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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 17, 1994

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, Certified Shorthand Reporter in Travis County for the State of Texas, on the 17th day of September, A.D., 1994, between the hours of 8:40 o'clock a.m. and 12:30 p.m. at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

SEPTEMBER 17, 1994 MEETING

MEMBERS PRESENT:

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

MEMBERS ABSENT:

Alejandro Acosta Jr.
David Beck
Honorable Scott A. Brister
Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring, Jr.
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert Low
Honorable David Peeples

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
David B. Jackson
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

Hon Sam Houston Clinton
Doyle Curry
Hon William Cornelius
Hon Doris Lange
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Jim Parker
Jeff Thompson (with Steve Susman)
Diana Thompson (with Steve Susman)

SUPREME COURT ADVISORY COMMITTEE
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CHAIRMAN SOULES: Good morning, everyone. It's 8:40. We will be in session. Anyone that was here yesterday and didn't get signed up we have a sign-up sheet up front here for you to sign, so we will send this around again this morning to get the attendance recorded, and I made a suggestion to Steve and actually Alex made it to me that we maybe go on with another subject than the work product issues in Rule 4 and let Alex and maybe Richard Orsinger exchange -- and anybody else who wants to be in that exchange -- positions so that we can more clearly focus whatever may be the problems. I'm not sure that we are able or were able yesterday to articulate exactly what the concerns are and come back to this at the next meeting. So maybe, Steve, if it's okay with you --

MR. SUSMAN: That's fine.

CHAIRMAN SOULES: We will let Alex be the clearinghouse for that exchange.

MR. SUSMAN: Right. Right.

CHAIRMAN SOULES: And anyone who wants to participate in it exchange information with Alex and then we will put

together a package where everyone's ideas are summarized, and next time maybe we can get right to the focus. Steve, if you all could, though, in your committee meetings try to address the issue as it develops in the exchange, and we would have something to start with.

MR. SUSMAN: Yeah. I think what we need is Richard and Alex to get together and see if Richard can convince Alex or Alex Richard of their views.

MR. ORSINGER: Not likely.

MR. SUSMAN: I mean, I don't really think this is a matter that's life or death viewed by the committee. It's kind of something --

PROFESSOR ALBRIGHT: It's my pet peave.

MR. SUSMAN: It's Alex's pet peave. I didn't say it. Alex said it. Okay. It does, as Scott said, make it look elegant. What does he call it, symmetry?

PROFESSOR ALBRIGHT: Yes.

MR. SUSMAN: Or symmetrical. I mean, it looks good to have our rule the same

as the federal rule, but let's go on.

CHAIRMAN SOULES: She raised a legitimate concern here. McCorkle was the first attempt to cause a lawyer to produce his notes of a witness' statement. The witness is talking to the lawyer. The lawyer is making notes. Witness never adopts it; witness doesn't sign it; It's not in witness' handwriting. McCorkle says "Lawyer, you can keep that. It's your own handwriting." First court said, "No, it's got to come out of your file." So there are some issues here that are kind of quirky that we need to get focused on and get to. Okay. Where do you we go from here?

MR. SUSMAN: Rule (5), the duty to respond. I guess the issue we have here for you is -- does anyone have any questions or problems with this concept? Let's not worry too much about the language but the concept.

MR. MARKS: Are we satisfied that all Texas lawyers have computers?

MR. SUSMAN: Have what?

MR. MARKS: Are we satisfied

that all Texas lawyers have computers in this day? It says "If the requesting party has served on the responding party a readable computer disk setting out the discovery request," blah, blah, blah, and my question, are we satisfied that all Texas lawyers are now computer literate and have computers in their offices?

MR. SUSMAN: I am not sure we are satisfied. I don't think we are satisfied with that. I don't think that was the goal. I think the goal was that if you have it, it is -- it makes it possible to put the question first and then the answer.

HONORABLE F. SCOTT MCCOWN: Well, Steve, this is like a ratchet. In other words, right now if you don't have a computer you have got to write the question and the response, so this doesn't make it any worse for you. It just says that you don't have to write the question and response unless they give you a disk. So those who don't have computers are no worse off under this regime than they are under the present regime, and those that do have computers get to do the

disk, so it's a ratchet that goes one way.

MR. LATTING: Have we considered making it a violation to use a computer in any phase of discovery?

MR. SUSMAN: Yes.

MR. LATTING: Handwrite it.

MR. SUSMAN: And associates, too.

MR. LATTING: By the lawyer. Right. The attorney has to write it by hand.

MR. SUSMAN: We considered that, too.

CHAIRMAN SOULES: Any problem with part (1) of Rule 5? Okay. Anyone have any objections to part (1) of Rule 5. Tommy Jacks.

MR. JACKS: Oh, no. I'm sorry.

CHAIRMAN SOULES: Okay. Part (1) of Rule 5 is then unanimously approved. Part (2).

CHAIRMAN SOULES: We will start right here. Bill Dorsaneo, and then we will go around the table counterclockwise.

PROFESSOR DORSANEO: I think I understand part (2). The two new concepts

would be the idea that if you learn something during discovery there wouldn't need to be a supplementation, and the supplements shall be in the same form such that I guess if something had to be done under oath it would have to be supplemented under oath. Is that the idea?

MR. SUSMAN: That's correct.

PROFESSOR DORSANEO: There is the possibility, it seems to me, that someone could be confused by the juxtaposition of the two concepts that seem to be competing with each other. One is that you don't have to supplement if there was supplementation in discovery. Okay. But yet you have to supplement in precisely the formal way. I am not sure that troubles anybody else, but it seems a little bit inconsistent to me. I mean, if we are going to have the concept that they would know about it, fine. Then why are we going to be so concerned about -- but if there does need to be supplementation, it has to be done formally, correctly. The Supreme Court hasn't taken a position yet on whether you have to, you know, supplement answers to

interrogatories under oath.

MR. SUSMAN: That's an interesting point, but I see the point you are making as is follows: I have a duty to supplement. Instead of using the same form as the original answer I simply write the other guy a letter. Now, I have removed the duty to supplement at that time because I have informed him in writing of the new information, and I know longer have a duty to get the answers to the interrogatories sworn. You're absolutely right. That's a loophole we built in, and we need to think about that.

PROFESSOR DORSANEO: That's what I was asking, if that's how it comes out.

MR. SUSMAN: That's a problem.

HONORABLE F. SCOTT MCCOWN: Yeah. But there is a reason for that.

MR. SUSMAN: Why?

HONORABLE F. SCOTT MCCOWN: The reason is when you learn of something in discovery, for example, you are deposing a witness and the witness names somebody new, both lawyers have that information. It comes from the witness who named them. They are

equally able to follow it up. When you supplement you're putting something on the table out of the blue that's totally in your control that the other lawyers don't know about. It's coming from you as opposed to from some witness you are deposing or from some document in the possession of a third party, and we want you to verify -- if we have required oath for the original, we want you to verify that under oath.

MR. SUSMAN: Yeah. But Scott, that's not the point. The point is that we have written it in a way that there is a loophole because it's either -- see, if the information is otherwise known to the other parties in writing all I have to do is write a letter or write a little handwritten note to my adversary and hand it to Harriet, for example, in a case. There are three new witnesses you ought to know about. I know I am going to have to respond to that kind by formal answer, sworn answers to interrogatories, because she knows it in writing. We just -- it's a problem.

HONORABLE F. SCOTT MCCOWN:

Where are you reading at?

MR. SUSMAN: In the middle of (2) we say you have got to supplement unless the additional -- "if the additional or corrective information has not otherwise been known to the other parties in discovery or in writing."

MR. MARKS: What's wrong with that? What's wrong with that? I like that.

MR. SUSMAN: I am not sure there is anything wrong with it. I just think --

HONORABLE F. SCOTT MCCOWN: It's contradictory.

MR. SUSMAN: We have a contradictory problem obviously. We have got to decide -- yes.

PROFESSOR ALBRIGHT: I am not sure it makes all that much difference because the only thing that you have to swear to, the only written discovery, is the interrogatories, and we have said that you have to respond -- "A party shall make a complete response based upon all information reasonably available to the responding party

or its attorney." So a party cannot swear to answers to interrogatories that this is information within my personal knowledge because that would not be a complete response. So the oath has to be that I have made a complete response based upon all the information reasonably available to me and my attorney. So how is adding that oath to a supplement going to help it, going to make any difference anyway? I just don't see that it's a real problem.

CHAIRMAN SOULES: Let me show you. We have already got litigation in the courts of appeals, and they are split. One court says if a lawyer writes a supplement to interrogatories it's good because there is no form in the rules that say how you -- what constitutes a supplementation of interrogatories. There is for answers but not supplements, so the lawyer's letter is good. The other court of appeals say, "No, it's not. You have got to use the same form."

PROFESSOR ALBRIGHT: Luke, I think the Supreme Court adopted your --

CHAIRMAN SOULES: Now, here we

have got a situation where Steve relying on sentence No. 1, I guess that's a long sentence, but anyway the last clause of sentence No. 1, writes a letter to Joe and says "Here is additional information in response to Interrogatory 2," signed "Steve Susman," and then they get into a debate. Okay. Well, is that an in writing make-know, or is that a supplementation because if it's an in writing make-know, it's good; but if it's a supplementation, it's not; and now we have got another issue.

MR. LATTING: What if he hands me this during a deposition and says, "Now I don't have to supplement my discovery because I gave it to you in writing"? That bothers me about the informality of that, about how in a complex case where we have got stacks of discovery in writing is pretty lose. I have some concern about that.

CHAIRMAN SOULES: But anyway I think the issue here is is it an in writing make-know or a supplement. It's got to be one or the other, and we ought to make it discernible.

MR. SUSMAN: One of the things we may want to consider is -- we may want to go back and consider, Alex, and I think we wrote this part of the rule -- before we got to what happens, we wrote the part of the rule that what happens if you don't, which is Rule 6, the failure to provide discovery. In some ways I don't think it's a problem if you require people to supplement, in fact, file a paper. You cannot rely on otherwise known in discovery or in writing.

If you retain Rule 6 as we have drafted it, that is, the information is not excluded unless it surprises and you can't be surprised if you have -- I mean, if you can demonstrate you otherwise knew the information. In other words, I have a duty to formally supplement my interrogatory to Harriet and tell her the three new witnesses, but if I fail to do so and she tries to keep me from calling those witnesses, I could argue that she's not surprised by that because she knew the identity of the three witnesses. I gave her the piece of paper during the deposition.

Now, I may have some sanctions imposed

upon me for not following the proper procedure, but she may have a difficult time getting the witnesses excluded because she can hardly claim surprise. I think we may be able to deal with this in connection with whatever we do with Rule 6. It seems to me they are related, and I do think we wrote them at different times and while we have hit it in the same way basically.

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: I do think it's make work to make people supplement marshaling everything that everybody already knows, that's been talked about in discovery, to supplement your interrogatory answers. So I hope the committee will head in the direction of not causing you to sit down at the end and figure out all the little facts that weren't in the original answer and stick them in a sworn answer.

CHAIRMAN SOULES: Well, this is a matter of form. This is a matter of form. This isn't a matter of substance. It's what form does this information have to go to you

in? I think the balance is if we go back and look at the reasons for why parties sign interrogatories. They thought that lawyers were jacking around with the interrogatory process and then the party gets on the witness stand and says, "Oh, I didn't make that answer. I didn't answer the interrogatory. My lawyers did." So you can't cross-examine them. That was all the debate that went on.

So somebody finally said, "Okay. We are going to make the parties sign interrogatories." Okay. Lawyers may still be able to jack around with the answers if the parties don't have to sign supplements, but what happens when you get to the point of supplementing 30 days, and this says 60, but 30 days ahead of trial like we do right now if you are representing a corporation, it takes a while to get somebody to sign interrogatories at wherever, Dow or Baxter, 3M or Exxon.

So really that moves your supplementation deadline back ahead of time. I mean, to me supplements ought to be let the lawyers sign them, however. They don't even have to be under oath, and I don't think that's a

problem. It is problem to the extent that lawyers jack with the supplements like they used to jack with the interrogatories, but how big a problem is that when you balance it against what we are really trying to do is tell everybody the information they need to be prepared for trial? And we are doing it at the last minute. So we are talking about what are the formalities that need to be attached to supplementing interrogatories, not the substance but the formalities of delivery and execution.

MR. SUSMAN: Well, keep in mind here -- let's not get ahead of ourselves. We have not gotten to the interrogatory rule which talks about who can sign it, what form it has to be in, whether it has to marshal evidence or not, and some of the things I am hearing are addressed to the rule itself, to the interrogatory answer rule itself, which maybe we ought to skip to, but I don't think there can be any quarrel that if you get new information you ought to -- and you should have turned it over in the first place, I mean, you would have had to turn it over in

the first place, you should turn it over. Can anyone quarrel with that concept? I don't think you can.

CHAIRMAN SOULES: That's three.

MR. SUSMAN: And I mean, I'm not sure you can quarrel very much with the concept that -- I don't think it's too objectionable to say, well, it should be in the same form it was in the first -- why shouldn't it be in the same form it was the first time? And maybe we should go and change the form of the interrogatory answers to begin with. We shouldn't require them to be signed by a party or something like that, but what's the objection to requiring it be in the same form?

The only other thing that's in this rule then is the timing. When do you want it done? I mean, we have a timing concept in here, and we have said amendments should be as soon as you know the new information or the different information and supplementation at a fixed period of time before the end of discovery. Does anyone have any problem with that concept?

MR. LATTING: I have one problem, and that is I would like to echo what Luke said earlier. As a practical matter when we are trying to supplement interrogatory answers and are worried about exclusion of evidence and we are down to the wire, I just don't like the idea of having to send my answers to Minneapolis to get somebody up there to sign them, to get them in on time, and I don't think the plan of salvation would be altered any if we allow lawyers to serve formal supplements to interrogatory answers. That wouldn't be a problem in either giving or receiving from my point of view. It's just one less thing that I have to do and plan for in getting ready for trial.

MR. SUSMAN: How about the original answers?

MR. LATTING: The original answers, I like the idea of a party because it gives you a mechanism to get the party impeached.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: I really don't see that much benefit in having the

interrogatories verified, period. Request for admissions aren't verified. Requests for production aren't verified. There is one case out there that says you can't impeach someone with their written response to a request for production because it isn't verified, but I think that's a nonsensical case. I think that they are admissions. I mean, the effect of an answer to an interrogatory by an attorney is an admission on the party, and I think that maybe how we handle it at trial is maybe the same way you deal with a deposition or whatever. You get an instruction to a jury that an answer to interrogatory regardless of whether it's by the party or the attorney is an admission by that party unless it's retracted and put all of this signature stuff aside. It's a bunch of malarkey anyway.

CHAIRMAN SOULES: Okay. But getting to Rule 5 --

MR. GOLD: And I think that would dispense with this problem.

CHAIRMAN SOULES: I mean, that's going to come up when we get to the interrogatory rule. Right now we are on

Rule 5, 60 days or 30 days. My sense is that the train -- that the 15 percent pulled the 80 percent out of the train and left all the people standing. I don't think this works. 60 days won't work in 80 percent of the cases -- we had trouble educating people to do things 30 days out. If you have got a divorce case you may not even know what you are going to do 60 days from trial, and this just will not work as a general rule. It ought to go back to 30 days. That's my feeling. Anybody else have anything they want to say about that? Okay. Tommy Jacks.

MR. JACKS: I agree with you on that. At some point I'd like to talk about the concept of differentiating between supplementing and amending because that seems confusing to me, and I'd like to hear about why that was done but --

CHAIRMAN SOULES: Okay. Let's get to that --

MR. JACKS: I don't want to get you off the timing issue.

CHAIRMAN SOULES: -- the very next thing. Okay. Nobody else wants to say

anything about whether it's 30 or 60? How many favor 60? Show by hands.

MR. SUSMAN: Let me articulate why. Okay.

CHAIRMAN SOULES: Go ahead.

MR. SUSMAN: The 60 days was set with a view to when the discovery window or the discovery period under these rules ends. In other words, our discovery period as currently worded in Rule 1, which is what we have been talking about, is the 30-day time period, and the notion is you ought to require supplementation a sufficient time before you end discovery. So people have another 30 days in the discovery period to discover about your supplemental answers. That was the notion.

Now, you know, you could say, well, your duty to supplement arises at a time the discovery period ends. That seems silly to me. How many days before the end of the discovery cut-off date do you want to do supplement? That's what you have really got to decide and then when we go and figure out what our discovery period is going to be we now know it's going to be three months

and -- we know it's three months or nine months from the date the answer is due. Okay. We can tell you when the supplementation will be.

Unless you now want -- well, let's see. If you are going to go to the nine months maybe we got to go back and look at this again because -- no. You're right. I'm sorry. You're right. We can change -- this is confusing because we have now got -- the default situation will be a discovery period that's nine months from the date of answer. That may or may not be close to trial. It could be months from the time of the first trial setting or the first trial.

We need to go back to our original regime where we put this supplementation not at the end of the discovery period but so many days before the trial setting, and we can do that. So we could do it either 30 days or 60 days. It's likely to be outside the discovery period anyway now, and you will have to rely on the reopener of subparagraph (4) of this Rule 5 to get additional discovery for a supplementation. So we can do the 60 days or

30 days as you wish.

PROFESSOR ALBRIGHT: So the way it would work is if you have a nine-month discovery period and your trial date is at the very end of that you still have a supplementation requirement 30 days before trial, and that may be within your discovery period.

MR. SUSMAN: It may not be.

PROFESSOR ALBRIGHT: It may not be, but in any event you just supplement 30 days before trial.

CHAIRMAN SOULES: Those in favor of 60 days show by hands. 60 days. Those in favor of 30 days show by hands.

Okay. It's the house to one, 30 days. Bill Dorsaneo says he has a question here, and then we are going to go to Tommy Jacks' amendment versus supplement.

PROFESSOR DORSANEO: Maybe I am even wondering about that. Say I make a response to a discovery request that affirms that I am the manufacturer of the product.

MR. SUSMAN: Right.

PROFESSOR DORSANEO: And then I

learn that that was -- well, I guess that's something -- that's not supplementation. That's amending.

MR. SUSMAN: No. Absolutely.

PROFESSOR DORSANEO: Okay. All right. Okay. So then -- so what would this one be about, I guess is what I am asking? I have trouble why we wouldn't let somebody make the correction later. I'm troubled by why you can't correct it, why it wouldn't be good for everybody for it to be corrected, if it was correct when made but is no longer correct. I have to have a context before I can really appreciate what's happening.

MR. SUSMAN: Well, our basic notion in doing this was that you can either -- I mean, one option is to require any corrections of answers which were wrong, either were wrong when made or have now become wrong by virtue of subsequent information you have obtained or subsequent events, to let any of those corrections be made at a time certain before trial. 30 days, for example.

Another alternative is, again, not to distinguish between the amendment and

supplementation and say whenever you have got any new information, cough it up, to have a continuing duty to cough up. We took the position that you should treat -- there are two different kinds. You ought to do it in two different kinds of ways.

When a person learns that something that they actually said was false, they now find they weren't the manufacturer, there was another witness to the collision, they were in error about the amount of money they made in 1991 when they said they made 100,000 and they in fact now know they made 150,000, that that may be significant enough to require a person to correct that as soon as it comes to their attention. It's a bad answer.

