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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 15, 1994

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, Certified Shorthand Reporter in Travis County for the State of Texas, on the 15th day of July, A.D., 1994, between the hours of 1:00 o'clock p.m. and 5:20 p.m. at the Texas Law Center, Room 104, 1414 Colorado, Austin, Texas 78701.

COPY

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

SUPREME COURT ADVISORY COMMITTEE
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AFTERNOON SESSION

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CHAIRMAN SOULES: Okay. Steve, we will be in session here a couple of minutes late. I don't know whether the --

MR. KELTNER: Luke, may I bring up one item? This is something I talked to you in the hall about.

CHAIRMAN SOULES: No. We have voted. We have voted on that.

MR. KELTNER: Well, no. My point is I think there are a number of people, and especially I am reinforced after listening to people during the break, who thought that we misunderstood the vote a little bit, and we would be for a limitation on the hours of depositions but not be for a limitation on total hours, and to get the sense of the committee my suggestion is we take a vote on it.

CHAIRMAN SOULES: It's been voted on. It's on the record.

MS. SWEENEY: This is a third proposal. You voted on two, but this is a third, and since we are getting the sense of the committee it seems that it would be fair and appropriate to get the actual sense of the

committee.

CHAIRMAN SOULES: State the third proposal.

MS. SWEENEY: To have a cap on the depositions per deposition but no overall cap, and it was certainly implied in the discussion that that would be something that we would be allowed to voice our opinion on, and I think it is fair and appropriate to follow through with that and let us voice our opinion on that.

HONORABLE DAVID PEEPLES: Luke, may I say, I am against their proposal. I'm for the hybrid, but I think in fairness we ought to see what the whole floor thinks. I really do.

CHAIRMAN SOULES: That's fine.

MR. LATTING: The trouble is it's kind of thinned out. We got rid of a few of people.

MR. MARKS: Yeah. We sent quite a few of them home.

MR. LATTING: I think they opened a bar somewhere.

MR. KELTNER: Luke, I don't

mean to throw a monkey wrench in this. My point was there were a number of people discussing that around the table and I think had the idea that we would vote on it, and again, I don't mean to mess up the works, but I think it might be helpful.

CHAIRMAN SOULES: So you think that we don't have evidence on the record of those people who assuming a cap per deposition would be opposed to an overall cap; is that right?

MR. KELTNER: Would be opposed to -- would favor over the 50 hours total, would favor the limitation of a per hour limit per deposition.

MR. SUSMAN: What now? In lieu of.

MR. KELTNER: In lieu of the 50 hours would favor a limitation of hours on depositions.

MR. MEADOWS: So you would have limitless depositions or no limits on depositions.

MR. KELTNER: No limits on the number of depositions but a limit on the hours

of individual depositions, and maybe I'm wrong, and maybe people don't feel that way, but I'm not convinced.

MR. SUSMAN: Why don't we have -- there are seven people here who voted. I mean, there are seven people that have got to change their mind, who voted for a 50-hour cap that now believe that is unwise and that they prefer to cap depositions and not the 50-hour cap. I would like to hear from the seven who voted in favor of a 50-hour cap, being honest, if you voted in favor of the 50 overall cap who now want to change their mind and argue in favor of no 50-hour cap but only a cap per deposition? That's the people who I think should be entitled to speak now because they obviously want to change their mind.

MR. MARKS: Do we have a motion?

CHAIRMAN SOULES: I don't know.

MR. MARKS: Is that a motion?

MR. KELTNER: I was just trying to get a sense. Maybe I'm wrong in my thought process, but if we need to get it on the table I would move that we consider in lieu of a

50-hour total cap that we would -- that I would propose that there be a limit on hours on each individual deposition.

CHAIRMAN SOULES: And no cumulative cap?

MR. KELTNER: And no cumulative cap.

CHAIRMAN SOULES: Is that your motion?

MR. KELTNER: Yes.

MR. MARKS: Second.

CHAIRMAN SOULES: Moved and seconded. Discussion?

HONORABLE DAVID PEEPLES: I want to stress something I don't think has been mentioned. In the criminal justice system even in a capital murder case there is almost no discovery where life is at stake.

MR. MARKS: We have got money involved.

HONORABLE DAVID PEEPLES: Yeah. We have got money involved. No. Our mindset is you can't go to trial unless you have uncovered every stone in the county, and we need to move away from that mindset, and we

need to help lawyers by forcing them to narrow what they are used to doing.

MS. SWEENEY: Well, can I have a search warrant in my next case, and can I force the other side to open their file and let me come in and browse through it?

HONORABLE DAVID PEEPLES: Paula --

MS. SWEENEY: I don't mean to be that harsh, but there is a big difference in trying to compare those two. We don't have the rights to go take stuff from people like they do in criminal court.

HONORABLE DAVID PEEPLES: There is no comparison, no comparison. And what we have done with the hybrid, the overall cap and the cap per deposition, which is a default rule and you can change it by agreement and by court order, is a major step and something that has to be done and so I oppose this, the revote that we are going to take.

CHAIRMAN SOULES: Any further discussion? Those in favor of the motion show by hands.

HONORABLE DAVID PEEPLES: What

is the motion?

CHAIRMAN SOULES: The motion is in effect to rescind the 50-hour cap.

HONORABLE DAVID PEEPLES: Okay.

CHAIRMAN SOULES: Those in favor of the motion show by hands. Those opposed? 10 to 5 the motion fails.

MR. KELTNER: Let the record reflect I was wrong.

MR. SUSMAN: Shall I move on?

CHAIRMAN SOULES: Yes. I think where we are heading now is two questions, what is the cap, what number of hours would be the cap per deposition, and how do you divide that, per side or per party or how? Whichever way you want to take those or maybe you see some other agenda.

MR. SUSMAN: I'm sorry. We voted on the 50 hours. Now the question is that 50 hours per side or 50 hours per party? The vote was taken 50-hour cap. That issue has been resolved. Now the issue is how do you count and what counts in the 50 hours. I will tell you what we agreed.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Included within the 50 hours are the time -- it's 50 hours per side and there is some -- but we add some hours, as I recall it. What is it, 204?

PROFESSOR ALBRIGHT: 204(2).

MR. SUSMAN: 204(2). A third-party defendant shares the defendant's -- "Each side, the plaintiffs and defendants, have 50 hours to examine and cross-examine deponents other than their own expert witnesses. Third-party defendants share the defendants' 50 hours with regard to issues common to the defendants. However, third-party defendants have an additional 10 hours for examination regarding issues upon which they oppose the defendants. Breaks during the deposition do not count."

Again, you're into the actual language of the rule. I don't think any of us -- we knew we needed to deal with the problem where there were parties who had genuine conflicts like a third-party defendant with other parties. At the same time we did not want to give defendants who are aligned or plaintiffs who are aligned with each other the full amount of

hours any more than the court will allow the full equal amount of voir dire time or equal amount of final argument time or equal strikes.

And the notion is that somehow we can determine -- a judge will be able to determine if the parties cannot agree what constitutes the plaintiffs and defendants. I mean, we were troubled with this and how you identify it, but that was the notion, that -- now I would be happy to go ahead and discuss this now, Luke, or we can kind of leave this to more -- this is more detailed. Like, once you establish the general 50 hour per side, the 50-hour cap, how you divide that up is kind of a detail on what counts, but either way you want. I mean, I was thinking it would now be appropriate to deal with the conduct of the deposition in general and see what people feel about that.

CHAIRMAN SOULES: All right. Before we go to what is going to be the size of the per deposition cap?

MR. LATTING: When are we going to do that if we don't do it now?

MR. SUSMAN: What now?

MR. LATTING: When are we going do get to that issue of how these depositions -- because that's a critical topic. Are we going to do that later today or --

MR. SUSMAN: I'm sorry. Like, we didn't --

CHAIRMAN SOULES: We did not determine what was going to be the size of the per deposition cap, how many hours per deposition. We need to do that now, or we can talk about deposition conduct first. We only voted to have a cap on the individual deposition. We did not set a size of that.

MR. GOLD: Are you entertaining motions?

CHAIRMAN SOULES: Pardon?

MR. GOLD: Are you entertaining motions now?

CHAIRMAN SOULES: Yes.

MR. GOLD: I would move that we consider the conduct of the deposition before we talk about the cap on the individual depositions.

CHAIRMAN SOULES: Everybody feel that's the most appropriate way to go? All right. Doyle.

MR. CURRY: If you are going to be considering conduct since you have got a 50-hour limit you need to consider conduct of the depositions in the 50-hour limit, too, because the big concern everybody has is that there is a 50-hour wall there, and people with information can maneuver. I think somebody made the comment that they can give you the phone book with a list of people and then you use up your time trying to find out what's going on and then 60 days out of trial they tell you "Well, here are the people we are going to use, bang, bang, bang," and you are out of time. So the conduct of the deposition and the conduct of the discovery is something you need to consider in the 50-hour limit, too, in deciding whether to award more time.

CHAIRMAN SOULES: What page is the conduct on?

MR. SUSMAN: This is Rule 204, page 19. Is that what we are going to now?

CHAIRMAN SOULES: Page 19.

Okay. Yes.

MR. SUSMAN: Let me tell you what the committee -- let me suggest that we begin with subdivision 204(3). There are two issues we tried to deal with in the subcommittee. One issue was that if we were going to limit time, you cannot tolerate any system whereby the other side can unnecessarily waste time at a deposition. The second thing was we just felt that a lot of the hostility and the things that -- you know, the judgmental-type comments and stuff that go on on depositions need to be eliminated. It's uncivil. It not productive, and we felt that what ought to happen is that the deposition room ought to become like a courtroom, and the only difference is that you don't have a judge in the deposition room and you do in the courtroom.

So the biggest, I think, thing that a lot of us thought would help was Rule 3 which basically tells people that what goes on in the deposition room is subject in all its glory to being played to the jury with the slow answers, with the giving of the phone

book when you ask someone who has the files, and some guy sits there and gives you a long, unresponsive bull answer with lawyers making objections, conferring their clients, that you capture it on videotape, and you tell the Bar, "Folks, you are in jeopardy of having all of this played in the presence of the jury. If you want them to see this, great. Go after it."

It was our feeling that that will in and of itself deal with a tremendous amount of the abuse that goes on in depositions because lawyers are not going to be making stupid and silly objections and instructions and clarifications and speechifying things at depositions if they know the jury is going to hear them. So that, to me, was a starting point. Now, does anyone object to the notion of what happens in the deposition room -- it doesn't say it necessarily will but we say, as I recall it, "May upon leave of court be presented to the jury during the trial." It's the last sentence of paragraph 3.

MR. MARKS: Are you asking for a vote? You say does anybody object?

MR. SUSMAN: Yeah.

MR. MARKS: I object. I think it would be one of those things that would be subject to abuse. It would also be an opportunity for a lawyer to make a speech during a deposition that he wants the jury to hear, and I think it would probably result in a lot of unfairness going in to the jury.

HONORABLE PAUL HEATH TILL: Can you speak up slightly?

MR. MARKS: I think it would result in a lot of unfairness to the jury especially to the client or the litigant, the party that's actually involved in the litigation. So you have a lawyer that does that sort of thing or does it or says something that may not have been the appropriate thing to say, you've still got to think in terms of the client. The one that's really going to be affected by this is not the lawyer but the litigant. So any kind of rule like this we should really be careful. I just would be against it. I think it might create more problems, Steve, than it would solve.

MR. SUSMAN: My personal

experience has been that, I mean, the anvent of the video camera has improved the conduct of lawyers at depositions so much because they are fearful that someday someone who counts may see it, and now it's only the judge that they are really fearful of, and I think when that fear expands to it may actually be shown to a jury, and I mean, this is not automatic now, and I think a court -- if you make a speech, a self-serving speech, on the record and then plan to have the judge show that to the jury I think courts have enough sense to know we aren't going to have that happen.

MR. MARKS: Some do. Some don't.

MR. SUSMAN: They have enough sense, I think, to approach the judge and say, "Judge, I think the jury is entitled to see how this witness was coached, how he evaded the questions, how every time I asked him a question he had a conference with his lawyer, how the lawyer reminded him of what the evidence was and refreshed his recollection," things that the jury would see if you were on the witness stand. So I mean, I believe that

this will have a very much beneficial effect if we do this. Paul.

MR. GOLD: Yeah. When we discussed this paragraph in the subcommittee one of the reasons for the phrase "upon leave of court" was exactly the point which you were just making, John, is I had come back from a discussion in Dallas with some attorneys, and they had said, "Well, what we will do is just use this opportunity to make statements in the record and then they will have to be played to the jury and we will just communicate to the jury that way." That's why we put the "upon leave of court" in the rule. Also, you could modify this even more to have it in the nature of like answers to interrogatories where the party making the objection could never be the one that was requesting that the information be put before the jury. It would only be the party that was conducting the deposition that would have the opportunity to put that before the court to put into the record.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I

think I agree with John Marks generally, but what is the actual thing that makes depositions longer and more difficult? Is it somebody making objections when they don't need to make the objections? Why not prohibit the making of objections that don't need to be made? Require somebody to make them when they need to be made rather than at some earlier time in order to have them recorded. When I started practice nobody, not too many anyway, unless somebody from another state, objected to deposition questions except perhaps to the form of the question because it wasn't, as it still isn't, necessary to do so. I understand that people are doing the objection practice more and abusing it to --

MR. MARKS: Educate their witnesses.

PROFESSOR DORSANEO: For tactical reasons or in some other manner. I think we should prohibit the conduct rather than doing something else. I mean, the fact that somebody made an objection at the deposition that they shouldn't have made, didn't need to make, I mean, how is playing

that to the jury going to do anything?

HONORABLE F. SCOTT MCGOWN: Well, you need to look on page 20, Rule 7. This rule is designed as a group of, as David Perry would say, scalpel cuts. We cover objections, what kind of objections can be made. We cover conferences, what kind of conferences you can have. That's on page 20. Then the icing on the cake, we cover instructions not to answer. That's on (4). We have a mechanism for terminating the deposition in (5). So we have a series of ways to regulate conduct, and we probably shouldn't have started with this subdivision (3). That's just the icing on the cake; that is, if things go badly in the deposition.

And in answer to John Marks we may need to work on the drafting here. We never envisioned that you could be the bad actor and automatically get to show that to the jury. What we envisioned was if you are the bad actor, then the other party can say to the judge "I want to show the bad acts to the jury." The judge would have to decide whether they really were bad acts and whether it

justified showing them to the jury and might well decide they weren't bad acts or they weren't bad enough to justify showing to the jury or he wasn't going to get off on that tangent, but that's an icing on the cake provision.

PROFESSOR DORSANEO: What kind of things did you have in mind? Like cursing, like using an "F" word at a deposition or something like that?

MR. SUSMAN: Yeah. That's --

PROFESSOR DORSANEO: What point is there in showing that to the jury?

MR. SUSMAN: Well, I tell you what point it is. I tell you what point.

HONORABLE F. SCOTT MCGOWN: It's demeanor evidence. It suggests to the finder of fact what kind of obstructionism is going on and thus goes to their credibility and the weight you want to give their testimony.

MR. MARKS: Well, I mean, that's the witness, but what about the lawyer? I mean, that's --

HONORABLE F. SCOTT MCGOWN:

Well, we reasoned that for this highly abusive kind of behavior that this icing on the cake is designed to catch that you are going to hold the client accountable for the behavior of the lawyer, and if the lawyer is making --

MR. MARKS: Why not make it sanctionable?

CHAIRMAN SOULES: Just a minute. You-all talk one at a time. Judge McCown.

HONORABLE F. SCOTT MCGOWN: If the lawyer is engaging in the kind of conduct -- this is not ordinary kind of conduct. We don't see this happen a lot, and so I'm sorry that we started with this rule instead of took it at the last, but the extreme kind of abusive deposition behavior that unfortunately does go on -- I wouldn't say it's common, but I wouldn't say it never happens. I would say it's infrequent but it happens. That could be captured, and if the lawyer or the witness were behaving in a way that if you showed it to the jury the jury would say "These people are jerks and I'm not believing any jerks" it would have an impact

on behavior, the kind of thing that doesn't happen in the courtroom because you would be embarassed if the jury saw it. So it doesn't happen in the deposition room because the jury may see it.

CHAIRMAN SOULES: John Marks.

MR. MARKS: It seems to me that that sort of thing could be dealt with by sanctions, but it seems to me that we are mixing two concepts here. We are mixing the concept of fundamental justice. In other words, the jury deciding the substantive issues in the case as opposed to controlling the way a lawyer or a witness conducts himself. Now, if a witness does a lot of things like that, that may well go to his credibility and his demeanor, but to say that a party can always control his lawyer I don't think is completely accurate, but it seems to me that a lawyer certainly can be sanctioned by the court, and if you made those things sanctionable then you're punishing somebody for something they did wrong without really affecting his substantive rights but the litigant's substantive rights in court.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Let's say it's a discovery deposition, and it's not done by videotape. How do you keep someone from using up a bunch of time, you know, that's ticking on the other side? I mean, you are not going to show a written deposition to them. I mean, it's not going to show it. The witness dragged --

MR. SUSMAN: That is a problem. I mean, the problem is that is a problem. We don't know how to deal with that because people speak at different rates, and you know, how do you really say whether they are speaking too slow. I mean, one of the notions was that -- I mean, this will encourage the use hopefully of video as a policing mechanism. I mean, it is -- in fact, it is a form of sanctions. I mean, that's exactly what it's entitled to be, to sanction lawyers for violating -- and it's a form of warning. I mean, if you are going to sanction them by letting it happen to them anyway, by reading in the rule, you might as well warn them of

what might happen if they use the "F" word at a deposition or any other bad words or just general conduct.

It's basically saying -- you know, I think it is prophylactic frankly when you say to lawyers who come down here from New York or somewhere else to take a deposition or defend a deposition, you know, "Before you begin look at our Rule 204(3), and remember if you mess around I may move to have the court play this to the jury." I have not yet heard, though -- I mean, again, I have not heard any meaningful objection to this. I mean, what is the chilling -- I mean, what is the chilling fact?

HONORABLE F. SCOTT MCGOWN: And, Steve --

CHAIRMAN SOULES: Just a minute. Paul Gold, you had your hand up.

MR. GOLD: Yeah. Let me walk through what some of the rationale was for this because we discussed it so long in the subcommittee it's probably just engrained in us, and I want to make sure that everybody is aware of where we were coming from with this.

One of the problems that we perceive takes place at a deposition is through the guise of objections someone either coaches their witness or tries to distract the questioner or just distract everybody or prolong it or whatever, and even if you put in the rule, Bill, that, you know, you shouldn't be able to do this the problem is is that by the time you go and you seek a remedy from the court the witness is either instructed or the question has been obstructed. In fact, generally the person that's obstructing it will say, "Great. Let's go to the court. Let's stop right now," and that's what they would love, is for the whole thing to lock down. They can go coach their witness. They can stall a little bit longer.

And what we were trying to do with paragraph (3) was to chill that for the person to know that, yeah, they may accomplish some obstruction of the deposition. They may coach the witness, but the jury was going to be able to see that. And I disagree with John Marks on one regard, and it's a trouble that we have got with the whole sanctions area right now, I

think, is trying to figure out, especially on death penalty situations, whether the conduct of an attorney should be impuded to the client. I think that it should. I mean, I don't think it's so much a substantive issue, but I think that the jury by and large judges the client by the conduct of the attorney during trial.

I don't think there is any reason why an attorney under the cloak of discovery should be able to obstruct and coach and do all sorts of nefarious things knowing that the worst that can happen is some sanction. You know, some, you know, dollar amount in the big scope of things, it's a cost analysis. Yeah. I'm going to do it. I'm going to get sanctioned. My client isn't going to hurt. I will take the hit. I will pay, you know, a couple of hundred dollars or a couple of thousand dollars. It's worth it for him not to have to answer this question right now, and I think by putting it on film when you can do it I think has a chilling effect, and I think that's what the committee was trying to do is have this chilling effect by No. 3.

CHAIRMAN SOULES: Judge McGown.

HONORABLE F. SCOTT MCGOWN: I agree with what Paul said, but let me pick up on what Steve said and add to it a little bit, that if you look at Subdivision No. 4 what it says is that instructions to the deponent not to answer a question are improper except to preserve a privilege, to enforce a limitation on evidence that's already been ordered by the court, to protect a witness from an abusive question, or to present a motion under paragraph 5. Then we provide the built-in procedure that should a court later order an answer to a question which a witness was instructed not to answer that that doesn't count against the deposition time of the party taking the deposition.

Then you flip over and look at No. 6. We say no private conferences except to determine whether you have got a privilege, and on No. 7 we say no objections except as to leading evidence if you put everybody on notice that they shouldn't lead before the deposition and even then it's supposed to be limited to simply saying "objection, leading" providing

that if you do have a narrative objection that that automatically means your error is not preserved. So we have built the conduct provisions in and then we have said --

MR. SUSMAN: Don't forget (5).

HONORABLE F. SCOTT MCGOWN: Yeah. A mechanism to terminate the deposition that, in fact, if it's becoming harassing that you don't harass back and get in a tit for tat. Instead we have got a mechanism to terminate the deposition, and if the court orders if you terminate it and you shouldn't have terminated it and the court orders it reconvened then that doesn't count in the deposition time. So we have built in conduct rules, and we have built in automatic kind of default penalties based upon the deposition time that are designed to make people follow the rules.

