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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 16, 1994

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 16th day of July, A.D. 1994, between the hours of 8:30 o'clock a.m. and 12:30 o'clock p.m., at the Texas Law Center, 1414 Colorado Street, Room 104, Austin, Texas 78701.

SUPREME COURT ADVISORY COMMITTEE
JULY 16 1994

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JULY 16, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Prof. Elaine A. Carlson
Sarah B. Duncan
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
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 Brister
Honorable Ann T. Cochran
William V. Dorsaneo III
Mike Gallagher
Honorable Clarence Guittard
Tommy Jacks
Franklin Jones
Thomas S. Leatherbury
Gilbert Low
Richard Orsinger
Anthony Sadberry

EX OFFICIO MEMBERS:

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

EX-OFFICIO MEMBERS ABSENT:

Honorable Sam Houston Clinton
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

(Reconvened at 8:30 a.m.)

CHAIRMAN SOULES: I'll be sending a sign-in sheet around so everyone can sign up as it comes by.

Steve, are you ready? Where should we go on this? Let's go to work, and we'll adjourn at 12:30 noon.

MR. SUSMAN: Rule 168, Page 12 of the July 11th draft. This is the Interrogatories to Parties Rule, and let me tell you about the key features.

The key features are that there are an unlimited number of interrogatories that require a yes or no answer. Two, there is a limit on other interrogatories to 30 in number, including discrete subparts, whatever that means.

Three, we wanted to get rid of that type of contention interrogatory that requires a party to marshal its facts, to essentially put out or put together a pretrial order early in the case; and use the contention interrogatory that requires more than a yes or no answer primarily as a vehicle to get more particular pleadings.

The fourth feature of what we did, which I do want some discussion on today because we are kind of in a quandary ourselves, is you will see that we do not have a rule on requests for admissions, the feeling being that you can get, through a yes or no interrogatory, the same thing you can get from a request for admissions. But there are some people who have said recently that there is an established body of jurisprudence on admissions, you should not throw that away, admissions are very helpful, and that the consequence of a failure to admit or deny something is more useful in litigation than a failure to answer an interrogatory.

So we will come back to -- I'm not skipping over it, I'm just kind of highlighting what I consider to be the four main topics.

Let's begin with Topic 1, and that is, does anyone have any objection to an unlimited number of interrogatories that simply require a yes or no answer?

MS. SWEENEY: One question. How do you determine which ones those are that

require a yes or no answer? Do you tell them, "The answers to these are intended to be yeses or noes"? Because I can see, you know, that often on the witness stand you think you're going to get a yes or no answer and you get several paragraphs.

MR. SUSMAN: Well, I think the answer would be, if it can be answered with a yes or no, it's a yes or no question.

MS. SWEENEY: Does it have to be answered yes or no?

MR. SUSMAN: No. I mean, a person can -- well, if you want to put in junk, if I send you an interrogatory that you can answer yes or no and you want to make a speech in response rather than put yes or no, you're welcome to. As far as I'm concerned, it doesn't count against my number of interrogatories because you could have answered yes or no. I mean, that's the theory in counting it against me. Now, what we are going to do to you if you make a speech, I don't know.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think that just

kind of opens the door and says you can send as many interrogatories as you want, because a clever lawyer is going to be able to word an interrogatory requiring a yes or no answer that cannot be answered with a yes or no.

MR. LATTING: I can think of some good ones.

MR. MARKS: Yeah, I can too. I mean, I think lawyers spend hours trying to do things like that with requests for admission. Why wouldn't they try to do that with interrogatories?

CHAIRMAN SOULES: Why are we doing this? Is that so you can eliminate requests for admissions and put this in the interrogatories? Why do this at all?

MR. SUSMAN: Well, the feeling was that it's to deal with the contention interrogatory issue: Do you contend that I committed a fraud by nondisclosure? Do you contend that you relied on it to your detriment? Do you contend that there was consideration? Was the consideration limited to "X"? I mean, the thought process was that -- and you know, law professors do come

up with exams now that are yes or no exams in law school. They're very clever and very good exams, too. It was our feeling that the questioner had to be better and cleverer to come up with a question that requires a yes or no answer. You had to give it a hell of a lot of thought and it doesn't take a lot of effort to answer. That was the theory.

CHAIRMAN SOULES: Why can't you do that with requests for admissions?

Paul Gold.

MR. GOLD: I've probably spent as much time drafting clever requests for admissions as anyone around, and judges hate clever requests for admissions. No, you cannot get that through requests for admissions. I've tried relentlessly to get admissions to contentions, and the objection is that that's not the province of requests for admissions, even though the rule was amended in, what, '84 to allow requests for admission on anything within the scope of discovery. Still, all the responses I get cite the old cases that say, you know, requests for admission aren't to be used for

this, they aren't to be used for anything but to admit or deny the facts or the authenticity of documents.

And one of the reasons why we did this is, as Steve was saying, that we wanted to get away from the contention interrogatory, "State the complete factual basis for your claim that this, this and this," or whatever, but at the same time allow a simple mechanism without a lot of preexisting baggage adorning it that would just allow someone to say, "Yes, I'm contending that you violated 1746(4) or 1746(5); yes, I'm contending this; no, I'm not contending that."

And it's a different concept than "I admit this. I admit I did this. I admit I did this. I deny I did this." It's not an admit/deny thing, it's just identifying what the issues are in the case. But it's not admitting or denying anything.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: The problem with contention interrogatories is not with stating the contention, the problem is stating each

and every fact upon which you base the contention. That's what needs to be stopped.

MR. GOLD: The other problem with that was that everybody was frustrated with contention interrogatories and thought that it required a tremendous amount of attorney time having to answer "List all the contentions." And what we thought is that it would be much simpler for someone merely to say, "Are you contending this?"

"Yes, I am."

I mean, you can answer yes or no to a whole number of interrogatories in a very short period of time without having to waste a lot of time and money drafting very precise responses or very calculated responses or responses that protect you a hundred ways from Wednesday. You just say, "Yes, I'm contending this. No, I'm not."

The whole idea was not to avoid the contention issue but to make it a lot easier and a lot more efficient in answering it. The person that's responding doesn't have to waste a lot of time and the person that's requesting knows what the issues are then, and you can

ask any number you want.

MR. MARKS: This goes beyond contention interrogatories, though.

MR. GOLD: That's right. You can ask yes or no to your heart's content.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, I would like to say that I hate contention interrogatories. I hate answering them. But I hate answering them because they're so pertinent. It's not because their impertinent, it's because I'm scared I'm going to leave something out.

CHAIRMAN SOULES: You're tying yourself down.

MR. LATTING: I'm tying myself down, is the real reason I hate them. And the fact of the matter is there's nothing complicated at all about somebody saying, "Tell me all the reasons you're suing me." That's what my clients want to know when they get sued, "Why is this guy suing me? Why don't you ask him?"

I say, "Well, we can't find that out." We can file special exceptions and we can set

hearings, but we can't just ask him and have him tell us.

And I guarantee you that by asking interrogatories that can be answered yes or no I'm going to get stuff from lawyers that I'm against that I'll never be able to answer yes or no, because what they do is they'll swerve right up against what I'm contending but they won't state it quite right.

They'll say, "Are you contending A, B, C, D and E?"

And I'll have to say, "Well, yes, except that as to E, it's not really E. What I'm contending is" -- and then I'll have to write a little essay about that, and then I'll object to it and say, "Only to this extent do I say yes," and put the usual stuff.

So we're not solving the problem here, we're just moving it down one more tier, I think. I mean, the question is, we had a meeting here several times ago where I thought we had a discussion that said one of the things that was fundamental -- in fact, it was the Richard Orsinger that made the point; I wish he were here now. He said that you ought

to be able to find out why somebody is suing you. At some point you need to come down to the lick log and say, "Yeah, this is everything I know about that you've done wrong. I think you've done A, B, C, D, E and F and there's nothing else that I'm contending, and I want to know the same thing from you."

So I don't think we're saving any money by addressing it this way.

CHAIRMAN SOULES: Steve Yelenosky, you had your hand up?

MR. YELENOSKY: Yeah. If we do this, why is it important that it be unlimited? I think an aspect of it being unlimited is that you're going to get a lack of precision and they're just going to ask the same question 15 different ways. And although it doesn't take long to answer what is purportedly a yes or no question, as Joe points out, it often is not -- it may take some time to figure out whether you can answer it yes or no, and I think that putting some limit, whatever it is, encourages some precision.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Well, I think our feeling, again, is that it is so hard to ask those questions to get any useful answers that it will not be a vehicle that will be used very much, and that if it is used, that it's not a vehicle that requires much effort to respond to. A yes or no is -- I mean, it is shooting with a rifle for sure, but I think it's shooting with such a rifle that you may never hit anything and that's why it won't be used very much, but that was just feeling.

I mean, maybe it's best to kind of skip down to see how we deal with contention interrogatories and come back to the yes or no thing, I mean, because they're related.

CHAIRMAN SOULES: Okay. Well, David Perry had his hand up. David.

MR. PERRY: I would just throw out the comment that I think the rules should make a very clear distinction between interrogatories that are asking about specific facts, pieces of data, versus contentions. I personally think that interrogatories that ask for a specific piece of data like social

security numbers and addresses and the doctors that people have seen and that sort of thing which can be answered without the intervention of the lawyer generally, by a paralegal or an investigator or someone like that, are a very efficient means of discovery and should be unlimited in number.

I think that contention interrogatories need to be limited strictly in number, and I think that what Bobby Meadows said, that if you have somebody state their contention with reasonable specificity, the same that they would in pleadings, don't require them to marshal their facts, make them do that right away -- and one of the provisions that's somewhere else in these rules, it comes out of some of the Task Force discussions, that I think is very important is the requirement that you're not supposed to be able to get out of answering these by saying, "Well, it's not time for me to answer it yet because I haven't done discovery."

A plaintiff, for example, needs to answer the contention interrogatories at the beginning so that the defendant knows what

he's having to respond to. I think that we could draw a more clear distinction between interrogatories that go to factual data and contention interrogatories and then have the factual data be unlimited in number but have the contention interrogatories be relatively limited.

MR. SUSMAN: Let me invite people to look at No. 4, 168(4), and also invite you, if you can do better than this, to do better and send us a draft as quickly as you can, because we wrestled with that language a whole lot, and with it goes the note on the following page.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: Let me follow up on what Steve is saying there. Everybody remembers from first year of law school procedure going through and trying to figure out the difference in substance and procedure and ultimately concluding there was no difference in substance and procedure. Well, that's the same problem with contention interrogatories. This room could not define

what a contention interrogatory is, if we undertook that task, and separating out what's a fact interrogatory from what's a contention interrogatory is very difficult. We know it when we see it, but if you tried to draft a rule to do it, it would be very difficult.

If you had a rule that said we will outlaw contention interrogatories, you would find yourself outlawing very reasonable questions that have been asked for hundreds of years that you want to continue asking. If you say we're going to limit contention interrogatories, you have to be able to define what a contention interrogatory is in order to apply the limit and you're going to have trouble coming up with a definition of contention interrogatory. So it's an easy problem to agree on in principle; it's an extremely difficult problem to come up with a rule.

So that really was our best shot at the bottom of Page 12 after a lot of work, and it's a tough problem.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Two points. Number one, I want to second what Steve Yelenosky said a minute ago, which is I have a real fear about allowing anything to be unlimited in number. We've talked about the young associate that's just been sent off to the library to do a bunch of work and I can just see him coming up with hundreds of these unlimited interrogatories.

The second is more of a question. I'm wondering how much of the problems that we're dealing with here are related to the fact that we've got noticed pleadings that can be amended at will to trial, and I'm wondering also if it would be fruitful to look and see what other states have done. I mean, really, if the problems we're having in discovery are related very much to our pleading practice, maybe we need to take another look at that. But I just think the intelligent way to handle this is to see what other states comparable to Texas, I'm talking about big industrial states with a lot of litigation, how they handle these problems, because we're not going it alone here.

CHAIRMAN SOULES: Most states follow the federal rules.

HONORABLE DAVID PEEPLES: Well, you sure can't amend at will in federal court.

CHAIRMAN SOULES: That's right. But most state practices practice under rules that are identical to the federal rules.

HONORABLE DAVID PEEPLES: For the last 10 minutes here we've been dealing with the problem that is caused by the fact that pleadings don't mean very much.

MR. LATTING: Yes.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: We're trying to fix an insufficient pleading problem with a discovery tool, and in my view that's why contention interrogatories, one, are so burdensome; and two, have never worked very well. If my pleadings are sufficient to tell you what I'm suing you for, then you're just imposing make-work on me with contention interrogatories, which frequently happens. If my pleadings are insufficient, if I don't put it in a pleading, I'm probably not going to

tell you in a contention interrogatory.

MR. MARKS: Well, what if we do something that --

CHAIRMAN SOULES: Excuse me. The idea of contention interrogatories came really into the rules in 1984, and the debate of this Committee at the time was that it would enable the parties to use the interrogatories as a substitute for the special exception practice that calls for -- that required the engagement of the court or the judge. It hasn't worked. That was the purpose of it, and it didn't work.

So maybe what we ought to do is just back the whole thing out and recognize that it didn't work and go back to the special exception practice and pleadings. That's the background of this, for whatever it's worth.

Doyle Curry.

MR. CURRY: The pleadings in federal court are less specific than they are in the state court. There's almost nothing in the pleadings. You find out in the interrogatory system. And the interrogatory process in the federal court is not as onerous

as it is in Texas on the state docket.

CHAIRMAN SOULES: How so? How does it differ?

MR. CURRY: Well, you've got a limit on the number; just the way they ask the questions, it's just a different practice.

And while we're on this subject, every time something comes up about the federal system, everybody says, "Oh, no, no. We don't want that because it's federal." But wouldn't it be nice if lawyers not only didn't have to shift gears but didn't have to change vehicles going from one court to another but had some similarity between them? I mean, I'm too old to learn any new stuff, I guess.

CHAIRMAN SOULES: Okay. Paul. We'll go down the table.

MR. GOLD: It has taken an incredible number of years to get away from the specific pleading process that we had in this state. And I believe when this came up, Justice Hecht was in one of our meetings and he grimaced when the issue about going back to specific pleadings came up. I don't think there's any inclination on anybody's part to

return to that. If we did, I'd want to immediately attach to it that the defendants would have to specially admit or deny each allegation, which I don't think they want to go to in that situation either.

But the issue here, and I think that it's a very clean, very efficient way of addressing the problem, is that you have noticed pleading, and what you're trying to do is avoid a tremendous amount of wasted time and energy expended by attorneys. Because the clients don't answer this stuff; this is totally an attorney deal.

And if we return to a special exception practice, that's a tremendous waste of time. You go to the court, the court doesn't want to hear them, you amend the pleading, you amend the pleading five or six times until you get the specificity the other side wants.

With this, someone can send you a question, "Are you contending this?"

The attorney is the one that's answering it "Yes, I am," or "No, I'm not." You can keep refining it.

And as to Paula's question about whether

you can answer it more expansively, yes, if you want to, you can, but you don't have to. All it requires is a yes or no. And we thought that that was a very clean way and a very expedient way of helping the two sides identify what's an issue and what is not.

And what we wanted to definitely get away from was this thing about state all the facts that support your contention, identify all the documents that support your contention, and identify all the individuals with facts relevant to your contention, because that is definitely an invasion of attorney work product.

And similarly, you start -- and one of the things we asked in the committee is when you start asking what facts support your contention, so what if what a party says supports their contention or not. If it's a fact and on appeal it happens to support the point, it's going to support the point whether they thought it supported it or not, if it's a fact in evidence. So what an attorney thinks supports a point or not really is not very germane to the discussion, so I don't think it

takes away from anything. I don't think it causes anybody undue work. I think it's a way of efficiently identifying more specifically what the issues in the case are, and that's why I would support it.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I was just going to say that I think we need to keep in mind what we're trying to accomplish. Before 1984, people used to get interrogatories, give them to your paralegal or your investigator, and say, "Get me the answers to these." They would come back, you would look them over, they could be signed and sent out, and it was not a burden on the system. And part of what we need to accomplish is to try to get back in that direction.

Now, the change that was made in 1984 to allow contention interrogatories, as you say, was intended -- or it is intended to substitute for a special exception. An interrogatory that simply says, "List the acts of negligence that you're claiming," or "Set out the way in which you claim the design was defective," that's going to require some

lawyer time, but it's not unfair, and in some way or another we need to keep that.

But we need to outlaw the kinds of things which we're talking about where you have to marshal your facts. And marshalling the facts may be the best way to say that or perhaps there might be another way, but I think we need to keep our eye on the ball; that we need to allow for the discovery of facts and limit the amount of lawyer time that is required to respond to the discovery of legal theories, because except for getting the pleadings in effect down to what you get on a special exception, discovery of legal theories is one of the great time wasters in the system and one of the great burdens on the system.

CHAIRMAN SOULES: Well, the second piece of that, too, was that there was a feeling that there should be some way to smoke out the legal theories other than by summary judgment, which there wasn't a vehicle to do that before '84, so that was kind of another piece of this contention thing. And that probably hasn't worked either, but that was one of the notions behind that.

Joe, and then I'll get to Steve.

MR. LATTING: Just a short reply to what you said, Paul. I agree in general with what you said, and I agree with what you say, David. The problem with what you said, Paul, is this: You said that a fact is a fact if it comes in evidence whether it was listed in response to a contention interrogatory or not, and that's true.

The question is, does it come in evidence? The fear I have is that I get a contention interrogatory that says, "Tell me what facts you're relying on to prove this theory," which is the central theory of my case, and I list A, B, and C. I then get to the courtroom and I start wanting to prove A, B, C and D and there's an objection. And the objection is that it was not listed as one of the facts relied on to prove the theory and it's not admissible for any other reason, so there's a motion to exclude.

And so when I answer these questions, I'm going to have to be extremely careful to make sure that I list everything for fear of not getting this admitted.

Now, am I off the mark here somewhere?

MR. GOLD: No, no, no. That's a problem. I'm grimacing because I'm hearing what you're saying and I'm trying to think.

CHAIRMAN SOULES: But isn't that what this is intended to solve?

PROFESSOR ALBRIGHT: That's exactly what I was going to say. The problem is not that contention interrogatories as a vehicle are all that bad. It's a way to get more detailed pleadings, and there has to be a way to get more detailed pleadings either by special exception or discovery and you just decide whether you want it to be a pleading practice or a discovery practice. But having it be in discovery practice is not the problem. The problem is the exclusion rule.

MR. LATTING: That's right.

PROFESSOR ALBRIGHT: We have this automatic exclusion rule where if you forget to put E down, then it gets thrown out and so you're screwed at court. Where then if you get to our -- and before the end of the day we're going to talk about our requirement of response and supplementation and then what

happens to you when you don't make a full response to supplementation, and I think you will find that you're not going to have this problem under the regime we have here.