On the other hand, we thought that things that -- subsequent events, information that arises through subsequent events, facts that occur after the original answer, that we ought to give people a time certain before trial at which they can accumulate all that information and turn it over to the other side, not make them have to review their interrogatory answers every week or their discovery requests

every week. There may be a whole group of documents I asked for that develop after a request is made. That was the distinction. We tried to explain it in comment 2 on page 9.

PROFESSOR DORSANEO: How does this affect my trial behavior? If I am at trial and I know that what I said before is something that I wouldn't say now, am I allowed to say the right thing now, or am I stuck with what I said before?

MR. SUSMAN: You mean -- what are you talking about now? We have got to figure out -- if it's a deposition or testimony that's different from your deposition, there is no duty to supplement your deposition or to amend it. Okay. We don't deal with correcting depositions. We deal with correcting written discovery responses. So whether you are going to go back and correct an oral deposition or not depends on whether you want to be impeached with said or not, and I mean, we leave that to a totally different area. I think that's right. We did not deal with deposition supplementation or amendment.

CHAIRMAN SOULES: Well, is the answer to Bill's question that he doesn't have to supplement his deposition, and the only thing you can do with it is impeach him?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: He is not stuck by his answer?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: Not bound by his answer?

MR. SUSMAN: Correct.

PROFESSOR DORSANEO: But if it was an interrogatory answer, I am stuck with it.

MR. SUSMAN: Well, I think you are stuck with it to the same extent you are today.

HONORABLE F. SCOTT MCCOWN: An interrogatory answer now is not an admission. It's exactly like a deposition. If it varies from the trial testimony it's nothing more than a prior inconsistent statement.

PROFESSOR DORSANEO: All right. Fine.

MR. SUSMAN: It's the same

thing.

PROFESSOR DORSANEO: I guess I am just trying to find out what happens here.

CHAIRMAN SOULES: Okay. Tommy, you want to articulate your concern here so we can get to that?

MR. JACKS: Yeah. It seems to me that the information required by supplementation may be just as vital to the other party as the information required by amendment. I mean, we have given an example of you learn about three new witnesses and so you have got to amend promptly your answer regarding people with knowledge of relevant facts, but if my client in an injury case -- and in an injury case there is always new stuff happening. He goes to see a new physician, and this client who had been, let's say, diagnosed by the prior doc as having just aches and pains is now --

MR. LATTING: So you sent him to a new --

MR. JACKS: Yeah. Exactly. And is now diagnosed as having a permanently disabling condition. That may be far more of

interest to the other side than the fact that I know about three more people, you know, who are grunt and groaner witnesses, and yet I can wait until the supplementation deadline, whenever that is, to tell them about this new stuff, but I have to tell them promptly about the unimportant new stuff, and it -- I guess, I would urge our thinking about the first alternative you mentioned, Steve, which is whether it's -- if it's something new that you have learned, treat it all the same way, however you decide to treat it.

If you are going to make it a continuing duty, let's do it that way. If you are going to make it something you do by a deadline, let's do it that way, but you know, in my office -- and I'm sure I'm the only lawyer in the state that does this. I actually have paralegals who do a lot of the interrogatory responses, and I dread having to go back and explain to them the difference between amending and supplementing. I am going to be -- everyday they are going to be piling into my office saying, "Well, now, let me get this straight. Is this one we are going to

amend, or is this one we are going to supplement?" I don't see a policy basis for the distinction.

MR. SUSMAN: Well, let me again try and tell you what we are trying to do here. I mean, clearly in all of these rules what we are trying to do is -- I mean, again, generally what we were up to was imposing limits on discovery so discovery is more affordable, less expensive, and it takes less time. At the same time we did that we are trying to make sure that we do not deprive people of necessary protection either under the current rules or even somewhat improving the current rules to make sure that those limitations do not result in the miscarriage of justice at trial. That's fair.

But what we do not want to do is make the safeguards against miscarriage of justice or trial by surprise or trial by ambush so difficult, so cumbersome, so expensive to comply with, that everything we have gained by limiting discovery in the way of saving money on the one hand we are giving back by making these make work projects on the other hand.

On the question of supplementation or amendment, I mean, I for one if I had to make the choice between -- I mean, if you told me I had to treat it all as the same, all the information the same, I would say give them a period -- give them the 30 days or the 60 days before trial and let them do it all then because frankly I think it's a tremendous burden on people to have them constantly have to review discovery responses to see whether there is anything new and to impose sanctions on them of any kind if they fail to do so.

MR. JACKS: Yeah.

MR. SUSMAN: And so I would opt -- I mean, I have no problem with your proposal as long as we opt to do it the 30 days before trial, but the problem is you are going to have, I think, a lot of people screaming that's unfair. When you give an interrogatory answer and you know damn well it's wrong, you made a mistake, does that make sense to allow you to wait 'til this 30 days before trial and correct it? I mean, that's --

HONORABLE F. SCOTT MCCOWN:

Could I add to what Steve said that the task force -- and David Keltner was part of our subcommittee, and we talked at length about this -- said that one of the things that they got the most complaint about was the tremendous cost of supplementation. So I think we are all agreed with Steve that if you are going to -- the only way to minimize that cost is to have a single period in which you have to supplement. The downside of a single period at which you have to supplement is losing the corrective process and maybe spending a lot of money on discovery that you wouldn't have done if you had had a correction or with our time constraints wasting valuable time you wouldn't have done if you had a correction.

And so what we have tried to do is draw these two categories, one where you have got the continuing duty and one where you don't. Now, admittedly it's going to take a little time for people to understand them, and they are going to be uncertain of application. For example, in your hypothetical, Tommy, that you posited, that would not be a supplementation.

That would be an amendment, and so your paralegals had they come to you would have gotten the wrong answer, see. Because what happened was you said in your interrogatory, I have aches and pains," when in fact you had a ruptured disk. Supplementation is when the facts change due to occurrences subsequent to the prior response.

MR. JACKS: It's not that simple, and what I was focusing on, I was assuming I wasn't asked anything about my symptoms. I was assuming I was asked what doctors I had seen.

HONORABLE F. SCOTT MCCOWN: What doctors. Okay.

MR. JACKS: Your example calls that a supplementation.

HONORABLE F. SCOTT MCCOWN: If you ask what doctors you have seen, that would be a supplementation, but let me point out one last thing. Given Rule 6, if you go with something that looks like Rule 6, what happens if you fail to provide discovery, there is no big cost for getting it wrong. So if you make an amendment and it should have been a

supplementation, obviously there is never any cost there, but if you don't amend when you should and instead you supplement, there is not any cost there either. There is no penalty for that, and so it's just a way to try to get information that we all think ought to be disclosed earlier disclosed earlier.

MR. JACKS: And I guess what concerns me is that, again, we are taking -- I think we are adding complexity, and I think that adds costs because it's -- I think there is going to be confusion, and I think that people are going to end up probably doing both, supplementing and amending just so they are sure they have got their bases covered, but I mean, what's important to us, both sides of discovery, is that we get the information we really need to get ready for trial and know what to expect at trial, and the problem I have got with this distinction is that it doesn't have anything to do with how important the information may be.

The information that here need not be disclosed until late in the game may be far more important information than information

that's being required to be reported earlier in the game. I guess I would pick up on something Harriet said a minute ago, and that is I like your idea, frankly, of saying in the rule that if the new information, regardless of what kind it is, is known, you know, it's discovered in a deposition so both sides know it or I sent the other lawyer a letter, then there is no need for a formal supplementation in my opinion. And I think that is make work, and I think that definitely does add to costs. Clearly it does.

I would rather see us go towards something that recognizes what really happens between lawyers, and that is much of my supplementation to other lawyers and theirs to me is done by letter. You know, "My client has seen Dr. So-and-so. I am planning to call him at trial. We will make him available for deposition. Let me know when you want to do it." And I think that's the sort of thing that ought to be encouraged by our rules. I would urge us to think about not trying to distinguish between whether we amend or supplement but rather get them the new

information, and if you haven't done it by 30 days out or whatever, do it then. If you have done it earlier in writing or they found out when they took the client's deposition, "Yeah, I went to see Dr. Jones the other day," then you don't have to go through the formality of things. That's all.

CHAIRMAN SOULES: Just on that same point before, somebody may have a different point. You know, there has been very little appellate litigation on the question of as soon as practicable but not less than 30 days, and I know that the CLE programs are full of it and everybody's viscerals are full of it, but as far as I know there have only been two cases in the appellate decisions where somebody got precluded at trial from putting on testimony or documents for not getting something done 30 days out when they should have done it earlier, and that was -- both were pretty aggravated. The Onion case wasn't so aggravated, but the sense of the next case, the circumstances were very aggravated, and when that's -- we have got that concept

already in jurisprudence and it's not causing that much trouble, why not leave it alone?

MR. JACKS: Well, I think it is causing a lot of trouble --

CHAIRMAN SOULES: All right. How is it?

MR. JACKS: -- at the trial levels. I agree with you it hasn't percolated up to the courts of appeals opinions, at least not the reported cases.

PROFESSOR DORSANEO: Well, there has been some.

MR. JACKS: But there is a lot of activity in some parts of the state at the trial court level, and it's created lots of problems.

MS. SWEENEY: And there is more than just those two appellate opinions. I know of three and I am not a --

MR. JACKS: I mean, I think one of the great things that this subcommittee has done is in the next rule in the sensible way I think they have handled the consequences of not supplementing. I think that's really fine work, and I think it does make some of the

formalities of all of this other stuff less important.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Well, two points I wanted to make. I think Steve and Tommy are talking about two different things. I think you are talking about full disclosure and getting all the information you can get, and Steve is talking about saving money. I think the current rules we have got right now enable us to get all the information we need to go to trial. The question is how do we do that and follow the Supreme Court mandate to save money on discovery? So when we start saving money on discovery we are going to have to start cutting things out. We are not going to get full discovery and save any money. At least it doesn't seem like we are to me.

In the second place, so we are talking about -- we are balancing, and the second thing I was going to say is it seems to me maybe we ought to go through and finish the discussion or move through all of these rules because I am more interested as a working trial lawyer to see what happens to me if I

don't supplement than to see exactly what the metaphysical requirements of supplementation are. I am interested to know what I have to do and what happens if I don't because that's what really dictates what I do in my practice.

CHAIRMAN SOULES: David Perry.

MR. PERRY: I think Joe Latting is very much correct that what we are engaged in is a balancing process. The Discovery Task Force got a great deal of complaints over the duty to supplement on the ground that the advantages and the beneficial effects of the continuing duty to supplement are far outweighed under the present rules by the make work aspect of it and by the uncertainty of the timing, and the problem is that there is a tremendous uncertainty in timing. The task force ended up with a somewhat different proposal, that -- let me just throw out for consideration.

The task force did not make the distinction between amendment and supplementation. It merged the two in the way Tommy Jacks is suggesting. The task force also decided that there should never be a

continuing duty to supplement, that the party who is going to supplement has to initiate on their own. The task force developed the idea that if you want the other party to supplement their discovery, you have to send them a request, and when you send them a request they then have 30 days in which to supplement, but you could not send such a request more often than once every six months in any given case. The idea behind that was that when you are focusing on the case and if you think it's time that you need to be updated, you can ask the other side to do that, but you can't do it too much to harass them. Anyway, I just throw that out as something that we might want to consider as another place to draw the boundary.

CHAIRMAN SOULES: Paul Gold, and then I will get to Steve.

MR. GOLD: Yeah. I merely want to go back to something Steve was talking about about the 60-day concept, and it adds another element into your concern, Joe, about the effect of all of this, is one of the things that we are now confronted with on the

supplementation and balancing is when somebody supplements on the 30th day before trial or the 31st day, I think the Mother Francis case; and the cases pretty much say that these sanction rules or whatever don't come into play until you supplement within 30 days.

But the problem is here you are. You're 30 days before trial. You get this new stuff, and then what? You are confronted with the situation of you thought you were ready for trial but now you are having to request a continuance, and you don't have any real choice. Either you have to ignore the supplementation or request a continuance, and so long as I think we have covered either through this tier approach or whatever so that the person on the other side of this balancing can at least present the argument to the court either I have got the time to do the supplementation -- I mean, to challenge the supplementation or on balance this supplementation shouldn't be allowed. I should be able to keep my trial setting, and this shouldn't be allowed.

I think so long as that concept is built

into it I think whatever we do is fine, but I think on one hand Harriet is right. It's a cost factor, but I think a large component of the complaint that the Bar has right now is the preclusion effect of all this supplementation at trial. What happens if on the 31st day someone like in Mother Francis designates -- and that was experts, but nine new experts or says on the 31st day of trial, "I really don't have a back sprain. I have a ruptured L-5 disk, and it's a much bigger problem than what I have got."

It's not just getting the information. It's how is that going to impact your trial setting, and I think so long as we take care of that I think this balancing concept that Joe was talking about is there right now, and I think that's how we need to do it, and I favor the merging of the two concepts, supplement and amendment.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I just want to say I think Tommy is exactly right on this amendment versus supplementation. I think

it's a distinction without any relevant difference, not only in the example that was apparent. When Scott pointed out that, well, that would be an amendment rather than a supplementation, it all depends on how you ask the question, and so people are going to have to be careful and ask questions five different ways. "Who did you see as a doctor? What was the diagnosis?" Well, one of those would be an amendment and one of those would be a supplementation.

Not to mention in the personal injury case if the diagnosis changes -- I mean, all your concerned about is what's the extent of the damage. The diagnosis changes, that's an amendment, but if the condition worsens as a matter of biology, that's a supplementation because at the time you answered it it was correct. They just got worse, but if it's causally linked, it's still -- the damages are what you are getting at. So it's a distinction without a relevant difference for the purposes of what you are trying to reach at trial. So I think it shouldn't be there.

CHAIRMAN SOULES: Okay. Judge

McCown.

HONORABLE F. SCOTT MCCOWN: Tommy has convinced me, too, and I think what the subcommittee ought to do is either adopt a time at the end that you have to have a single supplementation or go back and look at what the task force suggested that David just laid out, which has a lot of appeal, particularly in big cases, and -- but the one thing I think I hear most everybody saying is there shouldn't be a continuing duty to supplement. So if we are agreed that there is not a continuing duty, then why don't we let the subcommittee get rid of the distinction between supplementation and amendment and rewrite this?

CHAIRMAN SOULES: Okay. Going around the table, anyone? Around to Tommy Jacks.

MR. JACKS: And let me make clear I was not arguing for a continuing supplementation.

HONORABLE F. SCOTT MCCOWN: Right.

MR. JACKS: What I was saying

was I liked Harriet's idea that if I have supplemented by sending a letter to the other lawyer then don't make me also go back and do it the formal way. I liked that part of your supplementation paragraph in paragraph (2) of Rule 5.

MR. SUSMAN: Let me just ask this for clarification. The way this is written it applies to documents as well as interrogatory answers. Now, it frequently happens in the real world that when I search my client's files for documents I don't find everything the first time. Two weeks after I made the production the client walks in with "Guess what we just found, the file in the bottom drawer of the president's desk." Am I entitled to sit on that 'til 30 days before trial before I turn those documents over to the other side? If you are going to -- or am I entitled to sit on them until David asks me to produce more documents? You see, we have got some problems that are not just because of the way it's written. It covers document production as well as interrogatories. Now, maybe you want to separate those two concepts

out.

MR. MARKS: Well, what happens now, Steve? Right now when that happens what do you do when you find out?

MR. SUSMAN: I think you have got an obligation right now to turn them over.

MR. MARKS: And that's what you do, right?

MR. SUSMAN: Immediately. Yes.

MR. MARKS: Immediately.

MR. SUSMAN: Yes.

MR. MARKS: And that's kind of what happens when -- that happens to most people now under the rules.

MR. SUSMAN: Yeah.

MR. MARKS: And if you don't, you can get into trouble under the rules, right?

MR. SUSMAN: Well, basically, see, I think I also have an obligation right now to amend interrogatories that I know were wrong. If I made an interrogatory answer and I found out there was a mistake, I think I got a -- I don't want to sit on that 'til the end.

MR. MARKS: Right.

MR. SUSMAN: -- to do anything with it because I just don't think that's right. I think that's deceptive. I mean, I think if you know you told a lie, even though it was an inadvertent lie you have an obligation to correct it. That's kind of what we were trying to say here, but maybe it's too complicated for people to handle, and you-all want just -- people want to just say, you know, see, I mean, the difficult thing is to distinguish between knowing you told a lie or knowing you have documents that just turned up in your office two weeks after you have produced to the other side.

And some, you know, well, your client go sees another doctor who gives a different diagnosis of what's wrong. I mean, maybe they fall in different -- but there is a drafting problem here, and that's what we are struggling to deal with.

MR. GOLD: Luke, why was the "as soon as practicable" wording added only with respect to supplementation of experts and not with regard to everything else? I mean, do you recall?

CHAIRMAN SOULES: I don't know. No. I don't recall. Is that the way it is now?

MR. GOLD: Yeah.

MR. ORSINGER: Yes.

MR. GOLD: The only duty to supplement as soon as practicable applies in paragraph (6)(b) concerning expert witnesses, third line from the bottom, but it has "as soon as practicable but in no event less than 30 days prior." But with regard to everything else it's just "duty to reasonably supplement," and I don't know. I have had trouble with this "as soon as practicable" language, I mean, and so have the courts, but that seems to be the concept that we seem to be struggling with here is, of course, if we get something substantive that changes the answer --

CHAIRMAN SOULES: It's really applied to both, to all of (6) in the cases, as soon as practicable. It's not --

MR. GOLD: But technically the way it's written --

CHAIRMAN SOULES: I understand

the way it's written, and I hadn't even focused on that until -- all this time until this moment when you raised it, but if you look at the cases, the cases use it as though it's universal throughout all of paragraph (6).

PROFESSOR DORSANEO: My recollection is that that word "reasonably" once was "seasonably."

MR. GOLD: Yeah. It was "seasonably" once.

PROFESSOR DORSANEO: And we changed it, and my recollection of the conversation here at this meeting is that the people here didn't realize the difference between the two words.

MR. GOLD: Well, that's because in portions of the state there are no seasons, and that causes real problems.

MR. PERRY: If you find it in the spring, you have to supplement in the spring.

MR. GOLD: Only when the leaves have changed. I mean, some places that doesn't happen.

CHAIRMAN SOULES: Well, we are talking about concepts. Does this committee feel that in a situation where -- just like the one Steve gave his example on -- document production has been made, the hot documents were in the president's drawer. They weren't found. Now they are found. Does this committee feel like the right thing to do is just sit on those documents until 30 days ahead of trial because that's what the rule --

MR. LATTING: Of course not.

MR. SUSMAN: Or until you're asked.

CHAIRMAN SOULES: Okay. Let me withdraw that question. Forget it's the right thing to do. Is it a thing that we want the rules to allow?

MR. LATTING: No.

MR. GOLD: No.

CHAIRMAN SOULES: All right. That means that we have got to have some ongoing duty to supplement.

MR. JACKS: Yes.

CHAIRMAN SOULES: All the time, all the time. Otherwise we have a deadline,

and the rules say if you do it by then you are okay, and you don't have to do it sooner for any reason, or then there is for some reason you have to do it sooner, and that means it's always unless there is some trigger like David is saying, and we have to deal with that. David and then Harriet.

