* * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT
ADVISORY COMMITTEE

JANUARY 20, 1995

(AFTERNOON SESSION)

* * * * * * * * * * * * * * * *

Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 20th day of January, A.D. 1995, between the hours of 1:00 o'clock p.m. and 5:35 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 101 and 102, Austin, Texas 78701.

JANUARY 20, 1995 MEETING

MEMBERS PRESENT:

Luther H. Soules III
Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

David J. Beck
Michael Gallagher
Anne Gardner
Mike Hatchell
Tommy Jacks
Franklin Jones, Jr.
Thomas Leatherbury
Harriett Miers
Paula Sweeney

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Hon William Cornelius
Paul N. Gold
David B. Jackson
Hon. Doris Lange
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Kenneth Law
Doyle Curry
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
JANUARY 20, 1994
(AFTERNOON SESSION)

INDEX

MR. SUSMAN: We're back on the record. To summarize what we just did, we approved Rule 11 with the exception of Subdivision 5, which has been sent back for redrafting. And you will see, as someone pointed out, you're going to get a copy of these rules again, so this will not be the last time you see them.

Rule 12, Interrogatories to Parties. Again, the "during" should be changed in the rule, Subdivision 1, to "at any time prior to 30 days before the end of the discovery period" to make it consistent with the prior rule. Interrogatories can be served with citation, and they can be served 30 days until the end of the discovery period.

The notion here, which you have heard before and I think we have voted on before, was 30 interrogatories not to exceed -- including discrete subparts. No limitation on sets. These are concepts that have been discussed before and have been approved.

But officially now, is there any comment on 12(1)? All in favor of 12(1), raise your right hand. All opposed. 12(1) passes.

MR. McMAINS: Steve?

MR. SUSMAN: Yes, sir.

MR. McMAINS: The deal there where you say interrogatories will be limited to 30, including discrete subparts, so we abandon the 30 answers? We're back to questions rather than answers?

MR. SUSMAN: Yes.

MR. McMAINS: Is that the deal? Okay. I just wanted to know.

MS. McNAMARA: Steve, one question. Somewhere else doesn't the court have authority to vary this?

MR. SUSMAN: Yes. All of these rules -- to remind everyone, every rule can be varied by the court or by agreement of the parties.

Rule 12(2). Nothing new here. Any discussion of Rule 12(2)? Everyone in favor of Rule 12(2) raise your hand. All opposed. Rule 12(2) passes.

HONORABLE SCOTT BRISTER: One quick question. Rule 12(2)(c), "The provisions of Rule 14 shall not apply." What is that in reference too?

MR. HERRING: That's the old Rule 14. The attorney signing.

HONORABLE SCOTT BRISTER: Okay.

MR. SUSMAN: It's not the new rule. That's the old rule. We'll probably need to make that clear in the draft, that it's not this new rule.

Okay. Subdivision 3, Scope of Interrogatories. This has received a lot of drafting attention. The concept has been approved and discussed and approved over and over again. I think we have captured the essence of what you all instructed us to capture. Any problem with the wording of Subdivision 3? Any discussion of that?

All in favor of Subdivision 3, raise your right hand. All opposed. It passes.

Subdivision 4 is nothing new. Any discussion of Subdivision 4? All in favor of Subdivision 4 raise your right hand. All opposed. It passes.

Subdivision 5. I do not believe there's anything new in this from existing law. It's simply the option to produce records in lieu of answering.

Any discussion of Subdivision 5? All in favor of Subdivision 5 raise your right hand. Subdivision 5 passes.

Rule 13. We were instructed by the entire Committee -- and for the record, Rule 12 has passed in its entirety. Rule 13. We were instructed by this Committee to leave in as an available discovery vehicle requests for admissions. We not only did that, but when we read the current Rule 169, we did not think we could significantly or materially improve upon it. Therefore, we will simply copy Rule 169 in as Rule 13, unless anyone has any objection.

Any discussion of that proposal? All in favor, then, of Rule 13, which will be a verbatim copy of Rule 169, raise your right hands. All opposed. Rule 13, as I have described it, passes. Rule 14.

MR. LATTING: Steve?

MR. SUSMAN: Yeah.

MR. LATTING: A question about the numbers of these rules. Is it proposed that these will actually be the numbers of the rules?

MR. SUSMAN: It is really -- I think that's a question we'll have to take up with Justice Hecht. I mean, Lee -- I mean, someone will tell us what you all want to do. I mean, it was easier for us to renumber them. It will probably be easier for the bar, but whether they want to do that for us or not I don't know.

Depositions Upon Oral Examination. The one -- every time you read these rules, you learn that -- I mean, we do, when we go back and read them all the time -- you learn that we've missed something that -- we've left out something that's important.

I think what we have left out in Rule 1 is that depositions -- this sentence, which should be added at the end of Rule 1: "Leave of court, granted with or without notice, must be obtained if a party seeks to take a deposition prior to the appearance day of any defendant." That comes right out of Rule 200(1). We just inadvertently left it out, and it needs to be put in so no defendant gets deposed or there's no effort to depose a defendant prior to --

PROFESSOR ALBRIGHT: Nobody gets deposed.

MR. SUSMAN: Huh?

PROFESSOR ALBRIGHT: Nobody gets deposed. There are no depositions without --

MR. SUSMAN: Right. Right.

PROFESSOR ALBRIGHT: -- court order.

MR. SUSMAN: No one gets deposed, correct. It's the existing provision that we have put into Rule 1.

Any problems with Rule 1 as I have modified it? All in favor of Rule 1 as modified.

MR. LATTING: Rule 1?

MR. SUSMAN: I mean Subdivision 1 of Rule 14. Forgive me.

All in favor. All opposed. That passes.

Subdivision 2, Notice and Subpoena. I do not believe, correct me if I'm wrong, Alex, that we did anything to the existing law here. Did we?

HONORABLE C. A. GUITTARD:

Steve, then it has Subdivision (b), and it seems to me that the second sentence there and the third are repetitive. If they're not, I don't understand it. I would suggest that --

MR. SUSMAN: Oh, it's just -- it's a typo. You're absolutely right.

HONORABLE C. A. GUITTARD: -- the second one should be stricken and the third probably should be kept.

MR. SUSMAN: I think they're identical.

HONORABLE C. A. GUITTARD: Not quite, but --

MR. KELTNER: The leading phrase isn't.

MR. SUSMAN: You want to strike which one?

HONORABLE C. A. GUITTARD: The first one.

MR. SUSMAN: "In that event"?

HONORABLE C. A. GUITTARD: "In that event," yes.

MR. SUSMAN: Strike that one and leave "In response"?

MR. LATTING: What page is this

on?

MR. SUSMAN: Page 29. Okay. Any other comments? That's a good catch. Any other comments on Subdivision 2? All in favor of Subdivision 2 as recommended by the subcommittee and amended -- yes, Scott.

HONORABLE F. SCOTT McGOWN: No, I was voting.

MR. SUSMAN: -- by Judge Guittard, all in favor raise your right hand.

MR. LATTING: What is being stricken precisely? The second --

MR. SUSMAN: The second full sentence of Subdivision 2(b) is being stricken.

MR. LATTING: "In the event"?

MR. SUSMAN: Right. Subdivision 3, as I recall, there's no change from the existing law.

HONORABLE F. SCOTT McGOWN: (3) should be read in conjunction with (4).

MR. SUSMAN: Read (3) in conjunction with (4). We have made it clear here that if you ask for the production of documents, the same 30-day requirement of

Rule 11 of these rules applies, so no one can use a notice of a deposition to shortcut the document request as to a party.

Any other discussions of Subdivisions 3 and 4? All in favor of Subdivisions 3 and 4 raise your right hand. All opposed.

Subdivision 5 --

HONORABLE C. A. GUITTARD: It passes. It passed.

MR. SUSMAN: It passes. Thank you, Judge.

Subdivision 5, Time and Place. Alex, correct me, same as existing law?

PROFESSOR DORSANEO: Can we back up to Subdivision 4 for a second?

MR. SUSMAN: Only if you get a three quarters vote. No, go ahead.

PROFESSOR DORSANEO: Well, this is worded like our current rule is worded, but there are a number of significant problems with figuring out who a person subject to the control of a party is. The companion sanction rule in our rules talks about this same matter. It was borrowed from the federal rule, which itself is not all that well

drafted. But the concept of managing agent and the identification of an officer and a director as being within the category of persons that an organizational deponent, you know, would have to produce, you know, would clarify things tremendously. So I'm saying our current rule, when it talks about a deponent who is a party or a person subject to the control of a party, would be improved, as recodified, if it added in "officer, director or managing agent," which I think is general law.

MR. SUSMAN: No, no. How about an employee? How about the lowliest employee who is certainly in my control?

HONORABLE F. SCOTT McGOWN: What's the question? I'm having trouble hearing it. What's the --

MR. SUSMAN: The question, I think, is under (4). When the deponent is a party, or a person subject to the control of a party, service of the notice upon the party's attorney will have the same effect as a subpoena served on the deponent.

PROFESSOR DORSANEO: Well, the

issue is, who are persons subject to the control of a party. And I probably stated it badly. The normal statement of who those persons are includes, among others, managing agents, officers and directors.

I had a case that involved Wal-Mart. The argument was made that Sam Walton, may he rest in peace, was not subject to the control of Wal-Mart because he was in control of Wal-Mart. I thought that was a pretty silly argument, but the trial judge didn't.

MR. SUSMAN: Anne.

HON. ANNE TYRRELL COCHRAN: It is so -- I mean, there are so many things. I mean, just while you were talking, I was sitting here thinking, well, there are, you know, contractual agreements that give one entity control over the employees of another entity. I mean, it's so factually determinative that there's no way you can define it.

PROFESSOR DORSANEO: All I'm saying is in normal jurisprudence, discovery jurisprudence at the federal level and in our own sanction rule right now, those other three

types of persons subject to control are named specifically, and there is a lot of litigation about this.

HON. ANNE TYRRELL COCHRAN: But that's a lot different, though, than who can you make come to the deposition because they'll fire them if they don't show up. I mean, for sanctions it's still very different. And as far as who you have the ability to make show up for a deposition, it's too factually specific.

MR. SUSMAN: Paul Gold.

MR. GOLD: When I drafted the proposed draft of this rule, I had used the federal rule. This one that has now gotten in has now changed it again. And I did it for the reasons that Bill has talked about. Number one, it tracked the federal cases; and then, number two, what another issue is, in the federal cases, is if someone is a manager, director or executive, they are automatically considered a representative. They're already someone who can bind a corporation whether the defendant designates them as a representative or not. And that was something that I wanted

to point out.

MR. SUSMAN: Joe Latting.

MR. LATTING: I don't think we clarify things or make things easier by specifying some particular classes. And I think we would be better off to leave it just like it is.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT McCOWN: I'm going to echo Joe's comment, and just add to it that the language suggests a high degree of control. So if you put the added language in, it tilts the rule toward the trial judge finding that they're not within control. If you leave it the way it is, it's a very practical test. It's not going to matter, because if there's a fight about it, the trial judge is going to decide it, and so I think it ought to be left the way it is.

MR. SUSMAN: Okay. Is there any motion to reconsider our approval of Section 4? Okay. Hearing none, we move on to Section 5.

Section 5, I do not believe represents a change in existing law. Does it, Alex?

PROFESSOR ALBRIGHT: No. 5, no.

MR. SUSMAN: I think you would have put something if it was. Section 5, time and place of a deposition. Any discussion? All in favor of Section 5 raise your right hand. All opposed. Section 5 passes.

And I am pleased to announce that Rule 14 has now been passed in its entirety.

Rule 15. Rule 15(1). Subdivision 1. Nothing new here to my knowledge.

HONORABLE C. A. GUITTARD: Steve, in order to make explicit what seems to be implied here in the last line of Subdivision 1, it doesn't say -- it might be better to say, "the officer, who shall open the envelope and propound the questions to the witness," to make sure that he's the person who has the authority to open the envelope.

MR. SUSMAN: Any problem with that addition?

MR. LATTING: Where is it?

MR. SUSMAN: It's the last, the next to the last line of Rule 15(1), "who shall transmit them to the officer who shall open the envelope and propound them."

HONORABLE C. A. GUITTARD: The questions.

MR. SUSMAN: Propound the questions.

HONORABLE C. A. GUITTARD: Yes.

MR. SUSMAN: Any problem with that? Alex, did you get that?

PROFESSOR ALBRIGHT: I got it.

MR. SUSMAN: As thus modified, all in favor of Subdivision 1 of this Rule 15.

MR. YELENOSKY: Steve, just one minor point. What about non-stenographic? I mean --

MR. SUSMAN: All opposed. It passes.

Now I'll take your question.

MR. YELENOSKY: Okay. I may be missing something, but you don't have an officer at a non-stenographic deposition, so who is responsible for --

MR. LATTING: Well, you have to send an envelope anyway.

MR. SUSMAN: Well, it doesn't have to be in an envelope.

MR. YELENOSKY: No. I mean,

who is the officer that's going to propound the question?

MR. SUSMAN: Well, there has to be someone there. Doesn't there, David?

MR. JACKSON: Well, it's whoever you hire to go take it. It's usually not -- it doesn't even have to be a CSR. They usually don't -- a lot of times they don't even take a stenograph machine. They take a typewriter or a word processor with the questions in it, fill in the answer, and then have it printed out and have the person sign it.

PROFESSOR DORSANEO: Not if this is an oral deposition.

MR. YELENOSKY: Yeah. What if it's an oral deposition?

MR. JACKSON: Okay.

PROFESSOR DORSANEO: Yeah, an oral deposition.

MR. YELENOSKY: And it's a tape recorded deposition, and it's another party who wants to ask questions. Who do they give the questions to?

PROFESSOR DORSANEO: There has

to be a CSR there. You can't do that.

MR. JACKSON: I'm sorry, I missed that.

MR. YELENOSKY: Under these rules, or under the current rules?

PROFESSOR DORSANEO: Under current rules. Under the statute. There are some minor limitations on that, but not very many.

MR. SUSMAN: Shall we go on?

HONORABLE F. SCOTT McGOWN: Well, wait. Hasn't he raised a problem that isn't solved here?

PROFESSOR ALBRIGHT: I think what happened is that in our redrafting last weekend we didn't -- I think it was originally said that this person shall be placed under oath by an officer who can do so, and we deleted that. And so that's where you first have an officer, and then it's there again, so that makes it --

MR. SUSMAN: I mean, the real question is, where you have a non-stenographic deposition do you still need an officer to administer an oath?

PROFESSOR ALBRIGHT: Well, that's not where we are. We are in an oral deposition where someone has chosen to send written questions to that oral deposition, so what I can do is send written questions in a sealed envelope. The court reporter is then authorized to open the envelope. I think what Justice Guittard is saying is you can't open the envelope. But the court reporter can open the envelope, read the questions, and then the person who is being orally deposed then answers those written questions. Isn't that correct?

MR. SUSMAN: Yes. And I thought Steve's question was what happens if you don't have a traditional court reporter because it's not being recorded stenographically; in fact, it is going to be recorded with a tape recorder. As I understand the rules being written, an officer still has to administer the oath.

MR. YELENOSKY: Well, they're saying that's the current rule. All I know is the practice very often at Legal Aid was to do a non-stenographic notice and walk in there

with a tape recorder. And what would happen is a notary would come in and swear the witness and leave.

HON. ANNE TYRRELL COCHRAN: Now you have to bring the notary back in to open up the envelope.

MR. YELENOSKY: Okay. Okay.

PROFESSOR DORSANEO: I don't want to be an obstructionist, though, but is this the first paragraph of 201 right now?

PROFESSOR ALBRIGHT: I can't remember.

PROFESSOR DORSANEO: Because if it is the first paragraph of 201, the first sentence of that first paragraph says that the certified shorthand reporter can be the deposition officer. When 201 was amended effective April 1, 1984, that was the first place that it said that a CSR could administer oaths. I think now the government code has caught up with that, or else the Civil Practice and Remedies Code. But I'm not completely sure that it isn't 201 that still carries the freight with respect to who can administer oaths for an oral deposition. It

used to have to be a notary public, remember? And then we changed it to certified shorthand reporter, and it says that in 201 right now. We put it in there.

MR. SUSMAN: All right. You have flagged a problem, and we will check it.

PROFESSOR DORSANEO: Okay.

MR. SUSMAN: David, you're responsible for checking that problem and reporting to the subcommittee.

MR. JACKSON: In 25 years of court reporting, I have never done this process.

MR. SUSMAN: Well, check Rule 201 or whatever it is.

We've passed now Subdivision 1. Subdivision --

HONORABLE F. SCOTT McGOWN: Well, wait. Are we committing the subcommittee to study and fix this problem that Steve has brought up?

MR. SUSMAN: Yeah.

HONORABLE F. SCOTT McCOWN: Okay.

MR. SUSMAN: We'll look at it.

HONORABLE F. SCOTT McGOWN: Okay.

MR. SUSMAN: Subdivision 2, Time Limitations. This has been something which has been controversial but, as you know, discussed and approved. So I don't want to revote this. These time limits were approved at our last meeting.

MR. MARKS: They were?

MR. SUSMAN: Yes, sir.

MR. MARKS: I don't remember that.

MR. SADBERRY: At the last meeting where they were discussed.

MR. SUSMAN: At the meeting where they were discussed. I will get that for you.

MR. MARKS: But even if they were, I think we ought to discuss it again. I move that we reopen the discussion.

MR. SUSMAN: Is there a second to the motion to reopen the discussion?

Hearing no second, that motion fails.

MR. MARKS: Thanks a lot.

MR. KELTNER: I'd second it,

except I've tried too many times on this one.

MR. SUSMAN: Yes, sir.

MR. GOLD: And just so it's clear, I've talked with Alex about it, just to clarify in the first sentence of (a), change "their" to "the opposing party's" control, because it's not clear.

MR. HERRING: Where?

MR. GOLD: It should say "shall have 50 hours to examine and cross-examine opposing parties and persons subject to the opposing party's control," so it's clear who "their" refers to.

MR. MEADOWS: Isn't that in there, Paul?

MR. GOLD: "Their" is just somewhat ambiguous. We can spell it out better.

HONORABLE DAVID PEEPLES: Steve?

MR. SUSMAN: Yes, sir.

HONORABLE DAVID PEEPLES: What's the court supposed to do when defendants who genuinely have some adversity can't agree on who gets how much time? That's

not a hard question for me when they really are aligned and they just seem like one in the case. But sometimes defendants really have some difficulties among themselves in addition to being adverse to the plaintiffs. What am I supposed to do? And they can't agree on who gets how much time.

MR. SUSMAN: By the way, I just wanted to interject so no one thinks I'm taking liberty with the record, at our meeting on July 15th, the vote was 15 to seven for a time limit of 50 hours, and 15 to seven for additional per deposition limits. That was the vote.

Now, I think you may be right, we did not discuss at that July meeting (b). I mean, I think we, the committee, came back after the meeting -- you wanted a per deposition limit; there was some discussion. We may not have all agreed on the three hours on the lay witness. I don't remember without looking at the actual transcript.

HONORABLE F. SCOTT McGOWN: Steve, in answer to the question that's been posed, I think under this rule, if the

defendants cannot agree, you've got to keep in mind that this rule can always be changed by agreement. If they can't agree, then the court -- they're going to have to go to court and the court is going to have to hear them all out and the court is going to have to set the limits. This rule would be a kind of norm against which the Court would look in setting a limit. But you know, I think what most judges would do is increase the number of hours from 50 to something else and divide it up between the defendants accordingly.

MR. SUSMAN: Any other comments or questions?

MR. McMAINS: Steve, is this rule designed to be the second tier --

MR. SUSMAN: Yes, sir.

MR. McMAINS: -- in the discovery process?

MR. SUSMAN: Yes, sir.

MR. McMAINS: I'm just wondering because it doesn't say that.

MR. SUSMAN: Oh, then I'm sorry, Rusty. Forgive me. What we intend to do, I think it's a drafting matter, is take 2a

and move it -- it is already, if you will look, in Rule 1.

MR. McMAINS: Right.

MR. SUSMAN: If you look back, it's in Rule 1. We just did not delete it from this rule. Dave Perry wrote us a letter after our meeting suggesting we should delete it because it's now redundant, and he's right, so I think it will be deleted here because it appears, as you can see, at the top of Page 2.

MR. McMAINS: So it's in the tier approach?

MR. SUSMAN: Right.

MR. McMAINS: That's fine. That's why I was -- the problem I had was that it was in the general deposition rule but then it didn't relate back.

HONORABLE F. SCOTT McGOWN: That's just a drafting problem.

MR. SUSMAN: Time per deposition --

MR. LOW: Steve?

MR. SUSMAN: Yes, sir.

MR. LOW: I think if you're saying third-party defendants share the

defendants' 50 hours regarding issues common to the defendants, you mean the third-party defendant has common to the defendants, because as you go down and pick it up, third-party defendants have an additional 10 hours regarding issues on which they oppose the defendants. So I don't think it's just issues that they're in -- that the defendants have in common, but third-party defendants have in common with those defendants.

Well, if you don't get it, that's fine. Do you know what I'm talking about? Maybe someone else can --

MR. LATTING: Buddy, say that again.

MR. LOW: Okay. The defendants -- it says third-party defendants share with defendants hours with regard to issues common to defendants. Common to third-party defendants and defendants. In other words --

HONORABLE F. SCOTT McCOWN: It should be common to them and the defendants.

MR. LOW: Yeah.

MR. SUSMAN: Alex, did you get

that? Common to them and defendants.

MR. LOW: And then it clarifies it down there later.

MR. LATTING: Well, but that will actually be included in Page 2, because what we're talking about is redundant.

MR. SUSMAN: The same language. We're going to just fix the language and put it in one place.

MR. LATTING: Okay.

MR. SUSMAN: Now, can I focus your attention briefly on time per depositions. The concept here is one fact witness, you can burn all 50 of your hours if you want to. But after the one, you are limited to three hours per fact witness and six hours per expert. And third-party defendants may examine -- well, the limitations are in here.

Now, you know, Alex, there's a mistake here that we did not catch. I don't think we intended to allow one expert deposition to be unlimited in time, which is -- it could be that way now the way it's written, couldn't it?

PROFESSOR ALBRIGHT: Well, don't you think -- can't you choose? Does it matter?

MR. SUSMAN: Huh?

PROFESSOR ALBRIGHT: Does it matter?

MR. SUSMAN: Well, let's discuss that. I think the intent here was to have a fact witness be unlimited. Like if you were deposing the president of the other side, the named plaintiff, it would be -- you could use as much time as you want with one witness. The question is whether we want that one unlimited deposition to be also put on the other side's expert. Any feeling? We can leave it.

PROFESSOR ALBRIGHT: I would say I wouldn't care.

MR. LATTING: Let's leave it, because --

PROFESSOR ALBRIGHT: Because what if you --

MR. LATTING: -- he might be the main man in the case.

PROFESSOR ALBRIGHT: -- want

to take the treating doctor. He may be the treating doctor.

MR. SUSMAN: Okay. Any -- as thus clarified, which we will leave, that's fine, any problem with -- I mean, any further discussion of (b)?

MR. HUNT: Do (b) and (c) stay with 15(2)?

MR. SUSMAN: (B) and (c) stay with 15(2), that's correct, because it applies even to the depositions that are in Tier 1. Yes.

All in favor, then, of Rule 15(2) in its entirety raise your right hand.

MR. GOLD: Steve?

MR. SUSMAN: All in favor raise your right hand. All opposed. That passes.

Now go ahead, Paul.

MR. MARKS: I opposed it.

CHAIRMAN SOULES: By what vote?

MR. GOLD: All I need to clarify is --

CHAIRMAN SOULES: We didn't get the vote recorded.

MR. SUSMAN: The vote has not

been recorded on any of this. Why do you want the vote recorded on this one?

PROFESSOR ALBRIGHT: It's the only one we had a dissent.

CHAIRMAN SOULES: You told me a while ago that you were not recording votes because if there were no votes against, it was considered passed. Well, there were some votes against that.

MR. SUSMAN: All right. Let's record the votes on this.

MR. LATTING: Who is that guy that just talked? We were moving along so fast.

MR. SUSMAN: All in favor of 15(2), raise your right hand. Who is going to count?

CHAIRMAN SOULES: 15.

MR. SUSMAN: All opposed raise your right hand.

CHAIRMAN SOULES: Three. Three opposed.

MR. SUSMAN: Okay.

MR. GOLD: Can I get a clarification now?

MR. SUSMAN: Yes, sir.

MR. GOLD: For instance, if you were to take a deposition of an individual who at the time was not designated as an expert witness and then they were subsequently designated as an expert witness, I would imagine you would get your three additional hours with that individual or however many hours you have left. Does that make sense?

MR. SUSMAN: I guess.

MR. GOLD: Okay.

MR. SUSMAN: No. 3.

MR. HUNT: Before we go on to that, let me ask about (c). I know we've passed this, and it's fine, but I thought we were going to have something else to help the court reporter charged with the time about how some of that was to be done. All that's said here is that breaks don't count.

MR. YELENOSKY: We also have the non-stenographic issue there as well. So just flag that, because there's no officer, or there may not be.

MR. SUSMAN: Well, you have an officer there.

PROFESSOR ALBRIGHT: You have to have an officer.

MR. HERRING: To sit there through the whole depo?

MR. MARKS: Yeah. How are they going to certify the times?

MR. YELENOSKY: Yeah. I was only there for five seconds.

MR. MARKS: Could I ask for a clarification? This is intended to apply to Tier 2 and Tier 3 cases?

MR. SUSMAN: No. It applies to Tier 2 cases. Tier 3 cases, make your own rules.

MR. MARKS: Okay.

MR. McMAINS: But if you didn't specify otherwise, it would be applicable during the discovery period, right?

MR. SUSMAN: Yes, sir. If you can't get an agreement from the other side or get a judge to order otherwise, you are stuck with the limitations of Rule 15(2).

MR. MARKS: Even if you go to Tier 3? Or if you go to Tier 3, everything is off?