If those are the rules, there is not going to be a whole lot of opportunity for this bad act to be captured either in the written deposition or on video. Whether you show it to the jury or not, again I want to emphasize let's don't let the tail wag the

dog. But what if there is no video and it's on deposition and the witness is obviously slow-balling all of the answers and eating up your time? Then that's going to be a reason to apply to the court. We considered that. You go down to the court and show them the written deposition. You say I need another two hours added onto my 50 because the witness was obviously in a pattern of slow moving the deposition, and that's how we would take care of that problem.

JUSTICE CORNELIUS: Luke.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: With respect to paragraph (3) don't you think that ought to be at the option of the aggrieved party because otherwise a lawyer who commits a bad act could make it self-serving and then have that presented to the jury?

HONORABLE F. SCOTT MCGOWN: You're right. We need to redraft that. We assumed it would be at the option of the aggrieved party, and it doesn't read that way, and we need to redraft that.

MR. GOLD: Because that was something that we talked about.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: I mean, this takes sanctions into a whole new arena. It takes the sanctions to a jury trial for the view of the jury. I mean, do we need to put something in the Texas Rules of Evidence about this? This is new evidence. Never before do I know of admissible -- the only case where there is not a claim for attorneys' fees, and attorneys can whine all they want proving their attorneys' fees and how bad the other side acted, but in the absence of an attorneys' fees claim I don't think this evidence has ever been admissible in a jury trial to determine the fact issues to the parties' dispute.

MR. SUSMAN: I thought -- I mean, when I try a jury case I have been told that the jury watches me a lot, what I do, whether I have a toothpick. I mean, a jury is watching the lawyers all the time. The parties are responsible for their lawyer's conduct in court. If the lawyer begins an

objection or treats a witness harshly or treats the judge impolitely or his client impolitely the jury makes that lawyer and the client pay for it by what they see in the courtroom. Why is this any different? Why do we make the conference room sacrosanct so that what goes -- you are free to act up, act out, be an obnoxious idiot in a conference room, part of a judicial proceeding; but when you do it in court, the same conduct in court, you pay a price for that. I mean, we don't try cases behind screens. So I don't see where there is any unfairness to this at all. I mean --

MR. MARKS: Well, you asked --

CHAIRMAN SOULES: David Jackson had his hand up, and then I will go around the table.

MR. JACKSON: Well, the reality of a videotaped deposition, though, is that the lawyer is not going to be on camera anyway. So if that's what you are trying to get before the jury, that's not going to get there. The words he says will be on the written transcript, and they will be on the

audio track, but the jury is not going to get to watch the lawyer's demeanor. He is going to be watching the witness.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I was just going to say that a lot of things go on in a deposition that aren't admissible in court. I mean, you ask questions, you elicit information that would not be admissible and yet it's discoverable. So a lot of things happen in a deposition that don't necessarily get into the courtroom, and that's based upon what is really evidence and what is not really evidence, and this is certainly not really evidence that I have ever known about.

MR. SUSMAN: That's why we have -- you must get the permission of the court to do it.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: We talked about all of this in the subcommittee, and I remember asking the same question about, well, how is this going to be admitted into evidence, and I remember Scott McCown saying,

well, if it pertains to whether the witness is telling the truth or not it is admissible evidence, and so when you do have the situation where you have the witness being coached, the lawyer telling the witness what to say, then it is admissible under the Rules of Evidence, and we also have it at the discretion of the judge. We don't really think this is going to happen a whole lot of times, and I think what Scott says is absolutely right. This is only in the absolute worst situation where the conduct is such that you can't believe the witness anymore and the lawyer -- and the jury is entitled to know about why you can't believe this witness.

CHAIRMAN SOULES: How is it admissible, what a lawyer tells his client?

PROFESSOR ALBRIGHT: Well, it's not what the lawyer is telling the client. It's that the witness is being coached throughout the testimony.

CHAIRMAN SOULES: So do you call the lawyer in the trial to prove that the lawyer coached the witness? Is the lawyer by

this made a witness at trial and disqualified from continuing to represent his client?

PROFESSOR ALBRIGHT: I don't think so at all.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Wait. I don't see this discussion here the way it's going. If we start off with the assumption that testifying in a deposition is the same as testifying at trial, which it is, which it most certainly is. You may use a deposition just the same way as if the person were called at trial. Now, I don't understand why in a deposition an attorney can act like a complete ass, and no one seems to care about that even though we all get on this bandwagon of civility and everything, but at a trial we have to dress a certain way. We have to look a certain way. How we ask the questions is all considered.

If an attorney says something during trial a judge can't prevent him from saying anything during the trial, but if he says it, it gets before the jury, and the same thing should go with a deposition. I do not

understand the concept that the acts of attorneys should be kept from a jury because it happened during a deposition. I think a tremendous amount of abuse of the discovery system and a considerable amount of the delay that takes place takes place in these conference rooms, and like it or not we are protecting it. We seem to like it.

I mean, it's like you can send an associate who is a complete numbnuts to a deposition who has absolutely no tact, no brains, whatever, just with a list of questions and say, "We don't care how you get the information. Be a complete ass about it. Just get it. Bring it back on a shield, because all we have to do is have the data and our smooth-talking, well-dressed attorney at trial will know how to smile to the jury, be a gentle person, and get it before them," and that's what happens, and that's abominable, and I think we should put a stop to it, and one of the ways of doing it is to be able to show that type of conduct to the jury, and I think this stuff about evidence is not an issue at all, no more than it's an issue when

it happens at trial.

MR. SUSMAN: In spite of your disallegiance to the subcommittee this morning I have been asked to announce that we will let you back in.

MR. GOLD: Well, thank you.

MR. SUSMAN: Rejoin our deliberations in spite of the fact that you were a traitor this morning.

MR. GOLD: I understand. It's a tough subcommittee. It really is.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I agree with that. I guess I am just trying to envision how this is going to work if it doesn't go to the credibility of the witness, if it's just abusive. "Now, ladies and gentlemen of the jury, we are going to show you a little scene in which counsel is abusive of a witness." I mean, it isn't -- Paul is right. It isn't an explanation to say that it goes on outside the courtroom because it should be treated as the courtroom, but suppose you had a jury out and you had a voir dire and an attorney who was

acting like a jerk. When you brought the jury back in you wouldn't say "Now, we have a videotape of how the attorney was acting like a jerk during voir dire," you know.

HONORABLE PAUL HEATH TILL: Not a bad idea.

MR. YELENOSKY: It might be a good idea, but what's the basis for it?

CHAIRMAN SOULES: David Perry.

MR. PERRY: Well, I think that the comment that was just made contained its own answer. It would make sense to allow attorney conduct to be shown to the jury if it was in a context where it affected the credibility of the witness with regard to a particular question and answer, but if it's in some other context, it doesn't. It seems to me that to some extent we have got -- we kind of do have the cart before the horse on this subject. Judge McCown I think made the point that the real important thing about this rule is that it does change what attorneys are allowed to do during a deposition process.

The important part of it is that it prohibits a lot of the unnecessary objections

and things of that nature, and I think there are some details that maybe need to be further worked out on this, but I think everybody probably agrees that nobody is wanting to play videotapes to the jury unless it is something where the conduct of the lawyer at that point would affect the credibility of the evidence that somebody is trying to shuffle.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to be sure I understand how it works. Now, if in trial in the courtroom a question is asked and a lawyer wanted to go caucus with his witness, the jury would see that. Okay. As I understand this if that happens in a deposition and it's video, this would allow the judge to show that bit to the jury instead of turning down the volume and letting them edit it prior to trial. Now, certainly it would have that effect. Now, do I hear someone saying that this provision here underlying would allow the victimized side to come in and say, "Judge, we don't want to offer Witness Jones, the testimony, but we

have got five minutes worth of abuse by the other lawyers that we want to show." You don't mean that, do you, Steve?

MR. SUSMAN: No. That was not what we --

HONORABLE DAVID PEEPLES: Okay. So what this means is the volume doesn't get turned off during the abuse if the judge so rules.

MR. SUSMAN: That's right. And I have no problem really basically with the notion of you would add to it some phrase if you want to, which we considered adding, that it's played, I mean, one, at the request of the offended party rather than the offending party and, two, that the court deciding whether it should come in should consider whether it may view the veracity of the testimony, have some effect on, I mean, the testimony so that you may have to make that connection.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCGOWN: Before we give up so quickly, Steve, let me make one point. If you file a lawsuit and the

defense attorney calls you up and says "If you send me any interrogatories or any deposition notices two guys are going to come over and break your legs," and is that admissible? Well, it doesn't go to the veracity of any witness. It's behavior by the lawyer, not by the client, but that falls under the category of obstruction of justice. You are attempting to shut down their discovery from which we ought to be able to make some inferences about your case, and so if you have got five minutes where a lawyer is engaging in high level abuse why is he doing that? The reason you engage in high level abuse is to discourage the other side from pursuing their case, and I think that supports an inference about their case and about your case.

And frankly, we didn't envision that this would be very controversial because I think it's going to be worked out in specific context by specific rulings by the trial judge. Trial judges, and I am one of them, are not going to want to take a lot of time to try collateral behavior by the lawyers, and I think they are going to be slow to let that

in, but if you have got lawyer behavior that either does go to the witness' veracity where you say to the witness, "Was the light red or green?" And the witness says "It was green," and the lawyer interrupts and says, "Don't you mean it was red?" And the witness says, "Oh, yeah. It's red," that the jury ought to see that as well as the abuse.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I don't agree that that type of behavior supports an inference of the type you are suggesting. We have all had some, I think maybe in past years, limited experience with this. I recall one case where a woman lawyer in our firm was in effect verbally, sexually assaulted at a deposition, told things the equivalent to what you are talking about. That supported an inference that the lawyer who said it was a low-life, but it didn't really support an inference about his client's claim or the factual issues that would be involved in the disposition of the case, and I don't think we ordinarily draw inferences at that level. I

think we are probably more restricted than that rather than less restricted in terms of either the prior bad acts or the person we are talking about.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think there may be two issues here, and I agree that maybe anything that affects the credibility of the witness may should be shown to the jury.

PROFESSOR DORSANEO: I agree with that.

MR. MARKS: And that could be -- maybe we ought to expand that concept a little bit. You know, a lawyer by his objections or by his statements attempting to educate the witness on what to say, that sort of thing, but to have a blanket deal like this without any relationship whatsoever to the issues in the case seems to me would not be the best thing to do.

HONORABLE F. SCOTT MCGOWN: Well, Steve's offered to compromise, and I can live with that because, as I say, I think this is a rule that operates at the outside, and it's the other rules that are really going to

control deposition conduct.

CHAIRMAN SOULES: All right. Does this statement mean that the judge can ignore all Rules of Evidence in admitting deposition testimony? That's what it says.

MR. LATTING: What's the compromise?

MR. SUSMAN: I'm sorry. That was never --

HONORABLE F. SCOTT MCGOWN: Well, what Steve's -- in answer to Luke's question I guess I am having trouble understanding it because if it goes to the credibility of the witness; for example, if you say in the courtroom to the witness in the courtroom in front of the jury, "Was the light red or green?" And the witness says "green," and his lawyer jumps up and says, "Don't you mean red?" And the witness says, "Yeah. I mean red." All of that is part of the evidence and all we're saying is that if it happens in the deposition where you coach the witness through your answer, where you take a strategic break from and thus shielding the witness from a series of cross-examination,

that that would be shown to the jury, too, at the option you would have to -- I think Judge Cornelius is right. You have to redraft the rules so that it's the offended party not the offending party that gets to offer it, and the judge would have to make sure it went to credibility, but I don't see that that would violate a rule of evidence, any rule that I can think of. I think that would just be showing the context of the Q and A, the whole context including the coaching.

CHAIRMAN SOULES: Are you talking about lawyers' statements or the witness' statements?

HONORABLE F. SCOTT MCGOWN: Lawyers' statements.

CHAIRMAN SOULES: Okay. Well, it doesn't say that.

MR. LATTING: Why can't we already do that, by the way?

MR. CURRY: I do that all the time now.

MS. SWEENEY: Yeah. That's existing law. We show that to the jury now. I mean, if you have got a video depo and you

are asking questions and the other side barges in the middle of the question I play that stuff straight on through. What are they going to do, stand up and object to it? You know, so the difference I think is as opposed to interrupting a question or addressing the witness is the tirade or the tantrum. That's a different issue. The part about talking to the witness and bumping in and saying "Hey, wait. Don't you mean red?" That's existing law. We are not changing anything with that. The difference here is giving the judge permission to play the five-minute temper tantrum with the throwing and the slamming and the stomping around, and that is different, and I don't know how you justify that under the Rules of Evidence, but the other is no change.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: And mine, as an in between, is that I find the trouble with the objection, "I object to the form." That is a tricky question because you have given him testimony that the light was green when, in fact, you know that it was red and by the time

they get through with this objection then the person changes their testimony so that the objection never comes in. I mean, a person is shrewd enough to shroud it in an objection, and that's what the whole problem is now is that -- and we will see when we get to these other provisions is that under the guise of objection all sorts of things are conveyed to the witness, either to testify a certain way, change testimony, or not answer anything at all, and it's not the situation necessarily where the person barges in because I do believe that that can still be played. It's where they make an objection and then the minute there is the objection then the judge feels constrained about putting an objection before the jury, which I have always found to be somewhat difficult to understand since if it happened at trial the objection would be played to the jury anyway. You don't send the jury out every time there is an objection, and that seems to be why I have a problem here is why in a courtroom we wouldn't shield the jury from this type of conduct, but when it's in a deposition, we do. We just give them the

sanitized version of question and answer, and it's like an attorney was never there.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Again, maybe we ought to not get hung up on (4) right now and come back to it because -- I mean, on (3) because basically our feeling was that if you enact (4), (6), and (7) as written there is not going to be a hell of a lot of need for (3) other than just a mechanism to enforce (4), (6), and (7). On the other hand, if you did not enact (4), (6), and (7) as written (3) might be good in and of itself because -- I mean, certainly it would if you had a right to have this played because people would not -- I mean, they do kind of go together is all I am saying, and maybe we ought to go to some of the other ones and then come back to (3) because, I mean, if everyone follows (4), (6), and (7) there is not going to be much left, Paul.

MR. GOLD: That's right. I agree with that.

MR. SUSMAN: That I can imagine. And it's not hardly worth fighting

about other than if you want to make kind of an enforcement mechanism to make people abide by (4), (6), and (7) because as you say after the cat's out of the bag it may be too late.

CHAIRMAN SOULES: You want to move then to (4), (6), and (7)

MR. SUSMAN: Yeah. I would like to.

CHAIRMAN SOULES: All right.

MR. SUSMAN: Yeah. Actually (4), (5), (6), and (7) go together because -- Alex is saying do (7) first. We moved it back.

PROFESSOR ALBRIGHT: That's right.

MR. SUSMAN: We have moved (7) where it is for a reason, and we put (7) where it is because we began with the notion of keeping lawyers quiet, no objections during depositions. That's where we end up, and so the question comes to us, how do you protect yourself? What do you do if you can't object? What happens if the deposition gets used? And that's why we begin with (4) and (5) to see what you can do when things go wrong.

In the first place (4) says you can't instruct a witness not to answer a question in four circumstances. Otherwise you should not instruct them not to answer, and those circumstances are you can instruct them to assert a privilege. You can instruct them not to answer to enforce a limitation on evidence directed by the court. You can instruct them not to answer to protect a witness from an abusive question, and you can instruct them not to answer to present a motion under paragraph 5.

The limitation on evidence directed by the court would be you are not to engage in any discovery on the merits. I want you only to discover personal jurisdiction facts in this deposition. You could stop that kind of questioning, or class action issues only, not the merits, or something like that. An example of protecting a witness from an abusive question would be, we thought, if sufficient protection where the question is really "When did you stop beating your wife?"

When it is a question that generally is so unfair that it's categorized as abusive,

and you then adjourn the deposition, and if the court later determines or determines that you have -- the deposition can go on, but if the court later determines here that you are wrong in instructing the witness not to answer the court may order that the reconvened deposition does not count against the deposition time of the party taking the deposition. Kind of a built in sanction. There is a price that a lawyer pays if he is wrong in instructing a witness not to answer, and that is the time when the thing gears up to ask the question again the other lawyer has free time without it counting against his 50 hours. That's the instruction not to answer.

Terminating the deposition, we provide that any time during a deposition a party or deponent may move to terminate or limit it on the ground that it's being taken in bad faith or in a manner as to reasonably annoy, harass, oppress, or embarrass the party. Again, we felt it necessary to set these things out in bold print at the beginning so people don't feel that in an objectionless deposition environment, which is what we envisioned

basically under No. 7, that they are serving up witnesses as raw meat to the mercy of an abusive lawyer. And again, the penalty for terminating a deposition to get a ruling from the court is that the reconvened deposition shall not count -- the court may order that it shall not count against the time of the party who found it necessary to reconvene the deposition.

(6) on conferences is pretty well -- I mean, that comes from a number of local rules, the private conferences should be for the purpose only of determining whether a privilege should be asserted, but then private conferences could be held during normal recesses, lunch. Some rules, we saw one local rule that prohibited private conferences at any time during the day of the deposition, which we thought too far.

And No. 7 is our no object rule. No objection should be made during the oral deposition. The party may make and the court shall consider any objections to the question tendered as evidence. On the subject of leading questions we thought the way to handle

that is if the lawyer feels that the questioner is questioning and likely to ask leading questions of a friendly witness that the lawyer should advise the questioner at the beginning of the deposition that this is not an adverse witness, you are not entitled to lead this witness, and I will object at trial to your trying to introduce answers to leading questions. That's enough. Then the questioner proceeds at his own risk, and lawyers have to be good enough to recognize the difference between a nonleading and a leading question. You preserve it by giving that one warning at the beginning of the deposition.

And I think that that's basically what we have in mind. Of course, the parties can agree or the court can order in a case that objections can be made, but even then we wanted the objections to be kept simple, simply stating the grounds thereof, with none of these narrative objections. In fact, the penalty for asserting a narrative objection that coaches a witness is that the objection does not preserve, but the narrative objection

just doesn't preserve the objection at all. So if you have got a real good objection under a regime where you are allowed to ask it you better ask it in a short form. That is essentially our conduct rule, and as I said, if people follow those -- we enact them and people follow them there is not going to be that much of interest to videotape or play to a jury.

CHAIRMAN SOULES: Question.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: The only time then that there will be objections is when the parties have agreed --

MR. SUSMAN: Or the court orders it.

CHAIRMAN SOULES: -- to have objections on the record at the deposition or the court has made a special discovery order to that effect?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: All right. What about nonresponsiveness? Did you think about that?

MR. SUSMAN: Yes. I mean, we

talked about it at great length, and we came to the conclusion that that is -- you should not be allowed to object to the nonresponsiveness of an answer.

CHAIRMAN SOULES: So if I can get a witness full enough to really rain on you and you ask him a question and he starts raining, that's admissible testimony?

MR. SUSMAN: No. No. Let me -- I'm sorry. At the time of trial you can object to it. Okay. At time of trial you can object to a nonresponsive answer.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: The answer is nonresponsive, and if the lawyer wasn't careful enough to go reask the question --

CHAIRMAN SOULES: Then responsiveness works both ways. It could work.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: If I get a nonresponsive answer I like then I better ask another question.

MR. SUSMAN: If you get a nonresponsive answer you like, you better ask

another question, and that's where we thought the video -- the ability to show it to a jury would also be helpful; that is, that you couldn't just put in the questions you want. You know, "Isn't the sky blue?"

"Yes."

"What color is the sky?"

"Blue."

And at that kind of deposition the jury would see very quickly what's going on if they could see the whole thing, not just the part you want them to see.

CHAIRMAN SOULES: Okay. David.

MR. PERRY: At the last meeting we had we actually discussed -- we had not finalized. The subcommittee had not finalized the details of how the no objection situation would work. We discussed some other formulations, one of which is reserving all objections to the time of trial if you are deposing an adverse witness; but for example, if you are deposing maybe a neutral witness or a lay witness that is not likely going to actually come to trial then in that situation you may need to make the objections at the

time so that they can be cured or waived. There may be situations where you don't mind leading on matters that are not in dispute and a person would need to make a leading objection. So there are some other -- the matter was not completely resolved by the subcommittee, and probably it would be good to get the guidance of folks as to what approaches ought to be taken.

CHAIRMAN SOULES: Doyle Curry.

MR. CURRY: I have got a real problem with both the leading and nonresponsive. I don't perceive that those are problems in delaying depositions or adding time to them. The objection to leading simply says that, "objection, leading" and you go right on. It doesn't slow it down at all. "Objection to nonresponsive." That doesn't slow it down at all. If I'm asking the questions and I consistently lead and somebody says "objection to leading," and I'm the one that's using up my time, not this fellow that's objecting to it. And I have to make the decision. I either quit leading, or I continue to use up my time like that.

And to give somebody a blanket objection in the beginning that goes right on through, and you go through a deposition and some question that you ask may be construed to be leading. You have got some factual information that's pertinent, otherwise admissible, and because of some problem or just an inadvertent question the way you ask the question is leading, it gets knocked out, and the person is gone. You can't get him back. You can't redepose him. It seems to me we are letting the tail wag the dog. We are trying to shorten depositions. We are trying to stop people from stonewalling and doing things that are delaying and causing you to use up your time, and it seems to me that people objecting for leading questions and objecting to nonresponsive questions are not using up the time. I mean, I don't see that we need that in this area.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: In my experience, which thank heavens for depositions is limited in recent years, when

we put the form of the question business in 204 it seemed that the practice developed where lawyers would claim that a particular question is ambiguous or somehow otherwise attack the question in order to basically screw up the works, and I gather in your proposal that would be something that you could articulate at trial. Maybe you wouldn't get anywhere with it.

