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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 21, 1995

(AFTERNOON SESSION)

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Taken before William F. Wolfe,
Certified Court Reporter and Notary Public in
Travis County for the State of Texas, on the
21st day of July, A.D. 1995, between the hours
of 12:05 o'clock p.m. and 6:30 o'clock p.m.,
at the Texas Law Center, 1414 Colorado,
Room 104, Austin, Texas 78701.

COPY

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

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

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 ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 21, 1995 - AFTERNOON SESSION

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1 (MEETING RECONVENED 12:00 NOON.)

2 CHAIRMAN SOULES: Okay. We're
3 going to start on Rule 6. Thank you all for
4 coming back promptly. Rule 6.

5 MR. SUSMAN: Okay. The
6 Subcommittee, in its redrafting Rule 6, you
7 will note that there are no major changes in
8 the words at all. We changed the title to
9 make it clear to everyone that we are talking
10 about what happens to the trial because of the
11 failure to provide timely discovery. And that
12 is not the same as what happens to the lawyers
13 who fail to do it.

14 Now, we put a note to the Sanctions
15 Committee at the bottom that we recommend some
16 sanction be imposed on parties that fail to
17 provide discovery reasonably promptly, even if
18 provided more than 30 days before trial. But
19 we leave that for the Sanctions Committee, and
20 I think maybe they have addressed something
21 like that in what they sent us on July 18th.
22 Otherwise, the rule is pretty much the way it
23 is.

24 Scott Brister, he will articulate his
25 own -- I mean, the big picture of Scott's is

1 just, again, it seems to me, a reargument of
2 the minority's positions that have been
3 articulated on our approach. Our approach, as
4 you know, has been that it may take some time,
5 but ultimately courts have got to get involved
6 in the issue of whether the other side was
7 surprised or not. Was it serious surprise or
8 not serious surprise? That should be the
9 litmus test of whether the evidence should be
10 excluded or whether the trial should continue,
11 et cetera.

12 Now, Scott makes as eloquent an argument,
13 I think, as could be made on the other side of
14 the issue, that we ought to have bright lines
15 here, clear lines. And if you don't do
16 something by a certain time or certain things,
17 tough luck. And so I think that's where --
18 that's the big debate.

19 And just again, because this rule has
20 been approved so many times in this form, the
21 only question is how many converts Judge
22 Brister picked up by his appeal in his letter
23 to us that's attached under Tab 6. Now,
24 that's for his general appeal. He's got some
25 specifics that we will get to in a second. I

1 mean, that should be the first one. But
2 that's the first issue, and we still have
3 general agreement in the way we've been going.

4 CHAIRMAN SOULES: Okay. Judge
5 Brister.

6 HON. SCOTT A. BRISTER: Well, I
7 just, as a trial judge, even if -- this is
8 going to take a lot more time for me to do.
9 I've got to decide whether it's reasonably
10 prompt. We've got to have a hearing on that.
11 We've got to have a hearing on whether you're
12 going to be unprepared by this information,
13 and I mean, you know, that may mean certainly
14 calling opposing counsel to say why -- what
15 you -- how you're going to be spending your
16 time coming up to trial and why shouldn't you
17 be spending it on this new stuff that I just
18 gave you rather than what you want to spend it
19 on; expert testimony as to whether they should
20 be prepared, be able to get prepared on this
21 information fast enough; and then whether or
22 not it will affect the outcome of trial is
23 another issue in that satellite litigation.

24 And you know, just as I say there, it's
25 real easy -- it's not an easy decision to

1 decide if the option is continue or not.
2 Look, it was within 30 days and nobody -- it
3 wasn't because somebody died or something like
4 that; you just didn't do it. And then weigh
5 how much do we really need this information,
6 how important is it, versus how important is
7 this trial setting. And those are things that
8 are not an easy decision, but it don't take a
9 lot of testimony on it.

10 The other route, where there's no bright
11 line and we go into preparedness, trial
12 outcome and stuff, is, it seems to me, no
13 easier a decision, but it's also a very long
14 hearing.

15 HON. DAVID PEEPLES: Scott, why
16 does it need to be a long hearing? Why can't
17 you, plain vanilla, get to the nitty-gritty
18 and not let people call on all those
19 witnesses?

20 HON. SCOTT A. BRISTER: Well, I
21 certainly can do that, if you'll promise that
22 I won't get reversed. But until you say this
23 is totally discretionary and can never be
24 reversed, somebody is going to say, "Brister
25 didn't give me enough time to put on my record

1 about why this would affect the outcome of
2 trial why I couldn't get prepared. I was just
3 started into my list on how I planned to spend
4 my time in the next three weeks after that."
5 And then some silly appellate judge somewhere
6 may listen to it.

7 CHAIRMAN SOULES: Judge McCown.

8 HON. F. SCOTT McCOWN: Well, I
9 don't think it needs to be a long hearing in
10 most instances. In some cases the hearing
11 might be longer than in others, but the rule
12 was written to come up with a kinder and
13 gentler regime which then we hope will be less
14 expensive. I mean, this ties straight back
15 into cost; that any time you've got tough,
16 tough exclusionary rules, then you drive up
17 the cost of litigation because lawyers have to
18 be extraordinarily diligent because there is
19 such a severe penalty. And so we tried to
20 balance the level of diligence with -- you
21 know, a reasonable level of diligence without
22 being too severe and hit that balance.

23 The other thing I would point out is, I
24 don't think Judge Brister's alternative solves
25 the problem he's identified. I think it's the

1 same under either rule. His rule is unless
2 the court makes a finding of good cause.
3 Well, you know, good cause is what the party
4 pleads good cause is, and he's entitled to
5 offer his evidence and make his bill on
6 whatever he thinks good cause is. And the
7 judge makes the call, and the appellate court
8 then has to review it for discretion. I think
9 that's the same under this rule. This rule
10 just tries to give the judge a road map that
11 will produce a balanced decision and get away
12 from the harsh exclusion of evidence.

13 CHAIRMAN SOULES: I'm not a
14 convert to Judge Brister's view because I've
15 always been there. This rule, as written in
16 many, many courts and for a few lawyers,
17 totally eliminates automatic exclusion of
18 evidence. It just ain't going to happen. So
19 should we just erase it altogether? Because
20 for a big part of this state's jurisprudence
21 it's gone. Shouldn't everybody have the same
22 advantage?

23 HON. F. SCOTT McCOWN: Well,
24 the way I would respond is --

25 CHAIRMAN SOULES: I can tell

1 you that in a West Texas county for at least
2 one or two lawyers it will never happen no
3 matter how egregious the situation is. The
4 evidence is coming in and there's not going to
5 be a continuance, because this standard is so
6 light and it does not give the judge a command
7 to exclude the evidence. And I think the
8 current rule does.

9 So we have shrunk discovery, we've given
10 tremendous latitude for gamesmanship in this
11 limited discovery that we've now imposed on
12 the bar, and lightened up the abuse at trial
13 of evidence not disclosed during a constrained
14 amount of discovery. That's what we're
15 doing. Gamesmanship is going to be rampant.

16 HON. F. SCOTT McCOWN: Luke,
17 I --

18 CHAIRMAN SOULES: And that's --
19 as long as we know that's what we're doing,
20 well, then that's -- so be it.

21 HON. F. SCOTT McCOWN: I agree
22 with the first part of what you said. I
23 disagree with the second part. I think that
24 what this does is it makes exclusion
25 discretionary. It does say to the judge that

1 under these circumstances you can exclude. I
2 don't think gamesmanship results, because I
3 think you still have the threat of exclusion
4 as a deterrent.

5 The only thing I would say on this kind
6 of in conclusion is this is a big policy
7 issue. We have fought about this policy issue
8 at three or four different meetings. There's
9 lots of people like Tommy Jacks who aren't
10 here today that have had a stake in this, and
11 I think to change the policy decision now is
12 kind of not in the spirit of things, if there
13 are drafting problems or technical problems
14 but I think we ought to stay with our policy
15 decision.

16 CHAIRMAN SOULES: Okay. Does
17 anyone have a motion on this subject?

18 HON. SCOTT A. BRISTER: I'm
19 moving to --

20 MR. SUSMAN: I move that we
21 adopt the rule that the Subcommittee has
22 presented and that has been approved by a
23 large majority at at least three or four
24 meetings.

25 CHAIRMAN SOULES: Well, we've

1 got to go through Judge Brister's --

2 MR. SUSMAN: I mean, he's got
3 specifics.

4 CHAIRMAN SOULES: -- specifics
5 before we do that, but no one has got a motion
6 on that yet.

7 HON. SCOTT A. BRISTER: Yeah.
8 Probably an up or down on my motion to
9 substitute the task force would be the best
10 way to vote on it, wouldn't it? And then we
11 would get to tinkering with the Subcommittee
12 rule.

13 CHAIRMAN SOULES: Okay. Is the
14 task force --

15 HON. SCOTT A. BRISTER: It's
16 the next page under Tab 6. The task force
17 proposal is on the right and the subcommittee
18 proposal is on the left. I put it in as small
19 a print as possible.

20 CHAIRMAN SOULES: So Judge
21 Brister, you're moving what?

22 HON. SCOTT A. BRISTER: To
23 substitute -- actually it's the first
24 paragraph -- to substitute the task force
25 proposal for paragraph 1 of Rule 6 for the

1 Subcommittee's paragraph 1 on Rule 6.

2 CHAIRMAN SOULES: The text of
3 which says, "Exclusion or continuance. Unless
4 the court makes a finding of good cause, the
5 party that fails to make or supplement a
6 discovery response in a timely manner should
7 not be entitled to present evidence that the
8 party was under a duty to provide or to offer
9 the testimony of a witness other than a named
10 party who has not been properly designated.
11 The burden of establishing good cause is upon
12 the party offering the evidence or witness,
13 and good cause must be shown on the record.
14 Notwithstanding the foregoing, the court may
15 in its discretion grant a continuance to allow
16 the" --

17 HON. SCOTT A. BRISTER: And
18 that's just -- the intention of the task force
19 was just to write the rule to follow current
20 law given as Alvarado vs. Farrah and the named
21 party exception. It wouldn't change the law.

22 MR. MARKS: I second the
23 motion.

24 CHAIRMAN SOULES: John Marks
25 seconds. Those in favor show by hands. 10.

1 Those opposed. Eight.

2 Let's counts them again. Those in favor
3 of Judge Brister's motion show by hands. 10.
4 Those opposed. Eight.

5 It carries by a vote of eight to 10.

6 HON. F. SCOTT McCOWN: Luke,
7 can I move, and I don't know if this is
8 appropriate or not, but I'd really like us to
9 send both versions up to the Supreme Court,
10 and I think that would be a fair thing to do.
11 We're having a meeting in the middle of the
12 summer with a fair number of people absent.

13 HON. SCOTT A. BRISTER: I
14 second that. That makes sense. I mean, I was
15 going to propose that when I anticipated
16 losing this vote, to be honest.

17 MR. LATTING: Your generosity
18 is an example to us all.

19 CHAIRMAN SOULES: Okay. Then
20 we will submit Judge Brister's amendment
21 substitute as the vote of the Committee by a
22 vote of 10 to eight, and then the alternative,
23 which is, what, Rule 6, paragraph 1, to
24 indicate what the eight voted for. Okay. Can
25 we do that? Will you handle that, Alex?

1 PROFESSOR ALBRIGHT: Uh-huh.

2 CHAIRMAN SOULES: Okay. Now
3 then, let's get to the specifics. Judge
4 Guittard.

5 HON. C. A. GUITTARD: I'm not
6 sure in paragraphs 1 and 2 of our Rule 6 what
7 "continuance" means. Does it mean any
8 delay? Does it mean to say, well, we'll put
9 this case off until Thursday or until next
10 week? Is that a continuance? I can foresee
11 under subdivision 2 where there's the question
12 of taxable costs, the party could say, "You
13 can't tax the costs against me. You just had
14 a brief delay here. It was not a
15 continuance."

16 "Continuance" means the case goes off
17 the docket and has to be reset or something
18 like that; whereas what we're really talking
19 about is a postponement.

20 And I suggest to you that although we all
21 may think it's different -- or that it means
22 the same, there are a good many lawyers who
23 wouldn't think so and there might be some
24 satellite litigation or unnecessary hearings
25 because of the use of the word "continuance."

1 Therefore, I move that instead of the
2 word "continue" we substitute the word
3 "postpone"; and instead of the word
4 "continuance" we substitute "postponement."

5 CHAIRMAN SOULES: Is there a
6 second? No second. It fails for lack of a
7 second.

8 Okay. Judge Brister, you've got -- since
9 there will be an alternative going to the
10 Supreme Court, we need to go ahead and take
11 your specifics on it.

12 HON. SCOTT A. BRISTER: With
13 the Subcommittee I had the three. One was the
14 split infinitive, which is just a personal
15 offense, but I also just wanted to focus, and
16 maybe you all -- is "timely" the same as -- is
17 that when the 30 days after the request is
18 sent, is that when the supplementation
19 occurs?

20 MR. SUSMAN: Let me -- I mean,
21 you raised a good point. I mean, one of the
22 problems that we have on what we mean -- one
23 of the problems of adopting the alternative is
24 that when the Subcommittee dealt with what we
25 mean by "timely supplementation or amendment,"

1 we were content to leave it kind of vague,
2 "reasonably prompt," because the consequences
3 of what they really mean by "reasonably
4 prompt" did not seem to be very draconian.

5 Under the task force proposal that you
6 have now adopted, you have made the
7 consequence much more draconian. Do we want
8 to go back and consider with more specificity
9 when these things need to be done, is my only
10 question. I mean, what is meant by
11 "reasonably promptly"? I mean, don't we need
12 to put more teeth in that now?

13 HON. SCOTT A. BRISTER: I don't
14 see why that's really changed.

15 CHAIRMAN SOULES: Does anybody
16 have a motion on that subject?

17 MR. LATTING: I'm trying to
18 think through what Steve said. I'm trying to
19 think about this.

20 CHAIRMAN SOULES: While he's
21 doing that, Alex, put the word "timely" after
22 "information." "If a party fails to disclose
23 information timely during discovery."

24 PROFESSOR ALBRIGHT: Well, I
25 think you need to talk to Scott McCown about

1 that. That's Scott McCown's language and he
2 has a reason for it.

3 HON. SCOTT A. BRISTER: He
4 likes split infinitives.

5 HON. F. SCOTT McCOWN: I'll
6 send you a brilliant article on how split
7 infinitives are actually part of the logical
8 structure of language and the rule is
9 artificial from Latin, and that in fact we
10 ought to split infinitives to be clear about
11 what we're doing, but -- and Sarah agrees.

12 HON. SARAH DUNCAN: I like it.

13 CHAIRMAN SOULES: "If a party
14 fails to disclose information timely during
15 discovery" is a bad idea. Okay. Then back to
16 the question of Steve's issue. Rusty.

17 MR. McMains: The question I
18 have, Steve, is I don't see that there's a
19 different result from the rule as drafted by
20 the Subcommittee, because the rule drafted by
21 the Subcommittee, which is what I thought that
22 the judge was talking about, actually says if
23 a party fails to timely disclose information.
24 And wherever you put the "timely" doesn't
25 matter. If they didn't disclose it initially

1 and when the response date was due, that is a
2 failure to timely make a response.

3 HON. SCOTT A. BRISTER: Right.

4 MR. McMAINS: Now, whether or
5 not it causes a problem is the other thing
6 that is addressed by this rule. But the
7 burden, of course, is on them to show that
8 they didn't cause any problem. One would
9 assume that what you're trying to say is that
10 if they got the information later on while the
11 discovery period was still going on that
12 somehow that should satisfy any of the
13 obligations that they might otherwise have
14 about the prejudice.

15 But we don't really say how this rule is
16 implemented anyway; that is, kind of who moves
17 or when and what your burdens are. You could
18 theoretically be sandbagging and taking the
19 position they didn't timely respond to the
20 discovery, even though you know about the
21 information from some independent source. And
22 that's possible under the rule as drafted by
23 the Committee as well, it seems to me.
24 There's nothing in here that just refers this
25 to supplementation material. This is a

1 failure to disclose information timely, and
2 that can be either supplemented or just not
3 supplemented; it's done. And it's like the
4 cases we have where they leave out the phone
5 number of the witness.

6 HON. SCOTT A. BRISTER: I
7 guess, yeah, do we mean failure to -- if you
8 fail to disclose information when due, or do
9 we mean if you fail to disclose information
10 reasonably promptly?

11 HON. F. SCOTT McCOWN: When
12 due.

13 HON. SCOTT A. BRISTER: When
14 due.

15 HON. F. SCOTT McCOWN:
16 "Reasonably promptly" relates to your duty to
17 supplement.

18 HON. SCOTT A. BRISTER: If you
19 say "when due," that takes out any confusion
20 about which one you're talking about, and I
21 think that is what you ought to mean to say in
22 that.

23 MR. LATTING: Well, excuse me,
24 but the task force report says, "A party who
25 fails to make or supplement a discovery

1 response in a timely manner." Now, I'm
2 looking back over at Rule 5, and it tells me
3 that I have to amend or supplement my prior
4 responses reasonably promptly. So if there's
5 a hearing, and it will be a quick one in your
6 court now, and --

7 HON. SCOTT A. BRISTER: They're
8 all quick.

9 MR. LATTING: -- and I didn't
10 supplement reasonably promptly, then you will
11 be commanded by the motion that you carried to
12 keep all the evidence out, right?