MR. SUSMAN: No, sir. You can't go to Tier 3 unless it's by agreement between both parties or by order of the court. That's how you get to Tier 3.

HONORABLE F. SCOTT McCOWN: Steve, I think the confusion is Tier 3 is custom designed. So you've got Tier 2, and Tier 3 is a customization, so anything that's different from Tier 2 is, by definition, Tier 3.

PROFESSOR ALBRIGHT: But --

MR. GOLD: I discussed this -- I think that the problem is, and I discussed this with Alex just before the meeting and I think we need to get to it when we get to the discovery plan issue, is if the discovery plan does not specifically address the deposition time and the time per deposition --

MR. SUSMAN: -- these are the rules.

MR. GOLD: -- does it default to Tier 2?

MR. SUSMAN: Yes. These are the rules.

MR. GOLD: Because there's

nothing in the discovery plan rule that specifically says the court must structure a discovery -- a deposition time schedule. And that's what -- I think that's what the issue is.

MR. SUSMAN: Well, we have an interesting question raised about timekeeping, and I guess there's a mechanical problem there. I'm not exactly sure --

PROFESSOR ALBRIGHT: What's the problem?

MR. SUSMAN: -- how we make it better. Do you have any ideas?

MR. HUNT: Well, do we want to give the court reporter more help? That's just a comment. I felt like if when we get the final draft, is there anything more we can say that will help those who must be charged with the duty of saying "you used this amount of time" and "you used that amount of time" and avoid petty fights over timing?

MR. SUSMAN: Dave, is it a problem, much of a problem?

MR. JACKSON: No. I think it's just going to be a matter of the court

reporter writing down when he starts and when he stops and putting the time limit there, and then you can do your own subtracting. But I think the court reporter on his certificate ought to put what his tally is on there according to what's in the record.

And there are computer programs now that a lot of reporters are going to that, if you want to, you can have the minute and second that you said every word, so you could have that, too.

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: Is that your only problem?

MR. HUNT: I don't have a problem with the concept; I'm wondering if we want to say more to help the court reporters later on. And if it's solved, we may not need to.

PROFESSOR ALBRIGHT: Okay. I just misunderstood the problem.

MR. SUSMAN: Now can we turn to Subdivision 3, Conduct during the deposition.

HONORABLE C. A. GUITTARD: Steve?

MR. SUSMAN: Yes, sir.

HONORABLE C. A. GUITTARD: In the last sentence there, it seems to imply or say that these statements and objections and so forth other than the testimony can be presented to the jury, but it doesn't -- but that seems to exclude presenting it to a judge that is trying a case without a jury, and I'm not sure. If that's not the intent, then I would suggest that the last line be revised: "Testimony to be" -- instead of "presented to the jury during trial," it should be "to be introduced in evidence at the trial."

MR. GOLD: What was the last statement?

HONORABLE F. SCOTT McGOWN: He's saying we need to take out "to the jury" because you ought to have the same rule when you're trying it to the judge.

CHAIRMAN SOULES: The trier of fact.

HONORABLE F. SCOTT McGOWN: Yeah. Just take out the words "to the jury."

MR. LATTING: Or take out "presented to the jury" and include

"introduced in evidence."

HONORABLE C. A. GUITTARD: At the trial.

MR. SUSMAN: Any problem with that, Alex? The court may allow statements, blah, blah, blah, to be introduced into evidence at trial. Introduced into evidence at trial. We will accept that.

MR. MARKS: Okay. I have question about it.

MR. SUSMAN: Yes, sir.

MR. MARKS: Have we voted on this before specifically?

PROFESSOR ALBRIGHT: Yes.

MR. MARKS: Did we vote on this sentence right here, because my recollection was that there was quite a bit of discussion as to what do you do with, for example, the rules of evidence. I mean, what does that do to the rules of evidence?

MR. SUSMAN: Well, let me --

MR. MARKS: And shouldn't that be a sanctionable thing that's dealt with by the court rather than presenting it to the jury?

MR. YELENOSKY: I remember some of that discussion. One of the things that was said, I think, was that -- I mean, at least one of the things that I said was that it didn't seem to me that it would be admissible if it's just bad behavior. The only thing would be if it did relate to the veracity of the testimony; I mean, if it went to the credibility. And I don't think we had a drafting of it, but we did talk about it being limited to the --

MR. SUSMAN: I'll tell you what our basic discussion was, if I can refresh everyone. We came in with kind of a mandatory provision. No one liked that. Then it became at one point in time permissive. And then we said it could be used or go before the jury but only if it reflects on the veracity of a witness.

MR. LATTING: That's true. That's what happened.

MR. YELENOSKY: That's what I was saying.

PROFESSOR ALBRIGHT: As I recall this draft, we basically redrafted it

in the meeting.

MR. MARKS: In the meeting, right.

PROFESSOR ALBRIGHT: And we voted on it, and that's when I copied it onto the paper.

HONORABLE F. SCOTT McCOWN: And let me point out, there's no evidence problem with this because it's an out-of-court statement of the lawyer, but it's not offered for the truth of the matter of the statement. It's offered to show the context of the witness' answer and how the lawyer's interjection may have influenced the witness' answer.

MR. LOW: Steve, I think also this is a thing against the Rambo tactic where the judge can just -- and that's one of the things that got to be pretty bad, and I think this helps cure that pretty easily.

MR. SUSMAN: Well, our starting point was that if you make the deposition room look more like the courtroom, 90 percent of your abuse will disappear. People do things in depositions they wouldn't dare do in front

of a jury.

MR. LOW: Right.

MR. SUSMAN: Any further discussion of Subdivision 3?

HONORABLE SCOTT BRISTER: Yes. Does this mean you can't -- it says that during normal recesses you can confer. Does this mean somebody can complain that the other side is taking more than the normal number of recesses? I mean, does this permit you to say that you can't -- you get to a ticklish question and the attorney cannot ask for a recess to discuss the problem?

MR. SUSMAN: That's what we intend to say. Maybe we haven't done it artfully enough, but I would suggest that if an attorney -- that's exactly what we don't want, is the attorney saying "time for a recess." I think it requires some good judgment here on the part of -- you know, maybe the lawyer really does have to go to the bathroom.

MR. YELENOSKY: Well, why don't you just say "agreed recesses," because everybody is going to want a recess at some

point.

MR. SUSMAN: No. Somebody is going to say, "I've got to go to the bathroom." Okay?

MR. YELENOSKY: Then you'll agree.

MR. SUSMAN: Huh?

MR. YELENOSKY: Then you'll agree.

MR. SUSMAN: No. Suppose the other guy says --

MR. GOLD: Not in Dallas. Not in Dallas. Nobody in Dallas goes to the bathroom.

MR. MARKS: I do.

MR. GOLD: In fact, it's a sign of weakness to request it.

CHAIRMAN SOULES: The court reporter cannot make this record.

MR. LOW: That's one thing that would be hard to do unless you provide that ordinary breaks are so long or something, or unless you provide that if a break is called for, there shall be no consulting, you know, if somebody has an emergency break or

something like that.

HONORABLE SCOTT BRISTER: I think that "normal recess" isn't clear. I wasn't in on that discussion; I missed that meeting. But that was my impression when I read this, that "normal recess" was not, when you got to "Is that your signature or not," that you could take a break.

MR. SUSMAN: Any other discussion? All in favor of Rule 15, Subdivision 3, raise your right hand. All opposed. Subdivision 3 passes unanimously.

And Mr. Court Reporter, for the record, passage will be unanimous unless otherwise noted.

Subdivision 3 passes as amended by the "introduced into evidence." The last sentence will read, The court may allow statements, objections and discussions conducted during the oral deposition that reflect upon the veracity of the testimony to be introduced into evidence at trial.

HONORABLE C. A. GUITTARD: At trial.

MR. SUSMAN: Period.

MR. LATTING: Do we intend to have "may allow" --

MR. GOLD: Yes.

MR. LATTING: -- as opposed to "shall allow"? If the court finds that it does bear on the veracity, does he get to if he wants to but doesn't have to?

MR. SUSMAN: May. We've debated this and I think people were happy enough with "may."

MR. LATTING: Okay.

MR. SUSMAN: Subdivision 4. We have discussed this. I do not believe that this was subject to a lot of -- that there were a lot of problems with this. These are when you can instruct a deponent not to answer.

And we call your attention particularly to Subdivision (c), in which you may instruct the deponent not to answer an abusive question. What is an abusive question? One that we thought was a question that if the interrogator continually misstates what the witness said over and over, then that could be considered an abusive question.

You have to read this Rule 4 in context with Rule 6, the objections to testimony, if you recall that, where there are only three objections now tolerated in an oral deposition: Objection, leading; objection, form; objection, nonresponsive.

Any discussion of Subdivision 4? Steve.

MR. YELENOSKY: Just the point that it goes to (4) and (5). Is there a provision in here for stopping things when you believe the other side has exceeded their time limit? Do you terminate the deposition? I mean, what do you do when they keep asking questions and, as far as you've got it, they've exceeded their per person time limit?

MR. SUSMAN: I think you leave, but I don't think we have to say that, do we? I mean, I would just get up and leave.

MR. YELENOSKY: Well, shouldn't it be in "Terminating the deposition" then?

MR. SUSMAN: That's a good point.

PROFESSOR DORSANEO: In the first sentence maybe.

MR. SUSMAN: I would accept

that amendment on behalf of the subcommittee that one of the reasons for terminating a deposition is the passage of time.

Any other discussions of either (4) or (5) at this time?

HONORABLE C. A. GUITTARD: Steve?

MR. SUSMAN: Yes, Judge.

HONORABLE C. A. GUITTARD: With respect to (5), I have concern about the term "in bad faith." It's so easy for any lawyer to charge the opponent with bad faith and then get up and leave. It seems like to me that that ought to be more specific in some way, or we just strike out "in bad faith." It seems to me that leads to a lot of problems and -- well, problems for the trial court.

MR. LATTING: What does that add to the following language, where if it's not unreasonably annoying, embarrassing or oppressive, what does "bad faith" add to that?

HONORABLE C. A. GUITTARD: I don't know. Maybe if it's groundless, if they make groundless objections or something, that might --

MR. McMAINS: The thing is that I think it really is a modifier of "defended." The other part talks about the way it's conducted. But it says if it's defended in bad faith --

MR. LATTING: I see.

MR. McMAINS: -- so the point is, if it's obstructive, if you've got obstructionist conduct with regard to answering questions, constantly telling them what their answers are, you might ought to have the right to terminate that examination.

HONORABLE C. A. GUITTARD: That's right. But "bad faith" is not a good way to say it, because it gives too much opportunity for people to make unfounded -- to walk out without a real justification as well.

MR. McMAINS: Well --

MR. MARKS: Does this allow them to walk out or just get a hearing or suspend it briefly to try to get a ruling by the court?

HONORABLE SCOTT BRISTER: Well, can't you just say when it's being conducted

in violation of these rules, that would cover time, that would cover Part 4, questions that are abusive --

HONORABLE F. SCOTT McGOWN: That's a good idea.

MR. GOLD: It may. But the thing I want to protect, and Rusty has pointed it out, and I'm not sure if (4) deals with it or (6) does either, is what happens in the situation where -- and I know it's going to happen now -- someone says, "That's an abusive question. Don't answer that. That's an abusive question. Don't answer that." Do you just -- do you have to just sit there and just keep asking questions that the person is not going to answer, or can you terminate it because someone is abusing Part 4?

PROFESSOR ALBRIGHT: They're defending it in bad faith.

MR. GOLD: Then that goes back to Justice Guittard's question, which is, does "defended in bad faith" really tell the reader of this rule that that would be bad faith? And I don't know, because it's so...

HONORABLE SCOTT BRISTER: But

if it's in accordance with these rules, 4(c) says you can object to abusive questions. If you're doing it to every question, then you're not in compliance with that rule, it's not covered under any of these, and you're in violation of the rules.

And the problem with "bad faith" is that it calls for a determination of subjective intent. There are people who think they are doing right when they do just that; that they are in good faith doing something bad. And that ought to be prohibited.

HONORABLE F. SCOTT McGOWN: Steve?

MR. SUSMAN: Let me -- I think I -- I mean, I think "bad faith" is the wrong word. I think we have in fact selected the wrong word, and I'm convinced of that.

HONORABLE F. SCOTT McGOWN: But --

MR. SUSMAN: But we have wanted to provide -- I mean -- all right. The history of this is that we began with wanting to very much circumscribe what lawyers can do in a deposition, and we have done that in

Subdivision 6. But the feeling was that you've still got to allow a lawyer, as a last resort, the opportunity to just get up. Not many lawyers will use that last resort. I don't think I've ever been in a deposition where I've used it or someone else has used it, because you play like you're going to do it but ultimately you stay there and yell and scream and coach the witness, but you stick around because you're scared of the consequences of just leaving. And you know, you never know for sure what the judge is going to do if you just get up and walk out, so I don't think --

HONORABLE F. SCOTT McGOWN: That's why Judge Brister's formulation, I think, is perfect, because you're forgetting we've got Rule 3, too. Rule 3 says that it shall be conducted in the same manner as the courtroom and that counsel are to be cooperative and courteous. So if you take Judge Brister's formulation and say that a party or the deponent may move to terminate or limit the deposition when it is conducted or defended -- put both in, conducted or

defended -- in violation of these rules, that gives you free rein, then, to terminate it. And you're always going to have to go down to the courthouse and justify what you've done.

MR. SUSMAN: Okay. As chairman of the subcommittee I will accept that because I think it may be unclear without the change, and so that's a change.

MR. GOLD: Steve?

MR. SUSMAN: Paul, do you want a shot at that?

MR. GOLD: I'm fine with the whole thing except for this (c) about "to protect a witness from an abusive question," the reason being, right now, the present rule, if you have a privilege, and it's kind of arcane and not too many people use it, but you're supposed to, under the present rule, if you have a privilege, give the answer to the question in camera, seal that, and give it to the court. So there is testimony given and you keep going with the deposition and the court can rule on something.

I'm really afraid that (c) is going to be counterproductive to our goal because what's

going to happen is people are going to continue to send baby attorneys to the deposition, and what the instruction is going to be, either expressed or implied, is "If you're getting killed, object to the abusiveness of the question, instruct the witness not to answer, and we'll pay whatever sanction we have to pay. That will give me a chance, the big attorney, to come back and defend it on a later date or instruct you on how to defend it or coach the witness." And I think that would be counterproductive to our goal, so I'm going to --

MR. SUSMAN: Mr. Gold, I'm going to allow you this one privilege of rearguing what you've already voted on in Galveston for two days with --

MR. GOLD: I know. And I did that with great trepidation.

MR. SUSMAN: But this is your last chance.

MR. GOLD: I know. I'm just -- and I'm not saying --

MR. SUSMAN: Because we aren't going to have a subcommittee meeting here.

MR. GOLD: I know, and I'm just saying that it's a concern.

MR. LATTING: It's noted.

MR. SUSMAN: That is noted for the record.

MR. GOLD: I'm going to vote for this. I'm just concerned about it. I'm not being a traitor.

MR. YELENOSKY: We feel your concern.

CHAIRMAN SOULES: We're not getting a record on this, and we need a record.

MR. SUSMAN: Rusty.

MR. McMAINS: The part on "Terminating the deposition" about "A party or the deponent may move to terminate or limit the deposition," I'm not sure I -- I had understood that what we were talking about is that basically this is a privileged termination in this context, although you suffer the consequences if you have terminated it wrongly.

PROFESSOR ALBRIGHT: Except that --

MR. McMAINS: And it says "may move pursuant to Rule 8," and I know we haven't dealt with Rule 8, but when I went back to Rule 8, it looks like, you know, filing motions and stuff. So I don't -- I mean, you're not going to --

PROFESSOR ALBRIGHT: I accept your amendment.

MR. McMAINS: We have problems with "move to" --

PROFESSOR ALBRIGHT: I accept your amendment.

MR. McMAINS: Okay.

PROFESSOR DORSANEO: Wait a minute. We --

PROFESSOR ALBRIGHT: Rule 8 was an old rule. Throw it out.

MR. LATTING: So take out "move to"?

PROFESSOR ALBRIGHT: Take out "move to" and take out "pursuant to Rule 8."

HONORABLE F. SCOTT McGOWN: No. Not "move to." You've got to read the second sentence.

MR. McMAINS: Yeah, that's what

I was saying.

HONORABLE F. SCOTT McCOWN: Just take out "pursuant to Rule 8," because, see, the way --

MR. LATTING: Where are you, Scott?

HONORABLE F. SCOTT McCOWN: All right. The way this works -- you've got to read the second sentence. The way this works, you're in a deposition, the other guy is being a jerk, so you say, "I am moving to terminate this deposition. Mr. Witness and me are leaving and we're going to get a hearing on my motion." That stops the deposition. You go get a hearing. If the court rules you're right, it's terminated. If the court rules you're wrong, the court may impose a sanction.

MR. KELTNER: Can't we say "suspend" in the first sentence, because the truth of the matter is that there may be other questions which will be good that you're going to let him answer. So if you just change it to "A party or the deponent may suspend or limit the deposition when it's being

conducted," then that's the only thing -- that's the only change I think we have to make.

Now, I know we're getting awful close to drafting here.

MR. SUSMAN: David, let me see if I understand. The notion would be you can suspend a deposition or terminate it, whatever you want, you suspend it without getting a court order or without even filing a motion because you're in a deposition room. The next step is, as soon as you get back to your office, it's incumbent upon you to file a motion, right? And then the next step, the court rules on it. And either you were right or you've got to go back to prison again.

MR. KELTNER: Right.

MR. SUSMAN: Why don't we just say it in that way, that you can suspend it for failure to conduct it in accordance with the rules. You have an obligation then to promptly file a motion for protective order.

Scott.

HONORABLE F. SCOTT McCOWN: Well, let me suggest that the subcommittee

work on this a little bit, because I agree with David as to what we want. I think the word "terminated" is a nice word to have, though, because it suggests to the other party that if your conduct has been bad, that the judge may very well say, "This deposition is over, it's never reconvening, and that's your punishment." We don't want the party to get the idea that if the conduct has been bad, they go down to the courthouse, the judge slaps them on the wrist and they get to go right back and resume the deposition.

MR. KELTNER: Let's take a shot at redrafting this. The only question I have about that is, I may very much want that witness who is not being responive to testify because I'm going to use it in trial because I'm not going to have that witness there, because you have conflicting -- you have conflicting interests in a deposition. I may be wanting, even though I'm defending the deposition, to preserve the testimony. And if they stop it, I'm screwed.

MR. SUSMAN: Okay. Let me see if I can get --

MR. KELTNER: So we can work on this some more.

MR. SUSMAN: Okay. Let me see if I can get some order here.

Rule 4, Subdivision 4, have we voted on that? All in favor of Subdivision 4 raise your right hand. All opposed. Subdivision 4 passes.

Subdivision 5 needs to be referred back to the committee. All in favor of referring it back to the committee to make it clear how you do this raise your right hand. All opposed. That goes back to the committee.

And Dave Keltner, I'd like you to take the first shot at getting that right. I'm going to try to designate people as we go through here on the committee, so if you all have got any strong thoughts, you can write down the names and talk to them before the two days are up with your thoughts.

Okay. Subdivision 6.

HONORABLE C. A. GUITTARD: Steve, I'm still concerned about the unresponsive answer, which I think probably ought to be admissible if relevant. I'm

concerned about the case where the question is, Do you have an opinion of the market value of the property in question, and the answer is, The market value of the question -- the market value of the property is so many dollars. Now --

MR. McMAINS: That's right. That's nonresponsive.

HONORABLE C. A. GUITTARD: Now, that should be admissible, even though it's not responsive, and that the only objection should be that it's inadmissible because it's irrelevant or some other grounds. So I'll suggest that the objection to unresponsive answers not be made and that the court simply rule on the admissibility of the -- of it on other grounds.

CHAIRMAN SOULES: Judge, I think that this actually agrees with your concept.

HONORABLE C. A. GUITTARD: It doesn't say it. I didn't gather that from it, but...

CHAIRMAN SOULES: What we've said is an objection to a nonresponsive answer

has to be made at the deposition.

HONORABLE C. A. GUITTARD: But suppose it is made at the deposition. Is that a ground for excluding a nonresponsive answer? I would take the position that it's not if it's otherwise admissible.

CHAIRMAN SOULES: And you have, in a written opinion. But that's not what this is.

MR. LOW: But don't you think that if they do that, the nonresponsive, the lawyer is going to have sense enough to say, "Okay, you do have an opinion. Now give me your opinion."

HONORABLE C. A. GUITTARD: Well, he might not.

MR. LOW: Well, then he -- shame on him. He ought not to get the answer then.

MR. MARKS: Well, the other problem you have, if you don't have that objection there, is you have the guy who will answer the question and go on for 20 more minutes and you can't stop him. So are you saying that all of his answers should be

admissible when it really isn't responsive at all to the question that's asked? I mean, maybe it's just argumentative baloney.

HONORABLE C. A. GUITTARD: Well, that's sort of another question really.

MR. MARKS: Well, it seems to me that the objection has to be made and reserved at the time of the deposition.

MR. SUSMAN: Rusty.

MR. McMAINS: I have another -- I gather that the notion is that these are the words you're supposed to use in the objection. The function of making the obviable objections is so that the other side can in fact do it. I have a problem if you're saying, "Objection, form." I'm not sure what that means. And I mean, if you're limited to that --

MR. SUSMAN: No, sir. Because if you sit there and object form in a deposition with me, I will probably ignore you. But if I thought you were smarter, real smart, and I might be screwing up, I might, Rusty, resort to the third sentence. And that is, I might ask you what the basis of your

form objection is. That's my option. Okay? In which case you must tell me what it is. So I've got the option of either ignoring you and taking the chance that I'm smarter than you are or asking you to explain. But it's my option.

MR. McMAINS: But you are saying, for instance, that if I maybe just say "objection, form," that that is sufficient to preserve any conceivable predicate provisions or anything else that I might --

MR. SUSMAN: Yes, sir, unless I, the questioner, want you to explain it because I feel nervous about it.

MR. GOLD: But the explanation may use up some of that three hours.

MR. SUSMAN: Judge McCown.

HONORABLE F. SCOTT McGOWN: Well, back on Judge Guittard's comment on nonresponsiveness, I agree with him 100 percent as to what the trial judge ought to do. But I still think that the rule ought to be written as we have it, because what we envision happening is, if the witness is asked a question and he gives a nonresponsive

answer, usually in the example you gave, you won't even object because you don't care. If you do care, you object. That puts the other side on notice that they need to cure. Then they can cure as was pointed out. If they don't cure because they think your objection is silly, then when you get to the trial court, if it was silly, he's going to let it in. And if it wasn't silly, but your nonresponsiveness -- the witness' nonresponsiveness is really unfair, then he may keep it out. And so it allows the trial judge that flexibility.

HONORABLE C. A. GUITTARD: I have no problem with that. I simply want to ask, suppose the objection is not made at the deposition. Is it waived?

HONORABLE F. SCOTT McGOWN: Then it's waived.

HONORABLE C. A. GUITTARD: It's waived. Okay.

HONORABLE F. SCOTT McCOWN: It's waived. And that's the way the present rule is.

MR. SUSMAN: All in favor of

Subdivision 6 raise your right hand. All opposed. It passes unanimously.

Rule 16. Rule 16(1). I hope you have had an opportunity to read this. Basically, as I understand it now, a party can take a deposition without leave of court by whatever means they wish, smoke signals, hypnosis, whatever you want. The other side -- you've got to tell them how. You've got to tell your opponent how you intend to take the deposition or record it. The other side can bring the good old court reporter, if they want, and record it in the traditional way. The expense, you pay your own. You end up essentially paying your own transcriber. I pay the Indian if I want to do it by smoke signal; you pay the court reporter if you want a traditional court reporter, until the end, in which the court can get it right and make the adjustment. That's Rule (b), Subdivision 1(b). So that's basically what we've tried to do here, make it very easy to take depositions by nontraditional means.

Any discussion of Rule 1?

MR. LATTING: Steve, just a

question. Does this mean that if I want to take someone's deposition in my office with a personal tape recorder that I specify that and take it and then I have my secretary type it up and that becomes the deposition? Nobody does anything else?

MR. SUSMAN: Yes.

MR. LATTING: Okay.

MR. MARKS: No. Your secretary's transcription --

MR. SUSMAN: Your secretary's transcription is not the deposition.

PROFESSOR ALBRIGHT: The transcription has to comply with Rules 205 or 206. Your secretary has to certify to all of these things.

MR. LATTING: And what in general does that require?

PROFESSOR ALBRIGHT: Ask David.

MR. SUSMAN: David, what do 205 and 206 say?

CHAIRMAN SOULES: The existing rules?

MR. SUSMAN: Yeah.

MR. JACKSON: One is the

submission to the witness for signature and corrections, and the other is the certification of the transcript, that it accurately -- that it's accurate.

MR. SUSMAN: Rusty.

MR. McMAINS: There's no similar provision here with regards to -- of the necessity of making objections. What I'm wondering, therefore, is, does that mean that basically that you can make objections to form for the first time at trial, since there's no provision one way or the other to this kind of a non-stenographic proposal? Or does it mean that you can't make any objections? I mean, there's no objection procedure.

MR. SUSMAN: As I understand it, and let me just make sure I can do it right, I'm not sure there is an objection procedure. I mean, I think you -- if you -- you have to bring your -- if you want to do something better or different, you'd better bring your own -- you'd better bring your own tape recorder or your own court reporter or videographer or something like that.

HON. SCOTT A. BRISTER: But the

objection, other than the amount of notice you've given, which I assume you could get a protective order against, is that the transcript is not right.

MR. McMAINS: No, I'm not talking about the transcript. I'm talking about their playing of the recording. And there is a lot of objectionable stuff in terms of it's nonresponsive, it's leading, et cetera. There are no provisions in here with regards to it. And it may be perfectly all right to take just a videotape recording and not have a reporter there. It may be perfectly all right. But as I read this rule, I would not have to make any of those objections. I would argue that I could make those objections, form, leading, et cetera, for the first time at trial.

