, even if it was
2 six months before trial and you had plenty of
3 time to find everything out about it and it's
4 no surprise whatsoever, but because you failed
5 to reasonably promptly amend because you knew
6 about it two months before you disclosed it
7 six months before trial.

8 HON. SCOTT A. BRISTER: Well,
9 to me that's a different question.

10 MR. LATTING: It is.

11 HON. SCOTT A. BRISTER: With
12 "reasonably promptly" you get into this "as
13 soon as practical" problem, as I've indicated
14 in my discussion. If that's the standard and
15 that's a test and that's a ground for
16 excluding, then yeah, you need to rephrase it
17 that way.

18 I was intending it by having the task
19 force proposal not when due but that it would
20 be any time during the discovery period or
21 reopened discovery period with the exception
22 of the 30-day cutoff, et cetera.

23 CHAIRMAN SOULES: Judge
24 Cornelius.

25 JUSTICE CORNELIUS: I believe

1 that lack of surprise and lack of prejudice to
2 the opposing party should be matters on which
3 the trial court could base a finding of good
4 cause, and I would propose an amendment to
5 that effect to whichever one of these that
6 we've adopted or both.

7 HON. F. SCOTT McCOWN: Well,
8 that's the concept that the Committee's
9 Rule 6 --

10 JUSTICE CORNELIUS: I know
11 that.

12 HON. F. SCOTT McCOWN:
13 -- incorporates. And the concept of the task
14 force, you really you don't know if it
15 incorporates it or not. You're leaving it up
16 to --

17 JUSTICE CORNELIUS: Only to the
18 extent of granting a continuance, as I read
19 it.

20 HON. F. SCOTT McCOWN: Right.
21 But what you're doing with the task force
22 report is not advising the Supreme Court,
23 because you're not taking a position on what
24 the rule ought to be. And case law has said
25 that things aren't good cause that most of the

1 lawyers in this state think ought to be good
2 cause.

3 JUSTICE CORNELIUS: That's
4 right. Absolutely.

5 HON. F. SCOTT McCOWN: And
6 we're leaving the term and providing no advice
7 or guidance.

8 HON. SCOTT A. BRISTER: Not
9 entirely. There is a task force comment that
10 said specifically what "good cause" was not.
11 That was in the task force report, and I
12 didn't have -- my computer doesn't do
13 footnotes so I couldn't do a footnote on
14 this. But that was the task force way of
15 handling it, was to define in a comment what
16 the case is, so the lawyer that's lived under
17 a rock for the last 10 years will immediately,
18 following the rule, see the comment that says
19 what good cause is and is not.

20 MR. LATTING: What does it say
21 in essence, Scott? Really I'm asking, does
22 surprise to the other party have anything to
23 do with it?

24 HON. SCOTT A. BRISTER: No.

25 HON. F. SCOTT McCOWN: See, the

1 problem is that the bar has this disagreement
2 with really our jurisprudential. It's not
3 that they don't understand it; it's that they
4 do and don't agree with it.

5 CHAIRMAN SOULES: Judge
6 Cornelius, would you articulate what your
7 amendment would be again so that I can make
8 note of it?

9 JUSTICE CORNELIUS: That the
10 trial court may in its discretion find that
11 lack of surprise or prejudice to the opposing
12 party is good cause.

13 MR. LATTING: For allowing the
14 evidence in?

15 JUSTICE CORNELIUS: For
16 allowing the evidence or for denying
17 exclusion.

18 MR. SUSMAN: I second that
19 motion.

20 HON. SCOTT A. BRISTER: Here we
21 go. Here it is (indicating).

22 CHAIRMAN SOULES: Okay. It's
23 been moved and seconded that we add to the
24 paragraph 1 that we earlier adopted from the
25 task force report a sentence that says that

1 "The trial court may in its discretion find
2 that lack of surprise or prejudice to the
3 opposing party is good cause." It's been
4 moved and second. Now, those in favor show by
5 hands.

6 MR. KELTNER: Can we discuss it
7 briefly first?

8 CHAIRMAN SOULES: Sure.
9 Discussion.

10 MR. KELTNER: I have a problem
11 with -- I think Judge Cornelius is going the
12 right way in looking at it. But remember,
13 good cause is good cause for failure to
14 supplement. So surprise to the party can't be
15 good cause, because it's the reason you didn't
16 supplement is what you're trying to prove.

17 And maybe we ought to go at it in a
18 different concept; that whether it's good
19 cause or not -- and Scott, you got me as a
20 convert and I may be converting back the other
21 way -- the issue is that we ought to allow it
22 because there is no surprise, which I think
23 was what --

24 JUSTICE CORNELIUS: Well, like
25 what Joe Latting said a while ago, it would be

1 good cause for admission of the evidence or
2 for failure or for denial of exclusion.

3 MR. KELTNER: So Judge, would
4 be it okay to say that the trial judge in his
5 or her discretion could allow the admission of
6 the evidence upon a showing that it did not
7 prejudice or surprise the other side, and not
8 tie it to good cause?

9 JUSTICE CORNELIUS: Yes, that
10 would be acceptable.

11 MR. KELTNER: I think that's a
12 better way to look at it. That also, Steve,
13 gets us close to --

14 MR. SUSMAN: That's what we're
15 talking about.

16 MR. KELTNER: That gets us
17 closer to the rule that the Subcommittee came
18 up with as well, and I think, Scott, that's
19 what you were thinking of.

20 HON. F. SCOTT McCOWN: Well, it
21 is the Subcommittee's rule.

22 MR. KELTNER: Well, our problem
23 with the Subcommittee rule, Luke, is this: We
24 want to have some hammer, since we have cut
25 down the amount of discovery and there's going

1 to be an opportunity with the limitation of
2 discovery for some gamesmanship, so we want to
3 have some hammer, and I think everybody in the
4 room agrees with that. The question with the
5 Subcommittee rule is there's a general
6 feeling, and I think that's the reason that we
7 got 10 votes against it basically, that the
8 hammer wasn't big enough.