13 PROFESSOR ALBRIGHT: And even
14 if --

15 MR. LATTING: Am I right about
16 that?

17 PROFESSOR ALBRIGHT: And even
18 if it's six months before trial.

19 MR. LATTING: Yeah. Now, that
20 doesn't seem like a good idea.

21 PROFESSOR ALBRIGHT: And that's
22 the difference between the two proposals.
23 Under our version it's only excluded if it
24 matters and you didn't have time to conduct
25 discovery on it. But under the task force

1 strategy it's excluded, period, even if it was
2 six months before trial and you had plenty of
3 time to find everything out about it and it's
4 no surprise whatsoever, but because you failed
5 to reasonably promptly amend because you knew
6 about it two months before you disclosed it
7 six months before trial.

8 HON. SCOTT A. BRISTER: Well,
9 to me that's a different question.

10 MR. LATTING: It is.

11 HON. SCOTT A. BRISTER: With
12 "reasonably promptly" you get into this "as
13 soon as practical" problem, as I've indicated
14 in my discussion. If that's the standard and
15 that's a test and that's a ground for
16 excluding, then yeah, you need to rephrase it
17 that way.

18 I was intending it by having the task
19 force proposal not when due but that it would
20 be any time during the discovery period or
21 reopened discovery period with the exception
22 of the 30-day cutoff, et cetera.

23 CHAIRMAN SOULES: Judge
24 Cornelius.

25 JUSTICE CORNELIUS: I believe

1 that lack of surprise and lack of prejudice to
2 the opposing party should be matters on which
3 the trial court could base a finding of good
4 cause, and I would propose an amendment to
5 that effect to whichever one of these that
6 we've adopted or both.

7 HON. F. SCOTT McCOWN: Well,
8 that's the concept that the Committee's
9 Rule 6 --

10 JUSTICE CORNELIUS: I know
11 that.

12 HON. F. SCOTT McCOWN:
13 -- incorporates. And the concept of the task
14 force, you really you don't know if it
15 incorporates it or not. You're leaving it up
16 to --

17 JUSTICE CORNELIUS: Only to the
18 extent of granting a continuance, as I read
19 it.

20 HON. F. SCOTT McCOWN: Right.
21 But what you're doing with the task force
22 report is not advising the Supreme Court,
23 because you're not taking a position on what
24 the rule ought to be. And case law has said
25 that things aren't good cause that most of the

1 lawyers in this state think ought to be good
2 cause.

3 JUSTICE CORNELIUS: That's
4 right. Absolutely.

5 HON. F. SCOTT McCOWN: And
6 we're leaving the term and providing no advice
7 or guidance.

8 HON. SCOTT A. BRISTER: Not
9 entirely. There is a task force comment that
10 said specifically what "good cause" was not.
11 That was in the task force report, and I
12 didn't have -- my computer doesn't do
13 footnotes so I couldn't do a footnote on
14 this. But that was the task force way of
15 handling it, was to define in a comment what
16 the case is, so the lawyer that's lived under
17 a rock for the last 10 years will immediately,
18 following the rule, see the comment that says
19 what good cause is and is not.

20 MR. LATTING: What does it say
21 in essence, Scott? Really I'm asking, does
22 surprise to the other party have anything to
23 do with it?

24 HON. SCOTT A. BRISTER: No.

25 HON. F. SCOTT McCOWN: See, the

1 problem is that the bar has this disagreement
2 with really our jurisprudential. It's not
3 that they don't understand it; it's that they
4 do and don't agree with it.

5 CHAIRMAN SOULES: Judge
6 Cornelius, would you articulate what your
7 amendment would be again so that I can make
8 note of it?

9 JUSTICE CORNELIUS: That the
10 trial court may in its discretion find that
11 lack of surprise or prejudice to the opposing
12 party is good cause.

13 MR. LATTING: For allowing the
14 evidence in?

15 JUSTICE CORNELIUS: For
16 allowing the evidence or for denying
17 exclusion.

18 MR. SUSMAN: I second that
19 motion.

20 HON. SCOTT A. BRISTER: Here we
21 go. Here it is (indicating).

22 CHAIRMAN SOULES: Okay. It's
23 been moved and seconded that we add to the
24 paragraph 1 that we earlier adopted from the
25 task force report a sentence that says that

1 "The trial court may in its discretion find
2 that lack of surprise or prejudice to the
3 opposing party is good cause." It's been
4 moved and second. Now, those in favor show by
5 hands.

6 MR. KELTNER: Can we discuss it
7 briefly first?

8 CHAIRMAN SOULES: Sure.
9 Discussion.

10 MR. KELTNER: I have a problem
11 with -- I think Judge Cornelius is going the
12 right way in looking at it. But remember,
13 good cause is good cause for failure to
14 supplement. So surprise to the party can't be
15 good cause, because it's the reason you didn't
16 supplement is what you're trying to prove.

17 And maybe we ought to go at it in a
18 different concept; that whether it's good
19 cause or not -- and Scott, you got me as a
20 convert and I may be converting back the other
21 way -- the issue is that we ought to allow it
22 because there is no surprise, which I think
23 was what --

24 JUSTICE CORNELIUS: Well, like
25 what Joe Latting said a while ago, it would be

1 good cause for admission of the evidence or
2 for failure or for denial of exclusion.

3 MR. KELTNER: So Judge, would
4 be it okay to say that the trial judge in his
5 or her discretion could allow the admission of
6 the evidence upon a showing that it did not
7 prejudice or surprise the other side, and not
8 tie it to good cause?

9 JUSTICE CORNELIUS: Yes, that
10 would be acceptable.

11 MR. KELTNER: I think that's a
12 better way to look at it. That also, Steve,
13 gets us close to --

14 MR. SUSMAN: That's what we're
15 talking about.

16 MR. KELTNER: That gets us
17 closer to the rule that the Subcommittee came
18 up with as well, and I think, Scott, that's
19 what you were thinking of.

20 HON. F. SCOTT McCOWN: Well, it
21 is the Subcommittee's rule.

22 MR. KELTNER: Well, our problem
23 with the Subcommittee rule, Luke, is this: We
24 want to have some hammer, since we have cut
25 down the amount of discovery and there's going

1 to be an opportunity with the limitation of
2 discovery for some gamesmanship, so we want to
3 have some hammer, and I think everybody in the
4 room agrees with that. The question with the
5 Subcommittee rule is there's a general
6 feeling, and I think that's the reason that we
7 got 10 votes against it basically, that the
8 hammer wasn't big enough.

9 HON. F. SCOTT McCOWN: Well, if
10 this group adopts the sentence that you just
11 suggested, we can draw down the subcommittee
12 version and send only the single version, and
13 that's fine with me.

14 MR. KELTNER: All right.

15 JUSTICE CORNELIUS: I will
16 accept the language recommended by Judge
17 Keltner.

18 MR. LATTING: A friendly
19 question: What does "prejudice" mean?
20 Because everything that I want to put in
21 evidence is prejudicial to the other side or I
22 don't want to put it on. Now, do we know what
23 that word means?

24 HON. SCOTT A. BRISTER: Yeah.
25 I would leave that -- I mean, if it's not

1 going to prejudice the other side, that's kind
2 of like my one about the outcome of trial. If
3 it's not going to affect the outcome of trial,
4 let's not fool with it.

5 MR. LATTING: I don't mean to
6 be facetious here. It's just that it says
7 that if it doesn't unfairly surprise or
8 prejudice. And if I'm on the other side of
9 this, then I'm always going to be saying,
10 "Well, I may not be surprised, judge, but I'm
11 certainly prejudiced by you allowing this
12 witness."

13 HON. F. SCOTT McCOWN: There's
14 a body of case law about what "prejudice"
15 means.

16 MR. LATTING: Well, that's my
17 question: Do we know what it means?

18 HON. F. SCOTT McCOWN: Yes.
19 There's a body of case law. It's a term of
20 art.

21 MR. LATTING: What does it
22 mean?

23 HON. F. SCOTT McCOWN: It
24 doesn't mean that the evidence is against
25 you.

1 MR. LATTING: Okay.

2 HON. F. SCOTT McCOWN: It means
3 that you are unfairly disadvantaged.

4 JUSTICE CORNELIUS: It means
5 that your ability to prepare and try your case
6 has been unfairly impaired.

7 MR. LATTING: Okay.

8 JUSTICE CORNELIUS: Of course,
9 we can say that if we wanted to. Instead of
10 using the word "prejudice," we could say "find
11 that lack of surprise or lack of" --

12 MR. LATTING: Well, no,
13 prejudice is fine if we have some literature
14 on it.

15 JUSTICE CORNELIUS: -- "or
16 having a prejudicial effect on the opposing
17 side's ability to prepare and try the case."
18 But you're getting into a lot of verbage
19 there.

20 MR. MARKS: I have an
21 unfriendly question.

22 CHAIRMAN SOULES: John Marks.

23 MR. MARKS: An unfriendly
24 question: That added sentence emasculates
25 what you're trying to do, and that is to

1 eliminate the gamesmanship. If you open the
2 door to the judge to make exceptions there by
3 saying, "Oh, you haven't been prejudiced," or
4 that sort of thing, aren't we right back where
5 we started?

6 MR. LATTING: Yes. The truth
7 is, yes, which is where we ought to be.

8 MR. KELTNER: Well, let me tell
9 you why I think not, John.

10 CHAIRMAN SOULES: All right.
11 David Keltner.

12 MR. KELTNER: I think we're not
13 quite there because, remember, we're talking
14 about a limited time period and we're talking
15 about two instances here. One, about when
16 somebody just comes up and you find out about
17 it for the first time at trial. Now, that's
18 what you're worried about and legitimately
19 so. And in that instance there's no doubt
20 that the chance of prejudice and surprise is
21 great.

22 The other thing that can happen under
23 these new rules, John, that can't happen now
24 is this could be disclosed three or four
25 months before the trial and still you have a

1 sanction rule that would call for exclusion.
2 That makes no great sense, especially with
3 what we've already voted on that would allow a
4 reopening of discovery to take away the
5 prejudice. So it seems to me that it doesn't
6 emasculate the rule and that it is a better
7 all-around rule with that in.

8 I mean, everybody agrees that -- I think
9 even the Supreme Court, and I say "even the
10 Supreme Court" and I didn't mean it that way,
11 Justice Hecht, but the Supreme Court in
12 Alvarado said precisely, "Geez, we're giving
13 the trial court too few options here to deal
14 with it." And I think that's part of the
15 problem. I think it's a good trade in the
16 middle, and I think cause ought to have some
17 effect in this, and I think this is just
18 another reason the trial judge could overrule
19 it. I mean, excuse me, rule for the --

20 CHAIRMAN SOULES: Undo
21 prejudice is the test for a change in request
22 for admissions, responses or getting out of
23 deemed admissions, and of course, that could
24 be as prejudicial as not getting a piece of
25 discovery. But we already have a body of law

1 developed about here's what you have to
2 show --

3 HON. SCOTT A. BRISTER: Or late
4 filed pleadings.

5 CHAIRMAN SOULES: -- to change
6 your responses to request for admissions or
7 deemed admissions or -- what, Judge Brister?

8 HON. SCOTT A. BRISTER: Late
9 filed pleadings.

10 CHAIRMAN SOULES: Or late filed
11 pleadings. Well, it's really stronger, I
12 think, than 169.

13 So let's see where this will go in the
14 one we adopted. "Unless the court makes a
15 finding of good cause or a finding that there
16 is no undue surprise or undue prejudice to the
17 opposing party, a party fails to make" and so
18 forth --

19 HON. SCOTT A. BRISTER: One
20 more time.

21 CHAIRMAN SOULES: So the judge
22 can make either one of those findings, so that
23 takes care of good cause for not doing.
24 Okay. If you look on -- the task force is on
25 the right-hand side of this page that's right

1 behind Judge Brister's comments. This
2 insertion would go after these words.

3 It starts out "1. Exclusion or
4 continuance. Unless the court makes a finding
5 of good cause," write in these words, "or a
6 finding that there is no undue surprise or
7 undue prejudice to the opposing party," then
8 the rest of it would read as written.

9 PROFESSOR ALBRIGHT: Can I make
10 a suggestion?

11 CHAIRMAN SOULES: Is that where
12 you want to place this for discussion?

13 MR. SUSMAN: Yeah. And I
14 second it.

15 CHAIRMAN SOULES: Okay.

16 JUSTICE CORNELIUS: I so move.

17 CHAIRMAN SOULES: Alex, what
18 were you suggesting?

19 PROFESSOR ALBRIGHT: I have a
20 friendly amendment. I think the problem with
21 just using the word "good cause" is that what
22 we're really talking about is two concepts of
23 good cause, good cause for failure to timely
24 disclose and good cause to admit the
25 testimony. So I would say "Unless the court

1 makes a finding that there was good cause for
2 the failure to timely disclose or a finding
3 that there was no undue surprise," and then go
4 on with Luke's language.

5 And I might also put the "unless" cause
6 at the end of the sentence rather than at the
7 beginning because it's gotten so long.

8 MR. LATTING: That's fine.

9 JUSTICE CORNELIUS: That's
10 acceptable.

11 MR. LATTING: So we're voting
12 on Judge Cornelius' motion as modified?

13 CHAIRMAN SOULES: Right. But
14 I've got to get her language down first.
15 Unless the court makes a finding that there
16 was what?

17 PROFESSOR ALBRIGHT: A finding
18 that there was good cause for the failure to
19 timely disclose. Then go back to your
20 language, or a finding that there was no undue
21 surprise or prejudice to the other party or
22 that the failure does not -- or that the
23 failure does not unduly surprise or prejudice
24 the other party.

25 Okay. "A party who fails to make or

1 supplement a discovery response in a timely
2 manner shall not be entitled to present the
3 evidence that the party was under a duty to
4 provide or to offer the testimony of a witness
5 other than a named party who has not been
6 properly designated, unless the court makes a
7 finding that there was good cause for the
8 failure to timely disclose, or that the
9 failure does not unduly surprise or prejudice
10 the other party."

11 MR. LATTING: Judge Guittard
12 wants to make a friendly suggestion.

13 CHAIRMAN SOULES: Judge
14 Guittard.

15 HON. C. A. GUITTARD: I have a
16 friendly suggestion, and that is that you say
17 "unfairly" instead of "unduly."

18 CHAIRMAN SOULES: Well,
19 "unfairly," I don't know whether that's got a
20 body of jurisprudence, but "unduly" does.

21 HONORABLE C. A. GUITTARD: How
22 much prejudice is undue?

23 PROFESSOR ALBRIGHT: I liked
24 "unfair" first.

25 MR. SUSMAN: "Unfair" is

1 better.

2 CHAIRMAN SOULES: Okay. We'll
3 go with "unfair."

4 JUSTICE CORNELIUS: Let's put
5 "unfair."

6 CHAIRMAN SOULES: "Unfair
7 surprise and unfair prejudice." And then how
8 about dropping the words "failure to disclose"
9 and just say "failure," because it starts "A
10 party to who fails to" whatever.

11 PROFESSOR ALBRIGHT: All right.

12 MR. SUSMAN: Rusty has got his
13 hand up.

14 CHAIRMAN SOULES: Okay.
15 Rusty. Excuse me for delaying us there.

16 MR. McMANS: I have two
17 comments about those changes. First, in the
18 first sentence you're talking about, it is
19 unclear in my judgment from that liberal
20 reading whether you are requiring a finding as
21 to either or only a finding as to good cause
22 and then an abstract concept of undue
23 prejudice.

24 CHAIRMAN SOULES: I said a
25 finding, a finding on both.

1 MR. McMains: I know what you
2 said, but if you read the sentence as you
3 wrote it, it says "finding of" and then it
4 says "or."

5 CHAIRMAN SOULES: Or what? Or
6 what? Or a finding.

7 MR. McMains: Well, that's not
8 what you said earlier.

9 JUSTICE CORNELIUS: Well, it's
10 in there now.

11 MR. McMains: Well, that's not
12 what Alex said. Let's put it that way.

13 CHAIRMAN SOULES: Well, that's
14 maybe not what she said, but that's what I
15 said.

16 MR. McMains: The burden on the
17 second part is nowhere articulated in the
18 proposed amendment. The burden on good cause
19 is clearly delineated in the rule to be on the
20 party that is seeking admission. Whichever
21 standard you're using, that burden needs to
22 also be imposed on the undue prejudice issue
23 as well.

24 HON. F. SCOTT McCOWN: The way
25 to fix that is to say that the burden of

1 establishing the finding is upon the party
2 offering the evidence or witness and the
3 record must support the finding.

4 JUSTICE CORNELIUS: That's
5 good.

6 CHAIRMAN SOULES: Okay. Let me
7 see if I've got this now. We would say, " 1.
8 Exclusion or continuance." Strike "Unless the
9 court makes a finding of good cause." Start
10 with "(a), A party who fails to make or
11 supplement a discovery response in a timely
12 manner shall not be entitled to present
13 evidence that the party was under a duty to
14 provide or offer testimony of a witness other
15 than a named party who has not been properly
16 designated unless the court makes a finding
17 that there was good cause for the failure or
18 that the failure caused no" --

19 JUSTICE CORNELIUS: Or the
20 finding of.

21 CHAIRMAN SOULES: "Or a finding
22 that the failure caused no unfair surprise or
23 unfair prejudice to the opposing party."

24 PROFESSOR ALBRIGHT: How about
25 "does not unfairly surprise or prejudice"?

1 CHAIRMAN SOULES: Or a finding
2 that what?

3 PROFESSOR ALBRIGHT: The
4 failure does not unfairly surprise or
5 prejudice. Isn't that shorter?

6 CHAIRMAN SOULES: Or unfairly
7 prejudice?

8 PROFESSOR ALBRIGHT: Do we need
9 to have "unfairly" both places?

10 CHAIRMAN SOULES: I think so.

11 JUSTICE CORNELIUS: Yes.

12 CHAIRMAN SOULES: To be clear.
13 Then we have "The burden of establishing the
14 finding" -- is that it?

15 HON. F. SCOTT McCOWN: Yes.

16 CHAIRMAN SOULES: -- "is upon
17 the party offering the evidence or witness,
18 and good cause must be shown on the record" --

19 HON. F. SCOTT McCOWN: No. And
20 the finding. And the record must support the
21 finding. You don't want to just say "good
22 cause," because the record has to support the
23 finding of undue surprise or undue prejudice
24 as well.