MR. YELENOSKY: Why do you think that?

PROFESSOR ALBRIGHT: Why?

MR. SUSMAN: That wasn't our intention.

HONORABLE F. SCOTT McCOWN: I think the confusion -- this does not envision

that the actual tape itself is going to be played at trial. It would still have to come -- it's still just testimony. And whatever you're going to read or whatever you're going to play is going to be subject to objection. This is just a method for recording. This is nothing but the method for recording here.

MR. HERRING: The objection procedure in the other rule would apply here.

HONORABLE F. SCOTT McCOWN: Yeah.

MR. HERRING: If he wants to have his leading and other objections, that's what --

HONORABLE F. SCOTT McCOWN: Sure. The tape --

MR. McMAINS: I mean, that's what we're trying to say, right?

MR. SUSMAN: Yes. We're trying to say that the same objections have to be made in the same words, the same conduct, regardless of how the deposition is transcribed.

HONORABLE F. SCOTT McCOWN:

Rule 15 is how you conduct it; Rule 16 is nothing but how you record it.

MR. MARKS: Steve?

MR. SUSMAN: John.

MR. MARKS: Okay. What exactly can we talk about on this?

MR. SUSMAN: No, this one actually is -- this one we -- I don't even recall us getting to it, John, so this is wide open, in fact.

MR. MARKS: Okay. I have a real concern, and it's really more of a question. How is this going to advance the ball in terms of saving money? I mean, it may save money at the deposition taking point. But when you think about the time that the lawyers spend trying to watch a videotape, having it transcribed or the wording transcribed in the office, it seems to me that they're going to spend a lot more time fooling with a non-stenographic recording or a videotape than they would with a deposition that's transcribed the first time by the reporter they used.

MR. SUSMAN: Buddy. Buddy and

then David.

MR. LOW: To save money, I've even asked the plaintiff, I've said, "Let me just talk to him informally in my office and write a report to the client. I think I can get the case settled." This way I could just have it recorded, send it, and the case may move. I've settled several cases that way. Never take a deposition, just let me interview the plaintiff in my office.

MR. SUSMAN: Steve Yelenosky.

MR. YELENOSKY: Well, even if what you say is true about transcribing issues, if the rule --

THE REPORTER: Speak up, please.

MR. YELENOSKY: If the rule were clearer, and maybe it's implicit enough, that you don't have to do a transcription, a lot of times at Legal Aid, I mean, like Buddy is saying, informally you would set up a deposition, you would tape record it, and you would never have it transcribed.

MR. MARKS: Couldn't that be handled by saying if the parties agree they

can do that?

MR. GOLD: Why should it be that way as opposed to --

MR. LATTING: John, you can always have your own guy there if you want to save money.

MR. MARKS: Well, see, that's the point. I mean, at just about every major deposition, if somebody doesn't get a court reporter, I'm going to get that court reporter. And that's a double expense there, if you think in terms of the overall expense and cost to the client at the end of the day fooling around with that kind of a record.

MR. JACKSON: And it's a reverse expense to the effect that if I know John is going to get a court reporter every time, I'll notice all of my depositions non-stenographic because I'll get a free court reporter paid for by John.

MR. SUSMAN: Mr. Gold.

MR. GOLD: There are a lot of attorneys out there who are operating on a shoestring who oftentimes don't want a transcript. All they want to do is get a tape

of the deposition and preserve it. And you can do that cheaply by either a camcorder or by an audio tape. And if the other party, for reporting purposes to their carrier or whatever, wants to get a transcript, well, that's something they can do and should do. But I think the cost saving is to the person who is taking the deposition, who wants the deposition but may not necessarily want it transcribed. And I think it's an added cost on the whole system to have to get a court-reported stenographic transcription every time you do a deposition.

MR. MARKS: Maybe we ought to tie it into the Tier 1.

MR. SUSMAN: Mr. Dorsaneo.

PROFESSOR DORSANEO: Well, this goes back to this whole business of the court reporter statute. We have in the government code a provision that says all depositions conducted in this state must be recorded by a certified shorthand reporter, except as provided in two other statutes. One of them, the Civil Practice and Remedies Code, Section 20.001, is limited to deposition on

written questions. And the other government code section that's pertinent requires a non-certified shorthand reporter to deliver an affidavit to the parties or to their counsel stating that a certified shorthand reporter is not available, or an agreement of counsel. So whatever we decide to do, there are statutory provisions that limit --

MR. SUSMAN: Are you saying we cannot do this?

PROFESSOR DORSANEO: Not right now. I mean, whatever Steve is doing, he can't do it, but he apparently is doing it.

HONORABLE SCOTT BRISTER: But we can propose anything we want.

MR. SUSMAN: And the way things are going over there, we'll get it on the agenda eventually, too, and passed.

Steve.

MR. YELENOSKY: Well, my concern is, in Travis County we've been fortunate -- I'm no longer at Legal Aid so I'm not doing this any more -- but in Travis County we were fortunate enough to have a pro bono court reporter system set up that

worked very well. That doesn't exist all over the state. If there isn't a pro bono requirement on court reporters, then you have a real obstacle a lot of times in the Legal Aid situation of doing depositions if you can't do them non-stenographically. So if the court -- well, you know, I -- you know, would take care of that situation, then I'd be happy.

MR. SUSMAN: I think the point has been made, a good point, Bill, that the committee also has to look at what statutory changes need to be made, if any, to put this rule into effect. And David would do that if you approve the rule.

Are we close -- and Joe, I want you to talk, because I think we're getting close to voting.

MR. HERRING: One question. Under that interpretation, would not current Rule 202 be invalid? I'm not so sure.

HON. SCOTT A. BRISTER: I order non-stenographic depositions knowing that it's probably against the statute frequently.

MR. JACKSON: This rule had two

meanings.

MR. SUSMAN: David.

MR. JACKSON: The original 215 was set up so you could videotape a deposition and have a court reporter. And we're trying to change that now to where you can shift out the court reporter. But the way it's written and the way it's been interpreted, people were just assuming that there was always going to be a court reporter there. 215(c) you see among a lot deposition notices, and all they're meaning is that along with the court reporter they're going to videotape it. And now we're rewording this and reworking it where it doesn't mean that any more; it means something else.

And the point I wanted to make clear in these rules is that you've got to tell them if you really mean you're not going to have a court reporter there, because in the past it's just been assumed that there would be a court reporter there.

MR. SUSMAN: Low and Latting and then a vote.

MR. LOW: Steve, first of all,

if somebody objects to it, they can bring a court reporter. So if they don't, why isn't it presumed they've agreed to it? Why wouldn't that come within the statute? It says if it's agreed. Don't they agree to it if they don't object?

PROFESSOR ALBRIGHT: But that's not part of the agreement. The agreement is that --

MR. SUSMAN: Joe.

MR. LATTING: I was only going to observe that this doesn't prevent anybody from having a court reporter. It just allows people not to if they don't want to. It's a method to save some money. And if anybody in the litigation wants a court reporter, come on down.

MR. SUSMAN: Out of the largesse of my heart, John, you have the final word on this.

MR. MARKS: Thank you. Well, first of all, in response to all of this business about if you want a court reporter you can have one, that's great. But if we're talking about saving money in litigation, that

is an add-on expense and it's going to increase expenses overall rather than decrease them. That's point one.

Point two. The judge made a point that he often orders non-stenographic reporting. Now, why can't we leave it to the option of the judge. If somebody thinks that he doesn't need a deposition or doesn't need it done stenographically, then he goes to the court and gets leave of the court to do it.

MR. SUSMAN: I call the question. All in favor of Rule 16(1) as written raise your right hand.

CHAIRMAN SOULES: With all its problems, right?

MR. SUSMAN: All opposed raise your hand. All right. Wait a second, I'll count the nays. One, two, three, four, five. Five against.

All in favor raise your right hand. One, two, three, four, five, six, seven, eight, nine, 10, 11, 12, 13, 14, 15, 16. 16 in favor.

Subdivision 2 --

CHAIRMAN SOULES: Why do you

file a non-stenographic deposition and you don't file a stenographic deposition?

MR. SUSMAN: This is -- I think we have just passed --

CHAIRMAN SOULES: All right. It's passed. But we're going to revisit these things that go too fast sooner or later. You can bet on it.

MR. SUSMAN: I'm sure that's correct.

MR. SUSMAN: Rule 16(2) --

MR. LATTING: We don't have time for that now. We're moving on.

CHAIRMAN SOULES: We're going to file those tape recordings, but we're not going to file a transcript?

MR. SUSMAN: -- Deposition by Telephone.

HONORABLE C. A. GUITTARD: Steve?

PROFESSOR ALBRIGHT: But if I can respond to Luke, I think that's the court -- we have said, and maybe you weren't here, that these rules need lots of detailed drafting; that they have not been gone over

close enough to catch things like that. And we would love for you to give us that information. We're kind of talking big concepts now so then we can start doing the detailed work.

CHAIRMAN SOULES: Okay. I understand.

MR. SUSMAN: Now, this rule is assigned on the subcommittee to David Jackson, and all these subcommittee members, even if they voted against it, they at least get the sense of the group and will try to be honest -- you know, give us a product. So if you've got any problems, specific ones, give them to David, and he's going to give us another draft, and he's going to check the statute too and see what we do with that problem.

Okay. Now that brings us to Deposition by Telephone, Subdivision --

HONORABLE C. A. GUITTARD: I have a question on Subdivision 2.

MR. SUSMAN: Yes, sir.

HONORABLE C. A. GUITTARD: The last sentence there says, "The officer taking

the deposition may be located with the deposing parties instead of with the witness if the identification of the witness is substantiated and the witness does not waive examination and signature of the transcribed deposition."

I don't understand why, when the witness does waive that, that the officer can't be with the deposing parties rather than with the witness. Do you really mean that?

HONORABLE F. SCOTT McGOWN: Judge, it could be that way. The reason we did it this way is a belt and suspenders. Not only have you substantiated that the witness, who after all isn't with the officer, is who he says he is; but in addition, once it's transcribed, the witness has to read it and swear to it in front of a notary who he is in front of.

HONORABLE C. A. GUITTARD: So that, then, the reporter has to be with the witness if he does not waive the signature. Is that right?

MR. McMAINS: No, if he waives the signature.

subcommittee of Scott and Keltner on this.

HONORABLE F. SCOTT McGOWN: I mean, that would be the concept. We don't have the --

MR. SUSMAN: But our notion here, the notion that the subcommittee wants you to vote on, is we want to make it as easy as possible, consistent with statutes or the constitution or whatever it is, to take a telephone deposition with your court reporter and you in your city and a witness somewhere else.

MR. JACKSON: Can I just --

MR. SUSMAN: Yeah.

MR. JACKSON: One of the concepts that came up in the subcommittee that hasn't come up here is that video conferencing is starting to get more and more applicable to discovery. We took a video conference deposition yesterday. And you can actually see the witness on the monitor and he's looking at you and you're looking at him. It's easier for the court reporter to be in the room where all the people are, which is where all the lawyers are, so they can look

around and see everybody as they write and have the witness just frozen on the monitor. And that's where the swearing in problem comes in, if you've got to bring somebody in to the room on the other side just to swear in the witness.

HONORABLE F. SCOTT McGOWN: Well, but part of this is fundamental legal magic, that when a person takes an oath and is subject to penalties of perjury, that that has to be done in compliance with the oath law. And if somebody in Utah tells some notary in Texas, "Yeah, I swear to tell the truth," I'm not sure that that leagally ties them up. I don't know if they could be prosecuted in Utah or in Texas.

MR. YELENOSKY: Well, I think if we have a bigger problem with the oath law outside of this context, then we ought to think about whether we accept that. Administrative hearings are held all the time by telephone where the hearing officer administers an oath over the telephone to somebody somewhere else. And all of those are invalid, is what you're telling me, under the

oath law and cannot be used. And you know, I mean, are we going to accept that contradiction?

PROFESSOR DORSANEO: You're taking depositions and attending hearings that are all invalid.

MR. SUSMAN: Okay. I now call for a vote on Subdivision 2. I think I expressed what I'm asking you to vote on, which is the sense that we want to make it as easy as possible for a witness and the court reporter to be in one place -- I mean, the interrogator and the court reporter to be in one place and the witness in a distant place. And we would ask that this subcommittee of Keltner and McCown work on this.

HONORABLE DAVID PEEPLES: Steve, what does a lawyer do if he thinks that this witness is too important to leave it to a telephone deposition? Do you have to go to court, or can you just show up where he is and cross-examine there, or can you insist on a regular court reporter being there? What do you do if your opponent notices somebody important by telephone and you don't want to

leave it to telephone?

MR. SUSMAN: Paul.

MR. GOLD: I would think -- and I think I've seen cases on this. I think if someone notices by telephone and you want to fly out there to Arizona and ask your questions there, I would imagine you could take your court reporter and go out there and do it there.

MR. SUSMAN: See, the only question is whether you have to cross-notice. I mean, I would think that would be the only kind of question.

HONORABLE DAVID PEEPLES: We deal with that kind of question in Subparagraph 1 and we don't, as I read it, in Subparagraph 2.

MR. McMAINS: But actually you do.

HONORABLE DAVID PEEPLES: Do we?

MR. McMAINS: It says that you give notice that you're going to take it subject to Subsection 1(b). 1(b) says, "Any party may designate another method to record,"

in addition to --

MR. SUSMAN: -- in person.

HONORABLE DAVID PEEPLES: All right. I'm with you now.

MR. McMAINS: You've just got to pay for it.

MR. SUSMAN: All right. All in favor, then, of Rule 16, Subdivision 2, raise your right hand. All opposed. One vote au contraire.

Rule 17 -- I'm sorry, let me have the favorable votes to this for the record, please. Favorable votes for what we just voted on. We had one contrary vote, and I need to get a count. 20. 20 to one.

Rule 17 -- I got 20 to one.

MR. MARKS: 20 to one.

MR. JACKSON: And I didn't vote. I was raising a question, because we've got a gap between 16 and 17 of all of the certification rules and the submission to the witness rules and the use of transcripts in court proceedings. Are those going to be just incorporated, then, in between there, 205, 206, 207, before we get to the depositions on

written questions?

PROFESSOR ALBRIGHT: We did not address those rules.

MR. JACKSON: But they'll be just incorporated like they are in here (indicating)?

MR. SUSMAN: Will you look at that for us, David? We haven't even considered it.

MR. JACKSON: We just have a gap between these pages that don't really say what we're going to do with 205, 206 and 207.

PROFESSOR ALBRIGHT: That's because we didn't make any changes to them.

MR. McMAINS: But you didn't incorporate them.

MR. SUSMAN: We need to incorporate -- the truth -- no, I mean, I think David is right. We didn't even consider whether they needed changes, as I recall, right?

PROFESSOR ALBRIGHT: We didn't.

MR. SUSMAN: So, I mean, David, will you look at them and tell us?

MR. JACKSON: Yeah. The only

problem that I see as a court reporter on this submission to the witness and signing, and it's not a gigantic issue, is a problem that Houston seems to have with interpreting whether you actually give the original deposition to the witness or make him come to your office to read it. And that's the only thing that they seem to have a problem interpreting, and we may need to clear that up.

MR. SUSMAN: I would suggest that David -- again, I would like to delegate to you the task of -- if there is anything that needs clearing up in those rules, can they be adopted as is or how should they be clarified. And then they should indeed be given one of our special numbers and put in here, Alex, because we're doing that with the other rules we aren't changing like admissions or -- we're now getting to one, depositions upon written questions, Rule 17.

There's one where we actually looked at Rule 208, we said it looks fine, and we would recommend adopting it in its entirety in Rule 17.

Any problems with doing that? All in favor of adopting Rule 208 as Rule 17? Anyone opposed? That passes.

I would ask you, David, also to look at 208, which the subcommittee has never really done, and see if it needs to be changed in any minor way to comport, to be consistent, with the changes we made in the other rules.

Dorsaneo.

PROFESSOR DORSANEO: 208 in its current form effective April 1, 1984, has a paragraph, Paragraph 4, about the deposition officer. The same statutes that I mentioned earlier have been amended since 1984 to talk about deposition officers, and maybe this rule, when it's recodified, should refer to them. And that would be in Civil Practice and Remedies Code -- particularly Civil Practice and Remedies Code 20.001.

MR. SUSMAN: Do you have that, Mr. Jackson?

MR. JACKSON: Yes.

MR. SUSMAN: Great. Thank you.

Rule 18, Physical and Mental Examinations, another situation where we

simply adopted in toto the current Rule 167a. No -- not much attention paid to it. It seems to be working.

Any comments on this or anything like Bill had on the last one? I mean, we welcome any ideas, if you all have got any problems with these rules.

Okay. All in favor of adopting, then, Rule 167a in toto as Rule 18 raise your right hand. All opposed. That unanimously passes.

Now that brings us to Rule 19, Motion for Entry Upon Property. Where did this come from? Did this come from the task force, Alex, or the rules subcommittee? We have kind of --

PROFESSOR ALBRIGHT: It came from the task force.

MR. SUSMAN: Okay. Very few lawyers on the subcommittee, if any, had ever had any personal experience in their cumulative thousands of years of praciticing law with this particular discovery device, so we were somewhat handicapped --

PROFESSOR DORSANEO: It's a good way to get shot.

MR. SUSMAN: -- but this is basically --

MR. KELTNER: Steve?

MR. SUSMAN: Yes, sir.

MR. KELTNER: The reason we broke this out was that the rules for production of documents, where it is now in the rules, the procedure for the production of documents didn't work for entry upon land, and that's why the task force broke it out. It is no change from the rule now except that it eliminates it from the procedure of producing documents.

HONORABLE C. A. GUITTARD: I have a problem with No. 2.

MR. SUSMAN: Could you let us have it, Judge?

HONORABLE C. A. GUITTARD: All right. Subdivision 2 seems to require citation under Rule 106 even if the person in possession is a party, and I'm not sure the committee wanted to do that. If they didn't, I suggest that the rule read explicitly, "If the person in possession or control of the property is not a party to the suit, a true

copy of the motion" --

HONORABLE F. SCOTT McGOWN: That's right. We intended this to apply only to parties, and we screwed up with in the drafting.

MR. SUSMAN: Only to nonparties, you mean?

HONORABLE F. SCOTT McCOWN: Yeah, only to nonparties. We screwed up in drafting it.

CHAIRMAN SOULES: Well, that takes care of itself. The party is going to get a copy of the motion served anyway.

HONORABLE C. A. GUITTARD: Well, but do you want to go to the expense of a 106 service on a party? I don't know that they do.

MR. GOLD: I move that we make that modification.

MR. SUSMAN: We will modify -- your subcommittee makes that modification. This was unintentional. We wanted to make sure that if the party in possession and control were not a party -- I mean, if the person were not a party, that there was some

due process involved in giving them notice that you're going to show up at their house or at their place of business or on their property and do something. And we didn't want it to be quite as rigorous as serving a subpoena, because then you would have to find -- hunt the person down like a dog and serve them and they may be -- they may have abandoned the property. So we picked something like citation, which allows for certain substituted service or service by publication, and that's what we did.

MR. LATTING: Well, that was my concern, because that is not Rule 106; those are Rule 108 and Rule 109. And I'm concerned about where parties want to go examine a piece of real estate and you can't find whoever owns it. And 106 won't do it, because that only covers the actual personal, in personam service.

And another thing I want to say is --

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: Joe, I think it says "or any method ordered by the court" in 106.

MR. LATTING: Okay. That may take care of that. Although I think it's a little confusing, that may take care of it.

But I'm concerned about adding the expense of having to re-serve somebody. Why can't we just do it like deposition notices? Why can't we send them a latter and tell them we're coming out there to look at the place, and if there's an objection raised, then they can respond to it.

HONORABLE F. SCOTT McCOWN: This is nonparty only, Joe.

MR. LATTING: I understand that. I understand that.

HONORABLE F. SCOTT McGOWN: If it's a party, you just send them the motion.

MR. LATTING: All right. But if it's not a party, you have to do a 106 citation on them, right?

HONORABLE F. SCOTT McCOWN: Right.

MR. LATTING: Well --

PROFESSOR ALBRIGHT: But only if they don't agree. If they agree to let you come on the property, you won't be filing a

motion, will you? You can call them up and say, "Do you mind if I come look at your property?" And they say, "No, come on."

It's only if they don't agree, then you have to get a court order.

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: Let me get this straight, though. I have property, I'm not a party to this case, and you're going to come out to my place because you have a lawsuit under the scope of discovery that somehow relates to my property.

MR. LATTING: How about the place next door. We need to come onto your place because we've got a pipeline situation and we need to look at it.

PROFESSOR DORSANEO: Hmmm...

MR. LATTING: It happens.

HONORABLE F. SCOTT McCOWN: Now, the judge may say no, Bill. I mean, you get served with notice, and you say, "I don't want these guys on my property, I'm not a part of their dispute, this is an invasion of privacy, unconstitutional," whatever you want. You go down and you make your

arguments, and the judge may side with you and say they can't go on your property. This gives you notice that they've made the request to the court for that order and gives you an opportunity to be heard.

PROFESSOR DORSANEO: I guess that's all right, although I'm a little troubled by this kind of new cause of action, I guess. But what does the citation say? Is there a citation? There is no citation, right? It's just served in the manner of a citation.

PROFESSOR ALBRIGHT: You get a copy of the motion and the order.

MR. KELTNER: It's purely a method of service, Bill. And I think we can draft around that. The only thing is to give them notice to make any objections that the property owner wants to make for whatever reason, just like we send, you know, requests for production to nonparties. The same rule applies.

PROFESSOR DORSANEO: I would recommend to the draftsmen you say the manner of service, say by personal delivery,

certified mail, return receipt requested, instead of referencing --

MR. SUSMAN: Alex is our draftsman on this one, so direct your comments to her.

And Steve --

MR. LATTING: One further question. Is there a reason for making this different from a deposition notice to a nonparty?

HONORABLE F. SCOTT McGOWN: Yes.

MR. LATTING: And what is that difference?

HONORABLE F. SCOTT McGOWN: The reason is that if you want to take a nonparty's deposition, you've got to physically get them; but if you want to go see a piece of land, it may be that the land has been abandoned and you can't find the owner.

MR. LATTING: So it's easier to do this?

MR. SUSMAN: Easier, yes, sir.

HONORABLE F. SCOTT McGOWN: It's easier.

MR. LATTING: Okay.

PROFESSOR DORSANEO: Somehow I expect I'm going to be made a party to this case and I don't like it. Something is happening here before I'm getting ready to know about it.

MR. SUSMAN: Steve.

MR. YELENOSKY: Yeah. I just wanted to make a comment on this, and Alex pointed it out very well to me when we were talking earlier. The very same considerations that are here, when the subcommittee is returning to things, should be considered with respect to obtaining mental health records, because right now it is possible for somebody to subpoena mental health records from Travis County MHMR without any notice to the person whose mental health records are at issue. And certainly that's more of an invasion than entry upon property, but there's no protection for it.

Bill, I know you wouldn't agree, but --

PROFESSOR DORSANEO: I might, but I might not.

MR. YELENOSKY: But in any

event, we had to intervene in a lawsuit at Advocacy to prevent or at least to get a chance to be heard as to whether somebody's mental health records ought to be given up in a case where they were not a party.

PROFESSOR ALBRIGHT: And I think it would be very easy to add that.

MR. YELENOSKY: And I haven't thought through all of the circumstances where that may come up, but there is a letter from an attorney with attachments regarding this issue in there, in the --

MR. SUSMAN: Well, all in favor of Rule 19, with some discretion or some direction being given to Alex to look at the service provision and make sure it applies only to nonparties, and for parties it should be no more difficult than taking a deposition of a party. All in favor of Rule 19 raise your hand. All opposed. One opposition. Oh, God, raise your hand if you're in favor again, please.

PROFESSOR DORSANEO: Yeah, maybe make it worth it.

MR. SUSMAN: 18 yea; one nay.

We now --

CHAIRMAN SOULES: Is there a reason why we took out the request for documents from nonparties?

MR. GOLD: It's in another spot.

CHAIRMAN SOULES: Where?

MR. GOLD: It's in the request for production.

PROFESSOR ALBRIGHT: I think we just put it in subpoenas, didn't we?

CHAIRMAN SOULES: So now we're back to you have to take a deposition to get documents?

PROFESSOR ALBRIGHT: Well, I think -- I don't -- if we took it out, it's because no one ever hears of anybody using a motion to produce.

MR. KELTNER: Is this to nonparties?

MR. SUSMAN: Yes.

MR. KELTNER: On the task force, we have a task force rule which does the same thing as the old statute that we can just plug in there.

MR. SUSMAN: I think I can answer the question. The answer to the question is no, there's no reason we did it. We just forgot it. Okay? The subcommittee does indeed need to meet once again in Galveston, this time for a three-day weekend, to prepare a rule dealing with -- no, we will meet, obviously. We have totally neglected getting documents from third parties.

PROFESSOR ALBRIGHT: Well, no, we haven't totally neglected them.

MR. SUSMAN: We haven't?

PROFESSOR ALBRIGHT: No, because you can subpoena them with a deposition, which is the way most people get documents from nonparties, is by noticing the deposition of a document custodian. And we have addressed that in our deposition rule.

MR. YELENOSKY: But that doesn't help my problem, because the custodian of records is going to be somebody at the TXMHMR, not the person whose records are at issue.

PROFESSOR ALBRIGHT: Right. So I'm saying we'll put your mental health

problem here, but --

MR. SUSMAN: Alex --

MR. YELENOSKY: It's not my mental health problem.

PROFESSOR ALBRIGHT: I just didn't want it to be on the record that we had totally forgotten about getting documents from third parties.

MR. SUSMAN: I agree. But I think what Luke is talking about is we ought to abandon the fix of having to depose a third party to get documents from them. There should be a simpler procedure for getting documents from a third party without actually having to go send a court reporter and taking a deposition.

PROFESSOR DORSANEO: Under the federal rules, you can just use a subpoena for that purpose now without taking a deposition.