9 HON. F. SCOTT McCOWN: Well, if
10 this group adopts the sentence that you just
11 suggested, we can draw down the subcommittee
12 version and send only the single version, and
13 that's fine with me.

14 MR. KELTNER: All right.

15 JUSTICE CORNELIUS: I will
16 accept the language recommended by Judge
17 Keltner.

18 MR. LATTING: A friendly
19 question: What does "prejudice" mean?
20 Because everything that I want to put in
21 evidence is prejudicial to the other side or I
22 don't want to put it on. Now, do we know what
23 that word means?

24 HON. SCOTT A. BRISTER: Yeah.
25 I would leave that -- I mean, if it's not

1 going to prejudice the other side, that's kind
2 of like my one about the outcome of trial. If
3 it's not going to affect the outcome of trial,
4 let's not fool with it.

5 MR. LATTING: I don't mean to
6 be facetious here. It's just that it says
7 that if it doesn't unfairly surprise or
8 prejudice. And if I'm on the other side of
9 this, then I'm always going to be saying,
10 "Well, I may not be surprised, judge, but I'm
11 certainly prejudiced by you allowing this
12 witness."

13 HON. F. SCOTT McCOWN: There's
14 a body of case law about what "prejudice"
15 means.

16 MR. LATTING: Well, that's my
17 question: Do we know what it means?

18 HON. F. SCOTT McCOWN: Yes.
19 There's a body of case law. It's a term of
20 art.

21 MR. LATTING: What does it
22 mean?

23 HON. F. SCOTT McCOWN: It
24 doesn't mean that the evidence is against
25 you.

1 MR. LATTING: Okay.

2 HON. F. SCOTT McCOWN: It means
3 that you are unfairly disadvantaged.

4 JUSTICE CORNELIUS: It means
5 that your ability to prepare and try your case
6 has been unfairly impaired.

7 MR. LATTING: Okay.

8 JUSTICE CORNELIUS: Of course,
9 we can say that if we wanted to. Instead of
10 using the word "prejudice," we could say "find
11 that lack of surprise or lack of" --

12 MR. LATTING: Well, no,
13 prejudice is fine if we have some literature
14 on it.

15 JUSTICE CORNELIUS: -- "or
16 having a prejudicial effect on the opposing
17 side's ability to prepare and try the case."
18 But you're getting into a lot of verbage
19 there.

20 MR. MARKS: I have an
21 unfriendly question.

22 CHAIRMAN SOULES: John Marks.

23 MR. MARKS: An unfriendly
24 question: That added sentence emasculates
25 what you're trying to do, and that is to

1 eliminate the gamesmanship. If you open the
2 door to the judge to make exceptions there by
3 saying, "Oh, you haven't been prejudiced," or
4 that sort of thing, aren't we right back where
5 we started?

6 MR. LATTING: Yes. The truth
7 is, yes, which is where we ought to be.

8 MR. KELTNER: Well, let me tell
9 you why I think not, John.

10 CHAIRMAN SOULES: All right.
11 David Keltner.

12 MR. KELTNER: I think we're not
13 quite there because, remember, we're talking
14 about a limited time period and we're talking
15 about two instances here. One, about when
16 somebody just comes up and you find out about
17 it for the first time at trial. Now, that's
18 what you're worried about and legitimately
19 so. And in that instance there's no doubt
20 that the chance of prejudice and surprise is
21 great.

22 The other thing that can happen under
23 these new rules, John, that can't happen now
24 is this could be disclosed three or four
25 months before the trial and still you have a

1 sanction rule that would call for exclusion.
2 That makes no great sense, especially with
3 what we've already voted on that would allow a
4 reopening of discovery to take away the
5 prejudice. So it seems to me that it doesn't
6 emasculate the rule and that it is a better
7 all-around rule with that in.

8 I mean, everybody agrees that -- I think
9 even the Supreme Court, and I say "even the
10 Supreme Court" and I didn't mean it that way,
11 Justice Hecht, but the Supreme Court in
12 Alvarado said precisely, "Geez, we're giving
13 the trial court too few options here to deal
14 with it." And I think that's part of the
15 problem. I think it's a good trade in the
16 middle, and I think cause ought to have some
17 effect in this, and I think this is just
18 another reason the trial judge could overrule
19 it. I mean, excuse me, rule for the --

20 CHAIRMAN SOULES: Undo
21 prejudice is the test for a change in request
22 for admissions, responses or getting out of
23 deemed admissions, and of course, that could
24 be as prejudicial as not getting a piece of
25 discovery. But we already have a body of law

1 developed about here's what you have to
2 show --

3 HON. SCOTT A. BRISTER: Or late
4 filed pleadings.

5 CHAIRMAN SOULES: -- to change
6 your responses to request for admissions or
7 deemed admissions or -- what, Judge Brister?

8 HON. SCOTT A. BRISTER: Late
9 filed pleadings.

10 CHAIRMAN SOULES: Or late filed
11 pleadings. Well, it's really stronger, I
12 think, than 169.

13 So let's see where this will go in the
14 one we adopted. "Unless the court makes a
15 finding of good cause or a finding that there
16 is no undue surprise or undue prejudice to the
17 opposing party, a party fails to make" and so
18 forth --

19 HON. SCOTT A. BRISTER: One
20 more time.

21 CHAIRMAN SOULES: So the judge
22 can make either one of those findings, so that
23 takes care of good cause for not doing.
24 Okay. If you look on -- the task force is on
25 the right-hand side of this page that's right