25 CHAIRMAN SOULES: And the

1 record must support the finding.

2 HON. F. SCOTT McCOWN: Right.

3 MR. MARKS: Now, where is the
4 burden on -- who has the burden of showing
5 undue prejudice or unfair surprise?

6 HON. F. SCOTT McCOWN: It's
7 right there. The burden of establishing the
8 finding, whichever finding it is, the burden
9 of establishing it is upon the party offering
10 the evidence or witness.

11 CHAIRMAN SOULES: Okay. Any
12 further discussion on this? Carl Hamilton?

13 MR. HAMILTON: Does "properly
14 designated" mean that if you leave off the
15 phone number or some other information that's
16 requested, that the witness is excluded?

17 HON. F. SCOTT McCOWN: The
18 court can find that there's no undue surprise
19 or undue prejudice there.

20 MR. KELTNER: And Carl, when
21 you look at the disclosure rules under that,
22 you're going to see a different standard than
23 before.

24 CHAIRMAN SOULES: Anything
25 else?

1 MS. McNAMARA: Just a
2 question: Can the parties agree to let the
3 evidence in, or do you have to have the
4 finding even if there's really not a fight?

5 HON. F. SCOTT McCOWN: If
6 there's no objection --

7 MS. McNAMARA: Is that clear,
8 that if there's no objection, you can --

9 HON. F. SCOTT McCOWN: If
10 there's no objection --

11 CHAIRMAN SOULES: The case law
12 is clear that the objection has to be made or
13 there's no error. There's certainly no
14 reversible error.

15 CHAIRMAN SOULES: Okay.
16 Anything else on that? Okay. Those in favor
17 as it is now dictated into the record show by
18 hands. I'm sorry, let me start over. Hold
19 your hands high. 17. Those opposed. There's
20 no opposition to this.

21 HON. F. SCOTT McCOWN: And
22 Luke, I take it we've got agreement, then, and
23 we don't need the Subcommittee's 6? I mean,
24 this is fine?

25 CHAIRMAN SOULES: Will the

1 Subcommittee withdraw Rule 6 and substitute
2 this?

3 PROFESSOR ALBRIGHT: Yes.

4 CHAIRMAN SOULES: Okay. That's
5 done. So we'll send just one version to the
6 Supreme Court, which will be -- paragraph 1
7 will be what's just been dictated into the
8 record and voted on by a vote of 17 to zero.

9 And now back to Judge Brister's
10 specifics. Have we addressed most of these,
11 Judge?

12 HON. SCOTT A. BRISTER: Yeah.
13 The last one I had was on paragraph 2, as you
14 see on the left side. It's a question about
15 when you get costs and expenses. The
16 Subcommittee's was if the court continues the
17 case, you get costs and expenses, and I
18 propose to say if a party fails to disclose
19 timely, the argument being there's plenty of
20 times when your failure to disclose timely
21 costs extra costs. But the Subcommittee rule
22 would make it unless there's a continuance
23 those costs are just down the drain. And it
24 seems to me there ought to at least be the
25 discretion in the court to assess the costs

1 even if I decide not to grant a continuance.

2 If you have to, okay, I think we can go
3 forward with the trial date, you're not going
4 to be unduly prejudiced, but you do have to
5 fly to New York this afternoon, which is going
6 to cost more than if you had been able to plan
7 30 days in advance to go take the last-minute
8 deposition. So I move the task force of that
9 phrase.

10 CHAIRMAN SOULES: As the task
11 force has posed it.

12 HON. F. SCOTT McCOWN: But the
13 reason we didn't go with that is because
14 giving trial judges more discretion to hit you
15 with costs was something that we were very
16 hesitant to do. And the argument that this is
17 late and therefore I had to fly to New York
18 and therefore all my airfare and hotels should
19 be paid for, we just didn't think it was wise
20 to give trial courts that much authority.

21 CHAIRMAN SOULES: Steve Susman.

22 MR. SUSMAN: I think it's
23 more -- I think, Scott, probably the more --
24 the explanation that makes more sense was in
25 the footnote we had to the Sanctions

1 Committee, the note to the Sanctions
2 Committee. In other words, we were just
3 dealing with the effect on a trial setting.
4 And how it affected the trial setting is an
5 integral part of the failure to disclose and
6 what should be done with the trial to diminish
7 the effect on trial, as the heading refers
8 to.

9 We made it clear in our note to the
10 Sanctions Committee that there are other
11 sanctions you may certainly want to impose
12 through the sanction vehicles on lawyers who
13 don't timely disclose, which would be where
14 you could impose such sanctions as the extra
15 expense of proving something or having to do
16 it on an expedited basis or things like that.

17 Now, I frankly -- but I don't oppose
18 doing what you're doing. It just occurred to
19 us that it would be better to think about it
20 in those terms.

21 CHAIRMAN SOULES: What about a
22 hybrid here where we just add to it what's in
23 the Committee version, "and may impose other
24 sanctions under Rule blank," which would be
25 the Sanctions Rule, so that there is something

1 that plainly addresses the continuance issue?

2 HON. SCOTT A. BRISTER: Or just
3 drop it and we'll put it in the Sanctions
4 Rules somewhere.

5 MR. McMAINS: The problem is
6 that while we voted on the substance of the
7 rule, we didn't really vote on the title.
8 When we redid the title -- I mean, the title
9 to the rule is the Effect on Trial of Failure
10 to Provide Timely Discovery. If that's what
11 the title to the rule is going to be, then in
12 some respects you don't need (2) at all
13 because we're merely talking about whether the
14 evidence is excluded or -- I mean, we don't
15 kind of need it.

16 MR. SUSMAN: Yeah. For
17 example, as we went through this, we noticed
18 you don't really -- how about a person who
19 doesn't provide timely discovery and doesn't
20 want to use it? I mean, he is late and
21 failing to provide something that is against
22 him that you found out. I mean, there's no
23 effect of that failure built in these rules.
24 That's got to be solely dealt with by
25 sanctions, because excluding it from trial

1 would make him happy as a pig in mud. I mean,
2 the only way you're going to deal with that
3 party is throw him in jail or do something
4 serious to him or that lawyer or the party
5 that does it.

6 So we thought the title was deceptive,
7 and that's why we changed the title, so I
8 would suggest that we put the new rule that we
9 just passed, 6(1) at least, with the title
10 that the Subcommittee came up with and leave
11 (2) the way it is, because --

12 HON. F. SCOTT McCOWN: Or drop
13 (2) completely and refer it to the Sanctions
14 Committee.

15 MR. McMains: I think that
16 makes more sense.

17 HON. SCOTT A. BRISTER: Second.

18 MR. MARKS: I have a question.

19 MR. SUSMAN: That's fine.

20 MR. MARKS: The way this is
21 written, it applies to parties. But normally
22 the offending person is a lawyer. And if
23 you're in personal injury litigation, you
24 usually have a poor person on one side and a
25 rich person on the other side, which may be a

1 rich lawyer on the side of the poor person.

2 Now, this is not a very effective rule
3 for a defendant unless there are some
4 sanctions against the lawyer. Now, no
5 offense. No offense intended. That's a
6 friendly question.

7 HON. F. SCOTT McCOWN: I think
8 that's a good point, but I would recommend
9 that we drop (2) out and refer it to the
10 Sanctions Committee and let Joe Latting's
11 group solve it.

12 MR. KELTNER: Hear, hear.

13 MR. LATTING: No problem.

14 CHAIRMAN SOULES: Any
15 opposition to that? Okay. Just be sure that
16 the Sanctions Committee does address the issue
17 of costs resulting from a delay of the trial
18 for a late discovery response.

19 MR. KELTNER: And Joe, the rich
20 lawyer issue.

21 MR. LATTING: The rich
22 plaintiff's lawyer. That's a tautology, isn't
23 it?

24 CHAIRMAN SOULES: So in Rule 6,
25 the motion is to delete paragraph 2.

1 HON. SCOTT A. BRISTER: And
2 delete the title of paragraph 1. And since
3 you'll only have one paragraph, you don't need
4 to number it, and then make the title --

5 CHAIRMAN SOULES: Just make the
6 words "Exclusion or continuance" after No. 1?

7 HON. SCOTT A. BRISTER: Right.
8 Can No. 1, yeah.

9 HON. F. SCOTT McCOWN: And go
10 with the Subcommittee's title.

11 HON. SCOTT A. BRISTER: Yes.

12 CHAIRMAN SOULES: And go with
13 the Subcommittee's title. Okay. Any
14 opposition to that? That's unanimous.

15 Rule 7.

16 MR. SUSMAN: All right. On
17 Rule 7, let me try to pick up the pace here so
18 we can get through without staying all
19 weekend.

20 Rule 7 has had -- the main redrafting
21 took place in section 2(c), as you can see.
22 The rest of it is pretty much as you have seen
23 it before. We just tried to clarify it. I
24 think we have succeeded in clarifying it.

25 And the only comment we received here is

1 again from Scott Brister. And Scott, I think
2 the reason in response to your question of why
3 we keep a separate Rule 7 and Rule 8 is
4 because Rule 8 is intended to be a device
5 that's used by nonparties primarily and/or
6 depositions, to quash deposition notices;
7 whereas Rule 7 really deals with how you
8 object and present privileges in responding to
9 written discovery.

10 It does not deal with how you object or
11 present privileges during an oral deposition
12 obviously. How you object we cover in the
13 oral deposition rules. How you present
14 privileges and preserve privileges in oral
15 depositions is really not covered. I mean, it
16 is not covered. I mean, we do not say what
17 happens when during an oral deposition --
18 remember, we allow the lawyer to instruct a
19 witness during an oral deposition, "Do not
20 answer to the extent that that discloses
21 conversation with me." And so the witness
22 says, "Well, subject to my lawyer's objection,
23 here is the answer." And you know the witness
24 is withholding something or probably
25 withholding something because the lawyer made

1 the instruction.

2 What duty is there, then, to identify
3 what was withheld? I mean, we don't really
4 deal with it, is what I'm saying. We really
5 didn't grasp that issue. But that seems to be
6 a different kind of problem than withholding a
7 document that can be identified as privileged,
8 which is primarily what is what Rule 7 is
9 dealing with.

10 We try to make it clear that a protective
11 order can only be used where Rule 7 cannot be
12 used. Now, I don't know whether that's
13 responsive to your question, but I tried to
14 kind of tell you what we had in mind. That is
15 what we had in mind.

16 CHAIRMAN SOULES: Does this
17 cover where documents are being withheld on
18 the grounds of relevance? Is it intended to
19 cover that?

20 HON. SCOTT A. BRISTER: 7 is.

21 MR. SUSMAN: Yeah, 7 is.

22 That's what I'm trying to -- 7 is, yeah. You
23 just object.

24 CHAIRMAN SOULES: Is there any
25 requirement that you describe what has been

1 withheld on the grounds of relevance?

2 MR. SUSMAN: No. There never
3 has been. I don't know how you would do that.

4 HON. SCOTT A. BRISTER: It
5 would defeat the purpose to kind of have to
6 describe everything that you don't think is
7 relevant.

8 CHAIRMAN SOULES: Well, if you
9 asked for every vehicle General Motors has
10 made since 1942, and there's a real case on
11 that, well, how about just front-wheel drive
12 since 1990?

13 HON. SCOTT A. BRISTER: The
14 gist of my suggestion was just that all 8 is
15 is that it says that the court can make any
16 order and then list three orders a court might
17 make. And it just didn't seem to me that that
18 was anything different from what we were
19 dealing with in 7, and why not just put it all
20 in one place, was all I meant.

21 MR. SUSMAN: Well --

22 CHAIRMAN SOULES: Steve.

23 MR. SUSMAN: -- it clearly
24 deals with a nonparty. I mean, clearly 8 says
25 "any person."

1 HON. SCOTT A. BRISTER: No.
2 Eight says, "Except that any party may move
3 for such an order when an objection pursuant
4 to Rule 7 is not appropriate."

5 MR. SUSMAN: Yeah. Well, I
6 mean, I think what we meant to say, and maybe
7 we need to insert it, is that "any party may
8 move for such an order only when an
9 objection" -- we need to insert the word
10 "only," which I think was always our
11 intention. "Any party may move for such an
12 order only when an objection pursuant to
13 Rule 7 is not appropriate."

14 And the only time an objection under
15 Rule 7 would not be appropriate is when you're
16 dealing with oral depositions, right?

17 HON. SCOTT A. BRISTER: And the
18 oral deposition rule covers how you object to
19 a subpoena for documents, how you object to
20 the time and place. You know, I mean, there's
21 just so little left that this is covering. It
22 just doesn't seem to me to justify a whole
23 separate rule, because, I mean, those matters
24 are covered in the deposition rule, how you
25 object to those deals and when.

1 MR. SUSMAN: Well, my
2 concern -- listen, here is my concern: I
3 think, Scott, I mean, this is a point of
4 drafting --

5 HON. SCOTT A. BRISTER: Sure.

6 MR. SUSMAN: -- and aesthetics.
7 And my real problem is I don't think we will
8 ever finish this if we begin drafting again.
9 We have some rules here that are going to have
10 to be -- they will have to be all combined.
11 But we have to sit here and make sure --

12 HON. SCOTT A. BRISTER: But
13 this is a simple thing. And I'm suggesting if
14 you're going to take a truckload of new rules
15 to the bar, it's better to have fewer rules
16 than many rules, especially if they don't add
17 anything. I mean, what does a rule add that
18 says a court can make any order it wants to
19 and here are three orders it might want to
20 make? Thank you. Fascinating. How about 20
21 orders a court might want to make? How about
22 one? I mean, Rule 8 really doesn't do me
23 anything.

24 HON. F. SCOTT McCOWN: Okay.
25 Let's give up on this.

1 MR. MARKS: I have a motion
2 with respect to Rule 7.

3 CHAIRMAN SOULES: Rule 7.

4 MR. MARKS: And my motion is
5 that we delete the last two sentences.

6 CHAIRMAN SOULES: The last two
7 sentences of Rule 7?

8 MR. MARKS: Of Rule 7,
9 paragraph 1.

10 CHAIRMAN SOULES: Any second to
11 that motion? It fails for lack of a second.
12 I'm sorry, did I hear a second?

13 MS. GARDNER: I'll second it.

14 MR. McMANS: Well, I'm trying
15 to figure out what it's for. You're saying
16 you don't have a good faith objection, but did
17 you want to be able to not have a good faith
18 basis for an objection?

19 MR. MARKS: Well, I don't know
20 how it hurts anybody to have to read some
21 objections to the interrogatories. It never
22 hurt me, and you know, I just don't think
23 those sentences ought to be in there. There
24 are other ways to take care of that situation
25 than saying that you waive all your objections

1 because you obscured your real objection by a
2 lot of them and you've got to timely object or
3 you waive it. But then if you make too many
4 objections, then you waive them. I think it
5 kind of puts people between a rock and a hard
6 place.

7 CHAIRMAN SOULES: Okay. The
8 sentence -- you're talking about the last two
9 sentences?

10 MR. MARKS: Yes.

11 CHAIRMAN SOULES: Okay. The
12 first of those I'll call Sentence No. 1. The
13 purpose of that is to eliminate the need for
14 prophylactic objections in order to avoid any
15 waiver situation. It says you only have to
16 make them if you have a good faith basis at
17 the time. You don't have to make prophylactic
18 objections. That's what I understood it to
19 mean. Now, it may not say that, but that's
20 the purpose of it.

21 The last sentence may be what you're
22 describing.

23 MR. MARKS: Yeah. That's my
24 biggest area.

25 CHAIRMAN SOULES: It says,

1 "Objections shall be made only if a good
2 faith factual and legal basis for the
3 objection exists at the time the objection is
4 made." You make it whenever you have a good
5 faith basis for making it. You don't waive it
6 by not making it within 30 days if within
7 30 days you had no basis to make it.

8 MR. MARKS: Okay. I'll
9 withdraw my motion with respect to the second
10 clause of that.

11 MR. McMains: I don't agree
12 with that.

13 MR. SUSMAN: Well, listen,
14 John, I guess, again, we can go through this
15 and debate line by line these things. This
16 has been in there for -- a number of drafts
17 have been voted on by this Committee
18 repeatedly. It has not even had any draftsman
19 changes since the last draft.

20 MR. MARKS: Well, I raised
21 questions about it earlier, Steve, and I think
22 I'm entitled to have a vote on it, if it's
23 going on up to the Court.

24 MR. SUSMAN: I think that's
25 fine. All I'm saying is that it has been -- I

1 mean, if we want to record another vote, it
2 needs to be discussed and debated, and it
3 seems to me we'll be here for a week. I mean,
4 I don't mind another vote on things, and
5 that's fine, but...

6 HON. F. SCOTT McCOWN: Well,
7 this is a policy issue in which the group said
8 we want lawyers to stop making a zillion
9 objections, we want a new day in Texas, and
10 we're writing it into the rule. And John is
11 saying he doesn't want a new day, so why don't
12 we just move the question and vote on it.

