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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 21, 1995

(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 21st day of July, A.D., 1995, between the hours of 8:30 o'clock a.m. and 11:45 o'clock a.m. at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JULY 21, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon Ann Tyrell Cochran
Prof. William Dorsaneo
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
Harriett E. Miers
Richard R. Orsinger
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS PRESENT:

Justice Nathan L. Hecht
Hon William Cornelius
O.C. Hamilton
David B. Jackson
Doris Lange
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 21, 1995 - MORNING SESSION

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CHAIRMAN SOULES: Okay. We will be convened here. Thanks to all of you who have been punctual this morning to be here at 8:30 so we could begin. I want to first welcome Michael Prince who is joining us for the first time. He is the chair of the State Bar Committee on Rules of Evidence; is that correct, Michael?

MR. PRINCE: That's correct.

CHAIRMAN SOULES: So we want to welcome him as a new participant in our committee proceedings. I am passing the sign-up list around, an attendance list. It will come by you shortly. Please sign up to indicate your attendance.

I had sent a letter dated June 3rd that set the schedule for this meeting. As you all know from the letter attached that I received and sent to you, a letter dated May 20, Justice Hecht for the Court told us that at the conclusion of this meeting, by the conclusion of this meeting, we need to have the discovery rules ready to go to the Court.

So that's our charge. We will work as long as it takes to get that done. If we have

any time left on our regular schedule, which typically ends at noon on Saturday, we will go to consideration of the sanctions rules; but if we don't, we will end at noon on Saturday if we are through. If not, we will keep working through the weekend until we get the discovery rules ready to go to the Court, as I had indicated.

Also, I asked Steve to send to everyone the subcommittee's draft of rules, which he did on a timely basis, and asked that anyone who had any comments -- asked first that everybody read them and then anyone who had comments to send them in so that we would have them and Steve would have them for this meeting. We did get, I think, comments from two persons.

MR. SUSMAN: More than that actually.

MR. TREY PEACOCK: Four or five.

CHAIRMAN SOULES: Four or five. So you should have two things as we proceed to go to work on the discovery rules this morning. You should have a redlined version

of the proposed rules that says, "Supreme Court Advisory Committee, discovery subcommittee proposed rules of discovery, June 30, 1995, draft for July 21 meeting." And it says in parenthesis, "redlined from draft presented at May meeting." Get that in front of you, if you will.

The other thing you need is -- this has been spiral bound I think for everyone. It says "Supreme Court Advisory Committee, discovery rules subcommittee draft of July 19, 1995," and what this is, is a collated collection of the written comments that were received in response to the proposed draft of June 30. So I think we need to work from those two items, and Steve, if you would, I think, just take over, we will go rule by rule or paragraph by paragraph. I will try to conduct abatement, but I know you need to address what changes have been made rule by rule and how your committee feels we should respond to the written comments.

MR. SUSMAN: Let me first apologize that Scott Brister has done a lot of work on this, both in June that was submitted

when we met, our subcommittee, several times in June to finalize these things. He has been available. He even showed up in Austin for a meeting of the subcommittee, which had been postponed a day.

HONORABLE SCOTT BRISTER: It's a nice drive, though.

MR. SUSMAN: But we got his comments. Scott did write a cover letter that inadvertently got put under Tab 23 in these comments. So if you want to look, and some of his comments make a little more sense if you read his cover letter he made, which is under Tab 23. I don't know why it got there, but it did.

Insofar as Rule 1 is concerned, let's begin with Rule 1, which is in your bound booklet. I think what I will do on this since -- let's talk about the main comments we received. We have a comment from Mr. Nicholson about the family lawyer problem, and I think, Alex, you should kind of report on what's been done on that, and that discussion you have had.

PROFESSOR ALBRIGHT: Scott

McCown and Lee Parsley and I met with several family lawyers, what, last week was it, in Scott's jury room, and we had a very good meeting with them. We went through the rules, discussed all of the limitations. We emphasized to them Rule 2, which is the rule that allows you to change the limitations to meet your case. We talked to them about the privilege rule and the way privileges would be protected, and they seemed to be very comfortable with these proposals at the end of the meeting. So I think we had a very good meeting. Scott, do you want to add anything to that?

HONORABLE F. SCOTT MCCOWN: Yes. I would just add that this was an official delegation from the Family Law Council that asked to meet with us because of Richard Orsinger's concerns that he had shared with them. Richard was unable to be at the meeting, but we met with them for probably almost a good two hours and went through how the rules worked and talked with them about their concerns, and while I don't think we can say that they endorsed the rules, I think we

can say I think their exact words were, "Well, we can live with that." They did not ask or pursue the idea of any special family law opt out or family law provisions. So it was a very productive meeting.

MR. SUSMAN: And I think now on Rule 1, Alex, you ought to explain -- Alex has rewritten Rule 1, and it appears as Rule 1(1).

PROFESSOR ALBRIGHT: I have just rewritten 1(1)(a) --

MR. SUSMAN: Why don't you tell us what you have done?

PROFESSOR ALBRIGHT: -- about pleading deadlines.

MR. SUSMAN: And why.

PROFESSOR ALBRIGHT: Scott Brister raised the point that our pleading deadline on 1(1)(a), which is Tier 1, which is the 50,000-dollar or less cases, we have a 30-day pleading deadline here where we say, "No amendment bringing the amount of recovery above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days."

Then in our general pleading deadline

rules, which we discussed very early and we really have not addressed them recently, we had a 60-day discovery -- I mean, pleading cutoff. So Scott suggested that those rules needed to be combined and made the same, have the same kind of pleadings deadlines. So I worked through those rules for a couple of days, and what I have suggested, you will see it behind your Tab 1 of the bound book, and then also the rest of it should be at the end, Rules 63, 66, 67, which are -- and yeah. Maybe 70.

Anyway, these are -- yeah, 70. these are the pleading amendment rules, and what I have suggested is that we just have a 60-day pleading deadline and have that pleading deadline operate like our current seven-day pleading deadline, which is you can amend as of right up to 60 days before trial. After 60 days before trial you have to get leave of court to amend your pleadings. The standard, though, would be the same as it is in the current rules, which is really liberal amendment of pleadings unless the other party can show surprise or prejudice.

So you have a situation where you can -- you can just amend your pleadings. They have to file a motion to strike if it's filed before 60 days before trial. If it's filed within 60 days before trial, you have to file a motion for leave to amend. Then I have also provided at the end of Rule 1(1)(a) that "Any amendment bringing the amount of recovery above $50,000 that is offered for filing later than 30 days before trial presumptively prejudices the party opposing the amendment in maintaining its action or defense upon the merits within the meaning of Rule 63."

That means then that if the burden shifts, that the party who is opposing the amendment will have to prove it. The requirement for evidence of prejudice or surprise will be satisfied by this presumption. So then the other side would have to come forward with evidence of no surprise for the court to allow the amendment.

CHAIRMAN SOULES: Okay. Can you put that in the form of a motion as it would relate to Rule 1 of the discovery book?

MR. SUSMAN: 1(1).

PROFESSOR ALBRIGHT: I move that we adopt my changes to Rule 1(1)(a), which appear behind Tab 1 in the bound volume.

HONORABLE F. SCOTT MCCOWN: Is that on page 3 behind Tab 1?

PROFESSOR ALBRIGHT: Right. Page 3, and then there is a clean version on page 4.

CHAIRMAN SOULES: Okay. Is there a second?

MR. SUSMAN: Second.

CHAIRMAN SOULES: It's been moved and seconded. Anyone, any discussion? Okay. Those in favor show by hands.

HONORABLE SCOTT BRISTER: Let me just ask, Alex, so your reading of the new 63 is that the burden is on the party objecting to leave to file?

PROFESSOR ALBRIGHT: As I recall, it was intended to be the same as under the current rules, which it is the burden --

HONORABLE SCOTT BRISTER: Yeah. I agree, under the current rules. There is a presumption you should allow leave.

PROFESSOR ALBRIGHT: Right.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Judge Brister, did that --

HONORABLE SCOTT BRISTER: Well, I am just --

CHAIRMAN SOULES: Are you through? I just want to be sure. It looks like you were still puzzling about it a little bit.

HONORABLE SCOTT BRISTER: Well, yeah, I am, and I am not sure that it may not be better to take it up when we get to Rule 63. My only concern on this Rule 1 which is different from the -- I agree with Alex's change that you just refer to Rule 63, but I had the concern if you do file this and it bounces out into Tier 2 or in Tier 3, and the problem is mechanically Tier 2 window may already be closed. So it's just a logical problem.

Does that mean you bounce into a track where the window is also closed? And then you have to bounce into -- the court has to do Tier 3, but if a court won't do Tier 3, you

may be with a remedy that's no remedy.

PROFESSOR ALBRIGHT: Can I respond?

CHAIRMAN SOULES: Yes. Alex.

PROFESSOR ALBRIGHT: Since you have to file a motion if you are within 60 days before trial, the court will have to address these issues because one of the things the court is to consider is whether the discovery that would be necessary by the new pleading can be completed within the applicable discovery limitations. So you might be arguing, "Your Honor, you can't amend, allow this amendment now, because this will kick us out of Tier 1. We are too close to trial. We are really -- this is a good trial date that we have got in six weeks."

So that would be a reason for the court not to allow the amendment, but I thought about that, and I thought it really made more sense to have the court address all of these issues at one time when the pleading amendment is being considered. That's why I thought it made sense to require the motion 60 days before trial.

HONORABLE SCOTT BRISTER: That's fine.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: So if I understand correctly now, in order to be able to amend without a motion you have to file it more than 60 days.

CHAIRMAN SOULES: No. We are not voting on that.

MR. LATTING: Okay. Well, I am just --

CHAIRMAN SOULES: Whether we are going to let discovery drive the pleading amendments is something I think that's got to be discussed wide open when we get to 63. Whether it's 60 days or 30 days or some other number of days is not on the table. It's just what's here written down, which does not say "60 days."

PROFESSOR ALBRIGHT: Well, it refers to Rule 63.

CHAIRMAN SOULES: Right. But we haven't passed on 63 yet. So we don't know how long 63 is going to be.

MR. LATTING: Okay. That was

my question.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: I have a concern about the amendment. Considering that this is the first level, it seems to me that it ought to be pretty set in concrete, if you don't amend within not later than -- earlier than 30 days, you are in Tier 1; and there is no way to get out of it unless you reset all of the timetables because this is the one where you do not much discovery; you do not much interrogatories, not much of anything; and you go to trial. Now, if somebody comes in within 30 days, and says, "Now, I want $100,000 or $200,000," then that defeats the whole purpose of the thing.

Even though there is some need to prove that that person has not been prejudiced, in fact, by the very nature of being in that tier they have been prejudiced because they haven't done any discovery except pursuant to this first tier. So I think it ought to be pretty clear that if you don't do what we need to do within 30 days or before the 30-day period

begins, you are out. You stay in Tier 1.

CHAIRMAN SOULES: John, are you suggesting then that --

MR. MARKS: We keep it the way it was.

CHAIRMAN SOULES: -- there be no amendment inside of 30 days that would cause a party to be moved out of Tier 1?

MR. MARKS: Right.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: Can I respond?

CHAIRMAN SOULES: And is that the way Rule 1(a) is written now?

HONORABLE SCOTT BRISTER: No.

PROFESSOR ALBRIGHT: No.

CHAIRMAN SOULES: So that's -- Alex Albright.

PROFESSOR ALBRIGHT: The way that Rule 1(a) is written now, it just says that no amendment will be allowed within the 30 days so as to unduly prejudice the opposing party. Well, I guess, no, it does say in no event later than 30 days before trial.

MR. MARKS: Right. I think

that ought to stay there.

PROFESSOR ALBRIGHT: And so we do allow it. We do allow it possibly here. One thing that I thought of --

MR. SUSMAN: The last sentence, Alex.

PROFESSOR ALBRIGHT: Right. We do have a presumption that it is prejudicial. Now, one thing we might want to consider, though, is, you know, you have 30 days before trial. Is your trial date really a good trial date? Are you No. 94 on the docket, or are you No. 2 on the docket? So that seems to be something that -- the way I wrote it is so that the court could take all of these facts into consideration in making the decision.

MR. MARKS: Well, my concern is that we do Tier 1 discovery and then all of the sudden we are bounced into Tier 2, or we are bounced out of that, and now, we want $100,000 or $200,000 or a million dollars, and all we have done is this Tier 1 discovery, and we are out.

CHAIRMAN SOULES: Okay. Well, we have got the issue pretty well in focus,

whether it would be permission granted, but presumptively it would be against the party tendering the amendment. That's what Alex proposes, or as the rule is now proposed by the committee as a whole, that there be no allowance of amendments within 30 days of the trial setting. Okay. Do we need to separate the issues then, Alex, in order to vote? Are we going to change this first and then --

PROFESSOR ALBRIGHT: We could say that that's a proposed amendment to my amendment.

CHAIRMAN SOULES: Okay. Do you offer that as -- well, of course, that's the way it is right now. It doesn't really need to amend. It's up or down on yours.

Well, let's just get a show of hands on that unless there is further discussion. How many feel there should be --

MR. SUSMAN: Let me just ask this question, and I haven't really thought about it very much. It seems to me, I mean, what we are trying to do is encourage people to plead their cases in a way that they will go within Rule 1(1), and one of the reasons to

be a little flexible is if they discover something at the last minute, and under making some extraordinary showing to overcome the presumption of prejudice they would be allowed to amend and get out of Tier 1, particularly if you are going to allow amendments under some extraordinary showing in regular cases within 30 days before trial.

I mean, it seems to me if you distinguish the rights you get under Tier 1 greatly from rights you get under Tier 3 insofar as amendments are concerned, the Bar will just say, "Listen, we can't take the chance of being under Tier 1. We will just plead our case in excess of $50,000 so we have it there." I mean, that's one of our concerns. Maybe that's not a big concern.

CHAIRMAN SOULES: Of course, the incentive is that a party with a small case can opt into Tier 1 and stay in the complaint; and that's the real incentive, is minimal discovery without just getting bowled over by defensive discovery in a small case. Well, let's take them one at a time. The first thing that Alex proposes is to delete

the second sentence.

PROFESSOR ALBRIGHT: I think you kind of have to take it all at once.

CHAIRMAN SOULES: Well, I am going to take it a piece at a time. "No amendment bringing the amount of recovery above $50,000 shall be allowed at such time as to unduly prejudice the opposing party and in no event later than 30 days." The proposal is to delete that sentence. Those in favor show by hands. It's to delete this. Okay. Show by hands again so we can count them. Seven. Those opposed? Nine. By a vote of nine to seven it stays in the way it is. Okay.

HONORABLE SCOTT BRISTER: Then you have to do something else because that now conflicts with 63. The first part where you drop that sentence and put in "timely pursuant to 63" makes sure that you have one cutoff deadline. If you put that sentence back in, you now have two different ones.

CHAIRMAN SOULES: Right.

HONORABLE SCOTT BRISTER: One that goes for 63 and one that goes for Rule 1(1), and it's going to be a tremendous

confusion when you are supposed to amend your pleadings, but that is a different cutoff time from 63. Maybe you want to discuss all of that when you discuss 63, but it's --

CHAIRMAN SOULES: Well, that's right. Now, given that vote, Alex, what do we do with the next sentence?

PROFESSOR ALBRIGHT: Well, I would suggest that what we do is instead of leaving the current sentence is amend my added sentence down there and say that, "However, no amendment is allowed later than 30 days." Because the unduly prejudice concept is included in Rule 63.

CHAIRMAN SOULES: Okay.

PROFESSOR ALBRIGHT: What we are doing is making an exception to Rule 63 --

MR. SUSMAN: Correct.

PROFESSOR ALBRIGHT: -- for 1(1) cases. So that would be the "however" clause, "however" sentence at the end of that section. So I would say we say, "However, any amendment bringing the amount of recovery above $50,000 that is offered for filing later than 30 days before trial shall not" --

MR. SUSMAN: "However, no amendment shall be filed," something like that.

PROFESSOR ALBRIGHT: Right.

HONORABLE F. SCOTT MCCOWN: But am I missing something? Doesn't the rule already say that in our present version in the second sentence? After "and" it says "and in no event later than 30 days before trial."

