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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 15, 1994

(MORNING 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 15th day of July, A.D. 1994, between the hours of 8:30 o'clock a.m. and 12:15 o'clock p.m., at the Texas Law Center, 1414 Colorado Street, Room 104, Austin, Texas 78701.

COPY

SUPREME COURT ADVISORY COMMITTEE
JULY 15, 1994
MORNING SESSION

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JULY 15, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Honorable Scott A. Brister
Honorable Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
Anthony J. Sadberry

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable William Cornelius
Doyle Curry
Paul Gold
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Honorable Paul Heath Till

EX-OFFICIO MEMBERS ABSENT:

Thomas Riney
Bonnie Wolbrueck

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly H. Duderstadt, Soules & Wallace
Carl Hamilton
Denise Smith for Mike Gallagher
Jim Parker

MORNING SESSION

(Reconvened at 8:30 a.m.)

CHAIRMAN SOULES: Let's go ahead and get started. I want to welcome a new member, Anne McNamara. Anne is sitting right here. Hold your hand up, Anne, so everybody will know to come and introduce themselves to you if they don't know you. Welcome.

MS. McNAMARA: Thank you.

CHAIRMAN SOULES: We're glad you're here today. Thanks to all of you for coming here this morning.

Also I've been advised that Doris Lange, who is our district clerk member of the Supreme Court Advisory Committee, was named by the County District Clerks Association as Clerk of the Year. (Applause.)

Steve Susman says he's going to be an hour late this morning due to airplane delays, so we're not going to start with Discovery Rules; we're going to start with a look at some of the Charge Rules. In that connection, we have distributed Paula's final report.

MS. SWEENEY: I don't know if

you have it; I haven't got one yet.

CHAIRMAN SOULES: Holly is doing that right now. What I would like for you all to do on this is sometime during the day, or if we don't get to it today, then sometime tonight so we can do it tomorrow, read through this and everybody take a shot at commenting on whether it's really -- whether we've got the message as clear as we can make it and check for any language changes that you may suggest. I think the substance is all together now just like we've passed on it and the language is as we've passed on it too, but to some extent, it was written by a committee, it may not flow as clearly as it should, and if this is going into the rule books we want it to do so. And then we'll -- either in the Committee as a whole or just turn in your suggestions to Paula for her to consider, if there's any need to change any of the text at all, so give that some attention if you will.

Also we've taken another cut at the minutes, and Lee Parsley and Holly worked together on that as well, and I think we've got the minutes in pretty good shape. But if

you would take a look at those, and if you have any changes, maybe make notes and give them to us. If not, we'll want to try to take a crack at improving all the minutes by tomorrow morning and get the minutes up to date.

Okay. Since Steve isn't here -- I know all of you have been burdened with having to bring a lot of material, but it looks like we're going to start off right out of the gate, that being beneficial. In your original two volumes, starting at Bates Page 756, the -- over the course of some time, we have had suggestions and comments from lawyers, judges and the public on these rules. That's what these two volumes are all about plus most of that supplement. So on Bates Page 756 and forward, these are -- this contains information that the Committee has received from various sources relative to the Charge Rules.

And I'd ask Paula if she'll go through these with us and tell us what disposition, if any, has been made of them by the work that they've done already in rewriting the Charge

Rules, and then if there hasn't been some disposition made on the suggestion, then we may want to talk about that so that she can get some guidance from the Committee.

Paula.

MS. SWEENEY: All right. These don't -- what you all have already considered and what's in your final report so far are the rules that actually pertain to charging the jury and instructing the jury and talking with the jury and that sort of thing. Some of these other suggestions deal with other ancillary matters such as when you have to request a jury, the effect of the timing of a request, how to handle Batson charges and that sort of thing, so we're skipping around a little bit.

But the first rule to look at -- and for this one you're going to need two books because we now have supplemental materials also, so you need your Supplemental Supreme Court Advisory Committee starting at Bates Page 0410 as well as your Volume II of the Advisory Committee Meeting materials starting on Page 757. And while you all are getting

that out, what these proposals deal with are the timing of the request for the jury trial. And our subcommittee has not yet discussed this particular rule, but the issue is existing Rule 216, which is typed out in your supplement on Page 0410 -- did you bring your supplement, Paul?

MR. GOLD: Probably not.

MS. SWEENEY: (Continuing) -- which provides that in order to have a jury trial there has to be a written request for the jury trial filed with the clerk of the court at a reasonable time before the date set for trial on the jury docket but not less than 30 days in advance.

Then there are in your original materials several suggestions, including one that I'm really not sure I can identify the source of, which is on Page 757, which deals with the time that the jury has to be requested not less than 30 days after the service of the last pleading directed to the jury issue, so -- but in no event less than 30 days in advance of the date set for trial.

What the issue seems to be, as all of you

who try cases know, sometimes you get down to the courthouse, you've got a trial setting, everybody shows up, the judge thinks he's going to try the case, and then suddenly somebody realizes, "Oh, gee, we didn't request a jury." And everything gets thrown into disarray and there's a big scuffle to see if we can find a jury, and if we can't find a jury, the docket is in shambles, the case gets continued, and some of the judges, including Judge Coker, who sent a letter which is on Page 759, it's stamped sideways, recommends that the request for the jury has to be made within 30 days after the service of the live trial pleadings or not later than 30 days before the trial date.

The confusing thing about this as far as these recommendations is that the existing rule says not later than 30 days in advance of the trial, and what you have on Page 758 is apparently the last Supreme Court Advisory Committee in 1990 -- and I don't know who the author of it is, but it's on Fulbright letterhead, Revis McGrath maybe, I can't tell. Anyway, apparently the Committee at that time,

and Luke maybe you remember, voted or at least the recommendation was made that no change was needed; that the rule has just been amended in '88 and no change is needed because it already says 30 days before trial.

So apparently the recommendations are that instead of being 30 days before trial that the request be timed 30 days after the filing of certain pleadings as the trigger, either the answer of the last served person or the live trial pleadings, whenever those may be filed. We haven't discussed it.

My personal feeling is that, having just looked at this correspondence, that there's already a 30-day threshold in there, and that that should provide a certain amount of protection. And if you start trying to change the deadline to, you know, live pleadings or some sort of answer or some other threshold, it's going to confuse rather than clarify.

But if anyone has any input on that, I'll take it and add it when we have the -- when the subcommittee talks about it.

CHAIRMAN SOULES: Okay. This is David Beck's letter actually.

MS. SWEENEY: It is?

CHAIRMAN SOULES: Yeah. And it was a longer letter that addressed several rules. That's why it's cut off at the bottom, but the other pages are elsewhere in the agenda. But David recommended at that time that he was chairing the subcommittee, his subcommittee recommended that they do not adopt Judge Coker's recommendation.

Is that what you're recommending also?

MS. SWEENEY: It is.

CHAIRMAN SOULES: Okay. Any discussion about that? Okay. All those in favor of the subcommittee's report that we not adopt Judge Coker's recommendation show by hands.

Anyone opposed? Okay. That's unanimously rejected by the Committee as a whole.

The next one, Paula, is on Page 410, and we've run into this.

MS. SWEENEY: Yeah. That's yours.

CHAIRMAN SOULES: We've also talked to some judges about it. A lot of

judges don't have a nonjury docket or a jury docket; some judges have both a nonjury docket and a jury docket; some judges just set cases for trial and they may give the jury cases priority or they may not. But this rule, 216(a), keys the payment or the request for a jury fee to 30 days before the date set for trial that falls on a nonjury docket. In some courts that will never happen because they don't have a nonjury docket.

And my recommendation -- and I think from talking to the judges that do business that way, they just ignore those words "on the nonjury docket" and they say "before the date set for trial," period, and that's the way the rule basically is administered. And my recommendation was that we delete "on the nonjury docket," take that out, so that it says what's really going on in practice anyway.

HONORABLE C. A. GUITTARD: I agree.

MR. MARKS: Is that a motion? Do we move on that?

CHAIRMAN SOULES: Paula, will

you adopt that as a motion?

MS. SWEENEY: Yeah, I'll motion that.

CHAIRMAN SOULES: A second?

MR. MARKS: Second.

CHAIRMAN SOULES: All in favor show by hands. Opposed? Okay. That's unanimous.

HONORABLE DAVID PEEPLES: Luke, can I ask a question?

CHAIRMAN SOULES: Yes, sir, Judge Peeples.

HONORABLE DAVID PEEPLES: I'm on that subcommittee and I don't think we've discussed these matters, have we?

MS. SWEENEY: No. That's what I was thinking, too.

HONORABLE DAVID PEEPLES: Are we sure we want to just barge right through them without the subcommittee even thinking about it? These two votes don't bother me at all, I was for them both, but I was just wondering if that's a good way to do things.

CHAIRMAN SOULES: What I would like to do, Judge, if they are pretty

straightforward, easy things, is maybe get them out of the way. If they're more substantive, they may even impact what we do with the work product that we think is final and that may mean we need to go back to the drawing board too, so I don't want to go through anything complicated too fast, but we do need to get through all these books and all these suggestions, because one of my responsibilities is to advise the people who make these recommendations what our action is. We've been doing that for several years.

Rusty?

MR. McMAINS: Luke, on that last vote, for instance, in terms of when it's set for trial, does that mean any time it's set for trial or the first time it's set for trial? Because, I mean, a lot of courts do in fact set cases for trial pretty quick, I mean, after the case is filed, but it's kind of a fake trial setting.

CHAIRMAN SOULES: I think maybe before it actually goes; you know, sort of slip into supplementation, is the way I've always read this rule. It kind of slips with

the trial setting.

MR. McMAINS: Okay.

CHAIRMAN SOULES: But I can't remember any case law on that.

Okay. What's next, Paula?

MS. SWEENEY: All right. I don't know the best way to handle this series. This is Pat Hazel's letter that starts on Page 760, and what you have is a long revision of the instructions and oath to the jury.

De facto, we have handled all of this by the work we've already done because we have gone through and completely rewritten those instructions, or not completely rewritten them, but rewritten them as we've discussed it at the past two or three meetings. So I think the response to Pat's memo is to send him the rules that we did vote on and adopt and say, "Here is what we adopted."

I don't have any intention of going through these line by line as we sit here and comparing them to what we've done because very much of what he did in the "cleaning up," so to speak, you know, we did or we did something

similar. But anyway, that's my recommendation, that we pass that back to Pat and say, you know, "Here is what we did."

CHAIRMAN SOULES: Paula, did you all in your subcommittee work read through Pat's suggestions and use those that you felt were consistent with the rest of the work you were doing?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Pat Hazel's work has been a part of the subcommittee's consideration all the way through?

MS. SWEENEY: Absolutely. And it was in fact as far back as the task force when Judge Cochran was chairing the task force on these particular rules. We had this material and we took a lot of it and incorporated it, because he had done an awful lot of really good work already, so yeah, it has been useful and used.

And at this point there's no way to go back and sort out what came from here and what came from elsewhere because these have been two years' worth of work. But Pat's work definitely was part of it.

CHAIRMAN SOULES: Okay. Well, we'll just consider his work as something that the committee worked through in some detail and the task force also worked through in some detail and used some parts of it and didn't use other parts, but that's been given our attention.

Okay. What's next?

MS. SWEENEY: Page 778, which is a 1991 letter from Jim Parker.

CHAIRMAN SOULES: 778.

MS. SWEENEY: He was working off of proposed changes that were in the '91 Bar Journal and was commenting about -- he made several different comments. I don't have that Bar Journal article in front of me to know how that applies here, and we have not talked about this particular letter in our subcommittee.

MR. LATTING: Mr. Parker is here, by the way. He's right there.

CHAIRMAN SOULES: Good morning.

MR. PARKER: Good morning. That Bar Journal article is where they published Dr. Hazel's --

CHAIRMAN SOULES: Speak up a little so we can hear your comment, please, Mr. Parker.

MR. PARKER: The Bar Journal article that is referred to in that latter was where they published Professor Hazel's proposed changes to the rule, so this matter comes off of Professor Hazel's proposed changes.

CHAIRMAN SOULES: Paula, do you all need to work through these or can you --

MS. SWEENEY: Well, I'm not sure that they relate to what we've actually adopted at this point. I don't know why the first quote there, "You are performing a significant service which only few people can perform," is being replaced with language about doing your civic duty. I don't know if we still have the language you were concerned about in the rule or not. I mean, I can go back and pull the old Bar Journal article to trace that, but we have in effect already adopted these instructions.

MR. PARKER: I would say that's probably been superseded by the work that

you've done.

MS. SWEENEY: I think it has been, too, yeah.

CHAIRMAN SOULES: Did you get a copy of the final draft of these rules?

MR. PARKER: Yes, I've got them.

MS. SWEENEY: I don't know if you heard, Luke. Mr. Parker's comment was that he feels like his letter has been superseded by the work that's already been done.

CHAIRMAN SOULES: Right. I just wanted to give him a chance to look at what's been drafted and satisfy himself.

MR. PARKER: I appreciate that.

CHAIRMAN SOULES: And if there is still a live issue there that you're concerned about, we want to address it.

MR. PARKER: Okay. Thank you.

MS. SWEENEY: All right. The next is Pat Hazel's memo again dealing with the next rule and with the same comment. That starts on Page 782 and goes through 793, so again, we've de facto handled that.

Now, the next issue is one that needs to be addressed and I'd like to get a sense of the Committee on, and it has to do with Batson.

CHAIRMAN SOULES: That's on Page 794.

MS. SWEENEY: Yes. And it's a memo from Steve Tyler to Justice Hecht. And then there's also on -- wait, that's where it is. All right. What you have following that is a draft of rules on peremptory challenges, but as far as Batson is concerned, what we have started working on and I've circulated to the whole subcommittee, and we need to circulate to you all once we have the final discussion of it, is the situation that has come up now that we have civil Batson, and several people have raised the issue.

Under our procedure, you do all your voir dire, everybody huddles, strikes their list, hands them in, and the way you know who the jury is is the clerk calls the first 12 that weren't struck and they come in and sit in the box, and that's the first time that everybody gets to see who the other side struck.

So if you represent an African-American client and you look up and see that the other side has struck all the African-Americans from the panel, that's your first opportunity to say, "Wait, Judge. Batson."

The judge sends everybody out into the hall, the lawyers testify about their motive and intent, the judge decides yea or nay that the reasons for striking those folks were justified. If the judge decides no, one or two or whatever of these folks shouldn't have been struck, it was an improperly based strike, then the jury which has already been put on the box and the people who weren't picked who are still hanging around in the hall come back in, you take two presumably Anglos or whatever out of the box and you take two guys who know they weren't picked before who are African American, you stick them in the box, and it's not really a very good way to handle it. It, you know, probably makes the jury wonder what's going on and probably instead of doing what we're trying to do, which is to have an impartial and properly selected jury, it probably looks like we're

doing some kind of gerrymandering.

So what we're working on in the draft that Judge Scott McCown came up with and gave to us as a starting point is the suggestion that instead we change the procedure and we write into the rule -- the procedure would now go as follows: Everybody does everything exactly the same up through striking their list and handing them to the clerk. But then instead of calling 12 people in and seating them, you leave them out in the hall and the clerk tells everybody -- I mean, you've struck your list by then; you can't change, you know; your married to who you struck -- tells everybody, and you can figure out who the folks are who were struck and who weren't, and then if there's a challenge that needs to be made to the panel or to the nature of the strikes, the nature of the Batson strike, it can be made, the lawyers can testify, the judge can make a ruling, and then when you seat the 12 people, you've actually got the 12 that you're going to have, so that suggestion has been made.