13 CHAIRMAN SOULES: Which
14 sentence do you want deleted or both?

15 MR. MARKS: I think the last
16 sentence is the one that I would like to
17 delete.

18 CHAIRMAN SOULES: You're moving
19 to delete the last sentence of Rule 7,
20 paragraph 1. Is there a second?

21 MS. GARDNER: I'll second it.

22 CHAIRMAN SOULES: It's
23 seconded. Any further discussion? Joe
24 Latting.

25 MR. LATTING: I reluctantly

1 speak against my friend and colleague John on
2 this, but it seems to me that if we're making
3 it clear that you don't need to make
4 prophylactic objections, which we've done in
5 the preceding sentence, then all the more
6 reason for lawyers not to fill up their papers
7 with lots of unnecessary objections. And I
8 think it's a dandy idea to tell lawyers they
9 shouldn't and can't do that, especially if we
10 don't need to any more.

11 CHAIRMAN SOULES: Anyone else?

12 MR. MARKS: Well, I'm just
13 concerned about the court that's going to be
14 looking at this and ruling on it, you know,
15 because every judge we're up against is not a
16 Judge Brister or a Judge McCown.

17 CHAIRMAN SOULES: Mike Prince,
18 do you have your hand up?

19 MR. PRINCE: No. I've answered
20 my own question. Thank you.

21 CHAIRMAN SOULES: Rusty.

22 MR. McMANS: I don't have any
23 problem with voting. I don't like the idea
24 that the record in this Committee is that the
25 purpose of that rule is, as you say, that you

1 don't need to make prophylactic objections;
2 that they're just kind of -- that you can make
3 them later. That's not what I understood the
4 purpose of this rule to be.

5 The purpose of this rule is that if you
6 don't make objections for no reason at all and
7 if a reason occurs to you 10 months down the
8 road, that doesn't resurrect your right to
9 make an objection. Now, I don't think that --
10 which is what I thought you were saying.

11 HON. F. SCOTT McCOWN: No. The
12 way this works is that the trial judge would
13 have to find, number one, that there were
14 numerous objections; and number two, that they
15 were unfounded; and that therefore the one
16 good one that was buried inside all the
17 numerous unfounded ones is waived.

18 MR. McMains: I understand.
19 But what I'm saying is that I think, and I may
20 be mistaken, but I thought what Luke was
21 saying is that the sentence that he doesn't
22 have an objection to says, "Objections shall
23 be made only if a good faith factual and legal
24 basis for the objection exists at the time the
25 objection was made." That somehow infers that

1 you can make an objection later that you could
2 have made early, and I don't think -- I don't
3 know if you meant to say that, but that's what
4 I heard you say.

5 CHAIRMAN SOULES: If there's a
6 good faith factual and legal basis for an
7 objection during the response period, you have
8 to make it.

9 MR. McMANS: Right.

10 CHAIRMAN SOULES: If there's
11 not, and you later get into the other
12 warehouse of documents and you suddenly find a
13 bunch of attorney-client privileged stuff you
14 didn't know about, you can make it then.

15 PROFESSOR ALBRIGHT: Luke, I
16 need to correct that for the record. That is
17 not section 1; that would be under section 2.

18 MR. McMANS: Absolutely.

19 PROFESSOR ALBRIGHT: That's
20 your privilege. If you're going to make any
21 relevance objections, objections to the scope
22 or the form of the question, you need to make
23 them within the time of the response.

24 MR. McMANS: Right. That's
25 what I was getting at; that that's not

1 something that you get to wait and sit on and
2 decide that maybe you have the scope or
3 relevance or some of these general ones that
4 we now call prophylactic objections later on.

5 PROFESSOR ALBRIGHT: But it is
6 true that if you find another box of
7 attorney-client privileged information, you
8 may claim that privilege under section (2)
9 even though you never made an attorney-client
10 assertion before.

11 MR. McMAINS: I understand. I
12 agree with that.

13 MR. PRINCE: Question.

14 CHAIRMAN SOULES: Okay. Mike
15 Prince.

16 MR. PRINCE: Let's take the
17 same analogy, but the box is relevance. Let's
18 say you've got three boxes and they're called
19 for and relevant and you produce them and you
20 don't object. Two months later you find the
21 fourth box that's called for but is not
22 relevant. Does the operation of this rule
23 mean that that objection is gone?

24 PROFESSOR ALBRIGHT: Well, is
25 your objection to the question because the

1 question was overly broad, or is your problem
2 that this document is not responsive to that
3 request?

4 MR. PRINCE: Well, the request
5 is overly broad, but you don't make the
6 objection because the documents that have been
7 called for are the only ones that you believe
8 that you have that are responsive to this
9 overly broad request. You don't make the
10 objection. You produce the documents. You
11 discover a box of documents later that is
12 called for but is beyond what a relevant
13 request would be. Now, I take it that the way
14 this rule would operate is that you are
15 thereafter barred from at that time on
16 discovery of those later documents from making
17 that objection.

18 PROFESSOR ALBRIGHT: Well, I
19 think that's the way it is under the current
20 rules and we have not changed that.

21 MR. PRINCE: So to be safe you
22 need to make that objection, even though not
23 founded at the time you make it, because the
24 documents you have don't indicate that there's
25 a good basis for it on the off chance that

1 you're going to discover a box later that is?

2 PROFESSOR ALBRIGHT: Well, I
3 think what the question is or what the issue
4 is is that you need to make clear to the
5 requesting party what you -- what you're
6 responding to. And if you think that the
7 request is overly broad, you need to tell them
8 that you think the request is overly broad so
9 that they know how you're responding to it.

10 MR. PRINCE: So to tell them
11 that it either is overly broad or that it
12 might be overly broad would be a proper
13 response and not an unfounded response?

14 PROFESSOR ALBRIGHT: Correct.

15 CHAIRMAN SOULES: Well, for the
16 record, I disagree. I would think that if you
17 don't know that there's a warehouse and
18 whoever you're dealing with doesn't know
19 there's a warehouse in the first 50 days and
20 you've got 50 days to answer the
21 interrogatories and document requests and you
22 do your best but you find out there is a
23 warehouse, that you can make the relevance
24 objection.

25 PROFESSOR ALBRIGHT: Well,

1 that's not a relevance objection. That's an
2 unduly burdensome objection.

3 MR. LATTING: Well, it could be
4 a relevance objection.

5 CHAIRMAN SOULES: It could be a
6 relevance objection. But there's only one
7 motion on the floor, and that is that we
8 delete the last sentence and not the next to
9 the last sentence, and that's been seconded.
10 Is there any further discussion about that?

11 Those in favor show by hands.

12 MR. KELTNER: This is to
13 eliminate that?

14 CHAIRMAN SOULES: To eliminate
15 the last sentence. Four. Let me count them
16 again. Five.

17 Those opposed. 12. It fails by a vote
18 of 12 to five, so that sentence stays in.

19 Anything else on Rule 7?

20 HON. SCOTT A. BRISTER: Why
21 don't we just get a vote.

22 CHAIRMAN SOULES: Judge
23 Guittard.

24 HON. C. A. GUITTARD: I offer a
25 clarifying amendment to the second sentence of

1 subdivisions 2a. That sentence reads, "If
2 materials or information responsive to a
3 request are privileged, the party shall
4 withhold the privileged materials" and so
5 forth.

6 Now, that could be interpreted to mean
7 that if it's privileged, the party can't waive
8 it. I don't think that's the intent. I think
9 the intent is something like this: "If a
10 party claims a privilege with respect to
11 information requested, the party shall
12 withhold."

13 MR. LATTING: Hear, hear.

14 HONORABLE C. A. GUITTARD: I
15 move that it be amended with those words.

16 CHAIRMAN SOULES: Give me the
17 words again. Exactly where do they go and
18 what are they?

19 HON. C. A. GUITTARD: At the
20 beginning of -- well, it's the first sentence
21 actually since the previous first sentence has
22 been stricken. "If a party claims a privilege
23 with respect to information requested, the
24 party shall" and so forth.

25 PROFESSOR ALBRIGHT: Judge

1 Guittard, would this work: If a party claims
2 that materials or information responsive to a
3 request are privileged, the party shall
4 withhold the privileged materials or
5 information from the response.

6 HON. C. A. GUITTARD: That's
7 okay. Or you can just change "shall" to
8 "may."

9 PROFESSOR ALBRIGHT: So all
10 we're doing, Luke, is after the word "if" in
11 the first sentence is insert "a party claims
12 that."

13 CHAIRMAN SOULES: Okay. "And
14 the party shall withhold"?

15 HON. C. A. GUITTARD: Yeah.

16 CHAIRMAN SOULES: Okay.
17 Anything else on Rule 7? Judge Brister, you
18 had something else?

19 HON. SCOTT A. BRISTER: My
20 proposal is to combine the fourth paragraph of
21 7 with Rule 8 so that the ruling -- the kind
22 of rulings the court can make is all in one
23 place. If you want to put it all in 7 or put
24 it all in 8 it doesn't matter, but just that
25 everything on what kind of rulings the court

1 can make is in one place. And that's purely
2 just so it won't be in two places, so it's not
3 a big substantive deal to me.

4 CHAIRMAN SOULES: Is there a
5 second to that? The motion fails for lack of
6 a second. Anything else on Rule 7?

7 MR. SUSMAN: I move we adopt
8 Rule 7 then.

9 HON. F. SCOTT McCOWN: Second.

10 CHAIRMAN SOULES: Those in
11 favor show by hands. 13 in favor. Those
12 opposed. 13 to two. It passes 13 to two.

13 Rule 8.

14 MR. SUSMAN: Rule 8, Protective
15 Orders. We had the converse of what Judge
16 Brister just proposed, which I guess since it
17 didn't get seconded it will get tabled again.
18 That's the only comment we had on this, except
19 I would insert in the third line, "A party may
20 move for such an order only when an objection
21 pursuant to Rule 7 is not appropriate," which
22 I think is what our intention was. If you use
23 the objections vehicle, use it, not a
24 protective order.

25 CHAIRMAN SOULES: Okay. Any

1 opposition to that change? Any discussion of
2 Rule 8? Those in favor show by hands. One
3 more time, please. 14. Those opposed. None
4 opposed. It passes by a vote of 14 to
5 nothing.

6 Rule 9.

7 MR. SUSMAN: Rule 9. The only
8 comments we have were from Judge Brister, who
9 suggests that we should drop paragraphs 2(g)
10 and 2(h).

11 HON. SCOTT A. BRISTER: Do you
12 want me to just summarize what those are?

13 CHAIRMAN SOULES: Yes, please.

14 HON. SCOTT A. BRISTER: (g) is
15 the one -- under 2(f) this is -- you can say,
16 "Please send me the following." (f) is
17 "please send me a medical authorization so I
18 can get the bills"; (g) is the usually
19 plaintiff then sends back "send me any records
20 that you got pursuant to my authorization,"
21 and it's just a minor thing. It seems to me,
22 if that's in there, then somebody is not going
23 to do it. And then the patient is going to be
24 objecting, "Don't let them put my records in,
25 because even though I had a superior right to

1 get them and even though I was there when the
2 treatment was done, because they didn't
3 produce them, I don't want them admitted,"
4 which just seems silly.

5 I mean, this is something that the court
6 reporter calls up and says, "Do you want a
7 copy of the records?" You ought to just say
8 yes and not consider this some big discovery
9 deal, so I would just drop that one.

10 HON. DAVID PEEPLES: Is this
11 something new, or was this in existing law?

12 HON. F. SCOTT McCOWN: Which
13 provision?

14 HON. SCOTT A BRISTER: (g). It
15 is in existing law.

16 CHAIRMAN SOULES: In a suit
17 alleging physical or mental injury and damages
18 from the occurrence that is the subject of the
19 case?

20 HON. SCOTT A. BRISTER: It's
21 not a big deal, but it just seems to me it
22 makes it simpler if you just say, when the
23 court reporter says, "Do you want a copy of
24 the records," to just say yes.

25 CHAIRMAN SOULES: Okay. The

1 motion is that we delete the last paragraph on
2 the first page of Rule 9. Is there a second?
3 No second. That motion fails. Next.

4 HON. SCOTT A. BRISTER: The
5 other one is of more substance, and that is
6 that you have to produce relevant documents.
7 That's going to be a big problem and a big
8 hubbub from the lawyers. The main hubbub I
9 hear on the federal rules is I've got to
10 produce any relevant documents.

11 HON. F. SCOTT McCOWN: Which
12 one are you on now?

13 HON. SCOTT A. BRISTER: 2(h) of
14 Rule 9.

15 CHAIRMAN SOULES: Judge Brister
16 is talking about the first line on Page 2 of
17 Rule 9.

18 MR. SUSMAN: Can I respond to
19 that, Judge Brister?

20 HON. SCOTT A. BRISTER: Sure.

21 MR. SUSMAN: We have always
22 understood -- again, I have the same question
23 that you have, what the hell is meant by
24 "written instruments"? It's not relevant
25 documents; it's written instrument upon which

1 a claim or defense is based. What the
2 response is to that that I have heard from the
3 people who have given us this language, which
4 I think it came out of the task force and all
5 these other committees, is that that means a
6 promissory note, a written contract, a
7 release. We are not talking about producing
8 relevant documents. We are talking about the
9 type of thing that is normally attached as an
10 exhibit to a petition, because it's one key
11 crucial document upon which the claim or
12 defense is based, and that's what's called an
13 instrument.

14 HON. SCOTT A. BRISTER: All
15 right. But the problem is that the more
16 complicated the case, the more of those
17 documents there are going to be. And the
18 party that doesn't get them produced to them
19 is going to claim that their claim, maybe it's
20 their 19th defense to the 32nd complaint, is
21 based on a waiver provision in an insurance
22 policy, or you know, who knows what all else,
23 that some minor claim is based on a letter,
24 you know, that's the notice letter. It could
25 be a thousand things.

1 It is narrower than relevant documents,
2 but, look, everybody is asking for that in the
3 request for production anyway. Isn't this one
4 supposed to be the one that's just so plain
5 vanilla, we're not going to have objections to
6 it, we're not going to have a big dispute
7 about it? If so, I suggest that we drop that
8 one, because there is going to be a dispute
9 about that one.

10 MR. KELTNER: Luke, there may
11 be, and this did come from the task force. We
12 got this, interestingly, from both California,
13 Illinois and Colorado, who have not had a
14 problem with it. Now, it's gone through some
15 machinations, Scott, and that may be part of
16 the problem. It was to be the instrument or
17 suit upon which a defense was based on, but
18 quite frankly, that was just a few cases.

19 It's okay to take it out, as far as I'm
20 concerned, because I can see people trying to
21 make more of it than it is. But I don't know
22 how the Subcommittee people or the other
23 Committee people feel about it.

24 HON. SCOTT A. BRISTER: Yeah.
25 I agree with it, if it's just the note you're

1 sued on. But that's not going to be the way
2 it works out. Somebody is going to claim that
3 defense that you're raising way back there in
4 your petition is really based on a letter you
5 sent us or on a deposition that was taken.

6 MR. KELTNER: It truly is not a
7 problem. And if that's your interpretation on
8 it, that makes me somewhat fearful that we're
9 going to see other things occur, so it's not a
10 problem removing it from the rule.

11 CHAIRMAN SOULES: Justice
12 Duncan.

13 HON. SARAH DUNCAN:
14 Realistically speaking, if your suit or your
15 counterclaim really is based on a written
16 instrument like a written contract or a
17 release or insurance policy, you're going to
18 attach it to the pleading anyway. And if you
19 don't, somebody is going to ask for it
20 somewhere along the way. I agree with Judge
21 Brister. I think it's asking for problems.

22 MR. KELTNER: Steve, let's take
23 it out.

24 MR. SUSMAN: I'm not going to
25 fight. I mean, I've never been a proponent of

1 disclosure anyway.

2 MR. KELTNER: (To the reporter)
3 Did you get that?

4 MR. PRINCE: Certify that,
5 please.

6 MR. SUSMAN: A proponent of
7 voluntary disclosure, I mean, standard
8 disclosure.

9 CHAIRMAN SOULES: Okay. The
10 Discovery Subcommittee agrees to delete --

11 MR. SUSMAN: And that's the
12 only comment I've got.

13 CHAIRMAN SOULES: -- the
14 paragraph, the subparagraph -- let's see,
15 Rule 9, subparagraph 2(h), which is at the
16 top, and then I guess that will renumber the
17 rest and so forth all the way down.

18 MR. SUSMAN: I move the
19 adoption of Rule 9.

20 CHAIRMAN SOULES: Anything else
21 on Rule 9? Don Hunt.

22 MR. HUNT: Luke, I assume that
23 Lee will take care of this, but we have a
24 couple of situations where we have the title
25 reversed. It's "Request for Standard

1 Disclosure" and then "Standard Request for
2 Disclosure" in Rule 9(1) in the first sentence
3 and then in the first sentence of Rule 9(2).
4 I just think we ought to make the language the
5 same as the title.

6 CHAIRMAN SOULES: Where are
7 they again, Don?

8 MR. HUNT: 9(1), second
9 sentence; and 9(2), second sentence.

10 CHAIRMAN SOULES: Standard
11 Request for Disclosure.

12 MR. SUSMAN: Luke, I think we
13 prefer the articulation of "standard
14 request." We just didn't change it to that
15 throughout.

16 CHAIRMAN SOULES: Okay. So the
17 change needs to be made in the third line of
18 the rule, right?

19 MR. HUNT: Correct.

20 CHAIRMAN SOULES: Anywhere
21 else?

22 MR. SUSMAN: It needs to be
23 made in Rule 3(1) if we continue to define
24 "written discovery."

25 CHAIRMAN SOULES: Rule 1?

1 MR. SUSMAN: Rule 3(1).

2 CHAIRMAN SOULES: Okay. We'll
3 find it.

4 Anything else on Rule 9? Justice
5 Duncan.

6 HON. SARAH DUNCAN:
7 Subparagraph (4), where it says the time and
8 place of production can't be more than seven
9 days from the date of response, is that
10 another one of those things that the court
11 can't change under Rule 2, or is that not a
12 prohibition? If the parties can't agree on a
13 reasonable time and place for production and
14 they go to the court to ask the court to set a
15 reasonable time, is that not one of the things
16 that the court can't change under Rule 2?