Number one, you can't ask a question that makes you marshal the facts; and two, if you forget to list a fact, under our supplementation and response rule, if you have given that information through any other discovery or in writing, then you're okay. You know, again, it's a notice concept instead of "Have I marshalled every piece of evidence in the right place?" eight zillion times.

CHAIRMAN SOULES: Do you have a comment, Sarah?

MS. DUNCAN: Well, I just want to say that I don't think exclusion is the only problem with contention interrogatories. Certainly that is a by-product and it is a problem, but to me the biggest problem is the amount of time that a diligent attorney is going to take answering these things.

And I would like to, I guess, echo Doyle. I think pleadings in federal court work great. 12(b)(6), if you don't have an

element of your claim in your complaint, you get noticed that you're going to get dismissed unless you amend to fully state your claim.

PROFESSOR ALBRIGHT: But you don't -- except if you read the 12(b)(6) cases and the motion for more definite statement cases, the motions for more definite statements get granted only when you cannot figure out what they're claiming. In other words, the pleadings are so bad that you can't tell what's there. And in federal court, when you go to trial, you're not going to trial under your pleadings; you're going to trial under a pretrial order that has very detailed allegations in it, so it's a completely different system than what we have.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Mr. Chairman, could we -- I would like to take a vote now on whether people would like to outlaw contention interrogatories entirely. If you vote in favor of this, you make the subcommittee's work easy, a lot easier than it has been.

PROFESSOR ALBRIGHT: Do we have the drafts?

MR. SUSMAN: No. We outlaw them. Just say you cannot ask a contention interrogatory, okay, which is what we have -- we have not outlawed them, we have just tried to restrict them, right? But we could put in here, "Contention interrogatories will not be allowed."

CHAIRMAN SOULES: This is just a --

MR. SUSMAN: It's a straw vote.

CHAIRMAN SOULES: This is just a straw vote. It has no meaning.

MR. SUSMAN: Yet most people think that -- just give us some direction.

CHAIRMAN SOULES: I think we want to find out whether this is something we need to keep talking about. If it's obviously so one-sided, we probably don't need to talk about it.

MR. SUSMAN: Yeah. I mean, if people really want to get rid of contention interrogatories --

CHAIRMAN SOULES: How many feel that contention interrogatories should be eliminated?

HONORABLE F. SCOTT McCOWN: Could I ask a question before we vote?

CHAIRMAN SOULES: How many feel that contention interrogatories should be eliminated entirely?

How many feel they should be retained?

MR. PERRY: Do you mean retained entirely or to some extent?

CHAIRMAN SOULES: To some extent.

Okay. I think we still need to continue talking about it.

MR. SUSMAN: Now, look, please, rather than in a vacuum, look at No. 4, the language we have elected, when coupled with the footnote on Page 13.

CHAIRMAN SOULES: Steve, could I ask a question for clarification? The format that you have proposed here, is that dependent upon an unlimited number of interrogatories or not?

MR. SUSMAN: Oh, no, no.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: This kind of contention interrogatory that we're talking

about, one that requires other than a yes or no answer, is within the 30.

CHAIRMAN SOULES: No. I'm -- does your format -- is it relying upon an unlimited number of yes or no questions?

HONORABLE F. SCOTT McCOWN: No. It's in between --

CHAIRMAN SOULES: Because if it is, I don't think this Committee is going to go with that.

MR. KELTNER: No, no. Our scheme will work if you --

MR. SUSMAN: Take out yes or no questions, if you want to.

CHAIRMAN SOULES: I'm trying to engage the conscience of this Committee. Yesterday we decided that unless you get some special court order you can't find out what an expert is going to testify to at trial without taking his deposition. You know, we're going to go tell the public whenever we get done here that we're saving them a hell of a lot of money in discovery. Now we're talking about that the second thing we're going to tell them is that "And we're going to save you a lot of

money by giving back unlimited interrogatories." You know, we can't be moving in the wrong direction if that's the wrong direction. Maybe it's the right direction.

MR. SUSMAN: They don't have any -- okay. You can eliminate yes or no interrogatories entirely; you can put them in requests for admission; you can limit the number of requests for admission. I mean, these are all possibilities.

CHAIRMAN SOULES: Or you can count them in the 30.

MR. SUSMAN: Or you can count them in the 30.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Right now the thought was that 30 -- the limit of 30 should be on those that really require textual answers, I mean, you know, where someone has got to write a narrative, someone has got to write something or get some information. I mean, that's the kind of -- but in any event, Item No. 4 is designed to apply -- I mean, Subsection 4 -- to apply to those

interrogatories that will be limited in number and that come within the 30.

And the question before the house is, can you think of a better way to preserve contention interrogatories and yet eliminate what you find obnoxious in them? That's the issue before the house.

MR. LATTING: Is there something wrong with doing what Alex said, which is to say that -- or someone suggested, which is to say that -- or make a prohibition against marshalling evidence?

MR. SUSMAN: That's what we do. Okay? I mean, that's what we are trying -- I mean, look at -- read -- take five minutes, you all, or three minutes and read No. 4 and the footnote. Just see if we've got it.

HONORABLE F. SCOTT McCOWN: Let me make a suggestion. If you look at the bottom of Page 12 at No. 4 that Steve has called your attention to, just take out the words "that require more than a yes or no answer." This yes or no business was a bell and whistle we thought of that's causing you

all trouble. Throw it out a minute and just read, "A party can use contention interrogatories only to request another party to state the factual and legal theories upon which that party bases particular allegations. The answer to such an interrogatory shall provide information sufficient to apprise the requesting party of the positions the answering party will take at trial. A party need not marshal its proof to answer the interrogatory but need only disclose more precisely the basis of its pleading."

The question is, does that do the job we all agree needs to be done? If not, what can possibly do the job better, because we couldn't come up with anything that did it better than that that didn't also do a whole bunch of things that we agreed we didn't want to do.

CHAIRMAN SOULES: I think there's a problem with the second sentence, and I think that -- what does "position" mean? Is that whether he's going to stand or sit or stand behind the lectern? I mean,

that's obviously facetious, but you're really talking again about legal or factual theories, aren't you?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay. Well, say so.

HONORABLE F. SCOTT McCOWN: I think we say that exactly in the first sentence.

CHAIRMAN SOULES: You do. Why not say it again in the second sentence if you mean the same thing?

MR. MARKS: Or eliminate the second sentence.

CHAIRMAN SOULES: I think the second and third sentences are reversed, but that's a matter of draftsmanship there.

MR. LATTING: And Scott, do you need the "but need only disclose more precisely the basis of its pleadings"?

CHAIRMAN SOULES: I think so, because I think that takes us back to the pleading concept. It's saying really what we're talking about here is getting your pleadings clarified. It's not marshalling the

evidence.

MR. SUSMAN: Okay. Could I ask this, so we don't spend a lot of time drafting in this session, will you all take a look at this carefully and come back? If you've got some ideas on the plane, just write them on your copy and send them to me or Alex so we'll have these various drafts before us. We're trying to do what you all want. I think everyone understands what we're trying to do, it's just that we have had a hard time with the language of this, so just give us whatever input you've got.

CHAIRMAN SOULES: I think this makes a lot of progress. I think it's getting at the problem, the marshalling the evidence problem.

Judge Peeples.

HONORABLE DAVID PEEPLES: It is not clear to me what "factual and legal theories" refers to. Can somebody flesh that out for me?

MR. MARKS: What's a factual theory, is that what you mean?

HONORABLE DAVID PEEPLES: Fraud

is a legal theory of recovery of defense. Bad faith is a cause of action, a legal theory, a ground of recovery. What's the difference between a factual and a legal theory? I mean, I understand the notion of facts which support a legal theory. I can understand asking someone to list the elements of your theory of recovery of defense, but this factual or legal theory just doesn't --

PROFESSOR ALBRIGHT: Well, I think "factual theory" is intended to mean a set of facts under which you claim your legal theory.

MR. MARKS: Your factual basis.

PROFESSOR ALBRIGHT: Your factual basis, right.

MS. DUNCAN: That's marshalling your proof.

CHAIRMAN SOULES: It's not. It's the basis.

PROFESSOR ALBRIGHT: But it's a general statement of it. It's not "I claim you committed fraud because you did this or you didn't do this or you did that."

MS. DUNCAN: But you all aren't the ones answering the interrogatories.

MR. PERRY: Well, all we're trying to say is that you can be required to state the factual basis of your claim but you cannot be required to detail the evidence which supports that claim.

PROFESSOR ALBRIGHT: Yes. See, that's a hard drafting problem, which is you don't want to say, "You don't have to state any facts at all," because I think we do want general statements of facts because pleadings contain statements of facts. But we don't want marshalling of proof, so how do you phrase that to get it to come out the right way?

HONORABLE F. SCOTT McCOWN: We used the word "factual theory" for a reason, rather than "factual basis," because we wanted to try to indicate we're talking about a level of abstraction. Factual theory: OJ is a wife beater and slashed his wife's throat. Factual basis: The glove at the scene, the knife, et cetera, et cetera, et cetera. So we wanted to use a term that took it to a level of

abstraction and gave you notice without indicating that you had to list specific facts or specific pieces of evidence.

And "factual theory" is actually a term that you do find in the federal case law. I mean, it's not -- we're not making that up out of --

CHAIRMAN SOULES: Let me say that --

PROFESSOR ALBRIGHT: And there are also some Texas cases that use factual theories. There are the old, specific jury question cases. They talk about factual theory.

CHAIRMAN SOULES: If we look at the dynamics of this for a minute, what I'm thinking of is writing something here that says that you cannot exclude evidence for failure to respond to contention interrogatories or failure to respond completely. If we said that, you still would be able to use the answer on cross-examination. You still would be able to exclude the evidence if the evidence was not within the pleadings. Now, that's the basis

for excluding evidence, so if you've got pleadings that would support evidence not disclosed in the answer to a contention interrogatory, it gets in but you can still cross the witness. The party is the only one that's bound by the interrogatory anyway. You can still cross. So what would be wrong with just saying that the answer to a contention interrogatory cannot be used as a basis to exclude evidence? Objection, lack of pleadings, it's out.

PROFESSOR ALBRIGHT: We had that sentence in there at one point and we took it out, I think, because if there is a situation where a party claims they don't have notice --

CHAIRMAN SOULES: The pleadings serve as the notice. You go back to the pleadings. Isn't that right?

PROFESSOR ALBRIGHT: I think what we decided was we would rather go back to our response and supplementation rule and the exclusion mechanism there instead of having a separate one for contention interrogatories.

HONORABLE F. SCOTT McCOWN:

Well, Luke, I can tell you what our thinking was. I don't know if it will be a satisfactory answer, because I think you've got a good point, but what we were thinking was, the problem with pleadings is that it's hard to get judges to enforce them; it's easy to amend them right in the midst of trial. And what the judge says when you come down on special exceptions, as I always say, is "Get that through your discovery and don't bother me."

And so if you had a rule that said this discovery cannot serve as a basis for exclusion, then the lawyers aren't going to be very careful about getting it answered. And if they leave out an entire cause of action, then you haven't accomplished what you wanted, which was an effective way to make -- to get the allegations, an effective way to tie them down with a more specific statement. So we didn't want to go quite so far as to say this won't ever be the basis for defining the issues at trial. Instead we wanted to try to make it easier to do rather than take out the enforcement mechanism entirely.

CHAIRMAN SOULES: Conceived as a useful tool and promulgated as a rule to be a useful tool, contention interrogatories became the subject of abuse by lawyers. Eliminate the tool. That's the consequence. If they had used it right, it would still be there and it would serve a very good purpose, but it is used abusively and it's used so abusively that that abuse is not worth the cost of retaining the tool maybe.

John Marks.

MR. MARKS: Thank you. I hate to keep bringing up the Rules Committee, but the Rules Committee addressed this question by making that part of the mandatory disclosure that's made upon request, "What are your contentions and what is the factual basis"? If you all recall, under the Rules Committee's perception of this, all you had to do was write a letter, "Please make certain disclosures under Rule 166(b)," and the lawyer was then required to do that.

One of the requirements was to disclose your contentions and the factual basis for them. Now, it may have been a little bit too

detailed for people as written, but it seems to me that would be a good way to do it, and then you get away from this idea of sending 100 interrogatories asking what the contentions are.

MR. SUSMAN: Well, John, that's a good point, but what language do you use? See, we need to get -- it doesn't matter whether you have to voluntarily do it or you have to ask for it. We are still struggling with the language.

MR. MARKS: But you have made the problem worse by saying you can ask contention interrogatories ad nauseum, ad infinitum.

CHAIRMAN SOULES: Well, that's on the side for right now. Okay? And I think the Court Rules Committee has done a huge, big job and they've got a lot of good ideas and we do want to hear them every time that you think they're germane or anybody else thinks that they're germane to our discussion, because that work product is very valuable; it's huge.

MR. SUSMAN: That's why I'm asking you, is their language different? How

does their language compare to ours?

MR. MARKS: Well, it contains some of the same problems, Steve. I mean, it would require work. But the thing about it is that it's something that a lawyer would have to do without being asked the questions. One of his responsibilities would be to provide the theories upon which you're suing, the theories upon which you're defending and the factual bases for those.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Now, I believe this came up at the last meeting as well, and I merely want to get it on the table because it is a concern, and that concern is that you'll be -- that an attorney, however it's required, either by disclosure, by special exceptions or by interrogatories, will be forced to disgorge every fact that that attorney believes supports the contention. That would then have to be set out in the answer to interrogatory, the disclosure form or the pleading, which will then immediately be used as a summary judgment device.

And the admission by the Rules Committee

last time was that that was their intent, was to set it up so that a person would be required to set out their complete legal theories and the factual bases for those legal theories so that it could then be used as a summary judgment tool and wipe the case out right there, and that's what everybody is concerned about.

It's not just the expense, it's not just the time of the contention, it's the fact that if you don't set out everything in exquisite detail, someone is going to kick your butt out at court and you're not going to be trying cases on substance, you're going to be engaged in all this gamesmanship over how minutely you set out the facts to support these contentions.

I don't think anybody has any problem really with an attorney at some point setting out in either interrogatories, pleadings or in a disclosure letter what the contentions are and what their theory is for that, but I think what everyone is concerned about is the complete exposure of the attorney's trial process, having to give to the other side the

complete blueprint of how they think that the case sorts out and then if they don't set out one point, they're going to get a summary judgment on that point and not get to try it, and I think that's what the concern of a lot of people is on this issue about the contention interrogatory.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: I just have two points. When Luke talked about, you know, how this came in as a tool in 1984 and it's been abused and why don't we just eliminate the tool, that has a lot of attraction to it. But the problem it leaves us with is that it came in in 1984 as a tool to address another problem, and that was that pleadings weren't giving us enough information; special exceptions weren't working and were expensive. And if we eliminate the contention interrogatory, we then have to go back to the problem we had that they were designed to address in the first place, which is, as Judge Peeples said, the pleading problem.

And so what we were trying to do, rather

than throw out the tool and be stuck with the problem it was originally designed to address, is try to figure out how to fix it and make it work.

The other problem is that it's a monster that's been created that I question how do you kill it, even if you want to eliminate it. You can't define contention interrogatory. If you say there shall be no contention interrogatories, that's going to knock out a ton of interrogatories that you don't want to knock out, so I don't know exactly how you kill this monster. That creates the same problem that we've got today, which is defining it and nailing it down and driving a stake through its heart.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, Steve, you know, I sympathize with the difficulty in writing this rule. I don't think I could have done as well, much less any better.

But one thing I wanted to tell you that we shouldn't duck is this: What happens if an attorney does not respond properly to a contention interrogatory? Does he or does he

not have that evidence excluded?

MR. SUSMAN: Answered.

MR. LATTING: And I think that this Committee has to cross that bridge at some point.

MR. SUSMAN: Crossed.

MR. LATTING: Okay.

MR. SUSMAN: It's on Page 7, Rule 166e(5)(a) and (b), and this is a general rule that the subcommittee has adopted. "If a party deliberately or with conscious indifference to its duty under these rules fails to disclose information in discovery," including answering contention interrogatories, it's just like anything else, "the court may exclude the information not timely disclosed. Exclusion is not a favored remedy and shall only be done when the circumstances clearly warrant it.

"When exclusion is not an appropriate remedy, but a failure to disclose as required by these rules may create a significant risk of an erroneous fact finding, the court shall continue the hearing to allow the opposing party to prepare to confront or to prepare to

use the previously undisclosed information. When appropriate, the court may impose the expense of the delay, including attorney's fees and any difference between prejudgment and postjudgment interest, on the party that failed to disclose."

That is our solution. I mean, if you're deliberate or indifferent, consciously indifferent or recklessly, whatever, consciously indifferent, you're going to lose it, whether it be contention interrogatories, a document that should have been disclosed or whatever. But if it's not deliberate or consciously indifferent, then the court asks, "Well, is this going to really likely lead to an erroneous fact finding if I let the trial continue?"

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Yes. You know, we're operating from a premise that the parties need each other, by pleading or discovery, to map our cases out, and I don't buy that premise. I have never yet gone to trial as a plaintiff where I had a road map

from the defense of what they were going to say, who was going to support it and what their theories were. And I don't believe that any person who is trying a lawsuit actually needs that. We may want it. It may be a delightful thing to be able to force the other side to give us, but I don't think that -- I think we're buying into something here that we don't need to buy into.

And I don't think you need contention interrogatories to spell it out, nor do you need checklist pleadings. If you know you're going to trial because you represent the person who was driving the car that hit the other person, I don't think that you need to know that that person is going to bring the following witnesses to say the following things that support the following theory about whether or not you were looking at the red light or had your brakes on or whatever.

So you know, I think we need to question that underlying premise which is creating a tremendous amount of expense and friction and everything else as people try to ask their opponents, "Tell me what you're going to say

so I don't have to react to anything at the courthouse."

The second thing is, to follow up on what David's point was, how do you define a contention interrogatory. I think if we start from the framework of trying to kill it, as Judge McCown said, if you want to kill the contention interrogatory, it seems to me the difference is -- if you're trying to find out stuff, if you're trying to find out who are the people, what are the documents, you know, give me discovery that I need, identify these things that in large part the client can do or that involve gathering materials and providing them, that's one thing. If the lawyer has to sit down and then marshal the materials and create theories and legal argument and analysis to answer the interrogatory, that's when you're shifting over away from getting discovery to creating a road map or a script of the trial. And I think that distinction can be made in large part if we start to think down that line of abolishing contention interrogatories, which do need to be abolished.

But it makes no sense to me that we're sitting here acting as though we need to be scripting our trials through discovery or pleadings. We don't. And we should not be imposing that on people; that's what costs money.