MR. CURRY: Are you talking to me? Oh, Steve.

PROFESSOR DORSANEO: Steve.

MR. SUSMAN: Come again.

PROFESSOR DORSANEO: I agree with Doyle that the leading question form of the question objection is not a problem, and it's not a problem to allow somebody to make it as a warning after they hear a particular question.

MR. SUSMAN: Right.

PROFESSOR DORSANEO: But other types of form of the question objections are real problems at depositions, and I guess I would end up agreeing with him that as far as the leading issue I don't see it as a problem,

and I don't see that the cure to the problem is very good either.

MR. SUSMAN: We didn't --

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I think on leading we basically didn't see it as -- I mean, someone could sit there and repetitively during this deposition say "Leading. Leading. Leading. Leading." Alternatively we didn't see any problem with just asking at the beginning of the deposition to say "You can't lead this witness and if you do, you do so at your own jeopardy."

CHAIRMAN SOULES: Well, that's going to be a standard --

PROFESSOR DORSANEO: Well, that will be a prophylactic objection.

CHAIRMAN SOULES: -- objection that every associate is taught to do.

MR. CURRY: Well, they will just do that in every deposition.

MR. SUSMAN: Well, what's wrong with that?

PROFESSOR DORSANEO: It will just prolong the deposition. That statement

will always be made.

CHAIRMAN SOULES: Paula.

MS. SWEENEY: There is a certain judicial economy that's recognized even at trial of being able to lead on nonobjectionable things. If you want to lead through the preliminaries, you do it, and you get to where you are going, and if you can just lay behind the log and let them do that and then at trial object to all of it and keep the depo out, which I guarantee someone will do, then you are defeating all that economy of time that you get by being able to lead where it's not an issue.

So you know, saying "object to leading" when you need to, it doesn't slow things down, and it allows the person to cure the problem at the depo as opposed to maybe the problem is if you say "form and responsiveness" then form could lead itself to the abuse that Bill is talking about with, "Well, that's ambiguous because you failed to include," and then you get back into that old problem, but if you are talking about leading and responsiveness then you cure at the time of the depo when it can

be fixed something that is easily curable and at the same time you preserve the efficiency of being able to lead over things that nobody cares about and save some of your very finite number of hours for the more important stuff. I would suggest that to you-all, that you phrase it that you object --

MR. SUSMAN: Retain leading as an objection?

MS. SWEENEY: And it's not a problem.

PROFESSOR DORSANEO: Compound questions are a problem, too. I mean, there are some other form things that are legitimate things. You can't tell what question they answer.

MR. MARKS: Well, you can't really understand the question.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, in that same regard I think is where a lot of abuses do occur in terms of asking either hypothetical questions or assuming things or claiming that witnesses prior to this witness

or other witnesses said something, and so you are calling them liars, right, and what you are basically saying is lawyers aren't supposed to protect people from that kind of behavior.

PROFESSOR ALBRIGHT: You can instruct them not to answer.

CHAIRMAN SOULES: What, on the ground that it's abusive?

MR. SUSMAN: Okay.

MR. MCMAINS: But see, that's where you really do get into the argument as to what form of the question means.

MR. SUSMAN: The subcommittee always has some hip pocket fall back, you know, fall back kind of proposals when things get tough.

CHAIRMAN SOULES: This is Paul Harvey Susman here.

MR. GOLD: The rest of the story. Right.

MR. SUSMAN: This is an official subcommittee fall back proposal.

HONORABLE F. SCOTT MCGOWN: This is in case the group wasn't as

enlightened as the subcommittee.

MR. SUSMAN: No, no, no. Because David Perry has some unofficial subcommittee fall back proposals. This is an official subcommittee fall back proposal.

MR. CURRY: This is in case we were asleep.

MR. LATTING: Susman, you had this all the time?

MR. SUSMAN: I mean, again, the sense of the subcommittee is it's not worth fighting long over this. If we can get rid of the most abusive kind of deposition coaching and speechifying and particularly if you will go to a regime that keeps -- leaves the jeopardy of having what you do say shown to a jury if you abuse this, it will become obvious. No one is going to sit there over and over again and "objection, mischaracterization. Objection, mischaracterization." And someone will figure out what this lawyer is doing. This will preserve during the deposition three types of objections. You can say "objection, leading." You can say "objection, mischaracterization."

You can say "objection, nonresponsive." These are the only ones you can say.

MR. MARKS: What does mischaracterization mean?

MR. SUSMAN: Huh?

MR. MARKS: What does that mean?

MR. SUSMAN: Whatever you want it to mean. Well, whatever you want it to mean, and I assume with your own witness you will have some game plan worked out in advance that it will mean something to your witness. Objection to a leading question, I mean, will mean something.

MR. MCMAINS: Now, think about this before you answer.

MR. SUSMAN: Our problem was we did not know how to come up with a form objection that is not coaching but that generally covers, you know, if someone has compound, argumentative, assumes answer not in evidence or some -- you know, the various ways lawyers have figured out to make objections that are coaching, and so we had to come up with something, and this was the one we could

come up with. "Objection, mischaracterization" but if, you know, you could have it "objection, doll." Whatever word we want to use to describe --

MR. MARKS: But what does it do though, Steve? What does it do for you? I mean, you have got the objection.

MR. MCMAINS: If you don't make it it's waived is what he is saying. What he is saying is that in this context if you don't make it it's waived.

MR. MARKS: Okay. So you make it. What are you actually preserving?

MR. CURRY: Whatever objection you had to that question.

MR. MARKS: Whatever it might be.

MR. SUSMAN: Well, a whole heck of a lot.

MR. MARKS: Why can't we just say "objection"?

MR. GOLD: Well, that was an alternative, too.

CHAIRMAN SOULES: We are getting too many people talking now. John

Marks, do you need to complete a thought?

MR. MARKS: No. That's it.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCGOWN: The answer to that question is to distinguish it from leading and nonresponsiveness. If you have got a leading, you say, "leading." If it's nonresponsive, you say "nonresponsive." If the question somehow -- I think we were primarily thinking of facts not in evidence or as Rusty said the old trick of saying what some witness previously testified to that he didn't or restating your own witness' testimony from 30 minutes ago in a way that isn't right. It gives you a verbal tact, a leverage to make an objection and preserve the complaint so that if they don't cure it, and they are usually going to know when you object what they are doing wrong, and if they don't cure it, then you have got a handle for the trial judge to exclude that portion of the deposition. There is no perfect way to do this. I mean, we are kind of trying to figure out how to slice it.

MR. SUSMAN: John, the one we

were most concerned with, I think now it's coming back to me, is this notion where you ask a witness, "Now, you testified this morning, Mr. Jones, blah-blah-blah-blah." Okay. Which is nothing like what he testified and the problem at a real trial the jury will have seen the morning and know it was nothing like what he testified. With the deposition scenario that's not necessarily true. You may only get that answer, that lawyer's testimony and the answer. Yeah. The witness says "yeah" not thinking clearly, that you should be able to frame an objection that would allow you to go back and show that this was truly a mischaracterization of what the guy testified to. I mean, we struggled with this. I will tell you that. Maybe we didn't fall back far enough.

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: What was the thought of the committee in not including an objection "calls for a legal conclusion" as a form of objection? Is that just going to be preserved for trial or is that a judicial

admission or what happens?

MR. SUSMAN: I think the feeling would be that -- yeah. That that would be certainly preserved for trial probably. Oh, I guess some of the feeling was that that would be a usual coaching objection. That calls for -- "Didn't you agree with Mr. Jones that you would do something?" That calls for a legal conclusion. I mean, why give that --

PROFESSOR CARLSON: How about "Do you really think this conduct is a violation of the Deceptive Trade Practice Act?"

PROFESSOR ALBRIGHT: But isn't that a situation where you can say "I instruct the witness not to answer that question."

PROFESSOR CARLSON: Because what?

PROFESSOR ALBRIGHT: Because it calls for a legal conclusion. This is not a lawyer witness.

CHAIRMAN SOULES: That's not in the form.

MR. MARKS: It's not in there.

PROFESSOR CARLSON: Is that right?

MR. SUSMAN: It's an abusive question. Yes.

PROFESSOR ALBRIGHT: We meant abusive to have a broad meaning, not meaning to be -- not just that you are being rude to the witness but that you are asking an improper question.

PROFESSOR CARLSON: What if my client answers that in a way that admits themselves out of that contention? Now, have I got a judicial admission or no? I don't?

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think most of these things we can probably escape by legal conclusion. We can deal with that at trial. If it's a legal conclusion at the deposition it's a legal conclusion at the trial, but saying "mischaracterization" has kind of like, "Well, bless his heart, so we will just have to finish here today and we'll just let this be covered by mischaracterization."

It's a good try, and I am not meaning to be critical of it, but I probably would prefer to try to be more specific even if we had to add one more. It seems to me that the compound question problem is a real problem. That's real difficult because if you get an answer to a compound question at trial my understanding is that the answer is whatever the answer given is to either question for trial purposes and for appellate purposes, and that's not good enough. And that's not because there isn't anything you can do about it.

I don't know whether mischaracterization gets to that. If it does because it gets to everything then it may also get to "that's ambiguous," which I don't like. I don't want it to be that broad. Assuming facts not in evidence, that many times can be dealt with at trial, but sometimes it doesn't look like that. It looks like the witness is being asked both questions. Maybe that's a two questions problem, too, and I am not sure I have gotten this all figured out, but I would try a little harder to figure it out, and if

we left something out that turns up later, well, to me that's better than something opaque like "mischaracterization."

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: Actually I think I would go the other way because the whole reason for making these objections at the deposition is to put the questioner on notice that he's asked a question where there is a problem so he can correct it. So if you have got leading, nonresponsive, and you just say "objection as to form" for everything else then the questioner can ask for a clarification. "What do you mean?" Compound question, calls for, you know, whatever, and then you can explain it. You just can't do any more to begin with.

MR. SUSMAN: If you want the explanation.

MR. MEADOWS: Yeah. If you don't want it --

MR. SUSMAN: I love it. Let's change it "objection, form." How about "objection, form"?

MR. MEADOWS: That way if the questioner likes his question, he is not worried about it, he doesn't explain it. He just goes on.

CHAIRMAN SOULES: Let's start here with Judge McCown, and I will go right down the table with the following hands.

HONORABLE F. SCOTT MCGOWN: What Robert said I think is real important, that you need to distinguish between what happens at the deposition and what happens at trial, and legal conclusion is a good example. I think a lawyer is entitled to ask a lay person in deposition what their legal conclusion is. That doesn't make their legal conclusion admissible at the time of trial, but that's the very kind of thing we are trying to get away from is arguing about at the deposition whether the question is going to get asked or not, whether it's a good or bad question. That objection will be there and can be made at the time of trial.

The other thing that we envisioned happening under a basic no objection regime is there might be a little more cross-examination

of your own witness when you are defending the deposition. So, for example, with compound question, which bothers lawyers it seems to me a whole lot more than it bothers witnesses, "Were you driving fast, and was the light red" is a compound question which most witnesses manage to handle. I think they manage to handle a lot of compound questions, but if they don't and you are defending the deposition, you can come back on cross-examination. You may not have many of them, but you might say, "Now, Lawyer Jones asked were you driving fast, and was the light red. Let's break that apart. First, were you driving fast?"

"Yes.

"Second, was the light red?

"No."

You can do a little cleanup. I would hate to see us go to the system where we are simply asking, "objection, form" and then have the lawyer be able to ask, "What is your objection to form" and then have a statement of what objection to form is because it's the dialogue between the two lawyers that causes a

lot of problems and can quickly get out of hand when you don't have a judicial officer there. The whole point of the no objection regime is to try to keep the lawyers from talking to each other very much or from having much coaching in front of the witness, and that is going to be a lot of coaching.

MR. MEADOWS: But most of the time when you say "objection, form" the questioner knows just as well as the person objecting what the problem is, and then he doesn't have to ask anything more. He can reframe his question and go on. If I ask a compound question, and somebody says "objection, form" I know it's a compound question. I will just restate it or else I am not worried about it, you know, I won't restae it, but the interference is over with by that statement unless I invite more.

CHAIRMAN SOULES: Okay. Who's next here? Paul Gold.

MR. GOLD: I agree with Robert. We had this discussion in the subcommittee at one point, and it still seems like a very viable proposal in that someone objects to

form, it's left to the party that's asking the questions as to whether they want to waste the time getting the objection or just go on or choose that, you know, I know what the objection is. I know what the problem is. I want to move on with it anyway. I don't want any dialogue.

And I think what we are trying to avoid is -- and I want to modify Judge McCown's statements just a little bit. It's not all conversation between the attorneys but just the stuff that is just meaningless dialogue that goes on. I mean, if someone requests some guidance, requests -- someone objects to form, and you say, "Well, what is it?" And they say, "Well, you are missing a predicate." And then you go, "Well, what is the predicate?" And they say -- generally when I ask that in deposition they say "We are not going to tell you," which always seems kind of anomylous to me since if you ask at trial they have to, but you know, it's up to the questioning party how much dialogue they want to have because it's against their clock. So I think that that would be a viable

alternative to all of this, is just say "objection, form" and then if they want clarification they can get it to the depth that they want it.

MR. SUSMAN: Would you do "objection, form" for leading, too? Would that cover it, or leading would be separate?

MR. MEADOWS: I would say separate.

MR. SUSMAN: So you could have leading, form, and nonresponsive.

MR. GOLD: Yeah.

MR. SUSMAN: Could we get a show of hands whether --

MR. LATTING: Well, can I ask one question? Why say "form" at all? Why not just have leading, nonresponsive, and objection.

MR. CURRY: That's the way we do it now, as a practical matter.

MR. LATTING: Do we want to attach "form" to it for some reason?

MR. SUSMAN: I think we want to do "form" because we want to make sure it got typed up right in the transcript. I don't

know. I just --

PROFESSOR ALBRIGHT: I have a question.

CHAIRMAN SOULES: Okay. Alex Albright.

PROFESSOR ALBRIGHT: Are we going to require the objection to form, any form objection has to be made at the deposition or else it's waived?

MR. SUSMAN: Yes.

MS. SWEENEY: Yeah.

MR. GOLD: Uh-huh.

MR. MARKS: Well, isn't objection as to a leading question as to form?

MR. CURRY: Yes.

MR. MARKS: So wouldn't two be just as good as three?

MR. CURRY: Except that leading is so common they wanted that separate.

MR. MARKS: But you know when you lead.

MR. CURRY: I don't.

MR. MARKS: Not always.

MR. GOLD: Not all the associates that come to all the depositions

do.

CHAIRMAN SOULES: Doyle Curry.

MR. CURRY: The difference in leading is that the Rules actually promote leading. A lot of people don't think that, but when you read the Rule it does promote leading. It gives you a whole bunch of exceptions when you should lead, and the courts are never told to prohibit leading. They just say -- it says they should avoid leading questions, and then they give you a string of exceptions that are so long most of the judges I go in front of they want you to lead as much as you can 'til you get down to the things that are in dispute and then stop leading. And so most lawyers, they take two days to try a case that ordinarily takes four because they lead, and they lead all the time down to those critical questions. That's why they separated it.

MR. MARKS: But the Rule says as to the form of the question or the responsiveness of the answer, and form of the question covers leading and everything else.

MR. CURRY: Exactly. But

leading is so common that's why they made them separate like that, so that they would know immediately that it's a leading question, and it makes everything go faster than to stop and find out what form.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Mr. Chairman, on behalf of the subcommittee I move that we adopt alternative Rule 204(7), objections to testimony, with the third line reading "objection, form" instead of "objection, mischaracterization" and otherwise we adopt Rule 407. 404(7).

MS. SWEENEY: 204.

MR. SUSMAN: 204. Right.

MR. KELTNER: Second.

CHAIRMAN SOULES: It's been moved and seconded. Any further discussion?

MR. PERRY: What happened to Meadows' idea about asking for further clarification on an objection as to form? I missed that.

MR. CURRY: We still do it.

MR. PERRY: Is that still part of it?

MR. MEADOWS: Yeah.

CHAIRMAN SOULES: What does this mean? Are we supposed to make the objections as they are set out in quotes, and if so, why do we need "The objection shall be stated concisely only stating the grounds of an objection and in a nonargumentative and nonsuggesting manner"?

MR. SUSMAN: We don't. We don't. We can change that.

MR. GOLD: Yeah. That's why we had it, was to emphasize that this wasn't only the proper way of doing it, this was the only way that it was supposed to be done. It wasn't supposed to be "objection, leading" as a proper predicate or properly preserves the objection. It was that anything beyond leading, "objection, leading" that was a non-deal.

MR. SUSMAN: But what they are suggesting is if you eliminate the last -- we should eliminate the last two sentences because it really distracts from the spartan beauty of the other in which we say "These objections shall be made only in these terms

and are waived" -- I would add that. "These three objections should be made only in these terms and are waived if not made," something like that.

MR. JACKS: Or if made in any other way.

MR. SUSMAN: Huh?

MR. JACKS: Or if made in any other way. In other words, if you try to make an objection as a speaking objection, you know, you have no objection.

MR. SUSMAN: Right. Right. And I think we can add something if you will give us -- we are going to have to go back and redraft it. I think we should add something if -- what do you think about adding something that if the questioner asks you to explain for them and you don't explain it further, then you waive it. You can't just rest on a form question. Is that okay?

MS. SWEENEY: Yes.

CHAIRMAN SOULES: Yes.

MR. PERRY: Why don't we report back to the subcommittee to work out the details?

MR. SUSMAN: Well, I think that's a good idea. We ought to incorporate it. If the interrogator asks the lawyer who objects to form to explain what he means, that lawyer has a burden of being a little more explicit or it's waived. Good. We will do that.

CHAIRMAN SOULES: Okay. Does everybody agree with that? Anyone disagree? Bill.

PROFESSOR DORSANEO: I don't think we want to go so far as to explicitly talk about -- suppose somebody says "objection, improper form," I mean, instead of "form." We don't want to get back into if we don't do this exactly right without regard to any reasonableness or whatever you have waived it. I think we just don't talk about waive and just say this is the way you do it, and that will work.

MR. LATTING: I agree with that.

MR. SUSMAN: Okay.

PROFESSOR DORSANEO: The last sentence is good, you know. "Argumentative

objections are objections blah-blah" are no good because that --

MR. SUSMAN: Yeah. Well, we are going to take that out, though.

PROFESSOR DORSANEO: Well, I think it would be good to leave it in.

MR. SUSMAN: Well, see, it doesn't really add anything because if you are really telling people we expect you to use these words or close to these words, only, then by definition anything else --

PROFESSOR DORSANEO: But this tells you why.

MR. LATTING: And the last sentence also tells you you can terminate the deposition.

MR. SUSMAN: We will put that in a comment. I would rather put it in a comment that we expect the objections to be made virtually in this form. Small differences would not necessarily be fatal, but anything that becomes narrative or suggestive would, something like that.

MR. LATTING: What about this statement here, Steve, that says "Objections

that suggest answers or otherwise coach the opponent are not permitted and can be grounds for termination of the deposition"?

CHAIRMAN SOULES: You are not suggesting to delete that, or are you, that last sentence?

MR. LATTING: He was, I thought.

MR. SUSMAN: No. I am because there by definition --

MR. MARKS: You can only say three things.

MR. SUSMAN: If you can only say "objection, leading," "objection, form," and "objection, nonresponsive," I think we ought to keep people's feet to the fire on that in spite of Bill's suggestion that, well, "objection, improper form" would probably do, but if we intend to keep their feet to the fire on those three things then there should be nothing else.

MR. MARKS: Well, maybe --

MR. SUSMAN: See, this language comes from some local rules where they say objections at depositions shall be in short,

concise form and not argumentative, et cetera. We have gone farther than those local rules here by suggesting use these terms. There are three terms you have got to memorize, and that's why we took that.

CHAIRMAN SOULES: Address this if you will for me, Steve. I understand what you have just said. The last sentence merely states the penalty for going beyond. Do you want to state the penalty, which is if you go further the deposition can be canceled?

MR. MEADOWS: I think that's a good idea.

MR. SUSMAN: Okay.

MR. CURRY: But the penalty is going the wrong way, though.

MR. MEADOWS: Why don't you just say by the sentence "These objections shall be stated as phrased," in the last sentence.

MR. MARKS: And if they aren't that can be grounds for terminating the deposition.

MR. SUSMAN: We have a sense of the group. Let us go back and draft this. I

think we have a sense.

MS. SWEENEY: Can I ask one more?

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: And I totally agree this is great, but what about asked and answered because one of the greatest abuses is someone who asks the same question 25 times.

MR. SUSMAN: 50 hours solves that.

MS. SWEENEY: Well --

MR. SUSMAN: That's the notion there. The 50 hours plus any time limit on the deposition will do away with that.

MS. SWEENEY: Not on your one client on your one key expert, and they can afford to trash an extra hour asking the same question 12 times 'til they wear it out.

MR. JACKS: Well, it's abusive.

MR. GOLD: So it's abusive.

MS. SWEENEY: So what? You instruct?

MR. JACKS: Give us a broad comment on abusive.

MS. SWEENEY: That would include that.