17 PROFESSOR ALBRIGHT: No,
18 because this doesn't prevent the court from
19 changing it. All this does is just say
20 that -- it just makes people designate a time
21 and place within a specified time within a
22 week where they're going to produce these
23 voluminous documents. They can go to a court
24 which allows them to produce whatever the
25 court will allow them to. The only places

1 where the court can't do something is where it
2 specifically says the court cannot do it.

3 CHAIRMAN SOULES: Anything else
4 on Rule 9? Those in favor of Rule 9 show by
5 hands. 15. Those opposed. None. It passes
6 by a vote of 15 to none.

7 Rule 10. Here we are.

8 MR. SUSMAN: Rule 10. There's
9 obviously a typo in the third line of the
10 Committee's draft, red-line draft. It should
11 read "pursuant to Rule 9" rather than
12 "pursuant trouble 9." That's "pursuant to
13 Rule 9."

14 The other responses we have or the other
15 points we have are from Judge Brister. Scott,
16 would you mind explaining them to us?

17 HON. SCOTT A. BRISTER: Sure.
18 I just suggested that you make it all, rather
19 than one level, since (2) and (3) -- (2) is
20 just the designation of the expert. (3) is
21 the stuff about the expert. As a practical
22 matter, everybody is going to ask for all of
23 them. This is the standard requests only;
24 that you just collapse them and put them
25 together.

1 Do you want to do them one by one, or do
2 you want me to do them all at once?

3 CHAIRMAN SOULES: Any of them
4 that are related we probably ought to take
5 together.

6 HON. SCOTT A. BRISTER: That's
7 just by itself.

8 CHAIRMAN SOULES: Okay. By
9 itself. You're saying --

10 HON. SCOTT A. BRISTER: Because
11 you end up with, for instance, on response,
12 you know, it just makes this a long unwieldy
13 rule to me, to have totally different standard
14 requests, times, procedures and rules from the
15 expert's name versus the expert's opinions
16 when everybody is going to ask for both. It's
17 purely --

18 MR. SUSMAN: My response to
19 that is that has a long legislative history
20 and it works for this Committee. Again, the
21 Subcommittee began with one disclosure about
22 experts to take place at a particular time
23 prior to the end of the discovery period.
24 There were members of this Committee who felt
25 very strongly that there was other information

1 about experts that shouldn't be available
2 earlier, at least some information that should
3 be available earlier, or at least gettable
4 earlier if it was available earlier.

5 You recall someone talking about a party
6 that bandies around the name of their expert
7 early on in the game for settlement purposes
8 but doesn't want any discovery directed to
9 that expert. As a result, we have worked very
10 hard trying to draft this, and ultimately what
11 we came up with was two ways to satisfy the
12 Committee.

13 You can get some information very early
14 about name and subject matter, if known, but
15 all the other information comes at the fixed
16 time in wave 2, which is really the main
17 wave. And that was just the history of it
18 all.

19 Now, I would agree with you that we could
20 go back and make it much more -- a much nicer
21 looking product, but --

22 HON. SCOTT A. BRISTER: Well,
23 I've got -- on the next page I've got it put
24 together in that way, but it's -- you know,
25 that's purely a matter of if people want them

1 separate, leave them separate.

2 It just seems to me everybody is going to
3 request all of it and just put it all
4 together, so I move to put -- to combine
5 paragraphs 2 and 3 like I have on the page
6 attached under Tab 10.

7 MR. PRINCE: Yours being on the
8 right-hand side?

9 HON. SCOTT A. BRISTER: Right.

10 MR. PRINCE: I'll second it.

11 PROFESSOR ALBRIGHT: May I ask
12 a question?

13 CHAIRMAN SOULES: Just a
14 minute, I've got to catch up here.

15 Okay. Alex Albright.

16 PROFESSOR ALBRIGHT: So Scott,
17 the difference between the two drafts, between
18 the Committee draft and your draft, is that in
19 your draft, upon request the party then would
20 have a response -- would have the duty to
21 reasonably and promptly respond to all the
22 expert information with the deadline being the
23 75/45 mandate?

24 HON. SCOTT A. BRISTER: Right.

25 PROFESSOR ALBRIGHT: Where

1 under our rule, the Committee rule, you only
2 have the reasonably promptly obligation as far
3 as the identity and subject matter, and then
4 the rest of it you don't even have to think
5 about doing until 75/45 days.

6 HON. SCOTT A. BRISTER: Well,
7 they're both standard requests.

8 PROFESSOR ALBRIGHT: Right.

9 HON. SCOTT A. BRISTER: And
10 again, I'm not that clear on reasonable --
11 what has to be reasonably promptly and what's
12 not. The way I put them together is just that
13 you can amend pursuant to your (5)(2), but if
14 it's not reasonably prompt, you know, then
15 whatever happens on (6) happens, but that the
16 drop-dead dates are the 75/45 that you all
17 have.

18 PROFESSOR ALBRIGHT: I think,
19 going back to the legislative history, the way
20 that the Subcommittee originally drafted this
21 was that you didn't have to give over any
22 information concerning experts until 75/45
23 days before the end of the discovery period.
24 Then in this big Committee meeting it was felt
25 that, well, the identity and general subject

1 matter need to be given as soon as you know
2 about it. And so then Scott's draft then goes
3 even further and says we'll give everything
4 concerning experts as soon as you know about
5 it. So I think that's the continuum of what's
6 going on.

7 MR. PRINCE: That's right.

8 CHAIRMAN SOULES: Well, I think
9 what Judge Brister is saying is that under
10 Rule 9, if you ask for the same information,
11 you get it in 30 days.

12 PROFESSOR ALBRIGHT: Right.
13 Where under the Committee draft you only get
14 identity and subject matter in 30 days, and
15 then -- well, all of it is subject to you may
16 not decide to designate your expert until
17 75 days or 45 days before the end of the
18 discovery period, so you may not get anything.

19 CHAIRMAN SOULES: But under the
20 Discovery Subcommittee's own Rule 9 --

21 PROFESSOR ALBRIGHT: Right.

22 CHAIRMAN SOULES: -- you get
23 all 10(2) and 10(3) in 30 days.

24 PROFESSOR ALBRIGHT: No.

25 CHAIRMAN SOULES: That's what

1 it says.

2 MR. SUSMAN: You're reading
3 something that's crossed out.

4 CHAIRMAN SOULES: No. "Provide
5 the information pertaining to expert witnesses
6 as set forth in Rule 10(2) and 10(3)."

7 PROFESSOR ALBRIGHT: Right.
8 But the time for response --

9 CHAIRMAN SOULES: There it is,
10 within 30 days.

11 PROFESSOR ALBRIGHT: No. The
12 time for response, except as provided for
13 expert witnesses in Rule 10, the party has to
14 respond in 30 days.

15 CHAIRMAN SOULES: And so when
16 do you have to respond under Rule 9 to expert
17 witnesses?

18 PROFESSOR ALBRIGHT: You look
19 to Rule 10, and your date for the response is
20 in 2(b) and in 3(b). It's all very, very,
21 very complicated, but it's based upon the
22 discussion and vote in this Committee a couple
23 of meetings ago.

24 I would favor doing it one way or the
25 other and not have this type of version like

1 we have now.

2 CHAIRMAN SOULES: I don't think
3 10(3) ought to be in Rule 9. After you get
4 their identities, if you want anything
5 further, you ought to move over to Rule 10,
6 and then that would harmonize them.

7 HON. SCOTT A. BRISTER: And
8 just request that by an interrogatory?

9 CHAIRMAN SOULES: By any means.

10 HON. SCOTT A. BRISTER: An
11 interrogatory is the only other thing to me.

12 CHAIRMAN SOULES: Whereas a
13 standard disclosure means "Tell me who your
14 experts are." And then if a person wants more
15 than that, they have to go under 10(3) and get
16 the other information.

17 PROFESSOR ALBRIGHT: But that's
18 not what we -- I -- we've written this like
19 the last vote was.

20 CHAIRMAN SOULES: Okay. But
21 under Rule 9 it does not say when you have
22 to -- when a party has to give --

23 MR. SUSMAN: -- standard
24 disclosure as to experts.

25 CHAIRMAN SOULES: -- standard

1 disclosure as to experts.

2 MR. SUSMAN: Correct. You've
3 got to look under Rule 10 to figure out the
4 timing.

5 CHAIRMAN SOULES: But it
6 doesn't say that Rule 10 controls it either.
7 It says -- is that correct?

8 PROFESSOR ALBRIGHT: So maybe
9 we need another sentence that says the time
10 for response for experts is provided in
11 Rule 10, but I think we have it.

12 CHAIRMAN SOULES: That's fine
13 either way.

14 PROFESSOR ALBRIGHT: There are
15 some drafting problems, but much of the
16 drafting problem is because of this hybrid
17 version that we have right now. I think we
18 should talk about the philosophical decision
19 about when should you provide your discovery
20 for experts and when should you respond to
21 these. Do we want to keep the hybrid version,
22 or do we want to go one way or the other?

23 MR. SUSMAN: Well, the only
24 thing really I question at this stage of the
25 game in fairness is talking about

1 philosophical discussions.

2 PROFESSOR ALBRIGHT: Well,
3 we've changed philosophically on Rule 6 big
4 time.

5 MR. SUSMAN: Well, it turns out
6 we haven't. Okay? It turns out we haven't.
7 I mean, it turns out that what happened after
8 a long drafting session we've got a Rule 6
9 that everyone agreed to because it's
10 substantively the same thing that we had
11 before, I think. That's why everyone agreed
12 to it so readily.

13 And so what I'm saying, what I'm scared
14 of is that we're going to have another hour
15 drafting session on these rules as we go
16 through it to get to the same point, and my
17 only fear is that there were people in the
18 group that thought that some information about
19 the experts should be available early. There
20 were other people in the group that thought
21 that nothing should be available until a time,
22 a drop-dead time certain so you aren't
23 dribbling out information about experts.
24 Everyone knows clearly when you've got to
25 disclose information about experts, and you

1 disclose everything at one time.

2 The votes at our last several meetings
3 have put those two together, and we have
4 struggled to come up with a vehicle and a
5 timetable to express it in English so that you
6 get a little of both.

7 You can at any time during the discovery
8 period ask for the name of the other guy's
9 experts and the subject matter of his
10 testimony. And if he's got them, he has a
11 duty to reasonably promptly disclose them to
12 you.

13 On the other hand, you cannot require him
14 to reasonably promptly disclose to you early
15 in the discovery period the substance of the
16 testimony, the documents that the expert may
17 have prepared, et cetera, et cetera. That
18 comes at the 75/45 day time period. That's
19 the way we tried to write the rule. I mean, I
20 can explain what we have done, but I hope
21 we've done it in English.

22 And my fear is that to go back now and
23 get a philosophical viewpoint -- I mean, I do
24 think there is some question here on fairness,
25 a basic fairness of what we're doing, you

1 know, with the people who are in attendance.

2 CHAIRMAN SOULES: Well, we'll
3 leave it confused. Is that what the Committee
4 wants? I mean, it's not that hard to fix. If
5 you look at Rule 9 -- just a minute, look at
6 Rule 9 under "Response."

7 This whole last part is subsumed
8 already. Unless the time to serve a response
9 is extended in the request or by agreement or
10 court order, that's all totally redundant.
11 It's governed by an earlier rule. Okay.
12 That's completely redundant. If we strike
13 that and we just reverse the rest of the
14 sentence, "a party served with a Standard
15 Request for Disclosure" --

16 PROFESSOR ALBRIGHT: I don't
17 know where you are.

18 CHAIRMAN SOULES: A party
19 served with a Standard Request for Disclosure
20 shall file and serve a response making the
21 requested disclosure within 30 days after the
22 service of the request, 50 days if the request
23 accompanies citation, and then except the
24 responses pertaining to expert witnesses shall
25 conform to Rule 10 or be governed by Rule 10.

1 And that fixes it. It says when they are
2 to come. And then Rule 10 is true. We've
3 split it, but it's been split for a long
4 time.

5 The progress of that rule, Judge Brister,
6 was that the Committee voted that the expert
7 information would come late, but there was a
8 sensitivity that we didn't even know who they
9 were and we ought to be able to at least find
10 that out sometime early on so we can start
11 doing some planning. So we said okay, you can
12 find out who they are and the general subject
13 early, but still they don't start doing their
14 reports or their depositions until basically
15 the facts of the case fill out.

16 HON. SCOTT A. BRISTER: But is
17 that what the Subcommittee's Rule 10' does? In
18 Part 2 it says the response shall be made
19 within 30 days, but if it's amended or
20 supplemented, such supplement, which of course
21 means you can do it any time you want, becomes
22 unreasonably prompt if it's 75/45. That
23 clearly implies and infers, or I infer from
24 that you don't have to do it within 30 days.
25 You just have to do it reasonably prompt.

1 CHAIRMAN SOULES: That's right.

2 HON. SCOTT A. BRISTER: And all
3 I'm saying is if that's the standard on all of
4 it, let's put it all together. You should do
5 it at 30 days, but the fact of the matter is
6 you can do it reasonably prompt. And 75/45 is
7 the drop-dead as to what's reasonably prompt,
8 so to me 10(2) is not any "you have to respond
9 in 30 days."

10 CHAIRMAN SOULES: Well, you do
11 if you don't.

12 HON. SCOTT A. BRISTER: Well,
13 you just amend late and you claim it's not
14 unreasonably prompt because they had three
15 months left in the discovery period or six
16 months left in the discovery period. And
17 almost everybody says that's not unreasonably
18 prompt, if you had six months to do discovery
19 on it.

20 MR. McMANS: Well, except that
21 if it's more than 75 days, it's never
22 unreasonably prompt, is it?

23 HON. SCOTT A. BRISTER: No. It
24 doesn't say that. It's only if it's less than
25 75 it's --

1 MR. YELENOSKY: -- presumed.

2 HON. SCOTT A. BRISTER: -- it's
3 presumed unreasonably prompt. I'm suggesting
4 it can be unreasonably prompt a long time
5 before that.

6 CHAIRMAN SOULES: Okay. We set
7 up Rule 10 for the reasons I discussed just
8 earlier, and I guess, Judge Brister, if you
9 have a motion, well, make it.

10 HON. SCOTT A. BRISTER: I
11 proposed you collapse (2) and (3) into the (2)
12 and (3) I have on mine and just treat them all
13 the same.

14 CHAIRMAN SOULES: Okay.

15 HON. SCOTT A. BRISTER: Now,
16 that's if -- let me except out from that if
17 you want to play around with making it a firm
18 30 as opposed to reasonably prompt or
19 something, that's fine. I'm just -- the gist
20 of mine is that you don't have two separate
21 confusing procedures. Only one confusing
22 procedure will be enough.

23 CHAIRMAN SOULES: Okay. Is
24 there a second to that?

25 MR. PRINCE: Second.

1 CHAIRMAN SOULES: It's been
2 moved and seconded. Carl Hamilton.

3 MR. HAMILTON: I have a problem
4 with the 75 and 45 days.

5 HON. SCOTT A. BRISTER:
6 Different question. I do too, but that's --

7 MR. HAMILTON: Okay. Then
8 we'll save that until later.

9 CHAIRMAN SOULES: Okay. Those
10 in favor of Judge Brister's motion show by
11 hands. Seven. Those opposed. Four. We've
12 only got 11 people with opinions on that.
13 Okay. It carries seven to four.

14 PROFESSOR ALBRIGHT: Since we
15 had such a low vote, should we submit perhaps
16 two or three different versions to the Court
17 or the hybrid version or --

18 CHAIRMAN SOULES: Well, I
19 don't -- let me just count and see how many
20 people are here.

21 HON. F. SCOTT McCOWN: Well, a
22 low vote may simply indicate -- I don't think
23 it necessarily justifies different versions.
24 I mean, if we can go with one versions, I
25 think that would be better, as I see it.

1 CHAIRMAN SOULES: Well, we've
2 got 22 people here and 11 are voting on it,
3 and I feel like that's a duck because it
4 quacks like a duck. You all take positions on
5 these. These are very, very important policy
6 decisions here that we're making.

7 HON. SCOTT A. BRISTER: This
8 one is not that important. This one is not
9 as -- I said, everybody is just going to
10 request both of them anyway. All I'm
11 suggesting is just put it in one place. It's
12 not that important.

13 MR. SUSMAN: Well, why don't we
14 go back to the notion that nothing about
15 experts is due until a time certain before the
16 end of discovery date. Then we can talk about
17 what time they should be. But why should we
18 get into arguments about what has to be
19 disclosed about experts until you get to some
20 time certain.

21 And the fact of the matter is, that's the
22 way most pretrial orders are anyway, where
23 there's a time certain at which expert
24 disclosure has got to be made. Why not
25 provide that -- I mean, go back to the way we

1 originally worked, Scott, which was before we
2 had this dual system of disclosure; that at a
3 point in time certain that is easy for the bar
4 to know you have to make your disclosures
5 about experts and you can make them all at the
6 same time. I mean, that's what I -- I mean,
7 that's fine.