MR. PERRY: Let me express that the line of thought that the task force considered, what happens is that if you argue either side of this question everybody agrees with both sides.

CHAIRMAN SOULES: That's right.

MR. PERRY: Everybody agrees that the other side should not be able to sit on important information until some deadline, especially just 30 days before trial. Everybody also agrees that the continuing duty to supplement, number one, is vague and results in cases like Onion, and number two, often times results in a whole lot of make work. Now, the resolution that made sense to the task force was that there had to be some sort of mechanism for requiring the other side to supplement, sometimes substantially in

advance of trial, more than the 30 days, particularly with regard to a major case, but that the benefits of the continuing duty to supplement that require everybody to immediately supplement whenever they come into the possession of new information, although that is good in theory, that the benefit of that simply does not outweigh the make work problems, and so we resolved it --

MR. SUSMAN: David?

MR. PERRY: -- with the trigger mechanism.

MR. ORSINGER: What trigger mechanism?

MR. PERRY: The task force recommendation was that one party could send to the other party a request to supplement discovery, and that was the trigger mechanism, that you could do that no more often than once every six months. If you have sent one, you cannot send another one until six months has elapsed and that the other party then once they get it, they have 30 days to supplement their discovery. I think that it's very important that in discussing the issue that

all of us recognize that we all agree with both sides and that we discuss the issue from the standpoint of where do we draw the balance between disclosure and make work as opposed to simply urging emotionally that we have to do one or the other.

CHAIRMAN SOULES: Okay. I think I promised Harriet next and then we will go to Steve.

MS. MIERS: Well, I think everybody agrees that you have the continuing duty if you find something that's important, and so I think it all goes back to almost Bill's first question, which is do you have to do it formally, or can you do it with a letter, or if it comes out in a deposition is it okay? I don't know if it was here, but I sure recall the discussion and the task force recommendation and a rejection really of that notice request on the theory that that was more make work and that everybody would then computerize sending out routinely, and if you didn't, you would get sued for malpractice and that that was just one more pitfall, one more make work to increase the expense tasks. So

Steve.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Yeah. I mean, I think we have related questions here, and it's not only what you are supposed to do when you learn something new but it's the form in which you do it, which relates to expense, and it's what happens to you if you don't do it. All of these things get related. Now, as I sit here and listen to the discussion I'm not sure we shouldn't go back to the notion of just saying on question number one when you learn something new you have a duty to tell the other side, period, as quickly as you can, but on question number two we are going to let you do that in whatever form you select. You will comply with the duty by doing it in whatever form you select.

And on question number three saying, besides, if you fail to do it, the other side gets to exclude only if they can prove that they were surprised, which I think may accomplish what we want to accomplish here; that is, you are telling the Bar, "Don't sit on something and hide it." Okay. I mean,

it's like you are giving them the moral Sunday school lesson in No. 1. When you learn something whether it be documents or new witnesses or new diagnosis or new doctor or new profit or new employees, tell the other side.

Two, we aren't going to give any credence to the particular form you use. You can do it by letter. You can do it by phone call. You know, you can do it, tell them, and three, if at the end of the day there is an argument about whether you did it or not or did it in a timely fashion or something like that, the argument is resolved by either excluding or continuing the case if the person can prove surprise, otherwise, tough, it comes in. Now, what about that?

HONORABLE F. SCOTT MCCOWN: There is a problem with that.

MR. LATTING: I second that.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: Steve, I like everything you said, and I think that is our rule with one exception, that you continue the present duty to supplement, and

the problem with continuing that is the great mass of discovery requests that are sent create a duty to as it's made, as it's created disgorge a lot of information, a good deal of which is irrelevant or unimportant, I should say, and it doesn't fix -- it goes a long way toward fixing the fundamental problem because if they learn about it then you don't have to do it and because you can informally or inexpensively disgorge it, but you still have the continuing duty to disgorge. Why couldn't we take everything you have said except instead of a continuing duty make it a duty that comes up every four months on a calendar?

MR. SUSMAN: Because I think in the case of documents, okay, certain information, that's not soon enough. I mean, I don't think -- if I find the documents from the president's drawer I don't think I ought to have to wait 'til you ask me again, for you to serve another document request on me.

HONORABLE F. SCOTT MCCOWN: Make it automatic. Make it an ask again, but make it periodic instead of daily continuances.

CHAIRMAN SOULES: Okay. Paula Sweeney.

MR. SUSMAN: Again, Scott, I am not sure -- I mean, it seems to me that as a practical matter as a lawyer under such continuing duty is -- I mean, he is not as a practical matter going to sit every morning and read his interrogatory answers. He's going to know what's important that he's got to inform the other side. I mean, he doesn't have to check his interrogatory answers everyday or his -- you know.

CHAIRMAN SOULES: Paula Sweeney. Paula Sweeney has the floor.

MS. SWEENEY: The reality, though, is what Scott is saying. In every case now we are wasting a lot of time and energy with, "Well, when did you find it out? When were you hired? When were you first contacted? How long have you known?" I mean, we are wasting more resources on this "How quick did you know it?"

And we have to have something. There is going to -- it can't be open-ended continuing --

MR. SUSMAN: Irrelevant.

MS. SWEENEY: Wait a minute, please. It can't just be ongoing, continuing, endless, you have to supplement as soon as something because we are creating discovery wars in every single case.

MR. SUSMAN: But, Paula, that's irrelevant if you don't exclude it unless they are surprised. It doesn't matter when you learned it. Okay. It doesn't matter under my regime, if you adopt the third prong of my proposal, which is the showing of surprise is necessary to keep it out. So it's not going to be necessary to argue when I learned that there was another witness to the accident. I mean, if it doesn't surprise the other side, it's coming in. So keep that in mind. I mean, I think all of these three things go together, and the third is the most important, what you do for failure to comply. That's really the most important of all, and that's of course Rule 6 --

CHAIRMAN SOULES: We haven't gotten to that.

MR. SUSMAN: -- which we are

coming to, but it is so very, very much related as you walk/talk through these things. You know, the Sunday school rule, what's the moral thing to do, then how do you do it, and then the third thing is what happens if you don't, and they are all related, and we have got to treat them as a group insofar as how --

MS. SWEENEY: Well, I will quit worrying about it until I see how we are going to treat it.

CHAIRMAN SOULES: Could we see hands of people who have a problem with "as soon as practicable"? I mean, I have been at this 27 years and have had one case where it came up.

HONORABLE F. SCOTT MCCOWN: It comes up weekly.

MS. SWEENEY: Constantly.

CHAIRMAN SOULES: Does it?

HONORABLE F. SCOTT MCCOWN: Yeah.

MS. DUNCAN: Well, it's the fear that drives the system. The fear that drives the make work is that some piece of information will later be determined to be

critical information and you didn't supplement until 10 days after you learned it and what effect has that caused.

CHAIRMAN SOULES: Well, Steve's rule would be immediately, not as soon as practicable. So if I am at trial and I find out about it I have got to -- that night I have got to send a fax.

MR. SUSMAN: As soon as practicable is okay. I mean, I --

CHAIRMAN SOULES: Okay. Where do we --

MS. SWEENEY: But if you wait six months and then do it then you have to start analyzing were they surprised, did it hurt.

CHAIRMAN SOULES: Maybe. Maybe that's as soon as practicable, too. I don't know.

MS. SWEENEY: I mean, I am not going to do this every week. I don't want to supplement all my interrogatories in every case every week or be looking over my shoulder constantly to see if I have done it as soon as practicable or not. So what's the consequence

of if I discipline myself every 60 days or so to browse through my interrogatories and see if I need to come up with some answers?

CHAIRMAN SOULES: Okay. Let's go around the table one more time on this and then we will try to get a closure and go to another subject. Bill Dorsaneo.

PROFESSOR DORSANEO: I think we may have made a mistake in 1982 when we didn't pay closer attention to what the federal rule, which was our rule pretty much up until that time, meant operationally. I think the federal rule still says that you are supposed to seasonably supplement, although you don't generally have a duty to supplement when the circumstances would end up involving what the rule calls -- I think it still calls it a knowing concealment, and I think Steve's example with respect to the documents would probably satisfy that. Otherwise, I think the federal rule calls for an additional request for supplementation. I don't know. I don't know whether -- it's back 10 years ago. I appreciate how they must have had the same conversation that we are having and that must

have been how those words were developed, but it might be something that's worth studying now.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I am more like Steve Susman. When I get information I supplement immediately, and I really don't like a legal system that encourages lawyers to withhold information that they know is important to the other side until the last possible minute so that it minimizes the other side's opportunity to react to it so that they can gain an advantage in the trial and maybe win a lawsuit. Now, I realize that this is a balancing that we are doing, but my balance is more in favor of disclosure, and I don't see the disclosure of what we know is important information to the other side as make work.

Make work to me is when you have to take information that's known to the other side and type it into answers to interrogatories when they already know it. That's make work to me, but when I get -- on the 31st day before trial I get supplemental answers to interrogatories

with 25 new fact witnesses and 9 new experts, and Luke, I have always thought I could only nail the experts. I have never thought I could nail the fact witnesses because I thought that that only applied to experts.

I know that the other side has been playing games with me ,and I know that what they have been trying to do is minimize my reaction time, and I really don't like the idea that we are elevating what we consider to be a make work concern to the degree that lawyers can seize upon it to be fundamentally unfair about the way they do their discovery, and that's the way our rules are right now. Many lawyers will do that even though we know that it's not the good thing to do, and we are going to perpetuate that under this new system, and we are basically giving everybody the license to hide important information until the very last possible minute, and I just don't like that.

MR. PERRY: Could I ask you a question, Richard?

CHAIRMAN SOULES: David Perry.

MR. PERRY: How would you draft

a rule to distinguish between important information that you have to disclose right away and other stuff that you don't?

MR. ORSINGER: I don't know. I would have to think about that because the logical answer to that is to let the judge make that decision as to whether they think some important information was withheld in bad faith, but then that gets us into the litigation about suppressing information, which is one of the harms we want to avoid.

MR. PERRY: And it gets us into a lot of satellite litigation.

MR. ORSINGER: It does. I agree, but you know, the problem is if we don't do something we are encouraging the majority of the lawyers that I see in my law practice to wait until the last minute when they know it's not fair, and they are doing it to gain an advantage, and you know, everybody is complaining about the cost of litigation or the cost of discovery, but what about the complaints of the people who have to go and request a continuance because they have had all of this information disclosed to them 31

days before trial, and they have nothing they can do but request a continuance, and that's an abuse that we can address also.

CHAIRMAN SOULES: Okay. Come around the table here. Anybody else down this side? Harriet Miers.

MS. MIERS: Do we need a sense of the group on the informal/formal issue, or do you think we have that?

MR. SUSMAN: I sense that the group is in favor of informal, that that will suffice. I sense that the group is in favor of not distinguishing between amendment and supplementation because it's a difficult concept.

CHAIRMAN SOULES: Going to Harriet's question though, you are talking about deleting the sentence that says, "The amendment or the supplement shall be in the same form as the original response" because there was some debate about that. There didn't seem to be any debate about being able to supplement informally, but the second thing there seemed to be some debate about it, and I don't see how you can do both. You have

either got to have it informal, which means it doesn't have to be in any particular form, informal, or it's got to be formal, which means it has to have a form. And so that's the same thing. If we say we like informal, then we are taking away the obligation to put the supplement in any particular form. Anything goes that's in supplementation except perhaps what we would say in writing.

MR. SUSMAN: Could we get a show of hands on that?

MR. PERRY: If that's an issue, let me throw out one comment or one thought I think we ought to be aware of as well. Again, there are a lot of advantages to the informal supplementation, but some of the disadvantages that was considered by the task force is that you have some sort of a cottage industry to object to almost everything that anyone says at trial on the grounds that discovery was not made in a timely fashion, and if you allow informal supplementation, it becomes very important when you try the case to have an outstanding indexing system so that everything you are concerned about getting into evidence

you have to be able to go back and substantiate when and where and how it was disclosed to the other side, and it may be an area that even though it has a lot of advantages it also has a lot of opportunity for gamesmanship.

CHAIRMAN SOULES: Okay. This is on formal versus informal. If you vote informal that means it doesn't have to have any particular form. Could we have just some dialogue first about should it be required to be at least in writing, a supplement? Can someone call -- I say, "Look, I called David Perry a year and a half ago. I remember it. He may not. I told him I had some documents down here at my office he ought to come look at."

MR. LATTING: Isn't that going to go to the trial judge's discretion? Can we get to what Steve was talking about?

CHAIRMAN SOULES: Whatever you want. Whatever you vote is fine with me. I just want to be sure that we have that notion in mind, whether it should be in writing or whether a telephone call will get it done.

MS. SWEENEY: Well, is a deposition in writing?

MR. GOLD: So the first issue is whether it's in writing or not. That's what we are talking about?

CHAIRMAN SOULES: Either in writing or on the record at a deposition.

MR. MEADOWS: Documents.

MR. GOLD: Or not on the telephone.

CHAIRMAN SOULES: As opposed to being I told him at a recess. I told him in recess at a deposition.

MR. GOLD: It has to be on the record, or it has to be in writing.

CHAIRMAN SOULES: If you want it that way. We can do it any way you-all vote, but I just want to be sure we have that in mind.

MR. SUSMAN: Mr. Chairman, before we --

CHAIRMAN SOULES: Yes. Mr. Susman.

MR. SUSMAN: Again, we have elected to go through this in the order of the

rules, just I don't know why, but now it occurs to me I think we ought to take up Rule 6 first before we vote at all on Rule 5 or any of these issues on Rule 5 because I think what happens if you don't is the most serious gut issue. Okay. Because that's going to determine a lot of votes on when, where, and how, and that's why I think we ought to turn now to what happens if you don't.

CHAIRMAN SOULES: All right. That's okay with me unless you-all are ready to vote on some of these things we have talked about here for, what, two and a half hours, an hour and a half.

PROFESSOR DORSANEO: Hour and a half.

CHAIRMAN SOULES: Hour and a half. You-all want to go to the exclusionary rule at this time?

MR. GOLD: I want to go to 6, but I want to say something about 5 before we do just so it's on this record. I think that David Perry's suggestion about the request and the task force recommendation still has some

merit, and I think regardless of how we do this supplementation another concept that we need to think about is whether a person is precluded from requesting supplementation, and if they aren't, whether they can request supplementation informally. I mean, if you can respond informally, why not be able to request informally? That's one thing.

The other thing is I want to make sure that when we are talking about surprise is whether that also has a concept of prejudice in it as well because if we just write the word "surprise" lots of people can say, "Well, I was surprised by this", but is it a substantive issue? Is it outcome determinative? Is it really something that prejudices the case?

MR. LATTING: Is it harmful?

MR. GOLD: Yeah. Is it harmful? The second thing is that I want to make sure -- the third thing is that we consider is when someone puts up something at the last moment -- and this goes back to the Mother Francis case. Right now the rule is if you designate something 31 days before trial,

well, then you are -- that's fine. That's fine. It's only if you do it within 30 days, and I think there should be a concept that the courts should be able to balance whether the person who is offering the discovery at the very end can show good cause why they couldn't have done it earlier. That should be a consideration as well, I think, not this merely "Why did you wait that long?" I don't think a Rule 6 thing should be excluded or not, but in the balancing, "Why did you wait that long?"

And the last thing is to me -- and I was explaining this to John just a moment ago. To me the most important time for supplementation is before the experts are deposed or produce their reports or whatever they do because that's where the real expense comes in in all of this because everyone ponies up their experts, and if the information comes in after the experts have testified, it's similar to the concept that Steve was talking about. If you bring -- if you have the discovery cut-off before the supplementation it defeats everything.

If you are taking an expert's deposition, either it traps the expert or the expert says, "Well, I understand new information is coming. I haven't seen it yet. So I can't give you my opinions." So it complicates the most expensive portion of the whole pretrial litigation, which is the expert time. So I think some consideration should be given to how long before the experts that that process should take place. I just wanted to make sure that those thoughts were talked about whenever we talk about 5.

CHAIRMAN SOULES: Okay. Rule 6, or Tommy, did you have something to say before we go to that?

MR. JACKS: At some point will we have a chance to come back to the last part of Rule 5? We haven't talked about that.

CHAIRMAN SOULES: I think we are going to come back to Rule 5 in its entirety. I think we have resolved nothing under Rule 5 at this point.

MR. JACKS: Okay.

CHAIRMAN SOULES: Rule 6.

MR. SUSMAN: Rule 6, and Scott,

I guess you can present the subcommittee's view on why we think Rule 6 ought to be the rule.

HONORABLE F. SCOTT MCCOWN: Well, Rule 6 is something that this committee has been talking about since we began with sanctions when we started, and what we try to do in Rule 6 is set up a sanctions system that's balanced and fair and then doesn't drive the discovery process crazy for fear of the sanctions, and so what it says is, "If you fail to timely disclose information" -- now, we haven't decided under Rule 5 when you do have to timely disclose, but "If you fail to timely disclose information, and the failure leaves the opposing party unprepared for trial..." so your failure to disclose would have to leave your opponent unprepared "...such that there is a significant risk of an erroneous fact-finding as the trial proceeds."

So what that means is you may be unprepared, but it is completely unimportant and isn't going to turn the trial or I suppose so overwhelming that there is no way you are

going to get prepared for it. So those two concepts are linked. "Then the court may exclude the information not timely disclosed."

So one option then for the court is to exclude. This committee told us last time you wanted an exclusionary function in the rule. So the court may exclude. "...Or the court can continue the hearing to allow the opposing party to prepare to confront or to use the previously undisclosed information," because sometimes disclosure is stuff not that you want to defend against but that you want to take advantage of, and so that gives the court the option. The court can exclude it or continue the hearing to allow you the opportunity to take advantage of it or prepare to confront it.

"The court shall make that decision in its discretion as is fair under the circumstances," and we don't think you can fine-tune that. That's going to have to be up to the judge, am I going to exclude or am I going to continue; but in an effort to encourage continuance as opposed to exclusion in subdivision (2) we have given the court a

little extra option to make a continuance more palatable, that "If the court continues the case, the court may impose the expense of the delay, including attorneys' fees and any difference between prejudgment and postjudgment interest on the party that failed to disclose."

So that if the court chooses to continue the case they can compensate the opposing party by if he's lost a lot of attorneys' fees in preparing for that trial or if there would be a differential in pre- and postjudgment interest, then that can be assessed as a cost of the continuance. That's discretionary. The court could just simply continue the case with no cost, but again, you have to leave that up to the discretion of the judge. So that's kind of the way the rule operates.

MR. LATTING: Scott, I have got a --

CHAIRMAN SOULES: Okay. Steve. Let's get it explained here before people from the committee --

MR. SUSMAN: And keep in mind that the court focuses there on materiality of

the information and surprise. There is no inquiry, as I understand this rule now, into the mental state of mind of the offending lawyer or party. You don't ask did he do it intentionally? Was it in bad faith? Was it knowing? Was it negligent? It's rather the inquiry is on the impact on the innocent party.

HONORABLE F. SCOTT MCCOWN: No satellite litigation.

MR. SUSMAN: Well, except that that does involve, I mean --

HONORABLE F. SCOTT MCCOWN: Right.