CHAIRMAN SOULES: That's right. What we are trying to do right now is reconcile that concept with Rule 63, whatever the Rule 63 fuse may be when we get to it. If that's necessary.

HONORABLE F. SCOTT MCCOWN: But the only point I was making is I don't think we need the "however" sentence, the last sentence of Alex's proposal, in the book because we already have that in the rule.

PROFESSOR ALBRIGHT: Okay. I have an idea. We could say --

MR. SUSMAN: Just say "No amendment bringing the amount of recovery above $50,000 shall be allowed later than 30 days before trial."

PROFESSOR ALBRIGHT: Period. And then we refer to Rule 63 in the next --

MR. SUSMAN: Correct.

PROFESSOR ALBRIGHT: -- sentence, and what that does is then trigger in the unduly prejudiced if you bring in -- if you amend before 30 days before the trial.

CHAIRMAN SOULES: One more time. What are you proposing?

PROFESSOR ALBRIGHT: Okay. In the language that is crossed out that we just voted to keep in, "No amendment bringing the amount of recovery above $50,000 shall be allowed." Then we are crossing out "at such time as to unduly prejudice the opposing party and in no event." Then we go back and include, "later than 30 days before trial."

So it reads, "No amendment bringing the amount of recovery above $50,000 shall be allowed later than 30 days before trial."

CHAIRMAN SOULES: Within 30 days prior to trial.

PROFESSOR ALBRIGHT: Okay. "Within 30 days before trial."

MR. LATTING: I have a question.

PROFESSOR ALBRIGHT: Then "if by claim, amendment, or supplement filed timely pursuant to Rule 63" then it says -- and David Keltner just made the suggestion that instead of "filed" it should be "allowed pursuant to Rule 63."

MR. LATTING: I have a question.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: If a person, a plaintiff, files a Tier 1 case and for some good reason finds out that there needs to be an amendment which will take it out of Tier 1, and he finds that out 27 days before the trial, it cannot be done by the trial court.

HONORABLE SCOTT BRISTER: No. I can figure out a way.

MR. LATTING: Besides granting a continuance.

HONORABLE SCOTT BRISTER: That's it. You ask for a continuance and then you can do it, and a continuance is always done on that. This is going to be a manifest

injustice if we go to trial in 27 days. If it looks like a manifest injustice to me, we will grant a trial continuance and give you enough time to replead and take it out of Tier 1 and give you time to do Tier 2 discovery.

MR. LATTING: But it does do this. It does take away from the trial court the ability no matter what the circumstances to stick to the trial date but to allow the amendment.

HONORABLE SCOTT BRISTER: That's right.

MR. LATTING: And that's supposed to be saving the people of the state money.

HONORABLE SCOTT BRISTER: Sure. Because you chose to be in Tier 1 for certain cost-saving reasons, and you know, if manifest injustice requires that you get out of it then manifest injustice ought to allow the other side to do some more full discovery on it.

MR. MEADOWS: I agree. That's the way -- you set the rules in play by selecting Tier 1. If you change the tier, you have changed the rules. I mean, I think you

should get a continuance. That's exactly the way it ought to work.

CHAIRMAN SOULES: Okay. What I propose we do is just leave Rule 1 the way it is and deal with this in 63 because it's an exception to 63. So whatever we do with 63 we would have to recognize this exception. Any objection to that?

Okay. There being no objection to that, those in favor of Rule 1 as written show by hands.

HONORABLE PAUL HEATH TILL: And that's on page 4, right?

CHAIRMAN SOULES: On page -- well, let's see. The page numbers are a little hazy here.

PROFESSOR ALBRIGHT: Now we are going back to --

CHAIRMAN SOULES: It says, "Rule 1, discovery limitations, revised 6-21-1995." If you start with the redlined draft of the rules, it's the third page, counting the cover page as No. 1. It's the third page and part of the fourth page. Okay. Any opposition?

MR. SUSMAN: Wait a second. Why do we have this concept of unduly prejudice in the rule as written? "No amendment bringing the amount of recovery above 50,000 shall be allowed at such time as to unduly prejudice the opposing party."

PROFESSOR ALBRIGHT: That's why I think that needs to be taken out because the concept of unduly prejudice is in Rule 63.

MR. SUSMAN: I do, too, and this would require you to get approval of the court because you have to show you don't unduly prejudice the other side any time you go over 50,000.

PROFESSOR ALBRIGHT: Right.

MR. SUSMAN: Even if it's a day after you file your original petition.

PROFESSOR ALBRIGHT: Right. We wrote this when we were not considering Rule 63.

MR. SUSMAN: It shouldn't be there.

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: Okay. So you're proposing to take out in the second

sentence "at such time as to unduly prejudice the opposing party and in no event later than..."

MR. SUSMAN: Right.

CHAIRMAN SOULES: Strike that and strike "before" and make the sentence read, "No amendment bringing the amount of recovery above $50,000 shall be allowed within 30 days prior to trial."

MR. SUSMAN: Correct.

HONORABLE SCOTT BRISTER: And drop the last sentence? Drop the last sentence of Alex's?

CHAIRMAN SOULES: No. We aren't working on Alex's at all. We are working on the committee's draft. Okay.

Those in favor of that change show by hands. Ten. Those opposed? Ten to one it passes.

Okay. With that change those in favor of Rule 1 show by hands.

HONORABLE SCOTT BRISTER: Just a second. Can I ask one more thing real quick?

CHAIRMAN SOULES: Judge

Brister.

HONORABLE SCOTT BRISTER: The next sentence, are we leaving that in as 30 days before trial? Are we switching that to "timely pursuant to 63," or did you want to put whether we are going to change that sentence off until we discuss 63? Because this is a different time. 60 days before is Rule 63 when you have to come do this, this says; but if it's 50,000, you have to do it 30 days before trial, and it's going to create confusion, and the part I definitely agreed on Alex's proposal was just to drop that and make it timely pursuant to 63 as just all one test.

CHAIRMAN SOULES: Well, I think that assumes 60 days. I don't see how we can live with 60 days, but some day we are going to have to come to how long before trial you have to amend that.

HONORABLE SCOTT BRISTER: Well, it doesn't matter, but it sure ought not to be two different dates for two different places that are 62 rules apart.

CHAIRMAN SOULES: 63 is going to have to be amended in order to recognize

this exception, whatever it may be.

MR. SUSMAN: I can tell you how you might solve this. You could begin by the sentence -- instead of having the second sentence, the "no amendment" sentence, begin, put it "if by claim, amendment, or supplement any party seeks relief," et cetera.

PROFESSOR ALBRIGHT: And "not refer."

MR. SUSMAN: And "not refer" -- don't even look at yours. Okay. Do not look at yours. Look at the redlined version, and would read, "If in any suit the plaintiff's pleadings affirmatively seeks only monetary recovery of 50,000 or less" -- to the end of that, "discovery control plan."

Then it would skip and say, "If by a claim, amendment, or supplement, any party seeks relief other than monetary recovery in excess of 50,000," et cetera, and then the next sentence would be, "No amendment bringing the amount of recovery above 50,000 shall be allowed within 30 days before trial."

HONORABLE SCOTT BRISTER: That takes care of it.

MR. SUSMAN: Period, and that would take care of it.

MR. KELTNER: And, Alex, that takes care of my comment as well.

PROFESSOR ALBRIGHT: Okay.

CHAIRMAN SOULES: Okay. So how do you fix this "if by claim, amendment, or supplement," what?

MR. SUSMAN: You change that sentence to read "if by a claim, amendment, or supplement," comma, and eliminate the balance.

CHAIRMAN SOULES: Down to where?

MR. SUSMAN: Through "trial."

HONORABLE SCOTT BRISTER: Cut the words "filed more than 30 days before trial."

MR. SUSMAN: Yeah. Cut that out. "Any party that seeks relief other than monetary relief," et cetera, to the "suit," the end of that sentence.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Then you insert --

CHAIRMAN SOULES: And you move this other sentence?

MR. SUSMAN: Yeah. "No amendment" --

CHAIRMAN SOULES: Move it down to follow that sentence?

MR. SUSMAN: Right. Right.

CHAIRMAN SOULES: Okay. Any other changes to Rule 1?

HONORABLE F. SCOTT MCCOWN: Yes.

CHAIRMAN SOULES: Judge.

HONORABLE F. SCOTT MCCOWN: I have one suggestion because, I mean, we have all been working with this a long time and know what we intend, but for the lawyers and judges who are reading it when you say, "No amendment bringing the amount of recovery above 50,000 shall be allowed within 30 days prior to trial," I think you need to add the phrase -- and this isn't the way you would want to add it, but the concept would be if the case is staying in Tier 1.

Because the way that sentence -- what that implies to me is if you plead it in Tier 1 and you're within 30 days before trial, you cannot amend, period; and that's not what

we intend, and it's not contextually the way you would read it, but I think it's an easy misinterpretation to make, and it could be solved just by adding some words, and you would want better words than these, but maybe you would want to say "No amendment leaving the case under this section" or something. You-all see what I am saying? I don't have the words, but --

CHAIRMAN SOULES: I don't understand.

HONORABLE PAUL HEATH TILL: If you read it literally, it doesn't do what you intend. If you just read the words on the paper, it doesn't do what you are trying to do.

CHAIRMAN SOULES: I just don't understand what --

MR. MEADOWS: Scott's saying that the objectionable amendment is an amendment that takes it out of Tier 1, but there may be amendments necessary within Tier 1.

HONORABLE F. SCOTT MCCOWN: No. What I am saying is that under this rule as we

have got it written even within 30 days prior to trial the judge can still allow an amendment, but if he allows it, you're out of Tier 1.

MR. SUSMAN: No. Huh-uh. That's not what the group just voted on. The group voted on a circumstance that if you are in Tier 1 and you wait 'til 30 days before trial, you can't get into any other tier, with the court's blessing or anything, unless you get a continuance.

HONORABLE F. SCOTT MCCOWN: Well, what's the last sentence mean? "When a timely filed pleading renders this section no longer applicable discovery shall be reopened and completed within the limitations provided in section 2 or 3 of this rule."

CHAIRMAN SOULES: Actually the sentence that we are talking about moving should be moved to the very end after the word "redeposed."

MR. SUSMAN: I think that's right. You're right.

HONORABLE F. SCOTT MCCOWN: Okay. Well, then I misunderstood, but then to

be clear, if I am within Tier 1 and I am 27 days before trial, I cannot amend?

MR. SUSMAN: No. That's true.

HONORABLE F. SCOTT MCCOWN: And the only thing I can do is ask the judge in his or her discretion to give me a continuance and then allow me to amend.

CHAIRMAN SOULES: That's right.

MR. SUSMAN: Right.

HONORABLE F. SCOTT MCCOWN: Okay. All right. I just misunderstood.

CHAIRMAN SOULES: Let's see. Who's that? Rusty.

MR. MCMAINS: When you say "amend" you are talking about amend to get out of Tier 1?

HONORABLE F. SCOTT MCCOWN: To get more than $50,000.

MR. MCMAINS: Yeah. I mean, we are not barring amendments otherwise.

CHAIRMAN SOULES: That's right.

MR. MEADOWS: Yeah. That was my point.

HONORABLE F. SCOTT MCCOWN: All right.

CHAIRMAN SOULES: We are only talking about the amount.

MR. MCMAINS: I understand. If everybody is satisfied being in Tier 1 that if there is some pleading defect of some kind that they can fix that ain't going to hurt anybody or is not a big deal, that needs to be fixable.

CHAIRMAN SOULES: True. Okay. With those changes now we are talking about leaving -- starting with Rule 1(1)(a), the second sentence would be changed to read, "No amendment bringing the amount of recovery above $50,000 shall be allowed within 30 days prior to trial." With that change it would be also moved to the end of the paragraph.

The third sentence would read, "If by a claim, amendment, or supplement, any party seeks relief other than monetary recovery or" --

PROFESSOR ALBRIGHT: That "or" should be deleted.

CHAIRMAN SOULES: Take the "or" out. In excess, "monetary recovery in excess of $50,000, excluding costs, prejudgment

interest, and attorneys' fees, this section shall no longer apply to the suit." And the last sentence as presently written would stay the same.

PROFESSOR ALBRIGHT: Excuse me. That "or" is supposed to be in there because it's if you seek relief other than monetary recovery or -- maybe that should be "monetary recovery in excess of $50,000." That might make it clear.

CHAIRMAN SOULES: Oh, monetary recovery. Okay.

MR. KELTNER: I'm sorry. Would you read that one more time?

CHAIRMAN SOULES: Okay. Sure. You want me to read the changes to what's shown in the text as line three or sentence three?

MR. KELTNER: Yes.

CHAIRMAN SOULES: "If by a claim, amendment, or supplement, any party seeks relief other than monetary recovery or seeks monetary recovery in excess of $50,000 excluding costs, prejudgment interest, and attorneys' fees, this section shall no longer

apply to the suit." Okay. Those in favor of Rule 1 now as modified show by hands. 13.

Those opposed? 13 to 1, Rule 1 is approved.

MR. SUSMAN: This is word picking, but the next to last sentence, "when a timely filed pleading," can we eliminate "a timely filed"? Does it add any meaning now?

PROFESSOR ALBRIGHT: Yes.

MR. SUSMAN: Huh?

PROFESSOR ALBRIGHT: Yes.

MR. SUSMAN: Can it be eliminated?

PROFESSOR ALBRIGHT: No.

MR. SUSMAN: Why does it need to be there?

PROFESSOR ALBRIGHT: Before we talk about it, I'd like to do Rule 2.

CHAIRMAN SOULES: Okay. Well, let's go on now to Rule 2. Rule 2, discovery control plan suits.

MR. SUSMAN: Okay. Let me tell you where we stand here. We have added a provision on Rule 2 on conferences, 2(2). The rest has been essentially wordsmithing of

2(1), no change in substance. Scott Brister, if I fairly can characterize his suggestion, would say that "except where specifically prohibited" should only apply to parties and not --

HONORABLE F. SCOTT MCCOWN: Steve, we are not all together. Some people are looking at part 2 of Rule 1, and some people are looking at Rule 2.

CHAIRMAN SOULES: We have moved to what appears to me to be page 64; is that right?

MR. SUSMAN: He just approved the entire Rule 1.

HONORABLE F. SCOTT MCCOWN: I know, but different people are looking at something different.

MR. SUSMAN: We are now looking at Rule 2, which looks -- these pages are terrible to read.

CHAIRMAN SOULES: Go back to Rule 1. Okay. Rule 1 is one, two, three, four pages long and then you see Rule 2.

MR. SUSMAN: "Modification of Discovery Procedures and Limitations:

Conference Required." Okay. Scott Brister's suggestion, which the committee has considered and with all due deference not accepted, is that there should be no limitations upon what a court can do, and there aren't many. The only ones I can think of in here limiting what a court can do is that a discovery control plan must contain a trial date. It must contain deadlines as we have written these rules. It must contain deadlines for joinder parties, amending pleadings, and disclosing experts.

They can be whatever dates the court picks, and I don't know whether there are any other things where we put a limitation on the court, but that was one where we -- and so it doesn't seem to do -- we didn't think it did much harm to just leave it the way it's worded so that the "except where specifically prohibited" applies both to the parties, what they can do by agreement, and what the court can order; and as I said, I only know of the two instances where the court has got any prohibition.

CHAIRMAN SOULES: Judge

Brister.

HONORABLE SCOTT BRISTER: Well, we have just made a third one now. The court can't allow a excess of 50,000-dollar pleading within 30 days.

MR. SUSMAN: Huh?

HONORABLE SCOTT BRISTER: Within 30 days of trial.

MR. SUSMAN: Can't do it. There is a third one.

HONORABLE SCOTT BRISTER: But the court can't do a discovery control plan without a trial date?

MR. SUSMAN: Yes. Or deadlines.

HONORABLE SCOTT BRISTER: Or what deadline?

CHAIRMAN SOULES: Discovery cutoff.

MR. SUSMAN: Discovery cutoff, experts, joinder party.

MR. MARKS: But the court can change it?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Let me get

the -- let Judge Brister finish his thought here.