The question I have about that is, you

know, especially if you're talking about something like race, you might have somebody come back in and people not realize who it was that was struck until they see the composition of the panel, so there may be some problems there. But if anybody here has had experience with Batson procedures or has a comment about that, the subcommittee needs your input on any suggestions on how that should be drafted to avoid that problem.

MR. YELENOSKY: What was the problem? I don't understand that.

MS. SWEENEY: Well, you take -- you strike all the black people off the panel and they know they've all been struck because you've called the panel; you've seated 12 people.

MR. YELENOSKY: Yeah, I know that part, but the problem that you just stated with the change.

MS. SWEENEY: Well, let's say you know, you see the list. The list does not say on it, "This person is black; this person is Hispanic; this person is white."

MR. YELENOSKY: Oh, yeah. But

if we change the procedure, then people would start noting that, I assume.

MS. SWEENEY: One would hope. That's the only wrinkle that has come up, you know, if someone is concerned about that.

MR. YELENOSKY: Well, is there a problem with that? I mean --

MR. GOLD: Well, isn't that what we're supposed to be avoiding? The whole thing is to avoid having in your notes that someone is white and someone is black.

HONORABLE PAUL HEATH TILL: At one time that was the theory, yes; not any more.

MS. SWEENEY: And now, of course, gender. But that's easier to tell from the list sometimes, except for people named Pat.

MR. GOLD: The android.

MS. SWEENEY: Yeah.

CHAIRMAN SOULES: So the clerk and the judge and the lawyers would take a look at the final 12 before the names are read and they're put in the jury box, right?

MS. SWEENEY: Before the

panelists know what the preliminary -- I guess, preliminary strikes are or whatever.

CHAIRMAN SOULES: Okay. And you all are proposing -- Elaine Carlson.

PROFESSOR CARLSON: I think the Batson decision allows one of two remedies to address a Batson challenge. One is returning the juror who has been peremptorily struck --

CHAIRMAN SOULES: I can't hear you.

PROFESSOR CARSLON: One remedy that's available under Batson is to return the juror who has been peremptorily struck improperly for an equal protection violation to sit; the other remedy the court suggests in that opinion that would be proper is bringing in a new panel.

I think the statutes provided under the Texas Code of Criminal Procedure provide only for the second option; that is, striking the panel. But I read a recent case that says that that statute may be improper in not allowing counsel to successfully urge the Batson challenge be optioned between the two remedies. So the law is really in a state of

flux here. But I do want to note that the Supreme Court opinion seems to allow the entire panel to be struck, but then that runs contrary to the notion of you have a right to serve on a jury but we're going to strike the whole panel that's tainted.

MS. SWEENEY: And that was the other question that we had in our preliminary talks when Judge McCown and I were trying to get a working draft, is what is the effect if your strike is disallowed and the juror that you struck is returned? Does the striking party then effectively get the strike back to use on someone else, or is that strike just gone? I mean, have you gone now from six strikes to five because you made a mistake and struck somebody who it has now been found you weren't supposed to strike? And that does need to be discussed. Are we going to recommend that the rules say, "You get your strike back and you get another swipe at somebody," or you know, "You made the mistake, you did something impermissible; and therefore, you get five strikes instead of six"? Because right now that's totally

unclear. And the folks that I have talked to about the Batson situation, in addition to the problem that Elaine mentioned, say, you know, no one knows how this is supposed to work. We don't have case law guidance that I know of either.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: And I guess I'll muddy the water even a little bit further. I believe there's pending before, again, the Texas Court of Criminal Appeals the question of whether Batson violations would flow from striking a jury because of an obvious religious preference of that prospective juror. And at the Circuit Court of Appeals level there are cases pending dealing with striking jurors based on disability, violating the Americans With Disabilities Bill. Therefore, there's the potential that the grounds for, quote, a Batson challenge would be expanded. And if so, it will be even more cumbersome to try as counsel to memorize, if you will, the composition of a protected jury or juror under

the remedy suggested.

CHAIRMAN SOULES: Can't we -- I don't know how to fix some of those problems, but we already have a problem with this procedure Paula is talking about with fixed -- that is, sometimes, whenever the judge calls the list, he calls it wrong. You know, he just -- the clerk didn't execute on the master list the strikes. And then you get into this furor where somebody who has been seated was really struck. If we just had a procedure that said that the court is to provide counsel with a copy of the final list for any additional objections prior to calling the names of the jurors, that may be all we can do right now.

MR. MARKS: How about alternate strikes, Luke?

CHAIRMAN SOULES: Say that again.

MR. MARKS: Alternate strikes.

CHAIRMAN SOULES: I just picked a jury in Florida by that method. It's strange.

MS. SWEENEY: What's the

method? I didn't hear you.

MR. MARKS: Alternate strikes.

MS. SWEENEY: Okay. Where you just stand up and holler it out?

MR. MARKS: No. Alternate strikes. You strike --

MR. McMAINS: Here is your first preference strike; here is your second preference strike.

CHAIRMAN SOULES: They give you a list of 24 names. Well, it's 12 names, because we're in federal court. They bring it over to the plaintiff and he put an "x" on the page. Then the clerk picks it up, takes it over to the defendant. The defendant puts an "x" on the page. And if it gets down there and you like some of the people but you're afraid you're going to get to the end of the list and get some people you don't want, you pass and so you waive the challenge. It's crazy.

MS. SWEENEY: Let's do that.

CHAIRMAN SOULES: That's completely different from the way we do things. We would have to change a lot of

rules to change that. I mean, our rule pretty clearly calls for getting a list and making the strikes and giving it to the clerk.

MS. SWEENEY: Gosh, I move we entertain the Florida system.

CHAIRMAN SOULES: That's pretty crazy. Okay. Is the Committee in favor of drafting something along the lines of what we just said; that is, allow the parties to see the list before the people are called in and seated in the jury box; that there be some allowance for any additional objections at that point in time?

Joe Latting.

MR. LATTING: Yes, I'm in favor of that. But I think we should address the question of what happens when we see that list, because as sure as we sit here, we're going to have this question: "Well, I don't want anything I say to be taken as an endorsement of Batson," and all the murky swamp that leads us into. It seems like Batson to me is the beginning of the end of peremptory challenges. But as long as we've got it and we have to live with it, it seems

like we ought to fashion a remedy which is as conservative as we can in the sense of not changing things more than we need to. And it seems to me like we wouldn't strike the whole panel. We'd see the lawyers' striking panel, and then when the lists are exchanged, one lawyer says, "I think this is an impermissible strike. It looks to me like the defendant has struck all the Hispanics in this jury and I think that these strikes are impermissible." And the judge conducts an investigation and he rules in favor of that motion and he says, "These are impermissible strikes."

It seems to me that it ought to be given back to the lawyer who made the impermissible strikes and say, "You can't strike these people. Who else do you want to strike?" That seems to me to do the least violence to the current system and still correct the evil that Batson is directed at.

I don't like the idea, John, of striking the whole panel because that could get to be a little game in itself. I'll just strike all of the blacks and that way we won't -- we'll never try the case. I'll grant myself a

continuance that way.

CHAIRMAN SOULES: Richard Orsinger -- go ahead, Joe, and finish. I'm sorry.

MR. LATTING: That's all I have to say. I think that we can adopt that procedure where we could draft something along that line.

CHAIRMAN SOULES: Richard, you had your hand up.

MR. ORSINGER: Yes. I think you could defend the policy that if you use a racially or otherwise improper strike that you should forfeit it. Otherwise, there's no penalty for the person who takes a run at it and gets caught.

MR. LATTING: I think that's a reasonable position. It's just -- you know, what about a lawyer who has reasons for striking and they're bona fide reasons, they just -- he just happens not to like a group of people.

MR. ORSINGER: The trial judge has -- before you would lose your strike, the trial judge would have found that it was not

done in good faith, so we're bound by that, aren't we? I mean, we can't second guess the outcome of the Batson determination. What's in my mind is that if you don't punish somebody for an improper strike, then why isn't everybody going to go ahead and try to run through a bunch of improper strikes? The worse that could happen is that that juror will be seated and you'll get to strike somebody else.

CHAIRMAN SOULES: Set some more traps, right. John Marks.

MR. MARKS: I'm just following up on what you said, Luke. I think that's -- I don't agree with that at all. I think it should be -- I don't think it should be a punishable offense. I think that you've got a good point, Joe, and maybe you make your strikes, let's say, and then the judge sees the strikes, calls out the names before the jury ever is seated and gives each side the opportunity to object to the strikes before the entire panel is brought back in and then the jury is seated. Is that kind of what you had in mind?

MR. LATTING: Yes.

CHAIRMAN SOULES: Paula?

MS. SWEENEY: There's one issue that concerns me greatly in this area and it's this: The problem with taking a criminal law and strapping it on to civil trial lawyers is demonstrated here, because the criminal lawyer still gets to do voir dire because they have the Constitution that protects them. Half of us any more, you go to court and the judge says, "You have four minutes. Pick a jury." Now, at the same time, you can't make a strike without showing a damn good reason why you struck the person, but you don't even have time to ask them any questions because the judge gave you, you know, four to eight to 12 seconds per juror to question them.

So to the extent that we are going to be harnessed to this Batson stuff and we're going to lose our ability to exercise any lawyering in picking a jury, you know, there has to be a converse to that, that we get to voir dire. I mean, you can't on the one hand say, "You can't ask him any questions," and on the other hand say, "But you better have some real good

reasons why you exercised your perempts."

So, you know, I don't know, do we write a rule that says, you know, lawyers get to voir dire juries? I think that we need to consider that.

MR. LATTING: Yeah, that's a real good idea.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: I agree with what Paula just said, and I would also suggest that we ought to take a look at -- or the subcommittee ought to take a look at what information is permissible on the juror information cards, what information are you entitled to ahead of time.

And in response to Richard Orsinger, it would seem to me you do have a right to appeal a judge's Batson ruling. The standard isn't clear in civil cases; presumptively, it's an abuse of discretion. I don't know.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I don't mean to put things on another track, but I'm curious about something you said. I just don't know,

is there a severe limitation on voir dire now in state courts around here? I don't know that there is.

MS. SWEENEY: Yes, there is. And in federal court you don't get to do it at all.

MR. LATTING: Then I think we ought to address that. I think that's very important. You can't make peremptory challenges unless you have voir dire.

CHAIRMAN SOULES: Okay. Somebody write up a recommendation and send it in. We'll put it on the agenda, but not today.

MR. LATTING: Fine, fine. I'm just asking.

CHAIRMAN SOULES: I know. I mean, we've got Batson here, so let's give Paula some guidance on what we think needs to be in a general rule.

David Keltner.

MR. KELTNER: Paula, it seems to me there's two things you're going to have to probably look at. I agree with the idea that you have the judge -- you don't call in a

new jury panel; you have the judge try to work it out before seating the jury.

There is a problem, I think, that comes up with the idea of whether you forfeit a strike or not if a Batson challenge is done. I want you to think about it. Richard's suggestion really makes some sense, because the practical effect of a Batson challenge being sustained is going to be that the lawyer then gets to make a strike with the information of what strikes the other party has made, and that is a tremendous tactical advantage. And I think that that is another argument that what you do is forfeit the strike under those situations.

The other thing is I don't think you can call in a new jury panel, especially in smaller counties or rural counties, where you're calling in -- where they're having maybe one jury week every two months, for example, and we're calling in maybe 50 or 60 people total. I don't think it's workable to call in a new one, and that could create large problems in a substantial number of cases. But the real truth of the matter is let's not

stop those folks; they're trying cases out there right now, sometimes more than our more populous counties, so that's the kind of thing I think we ought to look at.

MS. SWEENEY: So the competing consideration is if you go for a -- you're inclining towards no new strike, you blew it, you lose it, no new panel, nothing, you just get stuck with whoever you tried to strike?

MR. KELTNER: Yes. And I know the harshness of that rule, but to do it otherwise is going to give a tactical advantage to the person who made the bad strike. I worry about that to some extent, but by the same token, I think the benefit is going to fall somewhere and the detriment ought to fall on the person whose strike is struck down.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, I don't disagree that the notion that if you have been determined to have violated the Constitution that maybe you should suffer some kind of penalty, but my problem is this: Right now we

have a clash in our two -- between Batson and assuming that you exercised a peremptory and that suppose the judge happens to be wrong, or suppose there really isn't any good evidence but the judge just decides, "Well, I don't want to take a chance." If you were to stand or be able to stand on your defense of your strike, the current law as yet unchanged is that if you prove an objectionable juror sat, which by definition you would have done in the course of the Batson hearing, then you are entitled to a new trial if you just presumed error, so what you are doing is you are basically -- if you do not give an alternative of you want to strike somebody else -- because then if you struck somebody else, you wouldn't have the complaint about, you know, you've gotten more strikes and so you just don't have a right to appeal on that issue.

So to me there's a lot more here than just the question of do we punish the person, because we also put at risk any verdict in any case on a presumed error of reversal where there is a successful Batson challenge or an

unsuccessful one, either way, because if it's unsuccessful, then the person that -- if that person that made the challenge loses, then they would have a right to appeal and reverse automatically regardless of any other grounds.

If they successfully make a Batson challenge and it's determined to be wrongful under whatever appropriate standard, then you have already demonstrated that an objectionable juror sat and you would be entitled to a new trial on that basis.

Now, that seems to me to put the system at a rather considerable risk at a very early stage in the proceedings on presumed error notions, and that bothers me to basically jeopardize every jury trial based on whether regardless -- it's a catch-22. It doesn't matter whether the judge grants the Batson challenge or not.

CHAIRMAN SOULES: Bill, do you have your hand up?

PROFESSOR DORSANEO: Yes. I just wanted to make a small point, that when the Recodification Task Force was working on

the rules as a whole, we did note that in the rule book from Rule 216 probably through Rule 235 that the rules with the exception of Rule 233 had essentially been carried forward from the last century without very much modification. There had been some adjustments made to try to make sense out of them, but frankly, especially with the discussion here today, it's fairly obvious that there have been two major changes that have occurred, the Batson business plus specific, if not arbitrary, limits being imposed on voir dire examination. I would suggest that this part of the process may need -- that part of the rule book may need to be looked at in the same manner as we've done with the Admonitory Instructions and the Charge Rules.

MS. SWEENEY: I think you're right.

PROFESSOR DORSANEO: And that probably should be the subcommittee's assignment.

CHAIRMAN SOULES: To look at this, including all the ideas that we've had here today. All right. Does everyone concur

with Bill's recommendation?

MS. SWEENEY: We'll do that.

CHAIRMAN SOULES: Okay. Paula, can we then refer --

MS. SWEENEY: -- voir dire as a whole.

CHAIRMAN SOULES: -- voir dire as a whole?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: And do any thoughts come to your mind where you want some specific assistance from the Committee right now or guidance?