MR. SUSMAN: I mean, that does require the court to make some decisions. How important is it, the information, which is one of the questions we were asking on Rule 5 and on the timing of disclosure, you know. How important is the information, and what is the impact on the trial surprise-wise?

MR. LATTING: Steve and Scott, I will address this to both of you.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I like your rule,

and I am ready to vote for it, but I would like to ask you, would it impact it negatively to change the wording in this way. It says, "If a party files timely to disclose information during the discovery and the failure to disclose..." And I would suggest we say "causes the opposing party to be unprepared for trial, and there is a significant risk of an erroneous fact-finding" rather than leaving him unprepared.

MR. SUSMAN: Sure.

MR. LATTING: I have cases against a number of people who are going to be left unprepared no matter what I do.

HONORABLE F. SCOTT MCCOWN: I would accept that amendment.

CHAIRMAN SOULES: Richard Orsinger.

MR. LATTING: Would that hurt anything to change it like that? Because I am for the rule. I think the rule is well written, and I am for it. I think we ought to pass this.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Scott, I think that -- I don't have any problem with the phraseology about excluding evidence, but I am worried that the committee or subcommittee has gone the opposite direction in terms of continuances and alternative because it seems to me that you have made it harder to get a continuance for somebody waiting until the last minute and giving you information than it is right now. In other words, under your standard I am only entitled to a continuance based on late disclosure of information if I can prove a serious risk of an erroneous fact-finding, and I think that a continuance ought to be a matter of fairness to the judge that if they waited until the 31st day and told you another five witnesses and produced some documents they could have given you, say, four months before trial, I think a continuance ought to be a more readily granted remedy than what this rule says. Because this rule says you can only get a continuance as easily as you can suppress the evidence, and I am worried because it's really going to encourage lawyers to wait because you may not

even get a continuance.

HONORABLE F. SCOTT MCCOWN: Well, Richard, that's not the intent of the rule, and if we need to work on the drafting to lead away from that interpretation, that's fine. I don't understand that to be what the rule says. The judge can always continue a case for any reason that somebody moves for a continuance.

MR. ORSINGER: Well, your rule right here says you only get the continuance "if."

HONORABLE F. SCOTT MCCOWN: No. No, it doesn't.

MR. ORSINGER: If so-and-so, then the court may do one or two. One is suppress; two is continue. So you have given them a new standard for continuance when the basis for the continuance is the late disclosure of important information.

MR. SUSMAN: See, I think what Richard is saying is that he would urge that you get a continuance automatically almost.

MR. ORSINGER: Not necessarily but at least let the judge use a sense of

fairness rather than this almost reversible error concept that you have written in here.

MR. GOLD: Well, Luke --

MR. LATTING: If the failure to disclose doesn't cause that, why give a continuance? It's not a game. You are not trying to punish somebody. A continuance costs a lot of money, and it ought not to be granted unless there is a significant danger of an erroneous fact-finding.

MR. ORSINGER: I don't agree because what's happening is you are encouraging lawyers to withhold the information because of the difficulty of the other side in responding to it, and whether or not it's likely to change the jury verdict and whether or not as a matter of policy we should encourage lawyers to disclose it early enough that we don't have to be put in this trap, you know, we are encouraging lawyers to play that game, and I think we are going to be much worse off under this concept than before because you are not going to get it excluded probably, and you are not going to get a continuance either probably.

MR. LATTING: Well, what you say is right where we are today, and maybe we shouldn't change where we are today.

MR. ORSINGER: I am not talking about the exclusion of the evidence. I don't have a problem with that. I think, though, you have made it difficult for a judge to say, "I think that in fairness I ought to allow this other side to retake some of these depositions," which is going to take more than the time between the 31st day before trial and trial. That's all I'm saying.

MR. LATTING: I don't agree with your assessment.

CHAIRMAN SOULES: Okay. Don Hunt.

MR. HUNT: What Richard says has great merit, but it may also work in the opposite way, however, and I would like to know what Scott thinks about this as a sitting judge. Instead of giving such a difficult standard to me in order to get a continuance, perhaps what it does, it gives the judge the very out that the judge doesn't have now. Judges don't really want to grant continuances

in most cases, but if it's one or the other, exclusion, and the exclusion punishes the party and there has been that gamesmanship, then this is a very easy out for a trial judge to say, "Okay. We continue for two weeks, plus lawyer who played games you get to pay $1,000 attorneys's fees." So it may encourage judges to choose the easier remedy that doesn't affect the merits of the case.

MR. SUSMAN: But you are not addressing what Richard -- see, gamesmanship doesn't count under the present rule, and what Richard is saying, I understand him to be saying, is that gamesmanship should count for getting a continuance. I mean, just so we understand what the arguments are being made. I think that's the argument that's going on here.

MR. ORSINGER: I am not saying that you should go into the transgressing lawyer's head, but I think that the judge should be able to make a decision on continuance based on overall fairness rather than on whether the evidence is so important that it amounts to reversible error in terms

of affecting the judgment.

HONORABLE F. SCOTT MCCOWN: This can be fixed easy by just adding a sentence that says "Nothing in this rule is intended to circumscribe the court's ability to grant a continuance when it determines a continuance should be granted." I mean, we can draft a sentence that says the judge can grant a continuance whenever he thinks there needs to be one.

MR. HUNT: Would this make it easier for you to grant a continuance, a rule like this? Faced with granting the continuance as opposed to exclusion, would it make it an easier choice for a trial judge?

HONORABLE F. SCOTT MCCOWN: This rule is designed to give the judge the ability to continue rather than exclude but to make the continuance not so much a free gift for the offending party. The offending party may well then have to pay the attorneys' fees or the differential in interest. So it's to try to balance so that we don't have a crazy system that excludes evidence that doesn't need to be excluded and yet doesn't give the

offending party a free ride.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yeah. I think one of the things we have to keep in mind is under Alvarado vs. Farah in the final paragraph of that case the court talks about encouraging courts to rather than exclude witnesses consider the concept of continuing cases, now. What this rule does and I think is very good and I think Joe Latting and I are both on the same page on this, is that I don't think simply because somebody at the last moment comes up with three witnesses that they would like to have in this thing but they are not outcome determinative, the case isn't going to hinge on them, that a continuance should automatically be granted because that's the only recourse. I mean, you either exclude them or not.

I think that there should be some shift. There should be some analysis about whether these witnesses are going to cause any real change in the fact-finding process, and if it is, well, then the court can make the determination whether to exclude them or

whether to grant a continuance or whether to allow -- if we are talking about a continuance -- 10, 15 days, even do the depositions and then start the trial, whatever, but I don't see this making it more easier or less easier or a significant change. I just think it clarifies that there needs to be some problem that's created with this late disclosure rather than simply because the person has designated them late you get an automatic continuance that theoretically is available right now.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I think what this rule does that works so well is it keeps from making timing of disclosure the all-important inquiry. Right now the only inquiry the court makes is was it disclosed 30 days before trial, and if it was disclosed 30 days before trial, you let it in. If it was not disclosed 30 days before trial, you exclude it, and that's been the problem.

Let's say we adopted the "as soon as practicable" alternative. Now that's a

problem because your only inquiry is was it as soon as practicable or not. Under this it would be, first, did it cause you to be unprepared for trial and is there a significant risk. If you disclosed it a year after you found it out but that was a year before trial, we wouldn't care whether you disclosed it as soon as practicable or not because you would have had a year to conduct further discovery to meet the new information.

So I think what this rule does is it focuses on the important issues, which is materiality and surprise instead of the relatively unimportant issue of timing, except that timing is important in allowing you to meet the information so you can use it or fight against it at trial, and so I think Richard's problem with the rule is more of a timing issue. Well, if we are encouraging people to wait 'til 30 days before trial to supplement information, we have a problem, but I think we can use this rule and the timing of supplementation rules to discourage late supplementation and to encourage early supplementation of important information, and

I think then people will get away from all of this worry about having to supplement with all of this unimportant information 31 days before trial because we will have gotten rid of that problem.

CHAIRMAN SOULES: Okay. My problem, I think, with this is that where the burden lies and maybe what the burden is, but we have put constraints on a party's ability to make discovery, particularly in depositions. Now then the offending party shows up inside of 30 days with a bunch of new information that they are going to use. That's why they are bringing it forward because they don't -- if they just pop up in trial it's probably going to be excluded, or maybe it just pops up in trial, and they say "We are going to use this information. We have never shown it to the other side in discovery, and all their deposition time is used up but we want to put it into trial." That's what I'm doing to Steve.

Steve says, "Wait a minute. I have never seen this stuff before," and the judge says, "Well, Steve, under this rule that doesn't

make any difference. Until you convince me that your trial preparation has been impaired it's your problem, not Soules who is the bad guy, and he's pretty bad in this. I will grant you that, but my hands are tied until you, the good guy, show me that you have been hurt, and if you don't show me that, this is coming in because that's what the rule says." And I think that the light to put constraints on discovery, pretrial discovery, and to shift the burden to the nonoffending party to exclude evidence is again fundamentally unfair.

MR. SUSMAN: Would you buy this rule if we simply shifted the burden?

MR. LATTING: Don't give up yet, Steve.

MR. SUSMAN: I haven't given up. I mean, I am trying to see what we have to do to satisfy Luke because I know he finds this rule an anathema. Would you buy it if I shift the burden?

CHAIRMAN SOULES: Close. I think the good cause decisions are kind of screwy, frankly. I mean, surprise doesn't

matter. Everything that doesn't matter -- as a matter of fact nothing matters.

MR. SUSMAN: In other words, if I have not disclosed --

CHAIRMAN SOULES: So nothing matters in good cause. I think good cause has got to be changed because it's just a mess, and there is no way to deal with it or fix it probably. So the test that's here, I don't really have -- I am not through thinking about it, but at this point I don't have a problem with it.

MR. SUSMAN: I am not certain -- I am not certain I wouldn't accept that amendment.

MR. LATTING: No. Please don't.

MR. SUSMAN: Well, I see my people --

HONORABLE F. SCOTT MCCOWN: Well --

MR. SUSMAN: Maybe I am certain I wouldn't accept it.

HONORABLE F. SCOTT MCCOWN: The reason the burden has to be on the

nonoffending party is because the party who is offering the evidence is going to be hard-pressed to articulate why the other party is not hurt.

CHAIRMAN SOULES: And then he loses.

HONORABLE F. SCOTT MCCOWN: It's always hard to prove a negative.

CHAIRMAN SOULES: That's right.

HONORABLE F. SCOTT MCCOWN: It's even hard to articulate a negative, a vacuum, and so all the nonoffending party has to do is articulate to the trial judge what this stuff is that he wants to -- that the offending party wants to offer, why that leaves him unprepared. In other words, how that comes into play in the case, what kind of discovery he would do if he had more time to do discovery, how that plays with the jury issues, and all the rule requires is that there be some significant risk of an erroneous fact-finding.

There just has to be a significant risk, and here I would make the plea of the trial judge that ultimately rules of reason have to

rely upon trial judges to be reasonable and to be fair. Automatic rules don't rely on trial judges but then they produce all of these terrible injustices that we see and have all of this cost to them, and I think this rule is specific enough and balanced enough that even most of our trial judges can fairly apply it.

CHAIRMAN SOULES: Well, it may be, but I -- there is going to -- I just see gamesmanship emerging. I mean, this is the perfect way to gain an unfair advantage at trial. You don't show something that is real important to your case that's going to really hurt the other side until you are in trial, and the other side has to show surprise.

MR. SUSMAN: Can we get a show of hands on this?

MR. LATTING: May I please respond to that?

CHAIRMAN SOULES: And maybe we are going that way, but that generates -- that's going to generate gamesmanship.

MR. LATTING: May I please respond to that?

CHAIRMAN SOULES: Yes, sir. Go

ahead.

MR. MARKS: Please let him respond. He's driving me crazy down here.

MR. LATTING: That's not right because if I offer a witness at trial that I have not disclosed, the simple question is "If it's not material to the outcome of the case, Mr. Latting, why do you want to put him on? Is this relevant to the outcome of the case, or is it not?" And if it is and I haven't disclosed it, I am the one who as a practical matter has the burden of explaining why that was okay. Otherwise a judge that has any sense is going to say, "Well, you didn't tell Mr. Soules about this witness, and I am not going to let you go forward with this witness."

CHAIRMAN SOULES: That's all I want in the rule, what you just said.

MR. ORSINGER: That's not what this says.

CHAIRMAN SOULES: You have the burden.

MR. LATTING: No. I said a judge as a practical matter will have that

much sense.

MR. PERRY: The task force -- and I just throw this out again as a thought -- had made a distinction between whether the untimely disclosure finally occurred more than 30 days before trial or less than 30 days before trial, and if the disclosure finally came to pass less than 30 days before trial and if it involved a witness not previously identified or a document not previously produced, then it was easier to exclude it; whereas if the disclosure even though untimely was more than 30 days before trial, this concept here was essentially what was --

CHAIRMAN SOULES: I don't have any problem with the continuance part of it except it may need some tuning. I spoke about the problem I have, and that's burden at the hearing or at the issue. Paul Gold.

MR. GOLD: Yeah. One thing we might want to consider is that for some reason in the request for admission rule there is a different standard that seems to apply for amendment and withdrawal of the admissions,

and that's probably a good thing, but the language is kind of interesting comprising what you are saying, Luke. It says that "The court may permit withdrawal or amendment of responses or deemed admissions upon a showing of good cause for such withdrawal or amendment if the court finds that the party relying upon the responses and deemed admissions will not be unduly prejudiced and the presentation of the merits of the action will be subserved thereby," which is a similar concept of what you are talking about.

CHAIRMAN SOULES: Exactly.

MR. GOLD: If somebody comes in and they are saying, "Here, I have got this stuff I want to offer," and Joe's right. The judge is going to say, "Well, is this really significant that you get this in?"

"Well, yes, it is." Well, that triggers materiality right away. I think the next burden that that person should have to show is that it isn't going to change the dynamics of the trial. It isn't going to prejudice the other side. Then they are forced into this conundrum about, well, if that's true, why do

we need it at all?

MR. LATTING: That's right.

MR. GOLD: But I agree with your analysis that it shouldn't be hoisted upon the unoffending party to have to show, "Judge, I don't know what this stuff is because I just heard about it, but mios dios, I think it's going to really hurt me." I think it's going to harm everything because there is no way of making that argument without hearing it first.

CHAIRMAN SOULES: I think we ought to put the request for admissions standard in here as a predicate if a trial judge makes a bench fact-finding as a predicate to admitting the evidence along the lines of 160 --

MR. GOLD: 169.

CHAIRMAN SOULES: 169.

MR. SUSMAN: What I would like to see us do now is vote on Rule 6 as drafted, and if it is rejected, I mean, my fear is that in the way we are going about this we are now through about five or six rules. It will take us another three years, and we will have no

guidance -- I mean, it's like group drafting. Everyone has got ideas, but we don't get any consensus. Now, the subcommittee brought you a proposal of things we believe in and we favor, and in fact, you have gotten us in the mode here of fighting with each other and bickering with each other. We are going backwards here. We never did it in our subcommittee meetings. I think we ought to go through these things and vote on them "yes" or "no." If it's a "no," then we obviously have got to discuss more and figure out what we have got to do to come back and get a "yes," but I am not giving up on a -- I am not saying we are going to get a "no" on Rule 6. I move the adoption of Rule 6 as written.

CHAIRMAN SOULES: Okay. Bill said he had one other thing he wanted to say.

PROFESSOR DORSANEO: And people haven't focused on this at all, but let's go back to Luke's hypothetical, and let's make him a very innocent person who did not provide information because he didn't learn it sooner, and let's make that information pivotal, critical information, the kind of information

that would qualify, and let's assume that he could satisfy the newly discovered evidence standard, okay, if this was a motion for new trial. I think it would be an abuse of discretion or should be an abuse of discretion to keep the evidence out if it would devastate his case. In other words, there is too much discretion in 6 going the other way, too; too much discretion allowing the judge to just keep it out regardless of the character of the information, regardless of the circumstances of the person who didn't provide the information earlier.

HONORABLE F. SCOTT MCCOWN: Well, Bill, aren't you just saying it would be an abuse of discretion to exclude the information?

PROFESSOR DORSANEO: Yes.

HONORABLE F. SCOTT MCCOWN: And a continuance should have been granted.

PROFESSOR DORSANEO: Yeah. That's why it would have -- but that thought hadn't been expressed, and maybe it's solved by your suggestion that there ought to be something more said in here about

continuances, but it should be -- it could well be that the person whose evidence would be excluded should be entitled to a continuance.

MR. GOLD: But don't they get a bill of review and then the court could make the determination after the bill of review, well, this needs to come in. Whereas if you put it the other way around --

PROFESSOR DORSANEO: No. They don't get a bill of review.

MR. GOLD: Not a bill of review.

MR. ORSINGER: Bill of exceptions.

MR. GOLD: Bill of exceptions. I'm sorry. I'm sorry. Bill of exceptions. At least the judge can then hear why it should come in. If you do it the other way, the party that's unoffending never gets that opportunity to challenge it.

PROFESSOR DORSANEO: I don't mind if it's heard -- if the arguments are heard in camera and the person has to justify that I just learned about this and it's really

important and, you know, I was diligent, and that's just where we are.

MR. YELENOSKY: Is that really under this rule then? Is that a failure to disclose?

CHAIRMAN SOULES: Steve, what we are trying to -- Steve, what I am trying to do is guide the committee consistent with your request yesterday to give you conceptual disagreements with the draft, not to draft in a committee.

MR. SUSMAN: Right. Right. Right. I understand that, but what now -- I mean, listen to the conversation. I'm not sure there is that much -- I think we might get a favorable vote on Rule 6 as written.

CHAIRMAN SOULES: All right. Those in favor of Rule 6 as written on page 10 hold up your hands.

MR. LATTING: Are you talking about with the amendment that we talked about?

MR. SUSMAN: Yeah.

HONORABLE F. SCOTT MCCOWN: Let me just change a few words. In the second sentence Joe Latting said to change "leaves"

to "causes the opposing party to be unprepared for trial."

MR. SUSMAN: Comma.

HONORABLE F. SCOTT MCCOWN: "Causes" instead of "leaves." In the last sentence instead of "the court shall" it should be "the court may." "The court may exclude or continue at its discretion," and then picking up on Richard Orsinger and Bill Dorsaneo's comments add a new last sentence to subsection (1) that says, "Nothing in this rule limits the authority of a court to grant a continuance," period, and with those suggestions then I think we have got the perfect rule.

CHAIRMAN SOULES: Okay. Those in favor show by hands. Ten.

Those opposed? Eleven. It fails.

If this passes, I am against any constraints on depositions and will vote against it. So that's where we are headed, at least I'm headed. If the burden is not on the offending party to get undisclosed evidence in at trial, I don't want any constraints on discovery. I need to be able to get to the

meat of the coconut whatever time it takes.

MR. SUSMAN: All right. Let me make another motion. Same rule except now we are going to put the burden -- same rule except we are going to word it in a way that puts the burden on the party that failed to make the timely disclosure. Could I -- could we see a show of hands if we do it that way? Could we get that rule passed? Because that's an easy drafting issue. Could we see all who would be in favor of that?