8 CHAIRMAN SOULES: Just let me
9 be sure that I understand what the vote was.
10 You've got Rule 10 here on --

11 HON. SCOTT A. BRISTER: The
12 Subcommittee version is on the left, and my
13 version combining them --

14 CHAIRMAN SOULES: And yours is
15 on the right. And your motion was to delete
16 what part?

17 HON. SCOTT A. BRISTER: Well,
18 it doesn't really delete anything.

19 CHAIRMAN SOULES: No, but put
20 this in place of what?

21 HON. SCOTT A. BRISTER: Make it
22 so parts (2) and (3) of 10 appear in (2) and
23 (3) of my version.

24 CHAIRMAN SOULES: Come out and
25 in the place of that is your --

1 HON. SCOTT A. BRISTER: (2) and
2 (3).

3 CHAIRMAN SOULES: (2) and (3).
4 Okay.

5 HON. SCOTT A. BRISTER: Which
6 is really just the same thing put into one
7 rather than repeating it all.

8 CHAIRMAN SOULES: Okay. I've
9 got it.

10 HON. SCOTT A. BRISTER: And to
11 respond to Steve, I mean, I agree with that,
12 but then you would have to go back -- that
13 would be contrary -- I mean, the whole idea of
14 supplementation is there's not a firm
15 drop-dead date. I mean, the reasonable
16 promptness comes in back at Rule 5 on every
17 other kind of discovery. The same argument
18 could be made.

19 CHAIRMAN SOULES: Okay. That
20 motion is made and carried, and do we have
21 another motion relative to Rule 10? Are you
22 making another motion, Judge Brister?

23 HON. SCOTT A. BRISTER: Sure.

24 CHAIRMAN SOULES: Okay. What
25 is it?

1 HONORABLE SCOTT BRISTER: Okay.
2 The paragraph 5 of the Subcommittee's, court-
3 ordered reports, the last sentence I propose
4 to drop. It says that a court cannot compel
5 production of a report before the 75/45 cutoff
6 dates.

7 I'm assuming, on the cases that John and
8 others are probably concerned about, I'm going
9 to want to move up those dates earlier than --
10 make them more than 75/45 before. Does this
11 mean I can't do that as to the reports? It
12 just doesn't make sense to me to say the court
13 can't order you to do your reports early at
14 any particular time when it makes reasonably
15 good sense for me to order it under the
16 circumstances of that case.

17 CHAIRMAN SOULES: The motion is
18 to delete the last sentence of paragraph 5 of
19 Rule 11. Is there a second? Paragraph 10,
20 I'm sorry. To delete the last sentence of
21 paragraph 5 of Rule 10. Is there a second?

22 MR. PRINCE: Second.

23 CHAIRMAN SOULES: It's moved
24 and seconded. Is there a discussion? Alex.

25 PROFESSOR ALBRIGHT: This does

1 not prevent a court from requiring an early
2 report. All it does is say that if you're
3 going to require the report early, you require
4 all the other expert information to be
5 disclosed at the same time. It just makes you
6 move all of the deadlines for discovery
7 disclosure earlier. If we're going to your
8 reasonably prompt, it doesn't make any
9 difference.

10 See, this was with the idea of you
11 shouldn't even have to think about putting all
12 your expert documents together early in the
13 discovery period because you don't have to
14 disclose them until 75/45 days, and so that's
15 a whole different part of the case that you're
16 not really worried about as far as discovery
17 is concerned right now.

18 If the judge is going to start making
19 lawyers disclose experts early or make expert
20 disclosures early before the 75/45 days, they
21 should do it all at the same time, and so you
22 do your report, your documents, your general
23 substance, et cetera, all at the same time.

24 HON. SCOTT A. BRISTER: How
25 many judges are going to order reports before

1 the date when they're setting also to order
2 designating the experts? I mean, nobody is
3 going to do that.

4 PROFESSOR ALBRIGHT: Well, we
5 just wanted to make sure that this deadline
6 all came together so you're not doing a report
7 one day and then six weeks later then you have
8 to make these other disclosures.

9 HON. SCOTT A. BRISTER: I mean,
10 I don't have any objection to that. I just
11 don't think that would ever arise. I mean, a
12 judge won't order the reports a year before
13 they have to designate the experts. I mean,
14 why would a judge --

15 PROFESSOR ALBRIGHT: But under
16 this rule, our draft, which this was
17 originally written for, you would have to
18 designate your experts, quote, reasonably
19 promptly or whatever. But this was just to
20 keep those second disclosures, those more
21 onerous disclosures, at the same time as the
22 report.

23 So I think what we have contemplated is
24 that you can only get a report by a motion.
25 So if somebody files a motion and says, "I

1 need a report from the other side's expert,"
2 and the judge says, "Yeah, you're entitled to
3 one" and signs an order and nobody really
4 thinks about the times, then you're having to
5 do a report and then later on you're doing
6 everything else. And we just want to make
7 sure that everything was kept together, and
8 that's the -- it was not to limit the judge in
9 changing those dates at all.

10 MR. YELENOSKY: But isn't that
11 what the -- the pursuant to Rule 3 seems to
12 import the deadlines from Rule 3, not just --
13 if you stop the sentence with "at the same
14 time as Standard Requests for Disclosures are
15 due," then it seems to read like what you're
16 describing, which is the judge can set the
17 standard disclosures at a different time, but
18 the report should be coterminous with that,
19 whenever it is.

20 That's what I understand Judge Brister to
21 be saying, is that it seems to import and hold
22 sacrosanct the 75-day periods in Rule 3 when
23 all you really want to import from Rule 3 is
24 the notion of what a standard disclosure is
25 and say that the reports should be due at the

1 same time.

2 PROFESSOR ALBRIGHT: Okay. But
3 under our rule, we had to separate two
4 different kinds of standard disclosures. We
5 had the earlier ones and the later ones.
6 Under Scott's --

7 MR. YELENOSKY: I don't know if
8 it's been modified or --

9 PROFESSOR ALBRIGHT: Under
10 Scott's rule, you don't have to differentiate
11 between the two kinds.

12 MR. YELENOSKY: But it's
13 distinguished just by the capital standard or
14 what you say, the Standard Requests for
15 Disclosure.

16 PROFESSOR ALBRIGHT: No,
17 because we have standard requests under 2 --

18 MR. YELENOSKY: Additional
19 standard requests.

20 PROFESSOR ALBRIGHT: -- under
21 "Designations," but then we have additional
22 disclosures under 3, and we just want to tie
23 it to additional disclosures under 3. We're
24 not worrying about two different kinds of
25 disclosure under this -- except actually under

1 Scott's rule this is all floating anyway so it
2 doesn't make any difference.

3 HON. SCOTT A. BRISTER: My rule
4 is not different on that. I just took the
5 language direct from yours. I didn't intend
6 to change anything about dates.

7 PROFESSOR ALBRIGHT: But under
8 yours, when do you want to -- how do you want
9 to put together reports with these other
10 disclosures?

11 HON. SCOTT A. BRISTER: Well, I
12 hadn't addressed that. I just copied that
13 part directly out of yours. I didn't change a
14 bit of that. In other words, in the
15 Subcommittee draft there never was, other than
16 75/45, any drop-dead date anyway.

17 PROFESSOR ALBRIGHT: Right.

18 HON. SCOTT A BRISTER: It was
19 you send it out, they should respond in
20 30 days, good people will, some people won't
21 and they'll do it late, and then there's a
22 reasonably promptness question.

23 CHAIRMAN SOULES: It looks to
24 me like this last sentence says you can't
25 compel production until 75/45.

1 HON. SCOTT A. BRISTER: That's
2 what it looked like to me when I read it, and
3 that's what it's going to look like to a lot
4 of judges.

5 PROFESSOR ALBRIGHT: But that's
6 not what it was intended to do, so I agree it
7 may need some redrafting, but I'm also saying
8 it may not -- if we're adopting Scott's rule,
9 it may not be so important so maybe we
10 should drop it.

11 MR. YELENOSKY: I have a
12 suggestion. If you just say instead of --
13 it's the reference back, since you're
14 referring to it. A court may not compel
15 production of such a report before the date
16 upon which the designating party is required
17 to submit additional Standard Requests for
18 Disclosure, because you use initial caps
19 there, and you don't -- I mean, you know what
20 you're talking about.

21 HON. SCOTT A. BRISTER: I move
22 we drop it.

23 CHAIRMAN SOULES: Let's take
24 Judge Brister's motion that it just be
25 dropped, and that way the judge decides if he

1 wants to move it to any time he wants to, and
2 he probably may have some reason for doing it
3 that way.

4 HON. SCOTT A. BRISTER: One
5 might imagine certain circumstances where you
6 would want to do a report first.

7 CHAIRMAN SOULES: Okay. It's
8 moved. Was there a second?

9 MR. MARKS: Second.

10 CHAIRMAN SOULES: John Marks
11 seconded it. Those in favor show by hands.
12 10. Opposed. 10 to nothing we delete the
13 last sentence of paragraph 5 of Rule 10.

14 Now, we have to go back to Rule 9 for a
15 moment, while we were talking about 3, because
16 there is only Rule 10(2), is that right, or is
17 it 10(2) and (3)?

18 HON. SCOTT A. BRISTER: What
19 are you looking for?

20 CHAIRMAN SOULES: The top
21 sentence of Page 2 of Rule 9 says "Provide the
22 information pertaining to expert witnesses set
23 forth in Rule 10(2) and (3)."

24 PROFESSOR ALBRIGHT: So now
25 it's just 10(2).

1 CHAIRMAN SOULES: So wouldn't
2 that just be 10(2) only?

3 PROFESSOR ALBRIGHT: Correct.

4 HON. SCOTT A. BRISTER: Yes,
5 that's correct.

6 CHAIRMAN SOULES: Okay. And
7 then down to No. 3 under "Response" on that
8 same page, let me suggest that we delete --
9 let's see, one, two, three, four, five -- in
10 the fifth line under "Response" the words
11 "unless the time to serve a request is
12 extended in the Request or by agreement or
13 court order." That would be in redundant.
14 That's mainly so that we can keep the first
15 sentence less complex.

16 And then change the first sentence to
17 start with the words "A party served with" in
18 the first line. "A party served with a
19 Standard Request for Disclosure shall file and
20 serve a written response making the requested
21 disclosures within 30 days after the service
22 of the request, 50 days if the request
23 accompanies a citation, except that responses
24 pertaining to expert witnesses shall be made
25 in accordance with Rule 10."

1 PROFESSOR ALBRIGHT: I don't
2 think that's needed any more.

3 MR. SUSMAN: I'm going to
4 suggest that -- I think it's -- let me put a
5 motion before the house.

6 CHAIRMAN SOULES: Because I
7 don't understand how these rules are working
8 timewise.

9 MR. SUSMAN: Let me make a
10 motion, because they're not --

11 CHAIRMAN SOULES: Okay.

12 MR. SUSMAN: I move using
13 Scott's draft on Rule 10, 10(3), "Response,"
14 be worded as follows: A party served with a
15 Standard Request pertaining to expert
16 witnesses shall make its response -- now,
17 eliminate the language there to the end of the
18 line, the next three lines, and say, shall
19 make its response the earlier of 75 days
20 before the end of any applicable Discovery
21 Period or 75 days before trial, et cetera,
22 until the end of the paragraph, so that there
23 is a time certain to respond to a Request for
24 Standard Disclosure on expert witnesses that
25 is the 75/45-day time period.

1 And let me tell you why I favor that
2 approach. I think that we are requiring a lot
3 of information now in the response to a
4 standard request about experts, and that's
5 fine. We are also requiring that that
6 standard request be answered within 30 days.
7 I think it's putting an undue -- I think it's
8 moving the expert process up too close to the
9 front end.

10 I may have an expert at the beginning of
11 the case. You serve a standard request on
12 me. Within 30 days I've got to respond. I've
13 got to give you two days that that expert is
14 available for his deposition within the next
15 45 days. That's what the rule says. Okay?
16 And within two days that he's available I've
17 got to give you all of the work that he's
18 already done. I think we ought to -- I mean,
19 I really urge us -- I think Scott's approach
20 is fine. I'm in favor of eliminating a dual
21 system of responding, but I think it ought to
22 be moved to a time certain toward the end of
23 the discovery period, not -- so it will
24 operate just like expert cutoff dates or
25 disclosure dates in pretrial orders, rather

1 than saying it begins the first day that a
2 standard response is done. If you do that,
3 then that simplifies it, and I have no problem
4 with Scott's version whatsoever.

5 I mean, I do not think we ought to be
6 asking lawyers, Scott, to do things and then
7 say, "But you don't really have to do it; it's
8 not serious if you don't do it." I mean,
9 that's not right. Okay? And I think when we
10 say reasonably promptly do something, you
11 ought to reasonably promptly do it. But I
12 don't think we ought to allow a Standard
13 Request for Disclosure, which can be served at
14 any time and is normally responded to in
15 30 days, be served at the beginning of the
16 discovery period, which requires the lawyers
17 to do everything that's in (a) through (f),
18 including you have to state the substance of
19 the expert's impression. I just think it's
20 premature and will create all kinds of
21 make-work. There will be all kinds of
22 amendments and supplements throughout the
23 discovery period. And you just shouldn't be
24 focused -- I mean, we all know that experts
25 come late.

1 CHAIRMAN SOULES: Okay. What
2 I'm proposing is that the part of the request
3 for disclosure, the Standard Request for
4 Disclosure that pertains to experts be
5 governed by the same rule as an interrogatory
6 seeking the same information, that is, be
7 governed by Rule 10 entirely. That's what I
8 have dictated. In other words, the standard
9 request for discovery can operate the same
10 way.

11 MR. SUSMAN: I'm not sure I'm
12 following what you're saying. I made the
13 proposal that we change the language of
14 Rule 10(3) for the response time on the
15 standard disclosures on experts.

16 PROFESSOR ALBRIGHT: Well,
17 let's deal with Rule 10 and then go back
18 and --

19 MR. SUSMAN: Yeah, we need to
20 deal with Rule 10.

21 PROFESSOR ALBRIGHT: Because
22 once we get Rule 10 resolved, then we can go
23 back to Rule 9 and check whatever we decided
24 to do with Rule 10.

25 MR. SUSMAN: I move that.

1 PROFESSOR ALBRIGHT: I second
2 it.

3 CHAIRMAN SOULES: Okay.

4 HON. SCOTT A. BRISTER: So the
5 idea is -- actually it's not that big a
6 change. All it is is instead of 30 days
7 before trial you get in trouble if you don't
8 name your experts, it now goes to 75 if it's
9 your expert, 45 if it's the responding expert,
10 and if you want more than that you need to go
11 to the court and get something earlier than
12 that?

13 MR. SUSMAN: Right. But keep
14 in mind it's 75/45 not before trial but before
15 the end of the discovery period, which may be
16 months before trial. It's only in rare cases
17 that the discovery period will come right up
18 to the trial setting, because the discovery
19 period goes nine months from the opening.

20 HON. SCOTT A. BRISTER: That's
21 fine.

22 MR. SUSMAN: And it's just
23 saying, you know, if you've got nine months to
24 conduct discovery in, the last few months you
25 ought to be messing around during the last

1 75 days with expert discovery.

2 CHAIRMAN SOULES: So we're not
3 going to be able to discover anything about
4 experts until the 75/45-day time period.

5 HON. SCOTT A. BRISTER: No. It
6 doesn't prohibit you.

7 CHAIRMAN SOULES: Well, you've
8 got to go to the judge to get it.

9 MR. SUSMAN: Yeah, you've got
10 to go to the judge to get it.

11 HON. SCOTT A. BRISTER: Or by
12 agreement.

13 MR. SUSMAN: Or by agreement.

14 MR. MEADOWS: But keep in mind,
15 I mean, that's basically six months into the
16 case.

17 MR. SUSMAN: I mean, it's
18 really quick.

19 HON. SCOTT A. BRISTER: It's a
20 default provision, though. The fact is, the
21 way it works in real life, we all know, is you
22 send out the interrogatory, the lawyers that
23 are ready and know who they are send back the
24 response. There are some people that then
25 wait to try to get to the 31st day, but that's

1 a risky thing to do because sometimes you
2 forget. So I think you send it out, and if
3 people know, they will go ahead and respond
4 like they do now.

5 But if you need more time -- because I
6 was real troubled with the 75/45 on the
7 complex case, but you have to keep reminding
8 yourself you can always go to the judge on the
9 complex case and say move it back.

10 CHAIRMAN SOULES: Well, this is
11 a major retreat from what this Committee voted
12 to tell the Subcommittee to do, because you
13 don't even get the expert's name until 75/45.
14 That's what it -- that's what's being proposed
15 now. David Keltner.

16 MR. KELTNER: Luke, I tend to
17 agree. And Steve and Alex, here is my point:
18 In many instances -- and Scott, what you said
19 is true, that in many instances a court sees
20 this in a default provision; that it is the
21 last time you designate an expert. But what I
22 don't think gets before the court but what is
23 going on with the lawyers is this: All of a
24 sudden, I see Susman asking very specific
25 questions of fact witnesses. I know he's got

1 an expert who is telling him how to develop
2 the case and what to do, which is exactly the
3 way it ought to be. Now, what I want to do to
4 be able to take that apart is know the basis
5 for all that. And if when the first time I
6 learn it is 75 days before the end of the
7 discovery period and all of the discovery is
8 done, what we've done is apparently our
9 preparation has crossed in the night, which is
10 part of the problem with the concept of the
11 time period. That is a huge problem. That's
12 why I think that this is a safeguard, that the
13 standard disclosure is a safeguard on the
14 system.

15 If I'm diligent and ask, I ought to be
16 able to get some of that information up front
17 and not have to wait until 75 days before the
18 end of the discovery period when the other
19 side has done all the discovery based on
20 something I wasn't told about.

21 MR. SUSMAN: David, you're --

22 CHAIRMAN SOULES: Carl
23 Hamilton.

24 MR. HAMILTON: I agree with
25 David. In cases where you have experts,

1 they're generally the most important witnesses
2 in the case. Why wait until the very end of
3 the discovery period to start talking to them
4 in oral deposition?