MS. SWEENEY: The one area is -- and maybe we need to write a proposal and try to come up with something to talk about, but the one area that I have the greatest concern about is the one that I raised which is, you know, we're being -- we have to now incorporate and in some way address Batson procedures. We've got to. It needs to be in there. I don't think you can do that without also addressing the voir dire issue and the fact that there has to be time to do voir dire and you have to have the

opportunity to develop the record, because you can't do Batson without a record. And if you have a judge that says, "You have five minutes," do you immediately go and single out the minorities or the people of the gender or whatever it might be that you're trying to strike or the handicapped people or whatever? I mean, then you're making the system worse rather than better and you're trying to do everything in three minutes that you can. So I'd like a sense from you all, but my feeling is that we have to address that in these rules as well.

CHAIRMAN SOULES: Did anybody see any district court or court of appeals opinions coming out of the federal court system? There's no voir dire there. What do they say about justifying strikes in order to avoid a Batson controversy? Do you know, Elaine?

PROFESSOR CARLSON: What I see in a lot of those decisions is a discussion of the questionnaires to the prospective jurors ahead of time. That's what I was kind of alluding to earlier, is getting information

sufficient to make the challenge and at the same time the court having control over timing.

CHAIRMAN SOULES: Well, there are some federal district courts that don't give juror information sheets. You can't ask ask any questions and you don't get anything in writing.

MS. SWEENEY: The judge does it for you.

CHAIRMAN SOULES: That's right, the judge does it for you or to you. For you or to you.

Well, I think that should be a part of your work. As I'm hearing the Committee, they want you to work on that part of the problem as well.

Richard and then Bill Dorsaneo, and then we're going to go to Steve Susman unless there's more on this Batson issue.

MR. ORSINGER: Some of the state district judges are experimenting with submitting written questionnaires and having the panel fill them out and turn them in and have them studied by the lawyers instead of

having the traditional oral questioning. And whatever the Committee does may not -- you may want to allow that procedure to continue to be experimented with and maybe even permit it to be formalized.

And the other thing I wanted to say is in this area whatever we come up with we're going to have to test out in our lawsuits to see whether it works or not. And perhaps we ought to put this part of the rule in in an ancillary order on the miscellaneous docket of the Supreme Court like we have the instructions that we give to the jurors so that they can be more readily adjusted than the formal rule change process.

CHAIRMAN SOULES: Any other comments? Okay. Well, Paula, we'll refer that to your committee.

And Steve, good morning. What I would like to do on the Discovery Rules is take the subcommittee's draft -- or let me -- let's stand at ease for a moment and let me speak to Steve.

(At this time there was a discussion off the record.)

CHAIRMAN SOULES: We're passing around the sign-up sheet now. Steve, thank you for suggesting to me a way to proceed here so that you can get answers to at least some of the basic questions that you need for your committee to get to the ultimate details of these rules. If you will, give the Committee or state to the Committee your approach to this so that they will understand what approach you're following and then we'll commence to try to give you some help.

MR. SUSMAN: Our committee has met once again between the time of the last meeting and this meeting, and you have before you some of what I would call minor revisions of our work product.

This is now the third meeting at which we've discussed the discovery problem, the third meeting of this Committee at which we've discussed the discovery problem. I think the committee now needs to get some mandates from this group on the big picture, on how you feel, and get -- you know, are we either for it or against it.

MR. MARKS: We don't have it.

I mean, I don't have it. Does anybody have it?

CHAIRMAN SOULES: It says "Supreme Court Advisory Committee" -- it will be the item that --

PROFESSOR ALBRIGHT: I sent out a set dated -- it has a memo from me dated July 11, 1994. I have a few extra copies, if you want them.

MR. SUSMAN: So let me again -- and Alex says, of course -- I mean, she told me that, you know, she thinks that maybe at our first meeting we discussed this and we had a vote, for example, in favor of certain things, and I said, "Well, let's just begin again." And I assume at some point the Chair is going to say, "We have voted on it and that's it," but as I have said, everything is open today.

What I have tried to do is to organize the big-picture issues without reference to these particular rules, because we can go back and draft them to make you happy; we're talking about what I consider to be and what I think the subcommittee considers to be the big

issues that are before you. And what I have tried to do is organize them in the order of those things which are likely to save the most amount of money in discovery.

Our mandate was what can we do to change the rules that will save litigants the most amount of money in discovery with the least amount of sacrifice in the delivery of justice. That way there's no question -- I think we all recognize that there's going to be some sacrifice, but it's a swap-off. I mean, the minute you impose any limits, there's the chance that somebody is going to figure out how to play the game and hide the ball, and that is a comment we've gotten from a lot of people. But I think ultimately we felt, the subcommittee did, that the test on all these rules is how much will it save and what is the real likelihood that someone is going to -- that it's going to result in a gross miscarriage of justice.

Beginning with the biggest rule first, because many of our rules flow from this notion, and that is, should there be a time limit imposed by rule on the amount of time

allowed for discovery in a lawsuit. Please disregard now the questions of how much time, how it begins, how it ends, what goes on during the time period, how it could be extended and whether that time period is placed at the front of the lawsuit or at the back, closer to trial, or divided up. Disregard those questions. Those are small-picture questions. The first question we need an answer from you is should there be a time limit imposed by rule. And also please disregard the question of whether the amount of time should be variable depending upon the size of the case or some other consideration. Let's just deal with the first big picture.

And Luke, that's -- I mean, our proposal, the proposal of the subcommittee for a vote by this group is that our rules impose a time limit on the amount of time allowed for the discovery process by rule. It seems to me that's the first issue that needs discussing, and then we go to the subsidiary ones that I mentioned, which are very important, but nevertheless, if this group does not believe there should be a time limit imposed by rule,

you know, it's going to considerably change our work.

CHAIRMAN SOULES: So what is the basic approach. With a time limit is one approach; without a time limit is a completely different approach. We've got to get an answer to that question.

MR. SUSMAN: Right.

CHAIRMAN SOULES: And what did Yogi Bear say, "If you come to a crossroads, take it."

MR. ORSINGER: Or if you come to a fork in the road.

MR. SUSMAN: I mean, the position that's remained which we've agreed to which was the position of the subcommittee was that we should have a limit on the time allowed for discovery because time is basically money. It will be the most effective thing on limiting the amount spent on discovery, because we thought that in most cases the amount of time -- if the time for discovery is limited, the trials may take place closer to the time that the discovery ends. And we just thought that it makes sense

to have a time limit imposed on the amount of time allowed for discovery.

CHAIRMAN SOULES: Okay. As I understand, the issue now is not where that time period commences or ends --

MR. SUSMAN: Correct.

CHAIRMAN SOULES: -- whether or not it's the beginning, middle or end between the trial and the start of the case; it's just is there going to be some arbitrary limit in the rules subject to being changed by agreement of the parties or order of the court?

MR. SUSMAN: Correct. That's the big-picture issue.

CHAIRMAN SOULES: Okay. Who would like to comment on that? Rusty and then Bill.

MR. McMAINS: Well, I understand you don't want to get into the little picture and all of that, but it's not the first question, because I think we have time limits now, albeit they're variable and whatever in terms of how close you come to the end of trial before the discovery ends. But

when you say subject to being changed by the judge or by agreement of the parties or whatever, that to me is really the big -- and maybe that's a different question that you want -- maybe that is somewhere else in your proposal.

MR. SUSMAN: I'm sorry, I probably should have laid that on, that every rule we are talking about, everything we're talking about today, everything, is subject to change by agreement of the parties or the court. And I think we used the term "for good reason" or something like that.

And by the way, that notion has not been seriously, I mean, debated. I mean, we haven't had a real problem with that.

MR. McMAINS: Well, you may not have had a contest about it, but I have a serious problem with it in terms of what it is that you're supposedly trying to accomplish, because, frankly, I believe that there are a lot of people that don't consider there's a problem with regards to having individual variances either by agreement or by judges because they don't think this rule is ever

going to apply to them. And be it right or wrong, they think, "Well, either I have enough influence with the judge or I know my judges so I know what they will do," or "I know who my opposition frequently is and we'll be able to work something out where it won't apply."

Frankly, I consider that to be a very -- and I think that the general reaction of people that I have discussed this with in the bar generally consider this to be a very elitist notion that we would apply rules that -- we would have these so-called grandiose general rules but subject to being changed depending upon who it is that had the most influence with the judge or who it is that had -- you know, who among counsel that could decide that they can do whatever they want to do. That is, I think, fundamental to that philosophy.

And I don't have a problem and I'm totally in agreement that there needs to be a limited period of time for most discovery. Obviously there needs to be ways out under certain circumstances. But to make a carte blanche way out seems to me to use the

exception to usurp the general rule.

And the approach the feds have taken in my judgment is that we're going to make a determination whether there's a way out right at the beginning and then there ain't no way out or not without real hurdles to overcome. And that -- because otherwise, if you just allow it at any time in the process for the time limits to break down based upon agreement of the parties or the concession of the judge or you go have hearings with the judge for relief, I do not think that has any serious impact on reducing the cost of discovery if you allow such universal opportunities for relief and universal opportunities for reaction.

And I do think that it is perceived by the bar generally, or by many of the people in the bar who aren't on this Committee, as being a very elitist attitude; that the people who are drafting these rules are drafting them for the significant unwashed rather than for themselves; that most people here think they're trying important cases, the judges know they're trying important cases and

they're going to let them out of this or the lawyers are going to be able to agree to it when you're dealing with a lot of money.

And I think that you have totally usurped the good that might come out of limits if you make them unqualifiably able to be changed either by agreement of the parties or action of the judge upon a motion by either of the parties.

CHAIRMAN SOULES: Bill.

PROFESSOR DORSANEO: That's pretty much what I wanted to say.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: And also something to keep in mind is something could go wrong and these rules might actually apply to us someday.

MR. McMAINS: Aha!

MR. LATTING: But it's probably not going to happen.

CHAIRMAN SOULES: Well, I guarantee they're going to apply to me in San Antonio, and I think they will apply to most of us.

MR. McMAINS: Well, Luke,

again, remember, one of the things we're dealing with here from the beginning is the so-called perception -- I mean, you're talking about the perception of the public. All I'm saying is you also need to look at the perception of the bar. And the perception of a lot of the people in the bar is that these rules are drawn for the significant unwashed, which in reality represents the bulk of the litigation that is on the docket. And I think it's wrong for us to be sitting here thinking that we're going to be doing something that is subject to being changed or whatever because you just inject politics too much into the system that is already infected or perceived to be infected by politics by those people on the outside.

CHAIRMAN SOULES: Steve, you have a direct comment back to Rusty, and then I'll go to Tommy Jacks and then Paul Gold.

MR. SUSMAN: I just want to suggest that maybe, Rusty, maybe this is a separate topic; that is, maybe we should have a separate topic of whether once limits have been -- the first topic is should limits be

established by rule, time limits, and then the next question is how do you get out of them, how do you change them. So maybe what you're -- I mean --

MR. McMAINS: Well, that's what I was getting at.

CHAIRMAN SOULES: Okay. We'll just debate at this point whether there should be limits without saying how relief from those limits might be had at this point.

MR. SUSMAN: Let me see if I can rephrase the issue. I think we all recognize that courts do impose these on parties during the pretrial conference procedure. We all have time limits that we have to work from in state and federal court. The real question, I guess, is -- and I guess how we get those limits fixed depends on what kind of stroke we have with the court at the beginning too, so that's part of the system. I mean, you know, you go in and -- but the real question is in the absence of -- if we have a judge who does nothing, who is too busy, who does not take the time to do that, should there be a rule that provides a

default. That's the issue, I think.

CHAIRMAN SOULES: Tommy, you had your hand up?

MR. JACKS: Yes. As Rusty was speaking, I was trying to decide whether I was washed or unwashed and I'm still confused about that. But the lawyers I've talked to, and I don't know that I would call them elite, but I would call them experienced, able trial lawyers, who talked to me about this rule after having read about it, have had quite a different reaction than the reaction that Rusty has got. And their reaction is not that they're concerned that the exception will swallow the rule, but they're concerned that the exception does not provide enough flexibility to offset what they see as the ill effects of the rule.

The ill effects of the rule that they see and that I see are that any time a committee decides or a court decides on a statewide basis that for all lawsuits we're going to have this time limitation and it's going to apply to all cases with some exceptions, no matter what the exception might be, you're

trying to fashion rules that are going to disserve many litigants and lawyers in many cases. And they don't find even comfort in what Rusty sees as a lurking evil; that by agreement with the opposition or by applying to a court that they may be able to relieve that injustice or may not be able to relieve that injustice. It's beyond that. They all question, and I question, the very premise upon which this notion seems to be based, and that is that if people come up with some arbitrary window that we're going to apply to all lawsuits with some exceptions that we will lower the cost of discovery.

In fact, most of the lawyers I've talked to think that you're only to go to increase the friction cost of lawsuits as lawyers try to figure out ways to use these arbitrary limits to advantage over other lawyers; and that there is a very real risk that costs, if they're affected at all, are going to be affected in the wrong direction.

And so I come down, I guess, on the side of saying that in response to the basic question Steve asked, should there be a time

limit, I would say no. I would say that that's better left to judges, most of whom I think do do their job or make serious stabs at it, on a case-by-case basis rather than on a blanket basis.

CHAIRMAN SOULES: Joe, you've got something?

MR. LATTING: As Bill Dorsaneo commented to me, we already do have time limits. The rules have a time for the beginning of discovery and the ending of discovery. The question here is whether we're going to address and make definite or -- I don't want to use the word "arbitrary" -- but make uniform for all cases --

MR. JACKS: Go ahead and use it because it's accurate.

MR. LATTING: It does have a certain appeal. But we already do have discovery time limits. The question is do we compress them down.

CHAIRMAN SOULES: What's the time limit in -- it's rare you take a deposition before you commence a lawsuit.

MR. LATTING: That's right.

MR. CURRY: But you can.

CHAIRMAN SOULES: But you generally can't take one after a verdict.

MR. CURRY: But you can.

MR. LATTING: Sure, you can.

CHAIRMAN SOULES: So what's the time limit?

MR. LATTING: Oh, the time limit. All right. Well, for example, you can't begin discovery ordinarily until the defendant has answered without leave of the court, and you can't --

CHAIRMAN SOULES: Well, everything except depositions.

MR. LATTING: Well --

CHAIRMAN SOULES: Okay.

MR. LATTING: And we're all familiar with the 30-day Supplementation Rules, so those are the ones I guess Bill was talking about that I can think of, because in every lawsuit I'm in I'm very concerned about time limits. I mean, every trial setting I've got, I've got a big red arrow that goes back 30 days.

CHAIRMAN SOULES: Bill

Dorsaneo.

PROFESSOR DORSANEO: I think in the system probably the date that is the one that needs to be the most solid is the least solid, the trial date. If we could actually have that be a date when cases went to trial, although you can talk about discovery after trial, really that's not what we're talking about. When it goes to trial or it's going to go to trial on a certain date, then the discovery window would be over at least by then and certainly a little before then.

I'm trying to sit here and decide what is the problem. Maybe it's that we don't have realistic limits because our trial settings are not real in a large percentage of the cases. However, if you just wanted to have less discovery and save money, discovery money anyway, well, I guess you could limit the amount of time you conduct discovery to Saturday mornings.

MR. MARKS: Or Sunday afternoons.