CHAIRMAN SOULES: All right. Could I just ask a question? As I understand it, this has to be like sole proximate cause. Is that what you are saying, that --

MR. LATTING: Yes.

CHAIRMAN SOULES: -- the offense has to cause the party to be unprepared for trial? It's a sole cause.

MR. LATTING: It's not sole, but it has to have some causal effect. It has to be --

MS. SWEENEY: A proximate cause.

MR. LATTING: If it doesn't

have any effect it doesn't have any --

CHAIRMAN SOULES: All right. Please listen to these words just a minute. "...Causes the opposing party to be prejudiced in preparing for trial or conducting the trial."

MR. LATTING: That would be an improvement.

CHAIRMAN SOULES: Okay. With that and the burden I will go for it.

HONORABLE F. SCOTT MCCOWN: Could I say one more thing on the prejudice point?

PROFESSOR CARLSON: Would you say it again?

CHAIRMAN SOULES: "If it causes the opposing party to be prejudiced in preparing for trial or conducting the trial."

HONORABLE F. SCOTT MCCOWN: Could I speak on that point, Luke? The word "prejudice" is an abstract concept that we have in several places in our rules, and it's confusing to people as to whether prejudice means --

MR. SUSMAN: Bad info.

HONORABLE F. SCOTT MCCOWN:

-- it hurts you. For example, if you bring in an eyewitness that's never been disclosed that's going to say you did it, that's prejudiced in the sense that it's evidence that's against you. Well, any evidence that's offered is going to be evidence against you, and so the concept "prejudiced" in the cases they say that we don't mean that it's evidence against you. We mean that it -- that you are unprepared, and so we purposely didn't use the word "prejudiced" because we wanted to get to the real concept of what we are really talking about, and that is, yes, it's evidence that's bad for you. That's why it's being offered, but has it left you unprepared and --

MR. PERRY: How about "unfairly prejudiced"?

MR. SUSMAN: I think if the concept of -- I think Scott is right. If the concept of prejudiced is unprepared, being surprised, whatever that means, we ought to say it, not just "prejudiced."

HONORABLE F. SCOTT MCCOWN:

Complaining.

MR. SUSMAN: Yeah. Because I think he's right because "prejudiced" can be read to mean it's just bad for you; therefore, it's prejudicial that this evidence come in because it's going to hurt you.

MR. GOLD: Unfairly disadvantaged.

MR. SUSMAN: No. I don't think that -- why don't we just say -- what we are really talking about is surprise. That's what you are really talking about. The guy is surprised.

MR. GOLD: I don't care about that.

MR. SUSMAN: And why if I can demonstrate that it's not going to surprise you in such a way that it's likely -- it's not going to cause you to be unprepared in such a way that's likely to affect the outcome of the trial, then I ought to be able to get it in.

CHAIRMAN SOULES: Actually, the concept that's in 169 takes care of this as well as the burden. Why don't you read that again?

MR. SUSMAN: Well, again,

what's wrong with just amending what we have got, same language, shifting the burden?

HONORABLE F. SCOTT MCCOWN: We deliberately -- we looked at 169. We knew that it was there. We looked at it. We deliberately didn't choose it because we wanted plain English words that expressed in real concrete terms --

MR. SUSMAN: Right.

HONORABLE F. SCOTT MCCOWN: -- what we were talking about, and the problem with --

MR. SUSMAN: I move, Mr. Chairman, that we do Rule 6 shifting the burden.

CHAIRMAN SOULES: Okay. Those in favor show by hands.

MS. DUNCAN: Of just shifting the burden?

MR. SUSMAN: Yeah. Just shifting the burden.

CHAIRMAN SOULES: Passing it with nothing but the changes in --

MS. MIERS: Well, with Judge McCown's other changes.

CHAIRMAN SOULES: Okay. It's the same motion that was made before except we are going to change the burden to the -- the burden is on the offending party. Nineteen. Nineteen.

Those opposed? To two.

MR. SUSMAN: Excellent.

CHAIRMAN SOULES: I think you are going to have some debate next time on what is the burden that got shifted. I don't know whether you would want to address that now or later. That's not resolved.

MR. SUSMAN: No. It is. I don't understand why you say it's not resolved. It's the same words. We just voted on using the same words, but the burden is on me, the offending party, to demonstrate that this information which I am now seeking to introduce will not unfairly prejudice you, my opponent.

CHAIRMAN SOULES: That's fine.

MR. SUSMAN: And it will not lead to an unjust -- will not lead -- there is no significant risk that this information is going to unfairly prejudice you so it will

lead to -- unfairly leave you unprepared so it will lead to an erroneous fact-finding. The same words. Okay. That was the burden. I am just going to word it in a way that makes me have to make the showing, and I thought that's the sense of the group.

PROFESSOR DORSANEO: That's going to be very hard to do, to make that showing.

MR. SUSMAN: Huh?

PROFESSOR DORSANEO: It will be very hard to make that showing because you are going to be arguing that your own evidence is really not that important.

MR. SUSMAN: I think --

PROFESSOR DORSANEO: Therefore, it's going to be out.

MR. SUSMAN: I think -- no. To the contrary, I think that --

MR. YELENOSKY: Well, doesn't it collapse down to whether they are going to be unprepared or not because obviously you are not going to argue the evidence is unimportant.

MR. MARKS: What does this

allow the judge to do that he can't do now?

MR. LATTING: It allows evidence that comes in more than -- or sooner than 30 days before the trial, if he thinks it's a good reason it wasn't disclosed and he thinks it's fair, we go back to the old way is what it does.

CHAIRMAN SOULES: I understand a case in Texas that says that a judge can substitute a continuance for striking the witnesses. Now, we have got this Partida case out of the Corpus court -- I've lost it now, but I mean, it holds that even though there were 100 fact witnesses and 50 experts named on the 30th day before trial the court shouldn't strike it. He should grant it. He should do something else. It doesn't say what else. So this rule does give a judge, specifically gives a judge, discretion to elect in favor of a continuance rather than preclusion of the testimony, and I think that's a very positive step.

I think the judges are told that and will consider it, and under TransAmerica, this case is on TransAmerica even though it's an

automatic exclusion case. They go back and pick up TransAmerica and Chrysler vs. Blackman and say it just isn't fair to -- that it's outcome determinative to strike all the witnesses and the experts, and you have to consider lesser -- something. So there is a case there that sort of says this, but now that we are saying it in a rule I think it will get more reading. So I think we have done that, in response to your question, John.

Richard Orsinger and then Elaine, and then we will go around the table.

MR. ORSINGER: Maybe because I do so much appellate work, but I think it's going to be rare cases where anyone is going to be able to show a significant risk of an erroneous fact-finding. The trial judge, however, is going to be required to let it in, and I would like for everyone to think when we consider all of these rules as a package are we inviting lawyers to withhold information until they are in the middle of trial because they think that while it may be important or it may give them a strategic advantage that it won't be so important that it creates a

significant risk of an adverse or an altered fact-finding?

Because if that's what we are doing, we are encouraging lawyers to withhold it until they are in trial in expectation that it may be important and it may give them an advantage but not so important that it would alter the outcome of the case, just the admission of that evidence.

CHAIRMAN SOULES: Steve Yelenosky. Oh, I said Elaine next. Elaine.

PROFESSOR CARLSON: I just had a point of clarification. What was the committee's reason for picking erroneous fact-finding? Is it literally in broad form submission the fact-finding, or was the sense of it an improper verdict?

HONORABLE F. SCOTT MCCOWN: Well, this rule would apply in a bench trial or in a jury trial, and juries find facts and judges find facts. That's what the trial process is about. So we didn't pick it in any technical sense. We just tried to capture what we are concerned about. We are concerned that if evidence comes in that wasn't timely

disclosed, that somehow the truth isn't going to be gotten to. The facts aren't going to be found to be right.

PROFESSOR CARLSON: There may just be one or two, three questions, right?

HONORABLE F. SCOTT MCCOWN: Pardon?

PROFESSOR CARLSON: I guess, you don't mean literally that you have to show that this is something that the jury has to expressly answer or the judge?

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Mr. Chairman, just if I may exercise a little prerogative. Any of these wording problems, please write us. Okay. But we need to move this on because we have got two more hours to get your input on the big picture stuff to last us for another two months of work, and any word problems you have got, give to us, write us on a piece of paper. We will take them into account.

I think on Rule 5, our discussion on supplementation amendment, I move that we keep -- we do not go back to that now. I think we have some sense of the problems that

you-all have to deal with it, and we may be able to come back with something that is more palatable.

CHAIRMAN SOULES: Something short because we need to take a break. The court reporter needs a break. Anything else?

MR. YELENOSKY: This is more than a word problem. Because of the discussion about burden and all, why should the court even be addressing whether there is a significant risk of erroneous fact-finding? Why don't we take that out and just say "causes the opposing party to be unprepared," and put the burden if you want on the party that failed to disclose because you are not going to have the party that failed to disclose saying it's insignificant because as Joe has pointed out then, you know, what's the point?

CHAIRMAN SOULES: Okay. We have got a 10-minute break. Be back here at ten minutes 'til 11:00.

(At this time there was a recess, after which the proceedings continued as follows:)

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

MR. SUSMAN: Rule 7, please. Rule 7, as I told you yesterday, was a new rule, and this is -- we need some concept feedback from you. The main feature of this rule, at least the main --

CHAIRMAN SOULES: We are in session, please.

MR. SUSMAN: The main feature of this rule is that a assertion of a privilege is now made not by the statement of an objection but rather by written notice to the other side in the form of a withholding statement notifying them that materials have been intentionally withheld and stating the privilege relied on. That withholding statement need not describe the materials withheld. However, if a request is made that the materials withheld be described, the withholding party then has 15 days to identify the materials withheld and the privilege which is being asserted with sufficient specificity to allow the requesting party to test the basis of the assertion of the privilege.

That's how Rule 1 operates. The feeling of the group was that this would be an improvement over existing law. It doesn't make people assert objections prophylactically as to what may be privileged. It gives the other side fair notice of when anything is actually withheld and provides a mechanism for testing the assertion of the privilege. Well, that's part (1) of the rule.

Part (2) of the rule is really basically objections. The only real new concept in part (2), I think, then -- the important concept in part (2) is -- and I am not sure it's new, but it's once you make an objection you are only relieved of responding to that portion of the request, be it an interrogatory or document request, which is objectionable; and to the extent you can fairly respond to something which isn't objectionable, you should do so. And then Rule 3 is simply the ruling on the hearing and how a hearing is obtained.

So, I mean, I guess, throw this open to discussion. Does anyone have any questions?

MS. SWEENEY: I do have a question.

MR. SUSMAN: Major problems?

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Looking at part (1) and the comment you-all are -- somebody walk me through the distinction between if you get a question that says, "We want all documents relevant to the lawsuit," and all you have to do is object, and you don't have to do anything else, but if they ask you, for example, too broad a request you can object and produce what you think is the appropriate part.

Where in the rule or what's the guidance for how you decide whether it's just so bad that you don't have to do anything but object, like, you know, you get them to produce everything in your file or produce every document you rely on or produce, you know -- or list all facts that are important to you, or you know, if you get those questions, where is the guidance or how do you-all propose that we be guided in, yeah, all documents related to damages or supporting your damages claim or supporting your claim for liability? You

know, something that -- where is the support here that allows the party who receives the request to decide this is so flagrantly dumb that I am just going to object to it and, you know, dare them to take it to the court versus, well, okay, it's pretty dumb, but gee, they are entitled to some portion of it, and I am going to decide what portion that is, and take my chances. How is that supposed to be --

MR. GOLD: Can I respond to that? Or do you --

CHAIRMAN SOULES: Paul.

MR. SUSMAN: Go ahead, Paul.

MR. GOLD: That is a difficult concept, number one, but I think the court has already addressed that on a number of occasions. There is Loftin vs. Martin that talks about the fact that you have to request particular types and categories of things. There is a recent case that, once again, we talked about yesterday where it says requesting your entire litigation file is an improper request. In request for admissions, the request for admission, "Admit that you do

not have a case" has been held to be improper, those types of things.

It is difficult to draft any better than what was said in Loftin vs. Martin. If someone, for instance, requests 15 years of income tax returns, a specific type of category of document, well, your response could easily be, you know, "I have got five years. I am not required to keep beyond, you know, seven years or whatever it is, and the rest of this request is unduly burdensome. I will produce within the five years." So that's a particular request.

The thing for all damages, I think in Loftin vs. Martin they held the request for all documents relevant to the issue of damages is overbroad. If they ask for all the documents from Dr. X, though, regarding your claim of damages you could say, "All the documents for this period of time I could produce. All the documents from, you know, the last 25 years of treatment is unduly burdensome, and I object to that," but I think we have a hard time drafting any more specifically in the rule than what the Supreme

Court has already drafted or given guidance to in Loftin. We can try, but I think that was the concept.

MR. SUSMAN: I think there are -- I mean, I have a case right now that's in Detroit. It's in federal court, but there is a local rule there that I find very helpful, and that is before you bring on any motions to compel, I mean, one of the things you give the court is a concise statement of each party as to what the requesting party will accept as a minimum and what the objecting party will give as -- will give in response to the minimum request, the requesting party, and you get those two concise statements right by each other. It's very helpful. Usually there you find out what the real difference is, if anything, and many times the requesting party will accept what is being offered.

All we are basically saying here is -- I mean, the real concept is to make the responding party when there is an objectionable request kind of go to your bottom line what are you -- when they ask, you

know -- when they ask me for all documents that relate to damage calculations or relate to damages, I mean, one possibility is to simply object that it's too broad. Another possibility would be to say, "Well, I will produce my P&L's, my profit and loss, for the last five years," because that's the most crucial thing.

Shouldn't we encourage people to produce that right away? When a request is made for all documents relating to the termination of a distributor and it's easy to get the documents that are in headquarters but very burdensome to have to search every salesman's file in 100 different branch offices in the United States, which would be really burdensome, and you think that most of them are going to be in headquarter's files anyway. Our notion is you should have to cough up the headquarter documents and then object that these others will be too burdensome.

We can give practical examples of it, but it is very difficult to put it into English, and the closest we could come was really the last sentence of paragraph (2) -- I mean, of

section, subsection (2) to put the concept into English. Now, maybe we can do better with that, but it seemed to us an unobjectionable kind of concept that a party at least should have to come forward and comply with what they think is reasonable.

MR. PERRY: It is really the decision of the objecting party to decide under this concept how much am I objecting to. The objecting party may decide that the request is so silly that I object to the whole thing and I will not respond to any of it, or they may decide it is too broad, but I don't object to all of it, and in that case they have to state the part they object to and the part they don't object to. It's kind of like the rules now on request for admissions. You can't deny it just because it's not all right. You have to say the parts you do deny and the parts you admit. The objecting party has to decide how wide is their objection and then they have to provide the information that is unobjected to, and they can stand on the part that is objected to, and the hope is that there will be some times when the stuff they

provide will end up being helpful.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: I don't have any problem with that, that concept. I think that's what a lot of lawyers do anyway, and I think it's good that it's in the rule. I do have a problem with saying that you only make good faith and factual legal -- "objections shall be made only if a good faith factual and legal basis for the objection exists at the time the objection is made. Any ground not specifically stated is waived, and any ground obscured by numerous unfounded objections is waived." It seems to me that's kind of a be damned if you do and be damned if you don't sort of trap that people are going to fall into, and what difference does it make what objections you make if you are producing what you are not objecting to? I don't understand why that's in there.

CHAIRMAN SOULES: I don't know if this is on the same point, but I don't see where in this rule the need for prophylactic objections is eliminated. Where is that in

this rule?

MR. GOLD: That's what this is addressing.

CHAIRMAN SOULES: Where?

MR. GOLD: The line that John read. "Objections shall be made only if a good faith factual and legal basis for the objection exists at the time the objection is made."

CHAIRMAN SOULES: And then it says if you don't object you waive them.

MR. MARKS: You waive them.

CHAIRMAN SOULES: So where do you say the prophylactic objection doesn't have to be made or it's waived.

PROFESSOR ALBRIGHT: Can I --

MR. GOLD: It might be -- and I will let Alex talk in just a sec. It might be that this could be worded a little bit better, but the concept is that these two sentences are trying to make -- to bring about is that you only object if something is in existence at that time to object to.

CHAIRMAN SOULES: It doesn't say that.

MR. GOLD: That was the intent. Whether it's come out clearly in the wording is probably arguable, but that was the intent of these two sentences.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I agree with John because I had marked here when I looked over these rules again yesterday that by having this waiver language in there we have created an ambiguity. I would delete the waiver language because then we would be saying, "Objections shall be made only if a good faith factual and legal basis for the objection exists, and a party objecting to a request must respond to so much of the request as to which the party has no objection."

MR. SUSMAN: Uh-huh.

PROFESSOR ALBRIGHT: So I think the problem with prophylactic objections is created because of our broad waiver rules, and so I would delete the waiver rule, the reference to waiver. The other place where we delete the need for prophylactic objections is for privileges, which is in part (1). You

don't object to privileges until you are actually producing documents, and you are then withholding specific documents on the basis of privilege. So you do not make an objection. "I object to the request because it may request documents protected by the attorney work product or attorney/client privilege."

MR. PERRY: You also have to look at the request for production rules because there is a specific provision in the request for production rule that privileged claims are to be made at the time the production is due so that if you get a -- I think that's right, Alex.

PROFESSOR DORSANEO: It says that, and that is really inconsistent with this.

MR. PERRY: Well, the way the system works is that if you get a request for production, your response is due in 30 days, and that is a response to the -- to what is stated on the paper.

"Give me the drawings pertaining to the seat back." You may not have an objection to what is stated on the paper --

PROFESSOR ALBRIGHT: The form of the request.

MR. PERRY: -- but when you go to produce the documents you may find that there are privileged documents among what has been turned up. You may have agreed that you are going to produce those documents 90 days later because you need the time to make your search, and under this system the privilege claim doesn't have to be made until the production is due.

PROFESSOR ALBRIGHT: Right.

MR. PERRY: The privilege claim is not due 30 days after. Now, if it's an interrogatory that you have to file an answer to, if you have an objection, you are going to have to make it in 30 days. You also have to distinguish between objection and a privilege claim because they are handled different.

CHAIRMAN SOULES: But when I go to Minneapolis to do my view of the documents I don't know until I get there that there are objections that have been made that I could have gotten straightened out in San Antonio before I left, but now I am in Minneapolis.

That's the timing. That's the new timing, not the old timing. The old timing was you had to put it in your response so that you knew before you left town that there were objections.

MR. PERRY: That's a good point, and one of the things that might be considered, if you are going to have to go out of town to view the documents -- and you could probably do this either by agreement or you could do it in your request for production, is to request that you get the withholding statement before you actually end up in Minneapolis.

CHAIRMAN SOULES: Well, the withholding is only on privilege and exemptions.

MR. SUSMAN: Privilege.

MR. PERRY: Only on privilege. That's right.

CHAIRMAN SOULES: It doesn't have to do with overbroad or --

MR. SUSMAN: And those objections are going to be made --

MR. PERRY: The overbroad

objection is going to be due in 30 days.