CHAIRMAN SOULES: Sarah, did you want to respond to that?

MS. DUNCAN: I want to second that, and also say that part of the problem that I've had with supplementation, and I don't think this rule addresses it at all, is that not only are we trying to script it, but we're having to script it in like -- it's not enough that all these facts come out during depositions, because nobody is required to listen to anything that goes on in a deposition. It has to be in writing in an interrogatory answer, and that in my view is wrong. If you can't listen at a deposition, if you can't look at your own documents, that's your problem. It should not be mine.

CHAIRMAN SOULES: I would identify that as part of the law of unintended consequences. I don't think anyone really

ever intended that to be a consequence of the rule of exclusion, that if something was fully developed in a deposition but it didn't happen to find its way into an interrogatory answer that it shouldn't be used at trial.

MR. SUSMAN: It's in our rule. 166e(3) makes it clear that if it's learned during a deposition, it's learned.

CHAIRMAN SOULES: That's good. I think that's a very positive contribution.

MR. SUSMAN: Can I ask --

CHAIRMAN SOULES: Yes, sir.

MR. SUSMAN: I mean, in the interest of moving along, because we have a lot of cover, I mean, I understand what you all are saying and the feedback I'm getting is that we should limit it in some way. The language we have may not be perfect and you all are going to take a look at it and send us better versions, but I don't think we have the votes here to outlaw contention interrogatories, nor do we have the votes here to leave them as they are without some restriction.

MR. MARKS: Can I make a

suggestion?

CHAIRMAN SOULES: John Marks.

MR. MARKS: Maybe part of the problem is that under the present rules somebody else is asking you a question about what your contentions are and framing that question the way they want to frame it.

What if, on the other hand, you go as the Rules Committee has gone and make it a thing that's required just to give notice of what you're alleging and what your general factual basis is in your own words, the way you want to do it, without responding to some interrogatory that tries to pin you to the wall.

MS. DUNCAN: That to me is what a pleading is. Here is my statement of my case.

MR. MARKS: Well, sometimes pleadings don't quite get that. But if the interrogatory -- you know, part of the discovery that you have to make early on is basically that. Then with that --

MR. SUSMAN: Let me ask you this, the State Bar Rules Committee --

MR. MARKS: Yes.

MR. SUSMAN: -- if we adopted your voluntary disclosure, what you want disclosed at the front end, would you be willing to do away with contention interrogatories? Is the defense bar willing to do away with contenetion interrogatories altogether, or do they want both? Do they want their cake and eat it too, or are they willing to give voluntary disclosure --

MR. MARKS: Look, I'm only John Marks, I'm not the defense bar. I can't answer that. I think that that would be good. In fact, that would be fine with me, but I don't know how they would react to that. I know that in the way that the Rules Committee has done it, there's some defense lawyers on the subcommittee that helped draft those things that I think envision that that would be an interrogatory that would not necessarily be included.

MR. SUSMAN: I think that maybe, I mean, you know, if we got some kind of consensus here that all I've got to do is give you some bullshit at the front end about

my theory of damages, like you ask here, and you don't ever come at me with another contention interrogatory in your life during the case, I would go for that. But if it's going to be both now --

MR. MARKS: You don't make it easy, Steve.

MR. SUSMAN: Well, I never said I would. I mean, the notion is -- I mean, I think the problem is if people -- if we allow these disclosures to occur once early in the case, voluntary disclosures, but you didn't have to keep jacking with it during the next six or eight or nine or ten months or modifying it so it was not this living pretrial order that --

MR. MARKS: Well, it seems to me that maybe that would work, Steve, because it seems to me the problem is, for a defense lawyer, I want to know what this guy is going to try to prove against me in court, I want to know it early on, early enough so that I can do my discovery on those things. And once I'm set on that crack and I know where they are headed, then I know where I need to go. And

basically that's what the contention interrogatory is for anyway. But to -- enough said, so maybe so. I'd have to check with the, quote, defense bar on that.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: We're in horrible danger of making progress here and I think we ought to pay attention to it. We've really only got three issues that I think, if we got input from everybody, we could solve the problem.

The first issue is one that we haven't discussed very much, although Paul and I think Steve just touched on it, and that's the issue of timing and what the consequences are to answering one of these. Paul's concern, of course, is that it would be used as a summary judgment tool. Quite frankly, that doesn't offend me very much, because if you had an obligation to plead the case in the first place and you're not having to disclose all the factual matters, just basically legal theories and a summary of the facts, I think that's good enough up front.

Now, it's interesting that under our current rule, contention interrogatories, you can ask under 166b under the preamble for those to be answered later after you do certain discovery. I'm not sure that's wise, nor do I believe that it is currently used very often, but that makes sense.

The second thing is I think that we ought to leave it in terms of an interrogatory so we can have the party who is asking the interrogatory pinpoint what they want to know. Otherwise, we're going to have people answering things that no one really was curious about in the first place.

The third aspect of this is, and Sarah brought this up earlier, is isn't there a way to cure this with an amendment to the pleading rule? We looked at that in the Discovery Task Force. The trend all across the nation is to go to even less general pleadings than we allow in Texas and certainly going the federal route; also, in a motion for more definite statement, that those things be in large denied and only, as we just discussed and Alex was talking about, in the most unusual

circumstances.

So I think the issue, if you'll get it back to us, one is meaning and how specific we want to be; two is exclusion and how we're going to deal with that. And I think there ought to be -- I think that we hear two things from you today. One is some kind of exclusionary tool is important to make sure it's definite enough; but on the other hand, if we go too far, we're cutting our throats.

And the third issue I think is going to have to be timing. I tend to think that up front is the best place and get it over with and never deal with it again. I also am intrigued by the idea of maybe having one shot at this and it's over so you don't get the horrible interrogatories.

But I think if you give us that input, we can make this tool what it was meant to be; and that is, not to resort to a motion for summary judgment to find out what the case is about if there is a pleading problem.

CHAIRMAN SOULES: Well, I think you're real close to No. 4.

MR. SUSMAN: Could I go to the

next issue that we need some help on?

CHAIRMAN SOULES: Yes, unless there's -- I think there was a hand up. I don't want to stop anyone from saying something.

MS. BARON: Well, I was just going to second what Dave said; maybe to have them early on, give a limited period of time to object; and if you don't object to it during that time period, that's it, you can't object at trial; that it's something that's beyond the contention answer and it's not going to limit or exclude evidence at trial.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I have a question that relates to what Scott McCown said earlier and about the portion that Steve Susman read on 5(a) that talks about deliberately or with conscious indifference failing to disclose information in discovery. It doesn't say in a particular discovery instrument, and I don't think it was meant to say that, but my question is, am I understanding it correctly, then, under what

has been proposed here, if you fail to answer a contention interrogatory in bad faith and fail to include something that you knew about but it later turned up in other discovery, in deposition or whatever, that there would be no consequence to that? That's the question.

MS. DUNCAN: That was my question, too.

HONORABLE F. SCOTT McCOWN: That's what Luke was saying earlier. What we wanted to do was fix this problem so --

MR. YELENOSKY: That can be answered yes or no.

CHAIRMAN SOULES: Folks, Judge McCown has the floor, and then I'll call on somebody else.

HONORABLE F. SCOTT McCOWN: We wanted to fix the problem that it had to be in any one place. If it is in the discovery, even if you've got notice of it and you can't argue at trial, then it should be excluded.

MR. YELENOSKY: So the answer is yes, that there's no consequence to that, which may be fine, but I just wanted to understand it.

CHAIRMAN SOULES: Is that what was intended, Judge McCown?

HONORABLE F. SCOTT McCOWN: Yes.

CHAIRMAN SOULES: Okay. Do you agree, Steve?

MR. SUSMAN: I'm not sure that that's the way we would word it, is what I'm saying. I mean --

MR. YELENOSKY: But when you combine it with No. 2 from above --

MR. SUSMAN: Yeah. But there we're talking about the concept of amendment and supplementation.

MR. YELENOSKY: Right. But it also talks about disclosing information in discovery, not in a particular instrument in discovery.

MR. SUSMAN: Right. In (a) we're really talking about a deliberate failure to disclose information in discovery. If our intent is that even though you deliberately withhold something, if the other party finds out about it from another source, you can't exclude that.

I mean, let's say it's a document. I mean, I think our position was that it should be excluded in those circumstances. That is a fair sanction, the deliberate withholding of a document, the deliberate withholding of a name, that a consequence ought to be exclusion, even though the other side learns of it from a different source.

HONORABLE F. SCOTT McCOWN: Luke?

CHAIRMAN SOULES: Okay. Judge McCown.

HONORABLE F. SCOTT McCOWN: Let me put a spin on that, if I could. The key word there on Page 7 is "timely disclosed." So for example, if you withheld a document deliberately and the other side was taking a nonparty witness' deposition and learned of your hiding of evidence, then the fact that they learned of it from this neutral party, like Steve is saying, would not let you off the hook because you would not have timely disclosed it. But if you don't answer a contention interrogatory with your theory of fraud, and in the midst of some deposition you

say, you know, this is my theory of fraud, and the trial is two years off, then that may well be a timely disclosure.

I guess what I'm trying to say, to go back to what Luke said earlier, is we didn't want the disclosure to have to be through any particular discovery device. If you've disclosed it, you've disclosed it.

Now, the question of whether it was timely or not might be different. If you should have disclosed it in interrogatories and you didn't and that delay created some kind of hardship, then that's a different issue. Have I reconciled those two answers?

CHAIRMAN SOULES: Anyone else? Steve Susman.

MR. SUSMAN: The next issue we have, the big issue, is this: I mean, someone, if you can, make the best case you can for preserving requests for admissions, because it's the subcommittee's view that that's another discovery device that's unnecessary, not needed; it creates its own body of jurisprudence; we would have to write another rule, and people don't need them. We

give them enough with these interrogatories plus their depositions.

CHAIRMAN SOULES: First of all, I don't think we need to write another rule because I think the rule on requests for admissions is written well enough. There are maybe a few blips in it, but it's in pretty good shape and it works.

What we use it for in state court practice, since we don't get many pretrial orders, is we use it to authenticate documents, to make documents admissible from the get-go. The first thing we'll do before we get a jury maybe is present the judge with a motion to admit a lot of documents, a lot of which have maybe hearsay in them for the first witness that's going to get on the stand, so you can't prove them up through them and you can't really ever finish that witness in one pass because you don't have the documents that are going to be important for some crucial testimony from that witness. So if you don't get the documents in, you've got to call the guy back and go back and forth between one witness and another witness in

cross-examination. And this really screws up a plaintiff's case, frankly, and I guess it can for the defense's case too.

MR. SUSMAN: In 168(1) we provide that interrogatories that ask another party only to identify or authenticate specific documents, as contemplated by Article IX of the Texas Rules of Civil Evidence, shall be unlimited in number.

CHAIRMAN SOULES: All right. I don't see why we do that, because all that does is supplant the request for admission practice in a valid area for requests for admissions and tell somebody you can have unlimited interrogatories, which I oppose. I don't think we ought to have one more interrogatory than we have right now. I don't think that's a message that we should send to the public.

MR. SUSMAN: Do you want to limit the number of requests for admissions?

CHAIRMAN SOULES: The second thing which we use requests for admissions for, and I'll stop in just a minute, is in a case where a version of the statute -- let's

say it's a DTPA case, and of course, the statute has changed significantly in terms of its consequences at various times in the history of the statute, and some work was performed and you're trying to identify the particular contract that covered a piece of work. Let's say it's a continuing work agreement with Southwestern Bell or something, and that gets renewed and you can't really tell and there may be some dispute about which contract covers it. You can get that resolved with requests for admissions.

Now, why is that different from interrogatories? Well, once it's resolved by a request for admission, you've got to have leave of the court to amend that answer. It's stuck, and if the people don't respond at all, then it's an admission. So you could go on with your lawsuit not expecting there to be any major change in the responses to the requests for admissions 30 days out; where if somebody wants to now say, "Hey, wait, King's X, we've decided we're not going to authenticate all these documents. We want to put you to your proof," or without even having

leave of the court change their interrogatory answer and say that another contract which hasn't been the subject of very much discovery, if any, is now the controlling contract.

Requests for admissions, because of the consequences that attach to the answers when given, do eliminate issues and legal theories that may be in the case and help contain the case all the way through the discovery process and trial. Interrogatories, since they are subject to supplementation without consequence, don't have the same effect. I think we need to retain requests for admissions for the purpose they are designed to serve, even if there is some abuse by someone. I don't have any -- I don't see any abuse of the requests for admissions practice, but I know -- I hear that it is in some places abused.

So who wants to speak next? Sarah Duncan.

MS. DUNCAN: I would just like to add, too, that Joe's client received probably the longest set of requests for

admissions ever sent out, and the only reason for it was to authenticate documents and say, "This number is an eight and not a three," et cetera, et cetera.

And the reason interrogatories couldn't do the same thing is that they weren't binding, as Luke said, and they would only be admissible against Joe's client as opposed to the other defendants in the lawsuit. So I don't think we could get rid of requests for admissions at least in my kind of cases.

CHAIRMAN SOULES: Joe, and then I'll just go around the table.

MR. LATTING: I was just going to second what you said, Luke. I don't see any abuse of requests for admissions in my practice. I mean, that's just my limited practice, but people don't abuse me with them. And if they do, I can always deal with it real easy.

You can respond to requests for admissions much simpler than you can respond to interrogatories, and I think they serve a valid purpose and they're not broken, it doesn't seem to me, so I don't think we ought

to try to fix them. I use them for the same reason you do, and I just don't see that they're a problem.

I don't know, Scott, do you see problems at the courthouse with them?

HONORABLE F. SCOTT McCOWN: I told Steve I didn't agree with him on this one. If it ain't broke, don't fix it.

MR. LATTING: I'll withdraw the question then.

CHAIRMAN SOULES: I'll just go around the table. Paul Gold.

MR. GOLD: I would want to keep them. I think that there just needs to be some clarification really in the rule, probably by a comment or whatever, about how they're to be used and how they're not to be used. I've used them to try to limit information. I've asked questions such as, "Admit that the defendants knows of no individuals with knowledge of facts relevant to the plaintiff's claim that they have suffered this injury."

MR. SUSMAN: Mr. Chairman, can we have a straw vote? Because I think this is

going to be the opinion of the Committee.

CHAIRMAN SOULES: All right. Those in favor of retaining requests for admissions, hold up your hands.

Okay. Those in favor of eliminating requests for admissions, show by hands.

Okay. It's unanimous to retain them.

MR. SUSMAN: I mean, let's go on.

CHAIRMAN SOULES: Okay. Let's go on.

MR. SUSMAN: Let me now --

CHAIRMAN SOULES: Excuse me. Paula Sweeney.

MS. SWEENEY: The only area that you all ought to address, because everything that's been said about the proper use is good and we should keep them, but you know, you get a set, "Admit there was no negligence" -- you've got a negligence lawsuit -- "Admit there was no negligence. Admit that any fact didn't reasonably cause" -- you know, and trying to get you to stub your toe and forget and deny away your whole case.

MR. SUSMAN: I need to ask something else. I forgot I need to ask something else.

Since obviously this group doesn't like anything unlimited in number, should we impose on requests for admissions the same number as -- now, Luke, how can you be against an unlimited number of yes/no interrogatories but in favor of an unlimited number of requests for admissions?

CHAIRMAN SOULES: Because requests for admissions are used by me to authenticate documents and I may have 15 file drawers full of documents.

MR. SUSMAN: How can we have an unlimited number of anything?

CHAIRMAN SOULES: Well, because it works. It's not failing to work. This works.

MR. YELENOSKY: It's also not moving away from a limit to an unlimit, like it is with interrogatories.

MS. SWEENEY: Can I finish my thought?

CHAIRMAN SOULES: Yes, Paula,

I'm sorry.

MS. SWEENEY: Couldn't you all just put something in there, someone draft -- or maybe I'll try to figure out some way to do it. That's the only area of abuse, when you get this silly set of requests that's just strictly designed in case you go 32 days --

MR. McMAINS: Deny it.

MS. SWEENEY: What?

MR. McMAINS: Well, just deny it. I mean, what's --

MS. SWEENEY: Well, no. They're designed in case you go 32 days and you get deemed and you've deemed your lawsuit out of court. I mean, that's the whole purpose of it, and you get a raft of them from some dingbat who spent three hours in the library drafting them, and that's the only abuse that happens.

MR. McMAINS: It seems to me that if you've got 30 days to deny it that -- if you can't figure out how to deny it in 30 days --

MS. SWEENEY: Rusty, there are three cases in the appellate books already

where people have failed to deny them and had to go --

MR. McMAINS: But there are dumb lawyers all around.

MS. SWEENEY: But why create the trap and the expense?

CHAIRMAN SOULES: Okay. Well, there's one court of appeals case that holds exactly that, where a party went too long and didn't answer. You don't have a lawsuit.

MS. SWEENEY: Right.

CHAIRMAN SOULES: And they said, "That's not deemed admitted. That's not a proper function of the request for admission, so it's nothing. We'll go on with our case."

But that's just one court of appeals case, I think. I don't think it's a Supreme Court case. I don't remember.

Do you remember, Paul?

MR. GOLD: I think it's Birdo vs. Parker that talks about that.

CHAIRMAN SOULES: Is that a court of appeals case?

MR. GOLD: Yeah, I think it

is.

CHAIRMAN SOULES: Okay. Going around the table here. David Perry.

MR. PERRY: Just to respond to Paula, I think the problem is that it can be a very legitimate function of a request for admission not to ask you to admit away your whole lawsuit, but it can be a very legitimate function to ask you to admit away certain major theories; you know, admit that employees were in the course and scope of their employment, or admit large sections. And whatever we do, we don't want to prevent that because that's a very useful tool.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: I would like to go back to what Steve said about unlimited in number. Maybe there's a compromise position here, which is sort of what they tried to do on the interrogatories, which is if you're asking to authenticate documents, they ought not count, but otherwise, there is some limit.

MR. GOLD: I think that has a lot of merit.

CHAIRMAN SOULES: I probably

don't have a problem with that. I'll have to think about it, but that's really where we use big numbers of them.

MR. SUSMAN: Okay. We will come back to that. We will look at the request for admissions rule, we'll get it back in and we'll consider imposing a limit where they're used for some purpose other than the authentification and identification of documents.

CHAIRMAN SOULES: And I'm not sure about "authentication." That's a term I used. Really what I'm talking about are requests for admissions used to establish the predicate for admissibility of documents, whether it's authentication, hearsay, whatever it may be.

PROFESSOR ALBRIGHT: Do you like the language we have in here?

CHAIRMAN SOULES: I'm sorry?

PROFESSOR ALBRIGHT: "To identify or authenticate specific documents as contemplated by Article IX of the Texas Rules of Civil Evidence."