CHAIRMAN SOULES: That might work.

Paul Gold, you had your hand up, and then David Perry.

MR. GOLD: I believe the person's name that keeps rattling around in the back of my mind as I listen to this is Professor Friesen. It sounds an awful lot like what we're talking about here is Rusty's proposal, which would be -- would lead to having different types of tracks. If you were going to have one rule that was unbending, you would have to identify in the rule that there were different types of litigation, which I don't think would -- I'm not saying that Rusty is suggesting that by any means.

MR. McMAINS: No, I'm not.

MR. GOLD: But that could possibly be a solution to Rusty's question about how do you define -- in a rule that doesn't bend you would have these tracks, and that seems to also answer a question that Bill is bringing up, is the trial date, and it sounds like we would have these tracks that we talked about a number of years ago where you would have Track A, Track B and Track C, and I don't think that's the way to go either. And

I really believe that if you did that, you would have some real problems.

I think one of the policy considerations that we also had throughout the committees that I sat on was trying to make the rules simple, and I think if we try to construct a rule that takes into account the different types of civil litigation -- family law comes into it. I know we had a number of issues that would come up that were unique to family law. I think if we start trying to write these rules to set out a definite rule that doesn't allow the parties or the court discretion, we're going to wind up with such a complicated rule that it won't be useful.

CHAIRMAN SOULES: David Perry.

MR. PERRY: The State Bar Committee report that considered these studies had a comment in it that indicated that they felt that mandatory or arbitrary limits were counterproductive, and I think that that is a very insightful comment. I believe that the great mushroom of the cost of discovery is largely related to what people talk about as being friction costs or transaction costs, at

least I think that's a very great part of it, that end up being disputes that take a lot of lawyer time and oftentimes a lot of court time to resolve. The more you have mandatory limits, clear, specific, numerical limits, the more of those disputes you're going to have.

Now, the other thing with this particular kind of limit is we mostly now deal with -- most all of us in all of our cases have something called a discovery cutoff deadline. The theory of all of these windows is that we're going to move the discovery back and have it completed 30 days or 60 days or 90 days before trial. Well, that's contrary to human nature. Human nature is that you don't finish the discovery until you have to go to trial. And human nature also is -- and this is beneficial to the system -- that in the absence of these kinds of limits, people will put off doing a lot of discovery in the hope that they won't ever have to do it. And a lot of times they don't ever have to do it, but then that means that sometimes they're going to end up doing stuff within the -- they're going to take depositions within the

last 30 days or within the last 15 days or whatever.

Now, what happens as a practical matter, if you create a rule that tells everybody that you have to do it earlier, is that some people are going to start a lot earlier but nobody is going to get finished early. You're going to end up going to court to get the court's permission in some cases not to finish early. And as a practical matter, I think this kind of limit will increase the total volume of discovery and I think it will increase the transaction costs and ultimately the total cost of the discovery that's done.

I think there are a lot of ways that discovery costs can and should be reduced, but I don't think this is one of them and I think it will be counterproductive.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I'll be real brief. I'm in agreement with David and Tommy on this. I think it's a bad idea to set these arbitrary limits. The bigger problem -- I don't know whether it will increase them or not. I certainly don't think it will decrease

them, and from what I'm hearing around the room, nobody knows exactly what it's going to do except that it might create another, yet another, stage for gamesmanship, so that you change the rules without really changing anything.

CHAIRMAN SOULES: Other hands were up. Richard Orsinger.

MR. ORSINGER: It's not clear to me from the debate whether we're arguing two things, which is whether we ought to narrow the window of discovery opportunity, which is a separate question from whether we ought to limit the amount of discovery. For example --

CHAIRMAN SOULES: This is time limits.

MR. ORSINGER: This is just the time limits without the amount?

CHAIRMAN SOULES: That's right.

MR. ORSINGER: And so all of these comments, then, are addressed only to how long a period?

CHAIRMAN SOULES: Well, I think the comments have been mixed. But what the

issue that we're going to try to get a consensus on is the time limit, the time window of opportunity for discovery in a case where there's no exception by whatever procedure.

MR. ORSINGER: And we're discussing that within the context of knowing that later on we will visit the question of limiting the number of depositions or the time that you can spend on depositions?

CHAIRMAN SOULES: Yes. Alex Albright.

PROFESSOR ALBRIGHT: Well, I think when we were in our subcommittee meeting the philosophy that I kept hearing throughout and I know I kept thinking about is that I think a lot of people have said that the best way to curb discovery costs is to have a judge very involved in every case and who can have a pretrial order that is tailored to that particular case; what do the parties need in discovery in this particular case. And I think we talked about that at the last meeting that in the real world that can't happen. There are not enough judges, there's not

enough money, there's not enough courts to do that, so what we were trying to do is say, okay, that's a given; we can't do that in every case. So what is a rule that is -- it's going to be arbitrary, but it is a rule where we're trying to figure out what will fit in most cases.

And we thought -- we picked the six-month limit. And we're not debating the amount of time right now, but we said we've got to find a limit that makes sense in most cases so that discovery will be limited in every case as if there was a pretrial order imposed.

And then those cases for which this time limit doesn't work, they can pull themselves out of that system and go to the judge. Those 20 percent of the cases that have 80 percent of the discovery, they can get a tailored rule, a tailored pretrial order for their particular case and pull themselves out.

Or for the smaller cases where they don't want to have that much discovery, they can pull themselves out. Maybe that's not very realistic that they're going to do it, but I

think the idea is that you have a default rule that will fit as many cases as you can so that it would be like having a pretrial order in those cases without the transaction cost of having to go to the judge in every case to get a tailored pretrial order.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: First of all, I'm not advocating in any way and never have the federal track system nor the previously rejected notion of trying to set something in the beginning. However, I think Richard's comment is particularly apt, because while you say we're not talking about scope of discovery or limitations on the type of discovery, any time you talk about a time window that is arbitrary you are talking about effectively -- and it doesn't reduce costs unless it reduces the discovery or at least the discovery fights that are going on. And that is perceived also from people that I've talked to in general about this issue, a number at the State Bar Convention, that is perceived as being, once again, directed at

limiting the scope of discovery, even though you can dispute that that's what it's doing.

If you've only got six months to discover, who are the people who gain by limitations on discovery? It's the people who have the information. And frequently that's the big companies, the big corporations in that kind of lawsuit. And I realize that there are frequently big corporations on both sides of the lawsuit, but there are also frequently not.

In a lot of areas of practice, you know, people are perfectly willing to look -- like in the personal injury practice, they're perfectly willing to look at the plaintiff's file because there's not much in it. It's got to be built up from the ground up. They're not the ones who have the information. It's the defendant who has the information.

And there is a perception that any limits that are arbitrary in this regard effectively limit the scope of discovery. They do, in fact, I think, and it has been demonstrated to have engendered some kind of gamesmanship in regards to trying to push as close to the

limit as possible before you disgorge -- before the person who has the information disgorges any information, even assuming they ever do. But you're going to invite the gamesmanship to go down to the very end where maybe they won't have to produce it at all by taking advantage of some kind of an arbitrary or default cutoff.

Now, I realize you're trying to allow back doors for that not to occur, but frankly, any system that is designed with arbitrary limits in mind is also designed, if they're going to save money, by definition, to limit the time spent on discovery, and that always operates to the disadvantage of the person who doesn't start with the information, because he doesn't have his discovery ability to direct it until he gets more information, and that's a moving window.

So I'm not suggesting that we should be in favor of some kind of arbitrary time limit other than one that relates to how close you are to trial, which we already have by and large, although we have exceptions even to that. But those are fairly few and far

between under the present rule.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: The problem I have with what Rusty just said is that I think it proves too much. If Professor Underwood is right in the study he cites that 80 percent of the time and money we spend in civil litigation is in discovery, 80 percent, if we're going to reduce the costs and the time spent in civil litigation, we've got to do something about discovery.

CHAIRMAN SOULES: Speak up a little bit, Chuck; we can't hear you.

MR. HERRING: We've got to do to do something about discovery. That's where the time and effort is spent. And I think what Steve has proposed is not radical; it's not new; it's not unheard of.

We certainly are seeing it in federal court around the country. The Western District, I read the rule, now has a six-month window for discovery under the standard pretrial order that's to be put into effect. That may not be the way to go, but it's

coming. We're seeing it all over the country.

I think it's incumbent upon the opponents to this kind of approach to figure out some other way to have a meaningful impact on discovery. If you're going to say that this is too arbitrary -- and any presumptive limit is arbitrary. It's too much for some cases and it's too little for other cases. But if you're going to say, "Don't do this. Don't try to curb or have some kind of limitation on discovery by a period window," then I guess we'll get to it. What are you going to do? What are you really going to do that's going to affect discovery?

And implicit in Rusty's last point, it seems to me, is the notion that if you're going to have any restrictions on discovery, they are inherently evil because they benefit the party that has the information.

And I think Steve is right, that there's a consensus, at least among the business clients that I have dealt with over the years, that they would like for us to figure out a way to reduce the time and money we spend in

civil litigation, and that means we have to address discovery meaningfully.

This is a meaningful way. It may be too arbitrary. It may have a lot of other problems with it, but I do hope I hear all of the opponents to this later in the morning come up with other proposals that will have that impact, because I think if we're going to have an effect on the system, we have to come up with something.

CHAIRMAN SOULES: Well, we've talked about this in earlier meetings. The profession is just under fire over the cost of litigation. Now, that means that there's going to have to be -- if we're going to -- if we're going to address that issue, we're going to have to reduce costs. If 80 percent of the cost is in discovery, taking much out of the other 20 percent is not going to do much to the cost.

I think, Rusty, in talking about scope, we're not really talking about 166b-type scope. We're talking about by setting some time limit or some other limits we're going to reduce the quantity of discovery that can be

done. That's at least an issue. Are we going to try to reduce the quantity of discovery? Is that the approach to cost reduction that we want to take? I don't know.

Steve, I would like for you to speak first, and then we'll go around the table.

MR. SUSMAN: Well, you know, I guess even the opponents, I mean, the people who have spoken against it, will have to concede -- I mean, I guess they would have to concede that it would be okay to have a rule that said, "All discovery must be completed in two years." If you don't concede that, then we've got to say, "No pretrial order should specify or limit the amount of time allowed for discovery."

I mean, I didn't want to get into this issue talking about how much time, because we can adjust the amount of time, but I mean, are there -- I mean, is there anyone here who seriously believes that a rule should not be written that says, "All discovery should be completed within two years?" I mean, does anyone find that obnoxious?

MR. MARKS: Do you want us to

raise our hand?

MR. McMAINS: Well, if you're in Harris County and you don't go to trial for four years, yeah. Then the problem you have is you've just got two years to --

MR. SUSMAN: Okay. I mean, I think that's fair. Everyone says -- do you mean you would not make discovery completable in two years even in Harris County? See, I mean, our feeling was -- I mean, our basic feeling was that -- I think in my experience that much of the time that is spent by lawyers and billed to clients is the starting and stopping time, the picking up the file, learning it and relearning it. The most efficient way to handle any lawsuit would be, in the ideal world, would be you have three weeks to do everything and get ready. I mean, that's frequently the way preliminary injunctions or temporary injunctions are handled involving millions of dollars. There's a short period of time that you don't do anything else but participate in the lawsuit. Everyone gets their experts, everyone gets ready, you go into trial and you

try your lawsuit. There is some efficiency in working on one thing at one time. And think about how much time is lost by not doing that and how much expense is incurred.

I also believe in my experience that there's a direct relationship between the cost of discovery and the amount of time allowed to participate, to have it. I mean, as a plaintiff evaluating whether I can afford to take a contingent fee case where the other guy's recovery, potential recovery is $500,000 and my fee would be a third of that, I think about how long is it going to take. How much time can I possibly be hurt by the other side in this discovery process? Now, maybe they won't do anything, but I've got to calculate that they've got 18 months to rag me and my client around. And I say, "You know, I'm sorry, I can't handle your $500,000 lawsuit. It's just not a big enough lawsuit." And the courthouse door is closed to a lot of people like that because -- I mean, and that's a serious problem, I think.

CHAIRMAN SOULES: It happens every day.

MR. SUSMAN: So I mean, I think that there is some -- and I mean, I think that's the -- I mean, frankly, the basis of pretrial orders is setting time limits. And what we're really talking about here and obviously what the subcommittee is talking about is much more drastic than time limits, a lot of which you may find unappealable.

But it seems to me that we can think in terms of some time limits, particularly those where you might have a situation which I began thinking of since we made our proposal, where you can have a proposal, for example, in a case where the plaintiff seeks under $100,000, discovery must be completed in three months; 100,000 to 500,000, you've got four months; $500,000 to a million, six months; a million to 10 million -- and the plaintiff is bound. The plaintiff cannot recover more than he specifies in his damages clause so that a plaintiff who wants to go for the big bucks is allowing the defendant a lot more time to complete discovery and potentially a lot more cost. Now, that's possible. You could have a system like that.

CHAIRMAN SOULES: Justice Hecht has something important here to put before the Committee.

JUSTICE HECHT: Well, I want to add to what Chuck said a minute ago and to what Steve has said, and that is that it seems virtually indisputable at this point that a lot of the cost of litigation is in discovery. And the public perception of that is that that cost benefits the bar more than it benefits them. It is incumbent upon us, I think, if this particular kind of limit is not viable or appropriate, that we come up with other real limits that are, which having worked with the subcommittee for some time, I'm not sure what they're going to be.

I suppose, in answer to Rusty's concerns, that if we just set the case for trial in six months, which we are able to do in a lot of areas in the state, and require that discovery be completed 30 days out, which is certainly no radical proposal, we would have effectuated the same thing, and I don't see how anybody could argue with that.

The fact that it takes a longer period

than that in the larger counties where the dockets are more crowded is due at least in part to the fact that it is harder to move those cases along and get out of the way those cases that don't need to go to trial, that are going to come up on the money that they're settled for and that keep the case that does need to go to trial from getting there on Monday, Tuesday or Wednesday until it is reset.

There is a certain cynicism in the public that I hear that lawyers are not going to be too receptive to restricting procedures that mean that -- that keep them occupied, and so I hope as we -- if this time limit or some time window or some real limitation is not appropriate in this regard, that, as Chuck says, it's incumbent upon us to come up with others that are. I mean, the public wants some solution to this.

I think most of us sitting around the table feel like the federal solution is not a very good one. It drew two dissents on the U.S. Supreme Court. A number of people who were involved in the process have complained

bitterly about it and they still say it won't work. Here is our chance to come up with something that will, but it will have to be restrictive.

CHAIRMAN SOULES: Well, I think as a footnote to that that if lawyers, and obviously we're some of them, don't put some limitations, we may lose our voice. Those limitations may come from someplace else and probably will come from someplace else and we will be caught with whatever that is, whatever the result of that is, by default rather than by contribution. So we need to approach this attempting to get results for the benefit of the public.

John Marks.

MR. MARKS: Well, there is another proposal that's being worked on by the Rules Committee that does impose time limits. It doesn't propose a window, but it does propose time limits, we hope, on depositions. It also streamlines discovery in certain areas, so there is another proposal on the table. And by saying no to should there be a window, I don't think anybody around this

table is saying there should not be time limits in some areas.