PROFESSOR ALBRIGHT: Yeah. Objections to the form of the request have to be made in the written response to a document request, and those are objections under No. 2, and if you look at the document request rule, that is in your written response 11(3), "The response shall state an objection to the request pursuant to Rule 7." It probably should say "7(2)," and then when you -- and then you also have to make objections to the time and place and manner of production at the time you make your response, but then in 4, which is production, in 4(c), "The responding party shall assert its privileges pursuant to" -- that should be "7(1), if any, at the time of the production." So what we are trying to do is to make a distinction between your objections -- I think of them as to the form of the request where you are saying "I have a problem with the way you are asking it or with how much you are asking for."

PROFESSOR DORSANEO: But the second is not to form. The second is a different answer.

PROFESSOR ALBRIGHT: That's right. That's right. That's why we deleted it. We didn't use the term "form," but it's -- you know, these are objections that I know about before I go rummaging through my documents. My objection that a particular document that I find is privileged I am only going to find out after I rummage through my documents, and if I have to make that objection early, then I am going to make every privilege objection that I can possibly make to prevent waiver, and so that's what we are trying to keep from happening.

CHAIRMAN SOULES: John Marks, and then we will get Tommy and Richard.

MR. MARKS: If you merely state after you make an objection that certain documents you have asked for are privileged and that you are withholding documents because they are privileged, doesn't that kind of take care of everything? Because then that puts the lawyer on notice that they are holding some documents because of this objection, and I need to find out something about those.

MR. PERRY: That's the way the

rule works, but under this rule you don't do that unless you are actually withholding documents, number one, and number two, you don't have to do it until the time has arrived that you are supposed to produce those documents.

PROFESSOR ALBRIGHT: Hand them over.

MR. PERRY: So that that is not a 30-day fuse. That is a date of production fuse.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I am understanding better what you-all are trying to do. I was confused initially about the difference between withholding statement and the objection. It would help, I think, if in the first sentence of paragraph (2) you would say "A party may object in writing on grounds other than privileges" because that's really what we are talking about.

The second thing I am wondering is whether -- I think your concept of a withholding statement is a good idea, and why can't that also be applied when you are making

an objection? That is, the request may be overly broad, but as a practical matter I am giving you all the information I have got anyway, and I am not withholding anything, but if I am withholding something you ought to know it. Isn't there a way you can incorporate the concept of the withholding statement for both?

I mean, you gave the example of a request for, let's say, medical records from 1980 to the present. Well, I think that's overly broad, but as a practical matter my client couldn't go to the doctor anyway for the first five years of that period, but I am going to give you all the medical records I have got. If on the other hand I am withholding something, it seems to me to make sense, "Look, guys, I am giving you from 1985 forward, but I am withholding everything before 1980," and then if you want to make an issue of it, you can do it under the same procedures you have got for privileges, and if you don't care about the old records when all is said and done, well, then you don't have to.

MR. PERRY: The point -- part of the provision of the objection section where you are required to state the extent -- if you object, you are required to state the extent to which you object and the extent to which you will comply. The point of that is to get to that point so that you tell the other side "I will give you this much, and here it is," and then what I think you are suggesting, Tommy, is that you also be required to say either "I don't have anything else" or "I do have something else, and you are going to have to come fight me for it if you want it."

MR. JACKS: Exactly. And that's what -- you know, one of the problems we have under current discovery practice is we get the objections but we can't tell whether there is anything there. So we have to write and say "I saw you made the objection. Are you withholding something or not? If you are, I may want to have a hearing about it."

PROFESSOR ALBRIGHT: Tommy, maybe the way to solve your problem is to say instead of saying tell me the extent to which

you are going to comply with the request, tell me the extent to which you are not going to comply with the request. Would that help?

MR. JACKS: Yeah. Or actually, I don't see why you can't just call it the same thing you called it in paragraph (1), the withholding statement. I mean, as a requesting party it's unimportant to me whether you are withholding it because you are claiming a privilege or you are withholding it because you have some problem with the way I worded my request. All I want to know is are you with -- do we have something to fight about or not? If we don't, let's move on, but if you are withholding something, just tell me about it.

PROFESSOR ALBRIGHT: Well, I think the reason we made the distinction is because in No. (2) these are going to be issues that you can resolve before production, but it may be that sometimes you don't have to resolve them if you are not withholding anything.

MR. JACKS: Exactly.

PROFESSOR ALBRIGHT: I mean,

based upon the --

MR. JACKS: And you are not -- under both (1) and (2) you are giving information, and you are withholding information, at least potentially, and in (1) you are making, I think, more clear what you are doing than you are in (2), and I think it ought to be clear in both. That's all I am suggesting. I think you have got a good mechanism in (1), and I would just apply the same thing to (2), and I would reword the first sentence to make clear that if you don't object the only grounds for withholding is a privilege.

CHAIRMAN SOULES: Okay. Who was next? Chip Babcock.

MR. BABCOCK: Yeah. I am not sure that works, though, because if you have got an objection -- in the example Luke gave yesterday where the guy asked for medical records from 1980 to the present and you say, well, you know, it's 1994. I shouldn't have to go back and look at 10 years of medical records and tell you everything that's there. I ought to just be able to say it's

burdensome. It's too much. I mean, you can't have the same kind of log that you had on a privilege because it's not the same.

MR. JACKS: I don't think you have to have a privilege log to make a statement you are not withholding. If I am withholding information and I know I am withholding information, I am not offended by the idea of telling you that.

MR. SUSMAN: There is a second case that we need to deal with, and that is not where I am withholding it but I am just not looking for it. Okay.

MR. PERRY: You can allow that option.

MR. SUSMAN: I don't know that I got it or not, but I tell you one thing, I ain't going to look for it because it's just goddamn unreasonable. Okay. Now, we have got to deal with that, too.

MR. JACKS: I agree. I think you are right.

MR. SUSMAN: But I think it is good to move in the direction of requiring the objecting party to give you that kind of

information. I mean, what am I actually withholding, but what am I not going to do that I know I could do but I am not going to do because you are asking me something unreasonable?

MR. PERRY: What if we --

MR. SUSMAN: Put that into plain English --

MR. JACKS: Exactly.

MR. SUSMAN: -- in some way.

MR. JACKS: Exactly.

MR. SUSMAN: I think that's good.

CHAIRMAN SOULES: Okay. Coming around the table, Richard Orsinger has got his hand up.

MR. ORSINGER: The very first sentence of (1) and (2) I am bothered by the phrase of "request for written discovery" and wonder if you mean a written request for discovery. If you don't mean a written request for discovery, then what is written discovery?

MS. DUNCAN: It's a defined term.

PROFESSOR ALBRIGHT: It's defined.

MR. ORSINGER: It's a defined term, and it's defined to include interrogatories and requests for production?

MR. SUSMAN: Yeah.

MR. ORSINGER: Well, I notice in looking through some of the other rules that you call them -- well, like in the last sentence of subsection (7), "within 15 days of a written request." Are these two different ways of saying the same thing, or are these two different concepts that are both being used?

PROFESSOR ALBRIGHT: No. I think it may be that we just need to change that word. We are talking about a -- you know, I make a withholding statement. You say, "I want to know more about what you are withholding."

MR. ORSINGER: Right. I am not talking -- I am talking now just the language. The first sentence talks about a request for written discovery and the other one says "within 15 days of a written request."

MR. SUSMAN: Totally different things.

MR. PERRY: That's a drafting problem.

MR. SUSMAN: "Written discovery" is a defined term that you look back to the discovery vehicle rule.

MR. ORSINGER: Okay.

MR. SUSMAN: And we defined it in Rule 3, Rule 3(1).

MR. ORSINGER: Well, why shouldn't the last sentence of the subsection say "within 15 days of a request for written discovery"?

MR. SUSMAN: No, no. We are talking about a different thing now. What we are talking about here is not written discovery but simply I ask you to identify for me what you have withheld. That's not a discovery vehicle. That's just simply a letter I write you and say, "Richard, you gave me a withholding statement" --

MR. ORSINGER: I follow you.

MR. SUSMAN: -- "now tell me what it is you have withheld."

MR. ORSINGER: Okay. I follow you. So it is different.

MR. SUSMAN: Maybe we need to put --

PROFESSOR ALBRIGHT: Richard, we can --

MR. SUSMAN: It's a language problem.

MR. ORSINGER: The next thing I would like to say is that occasionally you will get a set of interrogatories that with subparts exceed 30, and I am always in a quandry whether I ought to answer the first 30 or just object to the whole set, and I normally answer the first 30, but I think we might ought to put that in a comment as an example, and just say if you get a set of interrogatories that has more than 30 subparts that you answer the first 30, or at least we consider that because I think that comes up a lot, and if we can solve the problem cheaply we have eliminated some trouble.

PROFESSOR ALBRIGHT: And that's a good example of a situation where you can object but you should answer something.

MR. ORSINGER: I would suggest we include it in the comment as an example.

CHAIRMAN SOULES: Okay. Paul Gold.

MR. GOLD: Yeah. I want to go back to something that Tommy was talking about and that -- one of the things that this rule was trying to address is, although Loftin vs. Martin, one part of it has been very helpful in that you have to request very specifically, the troublesome part of Loftin vs. Martin was the part where people have interpreted it as saying you can object that something is an improper request and don't need to do anything more. You don't need to comply with Rule 166(b)(4).

As a result what we have gotten into on a daily basis is everybody gets responses now that object to the propriety of the objection -- of the request, and then you may get a smattering of information, and you don't know if they are just providing that gratuitously or that's everything they have got, and I think going back to what Tommy is saying on the burdensomeness issue is if you

look at -- I think it's Independent Insulating Glass vs. Streed out of Fort Worth, a long time ago, that it sets out the type of information that you have to provide if you're claiming burden, what you have to go to to produce this.

And I think one of the purposes of this rule is to prevent this thing where everybody has to go down to the courthouse for the first time, and the responding party for the first time tells the court either with live testimony or affidavit all the steps they would have to go through to produce it, and whether we combine the two concepts or whatever, I think that somebody should have to say what Steve was saying. "I'm not going to look. I have got it, but I don't want to go look because it would be too much burden." Because you want to be able to finesse the issue that they had in that Carruth case in Dallas where, yeah, it would have taken a huge number of man hours to go to all the various distributors and get the information, but it turned out they had a computer section that when they took the deposition of the computer

section the guy said, "I can get that for you in 15 seconds. I can print it right out."

Well, that should have been finessed in the discussion between the attorneys in the responses rather than having to go down to the court and have an all-day hearing on that. So those are things that we were trying to accomplish in the rules, and I think Tommy has got a good idea. I think that whether it's a privilege or an objection you should have to at least outline why it is that you cannot or do not want to respond and tell the other party, "I have got something." If we are going to have to go down to the court we are fighting about something as opposed to what we do now, which is we go down and argue academically about something the court says, "Well, is there anything here?" And the guy says, "I don't know, Judge. I haven't looked yet." And that is one of the things that, at least in my mind, we are trying to get around with this rule, and I think Tommy's suggestion may be well-founded. It might need to be modified to take care of the objections as well.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: One of the most troublesome problems that I have had in the last five or six years under the current regime involves this division of labor between withholding and objections. Let's suppose you have a discovery request that could be interpreted narrowly or broadly; that is to say it could cover a particular set of things that you know you have, but if looked at strictly someone could say, "They didn't ask me for what I have. They asked me for what I don't have." And let's say the lawyer applying conventional practice reads it literally and responds, "I don't have anything," and then but somebody is withholding.

Now, how do you deal with that? Is there some sort of hierarchy of responses? Do you object and then have the determination made as to what the request covers and then claim withholding or what?

MR. PERRY: What happens now too many times -- and this is I think exactly

what you are talking about -- is that the responding party first reads the request as broadly as possible in order to object to it.

MR. JACKS: And as narrowly as possible to --

MR. PERRY: And then produce nothing and then go have a hearing, and then after the hearing is ruled on they read the order as narrowly as possible in order to excuse any nonproduction, and what we are trying to do is shortcut that so that the responding party -- if there is an ambiguity or there is a problem, the responding party has the burden to say, "I object to so much. I object to anything beyond X," and they are going to have to -- they are going to have to figure out what their objection is.

It may be that they say, "I object to producing any crash tests other than rear-end crash tests," or maybe "I object to producing crash tests on any vehicle that is not a Pinto," or maybe "I object to anything older than 1985," but they are going to have to say -- they are going to have to define what they object to and what they do not object to

and then they will have the burden to go ahead and provide the information that they do not object to providing, and that will accomplish two things. Number one, it will delineate what's the fight, and number two is that it ordinarily will not delay the lawsuit until that fight is resolved. Ordinarily the lawsuit can go forward.

Now, our idea is that there may be a case where they say, "I really don't want to make the search twice and so I want to get the fight ruled on before I make the search and so until we get this ruling I am not going to produce anything," and that could be legitimate. That's an option that they have, but as a general rule they have to comply with the request to the extent that they do not object to it.

PROFESSOR ALBRIGHT: And it may be that David says, "That's fine. Produce -- you know, you can interpret it that way and so I am not going to call a hearing on that." You know, if you are going to interpret the request and produce me that information, great. Go get it. Bring it to

me, and then when you bring it to me you say, "And I am also withholding information on the basis of a privilege."

So I think your question about is there a hierarchy of the objections, I think it depends on the way the parties want to handle it. If David wants to have a hearing on the scope of his request before the documents are produced, then he can do that.

PROFESSOR DORSANEO: But I am still puzzled about when I make a withholding statement and when I make an objection. Do I make them together?

MR. PERRY: Are you claiming a privilege?

PROFESSOR DORSANEO: Well, I'm not sure what your request covers yet. I might be. I might need to go look.

MR. PERRY: See, if you think about -- if you think about the definition of a privilege, as a practical matter you can't claim a privilege unless you have something that is privileged, and so you don't need to worry about claiming a privilege until you have identified the fact that you have

something that is privileged.

CHAIRMAN SOULES: That's two different things. You don't have to claim a privilege unless you have something that's privileged, but what if you don't know?

MR. PERRY: Under these rules --

PROFESSOR ALBRIGHT: Then you're okay.

MR. PERRY: -- you do not have to claim a privilege during a period of time that you don't know if you have a privileged document or not.

MR. SUSMAN: Until you find it. And I think, Bill, we solve your problem by simply saying --

CHAIRMAN SOULES: You have got to write something that says that.

PROFESSOR ALBRIGHT: Yeah. But also when you amend and supplement --

MR. PERRY: Yeah. That's what it says.

CHAIRMAN SOULES: Where does it say that?

PROFESSOR ALBRIGHT: -- you

don't have to make -- you don't have to make -- if you amend and supplement, I've found a whole bunch of documents, and I am giving them to you, but I am pulling some out because they are privileged, then you make a withholding statement at that time. You have never waived a privilege unless you fail to assert it at the time you were producing those documents. I never have to object to a request because you may at some time find some privileged documents --

MR. SUSMAN: This is --

PROFESSOR ALBRIGHT: -- that are responsive to the request.

MR. PERRY: The language you are looking for, Luke, probably ought to be moved, but if you look on page 22, which is part of the request for production rule, a little below the middle of the page.

PROFESSOR ALBRIGHT: What page?

MR. PERRY: 22. It says, "The responding party shall assert its privileges pursuant to the objection rule, if any, at the time of production."

MR. SUSMAN: And 7(1) says, "A

party shall make a withholding statement only if the party is actually withholding specific information and materials responsive to the request." Now, I think we can deal with this. I mean, because I think that the only other thing we need to do is if you know you have something and are withholding it for any reason, tell the other side, and the other thing is if you know there is something you could do to look for something but are not doing it, tell the other side.

That's kind of the too broad, you know, "I don't understand what it means," and the concept, I think, is pretty much the same, which is -- I mean, what you see so many times in answers to interrogatories, for example, I see them all the time is, you know, for a half a page there will be objections. "This is too broad. This is vague, or it's ambiguous. It invades the attorney/client privilege. It invades the work product. Subject to the foregoing objections" and then the person has an answer. Well, you read the answer, and it looks perfectly acceptable to me. I mean, they have given me the information. Why did

they go to the trouble of filling up the paper with all of these objections?

PROFESSOR DORSANEO: That's irritating when you are trying to read it.

MR. SUSMAN: I mean, the answer is -- and actually most lawyers will give -- will put that kind of objection in. Now, why do I even have to do that if I am going to endeavor to answer the question to the best of my ability? I mean, and I don't know anything I am holding back, and I don't know anything I would have done had all of these objections been overruled in answering your question other than what I have already done.

MR. PERRY: And what does it mean that it's answered subject to all of these objections?

MR. SUSMAN: Yeah.

PROFESSOR ALBRIGHT: The reason people make those objections is because they are afraid of waiver if they should find something else, and you are a year down the road.

MR. SUSMAN: That's a legitimate reason, and an illegitimate reason

is if they have actually got something in mind, okay, that they say "Subject to all of these objections I am going to give this answer," and they know what it is they are not including in the answer.

PROFESSOR DORSANEO: When you make a withholding statement can you list a whole big bunch of things, or do you have to think carefully about whether the objection applies? When I am making the withholding statement as a general statement that I am withholding something under a claim of privilege can I list every privilege?

MR. PERRY: Well, that's the reason that an objection that is obscured by numerous unfounded objections is waived.

PROFESSOR DORSANEO: But that's not an objection. That's what I am asking. Is that up there in the withholding statement, or is that down here? Is that in the right place?

CHAIRMAN SOULES: Let me just say this. If you-all have attempted to write this rule to eliminate prophylactic objections, it doesn't get the job done.

MR. MARKS: Well --

CHAIRMAN SOULES: John Marks.

MR. MARKS: What difference does it make if you make prophylactic objections if you either provide the material or you tell them you are not providing the material and give them a disclosure statement or a -- what do you call it?

MR. JACKS: Withholding statement.

MR. MARKS: A withholding statement.

MR. SUSMAN: None, though actually you have --

MR. MARKS: I mean, it's irritating for you to read the objections. You don't like it, but there are more trouble getting rid of those than it's worth.

MS. SWEENEY: Well, but it does matter because if there is an objection you can't rely on the answer at trial. They can rip out two documents, and you say, "You didn't give me that." They say, "No. We objected."

MR. MARKS: Well, they have to

tell you. The way this is written don't they have to tell you if they are withholding documents? And if they tell you they are withholding documents, then you know what to do. You have got all the information you need to go and try to get it.

MR. GOLD: John's argument is -- should not be accepted, and the reason why is --

MR. MARKS: I thought he was going to start out agreeing with me.

MR. GOLD: No. No. Because for my entire practice in Dallas I used to get Strasburger & Price objections like that. No way. The reason being is it forces me --

MR. MARKS: I will have to change my whole practice.

MR. GOLD: I know you will. You should, because it's wrong. What it forces me to do as a requesting party -- because the burden is on me to challenge the objections. So then what I have to go do is I have to file a request for hearing with the court, and we have to go have a hearing on each one of those objections, and at that time

the court is going to say, "John, do you have anything that pertains to this objection?"

"No." Then why are we arguing about it? We should only have objections when something exists.

PROFESSOR ALBRIGHT: And that's what he said.

MR. GOLD: But we shouldn't fill the page with it.

PROFESSOR ALBRIGHT: So what you do is you make a withholding statement, and you say, "I am withholding specific documents on the basis of attorney/client privilege, work product privilege, and party communication," and that's all you -- you know, and you say, you know, husband/client privilege and penitence -- preacher/client, you know, all those privileges.