5 The other thing is that if the plaintiff
6 designates 75 days before the end of the
7 period and then gives two days during the
8 next, let's say, 30 days even, he can give the
9 witnesses on the 31st day, so before the
10 defendant ever gets to take the depositions
11 the defendant has to designate experts. So
12 the defendant either has to designate
13 unnecessary experts because he doesn't know
14 what the plaintiff's experts are going to say,
15 or he doesn't designate an expert that he
16 needs because he doesn't know what the
17 plaintiff's expert is going to say.

18 So there needs to be a plan whereby the
19 plaintiff's experts are designated, the
20 defendants get an opportunity to depose them
21 and then designate their experts. But this
22 plan here is a disadvantage to the defendants.

23 CHAIRMAN SOULES: This won't
24 work. The bar is going to run us out of the
25 state if we make a rule that you can't find

1 out who somebody's experts are until 75 days
2 before the close of the discovery or 45 days
3 before the close of discovery without the
4 court.

5 HON. SCOTT A. BRISTER: So you
6 want --

7 CHAIRMAN SOULES: We're
8 smokers. Look, this was set up this way in
9 the beginning by the Discovery Subcommittee
10 and we had a lot of discussion and we said at
11 least we ought to be able to get with
12 reasonable promptness, after the party knows
13 who they're going to be, the names and the
14 subject matter.

15 HON. SCOTT A. BRISTER: That's
16 what this is. Now, Steve wants to drop that
17 in his motion, but that's what this said.
18 That's what the Subcommittee did, and that's
19 what's in mind. The problem is, if you write
20 a rule saying "If you know, you have to tell
21 me in 30 days," what is the sanction? The bar
22 is going to go crazy if we tell them, "If you
23 don't answer the interrogatory the first time
24 it's sent within 30 days, your experts are all
25 struck."

1 To make somebody answer within 30 days,
2 what's the only sanction, "If you don't, you
3 can't call them"? That will make the bar go
4 crazy that we move it up not 30 days before
5 trial but 30 days after the case starts. They
6 will go crazy.

7 So now the only alternative is a
8 reasonable promptness, if you think reasonable
9 promptness actually makes people do something
10 more than a drop-dead date, which I'm not
11 convinced whether it really does or not.

12 MR. SUSMAN: I mean, see --

13 CHAIRMAN SOULES: Your rule,
14 the way you've got it written in paragraph 3,
15 would require everything, (a) through (f) --

16 HON. SCOTT A. BRISTER: Your
17 duty is to respond --

18 CHAIRMAN SOULES: -- with
19 reasonable promptness.

20 HON. SCOTT A. BRISTER: -- to
21 the impressions, et cetera, within 30 days
22 just like other standard requests. It
23 understands that many people, like they do on
24 the interrogatories right now that are
25 supposed to be answered in 30 days, will

1 answer and say "haven't decided yet" and will
2 supplement at a reasonably prompt time
3 thereafter, and but in no event later than 30,
4 75 or whatever days you want to do. That
5 operates exactly like it does right now.

6 MR. KELTNER: Well, in brief
7 response to that, Scott, I think it operates
8 only partially that way now. What happens is
9 people are so afraid of the Builder's
10 Equipment vs. Onion deal that they don't
11 operate that way.

12 My theory is, and I see where Steve is
13 going and he's got a good point, I'm not
14 saying it has no merit whatsoever, but what I
15 am saying is that there's got to be a check on
16 it. I'm not so sure that you have to give
17 everything up front.

18 If he's developing a case through an
19 expert, and this is long before I come to see
20 you, I want to know who it generally is. And
21 sometimes quite frankly the identity is going
22 to be enough for me to know. But I want to
23 have some idea in preparation of the case. I
24 may not want the report, I may not need all
25 the specific information, and Steve is right

1 about that, but I at least need some safeguard
2 that's got the sanction that if he knew and
3 didn't tell me -- I mean, if he has employed
4 this guy and he says, "On October 1st, 2001,
5 you're going to be in Scott Brister's
6 courtroom testifying, and I want you to help
7 me prepare all of this case for trial," and
8 the first time I get to know about it is
9 75 days before the end of discovery, whether I
10 am plaintiff or defendant makes no difference,
11 I am in a world of hurt, and we haven't
12 prepared the lawsuit that will be tried, and
13 that's what I worry about.

14 HON. SCOTT A. BRISTER: What
15 would you do now on that?

16 MR. KELTNER: What I would do
17 is just leave it up to the court. I would go
18 to the court. I would do it this way: I
19 would say -- and what the court is going to
20 tell me is, what did we say, 75/45, Dave, and,
21 man, I don't know what he's doing. I guess
22 we'll find out. And sure enough, I'm going to
23 find out after the discovery period is
24 finished, and then there's not anything you're
25 going to be predisposed to do to help me, nor

1 should there be at that point.

2 But my point is, at least in Rule 9 I get
3 some information up front that is helpful to
4 make me make a decision about whether to come
5 to you.

6 MR. SUSMAN: David.

7 MR. KELTNER: Yeah, Steve, I'm
8 sorry.

9 MR. SUSMAN: I mean, the
10 problem with what we are doing is like -- I
11 mean, this is the debate we were having at the
12 earlier meetings, okay, and we're going full
13 circle.

14 MR. KELTNER: You're right.

15 MR. SUSMAN: And we've had a
16 group of lawyers that diligently tried to do
17 what you all wanted done and it just got voted
18 down, I mean, by this last vote when we took
19 Scott's version. Okay?

20 We -- you're saying some things up
21 front. Those are exactly the same words that
22 we tried to accommodate in drafting the things
23 that we drafted, although it was awkward to do
24 it, where the bar knows that some things about
25 an expert, if you know them early, you've got

1 to give them early; and other things like the
2 dates that they're going to be available, all
3 their written product, their biography and
4 their current resume, there's a certain time
5 when you -- there's a certain rhythm when you
6 give those things and that's later, not
7 earlier. And that's how we tried to draft the
8 rule.

9 Now, you know, it turns out the majority
10 wants it all done at one time or maybe they
11 don't want it all done at one time or we can't
12 agree on the time. My only problem is --

13 MR. KELTNER: Steve, it's
14 slightly different. I like the safeguards
15 that Rule 9 gives currently, and we haven't
16 revisited that yet. So my theory is, I'm fine
17 to go ahead and let everything else go in
18 there as long as you let me have Rule 9 to
19 come and take care of just some basic fairness
20 issues.

21 MR. MEADOWS: But I don't read
22 Judge Brister's rule as changing what you're
23 saying. I mean, it says in the very first
24 sentence of his rule that there's a
25 designation under Rule 9. There's an early

1 right to request and receive information on
2 experts under his Rule 10.

3 MR. SUSMAN: Right.

4 HON. SCOTT A. BRISTER: And if
5 you know it and you're using it, there's an
6 argument you should have disclosed it already
7 because it's not reasonably prompt. That's in
8 what I've got, and I just took it from what
9 they have. It seems to me the only discussion
10 is, do you want reasonably prompt in or do you
11 want a drop-dead cutoff. You can't, again,
12 make somebody tell you the name, and there's
13 no ability to say, "Well, I wasn't decided
14 yet" or something like that or "I'll tell you
15 later," unless you follow it with a drop-dead
16 date. And if that's 30 days after the
17 request, that is not going to be acceptable.

18 MR. KELTNER: I don't have a
19 disagreement with what you're saying. But
20 what I read Steve as saying, though, is that
21 you can make it the 75 or the 45 and that's
22 it. That's what I'm --

23 HON. SCOTT A. BRISTER: The
24 proposal to drop out the reasonably promptness
25 would do that.

1 MR. KELTNER: And that's what
2 my comments are addressed to. I probably
3 didn't make that clear.

4 MR. SUSMAN: Well --

5 HON. SCOTT A. BRISTER: And I
6 don't think putting them all together changes
7 the concept of if you've got the name but he
8 hasn't done his studies yet, that makes the
9 reasonably prompt date different for the name
10 versus all the paperwork.

11 MR. SUSMAN: Scott, why don't
12 we tell lawyers when they are -- I mean, I
13 don't --

14 HON. SCOTT A. BRISTER: If you
15 tell them -- because if you tell them this
16 date and none other, then you have to cut the
17 expert after that date, and that's --

18 MR. SUSMAN: I mean, I think --

19 CHAIRMAN SOULES: We're back to
20 the same tension that we had once before. The
21 tension is I can't tell you everything I know
22 about my experts until I've got my discovery
23 done and that's going to be toward the end of
24 the discovery period, so you can't learn
25 anything about my experts until towards the

1 end of the discovery period. That was the
2 position that was taken here --

3 HON. SCOTT A. BRISTER: Is that
4 reasonable --

5 CHAIRMAN SOULES: -- and
6 debated at length.

7 And Carl Hamilton and others that I
8 remember said, "Wait a minute, we've got to at
9 least have a clue sometime before that what is
10 going on. At least let us know who your
11 expert is and the general subject matter of
12 his testimony."

13 MR. SUSMAN: And that's why
14 we --

15 CHAIRMAN SOULES: So we said
16 after literally hours of discussion about
17 this, "Okay. We'll fix that. We'll
18 accommodate those people who acknowledge that
19 it's silly to expect anybody to give full
20 disclosure about their experts early by
21 putting that towards the end of the discovery
22 period. But you can ask for this limited
23 amount of information early, and you can get
24 it early."

25 MR. SUSMAN: And that's why we

1 have a rule --

2 CHAIRMAN SOULES: And those are
3 the tensions that were there, and we split the
4 rule to take care of both of those issues.

5 MR. SUSMAN: And there's an (a)
6 through (f) --

7 CHAIRMAN SOULES: Now, what has
8 happened now is we've folded everything back
9 together, that that can't be learned until
10 later with that that somebody wants a clue
11 about early. And we can't reconcile them and
12 we never have been able to reconcile them
13 except by splitting them into two peices and
14 given them different time frames.

15 MR. SUSMAN: And that's why I
16 suggest that we go back to what the
17 Subcommittee was doing, which was treating (a)
18 and (b) of content, which is something, not
19 everything about experts, but (a) and (b),
20 which is on a different time frame than (c)
21 through (f). That has been our solution to
22 the problem. Now, that's why you had this
23 dual -- the Subcommittee has had this dual
24 thing. I mean, you're either going to have --

25 CHAIRMAN SOULES: And both

1 people, both sides are right. You can't give
2 a lot of information about experts in most
3 cases until late, but you can give some
4 information about those experts early, and we
5 want those two things done at a time that's
6 fair to everybody.

7 MR. SUSMAN: So I move we
8 reconsider the Subcommittee's draft of
9 Rule 10 --

10 HON. F. SCOTT McCOWN: Second.

11 MR. SUSMAN: -- in lieu of
12 Judge Brister's treating all those items on
13 the same timetable.

14 HON. F. SCOTT McCOWN: Second.

15 HON. SCOTT A. BRISTER: Let me
16 explain again. My view of it is, what you're
17 saying, then, is I know my expert, who they're
18 going to be, documents, I've got their resume,
19 I know when they can testify, but reasonably
20 promptly -- because the Committee is not
21 saying you have to do it within 30 days,
22 right? I mean, yours is reasonably promptly.
23 I tell you the name, and then not a minute
24 before 75 days I tell you everything else.

25 PROFESSOR ALBRIGHT: It doesn't

1 prevent you from --

2 CHAIRMAN SOULES: Unless the
3 court orders it or agreement.

4 PROFESSOR ALBRIGHT: But you
5 certainly don't have to.

6 HON. SCOTT A. BRISTER: No.
7 That's not even when it's due, according to
8 the Subcommittee one. Sure, you can always
9 volunteer stuff up. You can volunteer without
10 the request being sent, but that's not going
11 to happen.

12 Look at your 3(b). A party seeking
13 affirmative relief must respond to the
14 requests upon the later of 30 days or the
15 earlier of 75. In other words, you must
16 respond by 75 days before the end.

17 MR. KELTNER: But Scott, that's
18 as to the additional disclosure. If you look
19 at 2(b) under "Response" --

20 HON. SCOTT A. BRISTER: That's
21 what I'm talking about. I know everything but
22 I'm not going to tell you a minute before
23 75 days early. But the name, even if I know
24 the name, I have to tell you within 30 days or
25 later so long as it's reasonably prompt, I

1 mean, so --

2 CHAIRMAN SOULES: Where is the
3 duty to respond to written discovery, the
4 time, the time line. Where is it?

5 PROFESSOR ALBRIGHT: Under our
6 rules, there are two duties. Actually this is
7 much --

8 CHAIRMAN SOULES: Where is the
9 time?

10 PROFESSOR ALBRIGHT: This is
11 much easier to see if you will all look at the
12 one-page single-spaced version, because you'll
13 see them right next to each other.

14 If you look at that on Rule 10 you have
15 2(b), Rule 10(2)(b) is the response to the
16 request for designating experts. 10(3)(b) is
17 the response to requests for additional
18 disclosures.

19 The way we envision this working is I
20 make a -- if I'm a party in a lawsuit, I make
21 a standard request for disclosure soon after
22 the lawsuit starts, and I say, "Pursuant to
23 Rule 9 you're requested to make the following
24 disclosures within 30 days."

25 One of those is (h), provide the

1 information pertaining to expert witnesses set
2 forth in 10(2) and 10(3). You then go to
3 Rule 10(2) and 10(3) to see when you have to
4 respond to that particular Standard Request
5 for Disclosure.

6 The Standard Request for Disclosure for
7 designating experts, which is part 2 of
8 Rule 10, is identify each expert and state the
9 subject matter on which each identified expert
10 is expected to testify.

11 I have to respond -- the other party has
12 to respond to that 30 days after the request,
13 or reasonably promptly thereafter if they have
14 not decided who that expert is. The deadline,
15 the drop-dead deadline for reasonable
16 promptness is the 75/45 day deadline before
17 the end of the discovery period.

18 Then the rest of those standard
19 disclosures, 3(a)(1) through (4), I don't have
20 to respond to those until the later of 30 days
21 after service of the request, for instance, if
22 the request is served very, very late in the
23 discovery period, or the earlier of 75 days
24 before the end of the discovery period or
25 75 days before trial; and then for opposing

1 experts, 45 days before the end of the
2 discovery period or 45 days before trial.

3 So Scott is correct on these part 3
4 additional disclosures. You have no duty to
5 respond until your 75 day/45 day drop-dead
6 date.

7 CHAIRMAN SOULES: That's right.

8 PROFESSOR ALBRIGHT: And this
9 was the cut-the-baby compromise based on this
10 exact same discussion that we had at the last
11 meeting.

12 CHAIRMAN SOULES: The Committee
13 has drafted right on our votes.

14 HON. F. SCOTT McCOWN: So let's
15 stick with it and move on.

16 CHAIRMAN SOULES: Any other
17 discussion on that? The motion has been made
18 not to do Judge Brister's Rule 10(2) and (3)
19 and go back to the Committee version.

20 PROFESSOR ALBRIGHT: Second.

21 CHAIRMAN SOULES: Okay. The
22 motion is made and seconded. Those in favor
23 show by hands. 11. Those opposed. Five.

24 11 to five to go back to the Committee's
25 proposal.

1 Okay. Now that that is done, unless we
2 want to revisit it again, a couple of more
3 points here. Let me just go back to Rule 9
4 for a minute now, what I was talking about in
5 terms of the response to the Standard Request
6 for Disclosure. It's on the second page of
7 Rule 9.

8 And that first sentence I propose to
9 read, "A party served with a Standard Request
10 for Disclosure shall file and serve a written
11 response making the requested disclosures
12 within 30 days after service of the request,
13 50 days if the request accompanies citation,
14 except that responses pertaining to expert
15 witnesses shall be made in accordance with
16 Rule 10."

17 PROFESSOR ALBRIGHT: The
18 Subcommittee accepts that.

19 MR. SUSMAN: That's fine.

20 CHAIRMAN SOULES: And we will
21 put 10(2) and 10(3) back in (h). We had taken
22 out (3) and now it needs to go back in.

23 PROFESSOR ALBRIGHT: But we're
24 still taking out the last sentence of (5)?

25 CHAIRMAN SOULES: We're taking

1 out what now?

2 PROFESSOR ALBRIGHT: The last
3 sentence of (5).

4 CHAIRMAN SOULES: That's in
5 Rule 10, right. We're taking out the last
6 sentence of (5).

7 Now, we've got Rusty's point, because
8 Rule 10, paragraph 1, still has this last
9 sentence, "If the expert has personal
10 knowledge of the relevant facts" and so forth,
11 which makes the discovery of facts -- may make
12 discovery of facts from a designated expert
13 who knows -- who is also a person with
14 knowledge of relevant facts just like any
15 other person with knowledge of relevant facts
16 appear to be more limited. What would happen
17 if we just -- would it fix it just to delete
18 the word "personal"?

19 MR. KELTNER: Done.

20 MR. McMANS: Yeah. I think
21 that's the minimum that needs to be done.

22 CHAIRMAN SOULES: Okay. That's
23 the minimum. Any opposition to that? Steve
24 Susman.

25 MR. SUSMAN: You know, the

1 problem is every expert has knowledge of
2 relevant facts, right? There's not an expert
3 that doesn't have knowledge of relevant facts,
4 right?

5 MR. KELTNER: Right.

6 CHAIRMAN SOULES: My police
7 officer testifies he saw the accident, or he
8 got there and heard information.

9 MR. SUSMAN: But my economist
10 knows the business was making a million
11 dollars pretax for the last six years and he
12 knows that -- I mean, all experts know
13 relevant facts.

14 HON. F. SCOTT McCOWN: Well,
15 you can't -- you can't --

16 MR. SUSMAN: And what we don't
17 want to do is -- what we didn't want here is
18 to allow people to depose retained experts,
19 who have knowledge of relevant facts for sure,
20 outside the Discovery Rules, to get to them
21 outside of the Discovery Rules. I mean, that
22 was our problem. I don't understand.