CHAIRMAN SOULES: Why don't we go around the table --

MR. MARKS: Well, there's another thing.

CHAIRMAN SOULES: I'm sorry, John. Go ahead.

MR. MARKS: Secondly, I haven't talked to a lawyer outside this room -- now, I understand that lawyers don't count all that much, Your Honor -- but I haven't talked to one lawyer outside this room that is in favor of a window like we've been talking about here. Not one. Now, I haven't talked to every lawyer, but I've talked to a lot of defense lawyers and a lot of lawyers who practice on the plaintiff side. I haven't talked to anybody that really agrees with that.

Thirdly, I think that with a window like what's being proposed you get back to the same problem we have now: A good judge is going to move his docket well and a bad judge is not. I mean, you don't really change anything

that's going to give a good judge any more help than he's got right now.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I don't really know which way to vote on this issue because I don't know what's going to happen to the more important issue of what are we going to do in terms of limiting discovery. If we have a six-month discovery window but no limitations on depositions, interrogatories or anything else, it's quite possible that we won't eliminate any discovery. We'll just compress it, but it won't be eliminated and it won't be any cheaper.

On the other hand, if the politics are that there cannot be limitations on the number of depositions or the hours in deposition and that the only thing we can do is limit the window and that's the only limitation we can have, then I would be more inclined to vote to have a window because we can't restrict discovery in any other way.

But to me the more important thing, and I know we've debated it three or four times here

and we haven't even gotten off the starting block, is what are we going to do on the forms of discovery we have and how are we going to limit them. That is where we're really going to cut back on the expenses.

And so I kind of feel like right now I really don't know which way to vote because I don't particularly think the window is important if we're going to limit deposition time. If we can't limit deposition time, then the only thing we can do is to have a window, and I'm in a quandary. I have no suggestion.

CHAIRMAN SOULES: Next going down to Paula Sweeney.

MS. SWEENEY: I just -- one point that goes across all of this is we need to look very carefully at the genesis of this. If we're hearing what Steve said a moment ago, which is institutional clients, two big companies suing each other and choosing to delve into their deep pockets as a business tactic to abuse each other by paying lawyers for a long time, you know, that is a business choice, and then gripe about it, that's what we're hearing. Presumably, these

lawyers are acting with their clients' consent that we're hearing these complaints about.

We're talking about fashioning a fix that's going to affect every other kind of lawsuit out there where that problem doesn't exist, or at least it doesn't exist at all in the same way, to solve that. And we need to look at that in each of these instances. If what the problem is is institutional clients choosing to declare war on each other through the litigation process, that is a totally separate issue from whether or not discovery is abused in any other situation or kind of case. And that needs to stay in the front of our consciousness throughout this discussion.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I think there are philosophically several things we need to take a look at.

Bill Dorsaneo spoke of in his comments and his discussion about what I think is a very good point, and that is, among lawyers we waste time in discovery because we prepare for trial more than once. In fact, if you're in a

populous county, the likelihood of preparing for trial more than three times is quite frankly probable. That's a problem we've got to solve. It's not completely a discovery time problem, but it's one that we've got to solve. The more time given that discovery is open, the more likely a lawyer is to do discovery because he or she believes that it benefits their client. And that's another truism.

The second thing, though, that I think is important is that quite frankly in our rules now there is no obligation -- and this is incredible, but the Discovery Task Force looked at it in great detail -- there is no absolute obligation to answer a written discovery request. There is absolutely no obligation to answer in depositions. There is only an obligation to supplement discovery, and it's not even really completely stated; the rules simply say you can't introduce into evidence if you don't. So I think our rules have to have some absolute obligation to answer.

The problem that Rusty raises is valid,

and it's different -- it differs with every case, but the party with the information has the incentive not to choke it up; the party who doesn't have it has the incentive to ask for it. And there is a war in which the party who doesn't have it doesn't think the party that does has produced it until the last minute. We can take care of that with more absolute obligations to answer, and I think that is something we need to think about.

I tend to believe that some discovery period is probably necessary if for no other reason it would get us to prepare our cases for trial one time, one time only, face the idea that that case is going to trial or will settle by a certain date that you are relatively sure of within 90 days after the case is filed. I think that would cut down the discovery process tremendously on unneeded discovery.

Some discovery is completely needed, and all of us agree with that. Our problem is whether people are complying with the rules, number one, and then we have the discovery battles that go on in that regard. So I think

there ought be some limit if, and only if, it leads to a date certain on trial, one trial date per case, period and paragraph. And I think that's probably one way to get there.

CHAIRMAN SOULES: Okay. Let's go around the table. Robert Meadows.

MR. MEADOWS: Luke, much of what I would say about these specific points would be just repetition, but I do want to go on the record as saying that I am persuaded that it would be absolutely unacceptable for us not to do something about limitations on the time of discovery and the discovery scope.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I want to echo that. I mean, I personally -- I don't personally have a big problem with discovery in my cases. I mean, I think part of what we're doing here is doing something where we can tell the public and the lawmakers that we are trying to control in a very meaningful way the abuse of lawsuit expense, because I think the problem is -- regardless of what kind of cases cause the problem, although it may be institutional clients declaring war on each

other. And then the general counsel who authorized that war, okay, begin writing articles about how abusive discovery is and then they join groups that go to Congress that talk about doing something about lawsuits. And the victim is not these guys, these general counsel and their corporations. The victim is when Congress decides that the way to deal with that is let's just shorten the statute of limitations; if we've got a problem in the courts, let's just close the courthouse door a little; shorten the statute of limitations; remove this cause of action; well, we don't want an implied cause of action here.

I mean, they will -- the public reacts in a way, I fear -- and I think we see it in our court decisions, certainly in federal court decisions, we see it in legislation pending in Congress -- the public reacts to lawsuit abuse not to solve the kind of problems that we get around here but to simply close the door of the courthouse. And that's what scares me.

If we don't do something that we can go

brag about, saying, "Hey, we did something to solve the problem in a meaningful way," the reaction is going to be terrible. And that's partly what I think we need to do, is do something that is meaningful.

CHAIRMAN SOULES: Next coming around the table. Tommy Jacks.

MR. JACKS: I, too, want to go on the record as saying I agree that things need to be done to lower the cost of litigation and the cost of discovery. I think Justice Hecht is absolutely right about that.

I think the thing that Justice Hecht pointed out and that David Keltner echoed to some extent is that you can do all you want to do with windows, but if you don't do something about trial settings, it's all for naught.

I personally am strongly of the view that discovery windows are window dressing and that's all they are. I don't think that will lower the cost of discovery. I mentioned in our last meeting the experience we had in Harris County when effectively we had a discovery window that worked in a similar way to a six-month window in real life because of

the rule that prevailed there for a period of time, which was abandoned because it was so disastrous in its results, that you had to complete your discovery before you could then get a trial setting. And that meant that out of necessity there was a gap between the time when you finished your discovery and the time when your case would come for trial, just as there would be under a six-month window, even if you had a little refresher period at the end. And what happened under that system was that the cost that we've been talking about -- and that is that, you know, you packaged up your file after you finished your discovery and then you waited for months. In the meantime, you tried a couple of other cases and you went on vacation maybe, if you were lucky, and you came back and you didn't remember. You went back, reread all those depositions. You had to -- you know, all that time we're talking about that was wasted was wasted in that way because of a discovery window.

I don't oppose the idea at all of limiting discovery costs through limiting

discovery, but I think this is absolutely the wrong place to start.

We talked about other avenues of approach. You know, there's a motion on the table about how much time can be spent taking depositions, for example, and clearly marathon depositions are a cost driver; needless objections to written discovery are a cost driver; written discovery in itself to some extent is a cost driver, and those things, I think, all must be addressed.

I think the trial setting is probably more important than anything else. If we had certainty in trial settings and we knew that when a case was set for trial that it was really set for trial, so many more of these other problems would go away because cases would be resolved and that's all that resolves them.

We've been involved in litigation in Harris County in which we made a serious effort with some defendants to resolve the cases by voluntary discovery; give them the records, present our clients for deposition, and then try to evaluate the case and get it

resolved. Absolute failure, because we didn't have a trial setting. And that's in part driven by the desire anyone has to hold on to his or her money as long as they can until it's apt to be taken away from them by force; and it's in part driven by the mere fact that there are other things on the front burner. There are other cases that are set for trial. There are other things that they're preoccupied with so they just don't really get around to paying attention to the case.

So I think there are meaningful things that can be done, but don't put us all and our clients all at the -- we all become victims of the law of unintended consequences, I think, if we buy into this discovery window business. I think it's a bad idea.

CHAIRMAN SOULES: David Perry.

MR. PERRY: Luke, I think that the question that Chuck Herring raised about if we don't do this, what are we going to do, is an extremely valid question, because I think that everybody at this table agrees with Justice Hecht and Chuck Herring and others that we have to cut down on the cost of

discovery.

The problem is that we have to -- it is not that discovery is one problem; it is a series of various problems. We have a lot of problems having to with prophylactic objections that have to be dealt with. We have a lot of problems having to do with contention interrogatories that involve tremendous amounts of lawyer time, most of which is wasted. We have a series of problems. And whatever we do, we need to make changes in the rules that solve a particular problem.

The difficulty with the discovery window concept is that we're using a meat axe when we ought to be using a scalpel, and if we're going to -- part of the reason that we have the problem that we have is that in, say, the 10 years or 15 years immediately preceding now other folks used meat axes when they needed to use scalpels and we have ended up with some problems that need to be taken out of the system. But we don't want to create more problems than we're solving. The problem with the window concept is that it doesn't solve

any particular problem.

Now, where we have overdepositioning, where we have marathon depositioning, we have people who prevent depositions from proceeding in an orderly way, we have a whole series of specific problems that are solvable and can be solved and should be solved by changes in the rules, the Discovery Task Force has some very specific proposals that deal with a lot of those problems. The Discovery Subcommittee has a whole bunch of specific proposals that deal with a lot of other problems in the area of depositions. It seems to me that we should focus on specific proposals that solve specific problems in a scalpel kind of fashion rather than a meat axe kind of fashion.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I've been trying to jot down what I thought were some of the major points here, and I think that there's a constant theme. I think Richard Orsinger points out a very important point, and that is that we don't accomplish anything by merely compressing all this discovery dispute if we're not reducing it. Merely compressing it

doesn't solve the issue.

Rusty brings out a very important point as well, and that is that if you put time constraints on the process, it's the party that has the information that is always going to prevail.

The problem that we've had in the subcommittee -- and I respect Steve's philosophy in this approach, but Steve comes from a perspective that's different than mine, and that is that while he represents plaintiffs, those plaintiffs are, as Paula said, institutional clients that oftentimes know what documents to go get on the other side and know who to go depose and whatever.

And as somebody who historically has only represented personal injury clients, the people I represent don't have that information, and usually what -- the only thing that I have is tenacity and time to be able to get the information I need.

And then we wind up at cross-purposes with some of the things the Supreme Court has come down with. If you compress things, it encourages people to request broadly. Give me

your entire file. Give me the complete -- all documents on this issue; whereas the Supreme Court has been trying to counsel us to ask for things specifically. I think that by compressing things it's at cross-purposes with that issue.

I mean, there have been cases that have come down that said you can't request the attorney's file, you can't request the investigation that they did. All those things would -- if you could get your hands on them, of course -- would reduce the time spent in litigation. But there's a policy there that you shouldn't be allowed that. You should have to ferret that information out. Fine. I think you need the time to do it.

I think -- and I think that I'm agreeing with a number of people here -- that where we solve the problem is putting constraints on depositions, putting constraints on the devices that we're talking about.

When I've been involved in cases where the court has suggested we do arbitration, I have begged people to try and do the arbitration before we have to designate

experts. In most cases where I've been able to do that the cost is tremendously saved, because the minute you start getting into the experts you start increasing the cost exponentially. I mean, there are timing devices that could be used.

And I agree with Rusty. I think if you put arbitrary limits on it, and I agree with Tommy, if you don't allow the courts flexibility, then you're working at cross-purposes with a lot of goals.

CHAIRMAN SOULES: Okay. Rusty McMains.

MR. McMAINS: I want to make only two points. One, that what I'm hearing from Steve as well as Justice Hecht is that they are concerned about this committee doing something that at least looks like we're doing something, whether we are or not.

CHAIRMAN SOULES: That's not what I heard.

MR. McMAINS: What I'm saying is what I'm hearing -- or what they say is that they want to do something meaningful, and I agree with that, that we need to do

something meaningful. I don't think we should do something just to look like we're doing something. And I think that's where the approach may be considerably different.

The second point is that in regards to that, in order to do something meaningful, I think throwing out gross statistics like "80 percent of our time is spent on discovery" is misleading as hell, because the question you have is when you're saying 80 percent of time of whom, you're talking about lawyers and clients, are you talking about spent on doing discovery or are you talking about resisting discovery? Are you talking about obstructing discovery? Are you talking about objecting to discovery, trying to block discovery, of gamesmanship, of spending hours and hours to draft an interrogatory answer so they don't have to answer the question?

Let me suggest to you that in my view the 80 percent statistic about the discovery process is actually probably more accurately divided into a goodly portion of that 80 percent is on parties attempting to resist

what should be appropriate discovery, and I think that therefore the use of a gross statistic of 80 percent of the time is spent on discovery -- of course, most cases aren't tried. And if you just use an arbitrary period of, well, anything that happens to resolve itself before trial and you add in all the costs up to that time, we can just throw all that into discovery time. I don't know where those statistics -- how they are broken down, but I suspect that a goodly portion of that is spent on the resistance to discovery, and the question of how we get compliance and expedite that, to me, is the meaningful answer to the discovery question.

CHAIRMAN SOULES: Joe Latting. We're going around the table.

MR. LATTING: Well, I think that people, the public, think that there are a couple of things wrong with the legal process, and I think that -- I don't think they give a hoot about discovery. I think they think two things are wrong. One is that cases drag on too long; and that lawyers charge too much. The really serious problem

is that I think they're right about both of them.

I don't think we can do too much about what lawyers charge, but in my office the cases that end up costing my clients a lot of money are the ones that take a long time between the time when I get them and the time they're tried. The cases that I get in and get out of in several months don't cost near as much as the ones that stay in there for several years, so I agree with Bill Dorsaneo and Tommy. I don't think it makes much difference.

It's like the old joke about what rate is the insurance defense lawyer going to charge. You know, it doesn't matter; they're going to set the hours. You can set the rate, the hourly charge so we can do all the stuff we want to do. I don't think it will make any difference.

Until we get cases disposed of more quickly, it's going to cost people a lot of money, and that's what we need to address in my judgment. I don't think this matters.

CHAIRMAN SOULES: Bill

Dorsaneo.

PROFESSOR DORSANEO: Well, I agree with Dave Perry. I think we could reduce -- and maybe this is an overall issue; maybe people think otherwise. We could reduce the friction costs considerably by addressing specific problems. Like some of you may think that lawyers are sufficiently whatever to make it impossible to eliminate the friction costs in the system, but I personally don't believe that. I think we could do a lot by focusing on the resistance to discovery that is, you know, sometimes required as a prophylactic measure; I'm not saying that all resistance to discovery is inappropriate certainly. We could do a lot by eliminating formal problems, standard form interrogatories and those types of things that we've discussed.