Then I say, "Okay. You are withholding those. I am requesting you to identify those materials which you are withholding."

Then you have to say, "I am withholding Document No. 1 which was written by Lawyer Jones and sent to Client Smith on this particular date, and I am claiming it's

attorney/client privilege and attorney work product." Then there is -- then there is Document No. 2, and so that is going to focus what your privileges are for each particular document.

In the withholding statement I think Bill was saying, well, can I make every privilege? I think, yes, you can. You can assert every privilege and then if they are tested, then you have to list the particular document, and then we are going to focus our inquiry on particular documents.

CHAIRMAN SOULES: I don't think we are looking at the right thing. Honestly, this -- the reason prophylactic objections are made are two; No. 1, you are trying to protect your trial file, and the way some of these waiver cases have come down if you didn't object to work product, you might waive your trial file.

PROFESSOR ALBRIGHT: We have taken that out.

CHAIRMAN SOULES: I mean, some of them are almost that ridiculous. No. 2 --

MR. PERRY: But you need to

read the fourth line in the rule.

CHAIRMAN SOULES: No. 2, it's not whether something exists because we all know things exist that we just don't know about. We know that probably in a big case, a big document case, there are things out there we don't know about 30 days after we get a request for documents, but they exist. You have to pause for it. Until we write a rule that says that you don't have to make an objection until you know about something that you need to object to, we are going to have prophylactic objections.

PROFESSOR ALBRIGHT: That's what this rule does.

CHAIRMAN SOULES: This doesn't say that.

PROFESSOR ALBRIGHT: Well, that's what we are trying to do.

MR. SUSMAN: I have got the sense of the group on this one. I mean, I think we have got the sense of the group and can move on because I --

MR. GOLD: We just have to get the "know" in there.

MR. SUSMAN: I think no one is objecting to the idea that you should only have to object or say something when you actually withhold something or when you are not going to look for it because you don't like the way it's asked. I mean, I think we can go back and try a rule that states that more clearly.

CHAIRMAN SOULES: But you need to say that an objection -- when the objection is made. The last sentence of current Rule 166(b)(4) says if you don't make the objection when a response is due, you waive the objection. That's the problem.

MR. SUSMAN: Well, that's already -- we have taken that out of here now. We are going to take away --

PROFESSOR DORSANEO: I think there ought to be a hierarchy. If I don't understand your deal then I feel as if I am going to have to make a prophylactic withholding statement that's going to say all of the privileges, and then you will have to -- that's just two stems. I am going to object your question is ambiguous, it's

overbroad, and I am withholding something in good faith. I know there is something, but I may not know the individual document, and I may not list all the privileges. Then you are going to send me a request, and that's when we are going to start.

CHAIRMAN SOULES: Could we just talk about a policy issue here so that we don't just blow by it? The system that we have right now puts lawyers to work immediately upon getting a discovery request to determine whether or not there is something that is privileged that needs to be protected because if they don't, their rights are going to be seriously affected whenever their response is due. Those objections can't later be made without leave of court. That may be very good that we force lawyers to -- and parties to make the inquiry of privilege and exemptions and so forth early in the discovery request process.

If we changed the time to make the objections until the lawyers know or the parties know, then they probably are not going to activate early in order to get that out on

the table, but if we don't give them a later date when they know or whatever that standard is, we can't eliminate prophylactic objections. That's what we are really talking about. How early do we want to engage the search for privileges, and do we want to make it happen early by having consequences for not doing it early, or are we going to wait 'til they know or some other time?

MR. SUSMAN: I mean, I kind of have a hard time understanding what you mean. Let's take a document request. Normally, I have got to respond in 30 days.

CHAIRMAN SOULES: Right.

MR. SUSMAN: And I have got to produce the documents very shortly thereafter anyway. You know, I can't respond in 30 days, and say I will produce six months hence. The 30 days, I mean, I know that I am -- your document request on its face seeks privileged material because it doesn't say any nonprivileged documents relating to my plant's operation. So I can make those -- I am not going to go look at the files, okay, within the first 30 days. If I was, then why don't

we just say you have to produce all the documents in 30 days? Okay. Now, maybe that's what you want to do, is move up the time for complying.

PROFESSOR ALBRIGHT: You can request.

MR. SUSMAN: Huh?

PROFESSOR ALBRIGHT: A party can request the response be -- the written response be made the same day as the production as long as it's 30 days after the request. So you can require the written response be --

MR. SUSMAN: I understand that. I mean, I am just going back to Luke's problem, which is -- I mean, lawyers -- I mean, I am just thinking how do I know whether my client has work product or privilege in their files unless I look at their files? I mean, if I am going to look at their file to locate what's privileged and then I am going to withhold, hell, I might as well turn it over to the other side, what I don't withhold over to the other side at the same time. So I am not sure we are really talking about much

of a difference between us.

CHAIRMAN SOULES: I don't have any problem with on privileged materials and exempt from discovery materials having objections made whenever we find out we have got something we need to talk about, but the consequence of that is that the early process that's going on now of everybody running scared and getting it done as early as possible and the correlative practice of prophylactic objections. Maybe that's better. I don't think it is, but I think if somebody says, "I am going to give you everything you asked for," and in the course of doing that later on finds that there is an attorney/client privileged memorandum somewhere in the file right then they ought to be able to make the claim.

MR. SUSMAN: We agree.

CHAIRMAN SOULES: Or if you come to court and you say, "He hasn't given me his file." I say, "Wait a minute."

"No. He didn't raise the work product objection in 30 days."

"Well, I didn't know then that he wanted

my file, Judge. Now I know, and I want to object now." That's okay with me as long as we understand that probably there is going to generate -- it's going to generate some delay in the practice in some places, but I don't have a problem with that. I just didn't want to not say that that could be a consequence that we didn't see if we made a decision to go that route.

MR. PERRY: Can I point out one thing that has not yet been discussed --

CHAIRMAN SOULES: David Perry.

MR. PERRY: -- that everybody ought to just be aware of because you have mentioned the trial counsel's file. Under the second or the third sentence in part (1), the intent of this, it says if the party has withheld information on materials other than that created by trial counsel in preparing for litigation, you have to make this withholding statement. Now, the intent of that is that we all know that we are always going to withhold our trial file, and we don't have to make a withholding statement. We don't have to claim a privilege. We don't have to do anything to

withhold materials created by trial counsel in preparing the case.

Now, I think it's important that everybody recognize both that that is the intent of the rule so that you never have to claim a privilege on that, and also look at the draftsmanship and give us your comments if you agree either -- if you disagree either in substance or on draftsmanship.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Could we -- in the waning 13 minutes can we move --

MS. DUNCAN: Can I ask a question about what David just said?

I don't know if there is a drafting problem or not because I am not sure I am understanding you-all's intent.

MS. SWEENEY: Could you speak up, Sarah, please?

MS. DUNCAN: Is it intended that the "other than that created by its trial counsel in preparing for the litigation" is included within each of the concepts in the next sentence?

MR. PERRY: I think so.

MS. DUNCAN: If someone makes a written request of me and I am going to identify with sufficient particularity, I do not have to identify --

MR. SUSMAN: Correct.

MR. PERRY: Your trial file.

MS. DUNCAN: -- anything that is work product?

PROFESSOR ALBRIGHT: Right. Look at the end of paragraph (3) on page 12, the last sentence. "Evidence necessary to support a privilege for information or materials created by trial counsel in the preparation for the litigation shall be produced only upon court order in appropriate circumstances."

MS. DUNCAN: But that's not really the same as whether it needs to be included within my withholdings.

MR. PERRY: When somebody has a privilege log do you think we ought to have to --

MS. DUNCAN: No.

MR. PERRY: -- suggest the trial file or not?

MS. DUNCAN: No. That's why I am asking, is I think there is a drafting problem if we are agreed that we shouldn't have to do that, but if we are agreed that we shouldn't have to do that --

MR. SUSMAN: We could clarify that. I think the sense of all of us is that you should not have to say you are withholding your trial file or identify your trial file or anything else to mantain the sanctity of your trial file, and the only way it gets identified is if the court orders you to do so.

MR. GOLD: I move we take a vote on giving us -- that we have reached a consensus here and move on with this. I think everyone is pretty much in agreement on this one.

PROFESSOR DORSANEO: Before anybody knows how this is going to operate you are going to have to take Paula's kind of a discovery request that's arguably improper or that might be proper and be able to tell her what she does. Object, object plus withholding, move for protective order?

PROFESSOR ALBRIGHT: Do you want me to tell you? Do you want me to go through that?

PROFESSOR DORSANEO: Uh-huh.

PROFESSOR ALBRIGHT: Okay. Paula, what was your request?

MS. SWEENEY: There is a variety of them, but it shades in phases of "produce every document related to damages, produce everything that supports your contention of liability."

PROFESSOR ALBRIGHT: Okay. Okay. Just give me one of them.

MS. SWEENEY: "Produce your file."

PROFESSOR ALBRIGHT: Just give me one I can use as an example.

MS. SWEENEY: "Produce every document related to damages."

PROFESSOR ALBRIGHT: Okay. I object to that request under paragraph (2) because it is overly broad and does not -- is not a proper request under the request for production of documents rule.

PROFESSOR DORSANEO: Now, let's

suppose you're wrong.

PROFESSOR ALBRIGHT: Okay. Well, I am not there yet. I am not there yet.

PROFESSOR DORSANEO: Okay.

PROFESSOR ALBRIGHT: And therefore, I am not going to comply with that request at all, period.

Okay. You then can say, "I don't agree with you. We are going to have a hearing on that because I think you have to comply with that request." So we go down to the courthouse. The judge says you have to comply with that request, that it's a proper request.

I say, "Okay. Then I will now go look for those documents." So I go look for those documents and the time for production is a particular date. Okay. So at the production time I say, "Here are documents responsive to the request. I am withholding specific documents on the basis of privilege including attorney work product, party communications, and attorney/client privilege."

Okay. Then you go look at those documents and then you ask me -- you send me a letter and say, "I want you to identify the

information and materials that you have withheld with sufficient particularity to allow me to test the basis for your privilege." I then give you a privilege log.

MS. SWEENEY: Which lists my file.

PROFESSOR ALBRIGHT: No, no, no. So I give you a privilege log because I don't even have to talk about the -- about my trial file. So I say, "Here are the particular documents that I have withheld on the basis of privilege." Okay. Except I have also withheld my trial file but I don't have to talk about that. If you then want to see my trial file, you have to go to the court and ask for my trial file, and I don't even have to produce evidence about the trial file unless the court for some reason says, "I want you to prove up your trial file."

MS. SWEENEY: And that's going to -- that's not going to -- all right. I understand the process now, but it doesn't solve the problem because we are still going to get, "produce everything related to damages," which includes -- I mean, it's just

hugely overbroad, and I am still going to have to at some point, when some judge asks me to, catalog my file.

PROFESSOR ALBRIGHT: Okay. But to get to that point you have to have the party requesting the documents specifically say "I want your trial file, and Judge, I am asking you to make her produce evidence on her trial file."

MS. SWEENEY: No. He is going to have to say, "I want every document, and I don't know what's in your trial file. I want you to catalog it to be sure you haven't just stuck something in there that I am entitled to that you are calling it trial file," and he's getting paid by the hour to mess around doing this stuff.

MR. PERRY: Wait a minute, Paula. Number one, there is nothing in here that overrules Loftin vs. Martin. So the request to give me everything related to damages is validly objectionable on its face.

CHAIRMAN SOULES: That's not what Loftin vs. Martin holds.

PROFESSOR DORSANEO: That's

debatable.

MS. DUNCAN: I was going to say --

CHAIRMAN SOULES: That's not what Loftin vs. Martin says.

MR. SUSMAN: Could we not argue about --

MR. PERRY: Let me go on to the next --

CHAIRMAN SOULES: Here is what Loftin vs. Martin says if you want to read it.

MR. PERRY: Let me go on to the next point. The trial file is defined as materials created by trial counsel so that if you have obtained a medical report from a doctor and you have stuck it in the trial file, that doesn't make it privileged, and that doesn't mean you need to claim it. You don't need to claim a privilege.

On the other hand, if you have a memo that you have written to yourself or to your file based on the conversation with the doctor you don't have to claim a work product privilege. You don't have to do anything because it was created for trial.

CHAIRMAN SOULES: All right. Well, this needs a lot of work. I think the objectives are on the record. I don't think the wording of this rule meets those objectives.

MS. SWEENEY: Yeah. My vote is that you-all are on the right track, but I still have a problem.

MR. SUSMAN: We are here to serve and --

PROFESSOR ALBRIGHT: I would invite all of you to better draft it.

MR. SUSMAN: And we will try again. I like staying at the Four Seasons Hotel here. Let's go to -- if you will give me five more minutes to look at Rule 8 so we can at least --

CHAIRMAN SOULES: We are going to work 'til 12:30.

MR. SUSMAN: Huh?

CHAIRMAN SOULES: We work to 12:30.

MR. SUSMAN: Oh, we are working to 12:30 today. Good. Rule 8. What do you think about subdivision (2), the notion

that -- I mean, the way I would like to direct the discussion here so I get your input, so we get your input, is that the use of a protective order to stop the taking of a deposition at an improper place or time if you have more than ten days notice of the deposition. Everyone got how it works?

If you have less than 10 days notice of a deposition, the mere filing of a motion for protective order inandof itself excuses compliance. If you have more than 10 days notice of a deposition, or 10 days or more, then you not only have to file a motion for protective order you have got to make some good faith effort to get the court to rule on it, and if you don't, you just file it and don't show up, that's a no-no, and things can be done to you, like sanctions.

CHAIRMAN SOULES: I think it's a good rule. It does clarify. I mean, it's an open question out there in the jurisprudence of Texas right now.

MR. HATCHELL: I like it.

MR. SUSMAN: All in favor?

MR. ORSINGER: Wait, wait,

wait. Let's have some discussion.

MR. SUSMAN: Cool.

CHAIRMAN SOULES: Okay. Richard Orsinger wants discussion, and that's fine.

MR. ORSINGER: I am troubled by the application of this rule when applied to a nonparty witness because while this makes lots of sense with a party that has a lawyer and is familiar with the contentions in the lawsuit we are not making any allowances for somebody who is sitting out here and gets a notice and doesn't know what the pleadings are and maybe doesn't have a lawyer that they routinely confer with and is this the rule -- does this rule apply to a nonparty witness that has their own documents that they want to protect for their own reasons, and if so, is this fair what we are doing to them? Because they don't even have the context of the lawsuit, and they have got to hire a lawyer and get a motion filed within 10 days if they have more than 10 days notice. Isn't that right?

MR. LATTING: But they just have to make a good faith effort to comply.

PROFESSOR ALBRIGHT: We are talking about time and place of the deposition. We are not talking about documents.

MR. ORSINGER: Oh, is that right?

PROFESSOR ALBRIGHT: Yeah. This is only as to time and place of the deposition. If they are objecting to producing -- if they don't bring documents to the deposition, they come to the deposition and they don't have documents, then that has to be addressed.

MR. ORSINGER: Is that addressed in a rule, some other rule?

PROFESSOR ALBRIGHT: That is in the subpoena duces tecum rule.

MR. ORSINGER: Okay. Okay. I withdraw my comment.

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: Well, the only question I have is if there is a document request that is extensive and maybe -- I ask this as a question. Assume not previously

asked for documents in a --

PROFESSOR ALBRIGHT: To a party or nonparty?

MS. MIERS: To a party, even.

MR. SUSMAN: They can't do that.

PROFESSOR ALBRIGHT: The only way you can request documents from a party is through a request for production of documents, and you can't ask that they be produced at a particular deposition, but it has to be at least 30 days.

MR. SUSMAN: 30 days. Well, a breath of fresh air. Now, we turn to -- and the other notion in here, which I don't think is revolutionary, is simply that you do not use protective orders where an objection or withholding statement will do.

MR. ORSINGER: Well, let's go ahead and take a vote on this at least for formality purposes if we are going to approve it.

MS. DUNCAN: Conceptually.

MR. SUSMAN: All in favor of Rule 8 as written? Cool.

MS. DUNCAN: In concept.

CHAIRMAN SOULES: Could you point to me what you -- the part you just said that you don't have to have a motion for protective --

MR. SUSMAN: Second sentence. "Any party may move for an order only when an objection pursuant to Rule 7 is not appropriate." The word "only" --

MS. DUNCAN: Can we vote on this in concept and not as written? I mean, there is some typographical errors.

MR. SUSMAN: In concept.

PROFESSOR ALBRIGHT: You can always submit language changes.

MS. DUNCAN: I know, but we were just being asked to vote as written.

MR. PERRY: Steve, we might ought to be satisfied with not drawing serious objection.

MR. ORSINGER: Well, I am in favor of a vote because I have got to report back to some people whether this is a rule they are going to live with or not. So some of our rules we have sent back, and we haven't

voted on, and if this is one that we like, then I am in favor of a vote, and then I can say this is it unless you raise hell.

HONORABLE F. SCOTT MCCOWN: Richard, I would suggest you make that report after the Supreme Court order adopting the rules.

MS. SWEENEY: I think the record should reflect that we unanimously pretty much like this one.

MS. DUNCAN: I second that.

CHAIRMAN SOULES: Could anybody explain to me how paragraph (1) works in tandem with the objection and statement, withholding statement practice?

PROFESSOR ALBRIGHT: All it is is it's just saying we want you to make objections and withholding statements if you are a party to discovery requests instead of filing motions for protective order because there are procedures under Rule 7 for you to make objections and withholding statements and get hearings on those objections and withholding statements. The only -- under the current practice the only difference between

an objection and a protective order is that if I make a protective order then I am asking for a hearing on my objection to discovery, and the reason that we got into that box is because of Peoples vs. Fourth Court of Appeals which is no longer around anymore.

But so all we are saying is if you are a party we want you to operate under Rule 7 and make objections and make withholding statements and get hearings on those objections. We don't want to have another form of an objection, which would be a protective order. Unless if you are objecting to the time and place of a deposition you have to file -- that is a situation where you can't make an objection or a withholding statement because you are asking the court to protect you from an unreasonable time or place for a deposition.

MR. SUSMAN: Let's see if I can put it -- maybe this is a better way of putting it. You know, if the discovery vehicle used requires a written response, obviously an objection can be made in connection therewith. If the discovery

vehicle used -- I mean, like a deposition notice does not require a written response then. There is nothing you file routinely in which you can say "I object." So in that case you would have to resort to a motion for protective order. I mean, we are trying to think of examples of where you would possibly use, you know -- let me give you another example.

MR. GOLD: An IME is another example.

MR. SUSMAN: Huh?

MR. GOLD: An IME, an independent medical exam, someone requested independent medical exam. There is no mechanism for a formal response to that. You file a motion for protection.

MR. SUSMAN: A deposition, noticing a deposition after you have used up your 50 hours, that would be a motion for protective order. Although serving interrogatories after you have already served 30 would probably be an objection because you can file a response in which you simply say "I object to answering any of these

interrogatories on the ground that you are above 30." So I mean, maybe we can think about --

PROFESSOR ALBRIGHT: And we want you to go through the process of Rule 7 of written discovery because we have set out mechanisms to make you say what you are doing and what you are not doing that would not be in the protective order practice.