HONORABLE SCOTT BRISTER: Yeah. I think that's fine. I was just confused reading it, and I would prefer that we say in a comment what things the court can't do so that you avoid confusion by some judges about, well, I can't change the number of deposition hours limits. I just think there is going to be -- there may be some confusion because it just -- I just couldn't think of the things that would be limited that a court couldn't do. So I would just propose that we state in a -- have a footnote or comment stating specifically what things the court can't change.

CHAIRMAN SOULES: Okay. Judge Guittard and then I will get to Joe Latting.

HONORABLE C. A. GUITTARD: All of these periods seem to be keyed on trial date. Now, if the case is set on a Monday, and it doesn't actually get to trial 'til Thursday, does that extend all of these dates by three days? If so then that trial date is subject to manipulation, I guess. Is that the

intent of the rules?

CHAIRMAN SOULES: I mean, that's something that's just an inherent problem in the whole process, even today, and I don't know how to fix that. If somebody has got any ideas, we can sure talk about it.

HONORABLE C. A. GUITTARD: The only other thing would be to say the date fixed for trial in the discovery control order for that kind of case or some other analogous provision. In other words, that so many days before trial seems to be sort of a soft date in view of the uncertainty of getting to trial on that date.

CHAIRMAN SOULES: Joe Latting, you had your hand up.

MR. LATTING: Well, what I envisioned here is I am thinking of a big case where competent lawyers on both sides of a big case know that it's going to take maybe a long time to get the case ready for trial, and they don't know when it's going to be ready for trial, and they want a judge to aid them in moving the case along, but nobody really has an idea of when the case is going to be ready

for trial.

It might be eight months. It might be a year and eight months, depending, and there is no way to know that, and you go into court to try to get the trial judge to approve your discovery plan, and you have to put a trial date, although everybody knows it's artificial, and it seems to me to be a regression in our jurisprudence to say that a court has to do that no matter what the parties in their judgment think about it, and I am opposed to it on that basis if none other.

CHAIRMAN SOULES: Well, we are going to get that because that's a different rule. That's not this rule.

MR. LATTING: Well, that's what it says here, though. It says, "A trial date must be included in a discovery control plan," even never mind that you don't have any idea when you can actually get to one.

HONORABLE SCOTT BRISTER: And, of course, it's not really a prohibition on the court. You know, you can just put down, well, Christmas day of 2002 and then when I

want to change it I put something else different. It's not what I -- the reason I had originally thought put "except where specifically prohibited." Just putting in a trial date and putting a discovery cutoff deadline is not a prohibition from the judge's standpoint of view. You just enter a new order and change it.

CHAIRMAN SOULES: Okay. We are on Rule 2. I don't see anything in there about trial date.

HONORABLE SCOTT BRISTER: No. That's what Steve just said "except where specifically prohibited" refers to.

CHAIRMAN SOULES: Okay. Well, we are going to get to that.

HONORABLE SCOTT BRISTER: That's the only thing it means, Luke. That is the only thing "except where specifically prohibited" with reference to clause 2 means, trial date, discovery cutoff deadline, or this new 30-day thing.

CHAIRMAN SOULES: We know it's the 30-day because we have already passed on Rule 1. So we know that's there. We don't

know whether any of the rest of it's there or not.

MR. SUSMAN: Yeah, we do because it's in the discovery control plan.

MR. LATTING: Yeah, we do.

HONORABLE F. SCOTT MCCOWN: Well, could I make an observation? I think that the form of Rule 2 works real well, and if the Supreme Court adopts these rules, undoubtedly over time they are going to be amended, and you don't want to have to come back and amend Rule 2 every time you amend any particular rule, and the concept of Rule 2 is except where specifically prohibited. Right now there may only be one or two places. Two years from now there may be a half a dozen places, but it just says that except where specifically prohibited you can modify this in any suit by agreement or by court order. So I think the format works, and we ought to approve Rule 2 and then move forward and fight about the specifically prohibited when we get to each one individually.

MR. SUSMAN: So moved.

CHAIRMAN SOULES: Okay. Are we

ready to vote?

HONORABLE DAVID PEEPLES: No.

CHAIRMAN SOULES: I can't see whose hand is up. Judge Peeples.

HONORABLE DAVID PEEPLES: Do we mean to give the court discretion to veto terms that the parties agreed on? The parties come in with this vast comprehensive agreement, and I don't like part of it, am I stuck with it, or can I change it?

MR. SUSMAN: You change it.

HONORABLE F. SCOTT MCCOWN: Change it.

HONORABLE DAVID PEEPLES: It doesn't say that. I hope so. And if the court has, you know, issued a detailed ruling, can the parties change that by agreement without --

HONORABLE F. SCOTT MCCOWN: No. No. Let me point out why I think there is no problem. What this says is that the procedures and limitations set forth in these rules may be modified by the agreement of the parties. Once the court makes an order it doesn't say that the order of the court can be

modified by the agreement of the parties. So whatever the court orders the parties are not going to be free by agreement to modify.

CHAIRMAN SOULES: Okay. The only question I have is why "for good reason"?

MR. SUSMAN: Come again.

CHAIRMAN SOULES: Why the words "for good reason" after "the court order"?

HONORABLE F. SCOTT MCCOWN: The reason for that, Luke, is because this is a pretty new concept to give a trial court pretty vast discretion to alter the procedures and limitations, and we wanted a standard to say that there has to be a good reason to do it so that the appellate courts if they were reviewing that could say, you know, "This trial judge didn't have good reason. This wasn't appropriate."

MR. SUSMAN: Luke, this has been in here. I mean, the "for good reason" concept has been in for the last four meetings at least.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: It's been in from the very beginning.

CHAIRMAN SOULES: Okay. Are we ready to vote on Rule 2? Those in favor of Rule 2 as proposed by the committee show by hands. 14. Those opposed? 14 to 1 it carries.

Okay. Now we go to the next page, which is Rule 3, permissible discovery, forms and scope.

MR. HAMILTON: Is that Rule 2 passed as written or as amended?

CHAIRMAN SOULES: It's passed as shown on the page we just looked at.

MR. HAMILTON: And not by the amendment?

CHAIRMAN SOULES: Pardon me?

MR. HAMILTON: There is an amendment in this from Scott Brister.

HONORABLE SCOTT BRISTER: No. That's not it.

CHAIRMAN SOULES: I'm sorry. I can't hear. There are so many people talking I just can't hear.

MR. HAMILTON: There is an amendment in this book by Scott Brister, but that's not --

HONORABLE SCOTT BRISTER: It was just an idea.

CHAIRMAN SOULES: That's not part of it.

MR. SUSMAN: Rule 3.

CHAIRMAN SOULES: Rule 3, permissible discovery, forms and scope, and we have comments there from Judge Brister.

MR. SUSMAN: Judge Brister, again, comment. You have his comments. Let me give you the --

HONORABLE SCOTT BRISTER: It's mostly on the letter on item 23, the third paragraph in my letter.

MR. SUSMAN: Yeah. Let me tell you what I think would be the subcommittee's response to his comments, I think, which basically I think we have heard most of these before. His first comment, which is covered by his letter, is that the distinction between written discovery and other forms of discovery should be obliterated because -- and the reason we have retained it is because we believe that there is a requirement to supplement and amend certain forms of written

discovery; whereas we do not believe there is a requirement to supplement and amend oral discovery, like deposition testimony.

And one of the things that this committee has said on many meetings is that we don't want to have lawyers having to go read depositions and correct deposition testimony. So we have tried to make a distinction between written discovery and other forms of discovery so when it comes to the duty to supplement and amend we can limit it to written discovery. That's the first point of the subcommittee in response to, I think, Judge Brister's comments.

CHAIRMAN SOULES: Let's get Judge Brister's reaction to that.

HONORABLE SCOTT BRISTER: Well, if the only purpose -- for instance, you have two rules, 7 and 8, dealing with motions to compel, et cetera, that the only difference as I understand between them is one is written discovery and one is everything else. If everything else just means depositions, let's not have two sets of rules through all of this for written discovery and everything else.

Let's just make one rule is depositions and say for everything else -- that's my first.

It's just a lot of wasted space in the rules creating a distinction. If all we mean is to separate out depositions, which I will get to in just a second, just say separate out depositions and have one set of rules that applies to everything except depositions.

But No. 2, the critical -- there are going to be -- there is critical or noncritical items disclosed in a deposition. If it's critical, for instance, plaintiff's expert in a product liability case 30 days before trial -- this is an actual case. This isn't made up. 31 days before trial says, "Component A is defective in my opinion."

The day before trial, new facts to report from plaintiff's expert after settling with Component A manufacturer, "Did I say Component A? I meant Component B." Now, that ought to have to be supplemented because Component B manufacturer does not have an expert since we took the plaintiff's depo. and he said, "Nothing is wrong except Component A." That critical kind of an issue

ought to be supplemented.

And I think the rule -- everything else, you know, if you got the date wrong or somebody's name that, you know, you talked with about it or something like that, that's a noncritical matter, the rules that the subcommittee has drafted do not require that to be supplemented anyway.

So I don't think there is going to be -- if you abolish the distinction, if the concern is you don't have to read through and amend everybody's depositions on noncritical matters, that's not going to be required anyway. You are creating a confusing distinction, duplicative set of rules for something you wouldn't have to do even on written discovery. So that's why it seems to me it's simpler, it's shorter, everything is treated the same if you just abolish the distinction rather than keep people guessing.

CHAIRMAN SOULES: Any other comments?

MR. LATTING: Well, what is the reason for not just saying "depositions" if that's what we mean?

MR. SUSMAN: Well, I know it comes up at least in two places. Okay. It comes up -- part of it is the way we wrote the rule. I mean, it's just a drafting election, define written discovery because then it comes up I know in two places. One, it comes up on the duty to supplement or amend where we felt very strongly that we did not want to require lawyers to go read depositions that may have been -- you know, who the hell knows who defended the depositions. I mean, it's a big task and under penalty of some terrible claim to go have to supplement.

MR. LATTING: Yeah. I agree with that.

MR. SUSMAN: So we did it there. Also, in the assertion of privileges, when you withhold a document on the ground of privilege there is a whole procedure that you do with that document, identifying it, et cetera, et cetera, that doesn't really, we felt, apply to a refusal to answer a question in a deposition. I mean, you don't typically make a log, a privilege log of answers that were not given in depositions.

I am not exactly sure how you would do it, but it is withholding privileged information. I mean, you know, a lawyer asks you in a deposition. So it was easier to write the privilege and the way you assert privileges rules and objections and easier to write the supplementation rule by defining written discovery.

HONORABLE F. SCOTT MCCOWN: And could I point out something, too, on that, Steve? That on the merits of this issue I don't feel strongly and indeed Judge Brister makes a good point, but it's almost six of one and half a dozen of another. The problem is we picked the half a dozen, and he's arguing for the six, and it's a technical drafting nightmare because the whole rules that we have drafted now are built on us picking half a dozen. If we change to six, we are going to have to redraft an incredible amount of intricate detail that these are built on, which we could do if it was a big point, but it's going to be pretty hard to do and get these up to the Supreme Court, and when it's a close issue, I'd recommend we just stick with

what we have got.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: That's why I spent 40 hours on this. They are sitting right in front of you, no drafting necessary. All it does is make them shorter. The ones that it changes, which is Rule 7 and Rule 8, and basically that's it, you drop a couple of other places. You drop out "written," and that's all you have to do. There is no redrafting necessary, and it makes it -- I mean, when somebody in here -- and it ain't going to be me -- is going to have to write a Law Review article explaining what written discovery is and what it's not because these rules don't say.

I mean, it defines it in the front, but you have to imagine -- you know, you go through the list that it has and imagine what it has not and why is it has not; and if all you want is a different set of rules for depositions, which again in my argument is you don't, but even if you do then all you have to do is say at the start of the deposition rule

"notwithstanding any of the foregoing" or at the end of the sanctions supplementations rule say "except as provided in the deposition rule."

CHAIRMAN SOULES: Let me ask you, Judge, if we just said in the definition of written discovery say, "Written discovery as used elsewhere in these rules means all discovery except oral depositions"?

HONORABLE SCOTT BRISTER: Sure. Again, I don't -- you know, I don't see why oral depositions, especially the case I -- I mean, you don't have to read through a bunch of depositions to know your expert just changed who the target defendant was. Now, that's not confusing to anybody. That doesn't require any extra work, and it badly sandbags Component B manufacturer who all of the sudden the day before trial with no expert is the target.

CHAIRMAN SOULES: Okay. We are going to get to supplementation later since we are -- and we may need to come back here if we decide to supplement depositions when we get to there, if that change is made; but if we

are worried about some almost mathematical issue of trying to sort through and find out what's left by reading this written discovery the way it is, if we could just say, "Written discovery as used elsewhere in these rules means all discovery except oral depositions," then we know what's missing, what's left out of the definition, and we don't have to search to find out what's left out. Steve Susman.

MR. SUSMAN: Could I urge that we not spend a lot of time making aspirages? We can come back to this tomorrow sometime. You need to get all the way through these rules. Scott has an argument, too, that there is certain other forms of discovery that are written, and he wants to make them oral. I mean, that's coming down the road. I mean, I would agree with Scott if at the end of the day we conclude that on everything we are going to treat oral discovery the same as written discovery then we need to come back and change this, but for the time being why don't we leave it as it is because we have focused on it and then come back to it, rather than argue now because the only way to make it

sensible is to get into what are the consequences of those.

HONORABLE SCOTT BRISTER: That's true.

CHAIRMAN SOULES: So pass this problem for the moment? Is that what you are suggesting?

MR. SUSMAN: That's what I am suggesting.

CHAIRMAN SOULES: Do you agree, Judge Brister?

HONORABLE SCOTT BRISTER: Yeah.

CHAIRMAN SOULES: Okay. We will pass it for now.

MR. MEADOWS: What about Luke's proposed change in the language to redefine "written discovery"? I thought that was the sentence.

HONORABLE SCOTT BRISTER: The problem is it's entry on land and IME's --

HONORABLE F. SCOTT MCCOWN: Right.

HONORABLE SCOTT BRISTER: -- are also, though, I would want to change them and the subcommittee wouldn't and so --

MR. SUSMAN: Hold it 'til the end, please. Judge Brister had a comment on 2(c).

CHAIRMAN SOULES: Before we leave that, we should be able, though, when we get done to say "written discovery means everything except" and to designate what those exceptions are, right?

HONORABLE SCOTT BRISTER: I think that would be clearer.

CHAIRMAN SOULES: Rather than what it includes?

HONORABLE SCOTT BRISTER: Right. Right.

CHAIRMAN SOULES: So we will come back and do that after we know what the exceptions are going to be. So when we vote for this rule we know that we are doing it with that reservation later.

MR. SUSMAN: Fine. Judge Brister has -- if you look at the way we wrote section 2, there is a general of what's discoverable that talks about the requirement of relevance, under 2(a), and then it is true we repeat under (2)(c) -- well, it's in (2)(b)

we repeat because we talk about documents are things that constitute or contain matters relevant to the subject matter of the action.

(2)(c) says, "person with knowledge of relevant facts," and so there is concepts -- it is repetitive of the notion of relevance, and we considered that, Judge Brister, and just said the Bar is used to the concept of persons with knowledge of relevant facts. It maybe repeats it, but doesn't do any harm.

CHAIRMAN SOULES: Judge Brister, is your point it's redundant?

HONORABLE SCOTT BRISTER: Yeah. I wouldn't spend a lot of time on it. I am just trying to save trees.

CHAIRMAN SOULES: But does it assist clarity?

HONORABLE SCOTT BRISTER: I don't see how. You know relevant facts, you know it, relevant facts.

MR. SUSMAN: He's talking about (c).

HONORABLE SCOTT BRISTER: The last sentence of (c).

PROFESSOR ALBRIGHT: But this doesn't talk about relevance. This is about that it need not be admissible and personal knowledge is not required. This is the one that makes it clear that you can discover --

MR. SUSMAN: Oh, that's right.

PROFESSOR ALBRIGHT: That you have to identify persons with only hearsay knowledge, right?

MR. SUSMAN: That's right.