The concept of disclosure seems to be a pretty good concept to me to eliminate a lot of the costs, but some of you may think otherwise. You may think that the friction costs cannot be eliminated and that what we need to do is to be more arbitrary. I simply don't agree with that.

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT McCOWN: I want to respond to a couple of points, beginning with Tommy Jacks when he's talking about trial settings. Trial settings are a function of the number of cases and the number of judges, and we're not going to get any smarter judges and we're not going to get any harder working judges than we've got right now and we're not going to be able to -- the Chief Justice had a proposal for redistricting and it went nowhere. The judges we've got are going to be where they're at and we're not going to get any more judges because of the costs to the state and the counties and because we're involved in litigation that's going to be years in the conclusion of. I don't think we can look to trial judges to solve the problem.

The problem with trial settings we're just going to have to live with. We can make some marginal gains, we can do a few things, but I don't think we're going to get much done there.

I think we're going to have to solve the

problem by asking ourselves, and I made this point before, is all this discovery necessary. Mediation resolves cases without a whole lot of discovery; temporary injunctions get tried without a whole lot of discovery; criminal cases get resolved without a whole lot of discovery, and I don't have any personal feeling that those cases are winding up with a bad or wrong decision with that limited amount of discovery.

I don't think a scalpel is going to do it. I think we need major liposuction to suck the fat out of the discovery with default limits. It is not -- and I want to say that in the cases I see, it is not discovery abuse, it is the legitimate use of discovery under our norms and customs as a profession. It is a desire by the lawyer to know everything, a desire by the lawyer not to be in a position where he can be criticized for malpractice, a desire by the lawyer not to try the lawsuit but to keep discovering in the hopes that it's going to get settled or he's going to find something that is going to make him not have to go to the courthouse. That has a

translation into longer trials. I mean, an auto accident case got tried in a couple of days to a jury when I started just 14 years ago. We're lucky now to get an auto accident case tried with a soft-tissue injury in three or four days, because once you discover it, you want to use it in the courthouse.

There just has to be a realization that we've got to get the basic facts and we've got to get the dispute resolved and we can't learn and know everything.

And I agree with Chuck; I agree with David Perry, that we need to take care of some of these individual problems that are cost drivers, but that isn't going to get the job done by itself. What Chuck said is right. We've got to have default limits. And if not these limits, what limits?

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: My concern from everything I've heard, and I agree with probably some of what everybody has said, is that I feel like I'm being asked to vote on a solution when I really don't know what is causing the problem, as Paula said.

My understanding from what Judge Brister said about his docket is that the majority of cases aren't a problem in terms of discovery. If that's true, we've just proposed a rule for the majority of cases which don't have a problem. So that's my question, I guess, for the Committee and one that I would like to solve before I feel that I can fully answer it. What is the problem? Because I don't think any fix we propose can be meaningful, which I understand the Discovery Subcommittee wants to do, it can't be meaningful if it's not addressing the problem.

CHAIRMAN SOULES: We'll keep going around the table. I know Justice Hecht has something he wants to address, and then anybody else on this side of the table.

JUSTICE HECHT: Well, I want to second what Scott said, and say also that Rusty misunderstands if he thinks that I or the Court wants window dressing. We don't. We want something significant, and the public wants something significant.

I agree with the observation that if we could set the trial date up closer and really

mean it, it would solve some of these problems. But we don't want to fall into the trap of saying that some of these problems would go away if the world were flat. It's not. And as Scott says, there's a limit to what you can do about getting certain trial settings.

As you well know, the problems with trial settings are that cases come up, and they say, "By God, we've got to get tried," and then they come up on Monday and they've settled. So there's just no way that I know of or have ever seen proposed to solve that problem.

It is peculiar to me, as I listen to the discussion, that after 13 years on the bench this is the first time I've heard the plaintiffs or the personal injury bar argue that they needed more time before trial. Typically the argument is "Please, Judge, give us a trial sooner rather than later."

"How soon would you like it?"

"As soon as you possibly can."

"What if it gets postponed two or three years after that?"

"Oh, please, Judge, don't do that.

We've got to get to trial."

Typically it's the defense side of the bar that says, "No, no. We need more time. We haven't done all we can do. We need years. It wouldn't hurt if this didn't come to trial until the next decade."

So I'm a little puzzled about why the change, and the only thing I can surmise is maybe there's a fear that the setting of these limits is somehow going to operate not to speed the process up but to cut off real investigation of the case, and certainly I don't want to see that happen. And for that reason, this may not be the solution to that.

But it seems to me one general benefit to it, to limitations, is to provide incentives to the parties to be ready to try or dispose of the case sooner rather than later. I mean, if this limitation doesn't accomplish that, well, then perhaps others will.

There is Parkinson's Law, of course, which suggests that every job expands to fill the time allotted to it. I suppose if we told you you were going to trial in three years, discovery would take three years and six

months. If we told you you were going to trial in six months, discovery would take eight months. I mean, it takes a little bit and then some. So I don't want to see us set any kind of limits that would impinge on the proper investigation from both sides, but some of the experience on the subcommittee was that we discover a whole lot of stuff that we never use.

CHAIRMAN SOULES: Okay. Steve, and then maybe we can wrap this up.

MR. SUSMAN: Let me try to steer this in a different direction, if we can. There's no question that early trial dates, if we've got early trial dates, that will solve the whole problem. If we can do cases which are set in six months, let's disband the subcommittee. We don't have anything to do. I mean, that solves the problem.

Somebody asked, "What is the problem?" And the subcommittee did spend a hell of a lot of time studying that. We don't have any empirical resources at our command, but we hear a lot about the problem. We see it in

our practice. It takes too long and it costs too much money. That's the problem. Discovery just takes too long. Too much unnecessary work is done, too.

I agree with the sentiment being expressed that -- and then I'm going to suggest that we move on to something else -- that you don't need time limits on accomplishing discovery if you carefully micromanage and operate with a scalpel and impose time limits on various particular discovery devices. Now, that may well be true, and there's no question that in some respects this discovery window we talked about is superfluous to or extra protection of the notion of, well, let's impose limits on interrogatories, let's do away with requests for admissions, let's impose limits on depositions, et cetera, et cetera. But if you impose enough limits on discovery devices, then maybe you don't accomplish that much by compacting the entire process into a shorter period of time.

On the other hand, I mean, there were some on the committee that thought that there

was some advantage to compacting it into a shorter period of time, period. You allow courts to set cases sooner for trial because the whole thing is done; you allow people to put the file away and forget about it.

Someone said money -- I mean, there is the perception that the more time you have, the more you will do, and the less time you have, the less you will do, even if there are no microlimits. I mean, the feeling was, Richard, that if you had six months, even if you had no limits on the number of depositions or the hours or for interrogatories or documents, there's only so much people are going to do in six months, so you're going to eliminate some of the expense by just compacting the time.

But I would like to suggest, to get us off of this, that we turn to a very -- to the second issue, which is the --

CHAIRMAN SOULES: Well, I want to see a show of hands on the first issue, because even though we have heard from probably a significant minority number of the members here of the Committee, a lot of people

have sat here and not spoken but listened to it and they probably have some opinion to reflect by a show of consensus. I would like to do that before we move on, if you're ready to do that.

MR. SUSMAN: Sure.

CHAIRMAN SOULES: Okay. Arbitrary limits of some time, without saying what that time would be, how many favor that? 11. I believe it's 11.

How many don't favor that? How many are opposed? 10. 11 favor it; 10 disfavor it.

Let me count them again because that's a pretty close vote.

How many favor arbitrary time limits of some type?

MR. MARKS: You mean a window? You're talking about a window?

CHAIRMAN SOULES: Whatever. If you want to call it a window, that's fine.

Hold your hands up high so I can count them. 11.

Okay. How many are opposed? 12.

Are you here for Mr. Gallagher?

MS. DENICE SMITH: Yes.

CHAIRMAN SOULES: You're not able to vote. Mr. Gallagher is not able to send an emissary to vote.

So that's 11 to 11.

Mr. Gallagher can send an observer, or any member of the public is entitled to be here to observe, but your capacity is as a member of the public, because we don't have any procedures outlined that tell us how delegates can be appointed or named by an absent appointed member of the Committee.

So we're 11 to 11 on that.

Now let's go to another issue.

MS. SWEENEY: Can we take a break at any time?

CHAIRMAN SOULES: Sure. Good idea, Paula.

(At this time there was a recess.)

CHAIRMAN SOULES: Steve, what's next?

MR. SUSMAN: The next subject I think in order of importance is the question of -- because again, it's the perception that it's the most costly discovery device -- is

the question of limiting depositions.

Here again the issue is -- well, there are several choices. You can limit them by the amount, the number of depositions that can be taken. You can limit them by the amount of time per deposition with no limit on the number of depositions. You can limit them by the total amount of deposition time.

I think that before we get into the question of how it is best to limit depositions, either by number, the time for deposition or total amount of time, the relevant issue for this group is should there be a limit imposed on depositions in some way during the period of time a case is involved in the discovery process; or should we continue as we are now with no such limitation on the number of depositions or the time that can be taken in a deposition.

CHAIRMAN SOULES: So we want to get a consensus of the Committee as to whether the deposition practice should be limited somehow whether as to time or number? Is that the issue?

MR. SUSMAN: Correct. And we

are not talking now at all -- put for a different discussion, I think; put for a different discussion -- about the actual conduct of a deposition, what goes on in a deposition. Because whether you want to limit what people can do during a deposition or how they do it may in turn depend upon whether you want to impose any limits. I don't know how that cuts.

I mean, I know in our thinking, in the subcommittee's thinking, just if we impose a limit on the overall number of depositions, number of hours, not only number of depositions, and then to make sure that that time is not frittered away, we impose rules on the conduct of depositions. But the issue by rule is should we, and by some kind of default, should there be a limit imposed upon depositions?

CHAIRMAN SOULES: Okay. How many feel there should be some limit? Let's have a show of hands. One, two, three -- well, I guess before we do that, does anyone feel there should be no limits? All right. The Committee is unanimous that there should

be some limits on deposition practice.

Okay. What's next?

MR. SUSMAN: Okay. The next issue is should they be limited by number of depositions or the hours in a particular deposition? I mean, you could have -- I think some of the federal rules have the number of depositions limited to eight or 10. The number from orders we looked at before, pretrial orders that say fact witnesses are limited to eight hours, experts to six, you could have some other limit like that.

And as you know, what our position was is that it's best to have -- since what really costs money is not the number of depositions but the amount of hours devoted to the task, the way to control expense is to set the limit on the number of hours devoted to the task; that if a lawyer wants to take 50 one-hour depositions or 25 two-hour depositions, he ought to be able to so because that doesn't really cost a hell of a lot more than it does to take five 10-hour depositions or two 25-hour depositions, so that's the way we propose to do it.

You know, I guess the question to be proposed, Luke, would be is it permissible, if we want to limit depositions, to limit them by the overall number of hours devoted to the task? That would be the issue.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: Just for clarification there, I think that's probably the way to go. I don't necessarily agree with you, Steve, so the question would be in general, not necessarily addressing your recommendation, but addressing whether the hours in a deposition should be limited in some way. Is that generally the question?

MR. SUSMAN: Yes, uh-huh. We're not talking about the number of hours and we're not talking about how you allocate the hours, we're just saying an overall limitation on the number of hours of deposition. Is that clear? I mean, that's the issue I would like to propose.

CHAIRMAN SOULES: Okay. Who wants to speak?

MR. MARKS: Well, let me have a

little follow-up here.

CHAIRMAN SOULES: Sure. John Marks.

MR. MARKS: Your proposal is for 50 hours for all depositions. I think that there should be a limitation on the number of hours in depositions, not necessarily 50 hours or 60 or 80, but maybe a per deposition limit, hours per deposition, so many hours that each party can utilize in each deposition to take it. And I just wanted to be sure that that is covered by your general question.

MR. SUSMAN: That was not the sense of my question.

MR. MARKS: Okay.

MR. SUSMAN: I mean, I think if you limit the number of depositions and the hours per deposition, you obviously do the same thing that our rule does. Like if you say there's going to be 10 depositions and no deposition can exceed five hours, okay, you've accomplished the same thing that mine does. I don't know whether you've really moved the ball forward any.

MR. SUSMAN: I mean, you could say an unlimited number of depositions but no deposition can exceed "X" hours. You could say that. I take it that's your preference to say that?

MR. MARKS: Well, either that or no party can take more than "X" hours in a deposition. Unlimited depositions, but each party has so many hours they can devote to that deposition.

MR. SUSMAN: I understand. That would be your preference?

MR. MARKS: Yes. I just wanted to know if that would necessarily be included in the broad question that you're proposing here.

MR. SUSMAN: I think we are beyond that now. I mean, that is certainly one option, that you can have an unlimited number of depositions but you limit the time per party in the deposition.

MR. MARKS: Yes.

MR. SUSMAN: The other option is you limit the time on depositions, period. And our proposal was you limit the time of

depositions, period, and that's what I've put before the house for discussion.

CHAIRMAN SOULES: Use it as you wish.

MR. SUSMAN: Use it as you wish. But there is a maximum number of hours.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think we ought to focus on what is the evil that we're trying to cure. It seems to me that one evil is people who take unnecessarily long depositions. I find it very common to sit through depositions that go on for two or three or 10 times as long as that deposition of that witness ought to go on. And it seems to me that it would be a very sensible thing, as John Marks, I think, is suggesting to adopt some per deposition limits.

Secondly, in my personal practice I have some experience, but not very much, with people taking depositions of witnesses that they really don't need to depose, people who are very peripheral to the case or who only have knowledge that is -- you know, perhaps it's an injury case and there have been

10 doctors that have treated this person and the lead neurosurgeon has testified. Well, you don't need to depose all the other doctors that ever laid hands on the guy. You're not going to come up with anything new.

It seems to me that the problem with the total number of hours is that the total number of hours is going to vary tremendously by the number of witnesses who have new or different information.

Perhaps the better approach would be to set presumptive limits. For example, an eyewitness to a collision, their deposition certainly shouldn't take more than four hours; it probably shouldn't take more than two. An expert in a complicated product liability case or a complicated malpractice case, I wouldn't think their deposition should take more than eight hours, maybe not that long.

It seems to me that it would make a lot of sense to have per deposition limits and then to have some mechanism whereby if one side believes that the other is asking to depose people who are really peripheral or who are really not -- their testimony is really

not that material to the case, that the court could prevent that or something of that nature.

CHAIRMAN SOULES: Okay. Rusty, and then Sarah.

MR. McMAINS: Well, I just had a point of inquiry. Are you talking about -- you obviously are talking about oral depositions?

MR. SUSMAN: Yes.

MR. McMAINS: Okay. So you really don't have any -- I mean, I haven't really reviewed all of these changes that you've proposed, but do you have any limitation on written depositions?

MR. SUSMAN: No. I mean, I don't think we do. Do we?

PROFESSOR ALBRIGHT: I remember we addressed it, but I just can't remember which way we went on that.

CHAIRMAN SOULES: Okay. We can get an answer to that in just a minute.

Sarah Duncan.