MR. GOLD: Because if you are right, Paula, you can just show the judge it was --

CHAIRMAN SOULES: The court reporter cannot get the discussion that's going on right now.

MR. SUSMAN: We will add a comment on what is meant by an abusive question which would include a question that is asked repetitively and answered. That would be one form of an abusive question.

CHAIRMAN SOULES: Okay. Prepare that and we will look at it.

MR. SUSMAN: Okay. Now, can I get the sense of the group --

CHAIRMAN SOULES: Steve, did you have a comment?

MR. YELENOSKY: Yeah. I had a question and, I guess, a comment. I heard earlier, I think from Paul Gold, that the party that's causing problems may want precisely that, the termination of the deposition. So I don't know why we are so

quickly abandoning the proposal that there be a waiver of the objection if it's anything more than that because that will hurt them, and I don't agree with Bill Dorsaneo as far as, well, you know, they can fudge it.

I don't think -- I mean, if associates can be told to ask at the beginning of every deposition, you know, make the standard leading objection they can be told there are three objections and each of them consists of two words, and they can be taught that, and if they can't, then there is a problem. So I would say, you know, you have to make those two words or you waive it. If there is any solicitation of further explanation, fine. But once you say, well, you can say "improper form" then somebody is going to make an objection that has the word form in it but it's going to be as long as what I have just said, and that will be somehow proper.

CHAIRMAN SOULES: So Steve, I think the suggestion is if you are going to state the penalty you need to pick up some of the old (7).

MR. SUSMAN: We will do it.

CHAIRMAN SOULES: And some of the new (7).

MR. SUSMAN: We will do it. We have your comments, and these are very good comments.

CHAIRMAN SOULES: The last sentence of both the old and the new.

MR. SUSMAN: I have the sense of the house that -- could I have the sense of the house whether anyone thinks there will be a problem with (4), (5), or (6) and what the problem is?

PROFESSOR DORSANEO: Okay. Steve, I would say we don't need to be more Catholic than the Pope just because we have been recently converted.

CHAIRMAN SOULES: I think (4)(d) should be "make" instead of "present" if you really want to make an objection on the record and present it to the court. That's a small issue obviously.

MS. SWEENEY: Say that again, Luke.

MR. GOLD: What was that?

CHAIRMAN SOULES: (4)(d) in the

first sentence.

MR. SUSMAN: Instead of present a motion, make a motion.

CHAIRMAN SOULES: And then --

MR. SUSMAN: Luke?

CHAIRMAN SOULES: Yes.

MR. SUSMAN: I don't think we ought to ask people to approve the exact language here.

CHAIRMAN SOULES: All right.

MR. SUSMAN: Because that would be a detail that we are not doing elsewhere. Just the concept is what we are trying to get to.

CHAIRMAN SOULES: Okay. I don't see any problems.

MR. SUSMAN: Does anybody have a problem with the concept here? As I understand it we are going to have another meeting so we can talk detailed language.

MR. MCMAINS: Which concept?

CHAIRMAN SOULES: No. 4.

MR. SUSMAN: (4), (5), and (6).

CHAIRMAN SOULES: 204, paragraph (4). Rusty McMains.

MR. MCMAINS: What I was getting at is that on all of these there are two things that trouble me just because of the general wording. One gives, apparently, the deponent the right to terminate, and the remedy for some kind of premature termination or whatever is that you -- it doesn't count against your time, but more often than not, I mean, suppose it isn't the party or this is an independent witness or whatever, and the deponent really is having trouble, needs time to be coached, and he says, "Okay. I'm through. I'm not going to answer any more questions."

And I mean, there is no punishment to him. I mean, he just -- he has the right to do it under the way this is worded, and you actually do accomplish what it is that we have been trying to preclude all along. I mean, you just have to -- your witness has to be strong enough to say, "okay, it's over" when he backs himself into a corner; and it seems to me that there ought to be some way to -- it needs to be some penalty against the party who sponsors the witness, and then the problem you

have is should a witness be able to terminate unless it's by one of the parties' lawyers so that we have somebody before the court that we can control. If it's a genuine fact witness, I mean, our only remedies right now are contempt or whatever, but I'm not sure that a nonparty should be able to just terminate a deposition, you know, and walk away.

MR. SUSMAN: Could I urge you to write up something on this and give it to the subcommittee because that may be a great idea but we need some help? I mean, give us your ideas, but I don't think it's anything inconsistent with the direction we are going or will cause a change in direction, and I would say on any of these, particularly wording things, if you-all will give us your input in a letter, just write me a letter, with what you think these things ought to be reworded to say some way we will consider them all.

MR. MCMAINS: Okay. One other. If the idea is we want to take less court time, less deposition time, less discovery time, why isn't the penalty that we ask for

for a wrongful termination or a wrongful refusal to answer, why doesn't it operate against the person who commits the obstruction? That is, why don't we take it out of their time? See what I'm saying? In other words, you instruct a witness not to answer, and you're wrong. You don't have any of the reasons that are specified here. You go get that determined, and they say, "Okay. He's going to get to answer, and it's going to count against your time because you were going to take the questions anyway, but it's also going to count against his time." It's less time that he has as well.

PROFESSOR ALBRIGHT: It was written that way at some point.

CHAIRMAN SOULES: Well, in this rule if the court finds that the deposition should not have been terminated then when the deposing attorney reconvenes the time doesn't count against his client.

MR. MCMAINS: It doesn't count against his client. That's right, but what I'm saying is why shouldn't it count against the party who terminates?

MR. SUSMAN: All right. Let me answer. Rusty, I think you may be absolutely right. We have got two problems here we have got to deal with. The instruction not to answer is a limited problem because there is a limited amount of time. The deposition is going to be reconvened only to ask the question to which the instruction was given, and there I don't think there is much of a problem counting that against the party who gave the wrongful instruction.

MR. PERRY: Well, but wait. No, no. Because a lot of times that question is the prelude to a long lot of other stuff. I mean, a lot of times when you reconvene it you have got a lot of stuff to follow-up with.

MR. SUSMAN: Okay.

MR. KELTNER: We had it written the other way, Rusty, initially, and we came to the conclusion that there were two problems with having it that way. First of all, you wanted to have the party who had been inconvenienced benefited so they wouldn't suffer, and this was not so much as to have the bad party punished. We figured the court

can do that other ways under the sanction rule. We looked at that. So that's the reason for this way. I don't think this is the only sanction that would be available. It is just we want to make sure the benefit is built into the rule.

MR. MCMAINS: I understand that, but it seems to me if the function of these in large measure is to deter the conduct from occurring in part then I think there is more deterrence if you are impacting your time to do discovery, if it is detracting from your time to do discovery from when you are interfering with the other side's discovery.

CHAIRMAN SOULES: John Marks and then I will get David.

MR. MARKS: Okay. The problem I see with that, Rusty, is a lot of times you have legitimate concerns about whether something is privileged, whether it's work product. It may be right on the line. I mean, it may not be a conduct situation. It may be a legitimate dispute about the question, and to punish a person for making an objection or giving an instruction seems to me

is sort of telling a lawyer you can't -- you are being punished for legitimately protecting the interest of your client, if you take it away from his time. Now, if the court finds that he is doing it willfully or to obstruct or something like that I think that's a different situation.

CHAIRMAN SOULES: David, I was going to get you next and then Bill.

MR. KELTNER: Yeah. Rusty, in response to what you say, and it's a good point, but think that out in the way this is going to really come up. The truth of the matter is you have two different situations, instructions not to answer and terminate. What we want to do is make sure that we are putting the party who is being inconvenienced timewise back in at least the position they were if not a little better, and I think that's what these accomplish. We can accomplish the deterrent factor by operation of the sanctions rule, which will occur -- and I am going to suggest, by the way, that we are going to have to revisit sanctions on this issue regarding our limitations because

sanctions did not address that, but I think that's where we are going to have to put that in.

CHAIRMAN SOULES: Right. And I think all of these sanctions, all of these penalties are going to have to go into 215. We have tried to keep all the penalties in 215. It's good to have a couple here because we look at them together.

MR. MCMAINS: Well, the way they have done it I don't find it to be a penalty. It's a benefit.

MR. KELTNER: Yes, there is a benefit to the party who was inconvenienced. The penalties, I think, will have to go back in the sanction side, but that can be worked out later.

CHAIRMAN SOULES: Okay. In the fourth line of No. 5, "upon demand of the objecting party," don't you mean moving party there?

MR. GOLD: Where is that?

CHAIRMAN SOULES: Fourth line, "upon demand of the" -- you're talking about, isn't that the moving party?

PROFESSOR ALBRIGHT: Yeah. Yes.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay. Okay. Is everybody then in agreement with the concepts stated in (5)? Bill Dorsaneo.

PROFESSOR DORSANEO: I will just make a general comment that I think that terminating the deposition is something that we should not encourage even if it's a little rough and tumble. That really just messes up the entire process.

CHAIRMAN SOULES: Invites delay?

PROFESSOR DORSANEO: Now, maybe that could be handled by dealing with the last sentence. If it should not have been terminated then something bad happens to the person who terminated it or something good happens to the other side.

MS. SWEENEY: You are saying it should be a drastic -- it should be an exceptional situation?

PROFESSOR DORSANEO: The depositions that I have read lately people

threaten to terminate the deposition because it's not going well, but they don't have the courage to actually do it.

PROFESSOR ALBRIGHT: Luke, if I can respond?

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think the reason that we put No. 5 in is because we heard lots of lawyers complaining that by not being able to object they were going to become potted plants and have no recourse in the deposition. So we wanted to be sure that lawyers understood that they could instruct witnesses not to answer and they could terminate depositions. They do not have to sit there and let their witnesses be abused, and I think the way we have written No. 5 it says that you can terminate it if it's being conducted or defended in bad faith or as to unreasonably annoy, embarrass, or oppress the party. I think we have limited it to really unusual situations.

CHAIRMAN SOULES: Why don't we see if this will tighten anything up? If we

take out the words "at any time during the deposition," just strike that. Okay. And then say "A party or deponent may move to terminate or limit a deposition when it is being" instead of on the grounds that it could be and then put them at risk if they are doing it when that's going on.

MR. SUSMAN: All right. And there, I mean, because of the comments I have heard maybe there, Rusty, is an area on termination because it is such a drastic thing to do where we should say that the consequence of that is if you are wrong it comes out of your time. I mean, I would agree that's a much more drastic thing to do than advise a witness to assert a privilege, which is the issue. You know, you could be wrong on that. Should we be penalized that much or maybe this is one where the penalty ought to come out of your time.

CHAIRMAN SOULES: Yeah. No. 5 is where there is a fertile ground for gamesmanship, and I think we need to address that so that that's discouraged. Do you agree, Steve?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: What comes out of your time? Somebody said when it's improperly terminated and it's reconvened, it comes out of your time. What's it?

MR. SUSMAN: The entire -- if you were wrong in terminating and the judge says, "No, you were wrong to terminate this deposition" then the --

MR. MEADOWS: The new deposition.

MR. SUSMAN: The new deposition comes out of your time, out of your 50 hours.

MR. YELENOSKY: But you can't control that so --

CHAIRMAN SOULES: Well, that's going to pretty much force us to cap because I bet you could take a 50 hour deposition if it doesn't come out of your time.

MR. GOLD: Okay. Out comes the big book.

CHAIRMAN SOULES: Okay. Justice Peeples.

HONORABLE DAVID PEEPLES: I

want to pose another question.

CHAIRMAN SOULES: All right. Please.

HONORABLE DAVID PEEPLES: I want to pose this question. We have been concentrating on the cost of discovery and so forth, and somebody terminates a deposition and shouldn't have done it. What if someone terminates the deposition and it needed to be terminated because a lawyer was being abusive or objections were proper because a lawyer was abusing the right to bring this witness in and just rag him around. What can be done? And that's one question. Do we almost give people a license to do that by making depositions more wide open?

CHAIRMAN SOULES: Response?

MR. SUSMAN: Maybe we ought to say or maybe we ought to avoid this problem by instead of putting the sanction in the rule say that the court should consider a variety of potential sanctions for the wrongful termination of a deposition or conduct which wrongfully causes a deposition to be terminated. Those sanctions could include,

for example, giving one side free time or taking it out of the other side's time or ordering the party whose conduct caused the deposition to be terminated will never get another shot. In other words, you bring in the witness and you begin harassing, that's it. You don't get to go back and be a nice guy now. You are through, and maybe we ought to just suggest that the court should consider this whole penelope of possibilities and let the case --

CHAIRMAN SOULES: So let Joe's subcommittee, which he has said many times he needed these discovery rules in order to finish his work, to prepare a paragraph in the sanctions rule to take care of whatever the penalties may be under this rule, let them work together. Is that what you are suggesting?

MR. SUSMAN: Something like that maybe.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Okay. I'm not sure I am hearing all of this correctly, but would you then remove from the rule as it is written

taking away from the objecting party or the terminating party's time, the time wasted in the deposition, and leave that up to the court to formulate a proper sanction for the conduct?

CHAIRMAN SOULES: We would have to write a new paragraph in 215 that addresses, for example, giving additional time. Time has never been a factor really, so giving them additional time or the taking away of some time but it would be over in 215.

MR. MARKS: Right.

CHAIRMAN SOULES: And it would be referable to the 204 not by number but it would be reflective of the concept that it would be talking about problems in a deposition that might arise in 204, and you can work, can't you, Joe, with Steve?

MR. LATTING: Yes.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: Okay. You can work on that. Okay. So whatever comes out of here and gets substituted will probably go over to 215, but we have the concepts in mind. It's not going to be on mere

instructions that something heavy would happen, but if there is an interruption at a deposition that's improper then something more severe might happen. I guess, is that generally the thought that we are talking about here, going forward and drafting only? We don't have a consensus of approval but that's the direction for the drafting. Anybody object to that? Okay. That will be -- Tommy Jacks.

MR. JACKS: Just one comment. It seems to me there is a distinction between interrupting a deposition briefly to get a ruling on a pretty specific point by telephone usually, which is not common but it's not rare, and shutting the deposition down entirely when lawyers have traveled and spent money and so forth to prepare, and I would hate to see us throw the one -- the baby of the brief interruption out with the bathwater of termination.

MR. LATTING: The baby of brief interruption and the bathwater of terminating?

CHAIRMAN SOULES: All right. Well, keep that in mind. Keep that in mind.

MR. JACKS: The great unwashed baby.

MR. CURRY: Can I use that?

CHAIRMAN SOULES: Okay. That gets us through (5) then, (4) and (5). And okay. That gets us to (6). Anybody have any problem with (6)?

MR. JACKS: Yes.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I do have a problem with (6). I have got a couple of problems. First, it seems to me that we could be running into some real problems of how you mix (6) with the attorney/client privilege. When you say that private conferences shall be -- are improper except for determining whether a privilege should be asserted. Well, if there is a private conference I don't think anyone can inquire into the subject matter of it because it's obviously an attorney/client communication, which is absolutely privileged, and we are not giving either the courts or lawyers any real way of dealing with that.

I'm also -- I mean, fundamentally it seems to me that even during -- you know,

whether it's during a deposition or a trial or anything else a lawyer and a client have a right to talk to one another in a privileged way, and now, if that's done during the video deposition with the lawyer leaning over a la Watergate style you have got the rules in here you can show that huddle to the jury. That's okay. We muddy the waters a little further with the idea that it's okay to talk during a normal recess. Well, what's a normal recess versus an abnormal recess? If somebody says "I need to go to the bathroom. Can we take a break" is that --

CHAIRMAN SOULES: Pretty normal.

MR. JACKS: Well, I would think so.

HONORABLE F. SCOTT MCGOWN: He has to provide a specimen as proof positive.

MR. JACKS: Well, you know, it's not going to take any great genius of a lawyer to tell his client "If you need to talk to me just say you need to go to the bathroom." I mean, we are setting up a rule here -- all I'm suggesting is that we are

setting up a rule here that it seems to me is going to be pretty difficult to enforce. If there is abuse taking place by the lawyer and the witness huddling behind cupped hands between each question and answer then the provision saying we can show that conduct to the jury takes care of that it seems to me, and to try to have any other rule saying that you can't have a conference unless you are talking about this subject matter of whether to claim a privilege is impossible to enforce unless you are going to violate the attorney/client privilege by forcing the lawyer and the client to tell you what they were talking about during their private conference.

And by introducing the concept of a normal recess then we are going to have lawyers arguing about what are normal and abnormal recesses and trying to inquire about whether you talked to your lawyer and if so what did you talk about and were you talking about claiming a privilege or were you talking about something else. I think you are opening up a real can of worms here that again is

going to add to the friction and frustration and cost of deposition discovery and not subtract from it, which is what we are trying to do.

CHAIRMAN SOULES: Has anybody had one of those Federal orders? I gave Steve a copy of an opinion. I can't remember what it came from, United States District Court somewhere, where this was a part of the order, language pretty much like this, and if so, how did it work? Steve.

MR. SUSMAN: I mean, I have taken depositions in that regime, but I have never had a problem, but that doesn't mean it's right. I mean, I am inclined to agree with Tommy basically. I mean, certainly if you retain the ability -- if depositions are going to be videotaped and you retain the ability to show that to a jury, as far as I am concerned you are protected against the abuse. I mean, I guess theoretically in trial a lawyer could go to the witness stand and say "I need to talk to my client a second" but none of us do that in real life. I mean, I have never seen that done, but I guess it

could be done.

Insofar as, you know, is it enforcable or not, I'm not sure that's that big of a problem because basically, I mean, maybe it will never be perfectly enforced because we could always say, hide behind -- but if it happened frequently enough I guess a court could say there is no way this question could be privileged. You can't be asking these questions over and over again. There is no way the answer to that question would be privileged. So don't --

CHAIRMAN SOULES: That's the way it seems to me.

MR. SUSMAN: And then I am concerned about the case where you don't have the videotape of the deposition but you have just a court stenographer and then say "Let the record reflect that Mr. Susman was conferring with his client or his witness," and again, I don't have much of a problem if that's read to the jury either when that deposition is read because I think that keeps people from -- I mean, I don't really feel too strongly about that.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I think we need to look at why you have the provision in there. I assume you have it so that conference time doesn't use up the time of the opposing party during their deposition cap. As much as anything couldn't you just say on the record what time the conference began and on the record what time it ends and that doesn't count against your time? Is that the problem that you are --

MR. SUSMAN: Actually, the real problem was not -- that's a good point, but that was not so much our problem was the time because I guess if it went on long enough someone would be smart enough to have the court reporter put a clock on it. And the real feeling was that there are depositions where lawyers are abusing by every --

CHAIRMAN SOULES: Speak up, please, Steve, so the reporter can hear you.

MR. SUSMAN: Every question the lawyer leans over and talks to the client. I have seen that happen, and so the feeling was that should not happen, and we stop that by

making the deposition playable to the jury. I agree.

MR. MARKS: Just along that same line it would seem to me that if a lawyer is conferring with a client you can say "Let's go off the record," keep the television rolling, stay off the record while he is conferring, and then start up again after they finish conferring. So it doesn't go against your time and yet you have him there doing whatever he is doing.

MR. JACKS: That's right.

CHAIRMAN SOULES: But we are talking about saving money in depositions. Seems to me all of this talk about video is adding a lot of expense and burden to the process. Video, I don't think we should consider that to be curative or helpful because we shouldn't assume that that's going to be the general cases. It would be an exceptional case to say we can cure it because we are going do have a video record is sort of assuming additional discovery costs. I don't think that is really a very good answer to these questions myself. Robert Meadows.

MR. MEADOWS: Well, it's just a practical reality. The likelihood is we are going to have video depositions and nonstenographic, and I just think that more and more depositions are taken by video today. People have in-house video today where they have cut the cost dramatically. I just think as a practical consideration I agree with Tommy for that reason that, you know, you have got a right to talk to your lawyer, and if it looks bad people don't do it for that reason, and more and more often that will be showing up.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCGOWN: I would like to challenge this assumption that you have a right to talk to your lawyer. If you're in the midst of trial and you have got your client on the stand and the other side is going through a vigorous cross-examination I don't think you have got the right to say, "Judge, stop everything while I have a conference with my client." And the purpose of this rule, the whole assumption behind this, was to make the deposition as if as

closely to being in court with the judicial officer as we could.

And I agree with everything Tommy said about the rule, and my rejoinder would be so what? Because the purpose of the rule is simply to set a norm of behavior, and the norm of behavior is you don't have private conferences except during normal recesses and adjournments, and we are not going to quarrel about what's a normal recess. We are not going to question whether you do or don't have to go to the restroom. If you say you are talking about a privilege, we are not going to inquire into that unless it happens every question and it's clear that there is no privilege possible, but the rule sets out a normal rule of conduct, which I think is what we want. I think this is how we want depositions to be conducted.

MR. MARKS: You don't believe in the concept of recess for repairs?

HONORABLE F. SCOTT MCGOWN: I don't think we want that. There may be some normal recesses or there may be some restroom calls that are actually for repairs, you know,

and so what? That happens in trial, too. "Judge, this is a good time for a break." I mean, we can live with that. So I guess what I am trying to say, Tommy, is that we envision this to be a rule that sets out the expectations, and we didn't view it as anything that we were actually going to really try to enforce or get at very much.