HONORABLE SCOTT BRISTER: But, I mean, you know, you could also list, you know, maybe they got it from reading a document. I mean, there is a million ways you get it. The question is, is it relevant, and that's defined in (2)(a), that it may be admissible; it may be inadmissible.

I would just vote on it and move on. It's not that big a deal.

CHAIRMAN SOULES: Okay. Those in favor of deleting the last sentence of Rule 3(2)(c) show by hands. Eight. Those opposed? Eight. Stays in.

HONORABLE SCOTT BRISTER: That's fine.

MR. SUSMAN: The next item is on settlement agreements that Scott again said that settlement agreements should be discoverable but only if they are relevant. So he would replace "any settlement agreement" with the words "any relevant settlement agreement or part thereof." This I know we discussed in our subcommittee, and there was a lot of objection, particularly from Paul Gold. I mean, go ahead. You tell me what --

PROFESSOR ALBRIGHT: Okay. The issue is whether we limit it to relevant settlement agreement or any settlement agreement. There has been some debate in the lower courts about whether settlement agreements from other cases should be discoverable or not. The Supreme Court just came down with an opinion that's Ford V. Leggett where they decided that settlement agreements in other cases are not discoverable.

So what we need to decide, I guess, is whether to try to overrule Ford V. Leggett and say "any settlement agreement" or to say if we want to include the word "relevant" to make it

clear that we are accepting Ford V. Leggett, or leave it the same and just leave it presumably that Ford V. Leggett still exists.

HONORABLE SCOTT BRISTER: And I move that we recognize that the Supreme Court that's going to pass these rules just said "relevant" would be a good idea to put in, so...

CHAIRMAN SOULES: Okay. Judge Brister is suggesting that we change paragraph (g) at the bottom of the page, settlement agreements, to read -- to insert in the second line the word "relevant" prior to the words "settlement agreement."

MR. HERRING: Luke, question. And I have read Ford V. Leggett, but I don't remember if it uses the term "relevant." I would not want to change it in a way that literally seems to do something different than the Supreme Court had done. I just don't remember the precise wording that the Court used.

CHAIRMAN SOULES: It doesn't hold that they are not discoverable. It just holds that those settlement agreements were

not relevant to the issues in the case and that they were not discoverable for that reason. I don't know whether it used the word "relevant," but that's the essence of it.

MR. HERRING: Yeah. Yeah.

CHAIRMAN SOULES: So this would square -- adding this word would square with Ford V. Leggett except Ford V. Leggett also talks about the amount of the settlement, which would survive this anyway.

HONORABLE SCOTT BRISTER: I intended to cover when you say the "part thereof" that for some reason you may want to see the previous settlements, but it's not fair just to see how much you have been settling your cases for and the court not allow discovery of the amounts.

CHAIRMAN SOULES: And is that a part of this, too?

MR. SUSMAN: Yeah. "Any relevant settlement agreement or part thereof."

CHAIRMAN SOULES: You want to just put that all in one motion?

HONORABLE SCOTT BRISTER: Yeah.

CHAIRMAN SOULES: Okay. Is there a second? John. Are you seconding the motion, John?

MR. MARKS: No.

CHAIRMAN SOULES: Is there a second to Judge Brister's motion?

MR. HERRING: Second.

CHAIRMAN SOULES: Moved and seconded. Discussion, John Marks.

MR. MARKS: I have a concern with using the word "relevant." I think maybe we ought to in some fashion word it so that settlement agreements made in that case are discoverable, in the case that's before the court that's being tried are discoverable.

CHAIRMAN SOULES: Ford V. Leggett is not that restrictive.

PROFESSOR ALBRIGHT: I have a copy of it if you want to read that section. I have a copy of Ford V. Leggett here. It says, "We emphasize that we should not be interpreted to mean that the amount of settlement could never be relevant, only that the Whites have offered no explanation of how such information is relevant to their claims

in this case."

MR. MARKS: Okay.

CHAIRMAN SOULES: Okay. Any other discussion on Judge Brister's motion? Okay. Those in favor show by hands. 16. Those opposed?

Okay. That's unanimous. So (g) will now read, "The existence and contents of any relevant settlement agreement or part thereof," period, and then the last sentence will stay the same. Okay. Next?

MR. SUSMAN: And that finishes rule -- I think that finishes the rule we were on, Rule 3, except for Scott did suggest that he would add to Rule 3(e) a definition of expert witness and consulting expert, which is currently in Rule 4(2)(3)(a)(3).

HONORABLE SCOTT BRISTER: And that was just because all the rest of these are definitions. We define a witness statement, define persons with knowledge of relevant facts, just an organizational matter, define what documents and tangible things are. If we have got a definition of expert and consulting witnesses, it makes more sense to

me to put it here rather than to put it back with the rules.

CHAIRMAN SOULES: Do we have the definition elsewhere?

HONORABLE SCOTT BRISTER: Uh-huh.

CHAIRMAN SOULES: But not here?

HONORABLE SCOTT BRISTER: It's in 10.

CHAIRMAN SOULES: It's in 10.

HONORABLE SCOTT BRISTER: And consulting expert is in 4(2)(a)(3). So it's actually two different places.

CHAIRMAN SOULES: Okay. So that would be just a matter of reorganization to put the definition of expert witness, I guess, here at (e).

HONORABLE SCOTT BRISTER: It would be specifically from Rule 10, part (1), move the second sentence in its entirety; and from Rule 4, part (2)(a)(3), the second sentence in its entirety. Both are just definitions.

CHAIRMAN SOULES: Okay. It's Rule 10, and the other one is Rule 4.

HONORABLE SCOTT BRISTER: 4(2)(a)(3).

CHAIRMAN SOULES: And you are talking about the second sentence there?

HONORABLE SCOTT BRISTER: Right.

CHAIRMAN SOULES: Okay. Judge Brister is proposing that we move the definitions from Rule 10 where he identified and Rule 4 where he identified up to this Rule 3. Is there a second? Fails for lack of a second.

Our Supreme Court member, Justice Hecht, is here, and we want to welcome you, Judge. I hope we are proceeding as you desire today and over the weekend, and we are moving along. Do you have some remarks you would like to make to the committee at this time?

JUSTICE HECHT: Not yet. It's a tribute to your concentration that I have been here for about an hour and a half, and you haven't noticed.

CHAIRMAN SOULES: I apologize. Well, I'm glad that's on the record. Pardon me for that error.

Okay. What's next?

MR. MCMAINS: Luke, I just have one question about the expert witness section of that rule on discovery. Obviously it says, "A party may obtain discovery of the identity," and other information, "only pursuant to Rule 10." Now, I recognize that Rule 10 deals with what expert witnesses are, but this section also deals with persons with knowledge of relevant facts. We always have this problem that there are many experts in-house that have knowledge of relevant facts, and I recognize that we do deal with that issue in 10, but to say that it's only in 10 along with the notion of trial witnesses, for instance, we have a requirement to disclose trial witnesses and identify those.

I mean, I am just wondering is somebody going to read this little short part which says, okay, we are dealing with, quote, "experts." You don't even have to consider the rule on scope of discovery because that's not really what our current rule practice has been. These other rules purveyed -- on scope purveyed the issue of experts as well when you

are talking about nonexpert testimony. What is the subcommittee's intent?

CHAIRMAN SOULES: Okay. Response?

MR. SUSMAN: The subcommittee's intent is that you look to the expert rule, not to these other rules for an expert. That was our intent, and hopefully we have accomplished that.

MR. MCMAINS: Okay. I guess one of the things I am getting at is you have got experts sitting there with knowledge of relevant facts. You know it. I am talking about they have done testing on materials. They know things about the materials, and you don't make a specific request with regard to experts. Then are you saying that you are immune from any --

PROFESSOR ALBRIGHT: Rusty, can I answer that question? If you look at Rule 10(1), the last sentence, it says, "If the expert has personal knowledge of relevant facts, the party may also obtain discovery as provided elsewhere in these rules."

MR. MCMAINS: Well, except that

this other rule says you can't. I mean, that's kind of a circuitous thing to say, well, you can't get it except through 10, and 10 says, well, except that if you've got something else you can do it elsewhere.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I will try to answer your question. That's a very good point. The problem is it's even more circuitous now under the rules, and as you go to 166b(3) in scope -- or b(2) in scope. Then you have to go to b(3) in the exception. Then you have to go to the three cases that deal with this issue. The way this does it is really a less circuitous route, and it takes care of the problem.

An expert can be a fact witness for a whole bunch of reasons, even on expert matters if they didn't get it in anticipation of litigation in any event, which is really what your problem is; but that's dealt with, I think, well by Rule 10 and also by persons with knowledge of relevant facts, which is in the scope rule as well; and I think that it's

just going to continue the law in places it is. We didn't anticipate a change in the common law at all, and I don't think one is done, and quite frankly, I think it's a little easier done this way.

MR. MCMAINS: But you see what I am saying?

MR. KELTNER: Yes. It's a good point.

CHAIRMAN SOULES: What do we mean by "elsewhere in these rules"? Are we talking about as provided for persons with knowledge of relevant facts?

MR. KELTNER: That would be one example.

CHAIRMAN SOULES: What else?

MR. KELTNER: Well, it's almost all that, Luke. That's just about all there is.

CHAIRMAN SOULES: So if we say, "If the expert has personal knowledge of relevant facts, the party may also obtain discovery as provided for persons with knowledge of relevant facts." Is that what we are talking about?

MR. KELTNER: Well, yeah. But what Rusty really is talking about is the situation that you have an in-house expert who did not get the expert knowledge in anticipation of litigation. That can be discoverable, especially in a products case and things like that. He has an exception to the consulting expert deal. That's much better dealt with in the expert rule than in the scope of discovery rule, and quite frankly, it always has been so, both in the federal rules, most of the state rules, and certainly our rules. It's just not really practically a problem.

MR. MCMAINS: Well, except that remember that what we said, what you just did in the rule on the scope when you said you don't need to have personal knowledge. Rule 10 says, "If the expert has personal knowledge, a party also may obtain discovery as provided elsewhere in these rules." So what you have now done is you have institutionalized a discrepancy between experts and ordinary people with regards to their position of information apart from

expert testimony, and there is a broader scope of required disclosure under the scope of discovery rule than there is makable under the expert rule when it says you can use other rules if they have personal knowledge.

MR. KELTNER: I think that's a good point. That's not what we were talking about before, what your first comment was. I had noticed the personal -- I have problems with the personal knowledge as well, but I think we can cure that in Rule 10 by just having knowledge of some sort, but that's how it would ought to be cured.

I mean, it's always in all the rules that I have seen, in all the ones we have looked at on the task force dealing with experts, we didn't deal with it in the scope rule. We dealt with it in the expert rule because they are more precise problems. I would say we leave the scope rule the way it is and deal with this issue back in the expert rule.

CHAIRMAN SOULES: So we are going to -- Rusty, your point now is inclusion of the word "personal" in Rule 10(1)?

MR. KELTNER: And that's a good

point.

MR. MCMAINS: Well, my first observation was that it seems to me strange when you say out of the scope rule a particular class of testimony when those people might fit there beyond the class of testimony because they may have knowledge of relevant facts separate and apart from opinions.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: And they also obviously are trial witnesses. Now, I'm sure that we deal with -- and we do deal with when you have got to disclose the experts and so on as trial witnesses, but you may also be calling them for fact purposes, which to say that once you wear the mantle of expert you wrap yourself in Rule 10 and you don't go back to this rule in any other way. You have no duties with regards to disclosure, and even though you know full well that the person that has the most knowledge of a particular accident, incident, or issue also is going to be wearing the mantle of expert.

His response was, well, we covered that

because we say over here that you may also get discovery as provided elsewhere if he has personal knowledge of relevant facts. Well, now, that's a more limited scope than what's in the other rule.

CHAIRMAN SOULES: Okay.

MR. MCMAINS: So that's one issue that definitely needs to be fixed, but that really arose out of the response rather than my initial observation.

CHAIRMAN SOULES: Well, we have got a U-turn. When you go from Rule 3(e) to Rule 10 there is a U-turn at Rule 10 that takes you back to Rule 3(2)(c), and we are going to fix that when we get to 10 so that the U-turn gets done correctly. Okay.

Okay. Any other -- there is no other written comments to Rule 3. Those in favor of passage of Rule 3 --

MR. HERRING: Luke, question.

CHAIRMAN SOULES: -- as amended. Chuck Herring.

MR. HERRING: 3(2)(h), witness statements, near the end of that paragraph it says, "A lawyer's notes taken during a

conversation or interview with a witness," it says "is not." It ought to be "are not a witness statement." Was that a vote of the subcommittee to distinguish lawyer's from investigator notes, or how does that work?

PROFESSOR ALBRIGHT: I think that this came from a Supreme Court Advisory Committee where there was a big discussion about whether a lawyer's notes could be considered a witness statement, and everybody wanted to make it clear that a lawyer's notes could not be.

I think we should delete "lawyer." I think anybody's notes should not be considered a witness statement. Notes are not a witness statement, period. So I would move that we delete "a lawyer's," and just say, "Notes taken during a conversation or interview with the witness are not a witness statement."

HONORABLE F. SCOTT MCCOWN: Second.

MR. MEADOWS: I agree.

CHAIRMAN SOULES: Any further discussion on that?

MR. MARKS: Well, I guess it's

time to say it. I disagree with having to produce witness statements in the first instance other than the way it's presently written in the Rules. So I would delete that.

CHAIRMAN SOULES: Anyone want to make a motion?

PROFESSOR ALBRIGHT: I made one.

MR. MARKS: I move that we delete (h).

MR. SUSMAN: Hers is first.

CHAIRMAN SOULES: Okay. Restate your motion, Alex.

PROFESSOR ALBRIGHT: Delete the word "a lawyer's." Begin the sentence, "Notes taken during a conversation or interview with a witness are not a witness statement."

CHAIRMAN SOULES: Has somebody seconded that?

HONORABLE F. SCOTT MCCOWN: Second.

MR. MEADOWS: Second.

CHAIRMAN SOULES: Robert Meadows seconded. Okay. John, did you propose an amendment to that motion?

MR. MARKS: Well, not to that motion, but I have no --

CHAIRMAN SOULES: Those in favor show by hands.

PROFESSOR ALBRIGHT: In favor of what?

CHAIRMAN SOULES: In favor of Alex's motion. 12. Those opposed? 12 to 2. Alex's motion carries. John, do you have another motion?

MR. MARKS: I move that we delete (h) altogether as written and replace it with the existing rule.

CHAIRMAN SOULES: Any second?

MS. GARDNER: I will second that.

CHAIRMAN SOULES: Anne Gardner seconds that. Discussion? Anyone have discussion?

Okay. Those in favor of John's motion show by hands. Three. Those opposed? 11. That fails by a vote of 11 to 3.

Okay. Now, those in favor of Rule 3 with the understanding that we are going to come back and define what is not written discovery,

make that specific in paragraph 1, and with the change that we just voted on in paragraph 3(2)(g) and (h), those in favor of Rule 3 show by hands. 14 in favor, and those opposed? One opposed. That carries.

Rule 4. Privileges and work product.

HONORABLE F. SCOTT MCCOWN: Could I make a suggestion on Rule 4? The Rule 4 that you have in the redlined version was originally done by Alex and I, and then it was sent to all of the subcommittee, and we got responses back, and then Alex and I met with Lee Parsley a couple of times, and the Rule 4 that you have in the book under the tab is the final Rule 4, and it's really the one that the subcommittee would like for you to consider. It's the Rule 4 under Tab 4, and I know people maybe haven't had a chance to read it, Luke, and I was wondering, it's 10:00 o'clock, if you wanted to take just a short break, restroom stop, so people could read this because they just got it yesterday, but that's the one that we want on the table.

CHAIRMAN SOULES: Okay. Let's take 15 minutes and come back, and we will

take up Rule 4. Please try to read it at your convenience.

HONORABLE F. SCOTT MCCOWN: It's after Tab 4 in the book that we got the last couple of days.

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

CHAIRMAN SOULES: Okay. We have a motion on the floor to substitute Rule 4 in the materials that were sent in response to the subcommittee's report. Is there a second to that?

PROFESSOR ALBRIGHT: Second.

MR. KELTNER: Second.