MS. DUNCAN: I'd like to suggest that we start with the conduct of the

deposition first because I think there would be a greater degree of agreement. Rusty mentioned something during the break that -- for instance, asking noncontroversial questions for hours and hours in an oral deposition, which a Colorado expert recently complained to me about, because without limiting and affecting the way depositions are conducted, I don't know that we can ever get to a point that we could agree on what limit would be appropriate, if any.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, what about a sort of hybrid where you would have a per deposition limit but then you would have a reserve bank of hours that you could allocate as you wanted; so that for the deposition that you wanted to take longer, you could take it longer out of that bank of reserve hours but you pay a price.

MR. SUSMAN: By the way, Alex shows that our rule does include written depositions. It includes it in the time.

PROFESSOR ALBRIGHT: The time

used in a written deposition is counted against your time, your 50-hour limit of time.

CHAIRMAN SOULES: Okay. Well, let's park that for now and come back to that issue later.

Okay. Does anyone else have any comment on a means by which oral deposition practice could or should be limited?

What's your proposal then, Steve? 50 hours?

MR. SUSMAN: Our proposal that the subcommittee felt was the best way to deal with this was that both the unnecessarily long deposition, which a limit on the hours per deposition will deal with, and the unnecessary deposition, which the limit on the number of hours per deposition will not deal with, which David admits is an equal problem, but under the current system and under apparently his system, you would require court intervention to deal with that. Why is it necessary that they take another person who was a salesman in this organization's deposition? Don't they know how we sell our product?

Our feeling was that by imposing an

overall time limit of "X" number of hours, you deal with both the unnecessarily long deposition and the unnecessary deposition. You make the lawyers figure out how to husband their time the most efficiently to make hard decisions on do they really need to take it and what do they need to ask. It's a management problem that comes to the lawyer rather than -- and that's the way it ought to be handled.

CHAIRMAN SOULES: So is it your motion that the rules be amended to permit 50 hours of deposition per side, whatever that is, as a standing rule?

MR. SUSMAN: Yeah. But I think we ought to get -- well, yes. I mean, yes. That's the way the rule is. That's the way the rule has been for a while.

CHAIRMAN SOULES: So moved. Second?

PROFESSOR ALBRIGHT: Second.

CHAIRMAN SOULES: Alex seconds it. Okay. Now we've got a motion. Discussion.

Paula Sweeney.

MS. SWEENEY: The idea of putting some kind of presumptive limits is a good one. But in practice, if you think about it, the way to do it is to do what David said and limit time per and not the total time. Two reasons come immediately to mind.

One party announces 75 fact witnesses. The other party is then faced with -- and you can't get discovery about what they're going to say under our current rules. The other party then has a choice: Depose all 75, or depose 60 and have one of the other 15 be the one that gets called at trial and you don't know what they're going to say.

So if you limit the total number -- and I think that, you know, there's another problem there that needs to be addressed. But given the confines that we're in now, if you limit the total number of hours, you place arbitrary limits that may be unfair. You know, you go to a corporate defendant and you don't have one person who knows all about the history of the product or whatever it is, you've got 73 people. You've got a ton of people. You've got to depose them all just to

get the answers. It may take more than your 50 hours. On the other hand, there's no reason that any of them should take more than two hours or four hours.

The other problem that you have with putting a 50-hour limit or any limit is that what you're going to do is back yourself in in every case to at least a fair number of people in the case who are going to take exactly 50 hours. It's going to become -- you know, what was the rule, Parkinson's Rule. It's going to expand to fit the number of hours you have available to you and everybody is going to take 50 hours' worth; whereas, if you say, "Take as many as you need to, but you can't spend 14 hours in one deposition and you can't take a three-day deposition, you've got to get it done in two hours or four hours or six hours," you solve the problem of people interminably dragging things out and yet they have the opportunity to go depose who they need to depose.

So I think we're a lot better served by addressing limitations on depos themselves than we are on the overall trying to put a

total on there.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I agree with that. And I remember Tommy's story about, I think, he went like to the 50th witness before he got to one that told the truth. So I don't think a number can distinguish between the times when you need to take 50 depositions to get to the right person and the case where you are deposing the second or third salesman to find out how they sell their product. So I don't see how you can put an overall limit.

Plus the flip side of that, of course, which is in the small cases 50 hours is way too much. So I don't see how you can get away with anything that will work that doesn't include at least in part a per deposition limit.

And then you have to have some leeway within that to take care of the depositions that need to be longer, and that's why I suggest that you have some capped amount of additional time that you can use and allocate as you wish.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: Well, I want to speak in favor of the 50-hour limit as opposed to limiting deposition by deposition. If you're a trial judge and the other side has 75 fact witnesses listed, and that's become something of a common problem, it's very easy to seek court intervention and say, "Judge, I've got a 50-hour limit; I need to know who to dispose," and for the trial judge to enter an order that says to the other side, you know, "You've got to tell this guy who these people are, what they're going to say, you know. You all go back to the jury room and work this out." That judicial intervention is possible.

What's not possible is for a trial judge to make a witness-by-witness determination, because you're always faced with the fact that you don't know very much about the case, you're not positioned in a way that you can learn very much about the case, and the lawyer is always going to be saying to you, "Let me try my case. You're screwing up my marshalling of my proof."

It's very hard for a judge on a witness-by-witness basis to make that kind of a decision. It's very hard politically as well as hard practically. If we don't have an overall 50-hour or some time limit on depositions, then we in essence are not having any kind of limit at all.

And in the small to medium-size case, to say that we're going to have a two or four-hour limit on depositions but you can have as many as you want is to say that there's no kind of limitation at all, and we're not getting at the problem, which is these hours spent in deposition.

So I would echo Steve's comment on the rationale behind the 50 hours and point out that the problem that Paula identified can be solved by judicial intervention but that it can't be done the other way around.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Now, this may just be because this has been my experience, but the problems that I see are more like what David is seeing, and that is lawyers taking hours and hours and hours and hours at one

deposition. It's not the number of depositions so much that are taken but lawyers that, you know, have a book full of questions that thick (indicating) that they've got to go through on every deposition that they take.

The problem that I see with limiting it by the hour is that you're putting the lawyer in jeopardy when he's making a decision as to what depositions he's going to take. He'll always be subject to being criticized by his client later, too, after the suit, "Why didn't you take that deposition instead of this one?" You know, hindsight is always better than foresight, that sort of thing. So that's a question we would have to address if we're going to have an hour limit on depositions totally, and that is some protection for the lawyer in his judgment in arriving at decisions as to what depositions he's going to take.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: It seems to me like if you have an overall limit, then this is only for the cases where you have

a lot of witnesses. And for the cases that only have a few witnesses, it might be a big case, probably it's a little case, but if it only has a few witnesses, then you in effect would have no limits because there are not that many witnesses to deal with.

Now, it seems like to me that one of the things we ought to deal with, as Sarah mentioned, is what the conduct for the taking of the deposition itself should be, what the lawyers can do at depositions. Strike out a lot of superfluous argument or objections, objections to form, objections to substance, any kind of objections except privileges. I think Steve's original proposal about that has a lot of merit; that that would be more effective than an hourly limit.

How do you keep the hours? Is it the court reporter that's supposed to keep the hours?

And if you take a deposition and the defendant makes a lot of unfounded objections -- I mean, the opposing party makes a lot of unfounded objections, maybe it's for the express purpose of taking up your time.

So there ought to be some consideration given to a how the deposition is taken before we can intelligently determine whether a time limit should be imposed and, if so, how much.

CHAIRMAN SOULES: Doyle Curry.

MR. CURRY: I have just a question, are we talking about just discovery or are we talking about any deposition? For example, my opponent has a witness he wants to use and that witness all of a sudden can't be available and we're going to trial and he has used up his time or his number of depositions or the time, one way or the other, and he's got a witness unavailable and he wants a continuance and I'm agreeable to it. In other words, let's say he wants to take that deposition. It's not a discovery deposition, it's one to have the testimony for the trial.

HONORABLE C. A. GUITTARD: And most of the time is taken up by cross-examination.

MR. CURRY: But on a deal like this, it will be a fairly long deposition, but are we talking about just discovery or are we talking about any deposition?

CHAIRMAN SOULES: I don't think -- and that's a good question. The federal cases certainly differentiate between taking discovery depositions after discovery cutoff and taking trial testimony of someone who for whatever reason is not able at time of trial to participate.

Sarah Duncan.

MS. DUNCAN: I'm going to begin to sound like a broken record, and maybe you can just shake your heads, but I assume from this discussion that we've been opining that unnecessarily lengthy depositions and unnecessary depositions are a significant problem in small to medium cases?

MR. MARKS: All cases.

MS. DUNCAN: All cases.

CHAIRMAN SOULES: Is there a blending? Can there be both an outside cap and a limitation on any given deposition?

For example, in a family law case, you may have two parties and two experts. If the property is the principal issue, you probably don't need 50 hours, just as an example, but somebody might use 50 hours just because

they're available and drag out a party's deposition ad nauseum. Is that the way you do them?

PROFESSOR DORSANEO: Not me.

CHAIRMAN SOULES: I mean, could there be a blending? Because we've got sort of two different views here.

Paula Sweeney.

MS. SWEENEY: To follow up on what Doyle was saying, you know, if you have a max cap, you know, and you can't go beyond this number of hours, there needs to be some kind of opt-out on that that I guess you would say except for the cross-exam, because -- which it sounds like it's defeating the whole purpose, but here's the problem you run into: You legitimately discover along and you've kind of done what you need to do and so you have no way of foreseeing that your opponent is deciding to take a bunch of trial depos after you've used your time for discovery. And now you've used 48 of your hours and suddenly their three experts are going to be trial deposed and you can't cross them; you're out of cross-exam time for trial depos. You

know, there would be no way to anticipate that, and yet with an arbitrary limit, what -- do you always have to keep a bank of hours in case somebody decides to take trial depos? You know, that's another problem with putting an hour limit on there.

But on the other hand, the problem of somebody interminably cross-examining people, you solve that by a max time per depo.

So I still have an awful lot of concern that we are throwing the baby out with the bath water when we try to put max hours as opposed to controlling the length of each one, because if you control the length of each one, you're going to control the total eventually.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Actually, I don't mean to advocate necessarily this total limit. I mean, would you be agreeable to a limit that no deposition can last more than three hours? Is three hours acceptable?

MS. SWEENEY: It depends a lot on the conduct rules you're going to impose.

MR. SUSMAN: Well, we're going to impose -- I mean, see, I don't have any

problem with three hours because then I do think you accomplish something. But if you have in mind limiting the deposition to an eight-hour deposition, the only thing we've really done is eliminated multiple days, and they are pretty damn rare anyway, I mean, multiple days of deposition. So I mean, if you limit the amount of time in a deposition to three hours, you have accomplished a hell of a lot.

CHAIRMAN SOULES: Judge Cornelius, I didn't see your hand up. Go ahead.

JUSTICE CORNELIUS: I would like to propose a compromise that would address all of these concerns.

In the first place, limit the limitation on depositions taken for discovery purposes only. Secondly, limit depositions to eight hours each for a total amount not to exceed 50 hours.

It seems to me that that would address all of these concerns. It would take care of an inordinately long single deposition, but it would still give the lawyers flexibility to

use their time any way they wanted to but with a total limit of 50 hours. And then if you limited it to depositions taken for discovery purposes only, you would get around the concern that Doyle mentioned a little while ago.

CHAIRMAN SOULES: It would seem to me like if depositions have to be later taken to get to the testimony of a witness who you anticipated being able to call live but is no longer available, that the federal procedures seem to work. In order to take a deposition outside the discovery period, you have to move for leave and get leave, and if the judge wants to, he can set limitations on the time. We could write that into our rule so that you wouldn't have to go pick out federal cases. I haven't seen any cases like that in the state courts, but we could put something like that in the rule, where if later on, a witness who you anticipated to be live at trial is no longer available and it's necessary to get that witness' testimony for trial testimony, that that could be done only with leave of the court and the judge would

set time limits for direct and cross-examination.

John Marks.

MR. MARKS: Since you brought up the three hours, Steve, I want to tell you what the Discovery Subcommittee and Rules Committee have been working on is -- and I would recommend to the Rules Committee, I think it's appropriate that we tell you at this point -- is that Rule 200 should be amended to provide that each party has six hours in each deposition. And my thinking there was that will have the effect of doing away with the marathon depositions in most cases. And if you've got a two-party case, then generally one party or the other is taking the deposition and that limits the deposition to six hours.

Now, the six hours was just kind of agreed upon among us there, and of course, is subject to, you know, what everybody else feels about it. But we felt that six was a pretty fair number, but not limit the number of depositions that could be taken.

MR. SUSMAN: My notion on that

is that truly is eyewash. I mean, that is a limit. It is something more than we've got today, there's no question about that, but I mean, how many single party cases are there, I mean, that you can think of, that any of us can think of, where depositions have gone on for more than a day? How many days -- I mean, I just don't think --

MR. MARKS: Well, six hours is not a day. It's not a whole day. It's like --

CHAIRMAN SOULES: David Jackson.

MR. SUSMAN: Is that six hours a side? That's 12 hours.

MR. JACKSON: My point is that six hours is a day. You're going to be hard pressed to get six hours of on-the-record time in an eight-hour day.

MR. SUSMAN: And six hours a side is 12 hours for a deposition. In a two-party case --

MR. MARKS: Well, but usually one party or the other is taking the deposition. And I can hear what you're

saying. Maybe the six hours is not the number. Maybe that's not the number, but that's the idea.

CHAIRMAN SOULES: Okay. David, did we hear your comment all the way?

MR. JACKSON: Well, my point was that if you do have an eight-hour limit, you're almost forcing yourself into a two-day deposition, so six hours is a realistic limit.

MR. MARKS: Oh, it is? Okay.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think we need to make a distinction between fact witnesses and expert witnesses and between witnesses who are under the control of a party and witnesses who are not. I think if we start adopting rules that end up having the effect of preventing somebody from taking the deposition of a fact witness, we run a very serious danger that it will become the standard practice to try to hide those fact witnesses that may have crucial knowledge and spring them upon the other side at trial. I think that will open both the specter of gamesmanship in the outcome of the initial litigation and it will

open the problem of a lot of ancillary litigation in terms of malpractice for the lawyer who lost the first time.

It seems to me that we need to remember that the kinds of cases in which these rules are going to be applicable are generally lawsuits in which there are multiple millions of dollars at stake. And if you have lawsuits in which there are multiple millions of dollars at stake, preventing one side or the other from deposing a person with knowledge of relevant facts is something that in my judgment ought to be done only in very rare circumstances. I don't think we should adopt rules that would do that on a blanket, ordinary across-the-board basis.

If you put a total number of hours limit, you have done that in effect in a lot of cases because of the number of fact witnesses that there are; whereas, I think it's very reasonable to restrict fact witness depositions to, say, four hours per deposition or something like that.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke, three comments. First off, I've gotten more telephone calls on this, on the 50-hour limitation, than on any other proposal that we've had from the subcommittee, and I was reminded of several things, I must be frank, I had not thought of. And one was from people who do any type of professional malpractice work, medical malpractice, legal, accounting and the like. And they say, "Listen, remember, I can't go do informal discovery and talk to these people because they're not going to talk to me." Independent fact witnesses, they're just not going to do that, and I have to have the power to subpoena them and get them into a deposition. And I think that goes along with what David Perry was saying, that there are people who fall under that rule.