CHAIRMAN SOULES: No, because I

don't think that gets at all the predicates that you can lay with requests for admissions; for example, business records. In other words, getting away from hearsay.

MS. BARON: Well, how about Articles VIII and IX?

CHAIRMAN SOULES: Okay. Anyway --

MR. SUSMAN: Can I go on?

CHAIRMAN SOULES: Yes, sir.

MR. SUSMAN: Now I would like to call your attention to Rule No. --

CHAIRMAN SOULES: I'm sorry, Steve. John Marks had his hand up and I didn't see him.

MR. MARKS: I think we ought to leave the request for admission rule just exactly the way it is without change.

CHAIRMAN SOULES: Do you want to see the hands on that before you start writing?

Okay. How many agree with John, show by hands. Nine.

How many disagree?

MR. SUSMAN: I mean, the change

we're talking about is --

CHAIRMAN SOULES: All right. The house is evenly divided on that, so I guess you should do some drafting on it and we'll take a look at it.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: Anything else on that now? I don't want to limit the debate.

Okay. I think we're ready now for the next issue, Steve.

MR. SUSMAN: All right. I'd like to call your attention to page -- before we go to document requests --

CHAIRMAN SOULES: Okay. Well, I do want to get a show of hands, Steve, and I don't know where this would fit in to your agenda, on whether to change the limits on interrogatories. I don't know whether now is the time to do that or at some other point.

MR. SUSMAN: Why?

CHAIRMAN SOULES: Pardon me?

MR. SUSMAN: Change the --

CHAIRMAN SOULES: Whether there would be any change in the limitations on

interrogatories; that is, the number of interrogatories.

MR. SUSMAN: From 30 to something less?

CHAIRMAN SOULES: Or more.

MR. MARKS: Well, now we have 60. 30 plus 30.

CHAIRMAN SOULES: We've got two sets of 30. Is anyone inclined to change that for any reason? David Perry.

MR. PERRY: I would propose a lesser number for contention interrogatories and a substantially larger number for interrogatories that are purely factual in nature, purely data gathering interrogatories.

CHAIRMAN SOULES: Does anyone else have anything to put on that? Steve.

MR. SUSMAN: The subcommittee's proposal was 30 in total.

CHAIRMAN SOULES: 30 total?

MR. SUSMAN: The committee's proposal is that you can -- if I'm correct, let me see, is that you can submit as -- there's no limit on the number of sets.

CHAIRMAN SOULES: I think you

made a good point on that at the last meeting.

MR. SUSMAN: That it doesn't make any sense to limit the number of sets; that it does make sense to limit the number of interrogatories, and we limited them to 30 in total, period. That was our proposal.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: Well, I think something that David and I had talked about earlier was almost to have a separate set early in the proceeding for contention interrogatories which may have their own limitation in number that would not count in the 30, and then leave it at 30 and move on.

CHAIRMAN SOULES: Leave it at 30 total regardless of how many sets?

MS. BARON: Plus a certain number of contention interrogatories that just had their own limit, which who knows what that could be. I guess the committee could work out what the numbers would be.

CHAIRMAN SOULES: All right. Well, let me get at it maybe this way: Is anyone in favor of having an unlimited number of interrogatories for any purpose? If so,

show your hands.

MR. McMAINS: No.

MR. LATTING: No one would dare.

CHAIRMAN SOULES: So there are no hands up. No one favors an unlimited number of interrogatories for any reason. Okay. That gives you some direction.

MR. MARKS: Maybe we can have this rule: Have unlimited interrogatories but they have to be individually typed, not on a computer.

CHAIRMAN SOULES: Okay. We're ready to go on now. Sarah Duncan.

MS. DUNCAN: I do want to make one suggestion, and that is part of what takes time in answering interrogatories is if you can't get a disk from the other side. And we might could put something in the rule that sort of suggests that's a real nice thing to do, is to send a disk at the same time you're sending your interrogatories.

I've had people who use the same word processing program that I use who will refuse to send me a disk, which is just silly, and we

shouldn't encourage that. We ought to find some way to encourage a little efficiency within the system.

CHAIRMAN SOULES: I never had a problem with the old system where you didn't have to retype the question. I don't know why we did that. I mean, I could lay two pieces of paper down and read the numbers and look at the answers. I don't know why we ever required that.

Okay. I think that the number of interrogatories or the scheme of how we use interrogatories is probably going to be influenced by the decisions we make on disclosure, so exactly how many or how many sets or whether there's an unlimited number of sets or put a cap on the total, that decision should probably be reserved until after we've decided what to do about disclosure. Now, is there any disagreement with that? Okay. So we'll put that on the side and go forward.

Rusty McMains.

MR. McMAINS: But the only thing I'm curious about is -- and I understand the notion about having two limited

sets, maybe that's too limiting or something, but the idea that you have an unlimited number of sets basically means somebody can send -- I don't remember what it turns out to -- send you 30 sets of interrogatories just at different times. I mean, it may well be that they're in the -- and there will be people, particularly in Dallas, that will do that.

MR. GOLD: Almost all of them in Dallas.

MR. McMAINS: Yeah. You know, those that will send you three interrogatories at a time ten days apart so that all your times are running differently.

MR. MARKS: But nobody in this room would do that.

MR. GOLD: No one in this room, of course.

MR. McMAINS: And I'm just wondering why it is that anybody thinks that's acceptable.

CHAIRMAN SOULES: Listen, Steve needs some more direction on what he's going to be drafting, and I do think that's going to come up when we get to disclosure. We're

going to have to set caps or whatever about how many interrogatories, so let's put that on the side.

And Steve, what next do you need guidance on?

MR. GOLD: But could I ask one thing?

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: And it's picking up on something that Sarah brought up and I would really like to get an idea about it for the committee, and that is, you were saying, Luke, that you didn't know why we even went to the thing about having to reset out the question and then reset out the answer. And if you stop and think about all the wasted secretarial time that is spent redoing all this, picking up on what Sarah said, why couldn't we change the rule to say that the only time you have to set out the question and the answer is when the parties don't provide the disk setting out the -- so that you can merely copy it. That would be the carrot, in that if someone provided you the disk, then fine, then it's easy to set out the question,

set out the answer; if you don't get the disk, all you have to do is set out the answer.

CHAIRMAN SOULES: Well, I guess I do know something about that. The trial judges, after that practice was started, like it if the questions are retyped and the answers are typed in behind them. I had no idea this was going on, but whenever we decided not to have interrogatories filed any more, there was a ground swell on this Committee among the members of the trial bench that they wanted them in the file because they read -- one piece of their trial preparation getting ready to go into a trial was to read the parties' interrogatories. There were only two sets of 30 at most, and they would read the questions and answers in the parties' interrogatories in preparation to try the case and select a jury, so it probably does serve a function, but what you're suggesting may be helpful.

MR. GOLD: I don't think there has ever been any empirical study done on it, but I know in my office, because we can't find a scanner that happens to be just foolproof on

it, we wind up having to retype all of this stuff, so you've got one attorney's office typing it, sending it to you, then you've got the other attorney's office retyping it. It's a tremendous amount of --

CHAIRMAN SOULES: Okay. Paul, why don't you and Sarah work on whatever suggestion you want to go to Steve on that and get it to Steve in time -- say within 30 days from today, by the middle of August.

That will give you a chance, Steve, to assimilate that into your committee's work product if your subcommittee addresses it.

What else do you need help on?

MR. SUSMAN: Okay. I want to call your attention -- we're going to talk about document requests, which is on Page 10, but before you get there, look at Page 6.

What I want you to look at on Page 6 is not No. 1, which we beat to death yesterday, but Nos. 2 and 3. These are new. You have not seen these before. Page 6, Rule 166d(2) and (3).

We now provide that no party may serve discovery requests, interrogatories or

deposition notices or document requests until 10 days following the date upon which the defendant is required to appear and answer. Discovery requests must be made at such time that the response required by these Rules -- so once again, whatever the end of discovery is, we make it clear that the request must be served in order that you can comply during the period. It's not enough to serve your interrogatories the last day of the discovery period.

This is a change that we basically did because there's the question of should we continue with the practice of allowing people to serve interrogatories and document requests with their petition. And the feeling was, well, it's uncivil in many respects. But on the other hand, there was a feeling by some that, particularly with document requests, it had the prophylactic effect of causing parties to preserve documents.

To solve that problem, so that documents are not deep-sixed upon receipt of a petition, we have added No. 3, and that is, at any time, including with the petition, a party may serve

on any other party a request that certain documents or electronic data information be preserved for future discovery, so you're under a duty to preserve the documents.

Now, does anyone have any terrible bad reaction to this?

CHAIRMAN SOULES: We'll start on the south side of the table. John Marks.

MR. MARKS: I don't know about No. 3, Steve. Boy, I can see a whole new area of practice developing with just that right there. You know, people are under a duty not to spoliate evidence now, and I just don't see where that would accomplish a lot. I mean, I've never seen this as a problem in my practice; maybe you have.

MR. SUSMAN: Well, my experience is that -- I mean, the reason I would like to serve a document request with the petition is I think it's very difficult thereafter for a defendant to justify having destroyed documents that are expressly covered by the request. I have had many, many cases where people destroy documents after a lawsuit is filed, and you know, "Well, I didn't know

this document was relevant," you know, or some clerk or some executive learns about a lawsuit being filed or hears about a lawsuit being filed against a company and all of a sudden they sanitize their files. I think it's -- I mean, you know, it's improper, but I have always thought a document request being served with the petition, which puts them on notice, has some effect. I mean, that's why I've never felt the need to rush to the court to get some kind of nondestruct order.

But I think -- I mean, I would be opposed -- I have no objection to postponing the service of a request to a later time in a lawsuit as long as you have something in lieu thereof that you could serve.

MR. MARKS: Well, why don't you just extend the time for responding to interrogatories propounded with the petition?

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: John, that's a good question, and here is what I think our theory was. The truth of the matter is, one of the public perceptions that I believe

occurs when you get a petition and then a discovery request with it is, "Gee, I got sued, and now they want me to do all this work for them." And I hear that from clients constantly. I don't think -- and I think No. 2 would eliminate that vehicle problem. You can't have No. 2 without No. 3 in my opinion, because what happens in many instances, however innocently, is a notice goes out to a company that they've been sued, and what happens without any corporate conscience to it, people say, "Oh, my God, well, I'm going to get rid of that." And they rip it out of the file and into the trash can it goes and we can't discover it, so I think you need to have No. 3, but I think No. 2 will cure the problem of somebody getting sued and getting the discovery request at the same time.

MR. MARKS: Well, David, just following up on that, you're going to get that question after the interrogatories are propounded whether they were with the suit or not, "My God, now they've sued me. Now they want me to answer all these questions and do

all this stuff for them."

MR. KELTNER: Well, perhaps my theory is, though, that I get more questions about that from people who are sophisticated business people, who are used to being sued. They say, you know, "This is hardly fair," when they get sued, and now they want me to prove their case for them just right off. "Now, can they do that?" And the answer is yes, and so what happens is, instead of preparing the answer to the lawsuit, you're throwing together documents to get prepared to answer the plaintiff's requests, and it causes -- it is a public relations problem.

I tell you, we heard -- on the Discovery Task Force we heard from more defense lawyers that this was a problem. Now, this is not insurance defense. In commercial litigation this is a huge public relations problem they have with their clients, and that was the reason -- I'm sort of the one who suggested that we --

MR. MARKS: Do you think that's not going to be a huge public relations problem?

MR. KELTNER: No, I don't believe it is. I think it's something that is -- everybody knows you ought not to destroy documents, and an official reminder is something that's not very intrusive.

But what I would say is, I think if you have No. 2, which is a change, you have to have No. 3. The option is to go back to the practice we have now, and maybe that's just the best thing to do. It may well be.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Another reason we have No. 3 is that it goes with our discovery window. If you are a defendant and you get a petition, interrogatories and a request for documents all at the same time, then what the plaintiff is telling you is not only am I suing you, but I'm getting ready to open this six-month discovery window and there's not a thing you can do about it; where at least with this, what we're hoping is that the plaintiff can then serve the request for production and open the discovery window after the answer, but we're hoping that there will

be some opportunity for discussion between the lawyers of "Let's talk about when is a good time to open this discovery window."

So if we do have a discovery window, I think this is a much nicer way of saying, "These are the documents I'm going to want when we open the discovery window. I'm just giving you notice of what they are and that I want you to preserve them, but let's talk about when we want the discovery window to open."

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: If you're going to do No. 2 and 3, I would suggest you add a comment that makes references to both the Spoliation Doctrine and Rule 3.4(a) of the Disciplinary Rules, both of which cases are construed to create an obligation on lawyers that preexist the date of filing suit in some situations, just so this does not purport to change those duties or to mislead anyone that "Hey, it doesn't matter. I don't have to worry about it until I get a notice." It's just a little precautionary note.

CHAIRMAN SOULES: Okay. Coming around the table. David Perry.

MR. PERRY: The way this is worded -- and I don't think it's intended this way -- but the way this is worded is that the defendant could serve discovery earlier than the plaintiff, and I think it was the intent of the subcommittee when we talked about it to say that the first time that either side could serve it was 10 days after the defendant's answer date, and I just wanted to point that out.

MR. SUSMAN: Isn't that what it says?

MR. PERRY: It says no party may serve requests on any defendant.

MR. SUSMAN: Oh, I'm sorry, that's right.

PROFESSOR ALBRIGHT: David, we need to talk about this. There's a drafting problem with when you have parties that are added later, but we can talk about that.

MR. PERRY: Yeah. I think the intent is that the permissible time period starts at the same time for everybody.

MR. SUSMAN: For both sides, right.

CHAIRMAN SOULES: Okay. Doyle Curry.

MR. CURRY: Okay. Speaking specifically to that 10-day delay, you may want to reconsider that, whether to have it or if you want to have it maybe even longer, because you're going to have some sort of disclosure and you want the disclosure to work. The broader the disclosure, the less discovery we're going to have to do. It's my feeling that the better disclosure provision you have, the less problem you're going to have in discovery, the less friction you're going to have in discovery, because these things -- you're told by the court that you will disclose these things, bang, bang, bang, bang, bang, if requested.

And the broader it is the better it is, the less discovery you're going to have to do, and you may want to consider delaying any discovery until after the disclosure has been done.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Steve, I think that the idea of this is laudatory, but I think we're going to find that we're in the area of unintended consequences, because if we pass this rule, I'm going to have to tell all the associates that every time we file a lawsuit we better think about why we're not filing one of these; otherwise, when we lose the case, unlikely as that is -- "Did you send a document request?"

"No."

"Well, why not? You had the right to."

And it seems to me we're making another layer of things that we better do to avoid malpractice. And I wonder if we can't address the same thing by simply saying that once a lawsuit is filed, no document shall be destroyed for a certain length of time, because we're going to have to send one of these every time now or tell our client why we're not. And this is backwards from the way we ought to be going, I think. Talk about incivility.

MR. SUSMAN: That's a good point. I mean, there's no question about it.

And maybe we ought to just leave things the way they are. I don't think, frankly, that this is a big problem. I mean, I think we can go back to the way it was when if people happened to serve a document request or interrogatories with the petition, so be it. It doesn't happen that often. When it happens, it happens. I don't think it's particularly uncivil or anything, and if we want to go back to -- I mean, this is not a big deal, and I think you may be right and I think maybe we ought to reconsider this in the committee whether we really want to do this, because it does create this "Well, if you don't do it, does that mean I can then destroy it?" I mean, I think it's a point worth thinking about.

CHAIRMAN SOULES: The commercial collection lawyers are using the service of requests for admissions with their petitions somewhat, because if they've got any problem --

MR. SUSMAN: Okay. Let me ask for a straw vote.

CHAIRMAN SOULES: -- where a

default judgment came in that -- where proof is going to have to be supplied before a default judgment can be taken, and a whole lot of commercial litigation cases have default judgments anyway --

MR. SUSMAN: I mean, does anyone --

CHAIRMAN SOULES: -- and they serve the request for admissions with the petition and they fix it and they wait 50 days instead of 20 days for a default, then they take a bullet-proof default on the deemed admissions, and so it's a useful tool.

MR. SUSMAN: Luke, can we have a straw vote? Is there anyone here -- can we see a show of hands if you feel that we ought to prohibit the serving of interrogatories or document requests with a petition? Is there anyone here who thinks it ought to be prohibited?

MR. MARKS: I just have a suggestion on that. I think Doyle had a good point. Maybe we ought to look and see what kind of disclosures are going to be required to be made up front before we actually address

that. We may want to do something like that and we may want to throw something in the automatic disclosures that addresses this.

CHAIRMAN SOULES: But as of this time, until we get to the disclosures and understand those, are people willing to leave things as they are as far as the timing of discovery? Is anyone opposed to that? No opposition.

MR. SUSMAN: Now, 166(e) --

CHAIRMAN SOULES: Wait a minute. Harriet Miers has a comment.

MS. MIERS: I just wanted to ask if the subcommittee had any discussion about the priority of deposition taking? Do you have -- did you talk about that at all, or is the thought that people can drop their notices at the same time, or how does that...

MR. SUSMAN: I don't think we changed -- we didn't even discuss this.

MR. KELTNER: The Task Force did, Harriet. There was a lot of discussion about it, and we couldn't figure out a workable way to change the rule. And there were people who believed that the plaintiff

ought to have the first shot at depositions because that was his God-given right, but we've got so many God-given rights, we figured we better let God take care of it. We just couldn't find a workable way to make a change that would make any difference.

CHAIRMAN SOULES: Okay. Let's try to take one more topic and then we'll take a morning break.

MR. SUSMAN: All right. Requests for Production and Inspection, Page 10, Rule 167. There has generally not been a lot of redoing and retooling of this rule. The consensus of the Committee was that this is the one discovery device that we better not try to limit too much because it is probably the most useful discovery device to get the actual documents, so there are no limits on the number of documents you can ask for.

We do provide that you can ask for electronic data information, but if you don't ask for it -- I mean, if you don't ask for it, you don't get it. I think that was our solution on electronic data information.

MR. PERRY: I have a question about that.

MR. SUSMAN: Yes.

MR. PERRY: There's a sentence here that says that if you seek the electronic data information, you have to set forth the type of information that the producing party is to produce, and I don't understand the import of that sentence. Are we talking about the electronic way that it's to be produced? I just don't understand it.

HONORABLE F. SCOTT McCOWN: Yes. That's the floppy disk or hard drive or archive tapes, to specify what level of expense and trouble you want them to go to with regard to the electronic data.