CHAIRMAN SOULES: Moved and seconded. Discussion? Those in favor show by hands.

HONORABLE DAVID PEEPLES: As is?

CHAIRMAN SOULES: As is.

HONORABLE F. SCOTT MCCOWN: We have one suggestion by Judge Peeples that the committee is willing to accept as a friendly amendment. On part 7, it would be 2(f)(7),

the word "attorney" should be inserted before "work product" on the second line.

CHAIRMAN SOULES: Where are you? This is 4(2).

HONORABLE DAVID PEEPLES: The last sentence in the new rule.

CHAIRMAN SOULES: 4(2)(f)(7)?

HONORABLE F. SCOTT MCCOWN: Yeah. "Attorney work product."

CHAIRMAN SOULES: It reads, "if the circumstances"? Is that the sentence?

HONORABLE F. SCOTT MCCOWN: Right. That's it.

CHAIRMAN SOULES: "Are such that there is no attorney-client privilege under Texas Rules of Evidence 503(d)."

HONORABLE F. SCOTT MCCOWN: Attorney work product is discoverable, but Judge Peeples suggested that, and we have accepted it.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: I mean, it does seem to me that there is some drafting problems that we can deal with. I mean, I can just see some. You define -- 2(a) defines

work product. Okay. And there is really no definition, separate definition, of attorney work product in Rule 2(a). 2(b) talks about the protection of attorney's mental processes, and that's understandable, but I mean, I just gave Alex some changes that I would make in the wording to make sure you don't repeat it.

As I understand it, the attorney's mental processes, which are never discoverable, okay, but if it's revealed through a compilation of facts it can be discoverable while showing a good -- you know, substantial need, hardship, undue hardship, which makes it under like (c). It becomes like other work product then.

So I think you can do it by saying on 2(b), the first sentence would be where it is. I would add a second sentence instead of, "A judge may not order discovery of the work product" to simply say, "Work product that is merely a compilation of facts of the case, even if the mental impressions, opinions, conclusions, and legal theories of an attorney may be inferred from discoverable material," and I would eliminate the rest of that whole sentence and say it's not always exempt from

discovery, which is basically what you are saying, isn't it, Scott?

HONORABLE F. SCOTT MCCOWN: Well, it is, but I don't think it's an improvement on the way it's drafted.

CHAIRMAN SOULES: Well, we have an opinion about a week old from the Supreme Court on this subject, and the words we are using here are not the words in that decision. I cannot call the name of it. Can you call the name of it?

MR. KELTNER: Occidental.

PROFESSOR ALBRIGHT: I have a copy of it. It's the Occidental case.

HONORABLE F. SCOTT MCCOWN: This was drafted in light of that opinion.

PROFESSOR ALBRIGHT: The only difference is they use the words "mechanical compilation." We deleted the word "mechanical" because we could imagine arguments in front of judges where lawyers would argue that this was not a mechanical compilation of facts but an artistic compilation of facts using the art of lawyering. So we decided to delete the word

"mechanical."

CHAIRMAN SOULES: But is the first sentence really true to what they call Category 1?

PROFESSOR ALBRIGHT: Exactly.

CHAIRMAN SOULES: Work product?

PROFESSOR ALBRIGHT: Exactly.

CHAIRMAN SOULES: It tracks it exactly?

PROFESSOR ALBRIGHT: Well, I can't remember if it tracks it exactly, but it is clearly what they call Category 1. I have the opinion right here.

CHAIRMAN SOULES: It seems to me like sentence 1 in paragraph 2(b) is so broad that it also includes Category 2, but maybe not.

PROFESSOR ALBRIGHT: I don't understand. Do you want me to read this opinion from the Supreme Court?

CHAIRMAN SOULES: Yeah. Just the part on Category 1 and Category 2.

PROFESSOR ALBRIGHT: "The attorney work product privilege protects two related but different concepts: First, the

privilege protects the attorney's thought process, which includes strategy decisions and issue formulation and notes or writings evidencing those mental processes. Second, the privilege protects the mechanical compilation of information to the extent such compilation reveals the attorney's thought processes.

"With respect to an attorney's thought processes we agree with OxyChem that the work product privilege is absolute, subject only to the narrow exceptions found in the Texas Rules of Civil Procedure. With respect to compiled information that reveals an attorney's thought processes, the privilege is not absolute."

So that's the distinction that we are trying to make. We define all work product. Then we were talking about this first category in the Occidental case, which is attorney mental processes which are revealed directly, and then we take out of that the attorney mental processes that are only indirectly revealed through compilations of information. Then we say -- then we have protection for all work product other than the direct revelation

of attorney mental processes, which is protected, but it can be produced upon a showing of need and hardship.

Then in (d) we have limiting disclosure that whenever a judge orders discovery of work product pursuant to (b) or (c) then the court is to protect mental impressions and opinions to the extent possible.

CHAIRMAN SOULES: Well, paragraph (b) says you can't make discovery of certain things and paragraph (c) -- at all. Paragraph (c) says but you can in some circumstances. They are the same thing.

PROFESSOR ALBRIGHT: No. It says, "other work product."

HONORABLE F. SCOTT MCCOWN: That would be like party work product. Paragraph (c) is like party work product.

CHAIRMAN SOULES: I am talking about -- okay. Forget it. I probably misspoke. Paragraph (b) says two things. It says you absolutely can't get work product in the first sentence. The second sentence says the judge may order that you do produce the same work product under some circumstances.

PROFESSOR ALBRIGHT: No. It's not the same work product.

HONORABLE F. SCOTT MCCOWN: No. What we are trying to do, here is what --

CHAIRMAN SOULES: You use the words, "attorney's mental impressions, opinions, conclusions, and legal theories" in both sentences.

HONORABLE F. SCOTT MCCOWN: Right. And the reason is it's tricky. It's the old argument that if I have to tell you persons with knowledge of relevant facts, once you get that list you will be able to infer from that list --

CHAIRMAN SOULES: I understand that.

HONORABLE F. SCOTT MCCOWN: Right.

CHAIRMAN SOULES: I am just talking about the words here. I am not talking about the concepts.

HONORABLE F. SCOTT MCCOWN: Right. And so what we have said is you cannot ever ask for or get an attorney's mental impressions, opinions, conclusions, and legal

theories; but if what you are asking for is a compilation of facts and in getting that you will be able to infer or you think you are going to or they are arguing you are going to be able to infer what their mental impressions, opinions, conclusions, and legal theories are, we know that; and in the inference, that second category, the inference kind of disclosure we are going to live with that if you can show substantial need and undue hardship; but we are going to protect to the extent possible by only disclosing the factual information.

So, for example, a judge might not simply order that your legal pad with the witness interview be turned over, but might instead redact or rearrange so that you got the facts but you didn't get the mental impressions, opinions, conclusions, and legal theories. It's a real hard trick both to draft and also to do if you are conducting the in camera inspection, but we think that that captures the two-step process that the Court outlined.

CHAIRMAN SOULES: Okay. You intend, though, for me to have to produce my

compiled chronology of the events of a case?

HONORABLE F. SCOTT MCCOWN: Only if the party has established substantial need and undue hardship, which is going to be a tough burden. Then if they do that, you have got to produce it, and then if the judge in looking at it says, "This is only a compilation of facts, and it doesn't say anything about Luke's mental impressions, opinions, conclusions, and legal theories," he could order it turned over; but if he says, "This really tells them something about Luke's mental impressions, opinions, conclusions, or legal theories, how can I redact it so that all they are getting is the facts and not being allowed to infer anything about Luke's thought process."

CHAIRMAN SOULES: These words are different in verbage and in meaning than the Occidental case.

HONORABLE F. SCOTT MCCOWN: I don't think so.

CHAIRMAN SOULES: Well, okay.

PROFESSOR ALBRIGHT: Can I --

CHAIRMAN SOULES: Alex

Albright.

PROFESSOR ALBRIGHT: And one thing you really have to remember is the substantial need and hardship. I really cannot imagine a situation where another side would have substantial need and hardship to get your chronology of the case. I mean, the only reason they would want your chronology of the case is to get your mental impressions and opinions. They could make their own chronology of the case.

The situation where there is going to be need and hardship is the notes of the witnesses -- notes you have taken of a witness interview; the witness is dead; the judge decides that the other side needs to know what that witness said; and under the current law, under the current Supreme Court opinions, the courts have allowed discovery of that with no showing of need and hardship. So what we are doing is requiring need and hardship and some understanding that this may, in fact, reveal your mental impressions and opinions, and you really need to be careful of it, which is not done by the courts under the current rule.

HONORABLE F. SCOTT MCCOWN: And if these words aren't exactly the words the Supreme Court used or don't quite capture, they are the traditional words in the jurisprudence, the national jurisprudence, that defines, you know, what we are talking about when we talk about work product, and that's where we took them, and I think that they capture what we mean when we mean the attorney's mental processes.

CHAIRMAN SOULES: Any other -- Judge Peeples.

HONORABLE DAVID PEEPLES: Now that we have granted discovery of witness statements, period, how much need is there for this undue hardship exception?

HONORABLE F. SCOTT MCCOWN: Well, there may not be a lot of need, but let me give you an example. Remember we have got a pretty technical, straight definition of what witness statements are. So imagine a case where you have got an apartment complex that burns to the ground. The insurance company retains a lawyer immediately. He has the lawyer on the scene. The lawyer conducts

all of the interviews. Then the people in the apartment complex disperse to the four corners of the world, and their whereabouts are lost.

He's sitting on a whole lot of fact statements even though they wouldn't be witness interviews under our rule. That might be a case where you could show substantial hardship, substantial need and undue hardship, to get some kind of recitation of what he's got, protecting to the extent possible any legal theories or mental impressions that you could infer from the way he took the notes.

CHAIRMAN SOULES: And one more question. Do you intend to make it easier for the judge to grant attorney work product -- discoverable attorney work product than discoverable other work product?

HONORABLE F. SCOTT MCCOWN: No. We have tried to make it harder.

CHAIRMAN SOULES: Well, you say here, "A judge may not order attorney work product." Then you say a judge may, however, order work product and then you say a judge -- that's "may however order attorney work product," and then you say a judge may

not order discovery of other work product, "except." It's the second sentence of 2(b) that bothers me. Why should that not also be read or be worded "a judge may not unless," the same as 2(c)? It seems to me like the second sentence of 2(b) is more permissive than 2(c).

MR. SUSMAN: The problem with the repetition, Scott, is that you keep -- the reader of this thing wonders is there a different test in 2(b) than there is in 2(c), and what it turns out, I think at the end of the day it's all the same thing. You either don't get it because it's the attorney's mental impressions, the attorney or the attorney's representative, mental impressions, opinions, conclusions, and legal theories which you don't get under any circumstance, and everything else which you can get only upon a showing of undue hardship.

HONORABLE F. SCOTT MCCOWN: No. But no, you do get it under one circumstance, and we can redraft this. I think Luke makes a good point, and we can redraft it to make the permissive clause last instead of first, but

the reason it's drafted like this -- and it can be redrafted, and we will do that, but it is no defense or it's no shield to your work product to say, "If they get these facts, they will be able to infer my thoughts." That's not a defense, and so what we have tried to do is capture -- we have tried to express that, and in expressing it where we are trying to be narrow we actually sound broad. We can redraft it. What I would suggest is that Alex and Lee and I do that this afternoon and have it for you in the morning.

MR. SUSMAN: Fine.

PROFESSOR ALBRIGHT: But I think we can still talk about the rule concept as presented here.

HONORABLE F. SCOTT MCCOWN: Right. If you-all are cool on the concept, we will redraft it to make it sound narrow and have it for you tomorrow.

CHAIRMAN SOULES: Okay. Are we attempting to change the Supreme Court's Occidental case?

MR. SUSMAN: No.

HONORABLE F. SCOTT MCCOWN: No.

CHAIRMAN SOULES: Then we should use the words of that case.

PROFESSOR ALBRIGHT: No.

CHAIRMAN SOULES: Why not?

PROFESSOR ALBRIGHT: With deference to the Supreme Court this procuring of opinion is not the most artfully drafted opinion I have ever seen.

HONORABLE F. SCOTT MCCOWN: Well --

MR. HERRING: That's deference?

HONORABLE SCOTT BRISTER: Spoken like a true law professor.

PROFESSOR ALBRIGHT: With apologies.

CHAIRMAN SOULES: Judge, the per curiam is sometimes better and sometimes maybe not so. I don't know, but I think they do a pretty good -- they drew a pretty good distinction there that I don't think this quite draws. Maybe we do want to change that.

PROFESSOR ALBRIGHT: Well, Luke, what do you think the difference is between Occidental and --

CHAIRMAN SOULES: If you will

hand me the words, I will read it to you. Okay. "First," this is the first category, "attorney's thought processes, which includes strategy decisions and issue formulation and notes or writings evidencing those mental processes."

HONORABLE F. SCOTT MCCOWN: Thought processes and mental impressions, opinions, conclusions, and legal theories seem pretty much the same. I mean, we just kind of took the traditional work product formulation out of the jurisprudence.

CHAIRMAN SOULES: Okay. Well let's wait 'til we see what you draft, and we will come back to Rule 4.

HONORABLE F. SCOTT MCCOWN: Okay.

MR. SUSMAN: I have a problem with -- still on Rule 4 when you-all go to draft, with the exception part. Now, are we saying that these things are not work product, or are they work product? Are we not making a comment? They are discoverable?

HONORABLE F. SCOTT MCCOWN: They are conceptually work product when you

apply the definition of work product, and what we are saying is we are not talking about that. These things are discoverable even if made or prepared in anticipation of litigation or for trial. The reason we list them out here is because of the constant problem that all of you have that you will ask contention interrogatories or you will ask in admission, and they will say, "Oh, that calls for legal conclusion" or "that invades my work product." So we just tried to very expressly set out that we are serious; we mean it; these things are discoverable.

MR. SUSMAN: Why don't you say they aren't work product?

HONORABLE F. SCOTT MCCOWN: Well, because they are conceptually work product. They are work product. It's just not going to be work product that's protected. It's kind of like the old party admissions aren't hearsay. Well, you could do it either way. You could say it is hearsay and it's an exception, or you could say it's not hearsay.

MR. SUSMAN: All right. Now will you explain to me what No. (7) is then?

I don't quite understand.

HONORABLE F. SCOTT MCCOWN: Okay. No. (7) --

MR. SUSMAN: And by the way, each of these is a noun. Each of the things you listed is a noun except (6) is a sentence, a complete sentence.

HONORABLE F. SCOTT MCCOWN: (6)?

MR. SUSMAN: I mean, everything you list (1), (2), (3), (4), (5) are nouns. Okay. (6) is not a noun.

HONORABLE F. SCOTT MCCOWN: (6) is photographs. Am I not with you?

MR. SUSMAN: (6) reads, "Any photograph is discoverable." It's a sentence. It's the way it's written.

HONORABLE F. SCOTT MCCOWN: Oh, okay.

MR. SUSMAN: You see?

HONORABLE F. SCOTT MCCOWN: Yeah.

MR. SUSMAN: And then (7) is something --

HONORABLE F. SCOTT MCCOWN:

Okay. We will fix that.

MR. SUSMAN: I mean, it's just kind of weird.

HONORABLE F. SCOTT MCCOWN: No. (7) is not weird. We will make (6) a noun, and now I will explain (7). (7) was put in at the suggestion of the big advisory committee in response to their comments, and it comes right out of our present rule. If you will look at 166b(3)(a), and what (7) says, "If the circumstances are such that there is no attorney-client privilege under Texas Rule of Evidence, 503(d), attorney work product is discoverable."

So that comes out of 166b(3)(a) on page 53 if you have got your red book, and then if you look over at the Rules of Evidence and find 503(d), you see that what's referenced are the ways you break attorney-client privilege such as crime, fraud, exception. So what we are saying is that if you break attorney-client privilege under 503(d) then automatically attorney work privilege is gone as well. If you are engaging in a fraud with your client such that you have no

attorney-client privilege, you also have no attorney work product privilege.

CHAIRMAN SOULES: Do we get the privilege from 503(d)?

MR. SUSMAN: 503(d) is -- what is 503(d)?

HONORABLE F. SCOTT MCCOWN: It's the exceptions to the privilege.