MR. JACKS: Well, I guess what I would respond with is in that event let me suggest that the subcommittee simply consider trying to meld this into the provision about what things can be shown to the jury and/or read to the jury, and you can also provide for the court reporter to note conferences in the written record as well and to consider doing it that way instead of a "thou shalt not" that you really can't as a practical matter do anything about but that could engender needless friction between lawyers.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. I am going to disagree with Tommy and agree with Judge McCown on this because I remember the discussion in the subcommittee. The whole

philosophy was that there should be absolutely no difference between taking a deposition and testifying in a court of law, and the thing about this conference, either the attorney knows what the privilege is, the attorney doesn't have to confer with the client to know what the privilege is, so the attorney raises it. What we are really saying is, "Oh, my God, I didn't cover this with the witness before the deposition and so I need to have a running woodshed during the deposition." Not so. I just don't think so, and it's going to hurt me just as much as it's going to hurt the people on the other side, but I really think that it really distracts from the deposition, and I think that, yes, it should be shown to the jury, but no, I don't think it should be condoned either.

CHAIRMAN SOULES: If we have got a provision that says a lawyer can instruct the witness not to answer a question on the grounds of privilege in what circumstances would it be necessary to confer with the client?

MR. MCMAINS: Well, the client

may think there is a privilege and the lawyer not have any idea what's involved.

MR. JACKS: The lawyer may not be able to make the judgment about whether there is a privilege until he asks the client something. For example, if a question is coming up that may or may not be a violation of a corporation's attorney/client privilege the lawyer can't tell that and say, well -- unless he find out, you know, well, is Joe Smith at the general counsel's office or is he over, you know, somewhere else.

CHAIRMAN SOULES: I see. Okay.

MR. SUSMAN: Can we get a quick show of hands on this? I mean, I don't think it's just how the house stands now on this so we can move on because we have a lot of -- I want you-all to do enough over the next two days so we have plenty of work to do and can come back with a work product.

CHAIRMAN SOULES: Those in favor of (6) as written show by hands. Those opposed? Okay. Those in favor carry.

MR. SUSMAN: Okay. I would now like to turn -- I do not think (8) is

controversial, and by the way, what I am trying to do here if you-all do think (8) is controversial yell and scream, but my notion is to try to cover enough of it so we know what to do, where we have got serious drafting problems. (8) I don't think is particularly controversial. There can be a discovery master. I would like to turn to Rule 170, the expert witness rule.

HONORABLE F. SCOTT MCGOWN: Did you give everybody a chance on that, Steve, long enough on (8)?

MR. SUSMAN: I'm sure I did.

CHAIRMAN SOULES: Do we have to have a predicate of a serious pattern of abuse in the deposition process?

HONORABLE F. SCOTT MCGOWN: Well, the reason that we put that in, Luke, is because there is a strong feeling, and I think particularly on the Supreme Court, that trial judges are a little too quick to appoint masters and that if they appoint a master and they charge the cost to the parties that that can be a pretty onerous thing, and so we wanted to indicate a hurdle that the trial

judge can't just do it right out of the box, that the trial judge has to find a pattern and it has to be, you know, serious; and I'm sure it falls into the level of discretion even then; but we thought about that test and wanted to put that in there so people wouldn't worry that there would just be a whole bunch of discovery masters at the first sign of a little friction.

MR. KELTNER: But Luke, I think you have to admit that this has the at least partial effect of overruling two Supreme Court cases.

MR. MCMAINS: Correct.

MR. KELTNER: There is no doubt about that. It presses a different matter than what the Supreme Court will address, have the trial court address now for the appointment of a discovery master.

CHAIRMAN SOULES: Yeah. That's what I was getting at. Does this limit when a master can be appointed? Is this the only circumstance in which a master can be appointed to oversee depositions under (8)?

MR. KELTNER: I think that's

the effect of that.

CHAIRMAN SOULES: Is that the intent?

MR. KELTNER: I don't think it was the intent now that I think about it.

CHAIRMAN SOULES: Is the intent that only when the circumstances described in (8) occur can there be appointment of a master to oversee depositions.

HONORABLE F. SCOTT MCGOWN: No. And I wouldn't read the rule that way, Luke. This is an authorization if you find a serious pattern of abuse you may appoint a discovery master, but that doesn't write out the general provision for masters that if you have a complex case that needs to test the Supreme Court's outline that you can have a discovery master.

MR. SUSMAN: We can clarify that. We will work on that. We did not mean to -- for example, and I will tell you another one that we have not dealt with but we will have to deal with because I have got a lot of letters from people that have been very constructive. We have the problem on the time

with a witness who does not speak English and interpreter, how you handle that time in the deposition. I mean, we have got to deal with that, and I don't think it should count against the party, but we don't say it, and we ought to say it probably. And I would assume that there could be circumstances where a deposition would take place with foreigners here, and you don't want any screw-up, and there is no pattern of discovery abuse. You have just got one shot at a witness. It's a very important witness, one time only, and maybe the judge would want to appoint a master to make it look just like court, something like that.

In other words, appointing a master, there should be a circumstance where a judge should appoint a master in the absence of the discovery abuse, but we want to discourage judges in any kind of case that looks, quote, complex immediately appointing their good friend who will begin charging the parties $300 an hour for supervising discovery disputes which means manufacturing them often and prolonging their resolution.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, the only problem I have with (8), I mean, as it's currently drafted, there is no procedure. I mean, it just says "if the court finds." Like, how is the court going to know unless somebody comes to him. There is no motion procedure. There is no hearing procedure, nothing that says what you do about -- I mean, does somebody go over and request one, which I would assume would be the way that it would ordinarily happen, and you know, who has a burden, what kind of burden, what kind of notice do you have?

CHAIRMAN SOULES: Wouldn't we want to refer that to 171? I know Judge McCown doesn't like to refer back to other rules but that's the concept, we pick up whatever is necessary under 171, I guess.

And our court reporter needs a break, so let's take 10 minutes and be back at 3:20.

(Whereupon a recess was taken, and the proceedings continued as follows:)

CHAIRMAN SOULES: Okay. We are

in session. Okay. Rule 204, paragraphs (1), (2), (4), (5), (6), substituted (7), and (8), are approved in concept as I understand the voice of the committee at this time. The outstanding question that we were going to come back to this after we had gone through the other portions, the other paragraphs of Rule 204, is paragraph (3). And Steve, you're really talking about the last sentence in proposed paragraph (3), correct?

MR. SUSMAN: Correct. I would just like to see a show of hands of where we --

CHAIRMAN SOULES: Let's just get a show of hands whether that should be continued on discussion at our next meeting. How many believe in principle that the last sentence of proposed paragraph (3) is a good idea?

MR. PERRY: Are we talking about kind of subject to all the discussion that's been had?

CHAIRMAN SOULES: Right. Okay. Those opposed?

MR. MARKS: Well, I mean, I'm

not sure I -- well, I don't know what to think. I think David confused me there.

HONORABLE DAVID PEEPLES: You helped me.

MR. PERRY: Well, you-all work it out.

CHAIRMAN SOULES: Well, this is not --

MR. MARKS: All right. I understand.

MR. LATTING: Remember what he --

CHAIRMAN SOULES: -- one of the Ten Commandments written in stone at this point. Of course, rewriting and trying to incorporate the discussion and ideas that we got here today and bring it back to look at. Don't drop it, in other words. Okay.

MR. SUSMAN: I would now like to turn to Rule 170.

CHAIRMAN SOULES: Okay. Steve, what's next?

MR. SUSMAN: 170.

CHAIRMAN SOULES: 170.

HONORABLE DAVID PEEPLES: Luke,

can I just make one brief comment before we move on?

CHAIRMAN SOULES: Yes, sir. Judge Peeples.

HONORABLE DAVID PEEPLES: I am wholesale of radical change in this direction, but I have to say that after all of our discussions here I kind of wonder about the unintended consequences of what we are doing and are we getting ourselves -- are we creating something like the sanctions problems that happened in the last decade. I worry about that, and I just wanted to say that we may be messing things up worse than they are already, but we have got to do something, and I think we need to forge ahead, but I don't think our work is done or all that close to it.

CHAIRMAN SOULES: Well, I think it's critical that we get our antennas up in every direction --

HONORABLE DAVID PEEPLES: Yes.

CHAIRMAN SOULES: -- to avoid that consequence or to avoid it as much as possible, and a lot of discussion today has

been along those lines.

HONORABLE DAVID PEEPLES: Sure has.

CHAIRMAN SOULES: And we are going to keep on track on that because we don't want to create satellite litigation larger than what we have got right now or even in the magnitude of similar to what we have got right now. What we are trying to do is scotch it. Justice Hecht.

JUSTICE HECHT: And let me add a comment that I don't want to get lost either, and that is part of what is being discussed here is a real change in the norm of discovery, which is not intended to be enforced as much as it is to be acclimated to; and, for example, the comment was made earlier that part of the change that we have discussed in Rule 204 was to make a deposition more like trial, and it may be useful at some point to say that. We may have to say that because that will be such a big change in the norm under which a lot of discovery is conducted that it probably should be spelled out in just so many words, but at the same time you don't

want to try to make that a rule that is subject to sanctions or something because we don't want endless arguments about, yes, it was more like trial; no, it wasn't more like trial. But you do want to convey the idea to the Bar generally as we sort of change course here over time that that is the standard that is expected more in deposition or the custom.

MR. SUSMAN: We, of course, say that explicitly in 204(3). "The oral deposition shall be conducted as if the testimony were being obtained in court during trial."

CHAIRMAN SOULES: Give some thought of whether or not you think that ought to be restrictive of the discovery under 166(b) because if it could be construed that way we want to avoid that, I think.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: You see what I am saying?

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: Because obviously you can discover hearsay, for example. Bill.

PROFESSOR DORSANEO: We may get to this, and it may be in there, and I probably should have read it, but one of the things with depositions, being able to change your answers, I guess maybe you could kind of somehow do that at trial if the judge would let you, but the way a deposition is done is really the way it's processed and is still very different from doing it like trial.

CHAIRMAN SOULES: Okay. 170, expert witnesses.

MR. SUSMAN: Okay. 170(1) does involve a timing problem, and the timing problem we are going to have with or without a discovery window. It goes like this: Should the parties have to identify their experts at a time certain, which is usually the case with most pretrial orders now, or should they have to identify them when they know who they are going to be, whether they reach that time certain or not? If it's the former, which the subcommittee advocates, that it be a time certain. You don't have to identify them. In other words, as soon as practicable or something like that. It should be a time

certain. Then the question is when is that time certain going to be set and how much -- you'll see what we did in the rule, and again, I don't want to go back to the discovery period, but the notion would be that experts are designated at the end of the discovery time, whatever that is, and that the plaintiff designates first and the defendant second but that the defendant has to designate very quickly on the heels of the plaintiff.

Now, we have received a considerable -- I have received a considerable amount of commentary on this subject from, I assume, the defense bar which says that we cannot designate our experts until 60 days after we depose the plaintiff's. Forget about knowing their designation. That is a philosophical issue that you are going to have to grapple with. Do you want simultaneous disclosure designation of experts, and if they are not going to be simultaneous how much time between plaintiff's designation and defense designation are you willing to give? And I guess the amount of time you are willing to give depends upon the amount of time you have

for discovery.

You see, we had it very tight in here because we have a six-month discovery period. We left the designation for the plaintiff's experts 'til 60 days 'til the end of the period. The defendant designates 45 days before the end of the period, 15 days after the plaintiff's expert is designated. So that's one issue that we have got to grapple with on experts. Notice, just notice paragraph 2 that the designation -- disclosure of general information upon designation of an expert witness. I think much more information will be provided than under the current regime. Not only do you get the expert's resume, a bibliography of everything he has read, a brief summary of the general substance of his mental impressions and opinions, and a brief summary of the basis thereof. The underlying is stuff we have added as a result of our last meeting with the general notion to make sure that there is enough substance so a meaningful deposition can be taken but not a full-blown report.

So you are not entitled to a full-blown

expert report in a deposition or biases to take a deposition rather than an expert report. Certainly the parties could agree that they would exchange expert reports and forego depositions. That is permissible, but in the absence of that agreement you do take depositions of experts, and the report that proceeds it should be, we think, bare bones. Notice the document of tangible things that are required to be turned over to the other side upon designation, very far reaching I think. Any document or tangible thing prepared by, provided to, or reviewed by the expert must be provided to the other side at the time of designation, a major change in existing law in my opinion. And so that's the scheme for this voluntary -- this disclosure with experts.

And then finally we have this notion here in paragraph (5), expert depositions that we considered limiting the number of experts. We instead opted for the rule that two experts count against your own time, but if the other side designates more than two experts you get an additional six hours for each expert that's

designated by the other side, so if they designate ten. We want it to discourage the practice of, which we think is fairly prevalent, certainly in large cases, of lawyers designating a bunch of experts kind of seeing how they do in their depositions and then selecting the best one for the trial testifying expert, kind of the dress rehearsal, a needless expense we thought.

So we tried to avoid that not by prohibiting more than two experts. By saying that if you do use more than two on every third, fourth, fifth and so on additional the other side gets an additional six hours, and providing in the final paragraph, which is (7), that if you fail to use an expert that you have designated and the other side has deposed the court may impose upon you the expense of having to depose that expert, the other side's having to depose that expert needlessly because he wasn't used at trial.

That's kind of a summary of what we have done with the expert rule, and now I think probably the place for us to start is do we want simultaneous designation of experts by

both sides, or do we want them staged, plaintiff first, defendant second as we had proposed? And if the latter, how much time between the designations, or should it be not between the designations but between the actual deposing the plaintiff's expert? How much time does the defendant get? That would be, I think, the place for us to start our discussion.

CHAIRMAN SOULES: Okay. Who wants to start? Joe Latting.

MR. LATTING: I have a question for you, Steve, and it's not in answer to your question, but the concern I have got is the situation like this, that 60 days before discovery is to end in what is a complex case I receive a designation of a couple of experts, and I get this information that says the subject matter on which they are expected to testify in general, but I really can't make an intelligent decision about whom to designate as my expert until I have deposed those people it seems to me. How do you deal with that situation? And this is not meant to favor or to be any kind of a game to help

defendants. I just mean how does a defendant know how to do that?

MR. SUSMAN: Well, that is -- I will answer the question this way. The subcommittee does not perceive that to be in all candor a big problem. We think that the need -- usually a defendant, defense lawyer, will know the kind of experts you've got to designate just by the kind the plaintiff -- I mean, he's going to designate an economist to testify on damages. He's going to designate a safety engineer to testify about why the steel should have been a different thickness or something like that, and basically good lawyers ought to be able to designate counter-experts without having seen the full picture, with just the outline.

CHAIRMAN SOULES: Okay. Joe and then Paul Gold.

MR. LATTING: I have a follow-up question, and I think I generally agree with that, but is there some way we could accommodate the situation where a plaintiff's expert in deposition takes a position that is something new and that we

didn't foresee? It seems to me basically fair to be able if you ask him some questions and he talks about some principles of metallurgy that turn out to be something you didn't expect it seems like a jury needs to be able to hear some other -- what do you do about that?

MR. SUSMAN: Joe, I mean, the whole function of the rule that says that the judge for good reason ought to be able to modify these rules --

MR. LATTING: So you think that's --

MR. SUSMAN: We have got to believe that we can if there is a real injustice underfoot get a court's attention to give us justice and to make the truth come out. I mean, that's an assumption underlying this because if not then any of these limits can be, I mean, deadly impediments to the delivery of justice. So the belief is that you will get somehow an attentive ear of a judge who will say, "Mr. Latting, you are absolutely right. There is no way you could have designated an expert to respond to this

based upon the description this guy gave you of what his substance summary of his testimony was going to be."

MR. LATTING: I am not necessarily disagreeing with you. I am just wondering outloud how this is going to work.

MR. SUSMAN: And that's the way, I guess, it would work.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. For the first third of my practice I practiced in Federal court, and we always just designated simultaneously, and I didn't see anyone ever preserve a point of error for appeal or anything that they were denied due process because they didn't know what the plaintiff's experts were going to say. It's a peculiar Texas state court practice that's developed. In fact, the rule has never said anything about it. In fact, the first case that even talked about it was Werner V. Miller, a Supreme Court case, and in that case the Supreme Court held that it was not an abusive discretion for the trial judge to require the plaintiff to designate the experts, his

experts, when they requested at trial and then the defense to designate their experts two days later.

I don't know where this 30 days after the plaintiff developed, and then now it's getting up to 60 days after all their testimony is given. I don't think it's necessary. I think that throughout the case I think a good defense attorney has an idea about what the issues in the case are. They generally have talked with experts from the outset. In fact, often times have contacted experts before the plaintiffs have even contacted experts in the case. It really tends to gravitate more toward gamesmanship than anything else, and I agree that the provision could be there similar to a rebuttal witness.

If the defense can show that there was just no way to have anticipated this issue then they should be allowed to -- I think that should be good cause just like it would for a rebuttal witness to either bring in additional testimony or additional experts, but I really just have never seen anyone give a persuasive argument about why the defense could not

anticipate what the issues in the case were going to be until they had deposed the plaintiff's expert.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Well, the other problem that I have, again you are trying to do a rule that is generally applicable, and in many cases in the commercial area of which I'm sure you're much familiar, you can't really say other than unless you arbitrarily say whoever filed the lawsuit first is the plaintiff. There are frequently races to the courthouse. Both parties are going to sue each other on multiple different types of claims, and somebody may be a plaintiff for one purpose and a defendant for another purpose, and if you start trying to jack with the things based on calling somebody something then you inject a whole new problem in my view.

I mean, because there are many counterclaims out there. I mean, in the commercial area, in the general litigation area, there is a lot of that that goes on.

You can't really necessarily say for sure which one's the plaintiff or the defendant in a lot of those contexts because the dispute may well have been generated by what in essence is the defendant, and it's just that the plaintiff filed first either for a debt action or whatever, you know, in the contract setting. So I really think that if you are trying to make a general rule to try and give certain advantages, disadvantages, or presumptions based on nomenclature like plaintiff, defendant, you are going to have to tailor it to the particular type of case, certainly the DR areas, one of those in which neither side usually is resisting divorce. They are resisting other things about the divorce. I don't know that you can classify just the person who filed the suit as being the plaintiff in that kind of a context fairly, and so that's one of the problems I have with that notion.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Well, at the risk of being called not a very good defense lawyer I have to say that it's certainly important to

me in my practice to have some advance notice of what the plaintiff's expert is going to be testifying about because when I designate it's not going to be too much longer after that that the plaintiff's lawyer is going to want to take his deposition, and he may want to take his deposition at a time when my expert is not real sure what the plaintiff's expert has got to say so that he can get an undue advantage. So I think it's important that certainly in the context of my work that I have not only identity of the expert, generally what he is going to say, but I need to take his deposition so that my expert has all the facts that he is going to be called on to address when he is testifying in his deposition and in court, and I don't think that can be done with 15 days advance notice before you have to designate your own expert.

And I guess I'm sort of agreeing with Rusty in the sense that I guess it depends on the kind of practice you are in what your expert needs are, and it may well be in that context that you don't because if it's a race to the courthouse you have got your experts

ready already, but in what we do, sometimes the first time you have notice of a claim is when suit is filed. So you are actually starting out from ground zero with nothing and having to build from that. So I think it would be really unfair to a defendant if you didn't give that defendant some notice of who the expert is and an opportunity to take that expert's deposition if you wanted to. Sometimes you don't have to, but if you need to sometimes you have just flat got to do it because the expert -- your expert is going to be examined on issues that the plaintiff's lawyer is prepared on and has his expert prepared on, and you may not be aware of those until you take a deposition.

CHAIRMAN SOULES: Doyle Curry.

MR. CURRY: I do quite a number of products cases, and it's not unusual for me to take a defendant's expert's deposition when they are not through, and I have to come back and do it again. I mean, maybe it's a short deposition, but at least find out some general things and maybe come back and do it. I have had them take my expert's deposition when he

wasn't through. He was still working on it, but he gave them what he had at the time, and they got to do something on it.

When the Eastern District judges got together and developed their plan they considered all of these things we are talking about right now, and they made a decision among all of them, and as you know, there are conservative judges over there and some that are sort of middle of the road and otherwise, and they pretty well were agreed that that -- while it's something that sounds good and you talk about it and you think you can conceive of some situations that are problems as a practical matter, and the way things really happen, it's not a problem. Even simultaneous disclosure just doesn't seem to be a problem because even in a products case it's a defendant's product. He knows it better than anybody and many times the information is coming from him first for the plaintiff's expert to use.

There are other kinds of cases like Rusty mentioned that have their own special problems, and I noticed that the last sentence

of paragraph (6), I believe -- did I give that back to you? The last sentence of paragraph (6), "Within 10 days of receiving, amending, or supplementing information a party may initiate additional discovery." So that may need to be reworded a little bit, but they decided in the Eastern District and they have been living with that for a couple of years now, and it's also part of the Federal rule now, that simultaneous disclosure is not that bad a situation. It does not create the problems that most of us worry about.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: I totally agree with the simultaneous disclosure concept. What I would like to offer is a suggestion or friendly amendment or whatever. As far as exchanging documents can you draft around something to the effect of send them what they don't already have? And for instance, if I send my expert 14 depositions from this case plus a stack of medical records, which presumably came from the other side to begin with, I mean, assuming that it's obvious that

these are in the case already, can you draft it so you are not sending these bales of stuff to everybody?

MR. SUSMAN: Yes. Yes. It's a good point, and we can draft that.

PROFESSOR DORSANEO: Just send them a cover letter.

MS. SWEENEY: Send them a list or whatever.