MR. GOLD: We had a discussion about it, that it could be all -- unless there was some sort of limit on it, you would be asking for all the backup disks, and then we decided that you should be more specific in what you want before you just say, "I want all electronic data information," and that forces everybody to go all the way back in their archives and everything. If you want to go to

that level, you can, but you don't have to go find --

HONORABLE F. SCOTT McCOWN: I think David has got a good point. What we've said here isn't clear and we need to work on the drafting. But what we envisioned, David, is that a case might justify getting the archive tapes or might justify getting the floppy disk, but it might not justify hiring the expert to go in and pull information off the hard drive which has been deleted, which is technologically possible.

And so whatever you ask for with regard to electronic data you have to spell out what it was you are expecting them to do and at what level, and then if they objected, they could go to the court and say, "You know, a floppy disk is one thing, but pulling deleted information off of the hard drive is another, and we object to that."

MR. SUSMAN: We can make this clearer, but the notion is we wanted to make this stuff subject to discovery, but not in every case does a person have to go hire an expert to look at their hard disk because it's

very, very expensive and very time consuming and you need to know if you're being asked to do that so you can object and go fight it out, but you don't have to do it in every case. I mean, that's what we were trying to do there.

HONORABLE F. SCOTT McCOWN: We need to work on the drafting, because that's not clear.

MR. SUSMAN: We can clarify it, yeah.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: On Subpart 4, am I understanding this correctly that if no objection is made to the request, then no response is filed; but if even one objection is made to the request, I have to describe all the documents and count them? Could that be right? Surely that can't be what you all mean.

MR. KELTNER: Sarah, I understand what you're saying, and we need to work on that.

PROFESSOR ALBRIGHT: I think it's a problem, too.

MR. KELTNER: The idea was not

to accomplish what you're talking about, and I think we can redraft that and do that over.

MS. DUNCAN: Please don't make me count my documents. I'll spend the rest of my life doing that.

CHAIRMAN SOULES: What's the reason for that. If you've got a problem with the objection and responses coming at the same time in 30 days, I don't have any problem in my practice with that.

PROFESSOR ALBRIGHT: I think what it was -- the discussion was that if you're going to make objections to the time, place and the manner, you can't just say, "Well, I don't want to produce them at this place and at this time; I'll produce them later," and then just not tell them what you have. You can't use that as a way to put off responding to discovery. I think this is a way to make parties give some kind of response even if they're objecting.

MR. KELTNER: Right. And Luke, there are two new court of appeals cases that talk about this problem where there is a request made and the lawyer said, "Well, I'm

not going to produce them at your place of business; they will be available at mine." And there is one court of appeals opinion which says, "Yeah, that was an objection, but that's not production. They didn't produce them, so you can't introduce them into evidence."

MR. GOLD: It's Gustavson vs. Chambers.

MR. KELTNER: Right. And then there's another court of appeals opinion that goes exactly the opposite way that says, "Yes, that is a request," and to the requesting party, "You never went over to the office and looked at that."

So I think maybe the time periods are off, but we need to think about that. We have a problem where the response here is not the production of documents, and that's not something lawyers have been very good about following.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Just a question to follow that up, David. Somebody requests

the production of all of General Motors' transmission documents in plaintiff's office. That's overbroad. I'm going to object to producing those in that quantity at any time and certainly in plaintiff's office. On the other hand, if it gets narrowed down, I may not care. How does that work here? Do I object to producing them in the office and overbreadth?

MR. KELTNER: Correct. In 10 days. You have 10 days.

MR. HERRING: So I have to file them both, effectively, my overbreadth and my place objection, or at least I have to investigate the request enough to know that it's overbroad to be able to state my place objection within 10 days?

CHAIRMAN SOULES: Why not have it 30 days? Why not leave it the same way it is now?

MS. SWEENEY: Aren't we creating a new game here? I want them at my house and I would like beignets and coffee with them, and if you don't object, you have to do it.

MR. KELTNER: Let me fess up that this was my idea. It was my idea because I thought we ought to draw the distinction between production and response. But I get the sense that it ought to be 30 days and maybe it is a trap, so that's not a problem. I think we'll just go back and change it back to 30 days.

CHAIRMAN SOULES: Is anyone opposed to having the response, including the objections, all due in 30 days without setting some earlier date for objections? No one is opposed to that. Okay. So let's leave that as it is.

Judge Peeples.

HONORABLE DAVID PEEPLES: Steve, this is a total rewrite of the existing rules?

MR. SUSMAN: Uh-huh.

HONORABLE DAVID PEEPLES: And I may have not been paying attention, but is there that much of a problem with document production right now that we need to have a total rewrite of the rule?

MR. GOLD: I believe there's a

big problem with production of documents.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I don't have a problem with document production in my practice. It's a pain, but we do it. The rule is not a problem, so once again, if we write a new rule, we're going to have a new body of jurisprudence to create and new cases to appeal.

HONORABLE DAVID PEEPLES: Can I follow up on this real quick?

CHAIRMAN SOULES: Yes, sir.

HONORABLE DAVID PEEPLES: Just as a general matter, you know, and with this business about unintended consequences, I think that the one lesson we can learn from the last 10 or 12 years is all these well intentioned changes that this Committee did and the Supreme Court approved have had intended consequence that have just driven us crazy, and I think the burden ought to be on those who want to change something radically, as opposed to a little bit here and there. The burden ought to be on those proponents to show that the existing system is radically bad

to justify a radical change.

I look at this and I just know that there may be little -- you know, a word here or a phrase there lurking that will have a big change and I'm not going to catch it, but I'll be responsible for it because I was on this Committee. Is the existing situation that bad?

MR. PERRY: I don't understand this to be a total rewrite of the rule. Maybe I'm just --

HONORABLE DAVID PEEPLES: Well, just look at it, David. It's not even organized the same way.

PROFESSOR ALBRIGHT: I think there's definitely a reorganization of it and there are changes. I think most of the changes were things like making clear who has the expense of production and who has the expense of copying, and I'm also thinking of including the information, the electronic data information. We felt strongly that in the world that we're living in now, and it's going to be in the future, we needed to address that. Because if someone requests documents,

I think there are arguments now as to whether that includes electronic data and how far back do you have to go. Does that mean if anybody requests anything from me, do I have to go to the law school archive tapes?

CHAIRMAN SOULES: Well, right now you can get documents or tangible things. I guess there's some question about whether or not electronic tapes are tangible things, but that's easy to fix; just add it in there.

It's like when somebody said a photograph wasn't a document in one case, so we said, "Yeah, they're documents," so we added photographs so that couldn't be an issue.

Joe, and then I'll go around the table.

MR. LATTING: We define what "document" and "tangible thing" is in the request that we send, and I would like to second what Judge Peeples says. This is a rule which does not cause any problem in the practice that I see.

CHAIRMAN SOULES: Well, I guess you could argue that, even though you say that "electronic data" is a tangible thing, it's not; and then have some judge decide whether

it is or is not, and if it's not, then you can't get it under Rule 167.

MR. PERRY: I think 166b makes it very clear that it is.

CHAIRMAN SOULES: That's easy enough to fix.

MR. LATTING: This thing works.

CHAIRMAN SOULES: Is there anybody else on the north side? Okay. Going down to Paul Gold.

MR. GOLD: Yeah, I've got several comments. First of all, I have been in a case, the Phillips Petroleum case, where the defense argued that computer information was not a tangible thing, did not need to be produced, which was a nonsensical argument since federal court's interpreting Rule 34 had discussed that at length saying that it is a tangible thing. Of course it is. But if you don't put it specifically in the rule, you're going to have these problems. And people even put it in the definitions now that they send, which is a whole problem unto itself.

One campaign that we've had on both the task force and in the subcommittee now is that

there is a problem with regard to objections in requests for production. Since Loftin vs. Martin, we've had a requirement that requests have to be specific. We have no similar statement from the Supreme Court with regard to responses. So what you wind up doing is you send a specific request, and instead of getting a specific response, what you get is, "We will produce what we have," or "We will produce any" -- or "You are entitled to see anything that we have, if any," or "Subject to this page of objections, you may come and look at our documents when I'm in town and I don't have any objection to it, if we have any documents," all those types of things. I'm sure Strasburger & Price doesn't have a problem with these requests for production. Me, trying to get responses and get documents, I have a big problem.

The other thing is that you wind up with the problem that the plaintiff's firm had in Dallas with Ford Motor Company where they requested certain documents. Ford Motor Company says, "Everything that we have in response to every request that you've drafted

now or that you could draft in the future is responded to by saying you can look at these documents in our reading room."

The plaintiff goes up. There are 750 million documents in the reading room. Plaintiff selects certains ones. They get to trial. The defendant starts issuing documents right and left into evidence.

Plaintiff says, "Wait a minute, I've never seen those documents."

The defendant says, "Of course, you did. Either you chose not to look at those documents or you were negligent in going through our reading room."

The reason for that was because the defendant didn't have to specifically respond with what was specifically responsive to the request. In the same way that you have to identify what particular types and categories of documents you want, the responding party right now doesn't have to specifically respond the same way they do with a request for admission; for instance, meeting the substance of the request. You don't have to do that with a request for production, so you wind up

with this problem.

There's a case out of San Antonio, Texaco vs. Dominguez, where the court required the party -- and there were, of course, a lot of documents in that -- to identify the documents by control numbers. And then when you responded to a request, say, "The documents that are responsive to this request are Bates Nos. 1 through 15," then there's no question about what's been produced, there's no question at trial about what was responsive, and you don't get into this game at trial about "Yeah, we produced it."

"No, you didn't."

And then the judge says, "Well, let me look at the request for production."

He looks at the request for production, and it says, "We will produce everything we have, if any."

"Well, what was it, gentlemen?"

"Well, we produced this."

"No, you didn't."

So I'm merely trying to explain what I think are some of the problems with requests for production that we, both on the task force

and in the subcommittee, have talked about and tried to address and tried to clarify.

I think when you say that "No, we don't have any problem with the request for production rule," I disagree. I think there are a lot of problems. I think there are more disagreements about how people respond to requests for production than just about anything else.

CHAIRMAN SOULES: Well, what if we could write a response paragraph for the existing rule to be consistent? And if we want to be consistent with what Judge Peeples is saying, leave the rest of it as okay.

MR. GOLD: Well, that would be response objections as well.

CHAIRMAN SOULES: Yes. And patch that into the rule somehow so it fits someplace in the present rule.

David Perry.

MR. PERRY: I think what Judge Peeples is suggesting, I think as a general procedure, is to keep the present rules and the present language except when there is a specific need to make a change, and I agree

with that. And you know, I haven't been on this committee very long, but I have kind of assumed that at some point we will end up looking at a lined and an underlined version so that we'll see the old rule and see the changes that are made. I don't know if that's a procedure that is generally followed or not.

PROFESSOR ALBRIGHT: We have one.

MR. PERRY: Okay. I mean, I'm not saying we don't have one, I'm just saying I assumed we were going to get there, if we hadn't already.

It seems to me that what the subcommittee has done substantively about requests for production, and I think what the intent was, is that there are some problems, I think, with regard to the mechanism of production. I think that in larger cases, where you have a lot of documents, there can be problems about the mechanism of production. I think that in a lot of cases people agree among themselves and resolve those problems, and I think that the subcommittee has done some things to clarify how that can be handled and I think

that's productive and I don't think that's a big deal, frankly, one way or the other.

The other thing that is a problem, not only with regard to requests for production but with regard to a lot of things, is the timing of objections. And I think that one of the things that the subcommittee has done that I think is very beneficial is to make a distinction between an objection to the mechanism of the request versus an objection to the substance of the request. And over in another section we're going to get to what is proposed on how to handle objections to written discovery, which is a problem that I think everybody agrees needs to be worked on, and I think there are some very good suggestions on the table, but I think that the significant changes that are being proposed in this rule are to clarify the mechanism of production and to draw the distinction between the two kinds of objections and set out how you deal with the objection to the mechanism of production.

CHAIRMAN SOULES: Okay. Time out. Please be back in 10 minutes.

(At this time there was a recess.)

CHAIRMAN SOULES: Paula Sweeney, do you have a comment in response to David?

MS. SWEENEY: Yes, which is simply that we need to fix one problem that in every case -- and this does not, I don't think, do it. And it's an easy drafting thing. Right now -- and some of this is addressed; some of it isn't -- but right now -- and I'm not talking about a 750,000-document case but a 200-document case. It's just a little stack of things I need that you have. I send you the request, and your answer is "Will be produced."

Well, "will be produced" automatically creates a second tier by which then I have to call you up and say, "Okay. I want to schedule a time to come see them."

I want you to send me the copies. We need a mechanism by which automatically -- because this says they can produce copies, et cetera, but if you want to produce the originals, then they've got to come see them.

You know, there's not that many cases where you have to go see the originals. Most of the time you just want them to mail you the copies with the response and say, "Response to Request for Production No. 5, Attached are documents Bates Stamp Nos. 2 through 17," so that when you get to the courthouse, you don't have a response that says "Attached."

"Well, what did they give us"?

"Well, we give you this."

"No, you didn't. You gave me this."

"No, it was this."

You can't prove it, so the drafting needs to provide that the answer, when it's produced, is tied to the question and that it comes with it. And except in the cases where it's so voluminous that, you know, you can't do that or you don't want to make copies or it costs too much or whatever and then there's a legitimate reason to say, "Come and look at our reading room," which I don't think there probably ever is, but that's beside the point, but most of the time the default mode, the automatic way it happens is you get an answer with Bates stamped stuff, and it says on the

page, "Bates number such and such is attached," so that there's no other step you have to take after you make your request.

CHAIRMAN SOULES: Sarah Duncan.

MS. DUNCAN: Okay. I guess I disagree. I think that a producing party should either -- I think it's a good rule, that you either produce it as they're kept in the ordinary course of business, or you can segregate them according to request. I don't think it should be my client's responsibility to tell the opposing party which of the attached documents or produced documents are responsive to a particular request. I think that's the other side's burden.

I agree with you, though, and I don't know if we can impose it by rule, but I think it would be wonderful if everybody had to Bates stamp and date their documents.

MS. SWEENEY: There has to be some way to put a cover on it. I mean, otherwise there's no way to ever determine what was allegedly produced in response to the request when you can come up later at trial

and say, "No, I gave you this."

MS. DUNCAN: Well, that's why I think it would -- if I said in my response to your request for production of documents, "Attached are documents Bates stamped 1 through 200 dated the date of this response," you figure out what document is responsive to what request. But if I then come up at trial with a document Bates stamped 120 and it's different than the 120 that you've got dated and Bates stamped, there's a little problem there, or if I come up with a document Bates stamped 300 and I never supplemented my production, I'm out of luck. But I don't think I should have to tell you which documents are responsive to which requests.

CHAIRMAN SOULES: Well, we've got to, again, engage the conscience of the Committee and remember the breadth of cases we're talking about. Like in a divorce case, where there's a request for the bank statements and cancelled checks on one or two or three bank accounts for the past five years, does that party have to Bates stamp every one of those cancelled checks to make

the production? That's just not going to work at that level.

MS. DUNCAN: I think that's my responsibility as the receiving person.

CHAIRMAN SOULES: And that's more than a 200-page case. It's probably a thousand or maybe 500 pages.

MS. DUNCAN: That's what I would do as a receiving party, is Bates stamp and date them, to protect my client from any documents produced in trial or in deposition or whatever that weren't produced in response to that request.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yes. And bear with me here just a moment, because in the office that I'm in now, that's how they do it. We get the documents in and we Bates stamp them. So what? There's no agreement between the two parties at that point that what was sent is what you've got. I've even done it before where I would take and Bates stamp them, then I would attach them to requests for admissions, and then I would say, "I'm now sending you Documents 1 through 1,000. Admit

that these are the documents that you provided in response to my request." And what I would get regularly is "Denied. Cannot admit or deny that this is everything that we sent. We don't want to go through the documents to verify whether it's everything we sent."

And the problem that we've got is -- let's say you've got this family law case and you've got all of these checks and whatever. I'd be interested to know, Luke, how it is that there is some meeting of the minds that what is being produced in discovery is what is being produced at trial. There has to be some mechanism for this because you wind up in chaos.

I've had it in trial. I mean, I had it 10 years ago where we got into a major dispute where the defense objected to a particular manual coming in, claiming they had never produced it. We're saying, "Yes, you did."

They're going, "No, we don't. We don't have a copy of it."

"We do." And so we had this argument that Paula was describing. We had the document, the defense didn't. They're

claiming they couldn't have produced it; we're saying they lost theirs. And there is no record of it because it's not filed anywhere.

And this is not just a discovery issue, it is a trial issue. It is this one point, of all the points that we're talking about, where the discovery bridges over into the trial and you're talking about not only making discovery more efficient but making the trial more efficient.

And I believe a little bit differently than Paula. I don't even care if I get the copies with the response, so long as what they're saying -- and this ties into that Sarah is saying. I don't care if they go through and they say, "Here are the specific documents that are responsive." They can merely say, "We believe all of the responsive documents that we may have in this are contained within the deck of Documents 1 through 5,000." Great. I'll go through them myself then. At least I know the universe of documents then that can come in at trial on that issue are 1 through 5,000. And if I want to go through them and look, fine, but I've

got closure on that issue for trial. I know what the universe is. And that's my only beef with this, is I just want to know the universe of responsive documents.

And for the same reason that the court says you shouldn't be able to ask for all documents on a particular issue, the responding party shouldn't be able to say, "We believe everything in our reading room is responsive to this request," and then you have to go through it. I don't think that type of response is good either. I think that there should have to be a more specific response so that the court and the attorneys know what the universe of potentially responsive documents are.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think we're making this more complicated than it needs to be. The present rule says that the party who sends out the request is supposed to specify the manner in which the request is to be responded to. The problem that we have is that oftentimes people simply ignore that and they do something different. Now, what the

subcommittee draft does, and I think perhaps it could be worked on a little bit, but the basic thing that the subcommittee draft does is that it creates a mechanism so that if the responding party doesn't like what they have been asked to do, they can object to that and then it gets worked out.

What I see happen in many cases, especially large document cases, is that people will agree to do the Bates stamping and get the closure and so forth, and I think that under the draft of the rule, the concept at least, that's being dealt with here. The requesting party can ask for that. Ordinarily I think that can be agreed to. If it's a case, Luke, like you're talking about in a divorce case where it's not needed, the requesting party doesn't need to ask for it, or if they do, the guy can object to it if it doesn't fit.

I think we need to leave -- on the one hand, we need to leave flexibility so that people can tailor the details of what they do to their case. And on the other hand, we need to improve a little bit on the mechinism so

that we can iron out some of the problems, but I don't see it as a major problem.

CHAIRMAN SOULES: Okay. Steve, and then we'll go around the table.

MR. SUSMAN: I think that -- I mean, obviously, the science of document production and document inspection is very complicated. I mean, we have legal assistant manuals that explain how to do it, but I mean, they know exactly how to go in and Bates stamp them and how to keep track of files that were produced so you can resolve these articles.