MR. MCMAINS: Exceptions to the attorney-client privilege.

MR. SUSMAN: What does 503(d) say?

HONORABLE F. SCOTT MCCOWN: Yeah. There is a bunch of exceptions under 503(d). As I say, we put this in because the big committee wanted it. It's in the present rule, and I think it makes sense, but I need some defenders here who wanted it and asked us to put it in.

CHAIRMAN SOULES: Well, I think it needs to say, "if the circumstances are such that there is an exception to attorney-client privilege."

HONORABLE F. SCOTT MCCOWN: Okay. I like that.

CHAIRMAN SOULES: And then it is right out of the current rule.

HONORABLE F. SCOTT MCCOWN: 503(d) is on page 225 of the book.

CHAIRMAN SOULES: Okay. Anything else for the drafters?

MR. MCMAINS: Luke, Sarah has --

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: I guess I just have a question. I thought I understood what was meant by the old rule, but maybe we are changing it. The attorney-client privilege applies to a communication and can be broken as to a communication. Well, lots of communications, but you have got to prove it as to each communication, I thought; but is what this rule is doing is saying once there is -- once the privilege is broken as to any communication, all work product is discoverable regardless of whether it was -- and, for instance, in furtherance of a finding.

And does it apply -- that's my first

question. My second question is, I thought the old rule just applied to the underlying transaction. What if there is then a suit based upon the underlying transaction? Is the work product in that suit also discoverable? For instance, if a client doesn't pay, that's a breach of an obligation by the client to the lawyer. As I understand the rule that is being proposed, that would break the work product as to all work product in the underlying suit; but it doesn't, does it, preclude the attorney from having work product when he sues the client for payment?

HONORABLE F. SCOTT MCCOWN: Well, I think that's true, and I remember from high school debate when you put a plan on the table, and people used to argue about your plan. Your response would be, well, those disadvantages you're pointing out are not unique. The problems that you raise are problems with the present rule as well as with this rule. I don't think that this rule creates the problems. I think the problem is inherent in the present rule as well. The only thing I can see that would fix it would

be to say "related attorney work product is discoverable."

"If the circumstances are such that there is an exception to attorney-client privilege under Texas Rule of Evidence 503(d), related attorney work product is discoverable," and you're just going to -- you know, there is going to have to be line drawing by the judge, but you know, that might -- does that address your problem, you think?

HONORABLE SARAH DUNCAN: It would address my problem if there is no intent to change existing law.

HONORABLE F. SCOTT MCCOWN: No. There is no intent to change existing law, and I think you point out a good problem, and if we added the word "related," that might help.

CHAIRMAN SOULES: Okay. Any opposition to that? Okay. John Marks.

MR. MARKS: I'm sorry. What would be the consequence of just taking (7) out?

HONORABLE F. SCOTT MCCOWN: Well, the consequence of taking (7) out is that Rule 4 creates a discovery privilege. It

creates what's called the work product privilege, and you don't have any exemption. If you took (7) out then you would have the anomalous situation that the attorney could shield -- couldn't shield attorney-client, but if he could call it work product, he could shield it. And so (7) is in there to make it clear that if the attorney-client falls, the work product falls as well.

CHAIRMAN SOULES: Okay. Let's go to Rule 5.

MR. MARKS: I have one more comment, Luke, on 4.

CHAIRMAN SOULES: All right. Do we have a consensus now? Everybody has said what they need to say and given their input to the draftsman for redraft of Rule 4?

MR. MARKS: I just have one.

CHAIRMAN SOULES: Anyone have anything else? John Marks.

MR. MARKS: I know this is the law, but isn't it redundant in (a) to say, "the relevant facts within the knowledge of any party or party representative are not work product"?

HONORABLE F. SCOTT MCCOWN: Well, it may be redundant, but it's one of those issues that you wind up in court on all the time, and so it's just an effort to shut down those disputes by emphasizing that facts are never protected.

CHAIRMAN SOULES: It's a codification of a case.

MR. MARKS: Well, okay, but for example, I go out, and I talk to a witness. I make my notes. He tells me certain things. Joe said this, that, and the other. Now, I have to identify that witness, and I have to identify his address, and I have to identify generally how he relates to the case. Now, does this mean that I have to also say everything that he told me? Is it just what he told me, or if I identify the witness and give the other side the opportunity to talk to that witness, isn't that the purpose of it? And does this mean that I have to now tell him everything that the witness told me?

CHAIRMAN SOULES: If it's discoverable.

HONORABLE F. SCOTT MCCOWN:

Yeah. But in response to a properly worded interrogatory you might well have to disgorge what you learn, and that's the present law.

CHAIRMAN SOULES: But we limit what you can learn about persons with knowledge of relevant facts elsewhere in this rule.

MR. MARKS: Well, that's what I am saying, though. Do we really need this? I think it might cause more confusion in that sentence than it helps because it's covered everywhere else in here.

CHAIRMAN SOULES: Nowhere else does it say, however, that that is not work product, I think is the reason for including the sentence. Okay. Well, let's look at it after it gets redrafted and --

MR. SUSMAN: Rule 5.

CHAIRMAN SOULES: -- go to Rule 5.

MR. SUSMAN: Okay. The only comments that we got on Rule 5 were from Scott Brister, and Scott's comments on Rule 5 were shouldn't you have a duty to --

HONORABLE SCOTT BRISTER:

That's the written discovery issue.

MR. SUSMAN: Yeah. That's the written discovery, which is oral discovery, and again, it was our position here we were dealing with not the duty to supplement or amend discovery responses, and I think Scott's made that point already, and our feeling was that except for expert witnesses where there is a special supplementation rule -- you will recall in experts, we will get to that in Rule 10 -- where an expert's testimony does need to be corrected if it's wrong or if there are additional opinions, but there were a lot of people that felt very strongly that we should not require the supplementation or amendment of deposition answers of a nonexpert witness. I mean, that's an issue before the house.

CHAIRMAN SOULES: Well, that was voted pretty one-sided before.

MR. SUSMAN: Before.

CHAIRMAN SOULES: I mean, that supplementation would not be made, and the committee, subcommittee, has been true to that vote.

HONORABLE SCOTT BRISTER: Well,

I for one had no idea what -- how all of these fit together until I looked at it. Until I looked at it I didn't realize that their supplementation rule doesn't require supplements of noncritical matters for written discovery even. So when we say, well, we shouldn't be having to update the trivial matters in the deposition, that's no distinction from what you are saying in these rules to do with trivial matters in interrogatories, trivial matters in your standard discovery response -- request. So that's no difference.

I think all of us agree you shouldn't have to spend a lot of time going through -- I mean, doesn't everybody agree you shouldn't have to spend your time reading through all the written discovery to see if there is some trivial matter that needs to be updated? Of course. And that's no difference to me.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Well, the courts did not try to distinguish between trivial and nontrivial and critical and noncritical.

HONORABLE SCOTT BRISTER: Sure.

MR. SUSMAN: I think you would get into a terrible problem of defining what that meant. Insofar as oral discovery, it can be extremely important or not important. You simply do not on a fact witness have to go back and read their deposition and make corrections. That was a clean, bright line. No one has got to go reread a factual witness' deposition and correct anything, whether it's enormously important or not.

Where it's written discovery you have to correct where there was a problem, where there was an incorrect answer or you learned something new. The form in which you do it depends upon whether it is a correction as to the identity of trial witnesses, persons with knowledge of relevant facts, or expert witnesses. In that case it's got to be a formal supplementation. If it's some other kind of information that you are correcting then you can get away with an informal supplementation. I mean, that's the way we kind of thought it through in our mind.

HONORABLE SCOTT BRISTER: And why wouldn't that work for depositions, is

what I am saying? In other words, if you -- the plaintiff says at his deposition, "I have seen Doctors A, B, C, and D." You've got the medical records that show Doctors E and F also. You don't have to supplement your interrogatory answers. You are not going to call him as an expert or anything like that because of your Part (2) of Rule 5 here says not required -- next to last sentence, "Amendment or supplementation is not required for other responses if the additional or corrective information or documents have otherwise been made known to other parties in discovery."

MR. SUSMAN: Right.

HONORABLE SCOTT BRISTER: And if that's what you're concerned about in the oral deposition, he just said A, B, C, and D, then he doesn't have to correct the oral deposition either. He doesn't have to correct it because by giving them the records they know about it. They did correct it. So nobody has to go back and read through the deposition.

MR. LATTING: As a practical

matter when we are getting ready for trials, Scott, we have got a stack of depositions this tall, and I don't remember what's in all of those depositions on every page. What I am afraid of if we adopt your rule -- and I understand the problem you are talking about, but what I am concerned about is going to trial, asking the witness a question, having an objection, saying, "That's a change from what he said on page 356 of his deposition, which was taken eight months ago, and they didn't correct it. So they can't put that testimony on."

Whereas, when we are going to trial we can look at our interrogatory responses, and it's in one place. It's distinct and separate, and you can find it. That's the No. 1 problem I have. No. 2 problem I have is I can't imagine how we can distinguish between critical and noncritical because --

HONORABLE SCOTT BRISTER: It already does. It's too late.

MR. LATTING: Well, maybe I am --

HONORABLE SCOTT BRISTER:

That's what that does, and that's what definitely Rule No. 6 does because to sanction it and keep it out it has to be unreasonably -- not reasonably prompt, won't affect the outcome at trial, and they could still get enough discovery done on it anyway; and if it's not critical, it won't affect the outcome at trial, and you can get the discovery done, or you won't be prejudiced in preparing for trial. If it is critical, you will be. There is no way to remove that distinction, I bet.

MR. LATTING: Well, okay. I will give you that. Maybe that's right. I am trying to think ahead of how this is going to work in the real world, but what do we do about the problem of where we have -- or maybe we won't anymore under the deposition rules, but what do we do when we have got a stack of depositions this tall from 15 witnesses? Are we going to have to go back and comb those and see what's happened?

HONORABLE SCOTT BRISTER: Well, everybody I know does. I mean, you send them out for signature. As opposed to

interrogatories and everything else there is a process built in where you do that. You send it to them; they look through it; they change the answers all the time. The deponent changes the answers, attaches them to the back.

MR. LATTING: Yeah. That's true. That's true in 1995, but then two years from now when we haven't gone to trial yet and new things have come up, you don't send the depositions back to them and have them say, "Now, is there anything that you have learned since you gave your deposition?" You just don't do that, and I thought we had this debate and decided we don't want to have to do that.

HONORABLE SCOTT BRISTER: What do you do with my case where they change the plaintiff's expert -- I understand the problem, but the plaintiff's expert said it was Component A. That's the only place he said it, and the day before trial -- if you don't change this, the day before trial he will be allowed to change to Component B.

MR. LATTING: That comes under

the expert rule.

HONORABLE SCOTT BRISTER: And you, manufacturer of Component B -- no, no, no, no. You don't only -- let me explain a little more. This was outstanding lawyer, former president of the Houston Trial Lawyers Association; other side, good defense lawyers. They didn't get reports, and the interrogatory answers said, "He's going to say the product was defective." Now, that may have been able to get more on it, but that's a standard response. People say that all the time and will continue to say that all the time, and they will say something in their deposition specifically about what their criticism is that's not in a report because reports are going to be very limited under this. That's not going to be in the interrogatory answer other than in general terms, and it will be a total surprise at trial if you don't make that key expert update the critical matter of his trial.

PROFESSOR ALBRIGHT: Scott, we do require experts to supplement their depositions.

MR. SUSMAN: The expert has got to do it.

MR. LATTING: That's the answer to that.

MR. MEADOWS: I think that's right.

CHAIRMAN SOULES: Under these rules expert depositions must be supplemented, or at least that's the intent of it. Where is that provision?

MR. MEADOWS: It's Rule 10.

MR. SUSMAN: Let me give you an example of what would be a real problem in a case.

MR. LATTING: He's asking where it is. It's Rule 10, I think.

CHAIRMAN SOULES: Let's look at Rule 10 to be sure because Judge Brister has read these very carefully, and maybe that doesn't --

MR. MEADOWS: Scott, look at (3), part (3) of Rule 10 and part (6).

MR. SUSMAN: And (6), "A party's duty to supplement and amend discovery provided pursuant to this rule is governed by

Rule 5, except that the duty also extends to the oral deposition testimony of an expert that is retained or employed by or" --

MR. MEADOWS: But you need to look at part (3) of the rule because an expert is obligated to give all of his opinions under part (3).

HONORABLE SCOTT BRISTER: No. Just the general substance, which is exactly what I said they are going to say, "the product was defective."

MR. MEADOWS: Well, the opinion is held. I mean, you can't say Part A is not defective and Part B is and then change that at trial, I don't believe.

MR. SUSMAN: (6) is the section that expressly deals with the question that says an expert's deposition must be supplemented.

HONORABLE SCOTT BRISTER: So then you are just back where you started then. Joe, yes, you have to go back and read through all of the experts' depositions and change all of the things in there.

MR. LATTING: Experts are okay

with me. What are not okay with me are all the fact witnesses that we have to do that for.

HONORABLE SCOTT BRISTER: I don't understand.

CHAIRMAN SOULES: Does anyone -- we have voted on this before, and the debate has been fully developed in earlier meetings about whether we should have to supplement depositions of fact witnesses. These are people not expressing expert opinions in their deposition testimony.

HONORABLE SCOTT BRISTER: That's not my proposal. My proposal is definitely not that you have to supplement everything because that's not what this is, Luke. This is not you have to supplement everything in interrogatory answers. My proposal is just depositions get treated the same way as written discovery, which means if it's matters that appear elsewhere, that's all the supplementation you have to do. They knew about that already because you gave them some other documents that showed that. I do not -- am not proposing that you have to

formally supplement depositions.

CHAIRMAN SOULES: Okay. Then that's off the table, and we don't have to worry about it.

HONORABLE SCOTT BRISTER: I am just proposing that it be supplemented the -- that you treat them all the same way. This is going to be confusing enough to attorneys without once -- I mean, you are creating two sets of supplementation rules.

CHAIRMAN SOULES: That's right.

HONORABLE SCOTT BRISTER: And I just think you shouldn't create extra sets of new rules that we don't need.

CHAIRMAN SOULES: Well, let me see if I can articulate what the definition is in the rule; that is, oral depositions of fact witnesses, that is, testimony in depositions not expressing expert opinions of fact witnesses is not to be supplemented at all. Other discovery must be supplemented.

Now, we voted on that before, and those who believe we should stick with our prior vote show your hands. 15. Those otherwise, those who feel otherwise, revisit this. To

one. Okay. So --

MR. SUSMAN: The next point in Rule 5 that Scott makes and the final point he makes on Rule 5 is his statement that he would require under section (3) or paragraph (3) --

CHAIRMAN SOULES: His paragraph (1) and (2) says shouldn't a party have a duty to respond to any discovery? Do you mean supplement?

HONORABLE SCOTT BRISTER: No. Duty to respond is paragraph (1), but you have limited that to written discovery. So there is no duty to respond except to written discovery. I am just pointing that out.

CHAIRMAN SOULES: Oh, okay.

HONORABLE SCOTT BRISTER: That's what happens when you make two sets of rules for everything.

CHAIRMAN SOULES: Well, we may need to address that when we get to depositions if a party has a duty to respond to depositions. Okay.

MR. SUSMAN: The other point Scott makes is that when there is a supplement or amendment that occurs after the discovery

period shouldn't we, he says, require the response within 48 hours or some shorter time?

"I do not see why a party that we presume has not acted reasonably promptly should be given the leisurely 20 days when it has created a potentially big problem." The subcommittee's response to that was to point out that the amendment or supplementation of a discovery response frequently after the close of discovery, which is what this is mainly designed to deal with, is not a consequence of any fault offered to that party.

It will often be a consequence of the fact that discovery ends at a time certain. The trial is not set for many months. The world changes. The conditions of plaintiff or plaintiff's business changes, and responses need to be brought up to date. The other side ought to have a fair opportunity for discovery, but it's not a fault concept that we are dealing with, Scott, and that's why we thought it's fair to leave it the way we have it, but as you see, there has been very little changes in subdivision (3) since we got going. It's pretty much the same. I don't know

whether that --

HONORABLE SCOTT BRISTER: My concern is then 19 days before trial you say, "not Component A, Component B is defective." So Component B manufacturer panics, sends an interrogatory. "What do you mean? What's defective about it?"

