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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 19, 1995

(AFTERNOON SESSION)

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Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on
the 19th day of May, A.D. 1995, between the
hours of 1:00 o'clock p.m. and 5:35 o'clock
p.m., at the Texas Law Center, 1414 Colorado,
Room 104, Austin, Texas 78701.

ORIGINAL

MAY 19, 1995

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS:

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

Also present:

Lee Parsley
Holly Duderstadt
Trey Peacock (w/ Susman)

MEMBERS ABSENT:

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

EX-OFFICIO MEMBERS ABSENT:

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

MAY 19, 1995
AFTERNOON SESSION

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1 CHAIRMAN SOULES: Okay. We're
2 back in session after 19 minutes. More than
3 15 minutes have transpired. We're on Rule 11,
4 and we're going to finish this report before
5 we get to discovery, so we'll do what we've
6 got to do.

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

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

21 Suppose you give me a letter that says,
22 "I don't have to answer requests for
23 admissions until 45 days." And then on day
24 35, I say, "Ha, you never did put that on
25 record, did you? Well, now I dispute it." So

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

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

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

17 So what now, Rusty?

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

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

1 do?

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

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

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

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

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

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

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

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

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

24 MR. McMAINS: Okay.

25 PROFESSOR DORSANEO: And that

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

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

10 MR. ACOSTA: Yes, it is.

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

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

25 MR. McMAINS: Well, I'm not

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

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

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

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

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

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

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

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

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

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

4 CHAIRMAN SOULES: Buddy Low.

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

7 CHAIRMAN SOULES: I can't hear
8 you.

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

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

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

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

4 MR. LATTING: Yes.

5 CHAIRMAN SOULES: David Perry.

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

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

23 MR. LATTING: Hear, hear.

24 CHAIRMAN SOULES: Bill

25 Dorsaneo.

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

8 CHAIRMAN SOULES: Anyone else?
9 Elaine Carlson.

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

16 Would that meet your --

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

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

1 about, "Yeah, I did say that."

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

8 PROFESSOR ELAINE CARLSON:

9 Well, now it reads -- the current rule reads
10 "made in open court and entered of record."

11 MR. McMAINS: Yeah, that's
12 right.

13 MR. YELENOSKY: And we intended
14 it --

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

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

4 MR. MEADOWS: But those docket
5 notations are --

6 CHAIRMAN SOULES: Robert
7 Meadows.

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

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

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

4 CHAIRMAN SOULES: Who's
5 speaking?

6 MR. YELENOSKY: I'm sorry.

7 CHAIRMAN SOULES: Alex Acosta.

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

12 CHAIRMAN SOULES: So that would
13 be, what, delete "filed with the clerk"?
14 Judge Brister.

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

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

25 You know, for example, maybe you show up

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

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

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

10 CHAIRMAN SOULES: Yeah. David
11 Jackson.

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

1 a heated settlement discussion.

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

6 CHAIRMAN SOULES: Paul Gold.

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

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

20 CHAIRMAN SOULES: Okay.

21 Anything else? So where are we getting to?
22 We would delete in the second line "it be in
23 writing and signed"? We would take -- no.
24 Would we leave that in there, "unless it be in
25 writing and signed."

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

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

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

12 MR. YELENOSKY: Okay.

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

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

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

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

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

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

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

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

25 PROFESSOR DORSANEO: Well, if

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

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

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

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

5 "Yes."

6 "Do you agree to that?"

7 "Yes."

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

16 CHAIRMAN SOULES: Suppose you
17 have eight parties and eight sets of lawyers.
18 I serve my interrogatories on you. You need
19 15 days, and I say "Fine. Let's reach a
20 Rule 11 agreement between me and you. Here's
21 your 15 days."

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

25 HONORABLE SCOTT A. BRISTER:

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

5 CHAIRMAN SOULES: Steve
6 Yelenosky.

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

18 CHAIRMAN SOULES: Not under
19 Rule 11.

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

22 CHAIRMAN SOULES: Richard.

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

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

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

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

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

19 MR. LOW: No. But if I --

20 CHAIRMAN SOULES: Buddy Low.

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

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

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

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

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

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

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

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

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

1 MR. YELENOSKY: Okay. We can
2 say that.

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

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

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

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

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

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

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

25 CHAIRMAN SOULES: Signed at the

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

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

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

8 PROFESSOR DORSANEO: Make "be"
9 "is."

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

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

14 CHAIRMAN SOULES: Unless it is
15 made.

16 MR. ORSINGER: That sounds less
17 authoritative.

18 CHAIRMAN SOULES: Okay. Any
19 further discussion?

20 MR. MEADOWS: Luke?

21 CHAIRMAN SOULES: Robert
22 Meadows.

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

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

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

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

13 CHAIRMAN SOULES: Make a
14 motion.

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

17 CHAIRMAN SOULES: To insert
18 what words where?

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

22 CHAIRMAN SOULES: Any second?

23 MR. PERRY: Second.

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

1 HONORABLE SCOTT A. BRISTER:

2 Wait just a minute.

3 CHAIRMAN SOULES: Judge

4 Brister.

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

12 MR. PERRY: No, no, no.

13 CHAIRMAN SOULES: Wait. Judge
14 Brister.

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

20 CHAIRMAN SOULES: David Perry.

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

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

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

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

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

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

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

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

12 CHAIRMAN SOULES: Okay. Buddy
13 Low.

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

21 CHAIRMAN SOULES: Okay. I
22 agree with that.

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

25 MR. HAMILTON: Well, I only

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

8 CHAIRMAN SOULES: Judge
9 Brister.

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

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

24 CHAIRMAN SOULES: Any further
25 discussion on the proposed amendment?

1 Rusty.

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

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

20 MR. MEADOWS: Right.

21 CHAIRMAN SOULES: Any further
22 discussion on that?

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