We can't even write a rule that's going to explain in detail how to produce documents and assure that you have seen what -- that you can somehow reconstruct what in fact you have produced for the other side to look at, so I don't think we can get in on this micromanagement.

I think we can write a rule that certainly for the small case will work, where essentially you say, "I want your documents," and if we're talking about a handful of documents, "I want you to produce them in my office 30 days from now." And the obligation

of the party who is responding is to have the documents in my office 30 days from now, period. That's what should happen.

In a big document case where, you know, I'm asking for most of the documents of General Motors or Ford and I want them produced in my office 45 days from now or 30 days from now, I mean, I know I'm going to get an objection. And I think it should be quickly. The objection should be quick, 10 days. That's why we put it in there. I know someone is going to say, "We object. They're voluminous documents. They're in Detroit. We're not going to produce them in your office. It's unreasonable." And then I'll have to talk with the other side. That's how it works.

The default is going to require me to engage in a dialogue with that defense lawyer to figure out, okay, now, how many documents really are there. I mean, where are they located and how can we work this production out, because you objected to producing them in my office 30 days from now and no court is going to make you do that anyway. I just had

to put something in my document request. And maybe what I should have done is not serve the document request but should have called you up in the first place and say, "What are we going to do about the document production," I mean, which is the way it should work.

So I think the rule is going to be written so that it's self-executing, fast and quick for the majority of cases, for small cases. With the big cases, the 10 percent of the cases that involve hundreds of thousands of documents, we are not going to be able to write a rule that tells people how to protect themselves or to guarantee to avoid disputes in the future over whether they produced them or didn't produce them. I mean, those disputes are always going to be there.

I mean, Paul, the most efficient form of document production is where you ask for a lot of documents and I say, "Paul, come over to my client's office over the weekend and you just look through all the files. I want your agreement that it will waive no privileges, okay? I mean, I'm not waiving anything, but I don't want to have to go through these

documents ahead of you and pull out attorney-client or work product or something, but you go through all these file cabinets to your heart's -- and I'll have a legal assistant there and you can look at anything you want to look at, okay? And you put a sticker on them and we'll copy them for you." Now, that's the most civilized and fullest and completest production.

But how am I ever going to guarantee what you saw? I mean, that's the problem, okay? I have cooperated fully, but I've also cooperated in a way that never allows me to prove that you saw this particular document because it was in the filing cabinet. I don't know what you would do about that. I mean, it's just kind of -- you know, there may be some disputes, and I don't know how you write a rule that deals with that problem, because I can't tell you what you saw in the filing cabinet on that weekend when I let you walk through the entire office.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Well, what I seem to be hearing here is that for 90 or maybe

even 95 or 98 percent of the cases, the rule works just fine.

MS. SWEENEY: No, it doesn't.

MR. MARKS: And in a very small percentage of the cases, the rule does not work very well. And in those cases you have to have something tailored by the court or by agreement of the parties anyway and you would have to do that whether we change the rule or whether we didn't, so you know, I would like to see a sense of the group as to whether we ought to make any major changes in it, hopefully.

MR. SUSMAN: But the sense of our group, of the subcommittee, was not to make any major changes in the rule, and we did not intend to make any major changes in the rule. We reorganized a little and cleaned up the language and made clear, you know, like, well, when do you actually -- the rule is as ambiguous as hell as to when you have to produce the documents. I mean, the rule doesn't say when you have to produce the documents. I mean, that seems to be something that you might want to put in there, by what

date or when do you have to produce the documents.

MR. PERRY: One of the changes is that if you don't want to produce --

CHAIRMAN SOULES: It says that you produce when the request says so. The request shall specify a reasonable time, place and manner for making the inspection and performing the related -- that's in the rule right now. In other words, if you disagree, you have to work it out.

MR. PERRY: The practicality of that is that that is ignored, and what the new draft does -- it's frequently ignored. And what the new draft does -- the practicality is that a lot of times people simply do what Paula says, "We will produce it in the future."

MS. SWEENEY: Will be produced.

MR. PERRY: Under the new draft, the only change is if you don't want to produce it in 30 days, you have to say -- you can say, "We will produce it by June the 1st or by June the 22nd," but you need to put in something that says what you're going to do.

HONORABLE F. SCOTT McCOWN: Could I point something out?

CHAIRMAN SOULES: Okay. Judge McCown, and then we'll go around the table and get to you, Joe.

HONORABLE F. SCOTT McCOWN: Something that nobody has commented on is that the document production is a key area of cost to litigation, and it is a key area of intrusiveness that the general public is very upset about. And we shouldn't do anything here that's going to make it very much more costly or very much more intrusive.

I agree with Paula, that you've got problems at trial when you've got a dispute about whether a document was or wasn't produced. And as a trial judge, sometimes I can sort those out and sometimes I can't. What I will tell you is I haven't seen hardly any cases where it mattered, and so I don't think we should develop a rule that requires cataloging in a great bulk of cases, most of which will never go to trial, in order to have a finely tuned system of proving what was and wasn't produced, resulting in zillions of

attorneys' fees, zillions of direct costs to the clients who are having to do the work, a lot of intrusiveness all for the purpose of being able to sort out with precision whether this document was or wasn't produced when it isn't going to turn the trial anyway.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, what I had to say has now been said.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I think that in the bulk of the cases, and I'm not going to jump at 98 percent of the cases, because I don't think there's any empirical study that's been done on what the extent of this problem is or what the extent of the agreement is on any of this --

MR. MARKS: 98 percent.

MR. GOLD: 98 percent. Okay. I forgot what it was like practicing in Dallas.

I think in a lot of cases you're not dealing with a lot of documents, and it would save everyone a lot of time and a lot of copying expense merely to say, "The document

that's responsive to this is the manager's manual." Bam, you've got it.

I think in the larger cases, those that Steve is talking about, those that David has talked about, the ones that Judge McCown is talking about, then if somebody says, "Look, we've got massive amounts of documents here and it would be unconscionable to have to Bates stamp all of those," fine. That is the case where everybody gets together either amongst themselves or with a judge and tries to figure out some way of document control in that case. And I've been involved in those. I mean, we've done everything from document repositories to some sort of identification. But I think that in the bulk of cases you're not talking about a lot of documents.

Even the Houston Court of Appeals, the First Court of Appeals, said what you're supposed to do, the way they interpreted the rule, is you're supposed to attach the document to the response unless you can show that it's unduly burdensome. That's how they're interpreting the rule right now.

I just think that there needs to be

something done to fine tune the rule so that somebody has to respond with more than "We will produce the documents that we have, if any," so that you've got some sort of meaningful response that says, "We'll produce our management logs, which are what we believe are responsive to this request," or whatever, so that you have an idea about what's being produced and so that you know whether you need to go look at them or not.

And I just think this stuff about having to file requests and responses to finesse discussions with the other side is just a waste of time. I think it's all a ruse. I just think that if you have to put a response in, it should be a meaningful response. It shouldn't have to be a request that finesses a call; that tells you, "Oh, okay. What we're really talking about here, Harry, is we have 50 documents. 25 of those, we believe, are protected by an attorney-client privilege."

And I agree with Steve. I've done what you're talking about on a number of occasions. We agree that you won't waive any privilege if you allow me into your warehouse

and I'll go through all the documents. Fine. That works in some of the cases. I've got a lot of attorneys that won't do that, though. They're so pinched up with concerns about errors and omissions that they ain't ever going to allow me to do that.

I just think there needs to be some minor -- and I don't think it's major and I don't think this is a major rewrite of the rule as it is. I think there needs to be some minor revision that just requires somebody to put a little bit more than saying, "We'll respond."

MR. SUSMAN: Let me suggest what the committee or the subcommittee should do based upon the discussion. Let us take the old rule, not rewrite the old rule but keep the form of the old rule, and interline in red -- you know, underline for you any changes we make in the old rule so that you will be looking at the old rule and then you can readily see what we have changed in there and approach it with the notion that we have got to justify any changes from existing procedures.

CHAIRMAN SOULES: Okay. The Chair accepts that recommendation and makes the request that you go ahead and do that.

And Harriet made the suggestion, and let me put this on the table, too, that we need to have the information for our meetings distributed to everyone at least a week ahead of the meeting, two weeks if you can get it there. Obviously, if we've got things we need to talk about at the meeting and it comes to the meeting in multiple copies and that's the earliest you can get it here, we've got to live with that. But it is -- it's a burden on our dialogue not to have things in advance of the meeting, so -- and you've been good about that Steve, and I'm not suggesting anything by that. But if we could, as a goal at least, try to have the discussion drafts mailed to everyone at least a week ahead of the meeting.

MR. MARKS: And let me add on to that, Luke, a little bit. I hate to bring up Dallas, but getting mail into Dallas is probably slower than anyplace else in the state, so in order for us to get mail that you

send to Austin at the same time you get it in Austin, you might have to send it two days earlier.

CHAIRMAN SOULES: 10 days. The goal is 10 days instead of a week. Maybe that will work, because if you're in the subcommittee process, that takes time. It takes scheduling. And if you can't get the work out until later than 10 days or closer than 10 days to the meeting, it's not going to be up or down that we're not going to talk about it. We're still going to go ahead and talk about it. It just would be helpful.

Joe Latting.

MR. LATTING: Short. Steve, I want to say this about something that Paul said. I don't think there's any doubt that if we required responses -- and from what Paula said -- if we required responses to be germane to particular requests, that it would be helpful in narrowing the universe and it would be more particular. It would also be very expensive. And I promise you that if we make that in the rule, every single request for document production I get will contain one of

those, and every one I send will contain one, which means that not only will the client have to sit down with the request for production, so will the lawyer. And we'll have to go through and match them up, and this document will be germane to Request Nos. 4, 9, 11 and 16, rather than just producing the files.

And if we're headed -- if we're trying to save the public money, this is the wrong direction to go. And furthermore, it violates the Peeples Rule, which is that this area of practice really works pretty well in 98 percent of the cases.

And I think there are a few cases, a couple of big cases that Judge Hecht is talking about, where you do have a few problem situations. But we don't need to do too much rewrite of the rule to cover those.

And I conducted my own judicial poll earlier, and none of the judges have a problem with it out of all of those I talked to.

MR. SUSMAN: I think that's right. And I think what we ought to do is, Judge Hecht, if you will maybe have one of your law clerks or someone kind of pull

together for us the two or three that you've talked -- you said you have a lot of mandamus cases on this issue, on document issues. If you can, just give us like a one-page of what these issues are.

JUSTICE HECHT: We will.

MR. SUSMAN: Then we can kind of focus and say -- I think that you're absolutely right. This was a very small part and an unimportant part of our work. We didn't think that there was a big problem. We did something because we are a committee who will look at the rule, so I mean, there's no problem going back to the original. And if we make any changes, it will have to be justified, and we'll write it in the original form.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I would like to make a pitch for not having to have it look exactly like the old rule. I think one thing that the task force in revising these rules was supposed to do was to make the rules look more coherent. One of the things I have

been trying to do in revising these rules is make all the discovery devices, the rules for each discovery device, look kind of like each other. So if you're going to do that, you can't follow Rule 167 exactly like it is, so what I'm trying to do is make the Request for Production Rule look kind of like the Interrogatory Rule so that you know what things are the same about them and what things are different about them. We're trying to make all of the discovery rules a coherent and organized whole.

So I'd like permission -- I think what Steve said made it sound like we had to take Rule 167 and make it look just like that, and I would really like not to do that.

MR. SUSMAN: Have a version that does that and then rearrange a version. See what I mean? They -- these -- what they're looking at is they come to -- people come to a meeting and they look at something that looks strange to them and no one remembers what -- I suggest that this device works well, and no one is really familiar with the text of the rule, so you look at the real

rule and they say, "This is strange. This is strange. Is this the real rule?"

You know, and so then everyone gets confused about how radical our changes are, and I don't think our changes are that radical because we didn't even tell them what the changes were.

CHAIRMAN SOULES: I think we've got two things working here.

MR. SUSMAN: And whenever Paul attends a meeting, he always mumbles about some problem with document production, you know, but we haven't been able to figure that out either.

CHAIRMAN SOULES: Okay. We've got two things in response to Alex. We've got Rule 167, which we're going to try to rework in some respects. I think that should be done on a red-line of the existing rule that looks like the existing rule.

Then you've got, of course, you and Bill and that subcommittee that's going to try to pass through all the rules and give us a second red line, I guess, of some kind like we talked about two or three meetings ago.

Exactly what the format that that's going to be -- I think that's Step 2. Step 1, let's just use the rule we have.

All right. Coming around here, are there more hands up? Pam Baron.

MS. BARON: I'm sorry, I just wanted to agree with Alex. I think that the way the rule is organized now, it's hard to read. The subsections don't necessarily belong together. The new use of headings is beneficial. Some of the reorganization makes it a lot easier to follow and to comply with.

I think maybe Steve's suggestion is good, to show how it interlineates with the existing rule, but I think that the Committee should have the power to produce a ledgible, readable, understandable rule.

PROFESSOR ALBRIGHT: How about if I write a paragraph that identifies exactly what is the same and what is different from the old rule?

MR. SUSMAN: All right.

CHAIRMAN SOULES: Well, what the Chair is asking for is a red line of the existing rule, and then that will be a matter

for discussion at the next meeting. There's going to be some reorganization, and we'll look at it after that.

MR. SUSMAN: Now look at Page 7, 166e, Response, Amendment and Supplementation to Discovery Requests.

CHAIRMAN SOULES: Page what, Steve?

MR. SUSMAN: Page 7. Now, we tried -- Subpart 1 makes it clear that information reasonably available to both counsel and the party is required in response to discovery requests. It also makes clear that objections to certain disclosures does not relieve the objecting party of the duty to provide unobjectionable information. I don't think there's anything particularly controversial or exciting about Subpart 1.

We then go on to distinguish between the duty to amend a discovery response and the duty to supplement a response. An amendment is required when an initial response was incorrect or incomplete when made, and that's covered by Subpart 2. A supplement is required when the original response, though

accurate and complete when made, is no longer so because additional information has turned up, and that is covered by Subpart 3.

The duty to amend is when you know you've made a mistake, when it is just a full-blown error. When your answer was wrong when made and you discover that it was wrong when made, you have to amend immediately, as soon as you learn about the error.

When you simply have gotten additional information, there's a duty to supplement. And that need not be made as soon as you get the additional information but only need be made 60 days prior to trial, so you can save your supplementation until the end, but an incorrect answer has got to be amended immediately.

We make it clear or try to make it clear that amendments and supplements are unnecessary when the information has otherwise been made known to the other parties in discovery or in writing. And for these purposes discovery includes disclosures made during a deposition.

Subpart 4 deals with the issue that we

are going to have to deal with if we have either a discovery period or some deadline on discovery that could possibly be months before the trial is set. Either way you're going to have to deal with it, and that is the issue of freshening up the case, an opportunity to reopen discovery right before trial. And that's basically what Subpart 4 is designed to deal with.

And then we have already basically looked at Subpart 5, Exclusion, if it's deliberate or consciously indifferent; Continuance, not exclusion, if it's not deliberate but may nevertheless result in an erroneous fact finding.

Now, discussion.

MR. PERRY: Let me ask a question.

CHAIRMAN SOULES: David Perry.

MR. PERRY: First of all, as I understand it, this does not apply to supplementation at depositions, so that in effect we are abolishing any duty to supplement depositions other than your right to make changes when the witness signs it. Am

I right about that?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: At the risk of sounding radical, I think we have legions of associates whose full-time duty is answering written discovery, supplementing and amending, and I think this rule will continue those legions at their nice salaries, and I think it's silly. I don't think most lawyers in this room -- maybe I'm wrong -- but from what I've seen, I don't think most of the lawyers I've ever worked with ever sit down and read the written discovery or pay a whole lot of attention to it. And I think all this supplementation and amendment is just guaranteed to increase the cost of litigation and give a lot of people a lot of jobs at very nice salaries.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think maybe the only change that I see that would be productive is the last part which says that information obtained in a deposition is obtained in discovery. That would seem to cut

out a lot of work that all of us have to do in bringing our interrogatories up to date and that sort of thing when we already have the information. That ought to take care of a lot of ills right there, or we could add to that and say by any other means, by letter or whatever.

CHAIRMAN SOULES: Judge Cornelius.

JUSTICE CORNELIUS: With respect to what David Perry said about supplementation of depositions, there's nothing in that proposed rule about it. But the rule about experts does require that depositions of experts be supplemented.

MR. SUSMAN: We have a separate provision on the supplementation of expert discovery, and that is on Page 15, so let's keep experts separate for these purposes right now. Just hold off on experts until we go to Page 15.

JUSTICE CORNELIUS: That's a matter that we had in our court just last week, whether or not an expert's deposition must be supplemented as ordinary discovery is

required to be supplemented.

HONORABLE F. SCOTT McCOWN: Luke?

CHAIRMAN SOULES: Is this responsive to Judge Cornelius?

HONORABLE F. SCOTT McCOWN: No.

CHAIRMAN SOULES: Okay. Let's respond to that first. Who wants to address that?

HONORABLE F. SCOTT McCOWN: I think Steve just addressed that; that there is a different provision on supplementation for experts that's separate.

What I wanted to follow up on was Sarah's comment. The subcommittee understood -- and if this isn't right, I guess we need to know it -- but the subcommittee understood that supplementation was a big problem in practice; that there was a constant duty to supplement. And what this rule was designed to do, and I think does do, is solve that problem because it makes a big change. You've got a one-time duty to supplement at the end, 60 days before, and you can tie it either to the trial date or the discovery cutoff date, so that

supplementation would be toward the end, would be a one-time deal where you could review your discovery, gather up all your supplementation and file it. Rather than having a rule that says there is no supplementation required, which I don't think anybody would want to do, having supplementation once at the end is the only other way to do it.

Now, we do make a distinction that Steve drew between amendment and supplementation. If you gave an answer that was wrong when made and you discover that, you've got to let the other side know immediately, which I think is reasonable. They shouldn't be proceeding on the basis of something you told them that was wrong when you told them, but I don't think that's going to create a big problem. So the rule was designed to address the problem that Sarah has identified, and we think it does.

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: Well, I am troubled by the distinctions that people would then make between amendments and supplementation, and maybe I'm the only one that's troubled.

MR. SUSMAN: Between what?

MS. MIERS: Between what's an amendment and -- is adding another identification of an important witness, is that a supplementation or an amendment? And I'm a little troubled that 60 days out from trial is pretty close, if it's any kind of meaningful information that you then have to respond to. So for both of those reasons I would be a little concerned about being able to save everything up and then just dump it 60 days before trial.

CHAIRMAN SOULES: David Perry.