And the response is, "I will tell you the day before trial." That's the response. You don't shorten the time. You don't do anything, just keep guessing, and I will wait and tell you the day before trial.

MR. LATTING: I will tell you right before the trial.

HONORABLE SCOTT BRISTER: That's not fair. I mean, that is definitely your fault if you changed it and the other side asks about it immediately in a panic and you say, "Don't panic. I will let you know in time."

CHAIRMAN SOULES: Well, you are starting, I think, with the premise that there has been a breach of the duty to reasonably promptly respond.

HONORABLE SCOTT BRISTER: I am

starting with the premise it's a late supplementation, which is all this is about.

MR. SUSMAN: No, no. Remember, it's not. When we began out these rules we had two kinds of concepts, the duty to amend, which is where you gave a wrong -- that's your case, Scott, just an intentional or a mistake or whatever it was, but given the wrong answer in the first place and the duty to supplement where facts changed, through no fault of anyone but facts changed, and no one liked that distinction because there were different kinds of duties on the responsiveness with which you had to correct a mistake under both scenarios.

People said, "That's too complicated." So now we have -- the concept of fault we have taken out of this, I mean, and you have to amend or supplement regardless of whether it was right when it was made and changed since or wrong when made and you have now discovered the error. So, I mean, and we can and have invited in one of our comments the sanctions committee to deal with the kind of conduct that you are talking about where someone who

has intentionally waited 'til the last minute to do something.

There is no reason that someone couldn't go to the court in a circumstance like this and shorten the time because the court maintains the power for good reason to change these time limitations. I just think we get into a major drafting problem if at this stage of the game we go back here and provide different time limits depending upon the fault with which the responding party is charged for not having --

HONORABLE SCOTT BRISTER: I'm assuming they have a good heart, but they supplemented 20 days before trial. Shouldn't they have to scramble if they want to do that? Shouldn't they be forced to scramble if they want to do that? If they don't want to do that, the question doesn't arise. This is the one who wants to change the game shortly before trial. They shouldn't be able to demand a leisurely 20 days.

CHAIRMAN SOULES: All right. To bring this to focus, we are really talking about the 20-day period on page 2 in line 5.

HONORABLE SCOTT BRISTER: Sure.

CHAIRMAN SOULES: Shouldn't that be 20 days or fewer days or more days?

Okay. Somebody make a motion if you want to amend this to a different number of days.

MR. LATTING: Please make your motion, Scott.

HONORABLE SCOTT BRISTER: My motion is within 48 hours, but you know --

MR. LATTING: Could you stretch that out a little bit?

HONORABLE SCOTT BRISTER: Sure. You can always stretch, or you can say, "48 hours or at such time as agreed by the parties," but it ought to be on the burden of the one who's wanting to change the game after discovery is closed to try to get an agreement or go to court rather than the one who all of the sudden, the rules have been changed, and you have got to be the one that goes to court to get the rules changed or to try to beg for an agreement. So I would propose to amend to drop "the day before trial or within 20 days after the date of the service, whichever is earlier" to --

MR. LATTING: 72 hours.

HONORABLE SCOTT BRISTER: "Within 48 hours or such time as agreed by the parties."

CHAIRMAN SOULES: Is there a second to that motion? Fails for lack of a second. Any other motion? You want to make it ten days, five days, seven days?

MR. SUSMAN: I'd move it for ten days.

CHAIRMAN SOULES: Steve moves for ten days. Is there a second?

MR. LATTING: Second.

CHAIRMAN SOULES: Moved and seconded for ten days. Any discussion?

HONORABLE DAVID PEEPLES: I want to make a different proposal to that one. Is there any sympathy for just saying after the discovery period if you want to reopen you have got to go to the court and get permission? There is likely to have to be a court hearing anyway. There is a lot to be said for saying, look, once you get close to trial you ought to let things settle, and the burden ought to be on who wants to disturb

that to go to court and get permission to get something different. Instead of 10 days, 20 days, 48 hours. Come on.

CHAIRMAN SOULES: Recall that the discovery period starts on a start date that's triggered by something that the party does and goes for nine months. Then there may be months before the trial date during which this discovery is supplemented. So this rule really covers that, too, not just eve of trial supplementation but supplementation that occurs other than on the eve of trial.

MR. LATTING: Ten days.

CHAIRMAN SOULES: Motion made and seconded for ten days. Those in favor show by hands. Ten. Those opposed? To one. Carries ten to one. Now, we are changing that to ten days.

HONORABLE C. A. GUITTARD: Before we pass on Rule 5 may I inquire with respect to subdivision (2) about supplements and the supplement need not be verified? Now, I looked up under subdivision (1) to see whether the original response had to be verified. I didn't find it. I don't know

whether the intent is that the original response be verified or not. It seems that they both should follow the same standard, but what is the standard with respect to the original response? Should it be verified or not?

CHAIRMAN SOULES: Well, it only applies to interrogatories in the first place. So the verification only applies to interrogatories.

HONORABLE C. A. GUITTARD: Well, why do we have it on (2) then if we don't have it in (1)? Do you have to verify an original response?

CHAIRMAN SOULES: To interrogatories, yes.

JUSTICE CORNELIUS: The present law is, yes, but supplements, no.

HONORABLE C. A. GUITTARD: Supplements, no.

MR. LATTING: Except in El Paso.

JUSTICE CORNELIUS: Well, several courts have held that supplements do not have to --

CHAIRMAN SOULES: And I believe the interrogatory rule says that the responses have to be signed by the party, and they have changed that, Judge. So to make this -- I am trying to find the sentence, Judge, that you are focusing on in Rule 5. Where is it?

PROFESSOR ALBRIGHT: It's in the interrogatory rule.

HONORABLE C. A. GUITTARD: I was talking about Rule 2 where it says the response need not be verified, the supplement need not be verified, and why is that there if it's not in (1) about the original response?

CHAIRMAN SOULES: It's to make it clear that interrogatories can be supplemented without verification. That's its purpose.

MR. LATTING: Well, is your suggestion to make it clear in (1) that the original one --

HONORABLE C. A. GUITTARD: Yes.

JUSTICE CORNELIUS: Yeah. He's saying it's not clear that the original has to be verified.

MR. SUSMAN: It is over in the

interrogatories.

JUSTICE CORNELIUS: It is somewhere in the rules.

CHAIRMAN SOULES: It's in the interrogatories.

MR. SUSMAN: 12(3).

CHAIRMAN SOULES: I mean, we could make this "and need not be verified" specific as to interrogatories only if it should be done because that's the only place that it applies. So I don't know if that's necessary.

PROFESSOR ALBRIGHT: We could just put in Rule 12 that any supplement need not be verified, but I think that's a drafting problem that Lee Parsley can consider later and we don't have to address here.

CHAIRMAN SOULES: Well, I don't think we ought to make short shrift of Judge Guittard's suggestion. Should we leave this in or not? Are you suggesting we take this out, Judge, here, or change it?

HONORABLE C. A. GUITTARD: I just want it clarified. I don't know what it means.

CHAIRMAN SOULES: Okay. Anybody have a motion on this? Okay. Other hands were up. Carl Hamilton.

MR. HAMILTON: I need to go back to this ten-day period just a minute. It seems to me the whole purpose of this discovery period, the nine months, is to get everything done at once; and if there is something that a plaintiff knew or should have known during that period but didn't disclose, why do we let him disclose it at the last minute and then give the defendant only ten days in which to respond --

MR. LATTING: We don't.

MR. HAMILTON: -- and ask him questions.

MR. LATTING: We don't, do we, Steve?

CHAIRMAN SOULES: Carl, the way this reads is when the plaintiff makes the disclosure then the defendant can ask for their discovery any time, but the plaintiff has to give ten days response. It's not limiting -- it doesn't put the defendant to a ten-day period. It puts the supplementing

party to a ten-day fuse.

MR. HAMILTON: What I am saying is why let him make the new disclosure at all after the discovery period is closed?

MR. LATTING: He can't. If he already knew about it, he runs afoul of the other rules, which prevent that; isn't that correct, Steve?

MR. SUSMAN: That's correct. I mean --

HONORABLE SCOTT BRISTER: Huh-uh. Huh-uh. There is no limitation about you didn't -- you had to have been ignorant of this before it stopped.

MR. SUSMAN: We have the failure to -- I mean, if someone knew something and didn't disclose it within the discovery period, it could have two consequences on him because he has not failed to make -- he has failed to make a timely discovery disclosure, which is reasonably promptly. Okay. If he holds it back, he's failed. It could have a consequence on his trial setting, which we deal with in Rule 6. It could also have a consequence on the kind

of sanctions that might be imposed upon him, which the sanctions committee deals with for failing -- I mean, he can have -- I mean, that's a different issue.

HONORABLE SCOTT BRISTER: Or it may make no difference at all.

MR. LATTING: Huh?

HONORABLE SCOTT BRISTER: Or it may make no difference at all

MR. LATTING: It may not.

MR. SUSMAN: Or it might make no difference at all under Rule 6.

CHAIRMAN SOULES: Well, under Rule 6 we have lightened up the sanctions, which was a part of our debate; but as to the ten-day rule in Rule 5, that's just to cause the party making a late supplementation to have to be ready to respond quickly to the inquiry.

MR. HAMILTON: But what you are saying is that the plaintiff can during the nine-month period say it was Product A and then just 19 days before trial he can say, "Well, I'm sorry. Now it's Product B."

MR. LATTING: Well, but if he

does that --

CHAIRMAN SOULES: But he's subject to the sanctions under Rule 6 if he does that, which we will get to next.

MR. LATTING: Yeah. This is not expanding his right to do that. This says if he does that then he has a shorter period than was suggested in order to respond to a further inquiry by the other side.

CHAIRMAN SOULES: Anything else on Rule 5? Rusty.

MR. MCMAINS: Do I understand correctly that the way Rule 3 works that if the supplementation occurs after the expiration of the discovery period there is an automatic right of reopening discovery by the party to which the supplementation is directed?

MR. SUSMAN: Right.

HONORABLE F. SCOTT MCCOWN: From the way I look at it, it says the reopening side is allowed five hours of deposition in addition to that provided in Rule 1.

MR. MCMAINS: Am I also correct

that what that means is that the party that is supplementing doesn't get to ask any questions? It's just the other side; is that right?

CHAIRMAN SOULES: You're saying can the late supplementing party cross-examine a witness in a deposition?

MR. MCMAINS: Absolutely. Absolutely. It appears not.

MR. SUSMAN: If he has time left. If he has of his hours, which are 50 hours, yeah, I think he could.

CHAIRMAN SOULES: That's an open question, Rusty. It's not resolved by anything. It's not answered in these rules.

MR. MCMAINS: No. But it just says that the reopening side is allowed five hours of deposition time in addition to that provided in Rule 1.

CHAIRMAN SOULES: That's right. That's the only side --

MR. MCMAINS: And then it says, "Such discovery shall be related to matters related to any new information disclosed."

CHAIRMAN SOULES: The only side

that's accommodated is the reopening side. The other side is not accommodated.

MR. PRICE: Unless the court allows it.

CHAIRMAN SOULES: Unless the court makes some ruling.

MR. MCMAINS: I am just trying to figure out if that's the way it was intended to operate.

MR. SUSMAN: That's the way it was intended to operate.

MR. MCMAINS: That basically you just get to -- I guess you can make an objection, but other than that you can't do anything if you are sitting there.

MR. PRICE: The ten-day amendment, is the language "before trial or within ten days" in there, or is it just the "within ten days"?

CHAIRMAN SOULES: "Before trial" stays in.

MR. PRICE: Okay. Thank you.

MR. MCMAINS: And let me make one other observation. I disagree with your interpretation that if you have got time left

you can do anything because previous to that it says, "If the amendment, supplement, or document production occurs after an applicable discovery period, the opposing party may reopen discovery." So it looks to me like in the beginning you are saying that you don't get to do anything other than just take whatever the other side is going to do during that period, without regard to fault, and I suppose that your expectation is you have got to go to the court and get some relief from that if that's what happened.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Steve, the next to the last sentence in Part (2) says, "Amendment or supplementation is not required for other responses," and that's other than witnesses or persons with knowledge of relevant facts. "If the additional or corrective information or documents have otherwise been made known to the other parties in discovery or in writing." Normally that allows you to make your supplementation then

in the course of a deposition, that kind of information; is that right?

MR. SUSMAN: Yes.

MR. HERRING: I have got a case right now with 20 parties, a bunch of plaintiffs, a bunch of defendants. A bunch of parties don't show up at individual particular depositions because they don't apply to a lot of other parties. If at one of those depositions where other parties aren't present someone says, "Oh, by the way, here is some additional supplemental information," is that adequate supplementation? Has that been made known to the other parties even though they may not ever see that deposition because they wouldn't necessarily receive it because it doesn't deal with their parties or their issues?

CHAIRMAN SOULES: Yes.

MR. HERRING: Luke is nodding "yes." I just wanted to be clear which way it works.

CHAIRMAN SOULES: Yes. They better read the depositions, keep up with the discovery in that case.

MR. HERRING: Even if there are other parties in the suit that have nothing to do with them, you have to read every deposition to see if there is any supplementation?

MR. SUSMAN: I am not sure that's right because the test is whether it's been made known. Okay.

MR. HERRING: Yeah. Is it actual knowledge, or is it kind of the constructive knowledge that Luke would say you are getting because there is a deposition out there and it's in there somewhere?

MR. SUSMAN: What we really want to talk about is actual knowledge. I mean, I think that -- I mean, there are going to be some cases here. We cannot resolve everything.

MR. HERRING: Right. Right. Well, you're saying actual knowledge, and he had said "yes."

MR. SUSMAN: Because what the drafters intended here was to focus on actual knowledge, not let someone complain about not having something supplemented when they

actually knew it. By the same token, it seems to me unfair to put someone on constructive notice of something in a case like you described. Although, the important things, which are the identity of the witnesses and the -- you know, and experts and persons with knowledge.

MR. HERRING: That's in writing anyway.

MR. SUSMAN: Everyone is going to know that in writing. So you kind of wonder what's in this other category anyway.

MR. HERRING: Luke, you're still frowning. Are you going to retract your position there?

CHAIRMAN SOULES: No. I think this says that if it's on the record in a deposition, it's been supplemented, and that's it.

MR. HERRING: Well, it says "made known to the other parties."

CHAIRMAN SOULES: Made known. It's on the record.

MR. HERRING: I don't get the depo. It's not known to me.

MR. SUSMAN: We will have to look at that.

CHAIRMAN SOULES: Well, I disagree with Steve. I think that made known is when it is made public, when it's stated in the open for all to see, particularly if it's on deposition in a case, but that's going to -- that's not articulated one way or the other in the text of the rule at this point. Rusty McMains.

MR. MCMAINS: One other inquiry on the reopening part or the right to do some more discovery or more than you had or whatever depending upon when the supplementation occurs. We talk about in Rule 3 "the opposing party," much like what Chuck was talking about. We don't really define "the opposing party."

First of all, you may have more than one opposing party. You may have a principle opposing party and a few collaterally opposing parties. You may also have parties who are tangentially interested, and they may even be aligned with you for some purposes but against you with regards to other purposes. I mean,

you are really talking about any party to which you had an obligation to respond, aren't you?

I mean, it could easily be asked by a codefendant, for instance, without regards to whether or not that defendant is actually seeking relief against you, but I don't think under our current practice you could define a codefendant in which there is no counterclaims, cross-claims or whatever as opposing parties. They are on the same side. That doesn't mean that they wouldn't have to make an adjustment in the event that something happened where one party is taking a position that --

CHAIRMAN SOULES: Do you have a motion?

MR. MCMAINS: -- affects his liability.

CHAIRMAN SOULES: Do you have a motion? Elaine Carlson.

PROFESSOR CARLSON: I agree with Rusty. I mean, why talk in terms of opposing party --

CHAIRMAN SOULES: Do you have a

motion? Anybody got a motion? Let's get this to closure.