MR. GOLD: There was one other consideration on that, and we may have discussed it in the task force and not on our subcommittee, and that is, under the request for production rule, the nonparty has to respond in the court in which the case is

pending; whereas, if you subpoena the records of a nonparty in a different county, that party can -- that individual can assert their objection in that county and get it resolved. We talked about that in the task force.

MR. KELTNER: And soundly rejected it.

MR. GOLD: No. That's the present rule.

MR. KELTNER: No, no, no. Remember the Anthony vs. Teachers' Retirement case?

MR. GOLD: Yeah. I thought about it last night.

MR. KELTNER: Well, we have a rule in the task force I think we can plug in that will take charge of this issue.

MR. SUSMAN: All right. Dave Keltner is in charge, then, on behalf of the subcommittee of drafting a rule that deals with getting documents from a third party in a simple straightforward way.

We now turn to Page 40.

CHAIRMAN SOULES: While we're on that, let me ask you, Mr. Chairman, to have

someone on your committee go through the existing rules and identify every -- just everything that the existing rules facilitate that is not being carried into the new rules --

MR. SUSMAN: Alex.

CHAIRMAN SOULES: -- so that we do not let something fall through the cracks.

MR. SUSMAN: I agree.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: That will be assigned to Alex.

PROFESSOR ALBRIGHT: That sounds like fun.

MR. SUSMAN: Now, Pretrial Conference, Rule 166. I don't think this will be a terribly -- well, this has never been controversial on our subcommittee, and I don't think anyone is going to have a real problem with it.

Item 1(c), the scheduling order, including a Discovery Control Plan, you're going to have to look back at Rule 1 when we get there in a few minutes to see what that

means, what a Discovery Control Plan is.

MR. HERRING: Steve, let me ask, and maybe you want to wait until we get back to Rule 1, but parties can agree to a Discovery Control Plan or a court order?

MR. SUSMAN: Yes, either way.

MR. HERRING: If the parties agree, Rule 1 says -- I think you've basically answered it; that they may file it. And if they do file it, is it then enforceable in any way other than your exclusion remedy under Rule 6? In other words, if I don't have a court ordered discovery control plan and we just agree to it and file it, how do you enforce it?

MR. SUSMAN: I would think it would be treated as a Rule 11 agreement.

MR. HERRING: Okay. The only enforceability, then, would be under the general exclusion remedy, Rule 6?

MR. SUSMAN: Sure. Yes, sir. The pretrial conference.

HONORABLE DAVID PEEPLES: Steve, as I look at this as a trial judge, I would think I can do just about anything I

want to at the pretrial.

MR. SUSMAN: I think that's right.

HONORABLE DAVID PEEPLES: Yeah. But I think several years ago Rule 166 was expanded and many more things were listed explicitly so judges would know "You have this power. No doubt about it, we have given you this power." And I'm just wondering if by boiling this down and making it more general there won't be some judges who kind of think, "Well, it doesn't say so in here. I probably can't do it." I don't, you know --

HON. ANNE TYRRELL COCHRAN: Anne Cochran. I just compared the rules too, but -- go ahead, Scott.

HONORABLE SCOTT BRISTER: I thought that too, and I have been reversed twice by my courts of appeals who unfortunately incorrectly didn't read it quite as broadly as I did.

The problem with (d) here, "Determination of uncontested and contested issues of law," the point arises, you show up at trial, both sides -- it's a coverage dispute, a liability

insurance contract, and did we have coverage, do we have a duty to defend them on this case. I've seen lots of these.

And it immediately jumps into my mind that there is an eight-corners rule and there has been for 100 years. We don't have to worry about all this. Just look at the plaintiff's petition, look at the insurance policy, is it within eight corners or not, and decide.

Both lawyers look at me like lightning has struck them. They've never heard of this thing before, and they're ready to call 10 witnesses each to put on proof of duress and what all we were going to do, the discovery in the case.

And I say no, no, no, no, no. This is eight corners. You give me a brief, you give me a brief, and I'll decide whether it's within eight corners or not.

That one I happened to be affirmed on appeal two to one, because the two found that I had declared a non-jury trial, which nobody thought I did --

MR. McMAINS: Which was news to

you.

HONORABLE SCOTT BRISTER: -- that I declared a non-jury trial over everybody's jury request to determine this.

Do we mean, as I think we should -- and this arises in far more cases than cases you all would be in, because these things would strike you too, but lots of people don't think of things until they come down the week before trial and the judge looks at them; he can't try this.

And I have been told in another specific case, yes, I was exactly right, it is a matter of law, but no, I may not skip the rules of summary judgment. I may not declare what the law is. I must sit through the first five days of listening to witnesses as a total waste of time, everybody knowing I will have to direct a verdict on it. Do we mean --

MR. SUSMAN: Could I --

HONORABLE SCOTT BRISTER: Do we mean determination or do we mean agreement as to what's contested and uncontested?

MR. SUSMAN: Could I take the chicken's way out, and that is, on behalf of

the subcommittee, remove this as a rule which we present? I kind of don't know how it got there. I think -- I'm kind of thinking, Scott, out loud.

HONORABLE F. SCOTT McCOWN: Well --

MR. SUSMAN: We have now put in Rule 1 the Discovery Control Plan, which is really what we were concerned about. We are a discovery subcommittee. I mean, we are not dealing with everything else that a court can do at a pretrial conference. That is not within our prerogatives, like, you know, sanction people and do other kinds of things. Shouldn't we just say that this is not our problem? It's some other committee's problem. I mean, I just -- that's a possibility.

HONORABLE F. SCOTT McGOWN: Well, the reason it's here, Steve, is because, if I understand correctly, it was within the numbers that were assigned our committee.

Now, this is basically my draft, and we can make a little legislative history. There is no change that was intended in any way to

diminish the power of the trial court. And if we need to add a comment, that might be helpful. But I think somebody has got to review the pretrial conference rule. I think this version fits with what we've done. It may be that people have ideas about what a pretrial conference rule needs that the present rule doesn't have that they want to add in here, and we can talk about that and add it in.

MR. SUSMAN: Anne.

HON. ANNE TYRRELL COCHRAN: I think we need to clarify the fact that, at least from my perspective, there are two points that have been raised about Rule 166 that really are different.

As Scott can tell you, a few minutes ago, as I was reading ahead, I was reading this committee proposal, and immediately had the same reaction you did: You know, my God, they've cut it down to a third of what it was. Which powers have they deleted? And then I -- so I made Scott loan me his book, and I looked it up, and I learned that the only ones that were deleted were the ones that

repeated themselves five times.

I mean, so in substance, you know, what Scott is talking about is the question of does 166 go far enough to satisfy all trial judges and trial lawyers and everybody else in the world? But to the initial question of have we somehow cut back on the pretrial powers, I just went and double-checked it myself because my reaction initially was the same as David's, and I'm fine with it. If you go back and compare them, you start checking off, oh, yes, they say "uncontested questions of law and fact" five times. And that's why it looked sort of --

CHAIRMAN SOULES: Well, that's not true, Judge Cochran.

HON. ANNE TYRRELL COCHRAN: Well, Luke, what do you think is left out?

CHAIRMAN SOULES: The written trial objections to the opposing party's exhibits.

PROFESSOR ALBRIGHT: That's trial procedure.

HONORABLE F. SCOTT McCOWN: Well, you can make --

CHAIRMAN SOULES: Proposed jury charge questions and instructions.

HON. ANNE TYRRELL COCHRAN: That's in there. Proposed jury charges --

MR. SUSMAN: Exchange of exhibits.

HON. ANNE TYRRELL COCHRAN: -- and exhibits. Maybe just not the objections to exhibits.

HONORABLE F. SCOTT McCOWN: It says that "Trial procedure, including exchange of proposed jury charges or findings of fact and conclusions of law, and exchange of exhibits." I mean, this is kind of a philosophical drafting issue.

What I've done is say that you can make a pretrial order about anything in the world, and I have included kind of the logical big examples, and don't mean by including the logical big examples to leave out logical little examples, but just thinking that a long list didn't add anything to a short list.

What Judge Brister has raised is a very difficult question of procedure, not one of discovery, one in which trial judges and trial

lawyers have different perpectives. And I think courts of appeals tend to side with the trial lawyers on it, and I don't know that we want our subcommittee to get into that because it's a tough nut.

MR. HERRING: Well, haven't you done that when you add "contested issues of law"? Because you didn't have that before in 166.

HONORABLE SCOTT BRISTER: Well, what you had before is --

HON. ANNE TYRRELL COCHRAN: It was in there about four times.

HONORABLE SCOTT BRISTER: -- where you have a simplification of the issues, is one of the things where we had it; and let's see, and contested issues of law in Part (j), Agreed applicable propositions of law and contested issues.

I agree with Anne, I think. The same as we did on the Sanctions Task Force, it makes sense to shorten these things, burn less trees and say in a comment we're just intending to be more concise, not less coverage.

CHAIRMAN SOULES: Okay. 166

was a virtually unused rule until after 1990. And this committee got drafts of a lot of pretrial orders and orders preliminary to pretrial and orders from federal courts and went through and tried to list everything they could find in any of those pretrial orders or orders preliminary to pretrial to expand Rule 166 so that it spelled out for the trial judges a lot of things that they could do. It was a very short rule before 1990.

Since 1990, cases -- the appellate courts have started deciding cases that involved Rule 166, and I don't think there was a case before 1990. There were a few. There are a handful. So that did accomplish what we were hoping would be accomplished, and that was some activity at the trial bench of using 166 to do some things.

The problem with -- another problem the appellate courts are having and the trial bar is having on Judge Brister's problem of getting legal rulings ahead of trial is that nobody is looking at the right rule. The right rule is 248. Rule 248 says the trial judge is supposed to decide questions of law

before commencing the jury trial. If it is dispositive of the case, it's over. It doesn't say if it's dispositive of the case it's over, but that's what 248 says. And this committee also amended Rule 248 in 1990 to do exactly that.

So really, Judge Brister, what you're doing is not a summary judgment. I think it's you're ready for trial, what are your law points, I'm going to rule on those, and if you've got anything left, we'll pick a jury. If you don't have anything left, I'm going to assign a judgment. That's what 248 is for.

To retreat on 166 just four years after we're into activating it, and I think it's legitimate to say that we have activated it by putting in a lot of this, to me is counterproductive. That's just my view.

MR. SUSMAN: Joe.

MR. LATTING: Well, it seems to me what we could do, without retreating but still not making it longer than necessary but keep Scott's basic drafting, is just to say, "The court may consider any matter that would aid in the disposition including, among

others," or "including, without limitation," to make it clear that we don't propose to have an exhaustive list here. I mean, I don't --

MR. SUSMAN: I guess I'm not supposed to say this, but I mean, I kind of -- I'm kind of with Luke on this one. We have not paid much attention to this in subcommittee from the first time we got a draft of it. But if it's working okay --

CHAIRMAN SOULES: It is tough to get a trial judge to pretry a case.

MR. SUSMAN: If it's working, do we really care? Is it worth debating?

CHAIRMAN SOULES: It's tough. What all -- even when you can't get him to pretry the case --

HONORABLE DAVID PEEPLES: Can I say something: It helps for a judge to be able to look in the black-letter law and to find it right there, you know. It just gives you some backbone to decide "I can do this."

And it helps in the appellate courts too, when some person who maybe, you know, does not excel in the law --

MR. SUSMAN: Anne.

HON. ANNE TYRRELL COCHRAN: It seems to me I made a mistake, which is what I do from time to time, and maybe a few of you have done it at least once in your past, you know, in checking something, a list, real quick and saying, "Yeah, I think it is."

I mean, once you start looking, and you know, comparing -- I was looking for buzz words and not realizing that, you know, "identification" is quite a different thing from "determination"; and that if you get a little too general, you now have that the trial judge can determine contested issues of fact at the pretrial conference. I mean, I think that's a little broader than anybody wants to do.

It seems to me, though, that that doesn't mean, and I don't think any of us should endorse, even if we don't want to make any substantive changes in the pretrial rule, to not go back and try to at least organize what's currently there because it's been added on so many times. But if we could just very carefully organize it without trying to cut anything out that's there, because, just as

Luke said, it's hard to get a judge to want to pretry a case, there sure are a bunch of lawyers that sure are going to demand that it's written in the rule that you can even make them talk about something at the pretrial conference.

MR. SUSMAN: Paul.

MR. GOLD: I move that we withdraw from consideration Rule 166 --

MR. SUSMAN: I second it.

MR. GOLD: -- and send it back to committee. It's enough at this time merely to have the present Rule 166 in consideration in order to add the Discovery Control Plan.

MR. SUSMAN: The motion has been made and seconded that we withdraw the recommendation of 166 and send it back to subcommittee -- for what purpose?

MR. GOLD: At least for the consideration of merely adding to the present Rule 166 the concept of considering the Discovery Control Plan.

MR. SUSMAN: And perhaps we're deep-sixing it forever?

MR. GOLD: I think so.

HON. ANNE TYRRELL COCHRAN: Deep-sixing 166 forever?

MR. SUSMAN: No. Just this version.

HON. ANNE TYRRELL COCHRAN: Oh, okay.

MR. SUSMAN: All in favor --

MR. GOLD: I move we just withdraw 166 and submit it by --

MR. LATTING: Could I ask a question? Scott, do you think that this draft substantially limits or curtails you?

HONORABLE F. SCOTT McCOWN: Well, I'm convinced by Judge Peeples. I'm a trial judge that if it was one sentence long and it said the court may consider any matter that may aid in the disposition of the action, that's all it would need to tell me.

MR. GOLD: I reverse my motion.

HONORABLE F. SCOTT McCOWN: I've got sufficient backbone that I would do whatever I wanted. But I'm convinced by Judge Peeples that for the trial bench in general it would be helpful to aid them in doing things to have a specific list, so I'm convinced that

my original approach was wrong, and I agree that we ought to send it back to the subcommittee.

MR. SUSMAN: All in favor raise your right hand. All opposed. 166 is withdrawn.

We now get to the final rule, I mean, before we go back to -- I mean, before looking at the rules that were passed.

Amendments and responsive pleadings. This is the rule that says where there is a discovery period -- and keep in mind that the only time this rule applies is in Tier 2 cases, because you don't have a discovery period in Tier 1 cases; and in Tier 3 cases, well, you might have a discovery period, but it will be set by the court. So we are talking about pleadings may be amended typically in this situation after seven months of discovery and two months before the discovery period closes.

We thought that some of the resistance we sensed from the -- well, I'm sure a lot of the resistance we sensed several meetings ago discussed the notion of limiting discovery,

restricting the time allowed for discovery; was the notion expressed by many lawyers that if we could only get the plaintiff to stay put in one place long enough, these rules would be fair. But if the plaintiff is going to act like a blob of mercury and you can never get stuck to the ground or to the wall his contentions, that these limits would not be fair.

This timing is scheduled so that it ends at the time witnesses, experts, have to be designated under our expert rule, so no expert will be deposed until pleadings become final. And that's the thought here.

MR. LOW: No experts to be deposed until the pleadings become final?

MR. SUSMAN: The pleadings become final 60 days before the end. The expert's -- the first expert's deposition will take place between that 60 days and the next 45 days, in that time period, if you look back at the expert rule.

CHAIRMAN SOULES: You can't take an expert's deposition earlier in the case?

MR. SUSMAN: No. Comments on this rule? Yes, Sarah.

HONORABLE SARAH DUNCAN: Is it the subcommittee's intent that leave to file an amendment must be granted only if there is insufficient time to complete discovery, or are we completely dropping all other reasons for denying leave to amend, like surprise, prejudice, adding new claims and defenses?

MR. SUSMAN: Just what is there in print. In other words, we have -- I mean, that's -- the basic feeling is if you've got enough time to complete discovery, you ought to grant leave. Right, Scott? I mean, this is --

HONORABLE F. SCOTT McGOWN: Yeah. I'm not sure what -- if Sarah could give a specific example, I can't visualize it.

HONORABLE SARAH DUNCAN: Well, for instance, say you've got a motion for summary judgment by the defendant on grounds of limitation, and all of a sudden we get fraudulent concealment claims. There's a motion for summary judgment set. It's been worked up to the tune of a couple of volumes.

Can you then only deny the motion because of some discovery problem? What about the defendant that's relied on those pleadings being the way they are and prepared a motion for summary judgment based on it?

HONORABLE F. SCOTT McGOWN: Okay. This rule is a trial rule, and I know that case law says that summary judgments are trials, but we wrote this with trials in mind, and I think the amendment rules for summary judgments ought to be written specifically for summary judgments. This is a trial rule.

HONORABLE SARAH DUNCAN: Well, but the same thing applies with a trial. I mean, if you get up to -- you've been -- you know, a case has been on file for five years, and all of a sudden 60 days before the end of the discovery period or five days after receipt of a notice of trial setting, all of a sudden the plaintiff comes in and asserts fraudulent concealment, and the only reason we're not going to let him do that is because we can't get discovery on it? I mean, that just seems fundamentally unfair to me.

MR. SUSMAN: That couldn't

happen, obviously, because you have a nine-month discovery window, unless it never opened.

HONORABLE F. SCOTT McGOWN: I think there's a slightly different answer, Steve, because that's the way we do it now; that right now, as long there is no prejudice, meaning you can be ready for trial, we allow leave to amend. You're suggesting that when you have spent money and developed a case that that ought to be the case; and if people have new ideas close to the end, they ought not be allowed to interject them. That's not the law at present.

HONORABLE SARAH DUNCAN: I think that's a factor the trial court can consider in whether or not to deny leave.

HONORABLE F. SCOTT McCOWN: No, no, no.

HONORABLE SARAH DUNCAN: No? Okay. Never mind, then.

MR. SUSMAN: Any other comments? Yes, Anne.

MS. McNAMARA: Making the leave mandatory unless there's insufficient time to

complete discovery I don't think is enough with this rationing of discovery time. The defendant, for example, may be planning their discovery assuming one cause of action. They may have gone through 45 of their, whatever it is, 50 hours of discovery time. There's still sufficient calendar time left to complete discovery, but you don't have enough hours left in your bank to do it. If you then have the pleadings amended to include some whole new theory and you haven't taken any discovery on it, you're out of luck, I think, unless I'm missing something.

MR. SUSMAN: Well, let's -- I mean, clearly it would caution a careful lawyer to save some of your 50 hours until after --

HONORABLE F. SCOTT McGOWN: No, no. She's right. We need to fix that problem.

MR. SUSMAN: Do what? How?

HONORABLE F. SCOTT McGOWN: We can add a sentence to the rule that says that -- this is not the drafting, this is the concept -- that if there's sufficient time but

there's not sufficient time left on the clock, the court can adjust the discovery time as necessary.

MR. SUSMAN: Well, the court has that power anyway, Scott.

HONORABLE F. SCOTT McCOWN: Well, sure. But I think that it wouldn't hurt to add that sentence there.

HON. ANNE TYRRELL COCHRAN: As long as it's discretionary and not just a way to get around the clock.

MR. LATTING: But that's contrary to the McCown philosophy of cluttering up the rules.

HONORABLE F. SCOTT McCOWN: No, I don't think so. I think she's raised a very good argument, that what the trial judge has to look at is not only the calendar time before trial, but now he's got a new cause of action, time has been spent on the clock, the trial judge needs to make an adjustment in the discovery hours. I think it's going to have to be done in almost every situation and we ought to add a sentence there to direct them in that area.

MR. GOLD: Steve, I think Judge McCown is right, and I disagree with the concept that you were advancing. I don't think that you should have to save certain hours in anticipation that someone at the end will plead. I think that's counterproductive. And I really think that this is part of the tiering concept that we've tried to incorporate throughout that encourages people that if they're going to make amendments to make them earlier knowing that if you're going to make an amendment at the end, it may add additional deposition hours for the other side.

MR. SUSMAN: All right. Wait. Scott, what is your proposal? Let me make sure I understand what you are proposing and where.

HONORABLE F. SCOTT McCOWN: Well, right after -- excuse me, right before the very last sentence, we need to insert a sentence that says -- and this is the concept, not the drafting -- that says if the trial judge is going to -- even if there is sufficient time on the calendar to complete

the discovery so that the trial judge is going to grant leave to amend, the trial judge nevertheless should think through the problem of whether the discovery hours need to be enlarged, not that they have to be enlarged, but they need to think through that and enlarge the discovery hours, if that's what's fair.

MR. SUSMAN: I agree. No problem. You mean we would modify the next to the last sentence essentially in some way?

HONORABLE F. SCOTT McCOWN: Right.

MR. SUSMAN: Anne.

HON. ANNE TYRRELL COCHRAN: Now that we've taken care of that situation, could we also consider amending the next to the last sentence, which basically says "the court has to grant leave unless," to add another "unless" along the lines of unless the trial court finds that, you know, the reason for the late amendment to the pleadings was because they were trying to get around the discovery limitations? I mean, otherwise you're going to have people who really are bucking about

these limitations who are going to look at this and say, "Well, this isn't a limitation. We'll just, you know, take the first fourth of our discovery and then amend, you know, the pleadings and then the judge will have to give us, you know, 20 more hours of deposition, and then we'll add our next cause of action." I mean, there has to be something to prevent that. The way it's written now, the court has to grant leave unless...

MR. SUSMAN: Well, as I understand it, the party who is doing the amending doesn't get more time by virtue of the fact that you amend. Okay? We don't want the amending party to be able to buy more time by amending. It's the opponent who gets more time.

And what we are saying is, if you wait until 60 days before the end of the discovery period and during that time period amend, the trial judge should -- you've got to get leave of court, and the trial court should grant leave unless there's not enough calendar time or enough vehicle time left, in which case the court should consider either extending the

calendar time or the vehicle time basically, right?

HONORABLE F. SCOTT McGOWN: Right. But what Anne is saying is when we draft this, we need to make sure that we adjust the time for the one opposing the amendment and not for the one urging the amendment.

MR. SUSMAN: Yeah, opposing it. Is that --

HONORABLE DAVID PEEPLES: I want to speak to that.

MR. SUSMAN: Yes.

HONORABLE DAVID PEEPLES: You know, this does happen a lot. I'm faced with a last-minute amendment to the pleadings. And it seems to me the judge ought to have the discretion to say no, the pleadings as they are will fairly frame this case. Everybody is going to get their day in court, and I'm not going to make these young lawyers work 18 hours a day, you know, getting this case ready. There's always time left if the judge is willing to say, "You're going to drop everything else you're doing and get this case

ready for trial."

And we read articles in the Bar Journal almost monthly about stress and quality of life. And here we're just almost saying that when somebody wants to amend at the last minute, the judge has to give it to them and expand the calendar and make them work their tails off at the last minute.

Why can't we let judges say, "Look, the pleadings as they are fairly frame the case. You're going to try it the way it is and you're going to have the rest of the time to get your case ready without having to go take a bunch more depositions."

HONORABLE SARAH DUNCAN: Yes.

HONORABLE DAVID PEEPLES: I mean, really, it is in the legal profession's interest and everyone else's to give judges the discretion to say, "I think the pleadings the way they are are all right. Enough is enough."

MR. SUSMAN: Scott.

HONORABLE DAVID PEEPLES: And if it really is something that needs to be in the pleadings, okay, you can do it.

HONORABLE F. SCOTT McGOWN: But wait, there's a history to this, if I could argue the flip side now. Most pleading disputes are irrelevant. In other words, a guy comes in, he wants to amend his pleadings because he doesn't have them quite in order or he hasn't plead something that they've done all the discovery on or assumed or he forgot to put in the interest. Most times when pleadings are amended, it doesn't change the nature of what's going to happen anyway or what would have happened anyway.

And the history was and the reason we went to the free amendment rule is because people were losing cases they shouldn't have lost or causes of actions or interest because we had technical rules. And I actually think it would wind up being more stressful and more worrisome to operate under a regime that you couldn't get your pleadings cleaned up than it would be to operate in a regime where you could freely clean up your pleadings.

MR. SUSMAN: Joe.

MR. LATTING: I'd like to speak on this, and I'm going to stand up because

this is so important to me.

We're about to make a major change in the way we practice law if we pass this rule and the Supreme Court adopts it. Whereas we now have the right to amend without leave of court up to seven days unless it's an unfair surprise to the other side, what we're saying here, if we have a case -- and I do have one or two set toward the end of this year that have been on file for some time. This means that our pleading changes are through 60 days after the discovery period, so that means I can't amend any pleadings for a case that's set in November of this year. And this is a huge change in the jurisprudence of the way we try cases.

And may I add that this automatically falls under the second tier of cases, and if we adopt that rule, it's going to mean that we're going to have to amend -- plead our cases and have them all in mind and ready to go to trial, and then they're going to sit there for months frozen, and I don't think that's going -- I think the bar is going to be outraged.

MR. SUSMAN: Joe, wait a minute. Let me see if I understand. Let me see what we've got. We've got the position stated in the rule, which is Scott's position, that it's okay to put a deadline of 60 days prior to the end of the discovery period but you need to have some play in the joints.

We've got David's position, that at 60 days you ought to encourage the judge to say, "You've had four months, forget about it."

And then we have your position that says I don't even want the 60-day cutoff even with the flexibility of Scott's rule. Is that fair, or are you arguing for Scott's -- I'm not sure if -- is yours a third -- can you accept this rule, or are you against the rule because this is a change?

MR. LATTING: I'm against it because it's too long before the trial. I'm particularly toward or for changes in pleadings that don't unfairly disadvantage the other side.

MR. SUSMAN: All right. Let's argue, if we can, let's focus the debate, if

we can, on the strictest rule, which is the Dave Peeples rule, which is the rule that says at the end of four months you've got to get your pleadings in order. And if you don't, the judge can say, "Tough. I'm not going to make the other side go do more work even though there's plenty of time to do it, okay, even though he's got hours left. You should have done it earlier."

How many people here are -- let's have a show of hands, a straw vote.

HONORABLE DAVID PEEPLES: I want the judge to have the discretion to do that.

MR. SUSMAN: How many people think the judge should have that discretion? 11.

How many think the judge should not have that discretion? 12.