Others were saying basically that 50 hours was a nice rule, and we struggled with 50 hours, but all of us will have to admit this: 50 hours is too much for most cases, for probably 80 percent of the cases, and is not enough for 20 percent and it's an arbitrary figure. Chief Justice Cornelius'

suggestion, I think, is a good one, but we have to remember, our rules right now -- and Luke, this goes to what you were suggesting as well -- don't really recognize the difference between a witness being available to testify at trial and not as do the federal rules. And we would have to change a number of things in our rules to deal with that instance. We would have to have -- you would have to demonstrate that somebody wasn't available; that if you had their deposition, they couldn't testify live and the like. Now, I'm not against all of that.

It would seem to me that if we had a lower hour limitation on each deposition, we might be able to get at the problem more directly. It seems to me that our problem areas are abuse of deposition questioning and objections, which we can cure by conduct, and I think all of us agree that we ought to cure that. I haven't heard one negative vote on that.

Second, this is something that we have to own up to: We have a lot of unprepared lawyers at depositions and that's why they're

taking so long. We have to have lawyers who know more about the cases at the deposition, and there has to be a way to deal with that. Quite frankly, that's one of the reasons we came up with a total hour limitation because that's going to mean that lawyers who are trying the cases are taking the depositions. But we've got to deal with that situation. Sending the youngest lawyer in the office to take a deposition that he or she knows nothing about is designed to make that deposition last at least five times the amount it would normally last, and we've got to cure that some way.

Those, I guess, are the only comments I have on that.

CHAIRMAN SOULES: Paul, you had your hand up?

MR. GOLD: Yes. One of the problems I have with the recommendation that each party has six hours in each deposition is that ignores the side concept that we put into the rule. I think it might work in those instances where there was one plaintiff and one defendant, but I've been to a number of

depositions where there were like four or five defendants.

And then we get to the problem that David was just talking about, some one-year associate comes with a list of questions that someone else has already asked but feels this compunction to have to go ahead and ask these questions anyway because the senior partner said, "Go and ask these questions." That really will take six hours, and I think we can reduce the number of hours appreciably.

I've taken very long depositions, as you well know, and recently --

MR. KELTNER: All of us know that.

MR. GOLD: Yes. And recently, the Nixon going to China concept, I have experimented with reducing the number of hours that we take on an expert's deposition to four hours, and that ties in with what Judge Cornelius was saying, which is that I might want to preserve that expert's testimony for trial so I have one hour to preserve that expert's testimony for trial and then the defense side in the case has three hours of

cross-examination time. I've now done that with about 15 experts and we've had time left on the table. I mean, we've actually left with 30 or 40 minutes left, nobody had any more questions of the expert, and these are the same experts I've had in cases where people have deposed them for eight hours. So that ties in with what Justice Hecht was saying about the Parkinson's Rule, which is that if everybody knew they were going to have four hours for an expert -- and I'll leave Dave's suggestion for a fact witness to let him argue -- but on experts it forces everybody to get prepared. And you can cross-examine an expert in four hours, I think, or three hours.

So I still am in the process of being sold on the 50-hour concept or a total concept, but I do very much like, whatever we do, putting a limit on the number of hours that we take on any one deposition, because I think that's being abused totally now. I think that we could do that very successfully on both fact witnesses, expert witnesses and what have you.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: So we get something on the table on behalf of the subcommittee, I would make a motion that we limit all depositions, fact and experts, to three hours per side.

CHAIRMAN SOULES: Do you offer that as an amendment to your 50 hours total?

MR. SUSMAN: No. Forget the 50 hours.

CHAIRMAN SOULES: What?

MR. SUSMAN: Forget the 50 hours.

CHAIRMAN SOULES: You're withdrawing that motion?

MR. SUSMAN: Yes. I would like to see if we can get three hours per side. We may want to go on to some overall limit, but I do think three hours per side in a deposition is going to result in a substantial cost savings in the discovery process.

CHAIRMAN SOULES: Justice Peeples.

HONORABLE DAVID PEEPLES: I

think I prefer the 50-hour proposal to the other one for this reason: Most lawyers -- I know I act this way. I'm more efficient and I prioritize better if I have a ticking clock to discipline me. And I think lawyers will take, with the 50-hour approach rather than three per deposition, will prioritize their case with the big picture better because they've got to think big.

And I also think Scott McCown made a good point about the realities of judges ruling on these limits. I think 50 is better.

How about a proposal that's 50 and a per depo limit?

MR. SUSMAN: My basic notion, David, is that with 50 hours per side not many people are going to take more than three hours per side per deposition. I mean, they would have to have a very unusual case and it would be very foolish if they were going to eat up more than three hours in a 50-hour time limit, so 50 hours is fine by me. I mean, that's what our original proposal was. But it's the sense of the group -- and I don't mean to -- I mean, the Chair can do whatever you want on

this because, I mean, there are two proposals on the table, an overall time limit of 50 hours and/or three hours per side. I think 50 hours overall is better because I think it just will do -- will produce a better result, but three hours per side will not be a waste of our effort.

CHAIRMAN SOULES: Well, again, frequently when people are satisfied that they like a motion they don't always speak. The discussion on the prior vote would have made it look like we had 22 votes for it, but we had 11 on each side. I don't know how the Committee feels on your 50-hour proposal, and I haven't heard anyone offer an amendment to that to put -- you know, formally offer an amendment to put per depo constraints on it as well.

As I understand it now, you're withdrawing your 50-hour proposal?

MR. SUSMAN: No.

CHAIRMAN SOULES: Oh, is that still on the table?

MR. SUSMAN: No, I haven't.

MR. YELENOSKY: They're not

mutually exclusive, Luke. I mean, everybody can agree we should have some kind of hour limit per deposition and then we can take a second vote on whether there ought to be an overall cap.

CHAIRMAN SOULES: So is your motion, then, that we set a three-hour per side limit --

MR. SUSMAN: Plus a 50-hour cap.

CHAIRMAN SOULES: -- plus a 50-hour cap?

MR. YELENOSKY: Well, let's vote separately on that.

MR. GOLD: Anaconda High/Low.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: With respect to the limit on the number of hours per deposition, without taking into consideration the 50-hour overall, I would suggest that it might be a little premature to vote on that, because everybody has been going on and thinking about the 50 hours. And what I would suggest is that maybe your subcommittee and our

subcommittee will go back and do some drafting and working on a per deposition proposal and then come back when everybody is prepared and have something in front of them to review rather than throw something out on the table today and say, "Okay, if 50 hours is not good, let's limit all of them to three hours," because I don't think it's been thought out all that well.

MR. SUSMAN: This subcommittee is not going to do any further work. We're all going to resign unless we get direction from this group today on what to do, because it does not make any sense for us to go do some exquisite rule. You all know in your hearts whether you like three-hour or six-hour depositions.

CHAIRMAN SOULES: We're not going to refer our subcommittee to the Court Rules Committee for a conference. That's not going to happen.

MR. MARKS: That's not what I'm suggesting. I'm just saying that, okay, if you get the direction to go per hour rather than overall hours, that ought to be enough.

But for us to sit here and have to commit to three or two or five, I don't think we've thought that through enough to be able to assess that properly.

CHAIRMAN SOULES: Well, the Committee as a whole will express themselves on that.

MR. MARKS: Well, I just wanted to throw that out.

CHAIRMAN SOULES: Okay. Doyle Curry.

MR. CURRY: I've only been at this 32 years, and I've been thinking back, and I may have had four depositions that tried to go on beyond one day in that period of time, and two of those were document intensive. I don't think a six-hour limit would touch me anyplace in my practice. I recognize that people that handle commercial litigation that sometimes they're going to be in a situation where they would be devastated by any kind of a rule we put out. But six hours seems to me to be a very reasonable rule.

I think both limits are necessary. If

you're going to do anything about the nine out of 10 cases I handle which won't have 10 hours of depositions in them, nine out of 10 of them, if you want to do anything about that, then you've got to have a limit per deposition as well.

CHAIRMAN SOULES: Are you saying -- so that I understand what you're saying, are you saying six hours per side or three hours per side for a total of six hours?

MR. CURRY: A six-hour limit, three hours per side. That won't touch a case I've got more than once a year. And if I've got the ability to go to the court, that will take care of that; also a 50-hour limit. But if you don't have limits both ways -- it's nice to say a 50-hour limit, but if you do that, that won't touch 19 out of 20 cases that everybody in here -- and these are the washed people in here, and I'm not so sure I'm not unwashed -- but a 50-hour limit won't touch most of the people. They don't have that many depositions in a case except the rare case.

If you don't do both, you're not going to do anything about cutting the cost of

90 percent that are out there that are smaller cases. And a per deposition limit or a limit on each deposition would do something about that.

JUSTICE CORNELIUS: By "both" do you mean per deposition and --

MR. CURRY: -- and an overall limit. Do both and you've done something.

JUSTICE CORNELIUS: So six and 50?

MR. CURRY: Your limit per deposition will touch every case and keep the cost down in every case. The overall limit will keep the cost down in the bigger cases.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: One question for Steve, and then I do have a couple of comments, and I'm sorry for my confusion on this, but is this limit, like the window limit we talking about earlier, one that by court order or agreement can be extended in a document intensive deposition, for example? That's the only category of deposition that I've ever seen or had where there really was a necessity to go more than six hours, where

you've got a witness usually in business litigation where there's a very document-intensive deposition and you really need to ask the witness about a lot of documents and you just can't do it. Does the rule provide for that or not?

MR. SUSMAN: Yes. All of our rules provide for the by agreement or court order exception.

MR. JACKS: Okay. Thank you.

MR. SUSMAN: I mean, it seems to me that they've got to, in spite of Rusty's view that there's some favoritism built into the system then.

CHAIRMAN SOULES: In order to break this up into pieces, and I understand that every one relates to the other, we are setting aside the issue that some of the people are talking about of whether or not and at what level of ease these constraints could be relieved. Okay?

MR. JACKS: I understand. I just didn't know whether it would apply at all.

CHAIRMAN SOULES: This is the

base rule, and then relief from the rule will be a different topic.

MR. JACKS: Right.

CHAIRMAN SOULES: We will repeat the --

MR. SUSMAN: Maybe we ought to just vote on the subcommittee's proposal, which is an overall limit of 50 hours for depositions.

CHAIRMAN SOULES: All right. We can do that first. How many favor that rule?

MR. JACKS: Wait, can I finish?

CHAIRMAN SOULES: Oh, I'm sorry, I thought you were through. Go ahead, Tommy.

MR. JACKS: It seems to me that Sarah's point earlier is for me at least real important to knowing how I feel about these limits; and that is, are we going to do something about conduct at depositions and what that's going to be. It's hard for me to put this cart before that horse.

The third thing I'd ask be considered at some point, and this is finer tuning, but I

think there should be an exception in the rule for those cases that are subject to consolidated pretrial discovery proceedings pursuant to court order, because in those cases, while the discovery in that consolidated proceeding may be vast, it also is accomplishing great things in terms of conserving discovery time and expense overall and should be encouraged.

The last thing I would consider is that both for depositions on written questions and also for what I think we're going to see increasingly over the next few years, depositions by not only telephone as we're doing now but by teleconferencing, that if you're going to have some hour rule, that you ought to give a premium to work that's done by written deposition or by teleconferencing, where lawyers don't get on airplanes and bill for all those expenses, by making those hours sort of premium hours; that that six hours only counts as three hours against your limit, if you've got a limit, again, to encourage cost effective ways of accomplishing the necessary deposition work that has to be

done. That's all I have to say.

CHAIRMAN SOULES: Okay. How many favor a cap of 50 hours?

HONORABLE C. A. GUITTARD: May I inquire, does that mean -- does that include -- how is cross-examination to be figured in that 50 hours?

CHAIRMAN SOULES: It counts.

HONORABLE C. A. GUITTARD: It counts?

MR. SUSMAN: To the other side.

HONORABLE C. A. GUITTARD: To which party?

CHAIRMAN SOULES: Against the cross-examining party.

Okay. Those in favor show by hands. 13. Those opposed. The vote is 13 to seven in favor of a 50-hour cap.

Now, then, we can go to the per deposition limit.

MR. PERRY: Procedural question.

CHAIRMAN SOULES: Yes, sir.

MR. PERRY: Are we going to break for lunch?

CHAIRMAN SOULES: Yes, sir.

MR. PERRY: And if so, when?

CHAIRMAN SOULES: Let me just try to get a consensus on this so we don't have to come back and start all over again. I imagine the food is in the hallway right now.

MR. McMAINS: It is.

CHAIRMAN SOULES: Okay. First, per deposition, and then how many hours. Okay. Those who favor a cap on -- a per deposition limit, show by hands.

MR. MARKS: Wait a minute, let me get a clarification. Is this per deposition plus a 50-hour cap?

CHAIRMAN SOULES: No. It's per deposition within the 50-hour limit. It's within the 50-hour limit. Okay? Does everybody understand that?

MR. PERRY: But that doesn't make any sense at all.

HONORABLE C. A. GUITTARD: It will when he gets through.

CHAIRMAN SOULES: In other words, if you take eight six-hour depositions, you've used 48 hours of your 50 hours.

MR. YELENOSKY: Now I see why depositions are so long.

JUSTICE CORNELIUS: But you could take 50 one-hour depositions.

CHAIRMAN SOULES: You could take 50 one-hour depositions, yes.

PROFESSOR DORSANEO: Which would be very bad.

JUSTICE CORNELIUS: That would be very bad, but that's not going to happen.

MR. MARKS: But I mean, if you've got 50 hours and that's it, I mean, what difference does it make? You might want to take 20 or one, you know.

CHAIRMAN SOULES: The issue, as I understand it, Steve, and tell me if I'm wrong, is we're going to cap the number of hours in a deposition, in any given deposition.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: As well as the cumulative total number of hours at 50.

MR. SUSMAN: Let me tell you what the subcommittee came up with, and then you all can do what you want. I mean, our

view was to cap the overall number of hours at 50 and let lawyers then plan how efficiently to use that time. And in some cases they would elect to take 25 two-hour depositions; in other cases they may have a real important witness who they need to depose for 10 hours. But that would be the lawyer's choice, but however he uses that choice, it's not going to go over 50 hours.

Now, you know, conceivably the fear is that lawyers will unnecessarily depose a single witness for 20 or 30 hours even with a 50-hour cap. Then you could address imposing an hour limit per deposition in addition to the overall hour limits.

But the subcommittee thought we had accomplished enough by imposing an overall hour limit and it was not necessary to go ahead and try to help lawyers micromanage their cases within that. That was our feeling.

CHAIRMAN SOULES: Okay. How many feel that there should be a per deposition limit within the 50, that this limit counts against the 50? 15. Okay.

Those opposed? Seven.

The vote is 15 to seven. As soon as we come back from lunch, we'll decide how many hours per side or per deposition or per party.

MS. SWEENEY: When do you want us back?

CHAIRMAN SOULES: Let's try to be back here at 1:00 o'clock. That's 45 minutes. Lunch is in the hallway.

(Adjuourned for lunch at 12:15 p.m.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 15, 1994, morning session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $854.00.

CHARGED TO: Luther H. Soules III.

Given under my hand and seal of office on this the 29th day of June, 1994.

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