MR. MARKS: Just tell them to retype the notes that they made on the deposition so that the other side can see what those are.

MR. CURRY: They have to give you those.

MR. MARKS: Not the ones they write on the deposition, if they don't have to give you the deposition.

MR. GOLD: They have to give you their notes.

MS. SWEENEY: They don't have to bring you their notes.

MR. CURRY: Their cheating, and if you catch them doing that you can --

CHAIRMAN SOULES: Robert

Meadows.

MR. MEADOWS: One point I would like to raise about the timing of the designation of experts is apart from the ability to recognize what the issues are and the need for experts this does seem to be an area where unnecessary costs can be incurred by simultaneous discovery because it's not uncommon at all to make a decision not to have an economist if the plaintiff doesn't have an economist. I mean, you just don't want one. You don't need it, and that's true for other types of expert testimony, and if you have got to go out and get it to have it and incur the expense of getting your expert familiar with the case and have to be in a position to act quickly if you need him, that's all unnecessary unless you need that witness to respond to something that's going to be raised in the plaintiff's case if you are on the defense side. So by having it staggered somewhat I just don't see what the downside is.

CHAIRMAN SOULES: Steve Susman and then Bill.

MR. SUSMAN: Just understand the committee as hockish as we are on these issues staggers the designations. So the plaintiff designates first and then the defendant has 15 days to designate, and the theory is that the plaintiff's expert is deposed first, and the defendant then has his experts deposed, and yes, it gives something to the fact that they are called plaintiffs and defendants. So we do have a staggering, but the objection we have gotten is not to that slight staggering because it's so slight, but rather that it's not much greater.

CHAIRMAN SOULES: Okay. Bill, and then I would like to add something.

PROFESSOR DORSANEO: Kind of a point of information, is it generally necessary to pay or to make arrangements to pay experts who you are going to designate around the state now, or can you do it -- can you designate them and then if you don't need to use them, well, it doesn't cost you anything?

MR. CURRY: Suppose you designate one who's been contacted by the

other party and you show up and say "This is going to be my witness." Now, you can't use a witness because they are really contacted by the other side as a consultant, and you have designated somebody you can't use. You have got to make the arrangement with them or you are taking a hell of a chance, and that means pay them.

MR. MCMAINS: Or at least agree to pay them.

CHAIRMAN SOULES: My question is leading to a staggered designation where both parties designate and then can redesignate. For example, suppose in a family law case the wife files suit and then they exchange experts, and that's the first time that she discovers that the husband is going to have a child psychologist testify on custody issues. It's not -- she's the petitioner. So if the rule just gives the respondent the ability to designate later she's at a disadvantage. And in business cases as Rusty has indicated, the issues are such that sometimes you can't really tell as a plaintiff what experts you are going to need

until you see what the defendant's experts look like. Could there be an accommodation of that such that both sides would exchange simultaneously and then have a period of time to designate additional experts after that once the initial experts have been revealed, and if that can be done, is it a good idea or bad idea? David Perry.

MR. PERRY: We have come to that agreement in some cases that I have been involved in, and it's worked reasonably well. The theory has been that there are some experts, car wreck case, for example, the defendant knows he is going to use an accident reconstruction expert from the time he gets the file. I know the same thing. He probably knows he is going to use an expert on defect, and we both know that; but on an economist, for example, I may not designate an economist unless the defendant designates an economist, or there may be an area where the defendant is not going to use a life care planner unless I use a life care planner, and I think it does make some sense to have both sides designate and then both sides have an opportunity to

designate someone else in response to what they have learned from the first designation. I think that preserves the concern that John Marks had, which is a concern. It sometimes is valid for plaintiffs as well as defendants.

MR. MARKS: That's right.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: A couple of things, one, just to say I agree with you that that's a very common problem in a wide variety of litigation. We see it in aviation cases where you have got a raft of experts of different expertise and then one side may not have, you know, let's say an avionics guy and then the other side designates one, and then you have got to go out and find one. So I think we have run into it in a wide variety of cases. I think the rule ought to accommodate it.

Something else that is even more common that I think the rule needs to accommodate in some fashion is that there are potential witnesses who we designate as experts but they are really not the kind of experts we are talking about here, and yet the rule doesn't distinguish. For example, treating doctors.

You may want to put in their records that you don't want to run afoul with some objection at trial, "Well, judge they didn't designate them so we can't have the defendant come in by records."

Or an employee of a manufacturer, let's say, who truly is an expert but who's also a fact witness, an actor in the situation, and you know, everybody feels like, well, I have got to designate this person because if I get to trial and want to elicit an opinion I don't want to run into an objection on it, but at the same time you shouldn't have to go through all of these steps with each one of those witnesses, provide two deposition dates for every treating doctor, for example, and bundle up everything, all their records, and send them to the other side and so forth as if they were a retained testifying expert, which is what those parts of the rule really are geared toward.

The last thing I would say is that on the business of providing all the stuff the expert has seen, read, reviewed, et cetera, I would urge that we consider at least making that not

provided at the time of designation but instead provided, let's say, seven days ahead of the deposition or something of that sort because again you are going to get into situations as you start sorting through things where when you really get down to it you mutually agree, well, okay, we are not going to call this guy. You are not going to call that guy, so let's don't worry about deposing them. And yet this rule would require that before you get to that stage and maturity of the case where you really are kind of getting down to that level of decision-making you are having to have your paralegal scurrying around and gathering up all the correspondence and all their documents and sending them out, which may be wasted effort, wasted money, and wasted time. As a practical matter you are not going to look at it more than a week before that expert's deposition anyway nine times out of ten. So I would urge you to consider staggering that.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Can I ask you -- I don't have a Marks-a-Lot, but if we considered

a period point in time being the end of discovery. Either it's the day before trial or whatever it's set, the end of discovery, work backwards with me here. How much time -- when prior to that end to discovery do you think -- I mean, kind of help us. We are trying to visualize how we go backwards in the ideal dream pretrial order and then impose it by rule. So what would you do? At what point in time would you have the plaintiffs designate their experts?

MR. JACKS: I'm not -- I think again for almost all cases your 60/45 timetable works pretty well. It's an improvement. I know a lot of people think, well, the 30 days we have got now is too short. It's not for a lot of cases, but it is for quite a few. I think 60/45 is pretty reasonable most of the time, and when it's not you can work it out by agreement or get the judge to circumvent this by order. That doesn't bother me. I think that's reasonable most of the time.

CHAIRMAN SOULES: Anyone else? John Marks.

MR. MARKS: Following up a little bit on what Tommy said, you know, there are other categories of experts besides just doctors. For example, employees of a company who really their basic testimony is on the facts, and their expert testimony is really part of the operative facts, and do you treat those people the same way as you do the testifying expert, the one that's hired, the hired gun?

MR. JACKS: I don't think you do, John. I think we all know the difference, but the rule as written doesn't acknowledge the difference.

MR. MARKS: That's right.

MR. JACKS: I mean, I think we all know the difference between a testifying and retained expert for whom all this stuff makes sense, and then the other people we need, we feel to designate as experts in order to protect ourselves where it's a waste of time and money to go through this.

CHAIRMAN SOULES: Doyle Curry. I'm sorry.

MR. CURRY: I was just

scratching.

CHAIRMAN SOULES: Okay. David.

MR. PERRY: I think what Tommy is suggesting is that we make the expert witness rule only apply to hired gun experts and that we treat the employee engineer expert and the doctor expert and people whose involvement in the case is that of a fact witness who happens to have expertise, treat them as a fact witness.

MR. CURRY: Police officer.

MR. PERRY: And I second that, and -- police officers. And I think that would save a lot of money because we could get them out of the way earlier. We could save a lot of time and effort in dealing with them, and I think that would be a way to make things more efficient.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: It particularly makes sense in the two situations, the specially employed person, the person in the company that has expertise, the defendant doctor, because what you wind up with is if you don't separate those out is you get into

all sorts of attorney/client privilege, work product problems because you have got the special employee who may be privy to a number of things in the corporation which they have reviewed in the ordinary course of their business upon which they base their opinion. In fact, there has been a couple of cases at the appellate level that talk about does that waive the entire privilege as to everything in that regard.

Or the defendant doctor who happens to have reviewed a number of things with their attorney or whatever in preparing their case, and he's going or she's going to give expert testimony on their own behalf. Do they waive it? Have they waived everything as to that? So I really do think there is a tremendous benefit to segregating out the retained expert provision, and in fact, I have had agreements with attorneys on the other side of my cases that with regard to something similar to what we are recommending by the supplementation -- recommending by the subcommittee that it pertain only to retained experts, and it's worked well.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Are you talking about that just the designation rules apply only and the reports apply only to retained experts?

MR. GOLD: Yeah. Only the reporting, only the reporting and the designation.

MR. MCMAINS: I mean in the timing and whatever. And the problem I have is that in a lot of -- if you are saying that then, I mean, there are a lot of people, a lot of defendants, for instance, don't need to retain any experts.

MR. GOLD: Right. They would have to designate.

MR. MCMAINS: Well, that's what I was getting at. If you are saying you don't have to designate them, I mean, are you saying they are exempted? You want to treat them differently?

MR. GOLD: No. You would have to designate them, but you wouldn't have to produce this whole list of items at the same time of the designation with regard to those

people. Same thing with the treating physician. You don't want to have to produce, for instance --

MR. MCMAINS: But you do have to designate?

MR. GOLD: Yes. But I think there is one thing to be gained by designating someone that's an expert, but it's another thing having to go to your treating physician and say, "You have to produce a report. You have to produce to me everything that you have reviewed" because you don't have any control over this individual, and I think that's what, I think, a concern is. You even get into a little bit different situation with the specially employed expert, the person that's in the company, because I agree with you. A lot of times the corporate defendant may just rely simply on their in-house people.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: During our last meeting last Saturday this issue came up for the first time; that is, this rule was written with the expert who -- the retained expert in mind. The expert who is not also a fact

witness may be a better way of saying it, and we discussed, well, what do we do about the expert who also happens to be a fact witness, and we have not resolved that. So maybe we ought to consider -- not consider today but wait 'til the subcommittee discusses it and comes back with a proposal on what we do about the expert who is also a fact witness, and for purposes of today's discussion let's talk as if we were talking only about the retained expert who is not also a fact witness.

CHAIRMAN SOULES: Well, okay.

MR. SUSMAN: I mean, just to tell you because we are really beginning to -- that whole issue was something we didn't address.

CHAIRMAN SOULES: Okay. But that line is not as bright a line as we have been discussing here today.

MR. MCMAINS: I agree.

CHAIRMAN SOULES: For example, you know, the design engineer of a Ford Pinto, he's going to come right over this rule. This rule should get him and everything he has got if he is going to be a testifying expert in

the case. A nuclear design, you know, the nuclear power plant. We did the South Texas Nuclear Project litigation. There were not very many nuclear engineers in the country at that time, and both sides, we used HL&P. We were using in-house engineers, and we were using Brown & Root in-house engineers, and it was pretty hard to find outhouse engineers at that time. So it's just not that bright.

So if we just try to categorize those into two categories and treat them differently I don't know how you would make it work.

MR. SUSMAN: I mean, I'm not sure we can. All I can say with these pretrial orders and scheduling orders in every case, is it just basically says you designate experts by a certain day or you exchange experts or you finish experts' discovery, and then we argue about, well, wait a second. Is the guy who's the comptroller of the company who's going to testify on damages, does he come within here or not? And you know, we all had that real issue, and I'm not sure we are going to be able to resolve the issue because I agree with you that drawing the line between

the two is difficult in many cases.

CHAIRMAN SOULES: David.

MR. PERRY: I agree with you, Luke, that the line is not as bright as it might appear to be, but I think the guidance that's probably given is in that Axelson case where the distinction that is made is whether the individual has a pre-existing involvement with the dispute by virtue of having been a design engineer or a doctor or something like that or whether the individual becomes involved with the case in order to be a witness. The distinction would not be whether they are employed by the company or not, but if, for example, if an engineer in Ford's design analysis department becomes involved in the case because he is going to be an expert, then treat him like a hired gun. On the other hand, if it's the guy that actually did the design work, treat him like a lay witness. At any rate I think the subcommittee --

CHAIRMAN SOULES: Well, what if the second person is going to be their expert?

MR. PERRY: Sir?

CHAIRMAN SOULES: What if the

second person is going to perform the duties of an outhouse expert? He is going to be the one, the fellow that actually did the design work and is, in fact, a fact witness, and he is going to carry the mail. Shouldn't you get this information on that guy early on?

MR. PERRY: Yeah. But see, if he is actually a lay witness -- I mean, if he is actually a fact witness, you are entitled to get his name. You don't have to wait until 60 days before trial to get his name. You are entitled to get his name at the very beginning and to go take his deposition at the very beginning and find out what his opinions are. So why go through the rigamarole of naming him again later and then going back and deposing him later?

MR. SUSMAN: I would suggest that we --

MR. PERRY: There is some work to be done on it, but I think as a concept.

MR. SUSMAN: The subcommittee needs to deal with this.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: But for now can we

discuss this rule as it only applies now at least to the hired gun, retained experts who has no facts in the case.

CHAIRMAN SOULES: Okay. What do you want to hear? What do you want specifically direction on?

MR. SUSMAN: Well, what should the time limits -- Tommy Jacks said 45 in most cases, 60 and 45 days looked okay. Can we continue a discussion on that?

CHAIRMAN SOULES: Does anybody have a problem with 60 and 45? Richard Orsinger.

MR. MCMAINS: Are you talking about prior to trial?

CHAIRMAN SOULES: Prior to the discovery cut-off, whenever that is.

MR. JACKS: Or trial if there is not a discovery cut-off.

CHAIRMAN SOULES: Okay. Richard Orsinger to start with.

MR. ORSINGER: It's my understanding of the Supreme Court's interpretation of the current rule that as soon as practicable means when the decision is

made to have the expert testify as a witness in the case. Now that seems like, and maybe somebody will disagree with that, and if so, then maybe I'm wrong, but that's my conception of it, and I don't see what's wrong with that. When a decision is made that an expert is going to testify why shouldn't the other side find out about it right away so that they have the opportunity to pursue discovery about that testifying witness? Why wait 30, 60, 90 days to reveal that information that's already -- when the decision has been made?

CHAIRMAN SOULES: Well, assume that's part of the test, but when is the latest date?

MR. SUSMAN: Well, our view is that that's a game that people play, that basically lawyers intentionally don't make up their mind on whether they are going to use a consulting expert in testifying until they have to make up their mind, and so there is little to be gained by risking that there will be -- there is little to be gained by satellite litigation. Well, Susman really knew three months ago that he was going to

have Jones, his economist who he has been consulting with, to be a testifying witness. He should have identified him then. He shouldn't have waited 'til the 60-day time period.

It's just it's so difficult to enforce and such little to be gained by it that we said let's not worry about that. Let's have a date certain when you have got to disclose experts whether you knew him from the day he was born or not, and that was our thinking. Now, we may have been wrong, but that was the thinking.

MR. MARKS: Well, that would be an argument against the simultaneous designation right there. I would think that if that's taken out of the rule a lot of times, well, I would say I designated as soon as practicable, and that is whenever I know what the other side's expert is going to say and then I make a decision about who I need to designate as an expert, and I think that's probably why this time lapse at least in state court rules developed. Now, just because it's in Federal court, Doyle, doesn't necessarily

mean it's the best way to do things.

MR. CURRY: That's true, but don't throw it out just because it's got a Federal label on it if it's working. That's the problem.

MR. MARKS: Well, which is working better? I mean, the state way or the Federal court way? I mean, the way we have been doing it seems to be working pretty good. It's just that I think probably Doyle is saying we want to do it simultaneously, and I say we need more time, so...

CHAIRMAN SOULES: David Perry.

MR. PERRY: I assume -- I don't think it's in here now, but of course, there is a specific provision in the present rules that kind of encourages the trial court to set a different deadline if somebody asks them to. It seems to me that the 60 and 45-day deadline is not a bad deadline to have as a default. I don't have any particular concern with the 30-day deadline that we have now as a default because the way it works is that in almost all serious cases people agree on an earlier deadline, and I think it's very important to

keep the language in the rule that makes it very easy to get an order if not an agreement for earlier deadlines in complex cases.

CHAIRMAN SOULES: So you would keep the "as soon as practicable" language in the rule?

MR. PERRY: Oh, I don't have a problem with the 60 and 45, but I think it is important to keep the language in the rule that lets either side go and get a earlier deadline imposed in a complex case.

MR. SUSMAN: We think we have done it in Rule 166(1)(c) which allows the development of a scheduling order including discovery at a pretrial conference. We think that's the appropriate place to do it.

MS. SWEENEY: What page is that?

MR. SUSMAN: I'm sorry. Page 4, 166(1)(c).

MR. LATTING: Is there any place that says explicitly in the scheduling order that it overrules the default deadlines in the other rules?

MR. KELTNER: No.

MR. LATTING: Should it?

MR. KELTNER: Probably.

MR. SUSMAN: Probably. You would think that that would be the implicit in our saying that these rules can be changed by court order or agreement of party.

HONORABLE F. SCOTT MCGOWN: I mean, that's 166(c). I mean, that's so that we wouldn't have to say it every time. We made it right there at the get-go it can be modified by agreement. It can be modified by court order. All of this can.

MR. PERRY: I guess what I was trying to say is that Rule 166(b)(e)(3) now has a specific provision that the trial judge has discretion to compel a party to make the determination and disclosure of experts at specific times, and I think it would be desirable to keep that language specifically in the expert witness rule.

MS. SWEENEY: What page? Oh, you mean the --

MR. PERRY: It's on page 53 in the present rule book, the determination of status provision.

MR. KELTNER: David, when you need that it assumes practicable was not in, and I think the answer probably is "yes."

MR. PERRY: I think we are in an area where the default deadlines are going to not work so often that we do need very clear language that says it's real easy to go do something else.

MR. MARKS: Yeah. I think that's right, too.

CHAIRMAN SOULES: And then as soon as practicable has been used like in the Onion case to try to cause the 30 days to be moved back automatically whenever somebody wants to strike an expert, but it's also a tool for the trial judge. Whenever the trial judge decides is as soon as practicable he can order the exchange of experts.

MS. SWEENEY: We need to kill that. We need to kill that dead, dead, dead because it creates more expense when people spend an hour of the deposition trying to figure out, well, how long have you had these opinions? Well, when did you first convey them? Well, did she seem to understand when

you said to her that this was your opinion? Well, how come she didn't tell us? Do you know about that? You know, it's creating more satellite litigation that we don't need.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: It's worse now. I think I lived through the world's longest as soon as practicable hearing which lasted over seven days. 23 expert witnesses, halfway through about eight of them had been struck. At the very end only one ended up being struck. Every lawyer in the case, second parties ended up testifying when they made the decision. It is a nightmare. We did the -- on the Task Force on sanctions on the questionnaire we sent out we had 111 judges and 150 lawyers responding to overwhelmingly people said "Give us a bright line rule. Get that out of there. It's too ambiguous." I agree with Paula. That needs to be killed and buried.

PROFESSOR DORSANEO: That's in a different provision than the one David Perry is talking about.

MR. SUSMAN: Yeah. My sense of the group is no one wants the "as soon as practicable" thing, and my also sense of the group is that the court ought to be able to modify it, and it's a drafting problem kind of whether we repeat it every time and where we repeat it, but it's a decision to be made. All of this should be modified by court order, and the only question is how often we repeat it, and that's kind of a drafting problem, isn't it really?

MR. KELTNER: Yeah.

CHAIRMAN SOULES: How many feel that --

MR. SUSMAN: We can do that.

CHAIRMAN SOULES: -- we should express in the expert witness rule that the judge can change the time? Show by hands.

MR. KELTNER: Say again.

CHAIRMAN SOULES: In the expert witness rule go ahead and express that the judge can change the time even though it's also in 166 anyway. Those opposed? Okay. It carries that we would express it in the rule.

MR. LATTING: Where are we on

the bright line view as opposed to as soon as practicable?

CHAIRMAN SOULES: As soon as practicable has gone out.

MR. LATTING: Good.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: Has the subcommittee considered a rather drastic approach to this, which would be consisting of requiring reports to be exchanged upon experts together with the curriculum vitae and then beyond that abolish the depositions of experts that didn't know anything about the case until some lawyer approached them about it? Just abolish all of that, let them go and cross-examine at trial, but just don't have any pretrial discovery other than the report to the experts which would conform to whatever requirements the rule would make?

CHAIRMAN SOULES: But then would you confine the expert testimony to the scope of the report?

HONORABLE C. A. GUITTARD: Maybe so. That's another question to be

considered in that election.

MR. SUSMAN: Judge, the answer is that we definitely talked about that. I mean, there were some in the subcommittee, including me, I say I think an expert deposition is a total waste of time. I think you ought to be able to take a report and forget about the deposition, but there are others that like the deposition. What we did not want was both. That we did not want nor did we think it would usually work where, you know, you get reports and then you make the decision whether it's good enough. If you don't like it, you can take the deposition because almost everyone will opt for the deposition, too. So I guess basically we came down on doing the deposition in lieu of the report, but certainly I -- I mean, we could certainly argue that issue. I mean, that's a legitimate point. Maybe we should have reports and no oral depositions.

HONORABLE C. A. GUITTARD: But should that be a matter to be discussed by this committee?

CHAIRMAN SOULES: Well, I think

it should.

MR. SUSMAN: It should be discussed here for sure.