I think it's --

MR. LATTING: And Steve, let me say, I don't think he should not have the discretion. My concern is, I think he has that discretion under the pretrial order as it stands today. I don't think we need this

rule. My concern is that this is automatic, and that's what the problem is. I think it will -- that's my problem, is that it's an automatic fail-safe.

HONORABLE F. SCOTT McGOWN: But that's not really -- what Judge Peeples just described is not really discretion. Discretion is when there's a standard and you apply that standard within a range. But just to say no because they've had enough time is not a standard. That's just capriciousness. You know, the question is, what is the trial judge supposed to do?

Under our present system, he is supposed to let people amend their pleadings unless there is surprise, meaning that the amendment in cooperation with the trial setting is going to leave the person who is opposing the amendment unprepared, unready, unable to go to trial.

The standard in this rule would be that he's supposed to allow the amendment unless there isn't time on the clock or time on the calendar to get ready to go to trial. So this rule is really no different from the present

rule; it's only adapted to our discovery window.

MR. LATTING: That's right.

MR. SUSMAN: Keltner.

MR. KELTNER: I have, I guess, two observations. I don't know if we're focusing on the right thing. The truth of the matter now is, on cases that do get pretried, and I'll agree with Luke that probably not, in my opinion, enough do, we already have a fairly absolute rule.

The other problem is that if we're going to give them a rule to play by, I agree with David in many instances, that you can get up to the last minute and you have the hard problem of you've got to do a whole lot of work at the end of the case that doesn't make much sense.

But more often what happens is like what Scott said. Everything has been done, the discovery has been done, the witnesses are designated, and everything is worked out, and just somebody through a technical problem hasn't gotten exactly what they needed.

And I think if we can focus in terms of

changing the standard, to build in some discretion for the trial judge and maybe broaden what the discretionary playing field is on the things that the court is to consider, then I think maybe that would be better.

In response to what Joe said, and I think this is extraordinarily important, this system of justice isn't going to get one penny cheaper for the people who are in it unless we prepare for trial one time and go to trial or have the case resolved. That's truly what costs us money. So the truth of the matter is, we have to have a system -- and that's one of the reasons, Steve, we had the window, the discovery window, is to encourage that issue.

And Joe, it is true that currently you get ready and maybe there's a period of time. But until cases are finally prepared to go to trial, no system that we put in effect is going to ensure that they get to trial or get close to a position where they can be resolved. So my thought process is there's got to be a cutoff period at some point. We

have to give some, maybe a little bit more, rein, Scott, than we have been up until now to the things that the court can consider and deal with in that way.

MR. SUSMAN: Coming around the table. Luke.

CHAIRMAN SOULES: Under this Rule 63, the only reason that a judge can deny the amendment is insufficient time to complete discovery. Either the period, the overall period is going to end or there's no time left on the clock. So we're scrapping the old 63 standard where the judge could deny leave to file -- of course, this was within seven days. We move seven days back to 60 days now, so --

MR. LATTING: No, it's not 60 days.

CHAIRMAN SOULES: Well, to whatever it is.

MR. LATTING: It may be a year.

CHAIRMAN SOULES: Well, it may be a year. Anyway, it's earlier. A lot earlier.

MR. LATTING: A hell of a lot

earlier.

CHAIRMAN SOULES: Compared to seven days, it's a lot earlier.

MR. LATTING: A whole bunch.

CHAIRMAN SOULES: And the judge cannot deny a leave to file if the new amendment is a surprise to the adversary, prejudicial to the adversary, or asserts a new cause of action. It cannot do that. Even though it asserts a new cause of action, it's prejudicial to the opposite party and is a surprise, the judge's hands are tied because he can only deny a trial amendment -- or deny amended pleadings on the basis of discovery. It's altogether discovery driven. Is that what you want?

MR. SUSMAN: Yeah. But all of that is -- surprise, I mean, in the abstract, surprise is immaterial, unless it causes you some harm. If you have time to engage in discovery, it's hard to see the harm.

Prejudice. I mean, what's the prejudice? I mean, where is the prejudice if you have the time to complete discovery and can fairly defend the claim? So I'm not sure

that --

CHAIRMAN SOULES: So you want it discovery driven? You want it altogether discovery driven?

MR. SUSMAN: Yeah. I want it discovery driven because I put the deadline back. I made the deadline occur so quickly, because I want to basically tell the lawyers of this state, "Get your pleadings in order quick. It's a new ball game."

But then I want to be fairly fair and reasonable about what I'm going to do if they don't. I mean, I don't want it to be doomsday for them if they -- if there's some technical problem and there's time within the discovery window to fix it.

Bill Dorsaneo.

PROFESSOR DORSANEO: I think we have to look at some more of the rules here. You have to think about the trial amendment rule too, maybe. Right now, the way our rules are structured, we have this short period immediately before trial, and then the trial amendment rule operating under essentially the same standard, surprise, prejudice -- and

actually, I think our case law treats trial amendments and amendments that require leave of court essentially the same way.

Now, what you're talking about here earlier on is really a rule that would say that leave to amend should be denied if it messes up your discovery game plan. That's really worded the other -- it's worded "leave should be granted unless," the way you have it worded, and I haven't gotten it completely thought out, but it seems to me that there's this category of cases where you maybe wouldn't need to have any additional discovery but there still would be a surprise or prejudice problem that would be appropriate to deny a trial amendment. It may not be a large class of cases. Even a new cause of action wouldn't necessarily be a surprise or prejudice, and I could think of cases where a new cause of action ought to be allowed to be added in because it wasn't a surprise, there's no real prejudice, and somebody needed to add it because otherwise limitations would run on that claim or will have run on the claim.

So I think you need to go back to the

drawing board and focus on the whole amendment process, the trial amendment process, the standard there, the time between the time of trial and the end of the discovery cutoff period, and what could be involved there with or without discovery, and then this earlier contrast.

MR. SUSMAN: Anne.

MR. LATTING: Yes. Hear, hear.

MR. SUSMAN: Anne.

HON. ANNE TYRRELL COCHRAN: Steve, you know, if you look at what most pleadings -- or even where leave is granted after the seven-day-before-trial period, and most, like you said, or all of the surprise and harmful effect and everything usually turns on whether or not they waited, hoping -- you know, hoping it would be, you know, a surprise at trial and they would not have done any discovery or asked the right questions in discovery. 99 percent of the amendments are things like "I forgot the judgment interest," "I didn't take any" -- I mean, we have some pretty arcane pleading rules in some of the older causes of action; you know, I didn't do

this or that. Or maybe it's technically a new cause of action, but it's exactly the same, very simple set of facts that have been discovered to death during whatever discovery period there is. For those, even under the rest of the scheme that's being proposed here, the current rule about, you know, seven days before trial, two days before trial, I mean, anybody is going to let those go. Nobody would even dream of asking for more discovery on them. You don't have to worry about how close it is to trial.

It seems to me the only thing under your current proposal where pleadings even affect the discovery issue is when they really do, you know, change it from a straight document case to, you know, a malicious, you know, you have to go discover the evil hearts of the people on the other side, you know, where it really does change it. And then you really need to have -- but for most cases and for most of the purposes of this, I don't understand why -- maybe even for the whole thing -- why the current amendment rule needs to be changed at all to serve the purposes

that you're trying to get to.

MR. SUSMAN: Well, to speak to that a little, just to speak to it, and maybe it doesn't, but the history of it, Anne, was the feeling that absent a discovery cutoff date under the current system, yeah, pleadings can be amended until seven days before trial, but discovery can go on until very close to trial, too.

Our system said not only are we going to limit discovery so there's going to be an end to the discovery period which could be months before the trial, but we're going to limit the amount of discovery vehicles. And a lot of people complained, as I said before, that that's a problem in Texas because people can always amend their pleadings and you're shooting at a moving target, and this was the thought.

And therefore, we thought we had to monkey with the amendment rules to make sure that there was a point in time at which the picture became fairly static and the discovery vehicles could be used.

HONORABLE F. SCOTT McGOWN:

Steve?

MR. SUSMAN: Scott.

HONORABLE F. SCOTT McGOWN: I agree with everything that you said and everything that Anne said and everything that Bill Dorsaneo said, but the problem is --

MR. SUSMAN: I move. So moved.

HONORABLE F. SCOTT McGOWN: -- but the problem is that under this discovery regime we have both a clock and a calendar. And what this rule is designed to do is to say that if you've got any kind of cause of action that is going to necessitate discovery, that's going to affect the clock and affect the calendar, you have got to get it on the table at a certain point before the calendar runs out.

If it doesn't affect discovery, then it ought to be treated exactly like it's treated under the present system, which I think is the point that Anne and Bill are making. And so what we need to do is redraft the rule so that it's clear that if it's a calendar issue, you've got this rule; if it's not a calendar issue, it's the same as it's always been.

MR. SUSMAN: Paul Gold.

MR. GOLD: I agree with Scott on that. I think that we should not lose this rule as the discovery subcommittee has submitted it. I think it's a very important concept.

What we have now, even when we get pretrial orders from the courts, is that the pleading deadline is long after the discovery deadline. And one of the things that that perpetuates is motions for continuance, surprise, gamesmanship, and because someone always holds in their hand the ability to change the whole complexion of the case after all the discovery is completed. And the concept here was to get at -- as Steve said, get the case out there, what the issues are, do your discovery and get done.

And I agree with Scott also, that if it isn't an issue that revolves around additional discovery, then sure, Bill is right. We should keep intact the discovery under the present rules that allow minor tinkering with the pleadings and no one is prejudiced or whatever. But I think we should go with the

concept that the subcommittee has put forward here because I think that it's laudable.

MR. SUSMAN: Rusty.

MR. McMAINS: The problem that I have with the idea that there is a different standard, whether you're talking about doing it early on or later on, is that -- is if the standard is anywhere articulated, it's going to require more discovery. Every time somebody tries to amend the pleadings, they're going to argue "I need more discovery," and perhaps even feasibly so. I mean, you can actually make arguments legitimate that would say there is some discovery I would have done or would have done differently that I have used up, even though they're relatively minor and even though all the parties have already talked about everything probably to death in the course of the discovery as well.

A judge, you know, right now under that standard, if didn't surprise him as far as the facts, he's going to allow the amendment. He's got to, basically, even if it's a trial amendment.

Under this rule, if it says "Leave shall

be granted unless" and then it says "there is insufficient time to complete discovery," well, obviously, if it's made after the discovery cutoff, there is insufficient time, which means that all you have to do as a party opposing the amendment is to allege in large measure and convince somehow persuasively to the court that I would have done the discovery differently or that I would have done more discovery or that I would have at least gotten some more witnesses myself to respond to this new claim or whatever, even though that may be pure BS.

So I don't think the idea that there are two standards that you can use based on whether one affects discovery or not is a workable notion. If we have any standard that depends upon a discovery window and a discovery cutoff that is earlier on, that is going to be the centerpiece of the dispute. And we better have a very damn fine defining standard of what that means or there's going to be a lot of people that get screwed up in terms of not being able to amend their pleadings on a technical basis, nonetheless

that arguably deal with some discovery. It would be undisputed that one more deposition could have been taken on that issue. That will affect discovery.

And then at that point he just says --

MR. SUSMAN: All right. Now I'm going to exercise the prerogative of the Chair and call the question on Rule 63. I think we've a lot of discussion. Now let's vote it up or down because I'm --

HON. ANNE TYRRELL COCHRAN: Can we have a minute to think about it?

MR. SUSMAN: What?

HON. ANNE TYRRELL COCHRAN: Even if we promise not to talk, can we have a minute to think about it?

MR. SUSMAN: I tell you what, why don't we take a break now, our afternoon break, for 10 minutes, and come back then and vote on Rule 63. And if you don't like Rule 63, think if there's something else you want in its place, because we need some direction, and I'm missing it in the flow.

(At this time there was a recess.)

MR. SUSMAN: Can we call the meeting to order, please. Where is Anne? The Cochran break is over. Okay. Here is what Scott McCown suggested. I think he's probably right. He and Alex have come back with the suggestion that the subcommittee probably can do some more work on this rule insofar as the standard by which leave is granted by the trial court for amendments. The real question is as long as we have a concept or go with a concept, which we have thus far, of a clock and a calendar on discovery. Discovery ends at a certain point in time and also there is just so much clock time you have for certain vehicles.

Does this group agree with the concept that there should be some deadline on pleading during that discovery window before the discovery window closes, before the discovery period ends? Do not consider what the standard would be. Should there be a deadline, which is a departure from the present system which we're using as the deadline, seven days before trial, which will almost by definition be outside of the

discovery period. All in favor of that raise your right hand. All opposed.

All right. Let me get the count then. All in favor raise your right hand. 19.

All opposed. Four. 19 to 4. Is that right? 19 to four is the vote on that.

MR. MARKS: Now, let me just say that I voted for this. I'm against a discovery window, but if we've got to have a discovery window --

MR. SUSMAN: I understand that. I understand that.

MR. MARKS: Okay.

MR. SUSMAN: All right. The assumption is that there's going to be a clock and a calendar.

MR. MEADOWS: Steve, let me just speak on this point. John, on this point I think it would be -- that was my view as well at this subcommittee meeting we had at your house, but I think it would be helpful for John and others to know the direction we got on this report. I mean, that's something that we didn't even pursue because Justice Hecht said that in addition to discovery, a

limitation on discovery devices, there was going to be a window.

MR. SUSMAN: Well, let me come back to that when we go to Rule 1. But, I mean -- yes, Rusty.

MR. McMAINS: I want to make one comment about the rule that we didn't address, and that is the rule deals with both sides having the same time, which is kind of weird, because it talks about responding as well, so like, you know, the plaintiff files an amended pleading. The defendant's time to amend without leave is at the same time. I mean, if you wait -- in other words, you can file one without leave five months into the time frame, 60 days before the end of the -- or whatever, however many it is, seven days or however long, but you're two months ahead then, you know. One day, you're two months ahead of that, you can file your amended pleading right then without any leave of court. But on the next day, the defendant, who is going to respond to it, has to get leave of court. That looks silly to me.

HONORABLE F. SCOTT McGOWN: We

can fix that by providing a cutoff and then after the cutoff there's 10 days to file any responsive pleading that was filed during the cutoff.

MR. SUSMAN: Okay. I think we have beat this one to death.

CHAIRMAN SOULES: Not quite.

HONORABLE F. SCOTT McCOWN: Not quite.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: When you set the standard for whatever -- when you set the standard for whatever is going to be the basis or the criteria for amending after the free amendment period expires, so we're now within seven days or we're within whatever earlier period now it's going to be. Please keep in mind that we have trial by consent, things that happen during trial that according to our current practice do go to the jury, but they can't go to the jury without a pleading. But the judge gives you a pleading automatically if it's been tried by consent so that you can submit the question on discussion. So unless you're going to also eliminate the whole

concept of trial by consent, whatever that standard is has got to accommodate all kinds of amendments that happened up to and including the period between verdict and judgment, up to judgment, okay, because pleadings are amended up to judgment now.

MR. SUSMAN: And this is delegated by the subcommittee to Scott McCown.

All right. Now, let's go back to the beginning. Rule 1. Yes, I want to get your comments specifically, but let me just give a little introduction here, Judge.

You will recall that at our last meeting, the September meeting, there was a vote. This was voted on, that there would be one category of cases in which discovery would end 90 days from the commencement of the action, unless one party opted out, in which case discovery would end nine months from the commencement of the action, unless there was an agreement of the parties or a court order. That was the vote, and I forget exactly what it was, but it was pretty strong in favor of that kind of concept. It was that concept which we went

back to put into effect in Rule 1, except we did not exactly do it that way for the following reasons: I mean, number one, we were urged by Justice Hecht in a memo -- he liked the concept and told us unquestionably, as Bobby said, that the Court wants this approach with an end of discovery, with some finite end of the discovery period. They liked the three-tier approach.

We then began looking at this problem and considering it, and at one time you will recall that we even came up with the crazy idea, this was very early in our work, that all discovery, both the calendar and the clock, the amount of time you had in full on the calendar and the amount of time you had on each device, you could have kind of a schedule. So if the plaintiff pleads under 50,000, it was to be three hours; if it was 50 to 100, another amount of time; 100 to half a million, another. It was all based upon what the plaintiff asked for, with the notion that if the plaintiff wishes to visit on himself or herself the burden of discovery, expensive discovery, that's their choice.

So Tier 1 actually developed out of that idea, and somehow at the meeting the notion came up that there are a great many cases for damages only. This eliminates injunction cases and eliminates family law cases. It's a suit for damages where the plaintiff's pleadings affirmatively seek $50,000 or less. We exclude costs, prejudgment interest and attorneys' fees. We do not exclude punitive damages, statutory doubling or tripling or amplification damages. And we say that that's the amount, if you plead for that, and you can change your pleading, plaintiff, and if the defendant doesn't come in with a counterclaim seeking more than $50,000.

Then we have by definition a small case, and we have limited oral depositions to six hours per party. We didn't even talk here about side, because it seems like six hours is so small a number that we just do it by party; and 15 interrogatories per party.

We then considered putting a 90-day time limit, a calendar limit on this type of case, but decided that the Tier 1 case should have clock limitations but not calendar

limitations, because the amount of time is so small that who cares when it's done. And indeed, some of the objections to the calendar limitations came from lawyers, sole practitioners, small firms that complained about the radical change in their life that it would make if they had to do things within 90 days; that big firms could do it, but I'm a sole practitioner and so I'm going to need more. As long as they file cases under 50,000, they don't have to do it. And so that is the genesis of Tier 1.

Tier 2, as I've told you, is basically everything else. And Tier 2 is the calendar limitations that we have previously discussed at nine months. Now, on this discovery window on Tier 2, we decided to make it open not at the commencement of the action but instead when the first response to a written discovery request was due, except for the request for standard disclosure, which is a freebie, or when the first deposition is taken, whichever comes first. And it closes 90 days thereafter or 30 days before trial, whichever is earlier.

And then Tier 3 is basically the

tailor-made situation that you get by motion or agreement.

Discussion. I think the judge has asked first, and then I'll get to you, Anne.

HONORABLE C. A. GUITTARD: I have about three concerns with this Rule 1, Section 1(a). One is that "suit for damages" may be more restrictive than you intend. Is any suit for money recovery, whether for damages technically or for restitution or suit on a sworn account or suit on a note? I think you would have all of those within Tier 1 if it's within the monetary limitation.

Secondly, I'm not sure you want to limit it to money recovery. Say it's a suit for title to an automobile or something like that where it's not a big suit. Perhaps this term "amount in controversy" that you have in the heading here ought to be the term that you stick with.

The third concern I have is that probably you mean to say, instead of defendant by a timely claim, does that include a counterclaim and third-party claims, or, if so, maybe it would be better to put that in.

So I would strike out the words "for damages," and possibly say in a suit in which the plaintiff affirmatively seeks monetary recovery of $50,000 or less, or say in a suit in which the amount in controversy is $50,000 or less. I think that gets more to what you're trying to do.

MR. McMAINS: Say that again, Judge.

HONORABLE C. A. GUITTARD: The amount in controversy is $50,000 or less. The amount in controversy is a pretty well understood concept.

MR. SUSMAN: Anne.

HON. ANNE TYRRELL COCHRAN: I mean, if there's further discussion of Tier 1, that's okay, because I have a question about Tier 2.

MR. SUSMAN: Rusty

MR. McMAINS: The problem I have about amount in controversy partly is that there may be some very significant issues in a number of other types of cases. And I know that you're saying "affirmatively allege," but also in divorce cases in which,

you know, the community property may be less than $50,000, I mean, do we really want to be able to make that a race to the courthouse?

HONORABLE C. A. GUITTARD: Of course, in a suit for damages of $40,000 there may be some extremely important questions involved and that may be very complicated. But this is the proposal that you've made, and if you're going to talk about a dollar figure, you ought not to limit it to a technical suit for damages as opposed to some other suit for money.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT McGOWN: I agree with Judge Guittard that we've got the wrong formulation. I'm not sure exactly what the right formulation is.

I can tell you what we intended and what we want to do. We intended to only include cases for money and not for any other kind of relief and cases for money that were 50,000 or less and not family law divisions of the estate. And our thinking was that that may make Tier 1 smaller than would be desirable. There may be other cases that ought to be in

Tier 1, but we don't want to make Tier 1 broader. It's better that it be smaller than desirable than broader than desirable. And you can always go into Tier 1 by agreement. So if that's what the parties want to do, they can structure a Tier 1 lawsuit by agreement or by court order, if they want to argue that the court ought to instruct you to a Tier 1 lawsuit. So we wanted to find some formulation, and I think directly we don't have it, but of language that would catch the gist of straight suits for money.

MR. YELENOSKY: Well, when you draft it, you need to consider if you're going to draw a line between suits for money and suits for injunctive or declaratory relief that you can have a very important suit for injunctive or declaratory relief that has a nominal amount of damages claimed as well, so your language needs to contemplate that.

HONORABLE F. SCOTT McGOWN: If there's declaratory relief, we didn't want it in this tier.

MR. YELENOSKY: Okay. So what if we say, then, that any time you add a claim

for declaratory or injunctive relief that it takes you out of this?

HONORABLE C. A. GUITTARD: Or you say if it's a suit for monetary recovery only.

MR. YELENOSKY: Well, does that encourage people to throw in a claim for declaratory relief in order to get out of it? I mean, is that a concern?

HONORABLE SCOTT BRISTER: That they can do anytime by alleging mental anguish to the extent of $60,000.

MR. YELENOSKY: That's true.

MR. MEADOWS: I think the thinking here was that the plaintiff would want to exercise this Tier 1 so he could control discovery and then be affirmatively appearing to be inferior.

MR. YELENOSKY: But what about the plaintiff who doesn't want to be in Tier 1?

MR. MEADOWS: He can get out.

MR. SUSMAN: He can easily get out. I mean, we wanted to give a way for a plaintiff who wants to get in there in there.

And you know, someone then said, well, a defendant who doesn't want to be in there can always drop -- I think it was me -- can always hokey-up a counterclaim to take the case out of Tier 1.

But then people said no, there are a lot of cases where you can't really even hokey-up the counterclaim; I mean, some suit over a note, suit over an employment -- you know, that was the response I got.

MR. YELENOSKY: I had one other point.

MR. SUSMAN: Yes.

MR. YELENOSKY: I'm just confused on the drafting. In Tier 1(b), it begins with "In addition to other discovery limitations provided in these rules," and then if you look at Tier 2(c), it says "The provisions of this section shall not apply if the provisions of paragraph 1 apply." So if there is some commingling of (1) and (2), I don't know if that's intended or not. But the drafting isn't clear to me there. Are you intending to import from (2) the discovery window period from (1)?

MR. McMAINS: No.

MR. YELENOSKY: No. Okay. Well, then your limitations language in 1(b) is confusing because it says, "In addition to other discovery limitations provided in these rules."

MR. McMAINS: What he's talking about there are the limitations with regards to the deposition hours per person, those kind of things that are provided in other rules.

MR. YELENOSKY: Well, then maybe it needs to just be clarified.

MR. MARKS: Steve?

MR. SUSMAN: Yes, sir.

MR. MARKS: Somebody was talking about, last time we were together, about the mix of cases and what the predominant number are and what most of the cases filed are. And where do these cases fall? The cases for money damages for $50,000 or less, what percentage of those cases are on the dockets in Texas? Does anybody know?

MR. KELTNER: The task force did a study of that, and what we discovered was, this was interestingly roughly depending

upon whether the reporting is good or bad, but it's between 40 and 60 percent when you take all suits.

The theory here was that we would take -- make the $10,000 lawsuit worthwhile to file again. In other words, when somebody walks in and they have a $10,000 damages suit, you say, "Yeah, I can do that. I can do that and as a lawyer make it a profitable situation."

The other thing was, in sworn accounts, perhaps tax collections, perhaps certainly breach of contract claims and other things like that, that the system ought to spit those out pretty quickly and have something that no one can really unfairly beat up on you if you file them, and again, to make the $10,000 case, the $5,000 case profitable for lawyers again, and no one can price you out of that market just by doing a bunch of discovery.

Justice Guittard's thoughts were right, that if we had done it in a paragraph using some different language, and I think we can accommodate you on that.

There's an additional problem here that

you're going to think about as you go along, and let me put those out and let them air out.

How about the case where you file this as a dec action or some kind of suit and you get under this. It's going to have an effect and an impact on maybe the collateral and estoppel in another case. Yeah, that could happen. There ain't no doubt about it.

By the same token, having a tier that the plaintiff can choose, and I think it's okay in this, that the plaintiff can choose, because the defendant by a counterclaim can get out of it. My thought process was that it's a pretty easy deal, in and out real quick, and hopefully a quick trial.

MR. SUSMAN: Yeah. The affirmative ideas that have been expressed, I think, and the committee would agree on are that we will state that in a suit in which the plaintiff's pleading affirmatively seeks $50,000 or less, excluding, et cetera, and no other relief, then you're in this clause. Okay? So if you add any other relief other than for your affirmative seeking of less than 50,000, if you seek dec action, if you seek

injunction, you're out.

HONORABLE C. A. GUITTARD: Or foreclosure on an automobile?

MR. SUSMAN: You're out. I mean, because, again, Judge, we did not -- I mean, our feeling was that it would take days, if not weeks, to go through and to categorize all the different possible cases and types of remedies. Maybe we could. Maybe this will lead to this in the future, if this works. But our figure was to take -- our view was to take something that could be readily recognized, you can see it on the face of the pleading, the plaintiff's lawyer has got to plead affirmatively to get in it, and if he gets in it and he's not met by a counterclaim that will survive a sanctions motion, he's in it.

Buddy.

MR. LOW: Steve, this is not a substantive thing, it's a cosmetic thing. And I don't know if you want that or if you want to go on and finish the subject, but it's a cosmetic thing on all three tiers.

MR. SUSMAN: Let's hold that

for a second and get to substance.

Bill.

PROFESSOR DORSANEO: The counterclaim language in this Paragraph (a) would be restricted in the same way as well, such that if the defendant by a timely filed counterclaim --

MR. SUSMAN: Yes, it's meant to be paralleled.