MR. PERRY: The task force had considered the amendment versus supplementation issue. I think I suggested it to the task force and the task force decided that it was more trouble than it was worth and turned it down. The task force also considered a different mechanism on timing the supplementation. The thought that I think everybody has is that the continuing duty to supplement or being vague about when you have a duty to supplement is a very bad situation.

The task force considered a mechanism

whereby you would have a duty to supplement on request; that the person that had sent the discovery to start with could send a request for supplementation. And if you didn't get a request for supplementation, you didn't have any duty until -- I think we said 30 days before trial or maybe 60 days. And then that was coupled with a prohibition against sending that request more often than some certain times so you couldn't continually be harassing people with it. But I don't know that anybody felt totally comfortable that that was a perfect solution.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I've got a question for either Steve or Scott or David or anybody, and it's germane to what Harriet raised; this may be contained in it already. What happens when you ask the other side, "Tell us who saw this accident."

And they say, "A and B saw the accident." That's all the people they knew about, the two eyewitnesses to the accident. That was a true statement when made. They then find out that C also witnessed the

accident. When do they have a duty under this rule as drafted to make that known to me?

MR. SUSMAN: That would be a supplementation and they would have to do that 60 days before trial.

MR. LATTING: See, that would concern me. That concerns me because we've got a major change in the scene here. We have a new eyewitness that could radically change the outcome of this case that I don't get to hear about even though the other side knows about it.

CHAIRMAN SOULES: Under this test, that answer was incomplete when made. You didn't know it was incomplete, but it was incomplete when made, so that's an amendment.

MR. LATTING: Unintended but incomplete.

PROFESSOR ALBRIGHT: Joe, can I respond to how this is supposed to work?

Again, I think this is a rule that you have to think about. We were doing this in the context of a discovery window, and maybe that's the problem and maybe we need to reconsider it in that view or maybe rewrite

it. If you have a six-month discovery window, what we were concerned about was that if you find this Witness C three months, four months, five months after the discovery window is closed, then we don't want to reopen discovery all of a sudden and start everything all over again. We want to wait until right before trial and then have a month to reopen discovery to decide if -- to rediscover those things.

Maybe what we need to do is rewrite the rule. If we have a discovery window -- say, okay, if you find anything out during the discovery window, you have to disclose it right away. But you have to remember the way we started this is we want people to open their files for six months, close them, keep them closed, and then reopen them right before trial.

MR. LATTING: Well, it's kind of frightening to think about a situation where all the witnesses we know about in this case said the light was red. Well, actually that's not true. There are two of them that say it was green, but I don't get to find that

out.

MR. SUSMAN: That's an amendment. I gave you the wrong answer.

MR. LATTING: Okay.

PROFESSOR ALBRIGHT: But I think there's a problem in determining what the differences are.

MR. SUSMAN: Well, I think we make that clear. I mean, we say that the response is incomplete when made, even though you didn't have the information. We make that clear, Joe.

MR. LATTING: Okay.

MS. BARON: But that turns everything into an amendment once you say that. It won't work. It really won't work. Any new information you get perforce makes it incomplete when made. You're interpreting it that way with the next-witness example.

CHAIRMAN SOULES: If I'm understanding what this says, it says that if facts existed at the time an answer was given but you didn't know about it and you later discover that those facts existed at the time that you gave the answer, then you've got to

amend. But if facts occur later that didn't exist at the time you made your answer but those subsequent facts make the answer misleading, then you've got to supplement with that later developing information.

MR. PERRY: If the plaintiff sees a new doctor, that's a supplementation. But if you find a new eyewitness that you didn't know about, that would be an amendment.

CHAIRMAN SOULES: Right.

MS. DUNCAN: No. If the document existed at the time you gave the answers to the interrogatories but you just didn't know that it existed, that's an amendment.

CHAIRMAN SOULES: But he said doctor, if the plaintiff sees a new doctor.

MS. DUNCAN: Oh, I'm sorry.

CHAIRMAN SOULES: David Gold.

MR. GOLD: Without commenting whether this is a better approach or not, if there's -- if you wrote into it something that made the duty to amend subjective and the duty to supplement objective, that might be a way of curing it. In other words, the duty to

amend would be if you provided everything that you actually new about at the time but you suspected that there was more out there, you just didn't know what it was, that would be an amendment.

I mean, it's going to be very tough here, because what you're actually talking about in this amendment/supplementation type of thing, except for Dave's situation, which was pretty clear, is if there's this witness out there that Joe was talking about but you don't know about that witness, it's very similar to the doctor situation. You don't know about him so you can't tell anybody about it. You're not concealing anything. You're not preventing anybody from knowing about it. You don't know about it.

MR. SUSMAN: No, no. I think we intended that to be -- that's an amendment. I mean, that's something -- if you were doing your work, I mean, if you had all the knowledge you did at the time you answered, you should have included that in the answer, okay?

MR. GOLD: I can agree with

that.

MR. SUSMAN: And we don't want to talk about subjective fault or anything. I think supplementation really ought to deal with something which -- a fact which happens after the answer. Business profits change, the health of a person changes, not -- I mean, that's what we ought to do, I think, to deal with the problem that I think you have and that Harriet had, which is a legitimate problem.

CHAIRMAN SOULES: Harriet.

MS. MIERS: I know it will slow us down a little bit, but I don't think the Committee should reach an issue that is difficult, like the priority issue we talked about a minute ago where we sort of said, "Well, everybody views that different ways," and so we decided not to deal with it.

And I think Sarah's point is an issue in terms of the energies that go into this and we need to be solving these problems even though they're difficult, so I hate to see us move so quickly that we don't slow down and actually analyze what is a reasonable solution to what

we now have experienced for years is a real problem and keeps you fussing around a lot.

And I guess I'm -- a la Paul, you know, I had one case where we spent an awful lot of time arguing about priority, taking depositions, and I'd like to see us not pass over these issues but get some resolution on them.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: And I don't mean to say I don't think people shouldn't be complete and diligent and act in good faith all the time, maybe because I grew up under this amendment/supplementation system. The rule that I would propose is simply that I will answer honestly and completely and to the best of my ability the questions that you pose to me when you pose them to me. But past that point, we are both under an obligation to investigate each other's cases and our own cases, and if I find out something that you don't know, that's just life.

But to require this amendment and supplementation -- I mean, to think that in any lawsuit of any real complexity that you

can get up to the 60th day before trial and all of a sudden in a day or two amend and supplement every interrogatory that you've received since the inception of the lawsuit I think is naive. It's going to take in many cases months of associate time to do that. And it's not going to happen on the 58th day before trial starts; it's going to happen on a daily basis with all information from all sources.

MR. SUSMAN: Let me see, are you saying that if you use your best effort to answer completely and fully a discovery response, that should be it, no duty to supplement or amend, no duty to do anything else?

MS. DUNCAN: I --

MR. SUSMAN: Could we have a show of hands as to whether this group agrees that that's the way we ought to conduct discovery? Because if we do, it solves a lot of problems.

MR. PERRY: Let me ask a question on this: Could we separate out identification of witnesses from everything

else? Because that's just a different issue.

MR. SUSMAN: Okay. Identification of witnesses we're going to separate out from everything else. Do you want to do documents, too?

MS. DUNCAN: Yeah. If there's in existence a body of relevant documents, yeah, I don't have any problem with that.

MR. SUSMAN: Okay. Identification of documents and witnesses are separate, okay? Now, can we have a show of hands of who believes that other than for documents and witnesses, once you make an effort to in good faith answer and do that, that's it, you shouldn't have any duty? Who believes that?

CHAIRMAN SOULES: Nine. Is that right?

MR. SUSMAN: And who believes that there should be some duty?

CHAIRMAN SOULES: Eight.

MR. GOLD: Is that a done deal?

MR. SUSMAN: Harriet, did you vote both ways?

MS. MIERS: No. I voted for

some reasonable supplementation.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: What I'll say from the perspective of what comes up to the appellate courts either by mandamus or appeal or otherwise, the supplementation issue is there a lot. And the other issue is supplements to depositions, or if you don't supplement, does the deposition even count?

I think you've done a good job with the rule you've proposed in trying to get rid of both of those. I guess the problem I would have is that the way you interpret "amendment," we're just back to where we were on supplementation, which is as soon as practicable, basically, which is what we're trying to get rid of. So those problems have to be resolved or we're just going to be in the same position we're in now.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: A key part of Steve's framing of the vote was if you believe in good faith -- I mean, if you answered it in good faith the first time, and

I think that is the issue that's going to be litigated. As it stands now, you've just got to supplement. I mean, there's no good faith. And actually, that's going to come to court every time and I think it's a hell of a problem.

MR. McMAINS: And the problem is that makes the lawyers witnesses. I mean, everybody is going to say -- in terms of trying to say that they don't qualify here because they didn't do it in good faith and I get to examine this guy.

HONORABLE F. SCOTT McCOWN: When you say there will be no supplementation except for witnesses and documents, you have taken us full circle back to where we're at, because there's not a fact that's going to come into existence that isn't going to be referable to a witness or a document and so you are having the same duty to supplement with that vote that you have right now, which is constant supplementation.

CHAIRMAN SOULES: David and then Harriet.

MR. PERRY: I would suggest

that we strongly consider the system that the task force ended up coming to, which is that there is an automatic duty to supplement 30 days before trial, which I think is consistent with the way most people practice law. I think most people generally figure, "I answered these and I'm going to come back 30 days before trial and I'm going to update it and go on." And then say that the only other duty to supplement would be keyed by some specific request from the other side, and you don't let people do that very often, or else tie it to identification of witnesses.

It seems to me that it makes good sense to have people update their discovery answers 30 days before trial and that it is important to get updates on the identity of witnesses in between times; and that for other stuff, the continuing duty to supplement ought to go away.

CHAIRMAN SOULES: Harriet.

MS. MIERS: Why do we keep talking about the duty being before trial? Why wouldn't we be talking about a duty before the close -- some period reasonable before

the end of discovery, because I don't -- I mean, I don't much care what you do for me or to me if I have time to try and figure out what I need to before discovery closes responsive to the new information. So why do we keep talking about before trial instead of before discovery cutoff?

MR. KELTNER: That might be a very good idea. In fact, the more I think about that, that's one thing that on the task force we thought about. And Harriet, we probably didn't carry it as far as we needed to go, but that makes a lot of sense and it solves a lot of the problems.

If we go too far back, I think we're going to have a total duty to supplement again, but I think that is a very good suggestion and we need to follow that.

HONORABLE F. SCOTT McCOWN: But don't we have that in the rule, David? If you look at Subdivision 4, what we provide is that once you have a supplementation, whether it's -- you can pick any day you want, 30, 60, 45, 90 -- once you make the supplementation, then you've got an additional

period to do discovery on just what was supplemented.

MS. MIERS: But why before trial? Why does that make sense?

MR. SUSMAN: Harriet, do you want it during the discovery period but not before trial? In other words, if I end discovery on you six months before your trial is, you're willing to go to trial with information that is six months old; I'm not going to open it again?

MS. MIERS: No. Let me say, because I think your point is well taken, that you may need both. But if there's a big difference between the time that discovery -- I mean, if you're going -- if there's not a big lapse between the end of discovery and trial, then I want the supplementation before the end of discovery. If there is going to be, like we see all the time, a year in between the discovery cutoff and the trial, then, yeah, there ought to be another time at which you have to update. But that's still just two times instead of the continual that we deal with now.

MR. SUSMAN: We were trying to avoid -- I mean, basically what we were doing, obviously, is -- I mean, this rule is in the framework of a short discovery window, six months or something like that, and the notion was -- I mean, it doesn't really make much sense to have to -- six months is so little time basically to have to supplement at the end of six months. And the notion was let people finish the case in six months and then they have another 60-day period of intense activitiy before trial where the supplementation and redepositioning occurs; and that that's kind of a sensible regime.

Now, if we get rid of the window, I don't know what we're going to do with the supplementation issue.

MR. MARKS: Steve --

MR. SUSMAN: But what I'm hearing in here is a division, and I guess it's a fairly close vote, as to whether there even ought to be any obligation to supplement.

CHAIRMAN SOULES: Steve Yelenosky, you had your hand up.

MR. YELENOSKY: Well, there was

some reference earlier, I think, to disclosure provisions. Are there going to be some mandatory disclosures, and is one of those people with knowledge?

PROFESSOR ALBRIGHT: No, it's not.

MR. YELENOSKY: It's not?

PROFESSOR ALBRIGHT: In ours we have no mandatory disclosure. We have some standard requests which we ask in an interrogatory or request for production.

MR. YELENOSKY: I was just going to say, I mean, everybody who spoke focused on witnesses being crucial to know, but I don't know if that eats up the whole rule or if that exception would eat up the whole rule, as Scott said. But if you had a mandatory disclosure rule, once you've asked for people with knowledge, you have a continuing obligation to add people with knowledge when you become aware of them.

But then if you have supplementation, as Harriet suggested, I think if you're going to have supplementation, then you're going to need it twice, not have it or have it twice,

which is before the window closes and then right before the trial, because that could be a long period of time.

CHAIRMAN SOULES: Let me call on Sarah and then go around the table.

MS. DUNCAN: There's a big difference in my view between giving you a finite discrete list of names of persons who may have knowledge of relevant facts and a finite discrete list of bodies of documents and updating my expert's -- the basis for my expert's damage calculation which spans an 85-year period and probably 100 million documents. And that's what -- it's those types of interrogatories that you have to supplement under this or under the existing rule. And I think that's where the distinction is to me between, you know, relatively full and complete information and giving you, you know, every fact in my case. And that's -- you know, do you say that's a contention interrogatory or a fact interrogatory? I don't know. But that's -- that to me is what the difference is.

CHAIRMAN SOULES: David.

MR. PERRY: In response, Sarah, to what you're saying, I think it's real important to remember that under the changes that are being proposed, the detailed stuff that you're talking about is not going to be part of the paper discovery. The detailed stuff that you're talking about is going to be eliminated from contention interrogatories. And with respect to experts, you don't have to set that out. The way you get those details is by taking the expert's deposition, and that doesn't have to be supplemented.

PROFESSOR ALBRIGHT: No. The expert's deposition does.

MS. DUNCAN: I don't think there's any rule that's been proposed that will preclude interrogatories as to experts.

MR. PERRY: No, no. The identity of the experts, yes. But in terms of all of the detailed theories of calculations, that's not something that people are going to have to answer in interrogatories.

MS. DUNCAN: No. I'm just using that as an example. Maybe I need to find another example.

MR. PERRY: So we're taking a lot of the detail out of the written discovery. Then secondly, on the timing, I think everybody agrees that we're going to have to -- on a default, automatic basis, everybody is going to want the discovery to be supplemented 30 days before trial. That may not be the only time. If there's an early cutoff date or for other reasons, you may want to have the other side supplement it earlier than that.

Now, we could have -- we could try to write a rule about another earlier time, but my proposal would be that we just give people the right to send a request for supplementation, not very often, but if you have -- let's say you have the window -- let's say your discovery cutoff deadline in a particular pretrial order is going to be six months before trial. You can send a request for supplementation, if you want to, to where you're going to get your supplementation a month before that window closes or a month before that deadline, if that's the way you want to do it in your case.

So I guess my proposal would be that there be an automatic supplementation requirement 30 days out and then a supplementation-on-request trigger that the party who wants the supplementation can pull the trigger, with some limitation that you can't do that -- maybe you only get it once or maybe you only get it once every six months, if it's a long case or something like that, but you can't get it very much.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Just on that one point, I think -- and I think Joe has brought up this same thing earlier. Once you provide the trigger, everybody is going to pull it or they're going to face a malpractice claim. So to say they have an option of doing that I think is to say everybody is going to do it, so we might as well make it mandatory or not do it all, so I wouldn't provide the trigger. I would say let's decide how often it should happen and make it automatic rather than doing it that way.

CHAIRMAN SOULES: Alex

Albright.

PROFESSOR ALBRIGHT: One thing we talked a lot about in the subcommittee meeting and I haven't heard it discussed here is we were really worried about people having an obligation to respond fully at the very beginning when they first made that response, and that's why I think amendments -- we saw a real distinction between amendments and supplements.

If you're supplementing with things that happened after your response, it's not your fault that you didn't provide it to begin with, and so we do need to provide some kind of mechanism to provide that information. Maybe what we need to do is if parties are amending and providing additional information that they should have given at the very beginning, maybe something bad should happen to them for doing that.

But I think what we were trying to do is really try to require people to give full responses during the discovery period and get all the discovery done during that period, and then have a finite time to tie up what has

changed since then. And maybe what we proposed hasn't done it exactly the way it should, but -- and then I think that's why our exclusion -- when you see that down on 166e(5), we talk about failure to timely disclose.

Okay. If you should have disclosed it during the discovery period when you were producing documents and answering interrogatories and you didn't provide it until an amendment a year later, maybe that's a situation where that information should be excluded. That's what we were trying to do, I think, is focus on your duty to respond initially.

CHAIRMAN SOULES: Are we creating -- do we have an impasse in this discussion because of the undecided question of whether we're going to have a discovery window? It seems like we're blending those two issues together, and if so -- okay. Assume there's not going to be a discovery window, we're not going to --

MR. SUSMAN: You're going to have a problem anyway. I mean, you have --

CHAIRMAN SOULES: Well, let's make that assumption so we don't get backed into talking about a discovery window. We don't have a discovery window. Now, let's talk about supplementation.

MR. SUSMAN: Okay. You don't have a discovery window, but you've still got the duty to provide -- to correct an answer that was incorrect or incomplete when made or to provide additional information that has arisen by additional events in the real world since you responded. Those are the two problems. I think they can be defined so that they are distinct, and I think the best -- that you ought to talk about one as an amendment and one as a supplement, if we can understand that concept.

"Supplement" is additional things that have happened in the real world. "Amendment" is nothing new has happened but I have learned more about what I previously disclosed that made my answer incomplete. I mean, those are the two different concepts. We could basically say, well, in spite of the fact that they are two different things, they ought to

be treated alike and the obligation to respond to supplement and amend ought to be triggered at the same period of time. And we could trigger that whenever you want, a month before discovery ends and then a month again before trial, if you would prefer it that way. Treat them -- not distinguish between the situations.

CHAIRMAN SOULES: Well, let's assume no discovery window for right now.

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: So you don't have a first one. In other words, let's just focus on do you have an ongoing duty.

MS. MIERS: No, Luke, you do. I mean, courts set discovery cutoffs many times, and so you do have a time when this is it. And then the trial may be three years later.

CHAIRMAN SOULES: But that's not in the rules. It's in the pretrial conference, and that can be handled on an individual case basis.

MS. MIERS: But if we're creating a duty to supplement, we ought to

address it, it seems to me, in resolving the issues that now exist.

CHAIRMAN SOULES: If we don't have a discovery window in the rules, I don't think we ought to have a rule that contemplates what you do when there's a discovery deadline.