CHAIRMAN SOULES: In terms of trying to streamline costs and other things. David Keltner.

MR. KELTNER: Judge, we looked at that on the Discovery Task Force in great detail and came up with the idea that we would favor the deposition over the report. Let me give you the rationale for that. First off, there is obviously the distinction between the treating doctor type of expert that we have been talking about, hired gun; and one of the problems that practitioners all over told us was you can't get the treating doctor to give you the kind of report that would withstand the adequate disclosure, and as a result they get deposed anyway, and I think that is true.

The second thing was we didn't want to go to the trial judge with every expert report saying "This is not good enough or not or not adequate enough, and it doesn't give the specific grounds." We also didn't want to have the situation where you went to trial,

the expert gives more specific testimony than is in his or her report. That was going to create litigation in and of itself that was a sideline. So we thought, all right, let's put the burden on the parties that could make all those objections, and let's go ahead and let the people depose the expert and not have a report in detail like we have now, and we thought in the end that would be cheaper, and I still believe that to be the case.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: And that's awfully similar to what they have in Federal court except in Federal court it can be even cheaper in that you just do it by interrogatories. I mean, and you don't have to incur the expense of the expert having to create the report and charge you for the effort involved in that exercise. The problem that I think the people had with that is that people wanted something that the expert had signed off on. In fact, I think one of the proposals we discussed in one of the committees at one point was the attorney preparing another report so to avoid the expense of that, and no one wanted that

really because they wanted to make sure that the expert's signature was on it and they could impeach them with that.

But I'm finding more and more that it's one of the reasons why an expert deposition can be three hours, I think, is I think that you just go in, find out what are your opinions and what is the basis for it, and those people what mess around more in a deposition doing more probably are creating more problems for themselves than they know. All you want to know is what their opinions are and what did they base it on and then save the rest for trial. And you know, I think you could accomplish it -- to me at this point it's six of one and half a dozen of another. It's the report or the deposition. The only problem is sometimes you just can't get an expert that will give you the report. That's the problem. They will show up for the deposition gladly because they think they are going to make 10,000 bucks on the deposition, but to get a report you can't seem to get it out of them, and that seems to be the problem.

CHAIRMAN SOULES: Well, in

commercial litigation at least as often as not we don't depose the experts. We just get their reports and trial judges in San Antonio are going to hold them to their reports, and that is a lot cheaper, I think, at least we think so, than taking their deposition. Could something be done to accommodate that, that in lieu of a deposition the judge can order the report reduced to writing and furnished to avoid the duplication of the report and the deposition? I don't know. Steve.

MR. SUSMAN: Well, of course, the judge can do that under our rules, and the judge can order anything, but would you want a regime where the party whose expert it is has the option of either providing the expert -- see, Paul's problem can be solved by if he can't get his doctor to provide a report, you are going to put him up for a deposition. That solves that problem.

MR. GOLD: Right.

MR. SUSMAN: Is the other party willing to give the option to the person who retains the expert --

MR. GOLD: Well, the problem

with --

MR. SUSMAN: -- as to whether you are going to provide a report or provide him for a deposition?

MR. GOLD: I guess the next issue would be how do you interpret the report? Are you going to hold the expert exclusively to what's in the report, and under that proposal that you have just suggested if the party offering the expert has the option of either producing the expert for a deposition or producing a report it would seem like if they produce the report they should be bound by the report, that it's going to be read awfully literally and constrain the expert to that.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think under the subcommittees's proposal if the parties want to agree to have to exchange reports and not take a deposition they are free to do that.

CHAIRMAN SOULES: Right.

MR. PERRY: I think the problem with requiring that is that many people, by the time the lawyer works with the expert

there can become a fine art to writing a report that's very long and doesn't say anything, and so you can read six or eight pages and say, "Well, I have still got to take his deposition in order to find out what he has said."

On the other hand, even if somebody does provide a very enlightening report, a great many people are still going to want to take his deposition, and so it seemed to both the task force, I think, and the subcommittee that the best thing to do was to have the lawyer lay out as in 2(d) what in effect is a report, but it's the lawyer's statement of what the guy is going to testify to and then let people take the deposition, and then if the parties have a good enough working relationship that they want to do something different, which I think can be very efficient, they can always do that by agreement.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCGOWN: My experience has been that as lawyers part of our professional training is writing. It's a lot of what we do, and so reports are

something that we can churn out. In a lot of other disciplines, even highly educated, very professional people, producing reports is not necessarily their forte, and what we wanted to avoid on the committee was all the satellite litigation over "is this report adequate" before you go to trial, and when you are at trial "Was this opinion or this information fairly disclosed in the report?"

And we also wanted to get away from trial judges making decisions to exclude important expert opinions or important expert information because the report wasn't adequate, or it wasn't disclosed in the report, and we just thought that the report regime was more trouble than it was worth. If you have got lawyers who want to do it by agreement or they have got an unusually large number of experts and they want to set it up by court order, the rule provides for that, but the basic way that we would want it done is to have simply the disclosure with the expert and then take the deposition.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think one thing

that you would lose by not permitting the deposition as well is being able to go into the expert's qualifications and into his credibility, and that's not necessarily true with all experts, but let's face it. There are a lot of experts that are not very credible, and the only way you can get into that is to take a deposition. They may not have the qualifications to give the opinions that they are giving, or you have good reason to believe that you can prove to a jury that they don't, and you wouldn't have the opportunity to do that. So those are two things that you would lose right off the bat if you were not permitted to take the deposition and just have to risk that you were able to develop those favorable in the trial of the case, which you may or may not want to do.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Just from a political point of view I think it would be very difficult to explain to the Bar of the State of Texas that they were going to be precluded from taking the deposition of an

expert that might cost their client millions and millions of dollars. That would be a hard sale, I think. Seems like we have got a good system here from the subcommittee. I'm happy with this rule right here.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: If what we are trying to do or ultimately we will try to do is eliminate the report in favor of an oral deposition with no report then I think the information in the subparts of (2) we need to say at some point in here that that's not going to be a basis for excluding testimony at trial because the problem I've had with reports is -- or interrogatories asking about what my expert is going to say is I am concerned that I am going to miss some opinion somewhere whether brought out on direct or on cross and be precluded from having my expert testify about it at trial, and if the only purpose of the information in (2) is just to give a general overview and then let's go take the oral deposition, if it comes out at the oral deposition, it's fair game. That's different from the way it is now, and I think

we need to say it is different.

MR. LATTING: Well, what do you do when you get a list of experts and you are trying to decide whether to depose them or not, and here is a brief summary that says this expert is going to testify about A and B, and you say on the basis of that I don't need to depose him because I am not concerned about that. Then you get to the trial, and he gets on the stand and says, "Well, I would like to talk about now -- my main speech is about C, D, and E," and I'm saying, "Wait a minute, Judge. They said he was only going to talk about A and B, and we are not ready for this. This wasn't even in the case," and so I'm concerned how you handle that if it's not a basis for excluding his testimony.

CHAIRMAN SOULES: Well, the way I am hearing this is the lawyer is not going to have the choice up to 50 hours to depose the experts. You really can't get it any other way, can't get the information for cross-examination any other way.

MR. GOLD: What was that, Luke?

CHAIRMAN SOULES: Well, you

can't get a report to use for cross-examination. You are going to have to take -- we are going to be compelled to take the expert depositions of all experts in the case up to 50 hours plus 6 if there is some extra, and so we are going to load up the deposition practice on experts by this rule. That's my sensitivity to it. It's going to significantly increase our cost of litigation in terms of expert discovery.

MR. LATTING: My question is this: Directing to what Sarah said, what do you do if the attorney's brief summary, (2)(d), the brief summary of the expert's opinion says he is going to testify about A and B, and then he gets to the stand and starts wanting to testify about C, and there is an objection? "Wait a minute. This was not fairly contained within the summary of his testimony."

MR. SUSMAN: You can't do that.

MR. LATTING: Why?

MR. SUSMAN: We don't want to -- I mean, because the purpose of the general substance is to allow you to decide

whether you want to depose them or not, and if it's not -- I don't think he should be allowed to go beyond the general substance or the subject matter of what he has disclosed in his designation if you haven't deposed him.

CHAIRMAN SOULES: Sarah disagrees.

MR. LATTING: Sarah disagrees, I think. And that's just what I am trying to focus on, and I'm agreeing with you.

MR. SUSMAN: Why does Sarah disagree?

MS. DUNCAN: I am not talking about the general subject matter. I'm talking about, you know, it's sort of like points of error and questions fairly included therein. I'm talking about the layers of opinions that any expert is going to have, and they may not know that they have an opinion on a discrete question included within the general subject matter until they are asked a question about it.

MR. SUSMAN: Wait a second. Just one second. It seems to me if you go ahead and depose an expert, if you get the

summary and go ahead and depose them, the summary at that point is immaterial. You have taken your shot at your deposition. Okay. It doesn't matter what the summary says then. When you go to the -- the summary is just to aid you in determining whether you want to depose them, and if you depose them kind of generally what to ask them, but I don't think you should ever be able to go back and rely on a summary having elected to take the deposition.

But if you rely on the summary to forego taking the deposition then, I think, Joe, you have -- I mean, I think you have a legitimate claim. Don't let this expert testify beyond this at trial.

MS. DUNCAN: And I would agree with that. I am talking about the situation we have got now in some cases where a report or interrogatory answers are being used to limit an expert's testimony even though an oral deposition has been taken and covered those omitted matters, and I don't think that's good.

MR. SUSMAN: Well, we don't

want that to happen.

MR. LATTING: Well, why don't we say so in the rule? I suggest we say that because what could come up is the report says he's going to testify about A and B. I take his deposition and ask him about A and B, and I better ask him about "Do you have any other opinions, too," it sounds like if we're going to pass this rule.

MR. CURRY: He's going to say, "not at this time."

MR. LATTING: He will say, "not at this time." Yeah.

MR. MCMAINS: Not until you have used your 50 hours.

MR. LATTING: Yeah. When you've got 48 1/2 hours.

PROFESSOR ALBRIGHT: It seems like this exclusion problem is the same exclusion problem we have every time we talk about exclusion, and we haven't addressed exclusion here specifically, and I hope we will at some point, and I'm sure we will, but it seems like every time you have an exclusion problem what you really are worried about is

was it a surprise, and under the current law you don't take surprise into account a whole lot, and that's what the problem is. So if we can draft an exclusion rule as far as sanctions are concerned to take care of that problem, I think that we have got all of these exclusion problems satisfied, and we don't need to address it in every single little situation as far as discovery is concerned.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I think this is more a duty to supplement issue, and I thought that was covered in your draft rules where you suggest that anything that comes out in a deposition is a supplement by its own nature.

MR. MARKS: Well, if you take the deposition, and you examine on A and B and say, "Thank you very much," and if he doesn't say, "Oh, yeah. I have got two other things I want to talk about," we are not saying that he can get in the trial of the case and say, "Oh, yeah. There are two other things that I want to talk about."

MR. MCMAINS: That is what he is saying.

MR. LATTING: That is what he is saying. He's saying once you decide to depose him you better ask him everything that he might talk about or he can testify about anything, which is okay with me if we just write it that way.

MR. CURRY: He could do that now. That's under the rules right now that they can do that, and what you do is when you cross-examine him you say, "Well, you didn't have that opinion then and I asked you did you have anymore. When did you get that opinion?"

MR. MARKS: I'm saying what if you don't. What if you just say, "A and B," and then you ask the questions about that, then you cut it off.

MR. CURRY: Well, who's going to do that, though?

MR. MARKS: Well, that's a good question.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I thought where we were was that if the disclosure says he will talk about A and B, and you say, "That's fine. I'm not going to depose him" then he's going

to be limited to A and B. But if you just say, you say, "Well, I am going to take his deposition," and you go and you depose him about A and B and while you're there C comes up and so does D, well, then you have got to deal with A and B and C and D, and all of those things are going to come in; but if C and D don't come up, if you depose him about A and B, and C and D don't come up, he doesn't tell you he's got some additional opinions, well, then he is going to be limited to A and B.

MR. SUSMAN: I agree.

MR. CURRY: That's not the current law, though. That's not the current law, and the reason it isn't is because the person taking the deposition knows that there are underlying things he can go into if he wants to, and he decides to lay behind the log and try to keep it limited because it's no real harm because he knows what he is going to say anyway.

MR. GOLD: Well, I have had attorneys at the deposition presenting the expert at the end -- someone comes in to take

the deposition, and they ask questions about A and B, and they pack up, and they are getting ready to go, and the person who is presenting the expert says, "Are all your opinions limited to just and A and B?"

"No. They are not.

"Pass the witness." Now, everyone kind of sits there and wonders, okay, where are we? You know, they said A and B is what he was going to talk about. I asked him about A and B, but now they have suggested there is more, but they haven't told me what it is. Do I lay behind the log? Am I put on notice that there is more? I mean, where are you?

MR. MARKS: Well, I mean, if it comes out, if it stops right there where I said. I ask about A and B and I say "Thank you" and nobody does that, you don't come back and say, "Well, what about C and D?" Then I think there would be a legitimate reason for cutting anything off beyond A and B.

MR. GOLD: I think so, but what happens if you go the extra step and someone says, "Is that all you have?"

"No. It isn't."

MR. CURRY: Suppose he supplements after your deposition.

MR. LATTING: Why don't we do this the easy way and say that if you forego taking a deposition then you are limited to what is fairly disclosed. If you decide to take an oral deposition, then we are not -- then the expert may testify, period, and we can guard against surprise by simply asking everybody at the deposition, "Do you have any other opinions?"

MR. GOLD: Or "what are all your opinions?"

MR. LATTING: Yeah. "And tell me what they are."

MR. MARKS: We can't lay behind the log that way.

CHAIRMAN SOULES: Sarah Duncan. Sarah has got the floor.

MR. LATTING: Well, why don't we do that? I am proposing that. That's a real simple rule. If you don't depose him, you look at the report or you look at the summary of it. If you do depose the expert then --

CHAIRMAN SOULES: It's open season.

MR. LATTING: You've opened it up and asked the expert anything that he might know that's pertinent to the case. We can frame that some way. It's not any big deal. Then we get outside of all of this, well, this report said this but it wasn't fairly contained within that. Say "I want to know all your opinions about this case."

CHAIRMAN SOULES: The problem is that eats a lot of time.

MR. MARKS: That's right.

CHAIRMAN SOULES: That's the problem. Sarah Duncan, I called on you a moment ago. Let Sarah talk.

MS. DUNCAN: That's like asking "Tell me every document in existence that supports your claim on this cause of action." If I have got an expert who has gone through every accounting ledger from 1900 until 1993 and has classified every penny in every account as to whether it's community I can't tell you all of the subsidiary opinions that it took for that expert to come to the

conclusion that this is community and this is separate. I can tell you that my expert will testify generally on what is separate and what is community and every opinion necessary to get to that finite conclusion. So I think it -- you know, we are saying A and B and C, but in the abstract A and B and C have absolutely no meaning until you get to a level of specificity about an opinion versus a general subject matter.

CHAIRMAN SOULES: Steve Susman.

MS. DUNCAN: So I don't think we are advancing the ball is what I am trying to say.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Well, I kind of like the notion that if you elect not to take a deposition you can hold the expert to the (2)(c) and (d). If you elect to take the deposition, well, that's your discovery device, and (2)(c) -- you have no longer any complaint that (2)(c) and (d) were defective. Now, what's wrong with that? I mean, that's Joe's point.

CHAIRMAN SOULES: I think the

problem with it is it eats a lot of time.

MR. SUSMAN: Not really. It really doesn't. Just ask the witness a question. "Do you have any other opinions? Do you intend to testify about anything else?" And ask them to voice any other opinions.

CHAIRMAN SOULES: And I have got him ready to testify for about a day and a half on the rest of the stuff he is going to testify to, burning up your time while you ask the questions, burning up your 50 hours.

MR. SUSMAN: Well, suppose, okay, you wrote three sentences to cover that in (3)(c) and (d). I mean, suppose you just did that. I would still have to use the time asking the questions. You aren't requiring a report.

CHAIRMAN SOULES: Well, that's my big beef.

MR. SUSMAN: Huh?

CHAIRMAN SOULES: Is not requiring reports and avoiding the cost of deposition. But apparently the consensus of the committee is that we are just not going -- there is not going to be both, and

it's going to be by deposition. Is that the way everybody feels?

PROFESSOR DORSANEO: That's not the way I feel. I said that last time around. I am surprised everybody wants to do depositions instead of getting a report. That strikes me as strange.

CHAIRMAN SOULES: I mean, suppose in a family law case you have a report of a child psychologist and you have a designation of a child psychologist and whatever this sketchy information is you get here plus an accountant, the same thing. If you had a full report from that psychologist and that accountant, you wouldn't need any depositions. You're ready for trial.

MR. LATTING: Not me. You might be. I want to take his deposition.

MR. SUSMAN: Luke, why don't we take a vote? How many here would be willing to require expert reports with no depositions?

CHAIRMAN SOULES: No. I'm still getting back to both. I realize you-all have made -- the subcommittee has decided that there can't be both, but is that really cost

effective? You-all have determined that it is. My feeling is that it's not, and I don't know if anybody agrees with me. Richard Orsinger.

MR. ORSINGER: If we have the report option can we at the same time get the data and the worksheets and the exhibits of the expert in conjunction with the report without taking the deposition? Because if so I feel a lot better about the reports. If we can only get the underlying testing and whatnot, the raw material from which the expert's opinions are derived through a deposition then the report alone bothers me, but I don't see any reason why we couldn't get the underlying worksheets together with the report.

CHAIRMAN SOULES: Well, if the --

MR. SUSMAN: If I understand what Luke said, Luke is suggesting something that I think the committee certainly rejected, and that is both. We did reject both clearly. I mean, that is -- and I wonder whether anyone here thinks that both are a good idea.

CHAIRMAN SOULES: If you give me 166(b), what is it, (e) which is experts, (2) which is the reports, everything they look at and work -- the reports, everything they look at and work on, and (4) -- this is the current rule -- which is their report reduced to tangible form, I could cross-examine an accountant in a family law case without ever taking the deposition.

MR. KELTNER: Absolutely. And you ought to be able to do that if you wish to do it, but at least the task force felt, and I think we were able to convince the subcommittee that in some circumstances that's going to work, and you ought to have that option. And Richard, in answer to your question, the task force answer would be, yes, you get all of that information.

CHAIRMAN SOULES: Now, the problem is that on the fourth part of it somebody fudges big time.

MR. KELTNER: Yes, sir.

CHAIRMAN SOULES: Because I can't take the deposition now. If this rule passes, I can't take the deposition. Now if

there is fudging I can go ahead and take their deposition. I can make that decision after I have their report. So if they fudge big time I have still got a way out of a problem, but if they are forthcoming then I don't need a deposition.

MR. KELTNER: Yes. That's basically right, but the way that I think we intended the rule was that you get the report, you're the one who has requested it. Now you're going to make a determination of what you're going to do with it. If you make the determination after seeing the report and the supporting data that you don't need to depose them so much the better, and I am going to suggest to you that in family law cases and in some other cases especially with the hired gun -- I mean, excuse me, non-hired gun, that's exactly what's going to occur.

But if you make the decision then to depose, you're going to lighten up what the possibility of disclosure is, and I think that makes sense. But Luke, the idea here is -- and again, we looked at this, and one of the thing's trial judges said was the worst

problem calls they have to make were questions about whether the reports that they were given by experts matched up with the testimony that was given at trial, and they spent hours looking at that during the trial itself, and that was real difficult. And if it was a deposition they went to a pinpointed question, and the answer was either "yes" or "no," and they put it down, and the decision was made.

And that's the reason we ended up going with the deposition route and not requiring the big reports, and I understand your bias exactly because quite frankly going into it I had the same one that if I could get a good report I sure don't want to depose, no reason to. But I think this puts a -- if you look at it it has a real nice balance to it. There is a cost to doing anything, for taking any action. If the report is not good enough your expert is going to get deposed, but if your report is real general, that's what's going to happen. If the report is pretty specific, maybe the expert doesn't get deposed, but you're married to exactly what you wrote down, and let's not kid ourselves. Under this

proposal lawyers are going to draft a general statement that they are going to have to cough up all the documents as well. I think it's a pretty good balance that works well and especially if we are going to go with the 50 hours. It is going to make people make some tough decisions pretty early on.

CHAIRMAN SOULES: Well, if we are going to go with 50 hours all experts' reports are going to be general and force you to use your time and consume the 50 hours.

MR. KELTNER: That is a danger.

CHAIRMAN SOULES: That's going to be encouraged.

MR. KELTNER: There is no doubt about that.

CHAIRMAN SOULES: But as far as the trial judges not being able to make calls they ought to go to school in Bexar County because our judges with a report in their hands can make decisions pretty fast in a trial whether or not an expert has covered a subject. I have never seen hours delayed on that.

MR. KELTNER: Well, I tell you,

we have had them in our area, and maybe they are just not doing as good a job, but it gets to be a tough deal. Especially when, you know, the decision -- the expert's report is saying I believe that the insurance company violated the insurance code. Well, does that mean they can testify as to everything in the insurance code, all particular violations? I have also seen it 1746(b). Well, does that mean all the lists -- I mean, all the laundry lists under 1746(b)? Well, if it does you don't exactly know where you are going, and that's the problem we see happening, and quite frankly, when we were looking at this for this most recent University of Texas appellate court that was a whole lot of points of error on appeal, was that experts' testimony didn't relate to the report. So it was even going past the trial court. You were seeing it a whole lot in the appellate courts as well, which just amazes me.