PROFESSOR DORSANEO: Does any -- so the kind of case that I'm thinking this would cover would be a bank would sue somebody on a small note, and the counterclaim back would ask for cancellation of the note, the $20,000 note, as a form of equitable relief, and that would kick it into -- would it stay here or would it go elsewhere?

HONORABLE SARAH DUNCAN: That's Tier 2.

MR. SUSMAN: You're so smart; you come up with all of these hypotheticals.

PROFESSOR DORSANEO: This is the case that you would be worried about. It would be different from a personal injury plaintiff saying, "I'm willing to take $50,000

or less." The cases you would be dealing with would be creditors wanting to get the debtor to have 10 minutes of discovery on the fraud defense.

HONORABLE F. SCOTT McGOWN: Right. Under these rules, Bill, it would come out. You wouldn't be in Tier 1 any more. Tier 1 is automatic and it's narrow.

But let me point out what our thinking was. Our thinking was that if we really had Tier 1 in the rules, if that was really the rule, and the consumer counterclaim was for cancellation of the note, that you could go down to the judge and say, "Judge, we want you to make this case a Tier 1 case by a Tier 3 order because it really is a Tier 1 case." And then the judge, with Tier 1 in the rules, would for the first time have a real mandate to say, "Yeah, this ought to be limited to six hours per party and 15 interrogatories per side and that's my docket control."

PROFESSOR DORSANEO: Or something else in between?

HONORABLE F. SCOTT McCOWN: Right.

MR. SUSMAN: Sure.

PROFESSOR DORSANEO: That makes sense.

MR. SUSMAN: It's a norm.

HONORABLE F. SCOTT McCOWN: It's a norm.

MR. SUSMAN: All right. Any other discussion of Tier 1? Yes, sir.

HONORABLE PAUL HEATH TILL: So I understand that if a case was filed and it sought any damages other than monetary damages and the counterclaim was still sufficient to leave it in a court such as the justice court but they wanted something other than monetary damages, are they going to have to have a control order, a docket control order and it would be a Tier 3?

MR. SUSMAN: No. It would just go to Tier 2.

HONORABLE PAUL HEATH TILL: It would be in Tier 2. I understand that. But to be able to restrict the amount of discovery, it would have to fall into Tier 3?

CHAIRMAN SOULES: Well, because Tier 2 is restrictive, but it's nine months.

It's nine months plus 30 interrogatories.

HONORABLE PAUL HEATH TILL: Nine months is totally unrealistic in that little of a court. Most cases are tried in 60 days, not nine months.

MR. SUSMAN: Well, then we have 50-hour limits on depositions. I mean --

HONORABLE F. SCOTT McGOWN: No. I think the answer to the question is, Tier 3 is customizing, and you can customize up from Tier 2 or you can customize down from Tier 2. So if you've got a small case, by agreement or by court order you can customize Tier 2 down as well as up.

HONORABLE PAUL HEATH TILL: That's what I wanted to know. Thank you.

MR. SUSMAN: Any further discussion of Tier 1 cases? Rusty.

MR. McMAINS: Well, I had one other question. The last sentence says, "No amendment bringing the amount above $50,000 shall be allowed at such a time as to unduly prejudice the opposing party."

The only thing I'm wondering here is, since you don't have a window, I mean, how is

it that you would take the position -- I mean, if you've languished around with no discovery for a while with this $50,000 stuff, and then all of a sudden, maybe the case is set for trial in a month, and you amend your pleadings to sue for over $50,000. Is it just discretionary with the judge as to whether it's in Tier 2?

MR. KELTNER: I think that's going to go back to the amendment rule, which we pulled out, because I think that's an excellent point.

HONORABLE F. SCOTT McGOWN: But I think actually, though, what Rusty is saying, we could take that sentence out completely, because if you get an amendment that pops it out, then you either get the amendment or don't get the amendment under whatever your amendment rules are, and you either go to trial or don't go to trial on whatever your continuance rules are. So that that sentence doesn't add anything.

MR. PERRY: I don't agree with that. I think the reason that sentence was put it there, David Perry, is that regardless

of what the amendment rules are, the court in its discretion could deny an amendment under this rule if the case had been in Tier 1 for a long time and then at a time that would unduly prejudice the other party somebody amended it to try to exceed the $50,000 claim.

MR. McMAINS: Well, just as a classic example, to me it seems like I just think that it's too -- that it has too much risk for abuse in terms of lulling somebody to sleep under Tier 1. All I was saying is that it seems to me that there should be a window, a period, whether it's done by amendment or whatever, just presumptively, for instance, the nine months or whatever it is under Tier 2.

MR. SUSMAN: Well, this is something we discussed, and maybe we need to look at it again. I mean, we did discuss the situation where a party alleges a $49,000 case until, you know, two weeks before trial. And then two weeks before trial they amend it to allege a $15 million case. Okay. And now to say it knocks it into Tier 2 doesn't do a damn bit of good because you only have 15 days

left --

MR. McMAINS: Absolutely.

MR. SUSMAN: -- and discovery under Tier 2 ends 30 days before trial. So you're in Tier 2, but your discovery window under Tier 2 is already closed. That's what we were trying to deal with here, the right to just hold a party's feet to the fire saying, "You've been at Tier 1 too long; you cannot get out of Tier 1 now."

MR. McMAINS: I agree with that. All I'm saying is that I thought that it was too loosely accomplished by simply saying unduly prejudice the other party without having some, again, normative standard. I guess -- well, if you've been there nine months, you've been in Tier 1 for nine months and you've used up all your time, it ought to be kind of presumptive.

MR. YELENOSKY: Why don't you go to Tier 3 and make the court fashion something in particular. If you've been in Tier 1 and suddenly you allege over 49,000, you can't jump to Tier 2 because, as you said, some of those things may have been run.

You're basically throwing it to the court at that point.

MR. KELTNER: The theory was you want to keep the court out of this as well.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT McGOWN: But I think our present rules cover that without us having to say anything. Go to your example. It's been a Tier 1 case for nine months. You're two weeks from trial. It's been 50,000 all long, and you jump it to $500,000, so what are your opponent's options? Option No. 1, motion to strike because of surprise. It's been a Tier 1 case. I'm unprepared to defend this on Tier 1 discovery, surprise. Motion granted, amendment struck, you go to trial.

Or Option No. 2, motion to strike denied. Then, Judge, I move for a continuance because we're two weeks away from trial. It's been a Tier 1 case for nine months. I can't get ready in two weeks. I need my Tier 2 discovery. I move for a continuance to get into Tier 2. The judge says fine, we set off

the trial and we make it Tier 2.

What we wanted to do in this rule was allow the guy that had a sore back to plead it as a 50,000 case and get into Tier 1 and not be afraid of going into Tier 1 if it turns out a few months later that that sore back is a slipped disk. So we wanted to allow easy amending out of Tier 1, and I think we've done that.

MR. SUSMAN: I think, Scott, I mean, that's clearly what we wanted. We were concerned about no one would use Tier 1 voluntarily if it locked them into a straightjacket. I mean, why would you ever affirmatively lock yourself into that straightjacket in cases where you might find something in discovery that's a much bigger case. I mean, it would be malpractice city.

MR. YELENOSKY: But that isn't Tier 2, because you could have already been beyond the window from Tier 2. By definition you may be using the same time limits as are in Tier 2, but you're really in a Tier 3 situation.

PROFESSOR ALBRIGHT: That's why

we said that it shall be reopened.

MR. YELENOSKY: Reopened? Meaning that it begins from that point, that all the time lines begin from that point?

MR. SUSMAN: Right.

MR. MARKS: And I guess we have no problem with amendments after verdict. What if we've got a Tier 1 case and that goes to verdict and gets a $100,000 verdict?

MR. PERRY: Part of the discussion in the subcommittee had to do with amendments after the verdict. And we started to write this sentence in a way that would simply prohibit specifically amendments after verdict. And then we got to thinking, well, there are some times and some situations before verdict, before you go to trial, when also the amendments should not be allowed. And so the conclusion of the subcommittee was to put in a sentence that gives the judge discretion to strike the amendment in his discretion, if under all of the circumstances it is unduly prejudicial.

I think you're going to see, and I missed a lot of the discussion and maybe you've

already said it, but there are a lot of areas in these rules with respect to this and with respect to discovery that perhaps was improperly withheld, where these proposed rules go back to a lot of discretion in the trial court and rely on the trial court to do the right thing rather than trying to write all the rules in detail.

I think everybody thought it was obvious that no amendment of any significant amount over $50,000 would be allowed after verdict.

MR. MARKS: Well, shouldn't that be put in here specifically, that in no event should it be allowed after the return of a jury verdict?

MR. SUSMAN: How about it, Scott? That's wrong with it?

HONORABLE F. SCOTT McGOWN: I think what we ought to do, since you all charged the subcommittee with looking at all of the amendment rules and coming up with a logical scheme, is to roll this problem into that, because it's all related, and all the amendment rules ought to be together.

MR. SUSMAN: Concept. Concept

of Tier 1 cases. Concept. Let's have a vote on this: The concept of taking a group of cases defined generally as we have defined them and put them into a Tier 1 that has a clock limitation, as we have indicated, and no calendar limitation. We've got some amendment problems to deal with, agreed, and we've got the definitional problem of what is a $50,000-or-under case to deal with, agreed. But other than that, how about the concept? Can we have a vote on that?

All in favor of the Tier 1 concepts, raise your right hand. All opposed. It passes unanimously. Great.

And what I would suggest is, Alex, I would like you to take this, you and Bobby, this tier thing. Okay? And let's have you all work as kind of a subcommittee incorporating what you're hearing here, now that we've got some ideas, including this amendment issue.

MR. MEADOWS: Should we get some sense of that? Because I agree with John. I think a $50,000 case ought to always be a 50,000 case.

PROFESSOR ALBRIGHT: Could I make a comment? Alex Albright. We discussed this with the subcommittee in Galveston for a long time, and I remember Scott gave us an example of what made us change our mind. He said, you know, what if somebody -- they tried their case and it's 49,000, and then everybody realizes, "My God, we miscalculated the interest," and so it's really a $51,000 case. If it doesn't make any difference, then why not allow the amendment?

Where if it's something that makes it significant --

MR. MARKS: You opened the door, Alex. You just opened the door wide open with that little bitty bit.

PROFESSOR ALBRIGHT: Well, but that's what happened at the subcommittee, is we had been talking about those kinds of amendments. And we said, you know, let's let the judge decide. So I think what I may be hearing here is don't let the judge decide. Maybe we should take a vote on that to get the sense of the committee.

MR. SUSMAN: Well, as I gather,

HONORABLE C. A. GUITTARD: Well, it says if he does not waive it, waive examination and signature.

MR. SUSMAN: Well, what we have written here is --

HONORABLE F. SCOTT McCOWN: No, I think I can -- let me go through it.

MR. SUSMAN: We have a drafting problem here.

HONORABLE F. SCOTT McCOWN: No, I don't think there is.

CHAIRMAN SOULES: You think that this says the witness reads and signs. All this says is that he didn't waive the right to read and sign. It doesn't say that he will read and sign.

HONORABLE F. SCOTT McGOWN: That's correct. I guess I should say it's suspenders and a loose belt, because you can't force -- we didn't want to go so far to say that it wouldn't be any good if the witness just absolutely refused to read and sign.

MR. SUSMAN: Pam.

MS. BARON: Scott, what happens if, after you take the deposition, then, when

it's too late to fix it, then the witness says, "I'm not going to read and sign it." You're not going to want to use the deposition.

HONORABLE F. SCOTT McCOWN: Well, no, because under the regular rules, if a witness just refuses to sign it, you can still use it.

MS. BARON: But what if the witness says, "I waive it," after the deposition?

HONORABLE F. SCOTT McGOWN: This is like the second dam. If the first dam breaks, this is the second dam. And so it's not that great of a dam but we've got the first one. If you wanted to take it out altogether, it wouldn't make any difference to me. It was just an added precaution because the person who is taking the deposition won't be with the witness, so it was an added identification oath precaution. But if you don't want an added identification oath precaution, we can take it out. But all of the problems you've identified are there. It's not perfect.

MR. SUSMAN: Any other discussion?

PROFESSOR DORSANEO: I move to take it out.

MS. BARON: I second it.

MR. SUSMAN: What's the motion?

PROFESSOR DORSANEO: I move to take out the last sentence.

PROFESSOR ALBRIGHT: The last phrase probably.

MR. McMAINS: By taking the entire sentence out, doesn't that take out your ability to take the deposition from in state if you're going out of the state?

MS. BARON: Bill, I would like to just take out the waiver part.

HONORABLE F. SCOTT McCOWN: Well, no. Here is the problem. Excuse me, let me back up, because here is the problem: The law right now is that the person who administers the oath has to be with the witness, and so you can't hire a court reporter in Dallas to be with you while you take the deposition over the telephone from a witness in Houston and have your court

reporter swear in that witness, and so that's what we were trying to get around.

MR. SUSMAN: I take it the sense of the motion we had was to take out everything after "substantiate" in the last sentence?

MS. BARON: That's what I seconded, but I don't think that's what the motion was.

MR. SUSMAN: Then we don't have a motion. Is that your motion? Was that your motion?

MS. BARON: That's my motion.

MR. SUSMAN: Then I second it. Now we have to a motion.

HONORABLE F. SCOTT McGOWN: Well, let me just point out that you can't legally do that unless you add in there that there's somebody to swear the witness in on the other end. You're going to have to have somebody swear the witness in who is present with the witness.

MR. LATTING: Well, we don't want to do that, do we?

HONORABLE F. SCOTT McCOWN:

That's required by law.

MR. KELTNER: That's what the rule is now.

HONORABLE F. SCOTT McCOWN: I mean, I don't know that we can change that.

MR. LATTING: Well, we just did that with the court reporter rule.

MR. KELTNER: The truth of the matter is, these are generally taken in lawyers' offices in Delaware and Vermont and Nevada or wherever, and the truth of the matter is you have a notary there for the first two minutes swearing the person in and identifying who it is and writing in the notary book. It's not a real problem in my opinion. But it is an additional safeguard against an abuse that could otherwise exist. We want to make this simple to use. It doesn't seem to me it's worth the expense.

MR. GOLD: This is the way they -- there was a case out of Dallas called Clone that followed what we drafted here basically. And what we were trying to do is codify that approach and make it simpler.

MR. KELTNER: Well, actually it

has the opposite effect.

MR. GOLD: Right.

MR. SUSMAN: Can we -- do you all want to -- can we try to get a consensus? Can we eliminate the last phrase, "and the witness does not waive examination and signature"?

HONORABLE F. SCOTT McCOWN: What if we substitute the words "and the witness is sworn by a person present with the witness" or better words to that effect?

MR. SUSMAN: Perfect. Better. Is there a second to that?

CHAIRMAN SOULES: The witness is sworn by who?

HONORABLE F. SCOTT McGOWN: By a person present with the witness.

MR. LATTING: So what do we take out?

CHAIRMAN SOULES: Judges have let people testify by telephone sworn from the courtroom.

HONORABLE F. SCOTT McGOWN: That may have happened, but there's case law and indeed a statute --

CHAIRMAN SOULES: Well, this is case law.

HONORABLE F. SCOTT McCOWN: -- that says you can't do it.

CHAIRMAN SOULES: What statute says that?

HONORABLE F. SCOTT McCOWN: The statute on administering oaths. If you are administering an oath, you have to verify that person, you have to be with them, and there's case law to that effect.

MR. SUSMAN: Any problems with -- it would now read as follows: The officer taking the deposition may be located with the deposing parties instead of with the witness if the identification of the witness is substantiated and the witness -- and what is it, Scott?

HONORABLE F. SCOTT McGOWN: Well, we need to get some words, "is placed under oath by a person present with the witness" or --

MR. KELTNER: Why don't you let Scott and I work on this.

MR. SUSMAN: I will delegate a

I mean, I don't think -- I mean, aren't we all -- isn't everyone happy with the notion that if you opt to do a Tier 1 case, you ought to be able to change it any time to allege anything you want as long as there's plenty of time prior to the trial for the whole case to be converted to a Tier 2 scenario? That doesn't create a problem for you, does it, Bob?

MR. MEADOWS: No.

MR. SUSMAN: Okay. I mean, does that create -- I mean, does anyone have a problem with that notion? As long -- you do?

MR. MARKS: Well, I hate to be throwing cold water on everything. But I can see a clever plaintiff's lawyer starting a Tier 1 case and drawing a puff defense lawyer, managing to get a lot of concessions, a lot of things done, a lot of strategic errors made, and then converting it into a Tier 2 or a Tier 3 case. Well, maybe. Maybe he wouldn't do that. I don't know.

HONORABLE SARAH DUNCAN: We can't cure bad lawyering or bad judges.

MR. MARKS: Rusty is laughing.

HONORABLE F. SCOTT McGOWN: If you're a plaintiff and you file a Tier 1 case and you draw a tough defense lawyer, then you're going to want to keep it in Tier 1. I mean, you already said it's a $50,000 case.

MR. MARKS: I said puff, not tough.

MR. McMAINS: Or an inexperienced defense lawyer.

HONORABLE SCOTT BRISTER: But that could happen right now with no tiers. You file a $10,000 case, get that to happen, and you would have the same problem. I think -- I don't mind the concept that you can get out at any point. It seems like we ought to have a $50,000 firm lid, and that's it, okay, at any time, up until the surprising jury limit, and then it's too late. If you chose to limit it to 50, you got the benefits; you can't take the benefits and trash the limitations.

MR. SUSMAN: I agree with that. Does anyone think that you thought to be able to get out of Tier 1 after you get a

verdict?

PROFESSOR DORSANEO: I do.

MR. SUSMAN: After the verdict?

HONORABLE SCOTT BRISTER: You've gotten the benefits. You've limited the costs of discovery. You can't take that --

PROFESSOR DORSANEO: Well, what harm did it -- what discovery would have happened to forestall this $60,000 accurate number, is the problem I have.

HONORABLE SCOTT BRISTER: If I was a defense attorney, I could come up with something for sure.

PROFESSOR DORSANEO: Right. Then maybe you can grant a new trial.

HONORABLE F. SCOTT McGOWN: The reason I'm opposed to Judge Brister's view of it is because we want to encourage people to go into Tier 2. And the other thing is, it seems to me, and I admit I haven't gone back and catalogued them, but postverdict amendments have pretty strict standards. And if it's just a matter that they forgot to put in the prejudgment interest, they ought to be

able to do it.

The other thing, I think, is so what if it's 60,000 instead of 50,000. You know, I mean, we could pick a number of 100,000 to write the rule. This discovery could carry a $60,000 verdict. And I think if we leave the trial judge some reasonableness, the trial judge ought to be able to distinguish between a postjudgment amendment that truly is unfair given the nature of the discovery that occurred and the result that you got versus a postverdict amendment that didn't have anything to do with the discovery that you got and is in fact the right result.

MS. BARON: Steve.

MR. SUSMAN: Yes.

MS. BARON: Just one clarification. You've excluded prejudgment interest from the 50,000, so that's not a good example.

HONORABLE F. SCOTT McCOWN: Okay. Bad example.

PROFESSOR ALBRIGHT: The interest on the note.

HONORABLE F. SCOTT McCOWN: The

interest on the note.

PROFESSOR DORSANEO: No. That's prejudgment interest.

HONORABLE F. SCOTT McGOWN: Bad example, but same concept.

MR. MARKS: I think that just opened that old barn door wide open.

MR. SUSMAN: Let me see if I can -- Scott, can we get a show of hands. How many think that if you're in this category you should -- how many think that if you're in -- if you get in Tier 1, you're stuck once the jury comes back with a number. All raise your right hand.

MR. YELENOSKY: What do you mean by "you're stuck"?

MR. SUSMAN: You can't go above 50,000. It's too late then.

How many think you ought to be able to amend at that time?

HONORABLE F. SCOTT McGOWN: Can I rephrase that, since the way the pollster is asking the question is -- how many think that the trial judge is going to be able, in his discretion, to sort out postverdict amendments

that do matter from postverdict amendments that don't?

MR. MARKS: If they were all like you, Judge, we wouldn't have any problem.

MR. SUSMAN: Oh, you say that to everybody, John.

MR. SUSMAN: I mean, I think the sense of the group for the subcommittee is that we have -- when the jury returns a verdict, it's too late. Okay?

Now, I think the sense of the group from the earlier vote is that -- did I get the sense of the group? Maybe I haven't gotten it yet. But there's a sense of the group that you ought to be able to amend out of Tier -- well, yeah, the sense of the group is that you can always amend out of Tier 1 as long as there's plenty of time to do Tier 2 discovery. Okay. So the only other thing we've got is the situation where you want to amend out of Tier 1 so close to the trial setting that there's not enough time to give you full Tier 2 discovery. That's the situation we've got to deal with.

Steve.

MR. YELENOSKY: Are we saying that if a lawyer and his or her client in good faith claim that this is worth $40,000, including in that my claim for punitives, I have a claim for punitives, it's worth $40,000, and it goes to a jury and the facts have developed to where that jury is outraged and wants to award punitives of $100,000, that the jury cannot do that?

MR. SUSMAN: Yes.

MR. YELENOSKY: And why is that, if it has no relationship to discovery?

HONORABLE SCOTT BRISTER: For the same reason people do high/low agreements. You can agree to say, "I don't care what the jury gives; I'm not going to take above X," in return for whatever concessions you can get for that agreement. And the concession you're trading off here is he ain't going to spend any -- I'm not going to take 40 percent of your $50,000 because I'm only going to spend six hours on this case.

MR. SUSMAN: The justification, Steve, is -- I mean, the thought process is the defendant looking at a case that's only

got -- the maximum exposure is 50,000. I mean, no firm is going to be able to convince that defendant to spend a huge amount by the hour on defending that case where the maximum exposure is 50.

On the other hand, if you are facing a case where actuals could be 50 and punitives 500 or more, then you might well indeed spend more taking more depositions, crossing your t's and dotting your i's.

MR. YELENOSKY: Well, then you've got a real malpractice concern in deciding to go into Tier 1. And I think plaintiff's lawyers are -- well, I guess you could explain it to your clients. I mean, I don't do PI. But if you've got a plaintiff's lawyer that says -- makes a decision to stay in Tier 1 and they get a judgment later for $1 million and they're stuck with 50,000, I mean, they're not going to take Tier 1.

MR. SUSMAN: Keltner first. Brister second.

MR. KELTNER: I want to say two things. I think that's a good point. In general, juries do things that they're asked

to do or encouraged to do, so there's going to be some control there.

A client is going to be probably addressed with this issue about I'm either not going to take the case unless you file it under Tier 1 because I can't afford to seek only 50,000 in damages and be in Tier 2, so that is the trade-off. And I think that's a fair trade-off that the lawyers can make with clients to get additional access to the system.

We have to remember that the one thing we've found is and the one thing the Supreme Court told us when we got on the task force was significant numbers of citizens are denied access even on damage cases because discovery is so expensive. There has to be a trade-off there, and malpractice may be one of them, but I think that the trade-off is worthwhile.

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: And if you have a chance at punitive damages like that, you're not going to file it under Tier 1; you're going to file it under Tier 2. The cases that are going to be under Tier 1 are

your little DTPA cases. They're going to be the slip-and-fall cases. I see it more as just a way to -- you know, just the transactions that real people have where they have disputes. And like David said, they have no access to courts right now because it's too expensive. So the issues that you're worried about are not going to be --

MR. SUSMAN: Brister next.

HONORABLE SCOTT BRISTER: Keltner covered it for me.

MR. SUSMAN: McMains.

MR. McMAINS: I think that we can handle the malpractice stuff that's in there if we have to specifically say, "You ain't getting any more than this if you go this route"; that if the lawyers don't cover their tails with their clients with that, then that's their problems. But I do think that the stronger we make the rule read, the more notice we give to everybody that this is the trade-off and this is what's going on. And I think that obviates that it's going to be a serious malpractice threat.

MR. SUSMAN: Judge Guittard.

HONORABLE C. A. GUITTARD: The more discussion I hear of this is that I think this three-tier thing is a little too complex; that perhaps two is enough; that there ought to be a set of rules, not necessarily limited to $50,000, that apply to a great majority of cases; that if you go beyond those cases and you need more time, then you go to what we have now as Tier 3. So in other words, you have one and three and cut out two, except you put a lot of two into one. Now, that's my thought.

MR. MARKS: I agree. You're right, Judge.

MR. SUSMAN: David Perry.

MR. PERRY: It seems to me that the sense of the committee was to vote overwhelmingly for Tier 1 with a stricter limit on the amendments. And my suggestion would be to add to the sentence that is there, "but in no event, not later than 30 days before trial," so that in effect what we would be saying is that you could not amend out of Tier 1 at a time that, in the court's discretion, unduly prejudices the opponent,

but in no event, not later than 30 days before trial.

MR. SUSMAN: Will that solve everyone's problem?

CHAIRMAN SOULES: Not quite. I think it ought to be 30 days before the first trial setting.

MR. SUSMAN: We have a motion, before trial. Does anyone agree with the motion before trial? I'll second that.

All in favor of the motion raise your right hand.

HONORABLE SCOTT BRISTER: What was it again?

MR. SUSMAN: We are leaving Section (c) like it is, and we're saying no amendment bringing the last -- the last sentence will read, "No amendment bringing the amount above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days prior to trial."

HONORABLE PAUL HEATH TILL: Trial or the first trial setting?

MR. SUSMAN: No, trial. And

the reason I think Dave is right and Luke is wrong on that is that, remember, on these Tier 1 cases we don't have a window at all. We opted for no window. And so these are the cases where no one is going to do anything until right before trial.

MR. PERRY: Also, if you remember, when we tried to tie something before to the first trial setting, we got into the problems that trial settings are handled so much differently all around the state. Sometimes we have them but they really are meaningless. And it seems to me that we need to have this amount of flexibility.

MR. SUSMAN: All right. All in favor of this amendment now raise your right hand. All opposed. We've got to count.

All in favor raise your right hand again.