CHAIRMAN SOULES: So would Rule 8 only apply to discovery that is not written discovery?

PROFESSOR ALBRIGHT: Right. And nonparty discovery.

MR. PERRY: Well, it would apply to an unusual situation where an objection or withholding statement does not protect you. It's sort of an extraordinary measure.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I think basically that's got that one. Now, we -- since we have a little more time we can go to Rule 9.

CHAIRMAN SOULES: Okay. With that explanation, those in favor of Rule 8

show by hands.

Those opposed? Okay. Everybody favors it.

CHAIRMAN SOULES: Rule 9.

MR. SUSMAN: Rule 9.

MR. MARKS: Mr. Chairman?

CHAIRMAN SOULES: John Marks.

MR. MARKS: Rule 9 is going to take a long time, and several of us have planes to catch at 12:45.

PROFESSOR ALBRIGHT: And I just -- Pat Hazel just brought me a response to Rule 9 that I have not seen, and so I think everybody will need a copy of this.

MR. GOLD: That's the response. That's prima facie improper.

CHAIRMAN SOULES: How about -- Steve, how about skipping Rule 9 then and going to something else? What's your preference? Whatever you prefer is what we are going to do.

MR. SUSMAN: They are all getting -- I mean, I had just as soon skip right down to Rule 15, but that one is going to be controversial, too. Seriously.

MR. YELENOSKY: 16.

MR. SUSMAN: I don't know what's not going to be. We can go to rule -- you-all want to go to Rule 10?

PROFESSOR ALBRIGHT: 15, all we did was incorporate what they wanted us to, isn't it?

MR. SUSMAN: What?

MR. PERRY: I think Rule 10 might not take a long time.

MR. SUSMAN: All right. Rule 10.

MR. ORSINGER: We did Rule 10 last time. This is a rewrite of last time.

MR. JACKS: Rule 10 is going to take a long time.

MR. SUSMAN: Huh?

MR. JACKS: Rule 10 is going to take a long time.

MR. MARKS: How about paragraph (1) of Rule 15?

MR. ORSINGER: Well, let's do something. We have got 25 minutes.

PROFESSOR ALBRIGHT: How about electronic data? Do you-all want to do

electronic data?

MR. SUSMAN: Let's begin with Rule 10. I mean, why don't we begin with it?

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Rule 10 is our extra witness rule. That is not terribly different than what you saw the last time and --

MR. MARKS: Isn't that going to be driven sort of by what happens to what you are going to do with the nine months and that sort of thing, though? I mean, won't that change this?

MR. SUSMAN: No. Well, it just changes -- not really because the discovery period -- okay. See, this rule is -- we tried to write most of these rules so that we use the term "discovery period" which contemplates a finite period of time in which discovery must take place. That could be established by a court order, agreement of the parties, or these default mechanisms. We have now established two default levels, three months, nine months, and so the 60 days is going to occur -- at least in the nine months setting,

I mean, it's 60 days before the end of the discovery period.

MR. PERRY: Maybe we ought to discuss it apart from the issue of time of disclosure because the time of disclosure issue may vary depending on what we come out on the other, but the rest of it is sort of an integrated package.

MR. JACKS: Well, if we skip over that, then that will shorten the discussion, but it could mean a position where you are going to cut off the discovery after nine months the day the suit's filed. I am not going to trial for another year and a half, and I can't -- and failure to timely designate an expert is grounds for exclusion. I have got him designated seven months after the lawsuit is filed. It would be 60 days before the end of discovery period. I mean, that doesn't work.

PROFESSOR ALBRIGHT: So your problem is having to designate experts when your trial date may be a year down the road?

MR. JACKS: Oh, good Lord, yes. And I agree. I think until your committee

decides how you are going to open and close this window --

MR. SUSMAN: Hey, wait a second, you-all. We moved past this one yesterday. People in this group, the vote was in favor of a nine-month default window unless the court orders otherwise. Okay.

MR. MEADOWS: Now, Steve, I think the vote was for a three tier system.

MR. SUSMAN: Three month unless one party opts out. If one party opts out, it's nine months.

MR. MEADOWS: Well, that was Luke's way of describing that.

MR. GOLD: I understood it was just default windows, and we were supposed to go back to the subcommittee and work out more specific dates.

MS. MIERS: I don't think so.

PROFESSOR ALBRIGHT: That's the way I understood it, too.

MR. MEADOWS: Well, that's the way I understood it.

MR. SUSMAN: I mean, we will get a transcript, and we can read the vote.

MS. MIERS: I thought it was three and nine specifically.

MR. SUSMAN: But I thought it was specifically three and nine, and we called it that way, and that was the vote. Now, I don't want to go back to that, but if, in fact, discovery is going to end in nine months, that's all discovery. Now, I mean, what Tommy is suggesting is that, well, all discovery but expert discovery.

MR. JACKS: All I am telling you is this doesn't work with your window.

MR. MEADOWS: Yeah. I think it's just another flaw in the way that --

MR. JACKS: Your window is stupid. With this it's outrageous.

PROFESSOR ALBRIGHT: I think the vote was to consider alternatives for a window.

CHAIRMAN SOULES: How many think you ought to have to disclose experts during the discovery period?

MR. JACKS: I think that's fine, but making any allowance --

MR. GOLD: Wait, wait, wait.

Last time I voted on something like this the definition of terms changed. What do you mean by that?

MR. ORSINGER: Identify the name, address, and telephone number.

CHAIRMAN SOULES: Hold on.

MR. GOLD: When we are talking about the discovery period?

CHAIRMAN SOULES: Assuming that we are going to disclose experts during the discovery period can we look at the rest of the rule and maybe make some progress in the last half hour? We don't know when but at some time during the discovery period experts are going to have to be disclosed.

MR. SUSMAN: Everyone agrees with that.

MR. GOLD: That's fine.

MR. PERRY: We are going to have to figure out a way to integrate the time of disclosure with the discovery window, and obviously if we try to talk about that today we are not going to have an answer until we go back and flange up the other stuff.

CHAIRMAN SOULES: That's where

I am trying to get past that. You-all are going to have to work on that. What about disclosure of general information? Here is a list of -- it starts off "A party may request another party to designate or disclose information concerning expert witnesses set forth in this rule." Is there any opposition to that? Okay.

MR. JACKS: Yes.

CHAIRMAN SOULES: Okay. There is opposition to that.

MR. JACKS: There is a need, I believe, to distinguish between retained experts and other kinds of experts. For example, in an injury case there may be 15 treating doctors. You don't need to be going and getting resumes and bibliographies from treating docs, but you have got to call them experts for purposes of designation.

CHAIRMAN SOULES: Okay. Now, we are down in (3), and that's fine.

MR. JACKS: I thought that's where we were.

CHAIRMAN SOULES: Well, I just said any opposition to No. 1, Paragraph No. 1?

MR. JACKS: Oh, I'm sorry. I thought we were past (1).

CHAIRMAN SOULES: Okay. (1) is okay. (2) is to be worked on. Now we are down to (3).

MS. DUNCAN: Can I raise a question about (2)?

CHAIRMAN SOULES: (2) is off the table for today.

MS. DUNCAN: Okay.

CHAIRMAN SOULES: (3). Let's go to (3).

MR. MARKS: You know, I have always thought that with respect to what Tommy is saying there is a distinction between an expert who has testimony dealing with the operative facts, like a treating doctor or something like that, as opposed to an expert who is going to give opinions, and it seems to me we might be able to draw a distinction there that we could put in the rules and make different rules for that kind of an expert.

MR. JACKS: It goes even a little beyond that because, for example, in a medical malpractice litigation many treating

doctors also ends up giving opinions that may affect causation or even liability, and yet even at that you probably don't want to be subject to all the same rules as you do -- your action reconstruction expert, for example, and it's -- there is very much a difference in how much control either side may have over these witnesses, and I think there is a need to rethink (3).

I think that with one exception, which I will get to in a second, I think (3) works fine for the typical retained expert. The exception that I would encourage you to think about is in (3)(e) where you have being produced at the time of designation all the experts files and all the materials and so forth, and in the real world we frequently designate well before the expert -- I mean, even here you are allowed, I think, 45 days to set the expert's deposition, and in the real world the expert is really doing most of their works or a lot of their work they may do a week, two weeks, certainly 30 days before the deposition, and in the -- we have had experience with this in the breast implant

cases down in Houston.

There we just have it 14 days before the deposition requirement, and even there we have really gotten into a lot of wrangling where you get down to 14 days and they don't produce the documents. So the other side cancels the deposition, says, "You know, we can't have the deposition because we got the documents 10 days instead of 14 days. We have got to have our full 14 days to look at all the documents," and you are creating again lots of problems with this, and the earlier you make it, the bigger the problem becomes.

MR. SUSMAN: Well, I think we do need to think about the difference between a expert under a party's control and what's not under a party's control. I assume that's the difference between -- that would be a way to express it, and maybe insofar as (b) is concerned and possibly even (e) is concerned it ought to be different whether it's an expert under a party's control or not.

Insofar as the timing of (e), the (e) disclosure, I mean, keep in mind the way we have this set up what we really did was

waited -- whatever the discovery period, whenever it ends, the day of trial, a week before trial, 30 days before trial, at the end of six months, whenever it ends we figured that -- and as long as the expert has got to be diclosed within it, we went as far to the end of the period as we thought we could go, which was basically 60 days for the plaintiff, 15 days thereafter for the defendant, and then each set of experts gets deposed during the next 45 days. So you are pretty much at the end of whatever period you are talking about in any event, whatever the period is, as close to the end as you can get it.

And when you are talking about only 45 days from identification to deposition it's not terribly unreasonable, I don't think, to require disclosure of this material at the time of identification now. We no longer have the situation, for example, where you have a pre-trial order that requires designation of experts on September 1st, but everyone knows we ain't going to get around to deposing them until November or December anyway because discovery doesn't cut off until the end of

December. This is a different kind of situation. Now, you know, I guess that's the issue. That's -- we tried to push it as far to the end --

MR. JACKS: I understand. And all I'm -- and it may be, Steve, there is a way. I mean, I don't have any trouble with producing what I have got at that point, but in the real world experts are going to be doing a lot of work up until certainly in the weeks before their deposition, and there is a need to -- you know, you may need to say something about the failure to provide. You are going to need to deal with this problem because it's going to happen that if everything isn't provided at the time of designation is that going to be grounds for canceling the deposition, moving the deposition, or anything? Because, I tell you, lawyers are going to say that it is, and maybe there is a way you can have kind of a continuing providing of --

PROFESSOR ALBRIGHT: We do.

MR. JACKS: -- the information. I don't know, but it's a problem.

MR. SUSMAN: You have to look at (3)(e) in conjunction with 7 on page 20, which is supplementation, which has a sentence in it that reads, about the third sentence that reads or second sentence that reads, "Any document or tangible thing subsequently prepared by, provided to, or viewed by the expert must be provided to the other side as soon as it is available." Now, this is -- we have made the expert supplementation rule much more burdensome than our normal supplementation rule. With experts we basically say give the other side everything he has looked at, done, or prepared at the time you designate him because you know that you are just saying get it from his file. It doesn't preclude him from doing other things up until the time of his deposition, but it's an ongoing, continuing duty of sending it to the other side as it is ready. That's what we intended to do here.

MR. JACKS: Okay.

MR. SUSMAN: In other words, he can continue to work, but you have an immediate obligation as he generates something

or reviews something during that working period to provide it. See what I mean? That was our notion.

MR. JACKS: Okay. Let me look at that, and see what it --

MR. SUSMAN: What we are trying to do is put to the latest possible moment experts, make them cough up everything they have got when they are designated. Let them continue working but have a continuing cough up obligation. That's kind of what this was about.

CHAIRMAN SOULES: That seems to make a lot of sense. That's about as accommodating probably as it can be made but --

MR. SUSMAN: You know, the --

CHAIRMAN SOULES: What else do you need input on? As I read 4, Steve, what you have outlined is what you get with experts in terms of written discovery unless the court orders a report.

MR. SUSMAN: Yeah. This is basically your concern last time. We tried to deal with that in 4 and 5.

MR. ORSINGER: Can I ask a question?

CHAIRMAN SOULES: Sure. Richard Orsinger.

MR. ORSINGER: Steve, there was a pretty big rowl last time about excluding or just completely eliminating expert reports, and I see you have put them back in, which I am really happy with, but why did you-all do that?

CHAIRMAN SOULES: That was the consensus of the committee.

MR. ORSINGER: I thought the consensus was to exclude reports, but no?

CHAIRMAN SOULES: No. No.

MR. ORSINGER: Okay. Then I was confused.

CHAIRMAN SOULES: Four and five are the way the committee went.

MR. ORSINGER: Okay. Great.

MR. SUSMAN: I mean, just any other comments?

MR. JACKS: Moving down to (6) --

MR. SUSMAN: Uh-huh.

MR. JACKS: The requirement that all experts be produced in the county of suit, can you-all share with me your discussions about that?

MR. SUSMAN: Sure.

MR. PERRY: That one obviously only will apply to people that are subject to the control of the parties.

MR. SUSMAN: Maybe we need to add that in as a --

MR. PERRY: It doesn't apply to retained experts, and I think probably we need to clarify that because people that are not subject to the party's control that would be impossible.

CHAIRMAN SOULES: If somebody -- the suit is in Bexar County and the treatment is in Mayo you are going to have to go up there and get the doctor.

MR. PERRY: That's right, but we want to avoid the situation where somebody names experts who live in New York or California and Illinois and ten lawyers have to fly around the country when it would be a lot cheaper to bring the three experts to

wherever the lawsuit is.

CHAIRMAN SOULES: You are talking about hired gun experts?

MR. PERRY: Yeah.

CHAIRMAN SOULES: Yes. I think it works for that but not for the treating physician or someone in a similar position.

MR. GOLD: Does it work the other way? Can someone -- say, you have got a multiparty case and one of the parties wants to go and take someone's deposition out in California. Can they drag everybody else out there, or is it compulsory that the deposition can only be taken in the county where the lawsuit is filed?

CHAIRMAN SOULES: Only by agreement or order of the court can it be taken in another county.

MR. JACKS: Can we make an exception if the expert lives in, say, Hawaii or something?

CHAIRMAN SOULES: Or if it's a November deposition in Sante Fe? November depositions can be taken in Sante Fe.

MR. JACKS: That's right. I

think we need to say that.

MR. GOLD: Why don't we just put a list of places that it doesn't pertain to?

CHAIRMAN SOULES: Okay. Well, that's a good point. Let me get some guidance. Is there any other guidance that anybody feels the committee needs on Rule 10 other than the timing of (2) which has to be integrated in with our discovery window concept?

MR. JACKS: The other one I would suggest be discussed in connection with the discovery window is No. 8 because, again, if you are going to shut the window on me a year and a half before I go to trial I really think it's burdensome at that point to punish me for not calling an expert because what I am going to have to do is probably designate some people that when I really get down to trial, once I have re-read my file and kind of reminded myself what the lawsuit was about, I think 8 is onerous, and again, the further out from trial I have to make the decision to designate the more onerous it becomes.

MR. LATTING: I would like to second that and say I think we are headed in the wrong direction if we make it financially disadvantageous not to prolong trials.

MR. JACKS: I agree, and I think 8 is a bad idea all the way around.

MR. SUSMAN: Well, we -- you know, what we are trying to do here, and maybe what we will really try to do, I mean, to remind you of our bidding on this one --

MR. LATTING: I am sympathetic with what you are trying to do. I am thinking if we could get to it a different way.

MR. SUSMAN: Well, we thought about all kinds of different ways. I mean, one way is just to put an arbitrary limit on the number of experts that a party can designate or an arbitrary limit on the number of experts you can designate on the same subject. So what we are trying to avoid is designation of multiple experts on same or similar subjects. So --

MR. LATTING: Could we handle that with a rule that states that?

MR. SUSMAN: Maybe we can.

MR. LATTING: We want to preclude that and give the trial judge the discretion to award costs if that is shown to have occurred, say that we want to discourage it and that the parties shall not designate unnecessary experts.

MR. SUSMAN: See, I mean, this is really the -- I mean, what it -- we have made this discretionary with the trial court. It is not mandatory.

MR. LATTING: That's true.

MR. SUSMAN: I mean, it is a sanction the way it's written. Okay. "The court may" -- I mean, we were very clear to make it a "may" here.

MR. JACKS: But if we build it, they will come.

MR. SUSMAN: So it was not -- because we did not want -- I mean, we wanted the court to have the flexibility, but we just wanted if the court senses that is what is going on here, what a party had to do was go depose three accounting experts, all of whom basically said the same thing.

MR. LATTING: Maybe we could

add an explanation. That would satisfy my concern and Tommy's concern.

MR. JACKS: Yeah. I think a comment.

MR. SUSMAN: Comment.

MR. JACKS: A comment would help.

MR. SUSMAN: Comment on 8.

MR. JACKS: Eight is also one where the retained expert versus nonretained expert needs to be made. I don't have much choice but to list my treating docs as experts even though I know I am not going to call them all, and I am probably not going to know until I get to trial which ones I am going to call because some of them may have dropped by the wayside in terms of the treatment, and others may be the main treater and so on.

CHAIRMAN SOULES: Makes sense. Richard Orsinger.

MR. ORSINGER: Steve, can't you just get around this rule by just reading a few pages out of the deposition, and if you can -- if you can't, then how does the language say that? And if you can, then what

good is the language?

MR. SUSMAN: Well, I think you can get around it, but I think probably people would pay --

MR. GOLD: That should say it all.

CHAIRMAN SOULES: I guess you could tell the trial judge, "I have got eight more depositions. I am going to read them unless I am cleared of any problems under paragraph 8. Can we get a ruling?"

MR. ORSINGER: Well, this rule doesn't require that you use all of the testimony. It just requires that you use some of the testimony, and I really don't think the rule is going to accomplish anything because you can read three pages, and it means nothing.

MR. SUSMAN: Oh, well, I think it accomplishes -- I mean, what we really have done is maybe by having the rule here is required lawyers to read and say, "Uh-oh, I better not designate unnecessary experts because if I do I might end up having to read something from each of their depositions,"

which it's going to look very squirrelly if I read, you know, three pages. What we are -- maybe there is a better way we can do it.

HONORABLE F. SCOTT MCCOWN: Let's take 8 out and find a different way to do it.

MR. LATTING: We might deal with this under discovery abuses, under sanctions.

CHAIRMAN SOULES: Well, every place that we have a discovery sanction in these rules of Steve's we are going to need those in 215, I think, consistent with what we have done in the past, but if they need it, we can move them into Joe's rules later.

MR. PERRY: What would you think about limiting -- about saying that you can only name -- in terms of a retained expert that you can only named one retained expert on any subject?

MR. SUSMAN: Fine. What do you-all think about that one?

MR. JACKS: Let's discuss it.

MR. LATTING: At some time

other than 12:29 and a half.

CHAIRMAN SOULES: Yeah. I think there are some good reasons why you have to name two sometimes.

MR. GOLD: And other than at 8:00 o'clock at the next meeting.

CHAIRMAN SOULES: All right. 8:30. What's the next meeting date?

MR. PARSLEY: November 18th.

CHAIRMAN SOULES: November 18th at 8:30. We will be giving you notice of the place.

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

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 17, 1994, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,022.00 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 27th day of September, 1994.

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