CHAIRMAN SOULES: Okay. Well, I have said my piece. I think we ought to do both. Richard Orsinger.

MR. ORSINGER: I don't recall

why you-all dispensed with both. Was it because of the cost of the report followed by the cost of paying for your own expert to be deposed?

MR. SUSMAN: Paul.

MR. GOLD: When this came up in the task force originally because I remember I was very adamant about the cost. I thought that it was a tremendous waste of money to have to generate a detailed report because the expert charges you for that as well and then have to produce them for a deposition as well. It doubled the cost of the expert, and I didn't mind doing one or the other, but it seemed counterproductive to the goal that we had of reducing the cost of litigation to have to duplicate it, to have to do it twice, and it seemed like no matter what you did, no matter how specific the report, if you did a specific report the attorney on the other side wanted to cross-examine the expert in detail about all the specificity in it to hope to trip him up.

If you did it general, they wanted the report. So it seemed like, what the heck,

just produce the guy for the deposition and get it over with, but I don't know. One thing that we have not talked about that may make it more palatable for the two, both the report and the deposition, is who bears the cost. You know, I don't mind producing both if the person that's requesting one or both pays for it. Now, I don't mind that. Fine. If you want to run up the cost of litigation, you pay for it, and then you do it, but no one's talked about the expense in it, and I think the expense is a factor.

CHAIRMAN SOULES: But let me address that. I know the rest of you have your hands up. I don't think that that's really -- that that's correct, that there is that much additional cost to doing both because by the time we have got an expert ready to testify for a deposition that expert can put his testimony down in a report in very little time, and we are going to go over that anyway, and part of the preparation for the deposition is that in most cases the other side wants a report before they take a deposition, and we agree to exchange reports

ahead of the depositions, and so part of the preparation of our witnesses is doing their report to get some force, and the draftsmanship or the writing of it takes additional time, but the preparation is really the same time. Tommy Jacks.

MR. JACKS: I'm in agreement with Luke, and I'm also in agreement with the committee's approach in this sense. I don't think it costs that much more to get your expert to write a report, and I agree with you about that. The cost that accompanies reports is the cost about, again, the friction costs that are generated because of the report, the cost at trial where you end up wrangling, and it can take hours in some cases. You send the jury out. You get in there and you argue about the report. The judge asks the expert questions and this, that, and the other.

I have had it used against me. I had a case not long ago in San Antonio, and the defense lawyer -- I sent a report of my expert. The defense lawyer says "We don't think it's detailed enough and unless you send us a more detailed one we are going to set it

for a hearing." Well, I have either got take out the better part of the day and go down to San Antonio, whether I win or lose, or I call my expert back and for another 500 bucks I get a more detailed report. I chose that just because I didn't have time to run down and have a hearing.

But if you are going to have both then I would say you have something in the rule that says you get your report, you use it how you want to, but you don't have a right to bitch anywhere, any time, any place, the trial court, appeal court, anywhere else, about whether the report was adequate or inadequate or whether the expert deviated from it or not. I mean, when you get the report if you decide on the basis of the report you don't want to take the deposition, that's fine. If you decide you do want to take the deposition, then take your deposition, take your best shot, and that's fine, and go to court like big boys and girls and try your lawsuit instead of whining about whether your report was good enough, and it seems to me that takes the steam out of all this report problem.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: I am concerned that most of the input here is from people who handle damage cases, and I think Richard Orsinger is the only person here who really handles a lot of family law, and I think that the rule that we are getting ready to write and everybody seems to like would be a big change in family law cases. Social studies and psychologists that interview kids and parents and so forth, we're accustomed to seeing lengthy reports, and so I'm kind of I think on your side in wanting to defend more of the present report system than this does. I just think we need -- this rule applies to everybody, not just damage cases, and what, one-third, 40 percent of civil litigation is family law? A lot. And I think we would be doing a big injustice if we -- where we are coming from is not family law but this is going to mess up what happens in family law right now.

CHAIRMAN SOULES: John Marks. Then I will get to you, Tommy.

MR. MARKS: Okay. Maybe this is not the time or place to address this question, but should we give some consideration to limiting the use of experts, to limiting the use of experts to those situations where they really are experts?

HONORABLE C. A. GUITTARD: How?

MR. MARKS: Or is that too controversial?

CHAIRMAN SOULES: I don't know whether we can do that in the context of what we are doing. Tommy, you had your hand up.

MR. MARKS: Well, I mean, it's a great cost in our litigation.

MR. JACKS: David makes a good point, and it may be that we ought to consider having a special subsection for family law cases because there are different problems in these two areas, and both of them account for a big segment of what goes on in the courthouse. Damage cases account for lots of lawsuits. Family law cases account for lots of lawsuits, and it's hard to write one rule on this subject that covers both adequately, and so the subcommittee might think about the

special problems of those two areas of practice.

CHAIRMAN SOULES: Family law cases and construction law cases mixed in with family law cases because I have got the same situation as they do? Patent infringement, construction cases, you can try them all day long on reports without taking the depositions of the expert.

MR. JACKS: How much of that can be taken care of by agreement?

CHAIRMAN SOULES: Depends on what the Rules are. Lawyers are a lot more inclined to agree to things that the Rules can require them to do than they are to things that the Rules can't require them to do.

MR. JACKS: Well, of course, you still have got the opportunity to go to the court and have the court require it. I mean, it's not as if there is no recourse here.

CHAIRMAN SOULES: Not under this rule. You can't get a report.

HONORABLE DAVID PEEPLES: You can't force the detailed report.

CHAIRMAN SOULES: You can't force a detailed report under the proposed subcommittee rule.

MR. JACKS: The court could not by order do that as part of the court's ability to handle pretrial?

CHAIRMAN SOULES: Sure. I guess the court can do anything. I mean, that's one of the rules is that the court can do anything it wants to do, written and unwritten. Okay. Richard Orsinger.

HONORABLE C. A. GUITTARD: Except abuse discretion.

CHAIRMAN SOULES: Except abuse discretion.

MR. JACKS: Yeah. That's right.

CHAIRMAN SOULES: Richard.

MR. ORSINGER: The issue of written reports in parent/child suits is very much different from what all of us are talking about. The family code gives the court the authority to appoint a social worker and prepare a social study, and that has to be delivered to all sides, and it's specifically

in the family code that it can be shown to the jury subject to the Rules of Evidence, and frequently the courts will appoint a psychologist, and the psychologist is ordered to do a custody evaluation in writing and deliver it to all sides. And as often as not both of those, the custody evaluation and the social study, actually goes to the jury back in the jury room in addition to whatever sworn testimony you may give, and in custody cases you definitely have to either protect them or let us know that we have to go to the Legislature in this upcoming session to protect one of those two things.

In divorces it's not so important because the divorce issues are usually either appraisal issues, which are just like any other appraisal question. You get an appraisal report and you may or may not want to depose, or they have complicated accounting issues where you don't have reports. You have 700 pages of accounting sheets to pour over and figure out, but I deal with report problems all the time in both of those areas, and I think that if you are concerned about

the dual cost of having to do a report and pay for your own expert to be deposed you could do what I offer to agree to and what judges have sometimes ordered is that the proponent will produce a report and pay for it, and if the party seeking the report is not satisfied they can take the deposition, but they have to reimburse the cost of the report. Then the cost of the deposition falls on the producing party.

So if it's my expert, I have an incentive to give them a good report for $350 and whatever. If that's the end of it, I don't have to pay to have him deposed. If that report is inadequate or if the other side feels like they want to go for the deposition, then they pay for the cost of the report that I ordered, but then I pay for my expert to be deposed for however many hours it is, and that way the cost of the report writing is split and yet we haven't eliminated the role of the report as a preliminary, which may work in a lot of instances, and I hate to see reports disappear from the landscape because we are worried about the cost of a report in addition

to a depo. I think better to split that cost than to eliminate the procedure.

CHAIRMAN SOULES: Paul. I will just go around the table that way.

MR. GOLD: It's interesting because we have had shifting agenda on the different committees. At one point cost was a big deal. I mean, anything we could do to save a quarter everybody was jumping on the wagon to do that, but that -- oh, I was trying to think what I was going to say on the deposition. I will pass and come back. I got sidetracked by that because at one point we were on the task force trying to -- we were looking at the expense of everything. In fact, Danny Price was very much concerned about, you know, the costs that we were generating in doing depositions, doing reports, and everything. We were trying to figure out ways to save money because it was costing a lot of the smaller practitioners a great deal of expense in litigating. So if it's not an expense factor, then we can move on to something else. I will come back to the other point. I have forgotten what it was.

CHAIRMAN SOULES: David.

MR. PERRY: Well, back during the task force period of time when the idea of abolishing reports first came up the rationale for it was that you could not as a practical matter without undue friction costs force the other side to give you a reasonably detailed report. Therefore, the rationale was forget the report and go take the guy's deposition. That will be a more efficient way to find out what he is going to say anyway. Now, all of that discussion was had not in the context of a total case limit on the number of hours of deposition.

That discussion was had in the context of pushing people over to take the deposition in lieu of the report and with the idea in mind that the deposition was more efficient, but if we are going to have a total limit on the number of deposition hours, it may make a lot of sense to go back to a situation where you have people produce a report, try to get one that is sufficiently detailed that you can avoid taking the deposition because you have now a lot of incentive not to go depose the

guy if you don't need to, and that might be a good -- it may be that now we can work out something where you can effectively use a report in lieu of the deposition.

MR. SUSMAN: What you are suggesting is -- as I understand what you are suggesting, so I understand correctly for our drafting purposes, that if you know you want a deposition of the other guy's expert, period, you can tell the lawyer up front "I don't need a report. Just give me a general substance of what he is going to say." Okay. Then you can take the deposition. If you may, being someone like Luke who would want to avoid taking the deposition because it's going to eat up your time and cost more money, you can say "Give me a report in lieu of the deposition." If once you see the report you don't think it's good enough, you need to take a deposition, too, you pay for the report, and you pay for the time to prepare the report because you are now taking a deposition, too. How about that? How about something like that?

MR. PERRY: I think we need to

try to work out some details because something needs to be built into the Rules to create an incentive on the guy who's going to produce the report to produce one that is good enough that the other guy really doesn't need to take a deposition. You don't want to get into a situation -- the situation we are in now is that the reports in many, many cases are written to obscure as much as they reveal, and so in many cases they never dispense with the need to take the deposition, but maybe the subcommittee, you know, you could play with the concepts like if you produce a report so that the other guy does not need to depose your expert you buy an extra six hours of deposition time. I don't know. Maybe we could think of some ways that would not involve going down to the court and holding a hearing that would be an incentive on people to produce a good report.

CHAIRMAN SOULES: Chuck, you had your hand up first.

MR. HERRING: Yeah. Just by way of comparison the new Federal rule, the non-knocked out version, has pretty detailed

mandatory disclosure of experts. You have got opinions, underlying data, compensation, publications, previous trials testified in, all of that. You also get the right to depose the expert if you want to, but the standard is unless manifest injustice would result the party seeking discovery pays for the deposition, and then there is a sanction and exclusion sanction unless the failure to disclose in the report is adequate. Unless the failure is harmless there is an exclusion remedy. I don't necessarily recommend that, but it's just interesting to see how they have drawn the line relative to report and cost and the right of deposition.

CHAIRMAN SOULES: Paul.

MR. GOLD: The problem -- one of the problems that you have got with the cost -- there is two problems. No. 1, the cost situation is everyone is concerned that their expert is going to load up on the other side. You are going to wind up with some expert that if you say you're seeking the deposition, they are going to charge you $15,000 for that deposition. Then you get the

war of the experts here. It's sort of like bean ball. He charged me 15,000. Okay. So you charge him 20,000 for their deposition. I mean, it gets into that kind of thing.

The other thing that I just can't seem to figure out in my own mind is on the reporting, and maybe you can explain this, Luke, is it seems like at some point there is going to have to be this friction cost on whether the report was complete or not. It seems like that's what we are talking about is challenging the completeness of the report. You either challenge it by deposition in the pretrial phase or you wind up challenging it at time of trial, but even when you get what you think is a full report it may not be a full report, and I guess what the concern that I have is how do you know that? How do you just -- how during the pretrial phase do you say, "Okay. This looks pretty complete. I don't need a deposition"? Doesn't it just transfer the friction cost to the time of trial if it's not a complete report at that point?

CHAIRMAN SOULES: I think it

depends on the order that the judge enters whenever -- if it's done by court order or the agreement of the parties if it's done by Rule 11 agreement under 166(b)(3)(4). If you really track that rule, what's in the report, it's going to be complete or it's going to be incomplete, and what's incomplete, what's not there, is going to be pretty obvious.

MR. GOLD: See, I don't mind the report that answers the question, "What are all the opinions that you are going to testify to at trial, and what is the factual or substantive basis for those opinions?" That's fine. The thing that I am concerned about is that if you don't have some mechanism for excluding, and that seems to be the terrible phrase here, is if there isn't a provision for excluding testimony that isn't captured by that report, you haven't accomplished anything.

CHAIRMAN SOULES: Well, you have got factual observations, text, supporting data, calculations, photographs, and opinions.

MR. GOLD: So am I correct in

understanding that what your position would be, you get the report. If you get to trial and they offer data that wasn't enumerated in the report or they offer opinions that were not expressly set out in the report, those would be excluded at trial?

CHAIRMAN SOULES: Right. Right. And that's what is done in our venue.

MR. GOLD: See, I guess the problem that I have got with that is it seems like the courts seem to be moving away from exclusion, and there seems to be a philosophy of, well, if they didn't reveal it to you let's continue the trial or whatever. I keep seeing that seems like more and more in the cases, is that you don't exclude stuff. You shouldn't deny the tryers of fact the ultimate opinions or the ultimate facts. You should just kind of move the trial along and do a different time then, but if we are taking the position that, yeah, you don't put it in the report it's excluded, then I think what the subcommittee is proposing, one or the other or a combination or something with the cost, I think that we can work something out, but I

think you need to have some heavy hammer that if you opt for the report and the person isn't forthcoming in the report they get hammered. I could live with that.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: One suggestion. You-all are talking about allocating costs back and forth. As you draft the cost provisions, from a practical standpoint it is very problematic to ever have the other side supposed to be paying your expert because then you get into, you know, they are not doing it. They don't cut him a check. He gets peeved and doesn't want to come to trial because he hasn't been paid the 15,000 outstanding dollars, et cetera. So would you please when you are drafting draft in terms of reimbursing the expense? So I will pay my guy, thank you. I don't want you to pay my guy. I don't want you to talk to him. I don't want you-all getting into a contest about who owes who, you know. So phrase that in terms of reimbursement.

The other, the big problem with the

report option, and I understand what Paul is saying, if you are going to have the chance to choose a report or a depo I don't think a report has been written that under the games climate we live in can't be attacked for not being thorough enough because at that point you are drafting a script for the other side for the trial, and that's the whole problem with the report game that we are in and why I think the subcommittee is much better on the right track to say, "Forget the report. You get a designation, take their deposition."

There are very few cases where there is not going to be some word or phrase that comes out of the expert's mouth that is not on that page of the report, and it's an impossible, literally impossible task, to draft and craft a report way before trial that's going to be exactly what the expert says at trial and nothing else. For instance, you want to put a doctor on who's going to be your standard of care expert, but he is also going to spend a bunch of time explaining how the jejunum connects to the ileum or whatever, and you know, he is going to spend an hour doing that.

You don't want to put all of that in a report. "See Gray's Anatomy." You know, "The A is connected to the B which follows from the C."

So when you start saying, yeah, we can do reports in lieu of depositions I don't think that's realistic in a huge number of cases in the real world context of going to the courthouse with complex subject matter. You just can't write that script, and I endorse the subcommittee's recommendation of the designation and depo and not the report.

MR. MEADOWS: I agree. I hope we also deal with this with regard to discovery requests when you are confronted with a question that's asked you to state every opinion and every factual basis upon which the opinion is taken, and you know, you are confronted with this, and it's pretty appropriate for a deposition, but you are paralyzed about not leaving anything out, and it's just not the proper use of discovery in terms of finding out what your expert's going to say.

CHAIRMAN SOULES: Okay. So I guess what we have been debating here is

whether to have this rule, and the only way to get beyond this rule in terms of additional discovery is to depose the experts. Anybody wants to restate that a fairer way is welcome to. Obviously I have got a bias. I am not trying to slant things one way or the other, but I think that's the case. If you get past the information that this rule requires you have to do it by deposition. I think that's what has been proposed.

MR. LATTING: Yeah. Isn't that what you are proposing, Steve, essentially?

CHAIRMAN SOULES: On the other hand, and obviously getting reports in lieu of a deposition is not good enough because that just encourages gamesmanship in the architecture of the report. So that's not a viable alternative. So the only other alternative is to permit both along the lines of the current Rules.

MR. SUSMAN: The proposal as the way it's expressed in this rule, which is that if you want more information then you are entitled to under Rule 172, as we have drafted it. You have got to do it through a

deposition, and you are entitled to take a deposition.

MR. ORSINGER: Are you saying the court has no power to order a report?

MR. SUSMAN: Oh, no, no, no. No. On nothing did I say the court -- I mean, the court has power and the parties have power by agreement on anything.

MR. ORSINGER: Well, then what's your problem? If the court can still order it, then what's the big issue?

CHAIRMAN SOULES: Well, I think that if you put in these provisions that are in 166(b)(3)(e) that tells the judge just what it can do I don't have a problem, but without that to just say, "Judge, under your general powers you can go beyond this if you want to do it," and all these rules are going to be appealed, and I don't think the trial judges are going to do it.

MR. PERRY: Will you accept a motion?

CHAIRMAN SOULES: Yes, sir. David Perry is going to make a motion.

MR. PERRY: I move it be

referred back to the subcommittee with instructions to see if the draft can be revised to accommodate the concerns expressed by Mr. Soules and Judge Peeples and Mr. Orsinger.

MR. LATTING: Well, aren't we just -- how are we going --

CHAIRMAN SOULES: Are we going to permit both or only depositions? That's really, I guess, the division.

MR. LATTING: I'm ready to -- we have talked about this for two hours.

MS. SWEENEY: Let's vote.

CHAIRMAN SOULES: Okay. How many want it only depositions? Show by hands.

MR. HERRING: What?

CHAIRMAN SOULES: Only depositions.

MR. LATTING: What now? In other words we vote --

CHAIRMAN SOULES: Just like this rule says. Just like this says.

MR. SUSMAN: Who is in favor of this rule?

CHAIRMAN SOULES: Who is in

favor of this rule?

MR. SUSMAN: So everybody in favor of this rule.

CHAIRMAN SOULES: 12. Opposed? 7. Okay.

MR. SUSMAN: That's great. No more work. Tomorrow we have the floor again? Here is my proposal for tomorrow. We begin tomorrow talking about interrogatories, go from interrogatories to request for production of documents, cover request for production of documents to supplementation, in that order.

CHAIRMAN SOULES: Okay. Say it again now.

MR. SUSMAN: Interrogatory rule, the document request rule, the supplementation rule.

CHAIRMAN SOULES: And the interrogatory rule is going to address the request for admissions, I guess, because internally it goes to that.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay. Is there anything else we can take up in about 15 minutes here?

MR. ORSINGER: I would like to get a clarification.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: The way this now stands the court has the elicit power to order reports, but there is nothing in the rule that says they can do it but nothing in the rules that says they can't do it; is that right?

MR. LATTING: That's right.

CHAIRMAN SOULES: That's right.

PROFESSOR ALBRIGHT: Can I make a motion?

CHAIRMAN SOULES: Yes. Alex Albright.

PROFESSOR ALBRIGHT: Would it make you-all happier, I move that in Rule 174 that we delete the word "only" where it says in the second line "A party may obtain additional discovery regarding the mental impressions and opinions held by the expert and facts provided to the expert by oral deposition." Instead of "only by oral deposition." I think the "only" may imply that the court would abuse it's discretion if

it ordered a report.

MR. SUSMAN: No. I don't think you want to do that. I will tell you why. No. I will tell you why we didn't. We do not want people using interrogatories. We do not want people using the interrogatory rule to circumvent this because an interrogatory could require a report.

MR. PERRY: Exactly.

MR. SUSMAN: I mean, "Please tell me everything your expert is going to say about everything." See, that's why we had that in there.

PROFESSOR ALBRIGHT: Okay. All right. Then I withdraw my motion.

MR. ORSINGER: Well, then I think the implication of that is that the court doesn't have the power to order a report.

MR. SUSMAN: No. It's not the -- I mean, if you want us to put a comment, we can. I mean, we need to make it very clear that the court has the power on all of these things. These are default rules that only operate in the absence of party agreement

or court order. I mean, we can put it in there again, but what we are trying to do is to avoid using the interrogatory rules as a means to getting the expert to say more or having other request rules, I mean document request rules.

CHAIRMAN SOULES: Okay. Anything else today? We will stand adjourned. We will be in this room in the morning at 8:30.

(Whereupon the proceedings were adjourned until the following day, as reflected in Volume III.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 15, 1994, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,162.00 .

CHARGED TO: Luther H. Soules, III

Given under my hand and seal of office on this the 28th day of July, 1994.

ANNA RENKEN & ASSOCIATES
3404 Guadalupe
Austin, Texas 78705
(512)452-0009

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
Cert. Expires 12/31/94

#001,750WW