MR. MARKS: Can you count, Holly.

MS. DUDERSTADT: 18.

MR. SUSMAN: 18. Against?

MS. DUDERSTADT: One.

HONORABLE SARAH DUNCAN: Two. Tony voted against.

MR. SUSMAN: Two against. 18 to two.

Tier 2.

HONORABLE F. SCOTT McGOWN: Steve, can I make a comment before we move to Tier 2 on Judge Guittard's point. The reason we chose three tiers is because this first tier is incredibly restrictive. I mean, you can look at it, six hours per party and 15 interrogatories. And yet David estimates that it might carry as much as 40 to 60 percent of the docket, of a court's docket. And so if we do nothing but Tier 1, the public will be able to see an incredibly positive benefit from our work because they will be able to prosecute these small cases and have it be affordable. So I think Tier 1 may be the best thing we have on the table.

And then Tier 2, which is going to cover that other bulk, maybe the other half of the cases, is quite a bit more expansive.

MR. SUSMAN: Of course, no one knows, and I mean, you're guessing about this, because, Scott, I would guess the opposite. I would guess that Tier 1 will be rarely used,

and in fact it will be unused at all. It's just a PR trick, a ploy, and that in fact most of the cases are going to be Tier 2 cases.

MR. KELTNER: Steve, you've got tort reform. And with tort reform, I think all cases will be Tier 1 cases.

MR. GOLD: All mine are.

CHAIRMAN SOULES: Well, the Chair of this Committee takes exception to any statement that anything we do might be a trick or a ploy, and I think the Committee is opposed to accepting any rule like that.

MR. SUSMAN: No, I -- on the record --

CHAIRMAN SOULES: Yeah, you might want to put that on the record.

MR. SUSMAN: I retract my statement on the record. I didn't mean to say that. I mean, I just mean to say I don't think it's going to be used, but we don't know. We just don't know.

HONORABLE PAUL HEATH TILL: It will be used exclusively in my court. 5,000 is my limit for every case that I have, and we try an awful lot of cases.

MR. SUSMAN: Well, let me put it this way: No one knows whether discovery in those cases is more than we have provided for usually anyway, whether there are any abuses in those cases to begin with. I mean, do you know?

HONORABLE PAUL HEATH TILL: In my court, yes. I have quite a few cases that are.

MR. SUSMAN: That are abusive?

HONORABLE PAUL HEATH TILL: Yes. If you don't know it, I'll be glad to tell you. People get their necks bowed over $4,000 just like they get their necks bowed over $400,000. They get themselves all upset and fall on the ground just the same. I've got one case that I measured that was 17 inches thick that was over only $4,000. Yeah. Yeah, I have it.

MR. SUSMAN: Then maybe we have done some good.

HONORABLE PAUL HEATH TILL: I think you have.

HONORABLE F. SCOTT McGOWN: And the other thing you're not counting, Steve, is

the cases that don't get filed because nobody can do them because they're so expensive. I think this is going to be a much bigger advantage than most of us suspect.

MR. SUSMAN: Can we talk about Tier 2 cases. Tier 2 basically -- again, I do not -- I do think we should not go backwards on this unless the sentiment is overwhelming. The idea of having a discovery window was debated at length at our meeting in September and a vote was taken on a nine-month discovery period that ended -- that began, as I said, with the final commencement of the action, ending nine months thereafter.

We have moved the commencement back considerably by Rule -- by the first sentence on Page 2. But this is the -- and we have, of course, talked about the 50 hours to examine. That was approved. The 50 hours was approved at our -- that went back to our July meeting, I believe, where the 50 hours of depositions was approved, so as I said, the vote was 15 to seven then.

Comments, then, on Tier 2 cases, or are we ready to vote on Tier 2 cases?

HONORABLE F. SCOTT McCOWN: Can I ask a question?

MR. SUSMAN: Scott.

HONORABLE F. SCOTT McCOWN: This is Judge Cochran's question she raised and I didn't know the answer. She had to step out for a minute.

In Subdivision 2, we give 50 hours to examine and cross-examine opposing parties and persons subject to their control. So are neutral fact witnesses not included in the hour limitation?

MR. SUSMAN: Yes.

HONORABLE F. SCOTT McCOWN: Yes, they're not?

MR. SUSMAN: They are not included.

MR. MARKS: There's a different provision for those?

MR. SUSMAN: What?

MR. MARKS: There's a different provision for those?

MR. SUSMAN: No. You take as much time as you need, as much as you can do within nine months.

MR. PERRY: Well, not exactly, in this sense, Steve: The neutral fact witnesses are included in the per -- in the time per hour witness. In other words, yeah, a neutral fact witness is still limited to three hours per side for the deposition itself. But the total number of depositions multiplied by three hours would depend on the number of fact witnesses rather than total amount of time in the case.

MR. SUSMAN: Yeah. Any other comments?

HONORABLE SCOTT BRISTER: Is the plaintiff driver's sister who was not in the car and not an eyewitness, or a friend, is that person in her control, or is that just something that we're going to work out through case law as we go along?

MR. SUSMAN: I think we have to work that out from the case law.

MR. YELENOSKY: Why is it important to have this distinction?

MR. SUSMAN: What?

MR. YELENOSKY: Why is this distinction made between those in control and

those not in control?

MR. SUSMAN: I'll tell you why, because, again, the feeling was that -- again, this was out of deference to the people who did not want any limitations and felt that 50 hours was too small.

MR. MARKS: Like me.

MR. SUSMAN: Yes, you, John Marks, and others. There were others. There were others who thought it was too little. The committee then reconsidered it, and said, you know, most of the abusive discovery takes place on a party or a party's employees or its officers or directors. I mean, you don't beat up too much on third parties because they're going to go hire a lawyer and beat right back up on you.

HONORABLE SCOTT BRISTER: They will start changing their testimony and hurt you.

MR. SUSMAN: Right. And so this was the committee's -- many, many meetings back, we came to this compromise, which used to be a limit or 50 hours per side for everything, and now it's just for

witnesses under your control.

MR. YELENOSKY: Let me just make a point, because you keep referring to officers, et cetera, which appropriately applies to some control issues like when you get to attorney-client privilege and all. But for purposes of control for depositions, as people have said earlier, that goes down to the lowliest employee. So it sort of depends. If you're suing a company and all of the witnesses are the people who happened to be in the factory yard at the time, your total time is going to be limited to 50 hours for every one of those.

MR. SUSMAN: Correct.

MR. YELENOSKY: And if you happen to have a lawsuit where the witnesses are standing on the street but aren't employees, you're not limited.

MR. SUSMAN: Correct.

MR. YELENOSKY: And I don't see the rationale of that, I guess, because for purposes of the testimony, those lowly, as we're saying "lowly," meaning non-management, employees are not treated as management, and

they're not protected by the attorney-client privilege; they're just fact witnesses. So I guess that's what I --

HONORABLE SCOTT BRISTER: One difference is you can't go talk to opposing party's employees.

MR. YELENOSKY: Yes, you can.

HONORABLE SCOTT BRISTER: Well, you may -- some judges will say you can and some judges will say you've just violated the rules of disciplinary procedure. You can certainly go talk to anybody standing out on the corner that saw the accident that's not an employee of anybody and not spend a minute of deposition time. You just call them at trial.

MR. YELENOSKY: Well, isn't it the case that we can talk to an employee who has relevant facts but is not --

HONORABLE SCOTT BRISTER: Not if you know he's not represent by an attorney.

MR. SUSMAN: Scott.

HONORABLE F. SCOTT McGOWN: Well, I think as a practical matter, they're going to be told not to talk to you, so it really doesn't matter. And any way you cut

this, it's going to be arbitrary and you're cutting it to fit a large group of cases. You've got basically 14 days of depositions for opposing parties and persons subject to their control in every case. And if you've got neutral witnesses, you've got as many days as it takes. That's what it boils down to.

MR. SUSMAN: David Perry.

HONORABLE PAUL HEATH TILL: Can I ask the Chair's indulgence? Can I have a potty break?

MR. SUSMAN: Yes, sir. We will take a seven-minute break.

(At this time there was a recess.)

MR. SUSMAN: Can we reconvene. We were talking about Tier 2. Is there any further discussion of this that needs to be discussed before we formalize this once again?

MR. MARKS: Tier 2?

MR. SUSMAN: Tier 2.

MR. MARKS: Maybe we ought to talk about Judge Guittard's comment.

HONORABLE C. A. GUITTARD: Somebody make a motion.

MR. MARKS: Well, then, I'll put Judge Guittard's comment into a formal motion.

MR. SUSMAN: Which is what?

MR. MARKS: To go from one to three. Tier 1 and then to Tier 3.

HONORABLE PAUL HEATH TILL: Excuse me, repeat it down at this end of the room. I'm having some trouble hearing you.

MR. MARKS: To go from Tier 1, which we talked about, and then from Tier 1 -- just make Tier 3 Tier 2 and eliminate the existing Tier 2.

HONORABLE C. A. GUITTARD: No. The concept was sort of to merge Tier 1 and Tier 2, make it somewhat more restrictive than Tier 2 and yet less restrictive than Tier 1, something in between to take care of the great majority of cases. Then if it gets out of that category, go to a special schedule of ours.

MR. MARKS: So only two categories, though?

CHAIRMAN SOULES: Tier 2 would be less; Tier 1 would be nonexistent.

MR. GOLD: Steve?

MR. SUSMAN: Yes.

MR. GOLD: Just as a point of order, I don't know how this really works, but since we have put forth our proposal, shouldn't our proposal be voted on either up or down before a different proposal comes up?

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: No. That's not the way this committee works. This committee does not run on Roberts' Rules of Order. It runs on gathering a consensus and gathering comments to be instructed to the Supreme Court of Texas in considering what we're doing.

MR. GOLD: Excuse me if that was the impression. I'm just saying logically --

MR. SUSMAN: I think we're going to have close to consensus on Tier 2, so could I call for a vote on Tier 2. I think we're going to get all votes but one or two.

All in favor of Tier 2 as presently worded, raise your hand. All opposed.

CHAIRMAN SOULES: There are two

votes opposed.

MR. SUSMAN: No, three votes opposed. Let's count the fors.

MR. MARKS: Ha! You said one or two.

MR. SUSMAN: Let's count those in favor of Tier 2 again, please. If you're in favor of Tier 2, raise your hand. 16.

All opposed. Three. 16 to three.

Tier 3. Tier 3 is the Discovery Control Plan theory, which may be -- and the question was asked before, is it entered by agreement of the parties? We really meant it may be agreed to by the parties or imposed by the court. We don't -- we want to make clear here -- we need to change the language here.

When the parties make an agreement, they do not have to go get the court's order, because it's make-work, because none of us have ever heard of a case where the court has not approved an agreement of the parties on how they want to handle discovery, unless it's like on the eve -- unless it would interfere with the trial.

HONORABLE F. SCOTT McCOWN:

Just change the word "entered" to "made." A Discovery Control Plan may be made by agreement of the parties or imposed --

MR. SUSMAN: Perfect. All right. Now, these are the things that we have put in which the court should include in a Discovery Control Plan.

JUSTICE CORNELIUS: Steve, before you get to that, would the court be able to do this on its own motion, or would it be only on a request of a party?

MR. SUSMAN: I would think it should be on its own motion. I guess the court can always do some -- do we need to make that explicit, do you think?

JUSTICE CORNELIUS: I don't think so. I think the way it's written now it would include on its own motion.

MR. SUSMAN: We would intend that a court could do it, and many active judges should be encouraged to experiment and do things.

MR. MARKS: Should we have some provision for specifically allowing the court to alter the deposition taking time?

MR. SUSMAN: It is in there in (d).

JUSTICE CORNELIUS: Of course, if you're going to allow the court, on its own motion, to impose a Discovery Control Plan, then all limits are off.

MR. SUSMAN: Yes, sir.

JUSTICE CORNELIUS: Except at the discretion of the judge.

MR. SUSMAN: The judge -- again, the limits apply unless the judge rules otherwise, is what we're really talking about. I mean, we want to make it clear that these rules are default rules. If the judge doesn't rule, then the limits apply.

JUSTICE CORNELIUS: So in any case the judge can veto the limits?

MR. SUSMAN: Yes, in any case. And that we try to make clear again in Rule 2 where we say unquestionably, this is from the very beginning, that "The procedures and limitations set forth in these rules may be modified by the court for good reason." That has been in there from the very beginning.

CHAIRMAN SOULES: I have a question about that.

MR. SUSMAN: Yes, sir.

CHAIRMAN SOULES: All right. It looks to me like (a) through (g) are mandatory and that the parties cannot adjust those by agreement and the court cannot adjust them by order, because they are -- it says -- they say specifically these have to be a part of a control order. Later you say anything can be changed, but it looks to me like this cannot be changed.

HONORABLE F. SCOTT McGOWN: Yeah. I agree with Luke. I was going to suggest that we say a Discovery Control Plan may include, but is not limited to, the following provisions.

MR. SUSMAN: Okay.

HONORABLE F. SCOTT McCOWN: That a Discovery Control Plan may include, but is not limited to, the following provisions.

MR. PERRY: Hold on just a minute. Before we make a change, I think the subcommittee -- and I think you should know that to a large extent this was drafted based

on some conversations and some memorandum from some members of the Court. And I think that the concept was that the Discovery Control Plan does have to include items that fall under (a) through (g). In other words, you have to have a trial date or you have to have a date that you are requesting as a trial date. You have to have a discovery cutoff date that is not later than 30 days prior to the trial date, because even though the concept is that the limits of Tier 2 no longer apply, the concept also is that there has to be some limits, even though they're going to be different limits likely, but there have to be some limits and they have to be set out in the order, is the concept that I understood that we were supporting.

MR. SUSMAN: Excuse me, hold on just a minute, David. Suppose -- I mean, let me -- I'm not sure we thought about it that much. Why wouldn't it be -- make sense for a judge to have the flexibility of saying, "Look, I agree nine months is too short a period of time because during this period of time I know Mr. Susman is going on a

three-month vacation, he's got a witness in the hospital, or something like that, so I want to change -- I'm going to change it, folks, this scheduling order. I want to enter a scheduling order that makes this a 12-month discovery window or 15-month discovery window. But otherwise, I like everything. I like your default rules. I don't think depositions should be more than three hours per deposition for a fact witness. I think experts should be identified 60 days before the end of the discovery period. All I've done was move one day."

Now, what's wrong with that? And why should the judge be forced to address everything if he doesn't want to? He could. He can change the length of time of depositions, he can change what you can say during depositions, but why does he have to?

MR. PERRY: There's nothing that would prevent either the court or the parties from doing that. But I think the point is that we intend to have a requirement that all of these things be addressed, was the impression that I had.

CHAIRMAN SOULES: David, I don't have too much trouble with (a), Trial date; (b) Discovery cutoff date; (c) Dates for disclosure of experts; (f) for joinder of parties. But this may be a case where when we go to the court for a Discovery Control Plan, we can't identify all of the witnesses to be deposed by name or category and we can't fix the maximum deposition time by number. To me, this is a -- when we go for this Discovery Control Order, or whatever it's called, it's in a case that we may not have sized and probably will not have sized at that juncture.

Also, "Stating agreements for authentication of documents," maybe you want to do that right then, maybe later, maybe never. But that's a problem.

And specifying discovery disputes, I mean, those are the things that are going to come up, I think, after you start your discovery pursuant to the Discovery Control Plan.

So I think that some of this is okay because it tends to set trial, joinder of

parties, discovery cutoff. But I think there's too much here to say that the trial judge has to do all of these things.

MR. SUSMAN: Do we have -- Alex.

PROFESSOR ALBRIGHT: I think you were right when you first started what you were talking about, and that in the subcommittee we did not spend a whole lot of time on all of these items under the Discovery Control Order. I think we need to think about them, and it may be what we can do is fold in some of the work of the State Bar Committee into this portion of it because they have thought a whole lot about what these kind of orders should contain.

And maybe what we should do is take this back to the committee and think about what one of these Discovery Control Orders should or should not contain and bring it back. I think, you know, it looks like now we have the framework in place and we need to think some more about each of these individual things.

So I would move to table the details of Tier 3 and send it back to the subcommittee.

MR. SUSMAN: Paul.

MR. GOLD: I think before we do that, Alex, I think it would be important to get some sense of the committee on a direction about whether the trial court should have discretion to fashion just a small provision, as Steve was saying, or a larger, if they chose. Or the other side is that it be an order that has specific things in it regardless of what it is.

MR. SUSMAN: Well, I believe we ought to do it so we get it -- it should be "may" rather than "shall." We also ought to make clear that if the judge doesn't cover a subject, the other rules apply.

HONORABLE F. SCOTT McCOWN: Sure.

CHAIRMAN SOULES: I don't agree that the judge should not be required to put a trial date in the Discovery Control Order. I think that the trial date is probably the most driving single thing that can reduce costs of discovery. Everybody knows it's got to be done in a certain period of time, and that's classic -- in all the literature that you

read, that's the number one thing they say. Give a case a trial setting and try to hold it and you will reduce the cost of litigation, and then there's a lot of things that flow from that. But that's Benchmark No. 1.

PROFESSOR ALBRIGHT: Or any time you've gone to the trouble to do a Tier 3 case, you ought to go to the trouble of getting a trial date.

CHAIRMAN SOULES: A trial date, I think, a discovery cutoff, and joinder of parties. I mean, there are some things that probably --

MR. SUSMAN: Scott.

CHAIRMAN SOULES: -- the trial judge ought to have to do.

HONORABLE SCOTT BRISTER: But this rule is not really aimed at that. I mean, on Tier 1 and Tier 2 there's no requirement for trial date. And it's a little hard to write that into the rule because cases -- there are courts with a third as many cases as I have or five times as many cases as I have. You can't -- I agree with you, you've got to say trial date, but I'm not sure

that that's the focus of this rule.

MR. SUSMAN: Buddy.

MR. LOW: Steve, I think we shouldn't overlook the fact that -- because someone keeps saying we should also include supplements there too. In other words, you might say -- set a date for certain witnesses you don't know but would have to by a certain date, and then by supplemental order supplement it at that time. But I think what you want to avoid is having somebody that just meant part of this and then they're in no man's land on the rest of it. They're not in Category 1 or Category 2. But I think we need to look at the potential for supplementation.

MR. SUSMAN: Anne.

MS. McNAMARA: I think what I would really like, and I think it follows up on that point, is that if you can't meet all of these (a) through (g), the way this reads, then you are not entitled to Tier 3, which leaves you back at Tier 2, which in some of the cases from hell we know is an unacceptable alternative. You've got to be able to take

the really monster case into Tier 3, even though if at the time you try to do it the judge may not be able to force all of these guidelines on the form.

MR. SUSMAN: Elaine.

PROFESSOR ELAINE CARLSON: I was just trying to get a point of clarification. I know when we were back on Page 32 looking at Rule 15, time limits, 2(a), you said that was going to be moved forward to Rule 1. Are there any finite deposition discovery hours that apply to a Tier 3 case?

MR. SUSMAN: No.

PROFESSOR ELAINE CARLSON: Other than by order of the court or agreement?

MR. SUSMAN: I think, again, our notion was -- I think our notion has been that if the judge doesn't set it in the Discovery Control Plan, it is the default rules in the rules. So if a judge -- all the judge does in the Discovery Control Plan is, as I said, says the discovery window is 15 months, everything else from the rules governs. But he's free to change everything

else, including the amount of hours per deposition or anything. Scott.

HONORABLE F. SCOTT McCOWN: I think what we need to do here is make clear, and we don't say it and I think we need to say it expressly, is that Tier 3 is Tier 2 except as changed by agreement or court order. And then I think that Luke's concept of how the pretrial order works is exactly right and fits right here; that what we ought to do is say -- and trial date may be different. You may want him to have to set a trial date or not. I don't have a strong opinion on that. But we ought to list pretty exhaustively all of the things we want a judge to have to think about, and let the judge know he's got those powers, like we do with the pretrial order, but not require him to do any particular one, so that we give him the express black-letter authority, but he's got discretion then to apply them to the case.

MR. SUSMAN: David Perry.

MR. PERRY: Well, I don't think it's quite accurate to say that Tier 3 is Tier 2 except as changed. I think that Tier 3

really is a different animal because, as earlier people have said, you may have lots of cases that are in Tier 3, which, as a practical matter, you cannot come up with a number of hours of depositions at the beginning. You're going to have to be somewhat general. I think what we had contemplated was that the order should be as specific as is practical under the circumstances of the case. But we -- the whole idea of Tier 3, as I understand it, is you have to be open to a very wide flexibility that will be worked out between the parties, and if they cannot agree, by the court.

MR. SUSMAN: Elaine.

PROFESSOR ELAINE CARLSON: I had one other question. Can you motion out of Tier 2 and into Tier 3 when it doesn't look like Tier 2 is going to be a reality?

MR. SUSMAN: Sure.

PROFESSOR ELAINE CARLSON: So if you're eight months into discovery and it's a Tier 2 case, can you say, "Judge, this is really a Tier 3 case"?

MR. SUSMAN: Sure. Rusty.

MR. McMAINS: The idea that Tier 2 applies unless otherwise modified I don't think is accurate, because under Tier 2 we have an inapplicability section that says the parties can agree. It basically says that they can agree to waive any of those rules under Tier 2 and you would still be under Tier 2, which I think means the nine-month limit theoretically. But if you wanted to take one party's deposition for 28 hours or whatever, you could agree to do that. I mean, you could still be under Tier 2 and you wouldn't have to file the Discovery Control Plan. Isn't that right?

MR. SUSMAN: See, I guess the philosophical question is whether if the parties agree -- I mean, if you get out of Tier 2 and you go to the court for a schedule, a Discovery Control Plan, must the judge essentially touch every subject which we have touched in our rules, or are you back to an unlimited do what you want?

For example, we have a rule that says there are only three kinds of objections that can be made at depositions. Does the judge

have to deal with that subject in a Discovery Control Plan, because it was designed to control discovery. Okay? And if he doesn't tell you what kind of objections, you're free to sit in a deposition and go back to speeches again. I guess that's the question.

I mean, can't we have some of the work we have done here apply if the judge is silent on it and let the judge in his discretion, with the motion of the parties, modify what they want to modify?

MR. PERRY: I don't think that was a good example, because the only things that are specific to Tier 2 are what are listed under 2(b)(1), (2) and (3). I mean, the things about objections apply to all cases anyway no matter whether they are in Tier 1, 2 or 3.

MR. SUSMAN: Well, how about the amount of time per deposition?

MR. PERRY: That applies to all cases anyway, no matter whether it's in Tier 1, 2 or 3.

MR. SUSMAN: Then we're saying the same thing, I think. I'm sorry, we're not

communicating. I think I agree with you then, if that's what we're talking about.

MR. PERRY: In other words, I think what we're all saying is that the three specific limitations that are specific to Tier 2 go out the window when you go to Tier 3, but the subject matter of those limitations has to be dealt with. Instead of just saying "those limitations are gone and there are no limitations in that area," you say, "those limitations are gone, but we have to decide what our parameters are going to be in those areas."

MR. SUSMAN: Well, David, we didn't draft it that way, unfortunately. I mean, your limitations on Tier 2 are described at the bottom of Page 1, you know, and there are three limitations there. Okay? But there are a lot more than three things that you deal with under the Discovery Control Plan. You have (a), which isn't even talked about; you have (c), which is not talked about as a limitation under Tier 2; (d) is not covered as a limitation under Tier 2 anyway. Do you see what I'm saying? I mean, you are providing

for things to be covered in a Discovery Control Plan.

MR. PERRY: But these are things that are going to have to be dealt with. In other words, (a) and (b) both replace the window. You have to have a trial date and you have a discovery cutoff date.

MR. SUSMAN: I don't mean those.

MR. PERRY: (C), if you don't have -- if you're in Tier 2, (c) is tied to the window. Once you're out of that, you have to do something about it. (D) is --

MR. SUSMAN: No. I've done it just by putting a discovery cutoff date. That cures the problem.

MR. PERRY: It may not, because in a lot of cases the 60 days for designated experts is going to be too late, especially in a big case. You're going to have to talk about whether there are going to be earlier deadlines that ought to be fixed or not.

HONORABLE F. SCOTT McGOWN: I think I agree with David, and I withdraw my earlier comment. I've decided I was wrong

about that. And I think that the confusion is that we're doing -- we're using one thing in two different places and it means something different in each place.

In a Tier 2 case, you might well have a scheduling order or a pretrial order or a docket control order, whatever you want to call it, in a Tier 2 case that does a lot of things but doesn't affect the Tier 2 limits that we've set out.

In a Tier 3 case, you might have a pretrial order or a scheduling order or a Discovery Control Plan, whatever you want to call it, that does a lot of things that don't have anything to do with the discovery limits. But the point is that in Tier 2, you've got these certain discovery limits that are set out in our rule, and in Tier 3 you've got a blank slate where you've got to customize your discovery limits. And you may use Tier 2 as an example or as a start, but you're customizing the discovery limits in Tier 3 and encompassing that in a filing that's either an agreement or an order.

MR. SUSMAN: I mean, it's so

theoretical now, Scott. Part of the discovery limits are so many hours per depositions, okay, when experts get -- when experts get --

HONORABLE F. SCOTT McGOWN: No.

MR. PERRY: But that's not specific to Tier 2. So many hours per deposition is not specific to Tier 2. It applies in any case.

MR. SUSMAN: Correct. Go ahead.

HONORABLE F. SCOTT McCOWN: The only place you --

MR. SUSMAN: So why does a judge have to enter (d)?

HONORABLE F. SCOTT McGOWN: That's what I'm saying. This is wrongly drafted. Tier 3 -- what we ought to have under this Subdivision 3, Tier 3, is simply a rule that says if you don't want to do Rule 2, if you want to customize, then you've got to develop your customization and put it in an agreement that get's filed as a Rule 11 or get a court order. But your customization on 2(b)(1), (2), (3) is your Tier 3. All the other

rules, all the rest of the rules apply whether you're in Tier 1 or Tier 2 or Tier 3.