PROFESSOR CARLSON: Yeah. I would move in Rule 5 and Rule 6 we delete the use of the word "opposing party" and replace it with "a party or parties to whom the amendment or supplementation is directed."

CHAIRMAN SOULES: How about "another party may reopen the case"?

Supplementation I guess is directed to all other parties.

PROFESSOR CARLSON: Yeah. I would say where it's "other party" should be "from the responding party," and that's how I understand the rule.

CHAIRMAN SOULES: Okay. Your verbage is again, Elaine.

PROFESSOR CARLSON: Instead of "opposing party" I suggest "party or parties to whom the amendment or supplementation is directed."

CHAIRMAN SOULES: "A party or parties to whom the amendment, supplement, or document production is directed may reopen discovery." Okay. Those in favor show -- is

there a second to that motion?

MR. HERRING: Second.

CHAIRMAN SOULES: Moved and seconded. Any other discussion? Those in favor show by hands. 14. Those opposed? Okay. All votes are for. That carries.

And then that gets us to an issue about the reopening side in the next sentence. Anyone have a motion about that, or do we leave that the way it is?

MR. MCMAINS: Which sentence are you talking about?

CHAIRMAN SOULES: The last sentence -- the next to last sentence, "The reopening side is allowed five hours of deposition time in addition to that provided in Rule 1." What if the party that -- the plaintiff has supplemented and a coplaintiff reopens, or a defendant supplements and a codefendant reopens? Does that mean that just the defendants get to do five hours, and the plaintiffs don't? Anybody think that needs to be fixed?

MR. SUSMAN: The second sentence? Where are we now?

CHAIRMAN SOULES: Okay. Starting with the first full sentence on this page, second page of Rule 5. It's part of Rule 5(3), we say, "If the amendment, supplement, or document production occurs after any applicable discovery period, a party or parties to whom the amendment, supplement, or document production is directed may reopen discovery." We just voted to pass that.

"A party must respond to reopen written discovery served under this rule the day before trial or within ten days after the date of service, whichever is earliest." Why is it written? Why can't you take their deposition? But anyway that's another problem.

Then the next sentence is what I am talking about now. "The reopening side is allowed five hours of deposition time in addition to that provided in Rule 1." Okay. It's a defendant who supplements, and a codefendant reopens. Does only the defense side get to have additional discovery, or do the plaintiffs get some additional discovery?

MR. PRICE: How can that be the party to whom the supplement was directed?

MR. KELTNER: It can't, especially under the limitations we have in Rule 1. I mean, our problem is we have side limitations of hours. Now we are dealing with reopening and giving hour or time limitations per party. That's not going to work.

MR. MCMAINS: Right.

MR. KELTNER: So we have got to -- our last vote I think in due respect we ought to rethink a little bit because Elaine's point is exceedingly well taken. It's just that it goes against the grain of the limitation generally, and we have got to rethink that. This is a problem that was bound to come up.

MR. MCMAINS: Again, I think there is a distinction between written discovery and depositions. It seems to me that any party who is affected by supplemented material outside the discovery period should have a right to direct to the supplementing party written material, whether they are on their side or somebody else's side.

Whether or not they are entitled to open depositions is a different issue because our

deposition rule is constructed in terms of a collected side notion. So if it's a plaintiff/defendant issue and it's the defendant who supplements, it's the plaintiffs who get to reopen, and there is only five hours total. You can't make it per party because five hours per party or else -- I mean, five hours per party will give you more than 50 hours anyway in a lot of cases.

So I think there are two different issues, and in summary, it seems to me there should be a right to reopen whether you are opposing in a sense of you have a claim against or are defending a claim against when you have new material. You should have the right to redirect discovery directed to the supplementing material if you think it affects you and you are in the lawsuit, and that's what the first thing did, I thought, and I don't have a problem with keeping them both if we can. Now, whether or not there may be some drafting requirements on the second part to make clear that --

CHAIRMAN SOULES: Don't we really mean, though, that -- and the opposing

side is allowed five hours of deposition. I mean, say, I get my codefendants together, and one of us supplements so that I can get five more hours of deposition. We just do it that way. Mainly the whole function is so that I can get -- the defendants can get five more hours of deposition. So we find something and supplement, and that gives us five more hours of deposition. The opposing party ought to be the -- the opposing parties if it's a multiple party case ought to control whether there is any more deposition testimony, it seems to me. I don't know. Yes, David Keltner.

MR. KELTNER: I agree with that, but consider the opposite of that problem. On codefendants the question is which one of us really did it, and you amend as my codefendant for an additional testimony that it was, in fact, my product or my component. Then I have a real need for that discovery, the most realistic need you could possibly have.

CHAIRMAN SOULES: Some of these things are going to have to be fixed by the trial judge.

MR. KELTNER: Right. Absolutely. And I think this may be within that realm, but it's a real problem we have got to try to draft into, and it's going to be a question of "side" versus "party." Also, if we get into the responding party issue, I worry about Ticor and the other cases that the Supreme Court has decided on the universality of discovery generally about who can rely on what, and we may be rewriting that as well without intending to do so, and I am trying to think of a suggestion that would get around this to move us along, and I am just not coming up with it.

PROFESSOR ALBRIGHT: I have a suggestion, and it goes counter to what we just talked about, but we could have it where the party or parties to whom the amendment or supplements is directed may reopen discovery and then allow both sides five hours of deposition time. This gives both parties or both sides some deposition hours, but it gives the parties to whom the amendment or supplement was directed the ability to decide whether to take depositions or not. I am not

sure that that's -- that you-all like that, but that's just an idea I thought of to try to solve it.

MR. MCMAINS: The problem I have there is it allows a party who has not supplemented the opportunity to conduct more discovery automatically by his mere act of supplementing.

PROFESSOR ALBRIGHT: But also as Steve noted earlier, just because you supplement late does not mean you are a bad person. It means the things -- the world --

MR. MCMAINS: No, but I know a lot of people who are.

PROFESSOR ALBRIGHT: There are a lot of them who are, but there are some that aren't. I don't think we should make any moral judgment about people who supplement after the discovery period, and what we would be saying in that situation is to say, okay, only the reopening -- I mean, only the side to whom it was directed -- I mean, the party to whom it was directed. The other parties get to decide whether they want to go into more depositions or not, but if you go into

depositions then everybody has an opportunity to examine the witness.

CHAIRMAN SOULES: Okay. Let me see if -- this is what we are trying to write into the rule, as I understand it. The judge is going to have to do a lot of things in multi-party cases and otherwise, but what we are trying to write into the rule is that if the supplementation comes late, an opposing party may reopen discovery. That's the party presumptively offended by the late designation. I understand it can be a lot of other people, but that's the party presumptively offended, and that's the party that we are trying to help by writing a rule that they always get help. The judge can give help to any party, but that's the party we are trying to write the rule for, and then once an opposing party reopens, that entire side has five hours.

MR. MCMAINS: But we don't have a definition of opposing party.

CHAIRMAN SOULES: That's what we are trying to write this rule to say, and a lot of other things that we hypothecate,

whether or not hypothecation is their real world experiences, we are going to have to take that to the trial judge, and I think that we can fix this by just changing the word "the" before "opposing" to "an."; "an opposing party" and leave the rule just the way it is, and it basically functions the way we expect it to function.

MR. MCMAINS: Except that when you say "an opposing party" you put a qualifier in there that you have no objective way of determining. We don't have a definition of "opposing party."

CHAIRMAN SOULES: The judge can decide who's an opposing party.

MR. MCMAINS: This is an automatic right.

CHAIRMAN SOULES: Well, you may have to go to the court.

MR. MCMAINS: It's drafted as an automatic right.

CHAIRMAN SOULES: You may have to go to the court if you have a disagreement about whether the party is or is not an opposing party. You have that reprieve, and

then you either get the discovery or you don't after that's been reprieved.

MR. MCMAINS: I mean, we are the ones who are injecting this problem. We put in a term that we refuse to define. That's just silly. I mean, I don't think it makes any difference whether -- I mean, the notion of opposing party, I believe to the extent one could fashion one from existing rules, would be someone who has a claim, whom there is an active pleading against or in defense of if there is a pleading against them.

Defendants suing for contribution, for instance, would qualify as opposing parties, but if they agree among themselves as many doctors and hospitals do in malpractice litigation not to seek contribution, are they thereby not opposing parties, even though the amendments may be one pointing the finger to the other defendant, which is frequently what the case is. They normally have decided, well, we are not going to break a ground here, and they need a target. I am going to give them him.

CHAIRMAN SOULES: It's all fact-driven. It's got to be decided by the trial judge, but "an opposing party" does have meaning. Anne Gardner.

MS. GARDNER: I was just going to propose a suggested use of a term like -- he had used the word "affected" while ago. What about substituting "adversely affected" for "opposing"?

CHAIRMAN SOULES: The problem with that is when you get to the reopening side has five hours it's hard to reconcile. What if that party affected is on the same side as the party offending the discovery process? And we can only make a rule that works within a certain universe of situations, and beyond that universe the trial judge is going to have to be proactive.

HONORABLE F. SCOTT MCCOWN: Judge Brister, Judge Peeples, and I will take care of it. Don't worry about it.

HONORABLE SCOTT BRISTER: Maybe not the same way in each court, but we will take care of it.

HONORABLE F. SCOTT MCCOWN:

That's why you are worried, huh?

CHAIRMAN SOULES: Elaine, let me ask you this: Would you be satisfied if we backed up on that vote and just said "an opposing party may reopen discovery" and then go on forward with "the reopening side has five hours."

PROFESSOR CARLSON: I guess I don't know. I would like to hear from Alex or Steve, what was your intent in using the word "opposing party"?

PROFESSOR ALBRIGHT: I think we were just looking for a word at the time.

PROFESSOR CARLSON: You were tired.

PROFESSOR ALBRIGHT: I don't think our thought processes went so far as to require an actual claim being filed against the other one. I think we kind of more meant an adversely affected party. I agree with Rusty. "The opposing party" means an actual claim being filed against that, and I don't think that works here.

CHAIRMAN SOULES: Why doesn't it work? I mean, again, we can only write a

rule that works in a certain universe of situations. Beyond that the judge has to be proactive. Why doesn't that work in terms of writing a rule for the largest universe of cases?

MR. SUSMAN: I thought we -- I mean, I think it works fine to insert the words "to whom the amendment, supplement, or document production is directed" as the one who has the right to decide whether they want to reopen discovery or not.

CHAIRMAN SOULES: Well, it's directed to every party.

MR. SUSMAN: No. It's directed only to the one who asked the question in the first place. If you don't serve interrogatories on me -- if you are the one who serves interrogatories on me, I am going to direct the supplement to you, not to these other turkeys who didn't bother to serve me.

PROFESSOR ALBRIGHT: You have to send them a copy.

MR. SUSMAN: I am sending them a copy, but I am not directing my amendment or -- I mean, the guy who asked the question

in the first place ought to be the guy who is entitled to reopen and continue the questioning. If he didn't bother to ask the question in the first place -- we are dealing with supplementation here -- why should you have a right all of the sudden to be very interested?

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Steve, I really disagree with that.

MR. PRICE: Yeah. I do, too.

MR. KELTNER: And the reason is that if somebody else has asked it, I ought not to be charging my client to ask it again. That's the whole reason for Ticor and the like and cutting -- the reason of the rule is to cut down this expense. So I don't think that's a workable solution, and I think we meet ourselves in the middle on that one. I would prefer it not to be that way.

That's why I started saying that Elaine's I thought was on the right track of trying to change it. I am just not sure that we got the right language. I think the opposing party

situation probably is going to be the best we can do. However, it points out the problem with the side issues that we have agonized before, and the one thing that I think we ought to take note here was that one of the things we want to do by these rules were to the amount possible make decisions for trial judges that they were not -- that they were having to use their discretion in doing, and we are now into a situation of creating more and more areas that a trial judge is going to have to get involved when we have really been trying to get them out of the process and save their time, but you know, maybe this is just one of those trade-offs we have to do.

CHAIRMAN SOULES: Suppose we assume that "opposing party" means a party that is asserting a claim against the offending party or is being sued by. In other words, there has to be a claim asserted one way or the other for them to be opposing parties. Doesn't this still work?

MR. KELTNER: Yes.

CHAIRMAN SOULES: And then if somebody else wants to get involved, they go

to the judge.

MR. SUSMAN: I think it will work. I mean, I guess what I am thinking, Luke, is in most cases, the large majority of the cases that are going to be governed by this rule rather than a docket control thing or something having court supervision will not be the cases where you have all these multiple defendants. I mean, those are the cases that these rules are very difficult to deal with, I mean, the cases where there are all kinds of cross-claims and that are kind of tough conceptually to deal with on reopening and on limits in the first place.

So we were basically picturing litigation more as two-party litigation and dealing with that, and there is a problem, and there are going to be some practical problems, and what happens when you have multiple defendants, all of these counterclaims and endemnification claims and contribution claims, but I would think that that would be usually the case to have heavy court supervision anyway and so maybe --

MR. MCMAINS: Well, there are

other -- I have, I guess, some other problems in the notion of the opposing -- if you use an opposing party notion in the sense that you may have claims by the plaintiff against one defendant that he can't make or doesn't make against another defendant. Perhaps he's barred by limitations in making them or whatever. They are then sued by one another.

Now, under the scenario where you define "opposing party" as you must have a claim against them, the plaintiff has no claim against the defendant who is brought in and sued as a third party defendant, which means that if that party supplements then the plaintiff under your definition would not be an opposing party and would not be automatically entitled to anything, even though they might be, in fact, the facto under the control or direction of the party who brought him in.

A classic example of employers being brought in under kind of quasi-bogus claims for endemnity and various other type of third party litigation, that's the problem I have with the opposing party concept. It may

actually be directed to the other side, if you will, but who's not perhaps an opposing party in the sense of having an actual claim against that person, and they still may be adversely affected.

MR. KELTNER: I just can't come up with a better solution than "opposing party" is my bottom line.

MR. HAMILTON: How about "any party on the opposing side"?

MR. KELTNER: Which is by definition the opposing party.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I want to tell you-all that I am truly impressed with the tremendous intellect around this table in dealing with this problem, but it seems to me that it's getting terribly complicated for us ordinary lawyers. And aren't we trying to simplify the rules so that they are more understandable? Are we going to have to require in the rules that every lawyer has to graduate from Harvard?

MR. SUSMAN: The answer to that is the effort here was not to simplify the

rules, but the effort was to curtail discovery. That was our major effort, to limit the amount of discovery. If we have accomplished that, okay, even though it requires that lawyers be a little smarter or take a little more time or have a better -- you know, I think we have accomplished what we set out to do, which was not to make life easier for the lawyers but to make it cheaper for the clients. That was our thought process. Now, you know, in doing so, obviously when you begin alotting interrogatories or hours of depositions to parties in a complicated multiparty lawsuit, it's hard to do it.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: I mean, I think we ought to go back to the language we have got because --

CHAIRMAN SOULES: Well, no, we have already voted on that and -- okay. You make a motion, and we will vote on it. It ought to be at least "an opposing party."

MR. SUSMAN: I think we ought to go back to the words "an opposing party."

CHAIRMAN SOULES: Okay. Is there a second?

HONORABLE F. SCOTT MCCOWN: Second.

CHAIRMAN SOULES: Okay. Those in favor show by hands. Eight. Those opposed? Six. Okay.

To go back and read, that sentence will now read, "If the amendment, supplement, or document production occurs after any applicable discovery period an opposing party may reopen discovery. The party must respond to reopened discovery served under this rule the day before trial or within ten days after the date of service, whichever is earlier," and the rest is written. Okay.

MR. SUSMAN: I move the passage of Rule 5 as --

CHAIRMAN SOULES: Since it comes from the committee it doesn't require a second. Those in favor show by hands. 12. Those opposed? To five. Carries by a vote of 12 to 5.

MR. SUSMAN: Rule 6. Rule 6, we have made it clear that we are talking

about here about the effect --

CHAIRMAN SOULES: Everybody go get your lunch and bring it in here, and we will take up Rule 6. We will take 15 minutes and come back and go to work.

(At this time a recess was taken, after which the proceedings continued as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 21, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $943.25.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 4th day of August, 1995.

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