MR. PERRY: We ought to write the rules in light of the fact that some courts are going to have those discovery cutoff deadlines in some cases.

CHAIRMAN SOULES: Well, that ought to be written in the individual case rules.

MR. PERRY: Yeah. I mean, I think we need to have that in mind as we write the rules.

MR. SUSMAN: Well, I mean, the fact of the matter is and what you all are saying is in spite of the fact that we are 11 to 11 on whether there ought to be a discovery window, the truth of the matter is that in 98 percent of the cases there is a discovery window, period. I mean, there is a discovery window. It may or may not be longer than six

months, but it's there, and it frequently ends long before the trial takes place.

HONORABLE F. SCOTT McCOWN: Well, Steve, wait, instead of saying "discovery window," there is often a discovery cutoff --

MR. SUSMAN: Fine.

HONORABLE F. SCOTT McCOWN: -- created by local rule or pretrial order. There is so often a discovery cutoff and it is such a difficult problem to know what to do with supplementation that, following up on what Harriet said, I think it's a problem we ought to solve, if we can.

MR. SUSMAN: Correct.

HONORABLE F. SCOTT McCOWN: And that we need to think through it and have a rule that says, if there's a discovery cutoff, this is what the duty to supplement is going to be; if there's not a discovery cutoff or in addition, when you get to the trial, this is what the duty to supplement is going to be. It's a tough problem, it's costing a lot of money, and if we can solve it, we ought to.

MR. SUSMAN: It was our

thinking, I mean, and obviously I think we would all agree that the less that lawyers have to work the less expensive it will be, so if we minimize the work and not make it too dangerous to go to trial in an ambush situation, we ought to move towards that direction. I think we can all agree on that, if we could somehow figure out how it won't be exactly ambush but you aren't going to have months and years to gather the information.

My feeling is that, I mean, I think 30 days before trial is too late. I think 60 days is probably about right. I mean, people -- when you actually go to trial, a lot of activities occur during the last 60 days, and I think if you get the information the 60th day before you go to trial, there's a lot you can do with it if you're allowed to do some more discovery and fix things up. I mean, I would propose that instead of the 30 days it would be a 60-day period where something happens.

CHAIRMAN SOULES: Again, can you go to trial inside of the 60 days? I guess where I'm going is that this is going to

spread back into trial settings. See, we amended the rule that requires the first trial setting give 45 days' notice of the trial setting. And there's already some complaint about that in the family law area, but it's there, and the reason was to accommodate the supplementation of discovery, the demand for a jury and the payment of a jury fee, all of which have a 30-day period prior to trial, so that gives you 15 days to know that you've got to get some work done before you're cut off from that by the 30-day-prior-to-trial rule.

Are we going to now say that the first trial setting has to give 75 days' notice? I think that's a burden on the system. The 30 days doesn't work very well in some cases but it's working in most cases, I think, and to move it changes a lot of other things.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: This may be kind of -- I don't think it's a new topic, but it seems to me that the biggest concern people have is holding back on witnesses. I mean, I know there are some other -- there are obviously some other things as well, but the

biggest inconvenience is if there's a failure to disclose a witness that you find out about. Well, I understand the documents too, but the document you can produce, I mean, so you can require them to produce the actual document and your supplementation will mean "Here it is." You don't just file a response that says, "Oh, by the way, I have an extra million documents for you to look at."

So what I was going to say was as to the witness and the idea that shouldn't we penalize somebody who hasn't disclosed it earlier. Basically, when you get to this time frame, if you disclose it, then why shouldn't that person have to turn over their witness statement right then and there at the same time they supplement if they've got a witness they've been holding back. And this will discourage people from not having disclosed it during the discovery period and basically say, "Hey" -- which may militate against having to take depositions of that witness if you've got their witness statement. Of course, it may require that you take their deposition, but...

MR. SUSMAN: Well, again, what

would be wrong with -- I mean, what's wrong with the idea that when you learn of a new witness or when you learn that there was a document that should have been produced that wasn't produced, that you have a duty right then and there to turn it over to the other side?

MR. McMAINS: The problem is you're always going to be inquiring as to -- I mean, you open up the obligation or the right to inquire of the lawyer of what was he doing, when did he find out, when did he know, what did he know, that sort of thing. And it just puts the lawyer into the forefront of the inquiry.

CHAIRMAN SOULES: But whether there's inquiry or not inquiry, which may be a problem, isn't it the right thing to do? Isn't it the right thing for the system to say when you know something that has caused a prior answer to be incorrect or incomplete? You ought to make that known to the other parties to the lawsuit so they can deal with it because they relied on your information. I've already given you my information and

you're relying on that in preparation for discovery or trial, and now I know something else that makes the information that I gave you incorrect or incomplete, and I sit on it?

MR. SUSMAN: Here is another example: You let me go through your client's files and let me look through the documents and I go through the documents. And then two weeks after I come in, your sales manager confesses that he had taken the key file to his house. It wasn't at the plant when I went there. And he shows you the documents and you see these documents and they are what we would call "smoking gun" memos. Are you privileged at that time to sit on those fucking memos and wait until any period of time? I mean, my view is you ought to have to cough them up right away and get them over to my office.

Why should it be different with a memo than if you learn of a witness? I mean, someone tells you, your client tells you, "Oh, by the way, I just remembered that there was someone else standing on that corner that witnessed the accident." Now, why should -- I mean, I know that invokes the

lawyers good faith in that, but what's wrong with that? I mean, we're officers. I mean, if we're going to reduce the expense of discovery, I'm not sure there's anything wrong with requiring people to cough up the truth when they learn it.

CHAIRMAN SOULES: I think the way you've got No. 2 and 3 written -- I mean, I can understand what they say. Maybe somebody else can't understand it --

MR. LATTING: Could I respond to that a minute, Luke?

CHAIRMAN SOULES: -- but I know I do. And if they need to be made clearer so that they articulate what our discussion has been, then that's okay. Somebody can do that. But I think they set out what should be the policy of the rules. Now, if there's some inquiry made, so be it, but I think that's what your proposal is, Steve.

MR. SUSMAN: Yeah, it really is.

CHAIRMAN SOULES: Can we just get a consensus on that? I mean, we've spent

an hour and a half talking about it.

MR. PERRY: Can I respond to that?

CHAIRMAN SOULES: Yes, sir.

MR. PERRY: The problem is that theoretically you're totally right, but as a practical matter it engenders a lot more transaction costs than that rule is worth. When you have a continuing duty to identify a new witness every time you learn of a new witness and you're in a major case -- or maybe, you know, I've got a quadriplegic who is undergoing continuing medical care, so every time that that quadriplegic goes to a new rehab center and is seen by a new set of doctors and a new set of nurses, I have to be continually amending the answers to discovery.

CHAIRMAN SOULES: No. That's not a No. 2 problem, that's a No. 3 problem.

MR. PERRY: It's a new witness.

CHAIRMAN SOULES: The way you just articulated it earlier, received a new treatment, that's got to be done at some future time.

MR. PERRY: It's a new witness.

Let's say, for example, that Ford Motor Company in developing their list of the engineers that worked on this design, they come up with people or documents -- let's say people that they didn't tell me about to begin with, draftsman and people like that. You end up spending more transaction costs in the continuing duty to supplement and in the issue of whether this was done timely and the related issue of whether testimony can be excluded because it wasn't done timely than it is generally worth --

CHAIRMAN SOULES: That's a judgment we're going to make right here.

MR. PERRY: -- which you can avoid if you will limit the duty to supplement only to a time when somebody asks for it. And then when the guy who is getting their lawsuit ready for trial, they say, "You know, now is the time when I need to see if these guys have any more information," have them ask for it then. And until they ask for it, let the person who has been responding just go about his business and get his lawsuit ready.

CHAIRMAN SOULES: Okay. So

I've got information that is very helpful to you and you're going to ask me for it, but someone else may not. They may decide, in dealing with whomever, that they feel that they can rely on that person disclosing information as it comes up if it's really material to the case, so I just sit there. You never ask and I never do produce it and the case goes to trial. Why shouldn't -- I'm the one who knows it exists. You don't. Why should you have to prompt me for me to disclose that information.

And if I come up with -- if I have nothing, if I do nothing, then you do nothing and there's no cost. If I do have something and I produce it, you don't have to make a request so you don't have any cost except for reading what I give you or to depose the person whose name I give you.

MR. PERRY: We're talking about transaction costs on the system. We have a lot of satellite litigation and a lot of satellite disputes that are not productive at moving the ball down the road that arise out of the continuing duty to supplement whenever

you learn of something. That could be avoided if the duty was tied either to specific times so that you would know at a specific time I have to supplement or to a request.

Under the present rule, a person ought to be able to rely on the other lawyer to supplement right away. But what I'm saying is I think the rule ought to be changed because I think it's more trouble than it's worth.

CHAIRMAN SOULES: Under No. 5, the exclusionary rule is substantially curtailed, so the gamesmanship and the satellite litigation over "you didn't do it early enough" is going to be a different rule because basically if you didn't -- if you were not guilty of conscious indifference or deliberate indifference, then there's no exclusionary rule. There's some help, but there's no exclusionary rule.

MR. SUSMAN: Mr. Chairman?

CHAIRMAN SOULES: Go ahead, Steve. We've got about 15 minutes left.

MR. SUSMAN: I think having considered this and recovered from an initial shell-shock from listening to the comments, I

am persuaded now that the committee wrote a wise, just, fair and efficient rule that is understandable and subject to easy application. Therefore, I move -- and if the members of the subcommittee who wrote this rule will stick together on this vote, we've got it -- I move for the acceptance of Rule 166e in its entirety. Any second?

PROFESSOR ALBRIGHT: Second.

MR. SUSMAN: Second.

MR. GOLD: I'll second, too.

MR. MARKS: And we just got this yesterday.

CHAIRMAN SOULES: We haven't really talked too much about No. 5. Can you make that motion just 1 through 4? Because I still want to address something in 5.

MR. SUSMAN: Whatever the Chairman wants.

CHAIRMAN SOULES: Those in favor show by hands. Okay. Is that five?

Those opposed. Eight.

Okay. It's opposed by a vote of five to eight.

HONORABLE DAVID PEEPLES: Well,

let me just say we didn't have a good vote on that.

MS. DUNCAN: We had a really close vote on whether we were only going to have mandatory amendment and supplementation of documents and witnesses, and for us to go from that close of a vote on that issue to basically reenacting with some modifications the rule we've got, then my view is -- and I agree with Judge Peeples. That's why I voted against it.

MR. SUSMAN: Let me put it this way. I mean, all I'm saying to you is basically, having listened to it all, I don't really get much of a direction from the group of where to go with this. Therefore, I'm not going to spend a lot of time with the subcommittee between now and the next meeting going anywhere with this. If you all have got some ideas that you think -- if you want to take a crack, we've got two months, at redrafting Rule 166e for us and sending it to us, it would be very much appreciated. But I don't really know how we can do much better than we did without clearer direction than

I've gotten in the last two hours from this group.

CHAIRMAN SOULES: Steve Yelenosky. Steve Yelenosky has got the floor.

MR. YELENOSKY: All I was going to say was with the amount of time left maybe some discussions on what the committee might do. I think one that's been made and that Sarah has alluded to, again, is whether there can be any language drafted that would speak to amending with regard to people with knowledge and producing documents that should have been produced initially. Can that be accomplished as an option? That's a drafting option there.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think my problem, and I hear this as a problem for a lot of people, is not that we're against the rule, it's just that we need more time to think about it.

MR. SUSMAN: I understand.

CHAIRMAN SOULES: Harriet.

MS. MIERS: In terms of directions, I think the extent to which you

can minimize the last-minute fire drills when you're supposed to be getting ready for trial, that's a desirable goal. And so I think the supplementation before trial to the extent it's then necessary is fine, but I still think we need to look at one other requirement to supplement before the close of discovery if discovery is going to be closed at some point. And I don't know what the intent of the subcommittee is, but I --

CHAIRMAN SOULES: And then whether that would be triggered by a request or just be written in the rule as a specific deadline.

MS. MIERS: And I totally agree with Joe's theory that if it's in the rule you're going to have to do it every time or else you're going to be subject to question.

CHAIRMAN SOULES: But anyway, David has raised that several times and the committee ought to consider it.

MR. KELTNER: So this would be an up-front supplementation before the close of discovery? That's makes sense to me.

CHAIRMAN SOULES: Doyle Curry.

MR. CURRY: We get all involved in some of these discussions and we keep coming back to protecting one thing, and that's protecting each of us from surprise at trial. The truth of the matter is, claimed surprise is rarely valid. I can't remember the time -- and I've seen defenses thrown out when I've said, "Oops, I didn't think of that," when I really did, you know.

And I think another thing is true also. Your current rule, 30 days out, like you said earlier, is working. It's working pretty well. And the reason for the 30-day rule is to keep down surprise in the trial. It has some exclusion to it, but if you eliminate exclusion, then you eliminate a lot of the friction and a lot of reason for saying, "When did you know? Why did you know?"

We can have a disclosure rule or a supplementation rule or whatever you want to call it that is a continuing ongoing thing. Just don't put the exclusion rule in there to make people comply with it, put something else like Rusty had suggested, a penalty, like maybe you've got to give a witness statement

or something of that nature. But 30 days is plenty. If it's not, a continuance is the answer, so we don't get involved in all this stuff and we're still cutting down the cost. We're trying to eliminate lawyer time, eliminate cost. Why not use the 30-day rule we've got that's working? And in those circumstances where it doesn't work, a continuance will take care of it.

CHAIRMAN SOULES: Steve, No. 5, on the exclusion, what comes to my mind is that there could be situations where a continuance would be devastating. Should there be an ability of the court to go to trial and exclude witnesses or information not disclosed in discovery if the failure to disclose the information will materially affect the fairness of the trial and delaying the trial would cause substantial harm or injustice to the other parties that cannot be reasonably cured by a continuance?

HONORABLE F. SCOTT McCOWN: Can I address that?

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: I feel real strongly that we have made a serious mistake in developing a system that excludes evidence particularly as frequently and on as little showing as our present system, because I really think that when it comes to the merits of the case that the court ought to find the truth, whatever that is. Then if there's conduct that needs to be punished, that can be done by sanctions aimed at the conduct.

Luke, you've presented a really tough problem, because what you're suggesting is that if there's delay, a party is going to be hurt in some way that can't be adequately compensated by money, but yet this piece of evidence is important. But if it's important, it's usually important both ways. And so if you exclude it, you run the risk of having the trial come out wrong, and if the trial comes out wrong, then the verdict, however many dollars it is, becomes the punishment for the failure to timely disclose, and that is really troublesome, particularly in our world of big verdicts.

CHAIRMAN SOULES: The other side of that, though, Judge, is that the information would make the trial materially unfair and the delay of the trial doesn't take care of the problem. Getting at the truth is what we're all about, I hope, at trial, and my point is, I can't cross-examine this document; I cannot cross-examine this witness. This evidence is coming in, and we're not going to know at the end of the trial whether it's true because it cannot adequately be met.

HONORABLE F. SCOTT McCOWN: Why can't the expense of the delay --

CHAIRMAN SOULES: No. If delaying won't cure the problem, it's going to be materially unfair.

HONORABLE F. SCOTT McCOWN: Can you give me a concrete example of when providing a continuance is going to be unjust if we take care of the expense of the delay?

CHAIRMAN SOULES: I've got an injured party whose family is in serious distress and my next window on the trial calendar is a year away, and 30 days ahead of trial I get crucial evidence that puts me to a

situation where I cannot go to trial because I don't have time to meet that evidence, so my trial is going to be materially unfair and a delay of a year is going to really hurt my people. Then I think that that evidence should be excluded and I ought to be able to go to trial and get my people some money so that they can get along with their lives as best they are able to in their damaged circumstances.

MR. LATTING: And there's more to it than that. The notion is that if we impose that kind of penalty, that's the only thing that the bar is going to pay attention to, which results in more truth coming into other trials. So then if we don't do that, there's going to be a lot of suppression. Isn't that right?

CHAIRMAN SOULES: Yeah. This gives the defense a powerful tool, a way to disclose late evidence in order to get a continuance, and the judge has no discretion to do anything except grant a continuance. And the way this is written right now, that's all the judge has the power to do, is continue

the case.

MR. YELENOSKY: And the incentive not to disclose is directly related to what the verdict will be.

CHAIRMAN SOULES: What is it?

MR. YELENOSKY: Well, I mean, Judge McCown points out that the penalty is going to be directly related to the verdict, while the incentive, if you're talking about deliberate nondisclosure, is exactly the same, and that's why the penalty may need to be calibrated to the verdict essentially.

HONORABLE F. SCOTT McCOWN: Well, if there's deliberate nondisclosure, then it's excluded.

CHAIRMAN SOULES: That's all I'm talking about.

MR. YELENOSKY: That's all you're talking about?

CHAIRMAN SOULES: Yeah -- well, no. I'm talking about conscious indifference.

MR. YELENOSKY: Oh, you're talking about conscious indifference.

CHAIRMAN SOULES: Yeah.

MR. YELENOSKY: Well,

deliberate nondisclosure does seem to be -- it needs to be calibrated to the verdict, because that's the effect.

HONORABLE F. SCOTT McCOWN: If there's deliberate nondisclosure, it's excluded. If there's nondisclosure that you can't show was deliberate but there's no reasonable explanation for why it wasn't disclosed, then it's going to fall in -- the trial judge can find conscious indifference and exclude it.

MS. DUNCAN: But what about when you don't have conscious indifference? You've got a plaintiff who is paying their attorney on an hourly rate, they've just gotten through going through all of the supplementation rules preparing for trial, all of a sudden we've got all these devastating documents produced by the defendant, and my plaintiff can't afford to prepare for trial or retain attorneys for the next year that it will take to get on the trial docket.

HONORABLE F. SCOTT McCOWN: Let me tell you how I strike the balance here, and I guess it's kind of an intuitive, empirical

judgment. Throughout our work on the Discovery Rules, all of you have said it depends on what the exclusionary rules are going to be. And when we talked about the cost of litigation, we all said that the exclusionary rules drive up the cost; they require the lawyers to be more diligent; they require more money being spent.

My sense of it is that as tough as the example that Luke has given is, as difficult as it is to say we have to just eat that cost, that the world we've created with strict exclusionary rules is a worse world; that it costs more, and more injustice is done than in the example that Luke gave, which I admit this rule might not catch every one of them all the time.

CHAIRMAN SOULES: Okay. Well, that's something to keep in mind.

Thank you all for all your hard work here in the last day and a half. We'll be meeting again on -- when is it, the 16th and 17th of September?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Okay. We now

stand adjourned.

(Hearing adjourned at 12:30 p.m.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 16, 1994, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,010^{00}$.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 30th day of July, 1994.

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