MR. SUSMAN: But you can customize out of it.

HONORABLE F. SCOTT McGOWN: But you can customize them as well.

MR. SUSMAN: I think we're having a lot of problems with a simple concept that there's not much disagreement with.

HONORABLE F. SCOTT McCOWN: Right. The drafting doesn't expose the concept. We're in agreement with the concept, but the drafting doesn't --

MR. SUSMAN: Can you address what the concept is, then, Scott, and then see if we can't get a motion before us that puts the concepts in the drafting? Paul.

MR. GOLD: I think this needs to go back to the committee, because I've got a feeling even the people on the subcommittee feel like they're going to vote on something that isn't all the way cooked on this. There are so many subtleties going on here that I think everyone feels like they're losing the stream on it. And I think it's because of the

drafting on this. I think we can get a sense of the committee on some major concepts to follow and then I think we can go back and draft it and come back. But I'm concerned that if we took a specific vote right now, I don't know if we would capture the sense of the committee on this issue that's drafted or not.

MR. SUSMAN: All right. Then I would propose that we adopt the concept of a Tier 3 with a Discovery Control Plan to be made by agreement of the parties or imposed by court order; that what is going to be contained in that Discovery Control Plan should be referred back to committee for a recommendation and that the committee should be directed to consider how that impacts the other limitations in the rules that we have adopted.

MR. GOLD: I would second that.

MR. SUSMAN: Is that fair? All in favor of that motion raise your hand. Those opposed. That passes -- oh, one -- no, that was a question, not a nay vote.

JUSTICE CORNELIUS: Right, a

question.

MR. SUSMAN: Great.

JUSTICE CORNELIUS: Before you send this back to the subcommittee, I would like to raise the question of whether or not the judge's Discovery Control Plan -- if the parties would have any remedy in case they don't like the plan or feel that the trial judge has abused his discretion.

MR. SUSMAN: Mandamus.

JUSTICE CORNELIUS: Well, that's what they do now.

CHAIRMAN SOULES: I think -- of course, the trial judge under 166 has got control of the case, period. And if the parties agree to something that the judge doesn't like, the judge still has Rule 166 and you can run your docket under Rule 166 as you see fit.

So if the parties agree to something, a trial date two years from now, and they come to court with that, and the court says, "Well, you all can agree to anything you want to, but the case is going to go to trial one year from today," you have that absolute power. And I

don't think there's any review of that unless something happens in the course of that year.

JUSTICE CORNELIUS: Well, now we have trial judges entering case management orders, and if the parties don't like that, they file a petition for writ of mandamus and it's reviewed under an abuse of discretion standard. I just wondered if the court enters an order under Tier 3 if the parties would still have a right to have that order reviewed in the appellate courts either by appeal or petition for writ of mandamus.

CHAIRMAN SOULES: Well, they don't have the right to have anything reviewed by mandamus, of course. That's absolutely up to your court.

JUSTICE CORNELIUS: Not a right, but they can petition for review.

CHAIRMAN SOULES: They can file it.

JUSTICE CORNELIUS: And then if the appellate court finds that the trial court has abused his discretion, of course, it can be reversed or modified or whatever.

CHAIRMAN SOULES: In the

cases -- in the mandamus cases on consolidation and separate trial, there are some -- particularly some old cases that don't come to mind right now -- there's some language that says that mandamus just doesn't ally to review of the court handling his docket, handling his case. It specifically has to be something beyond that. He has to make an error of law.

JUSTICE CORNELIUS: We've had about five or six petitions for mandamus about a case management order involving the toxic tort litigation of Lone Star Steel down there.

CHAIRMAN SOULES: I think it's Highley vs. Hughes, I think, that says you don't interfere with the judge's running of his cases --

JUSTICE CORNELIUS: We have never granted leave, and I think they've gone to the Supreme Court two or three times and also -- well, maybe one time the Supreme Court did grant leave. Did you remember, Judge Hecht?

JUSTICE HECHT: It seems like we did.

MR. SUSMAN: Anne.

ANNE McNAMARA: I think your mandamus issue is going to come up again when you have a big case and you're seeking Tier 3 treatment to get out of Tier 2, and depending on what the trial court does or doesn't do, I would be really troubled to eliminate the right to seek mandamus, because we're talking about putting limitations on discovery, and I think that's where the mandamus issue arises, not on the trial judge or some of the other peripheral issues, but it's the discovery issue.

MR. LOW: But the rules don't give anybody a right until you lose to seek mandamus. I mean, I don't know of a rule that says you can seek mandamus here or there. I mean, why would this change anything?

MS. McNAMARA: My sense is we're talking about changing it, or am I misunderstanding?

MR. SUSMAN: No, we're not changing anything. I'm sorry, I mean, discovery rulings of court that you object to are treated under these rules in the same way

they were. We have not changed that at all. The same remedy.

MR. GOLD: Steve, I want to make sure if I understand Luke. I understand Luke to be saying that, for instance, to pick up on the issue, a party petitions to move out of Tier 2 and the judge says, "No, I don't care how much evidence you bring to me that you need to get out of Tier 2 to develop your case, you're not getting out of Tier 2," or if the parties move out of Tier 2 into Tier 3, they structure a plan, and a party comes forward and shows that they need some additional discovery, and the court says, "No, this is what I've ordered, and I'm not going to allow you to do any more discovery even if it impairs the development of your presentation of evidence at trial," that there is no mandamus relief?

PROFESSOR ALBRIGHT: Can I answer that? Can I respond to that?

MR. SUSMAN: Sure.

PROFESSOR ALBRIGHT: I think under Walker vs. Packer, which is the case that limited mandamus in discovery cases, that

the court said, well, there are three instances where you might be able to have mandamuses, and one of them is if you are prevented from having the discovery that you need to develop your case.

MR. GOLD: I just heard Luke say that wasn't --

MR. SUSMAN: Listen, this is interesting, but what does it have to do with the work that we've been doing?

HONORABLE SARAH DUNCAN: It is or it isn't, and we're not going to change whether it is or it isn't right here.

MR. SUSMAN: It's not a part of what we're doing. We didn't consider it.

MR. GOLD: Well, I understand that now. I just --

MR. SUSMAN: Okay. David.

MR. PERRY: I think that the answer to the question that was asked initially is that I think that the subcommittee views these orders as being comparable to Rule 166 orders and that you would have the same rights or lack thereof as you currently have under Rule 166.

JUSTICE CORNELIUS: Well, that was my question, and I just wondered if the new rule by implication would cut off that right of review.

MR. SUSMAN: Luke.

CHAIRMAN SOULES: I guess I have a conceptual problem, going back into what I thought we did in earlier meetings, between two and three. I thought Tier 2 was being set up to include all of these restrictions, including the time limitations on any particular deposition that are over now on Page 32; but that Tier 3 was obviously to be governed by the same number of interrogatories that we have and the way you conduct a deposition and so forth, but that under Tier 3 the limitations didn't apply. That was a case that was -- a monster case or for whatever reason a complicated case where either one party says it's that and the other party disagrees, and the judge decides if it is a complex case that needs, in effect, a Rule 166 order, or the parties agree that it does and they come to an agreement; and that once you opted into Tier 3, there were not

either total hour limitations, per deposition limitations or a discovery window. All of that was out that, because that was only existent in Tier 2. And when you went to Tier 3 you could conduct a monster case either by agreement or by order of the judge just like we do today without changes in the substantive discovery like interrogatories and that sort of thing.

And that's what I thought we voted on, that Tier 3 was going to be a venue, if you will, where John Marks and I could say we're going to not have these limitations, we're not going to have three hours, we're not going to have 50 hours, we're not going to limit the number of experts, we're going to get it done, we're going to have to get it done by time of trial, we're going to have to supplement before trial on some schedule, either by agreement or under these rules, but just like it is in effect today.

Now, if I misunderstood that, and Tier 2 controls and these limitations control everything in the big case, then I have a different approach certainly to what we're

doing on Tier 3.

And I heard David say, well, yeah, the three hour per deposition controls, six hours per deposition controls, all that controls even in a Tier 3. I think -- I don't understand that. I think when you move into a Tier 3 -- excuse me, apparently I'm out of order. Go ahead.

MR. SUSMAN: No, you're right. I mean, but isn't it semantics, Luke? I mean, aren't we talking about --

CHAIRMAN SOULES: It's not semantics the way I'm hearing it.

HONORABLE F. SCOTT McCOWN: Steve. Steve.

MR. SUSMAN: If you call me and we're in a case and you say, "Steve, let's get an agreement to get out of Tier 2," the first thing I'm going to say is, "What do you want to change, Luke? What do we want to change? Do you want more time for discovery? Do you want more hours for depositions?" I'm not going to give you a blanket agreement. Okay? I'm going to say, "Luke, what do you want to change by agreement?"

You're either going to tell me or not tell me. If you don't tell me, I'll say, "Well, you're going to go move to the court." Then we're going to go down to court, and now everything is fair game once you're before the judge. And it --

HONORABLE F. SCOTT McCOWN: Now, Steve --

CHAIRMAN SOULES: Now, wait a minute, you are going to give me a chance to respond now, aren't you?

MR. SUSMAN: Yeah.

CHAIRMAN SOULES: Okay. HL&P has just sued Halliburton for $20 billion in a nuclear power plant litigation. And I just say, obviously, Tier 2 is out. Can't we just enter a Rule 11 agreement that we're in Tier 3 and we set sail and we do the best we can? I mean, there were pieces of that case that were $100 million, just little pieces of that case where trial teams from all sides just worked on procurement, so that's all I have to do.

Now, in a smaller case, yeah, maybe you and I can come to an agreement that we step it out. You say, "I'm not going to agree to make

depositions longer than six hours." And I either have to agree to that or go to the judge and say, "Judge, I want 10-hour depositions, not three-hour depositions. He won't agree to but six-hour depositions."

But that takes a piece -- but I think you can just step out of -- I mean, my understanding of what we were doing and what I want to see done, and obviously the committee controls, is that when you step out of Tier 2 and I step out of Tier 2 with you, it can be anything we agree on or we don't have to agree on anything except to step out of Tier 2.

HONORABLE F. SCOTT McGOWN: Luke, you're right. That's what we voted on, and that's what the rules do. The problem we've got is that the drafting is not clear, and I think I can explain where the misconception is between you and Steve.

There are time limits and there are vehicle limits. And what we've described hereto as being on Pages 1 and 2 are time limits. And when you go into Tier 3, we're saying those go off. The vehicle limits are in the bulk of the rules and we haven't said

anywhere that when you go into Tier 3 those go off. But we have a rule, Rule No. 2, that says anything in here can be changed by agreement or court order.

And so I guess what I'm trying to say is that this isn't clearly written. There's not a -- Tier 2 is not a place like -- I mean, excuse me, Tier 3 is not a place like Tier 2 is, and that's where the confusion is coming from. We've got a clear Tier 1 that's a place. We've got a clear Tier 2 that's a place. You can change Tier 2 any way you want, so you're right for your HL&P case. You can do exactly what you want. But when you do that, it's not necessarily taking you to Tier 3, because Tier 3 is not really a place.

I'm not being very articulate, am I, but do you all see what I'm saying? It's a drafting problem.

MR. PERRY: Let me try to express it a little differently.

CHAIRMAN SOULES: The only thing I've got -- and I did understand -- and David, just one short point. I did understand, though, that deposition time

limits were going to be moved over to Tier 2; that they would be taken out of the deposition rule. Okay. Well, when that's over there and you step out of Tier 2, then you leave those limits behind too. Okay?

MR. PERRY: The concept is that there are two different deposition time limits. The time limit on the total number of hours per case is drafted to go in Rule 1, Tier 2. The per deposition time limit, the way we conceived of it, and this can be obviously changed if the committee wants it to and I think we need direction from the committee, but the thought process that I think we were operating under is that the time limit of six hours for an expert deposition or three hours for a fact witness deposition was a reasonable time limit to carry forth as a general proposition in all cases no matter what tier they were in. And the drafting that we did leave would leave the per deposition time limits in the deposition rule and have them apply to all cases. But that is also subject to the second rule, which provides that all of the Discovery Rules can be

modified either by agreement or by court order.

So it is true that in an HL&P case like you described, you and John Marks could get together and say, "Hey, we're not going to have any limits on anything and we'll sign a Rule 11 order to that effect and so be it." But the concept of the way the drafting is done is that the per deposition time limits would be left in a place where they do not obviously go away simply by going into Tier 3; that you have to specifically do something to make them go away.

HONORABLE SARAH DUNCAN: That's the issue.

MR. GOLD: And just to pick up on that and make a point, there was a lot of criticism from plaintiff's attorneys who handle large personal injury cases, medical malpractice, product liability cases, when the 50-hour issue came out. The -- I don't think -- and you know, I'm on record that there's a lot of criticism of the length of my depositions, so I come to this as one of those people. I think the issue was to reduce the

amount of time spent in any given deposition regardless of the nature of the case, because people believe that attorneys are ginning an incredible amount of wasted time and energy taking people's depositions for eight and 10 days, and that what we wanted to do is bring some reason to that and bring some confinement to that; and that if people wanted to opt out of that specific hour constraint, they would need to talk to the court about it and they would need to be specific; but to avoid this blank check of "We've got this monster case, all of the rules are off, and regardless of what our clients know or not, we're going to sit here for hours in deposition," when we all know that no matter how big the case is, you can probably reduce the amount of time spent in any one deposition considerably.

So I pick up with what David is saying. I think the issue that everybody had was the number, not so much the actual time that was spent in the deposition, and I want to make that point clear.

HONORABLE SARAH DUNCAN: It

sounds like people on the subcommittee aren't agreed as to how this was intended to be drafted. I mean, we've got Scott on the one hand saying that it was intended that all of the per deposition calendar limits wouldn't apply to Tier 3 cases. Is that right?

HONORABLE F. SCOTT McCOWN: No. I said that you can change them by agreement or by court order.

MR. GOLD: We're all in agreement that it's a drafting issue. That's why we voted about 35 or 40 minutes ago to send it back to committee.

MR. PERRY: But I do think we need direction as to how -- I think we all agree that the drafting can be improved, but I think we need direction from the full Committee as to substantively how the Committee wants to handle some of these issues.

MR. SUSMAN: Bill.

PROFESSOR DORSANEO: Well, the last time we talked about this I had the same attitude that I have now. In the cases that Luke is talking about, I'm very sympathetic

towards not being able to prepare a discovery plan or to anticipate what kind of disputes may arise down the road or really to do very much planning at that threshold. But it strikes me that if someone is going to get out of the requirements of the system, they ought to have the responsibility to come to a reasonably definite plan or game plan. Otherwise, all that's going to happen in a great many cases is for the lawyers to say, "We won't operate under the rules; we'll operate on the basis of an agreement to agree in the future," and that will not work out in the future.

So I think that the concept of having to make a relatively more specific agreement at the right time for doing that makes more sense than just opting out of the discovery rules altogether when we're talking about private agreement and not court authorization.

MR. SUSMAN: But Bill, we kind of went over -- I mean, in our subcommittee meeting, we contemplated that the adversary system is still what drives our litigation in this country, and it's not a bad system. And

if two clients with lawyers, and the clients are informed as they should be, agree that they want to conduct unending thermonuclear war against each other forever, okay, that they should be able to -- that John Marks and Luke Soules should be free to draft a one-sentence Rule 11 letter that says, "Nothing contained in Rules 1 through blank will govern the way we conduct discovery. We intend to conduct discovery according to the rules that were repealed on June 30, 1995," the old rules or whatever rules they want, and file it with the court. And that indeed should be -- we should not interfere with their freedom to do that.

HONORABLE F. SCOTT McCOWN: Wait --

MR. SUSMAN: Now, if Luke and I are in this case, okay, and he calls me and he says, "Susman, I want to agree" -- "I want get out of Tier 2."

And I say, "Well, the only way you get out of Tier 2 is if you agree with me on a Discovery Control Plan."

And he says, "Well, what do you want to

put in it?"

And I say, "I want to cover everything that's in the rules. I want to give a discovery window closing date, I want the length of deposition; I want your agreement that we will abide by this rule that's in the rules, I want your agreement you can depose no more than X depositions."

He says, "Well, I'm not going to agree to that because I don't know right now."

I say, "Well, we don't have a Discovery Control Plan then. Let's go file your motion before the judge."

We go before the judge. Okay. He says, "Judge, we can't decide right now."

I say, "Judge, that's nonsense. He can decide." I'm now before a judge. Okay. Now I'm talking to somebody who supposedly is going to exercise discretion. I say, "Judge, there's no reason in the world these depositions should last more than three hours, even though this is a zillion dollar case."

He will say, "Oh, yeah, there is, Judge." But we are before a judge to make a decision. And everything is subject to

argument.

HONORABLE F. SCOTT McCOWN: But Steve --

MR. SUSMAN: If we won't argue on some things and the judge doesn't rule on things, we are still back to the default rules. That was my idea. Everything is subject to change at that argument. But in the absence of a ruling from the court, we go back to the default.

HONORABLE F. SCOTT McCOWN: Steve.

PROFESSOR DORSANEO: That's what I want to happen. I don't want you to be able to say, "The deal is that we will not be under Tier 2. We will be operating as we move forward on whatever basis we decide." That is not a default system; that is an agreement not to have a system at all.

HONORABLE F. SCOTT McGOWN: Can I say something important here about these two views, because we wind up with the same rule but we go in different directions, and here is how: I do not agree with Steve that litigants ought to be able to do whatever they want to

do and that the court has no authority or responsibility to police that and make them do what's in their client's best interest or the system's best interest, so I have a different perspective. It's in the public's interest and the client's interest, and the court ought to be able to interject itself. Even with those two different perpectives, though, we come up with the same rule, and the rule is that what people agree to they agree to, and we're not going to require the court to review all those agreements and exercise its ministerial -- or exercise its authority ministerially by signing a bunch of orders that it wouldn't sign because that particular judge doesn't police people.

But if a trial judge desires to police people and has the time to police, whatever the judge orders is what's going to be done. And I think that was Luke's point earlier. So that these rules say if you make an agreement, that's the way it's going to be unless the judge says otherwise. And so the judge can do as much as he can physically do and has the inclination to do.

And I think that where we're getting confused on Tier 2 and Tier 3, I've got a better way to explain it now. Tier 2 is a set of rules. Tier 3, as we've got it defined, is a process, not a set of rules. That's why we can't make sense out of this. Tier 2 can be modified, but when you modify Tier 2, you're automatically using the process that we're calling Tier 3 and that's where the confusion is. So you've got Tier 2. It can be modified, and we need to explain clearly how you can get there. But what Luke wants to do in the HL&P case can be done under these rules. What Steve wants to do with nuclear war can be done under these rules. And if I, the judge, want to control discovery and police litigants, that can be done under these rules.

PROFESSOR DORSANEO: Why can't you put in the Tier 3 agreement or plan requirements certain specific requirements that we could agree make sense. Like Luke was saying he didn't have trouble with (a) or (f) or some of them. But whatever can be done, do it.

MR. SUSMAN: Well, we're going to go back to drafting that. I agree. I mean, we have agreed to that.

MR. KELTNER: Well, that is a fundamental change.

HONORABLE F. SCOTT McCOWN: That's a big point.

MR. KELTNER: And I think that's a very good idea, that if you've gone to Tier 3, that there would be some absolutes that you would have to tell the court about, like a trial date and those types of things.

PROFESSOR DORSANEO: Yes.

MR. KELTNER: But then we'll have a philosophical disagreement over something that I don't think the committee has yet voted on, and that is the question just posed, that if the parties agree, can the trial court overrule that? Currently I read the law as there's no question about. The trial court can do it.

HONORABLE F. SCOTT McCOWN: Under these rules he can do it.

MR. KELTNER: Well, you can certainly read these rules to indicate that is

not the case, and if that's what we intend to do, we need to say so. And that's an issue that I don't think everybody here is agreed upon, so that's something we probably need to seek some guidance on.

MR. SUSMAN: Does everyone here agree that the trial judge ought to be able to overrule the parties and can? Raise your right hand. We have total agreement on that.

JUSTICE HECHT: That's gratifying.

HON. ANNE TYRRELL COCHRAN: I think what Scott just said about the different proposals being -- the real differences between Tier 1 and Tier 2 and what we're calling Tier 3, and without in any way trying to rework any of the substance of what we're talking about, but to maybe make what we're talking about, maybe the framework, more understandable, it seems to me that the problem is calling Tier 3 a tier. What it is is the process to do what you're doing in Rule 2. It's really Rule 2. I mean, it seems to me you should have -- here you have two tiers, and then if either the court wants to

change it, or you by a Rule 11 want to change it, you go to Rule 2 and here is your procedure. Wouldn't it make more sense just to move all this Tier 3 business out and make a comprehensive Rule 2 about if either you or the trial judge want to not be in Tier 1 or Tier 2, here is the process and mechanism to get there.

MR. LOW: You have it now.

MR. SUSMAN: All in favor of doing that as opposed to having a separate Tier 3 raise your right hand.

MR. PERRY: Well, Steve, let me make just one comment. I think there's a lot of merit in that thought, but there is also some down side, because part of the theory about the whole approach is that if you're going to do away with the limits that are in Tier 2, then you need to have some requirement to put something in their place.

And for example, if you just agree to do away with the window, you need to have some requirement to do a discovery cutoff date or something like that. And as a practical matter, once you start doing away with the

windows and the hourly limits, there are a number of things that really are going to need to be done, such as time limits on joinder of parties, when are you going to name experts, something to replace the hourly limits on depositions, and so I do think that we may need -- as I understand it, we want a system that is relatively easy for the parties to get out of the Tier 2 limits. But when they get out relatively easily, we don't want to end up that there's nothing in its place. And so we want to have a requirement that if you're going to get out of those limits you have to get into this framework over here and touch some certain bases that still lead a framework in which everybody is proceeding.

HONORABLE F. SCOTT McGOWN: I think we need to draft just what David suggested.

PROFESSOR DORSANEO: Me too.

HONORABLE F. SCOTT McCOWN: But there's going to be a lot of disagreement over what the specifics should look like.

MR. KELTNER: If we can agree on the basic theory that judges get to

overrule it, I'll wager that we can come up with the basic things that you would need for any case that dropped out of Tier 2, and then put those as mandatory and put the others as mays.

MR. MEADOWS: The only thing you really need are those things that are lost if you get out of Tier 2. All we need to provide for is the things that we do.

HON. ANNE TYRRELL COCHRAN: Maybe we need a rule that says you can't play with no rules.

MR. GOLD: We've got docket control orders that are pretty formed now that fill in those things, and I think all we need to do is massage those and come up with dates. I think that what everybody is concerned about is parties entering into thermonuclear war and not have any type of nuclear disarmament built into the process.

MR. SUSMAN: I think what I see Buddy and Anne saying, I think you are right, you're technically right, okay, is that Rule 2 does it. You don't need Tier 3. You're technically right. The problem with thinking

about it that way is that you end up having -- if you want to escape the rules, you have to kind of make a motion to the court to modify Rule 3, modify Rule 7, modify Rule 10, modify Rule 21. You know, you've got to go through the rules and modify every little thing with a separate motion or one motion.

HON. ANNE TYRRELL COCHRAN: Let me back up. I think you misunderstood. I didn't say I liked Rule 2 in lieu of all this other stuff, I just said it might help everybody understand what we're talking about if you just moved Tier 3 over to a separate rule and then lay out everything you want to say about if you're going to craft a separate rule. I didn't mean just to say some little two-sentence thing there. I just meant to sort of move all of this discussion to an "in the event that either you agree or the court wants to have a separate structure crafted just for your case, then here is how you do it," that includes what you have to have, what the minimum requirements are, everything.

MR. PERRY: One of the things

that we did not do very well is take the time to integrate the Discovery Control Plan with Rule 166, and maybe we ought to go back and do that.

MR. SUSMAN: Alex.

PROFESSOR ALBRIGHT: As I understood this whole thing when Justice Hecht first brought it up at our last meeting of the Advisory Committee, it was like you have Tier 1 and you can agree within the limits of Tier 1. Then you have Tier 2 and you can agree within the limits of Tier 2 and then you're still within Tier 2. But once you want to go outside the limits of Tier 2, then that's an indication that you've got a bigger case or an unusual case. And Justice Hecht, if he was the trial judge, he would want to know that that case was going on. And so you have something there that then flags that case that this is a potential problem case. So a Tier 3 case is not a Tier 2 case where you have changed all the rules. A Tier 2 case is a case that is within the limits of Tier 2. It may be that you have agreed to 20 hours of depositions, but if you've agreed to 60 hours

of depositions, then you're a Tier 3 case, and you've got -- it's a different kind of deal.

HONORABLE F. SCOTT McCOWN: But Alex, you can't think of it that way, because then how much do you have to modify Tier 2 before it becomes a Tier 3?

PROFESSOR ALBRIGHT: Why not just say if one thing goes outside of Tier 2, then you have Tier 3.

HONORABLE F. SCOTT McCOWN: One last comment, Steve. I think what Anne said is exactly right, and what we have to do is say here is Tier 2, here is the way you modify it. If you modify it, here are the things that you are required to think about. And after you think about them, here are the minimum kinds of things that you are required to do, whatever those are.

MR. SUSMAN: Let's see, I think we are passed our adjournment time. I think we've done a great job. Thank you all. I don't think there will be any discussion on Rule 2 tomorrow. Basically there's not much on it. We'll begin with Rule 3. We have the vote on Rule 1. We know your direction. We

know we've got to go back to draft this Tier 3 concept, and we will do so. And we understand the concern, but I think we're pretty much in agreement on Tier 1 and Tier 2, and we've just got to do something with Tier 3.

(HEARING ADJOURNED.)

- -

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 20, 1995, Afternoon Session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $1,346.00.

CHARGED TO: Luther H. Soules III.

Given under my hand and seal of office on this the 7th day of February, 1995.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas Highway
Suite 110
Austin, Texas 78746
(512) 306-1003

William F. Wolfe

WILLIAM F. WOLFE, CSR
Certification No. 4696
Certificate Expires 12/31/96

#002,007DJ