23 HON. F. SCOTT McCOWN: Well,
24 what Steve is saying is that if you delete the
25 word "personal" and it just reads "if the

1 expert has knowledge of relevant facts," the
2 problem that creates is you talk to an expert,
3 you tell him about your case, he now has
4 secondhand knowledge. And if you left out the
5 word "personal," you could then use the other
6 rules, the non-expert rules to start deposing
7 the expert, finding out about the expert,
8 before the expert rules allow you to.

9 The problem that Rusty originally raised
10 was the in-house expert who actually has
11 firsthand knowledge of facts. And we agree
12 that that person in their capacity as a fact
13 witness, they kind of have two hats. You need
14 to be able to get at them. And so that's why
15 it says if the expert has personal knowledge
16 of relevant facts, you get at them. And so
17 that's where we drew the line.

18 CHAIRMAN SOULES: David
19 Keltner, and then we will get to Rusty.

20 MR. KELTNER: Well, since they
21 were directing comments at what Rusty said,
22 maybe I'll wait.

23 CHAIRMAN SOULES: Okay. Rusty.

24 MR. McMANS: Well, the problem
25 again is that when we said it in the first

1 place, it says that you can only get experts
2 and the scope under 9 -- I mean, under 10. I
3 mean, you can't get them anywhere else. And
4 then 10 sends it back if they have personal
5 knowledge. But remember, the first one
6 defines what knowledge of relevant facts is
7 and specifically puts in what the case law is
8 on what that means, and that means that it can
9 lead to discoverable information as well.

10 Now, I understand that they're trying to
11 protect obviously the discussions with the
12 lawyers, which I thought frankly was protected
13 under the work product stuff, it seems to me,
14 where there's a consultation thing in there as
15 well, but so I'm not sure that is much of a
16 concern.

17 My problem is that you are limiting the
18 scope of these people who have been there.
19 They may have been involved in the design of
20 the transmission for 20 years. A lot of the
21 information they may have may not be personal
22 knowledge. It may be secondary knowledge. It
23 may be hearsay. It may be something somebody
24 told them. That's discoverable information as
25 to anybody else, except, because you poke him

1 as an expert, he ain't. That is not right in
2 my judgment under the current case law and
3 shouldn't be under our rules.

4 CHAIRMAN SOULES: David
5 Keltner.

6 MR. KELTNER: I think there's a
7 way to cure it. What we're really talking
8 about is information that was -- at least what
9 Steve is concerned with is information that is
10 passed on in the litigation to the expert in
11 order for the expert to be able to consult or
12 testify. Obviously we don't want them to get
13 into that kind of situation.

14 What the expert can testify to is to
15 matters that he or she learned or became aware
16 of outside the litigation process, and I think
17 that's the dichotomy or test we ought to focus
18 on.

19 You can accomplish that, I think, Luke,
20 in two ways. We could either drop this
21 provision completely, and I think case law
22 takes care of the issue, but for Rusty's very
23 accurate assessment that in scope we have a
24 general statement that is a problem, or we use
25 the "outside of the litigation" or "in

1 anticipation of litigation," which we do have
2 case law to help on as well. Quite frankly, I
3 think we probably ought to do the second or
4 eliminate or change, go back and change the
5 scope deal slightly.

6 HON. F. SCOTT McCOWN: Well, I
7 don't think you can use a time test. I don't
8 think you can say "has knowledge of relevant
9 facts acquired before the litigation," because
10 what we're really talking about are underlying
11 transactional facts. But every expert is
12 going to have had lots of knowledge about
13 relevant facts. Your economist is going to
14 know a lot of facts that he knew before the
15 litigation.

16 MR. KELTNER: Yeah.

17 HON. F. SCOTT McCOWN: So I
18 kind of like your idea of just taking it out
19 altogether and just letting the --

20 MR. KELTNER: Scott, if we do
21 take it out, I do think we have to go back and
22 change the initial scope point to meet Rusty's
23 concern, because in looking at it over the
24 lunch break it is awful broad. And we don't
25 mean to create anything new there and I think

1 inadvertently we're doing it.

2 And quite frankly we can go back to the
3 scope provisions that Scott Brister suggested
4 in using the first paragraph of -- or
5 explaining what an expert witness is and what
6 a consulting expert is. That's what the scope
7 provisions in the current rules do, I think.

8 HON. F. SCOTT McCOWN: What
9 rule is that? Where is that?

10 MR. McMains: Do you mean in
11 your rules?

12 CHAIRMAN SOULES: In the
13 Subcommittee's rules. I think it's Rule 3.

14 MR. Keltner: Yeah. Let me
15 suggest this to move this along: Why don't
16 you let Rusty, Scott, Alex and I take a look
17 at that on the scope deal and see if we can
18 take care of that, and let's pass on to the
19 next item. It might just add some verbage,
20 but it's not going to hurt anything. And it
21 was Scott's suggestion in the first place, and
22 I think he's right.

23 HON. SARAH DUNCAN: David, are
24 you going to include --

25 CHAIRMAN SOULES: One at a

1 time, please.

2 Okay. David, you've got the floor.

3 MR. KELTNER: Sarah was asking
4 where that was in the scope.

5 HON. SARAH DUNCAN: No. I was
6 asking are you going to include -- the way it
7 seems to me right now, although I'm sort of
8 unclear on the organization of all this, is
9 that we don't even discuss this problem with
10 respect to consulting experts, and that's
11 because they are subsumed under the privileges
12 rule rather than either the scope rule or the
13 experts rule, and it's the same problem.

14 MR. KELTNER: That is correct.
15 But I think that the definitional provision in
16 scope would take care of that, and we can do
17 that and I think report back to you tomorrow
18 and get on. This will be an easy thing to
19 do. It will just add some -- we're going to
20 have one duplication, but the duplication is
21 not going to be big.

22 HON. F. SCOTT McCOWN: But
23 before we do that, can I just ask one thing.
24 Wouldn't it solve the problem if you just took
25 out (e) from the scope and took out the last

1 sentence of 10(1) and just have a rule about
2 how you discover experts, a rule about how you
3 discover persons with knowledge of relevant
4 facts, and then let the parties make the
5 common sense application?

6 MR. McMAINS: Except what you
7 do then is you just throw it on the courts.
8 You just say, "Okay, guys. Use your own
9 imaginations."

10 HON. F. SCOTT McCOWN: But it's
11 going to be next to impossible --

12 MR. McMAINS: In every single
13 case, products case that I have ever seen or
14 been involved in with in-house experts, they
15 refuse to disclose them as consultants most of
16 the time, and it takes a long time before you
17 can get to those people, even though they may
18 have been involved in the design of the
19 product that is the subject of the issue.

20 MR. KELTNER: Well, again, I
21 think we can change this, and I'm sorry to
22 interrupt, Rusty, but we can change this
23 without changing any part of the law by doing
24 the definitional suggestion that Scott made,
25 and I bet we can do it in about five minutes,

1 and if not, we'll report back to you that we
2 can't.

3 CHAIRMAN SOULES: Anything else
4 on Rule 10?

5 HON. C. A. GUITTARD: May I
6 make a suggestion to this proposed
7 subcommittee on the last sentence of
8 subdivision 1 of Rule 10. "If an expert has
9 personal knowledge of relevant facts" and so
10 forth, why don't you just say, "If an expert
11 has personal knowledge of relevant facts or
12 other information not acquired by trial
13 preparation."

14 MR. McMAINS: Well, that still
15 doesn't change the fact that we treat experts
16 differently than we treat the ordinary folks.

17 HON. C. A. GUITTARD: That's
18 right.

19 MR. McMAINS: We have a
20 different standard of whether they are
21 witnesses. Not that the same person may have
22 two hats; it's that one hat is smaller than
23 the other. Once he's an expert, he's got a
24 smaller hat; you can't get into his head on
25 things other than that which he has personal

1 knowledge of, and that's a cop out. It's the
2 "I don't remember" stuff that you get out of
3 that.

4 MR. LATTING: But doesn't Judge
5 Guittard's comment take care of that, though?
6 It seems to me it does.

7 MR. McMAINS: No, because that
8 deals with the personal issue.

9 CHAIRMAN SOULES: Okay. I'm
10 going to accept David's suggestion on this,
11 and David and Rusty and Judge McCown and
12 anyone else who wants to participate, Judge
13 Guittard, take this up somewhere and get back
14 to us.

15 Okay. Anything else now on Rule 10?

16 MR. McMAINS: Yes. I have one
17 question that is really a clarification.

18 CHAIRMAN SOULES: Rusty.

19 MR. McMAINS: It's regarding
20 these drop-dead dates that everybody seems to
21 think are pretty clear. It says "A party
22 seeking affirmative relief" in terms of
23 identifying when they have to do certain
24 things. It seems to me that in most business
25 litigation cases I've been involved in of any

1 size, everybody is seeking affirmative
2 relief. Now, there are claims, counterclaims,
3 different causes of action, some permissibly
4 joined, some otherwise.

5 The assumption, unfortunately, of this
6 rule is like you just have a plaintiff and you
7 have a defendant and that's kind of all there
8 is. You may have plaintiffs, defendants,
9 third-party plaintiffs and so on, and in your
10 different capacities, as I read this rule, you
11 might have to assume that you're going to have
12 to do your experts 75 days at least with
13 regard to certain issues in the case, but you
14 could wait 45 days on others. Now, is that --
15 am I wrong on that or is that --

16 MR. SUSMAN: That is absolutely
17 correct.

18 MR. McMANS: You just kind
19 of -- you figure it out, right? 75 days and
20 you're safe; 45 days and you may be sorry.

21 MR. SUSMAN: Well, the only
22 thing, Rusty, we need to do -- I mean, the
23 only thing we knew to do is call them
24 plaintiffs or defendants. And that's one --
25 that's the way we set out to do it because

1 it's simple and it's more like a pretrial
2 order. Plaintiff shall designate at such a
3 date; defendant shall designate on another
4 date. Then we talked about other
5 formulations, like the party who has the
6 burden on most of the case or the whole case.

7 MR. McMAINS: Yes.

8 MR. SUSMAN: And that didn't
9 seem to work because that was a judgment
10 call. And so the one way we got it down was
11 to basically say if the experts testify about
12 an issue on which you have the burden, then
13 you've got to designate that expert -- you
14 lead with his designation because the other
15 guy is responding. Now, to be sure, it may be
16 that both sides of that lawsuit designate
17 their experts on the same day.

18 CHAIRMAN SOULES: Strike "on
19 which you have the burden" and you're probably
20 all right. You can have the burden of proof
21 on an affirmative defense and you don't have
22 to designate in 75 days.

23 MR. McMAINS: That's right. It
24 doesn't -- it's not the burden; it's the
25 affirmative claim.

1 MR. KELTNER: Which we do in
2 federal court and it works out all the time.

3 CHAIRMAN SOULES: Carl
4 Hamilton.

5 MR. HAMILTON: Is the intent of
6 this that, number one, you cannot take the
7 oral deposition of an expert prior to the time
8 that that party has given the two dates; and
9 secondly, you have to take it on one of those
10 two dates?

11 MR. SUSMAN: I'm sorry, what
12 was the question?

13 CHAIRMAN SOULES: The first
14 question was can you take --

15 MR. SUSMAN: You can take them
16 anytime you want.

17 MR. MARKS: Oral depositions?

18 MR. SUSMAN: Yeah. You don't
19 have to --

20 MR. MARKS: Oral depositions of
21 an expert anytime you want?

22 MR. SUSMAN: After they've been
23 disclosed to you, yes.

24 MR. HAMILTON: After the first
25 30-day designation, you can take them anytime

1 you want to.

2 CHAIRMAN SOULES: Right. But
3 you're burning time.

4 MR. HAMILTON: But someplace
5 over here it says you can only obtain
6 discovery concerning experts pursuant to
7 Rule 10. And Rule 10 says you have to
8 identify two dates on which they will be
9 available.

10 MR. SUSMAN: We did not mean to
11 suggest that you could only depose -- that the
12 opposing party could only depose the experts
13 on those two dates. You could notice them up
14 for a different date. You could try to reach
15 an agreement on a different date. We just
16 thought it will make things move a lot quicker
17 if the inquiries of the experts are made and
18 at least two dates were given for them at the
19 time the disclosure is made. That's part of
20 your homework you've got to do, so at least
21 the other side, if he doesn't want to get into
22 an argument and have you claim you're not
23 available and go to court on a very tight time
24 frame, at least you will have two dates
25 certain where you can have that expert. It

1 was not meant to exclude you from trying to do
2 it on a different date.

3 MR. HAMILTON: I was wondering
4 if we shouldn't have something in there that
5 says it, that makes that clear, because it
6 looks like you designate the two dates and
7 those are the only two dates that you can
8 depose those experts.

9 MR. SUSMAN: We could certainly
10 put a comment to that effect. Do you all
11 think that it needs it?

12 HON. F. SCOTT McCOWN: Rather
13 than a comment, why don't we just say "two
14 suggested dates," and that let's you know that
15 they're just suggestions.

16 MR. HAMILTON: Rule 3(2)(e)
17 says, "A party may obtain discovery of the
18 identity of and information concerning expert
19 witnesses only pursuant to Rule 10."

20 MR. SUSMAN: I think that's
21 fine to put "suggested date" in.

22 CHAIRMAN SOULES: 3(2), what is
23 that, Carl?

24 MR. HAMILTON: 3(2)(e).

25 CHAIRMAN SOULES: And that's

1 what now?

2 MR. SUSMAN: Scott has
3 suggested that we put in the word "suggested
4 dates."

5 HON. F. SCOTT McCOWN: Does
6 that solve the problem, Carl, if we say
7 "suggested dates" to make it clear that
8 they're just suggestions?

9 MR. HAMILTON: Yeah, that might
10 help.

11 MR. SUSMAN: Alex, have you got
12 that?

13 PROFESSOR ALBRIGHT: Got it.

14 HON. SCOTT A. BRISTER: Can I
15 ask Steve, on 3(b), experts not retained or
16 employed or otherwise in the control, is the
17 plaintiff's doctor one of those or not one of
18 those?

19 PROFESSOR ALBRIGHT: This was
20 put in there specifically because Tommy Jacks
21 was concerned that there are some treating
22 physicians who have treated the patient but
23 the plaintiff has no control over them.
24 They're not their primary expert witness.

25 HON. SCOTT A. BRISTER: Yeah.

1 And as I said, so Tommy wants the defense
2 attorney to call them up and chat with them
3 about available dates and so forth? I can't
4 imagine Tommy Jacks wants that.

5 PROFESSOR ALBRIGHT: He said --

6 HON. SCOTT A. BRISTER: If he
7 said he did, well, that's fine.

8 PROFESSOR ALBRIGHT: Tommy
9 Jacks says that he has no control over that
10 person and he does not want to be responsible
11 for suggesting dates that that person may not
12 ultimately comply with later on.

13 HON. SCOTT A. BRISTER: That's
14 fine. The plaintiff attorneys in my court
15 never want the defense attorney talking to
16 those people under any circumstance. But if
17 that's what this means, that's fine. We'll
18 just have a rule across the board.

19 HON. F. SCOTT McCOWN: I think
20 what it really means is that the defense
21 attorney's legal assistant is going to be
22 talking to the doctor's receptionist about
23 deposition dates.

24 MR. SUSMAN: Anything else on
25 Rule 10? Can we vote? Can we approve

1 Rule 10?

2 CHAIRMAN SOULES: Other than by
3 implication under 3(a)(4), is there anyplace
4 that says you can take the deposition of an
5 expert?

6 MR. SUSMAN: Under (4)?

7 CHAIRMAN SOULES: (4).

8 MR. SUSMAN: On Page 3, Oral
9 depositions.

10 CHAIRMAN SOULES: Okay. Thank
11 you. Anything else on Rule 10? Subject to
12 the work that Keltner and his group are going
13 to do on paragraph 1, then let's take a vote.

14 Those in favor of Rule 10, show by
15 hands. 15. Those opposed. 15 to two it
16 carries.

17 Okay. Rule 11.

18 MR. SUSMAN: We are entering
19 into a real easy phase, Rule 11 and 12. This
20 is our afternoon lull. We have no comments on
21 these rules from anyone on these rules, but I
22 guess we ought to take them up one at a time.

23 Rule 11, no one has commented. The
24 Subcommittee moves the adoption of Rule 11.
25 Is there a second?

1 MR. KELTNER: Second.

2 CHAIRMAN SOULES: It's moved
3 and seconded. Those in favor show by hands.
4 16. Those opposed. No opposition. It's
5 unanimous.

6 MR. SUSMAN: Rule 12, same ball
7 of wax.

8 CHAIRMAN SOULES: The Committee
9 moves.

10 MR. SUSMAN: The Committee
11 moves. No comments.

12 CHAIRMAN SOULES: Any
13 discussion? Those in favor show by hands.
14 Any opposition? No opposition. It's
15 unanimous.

16 MR. SUSMAN: We are going to
17 make it, Justice Hecht.

18 Rule 13. That's unless Keltner with his
19 work product messes me up. It wouldn't be the
20 first time.

21 MR. KELTNER: I know, but I
22 enjoy it too much.

23 MR. SUSMAN: Rule 13, Request
24 for Admissions. Scott asked the question, why
25 was the phrase struck allowing the response to

1 be signed by the party or his attorney.
2 That's paragraph 3.

3 HON. SCOTT A. BRISTER: It's
4 actually paragraph 2.

5 MR. SUSMAN: Is it paragraph 2?

6 HON. SCOTT A. BRISTER: It's
7 the last sentence of your paragraph 2.

8 PROFESSOR ALBRIGHT: I think
9 it's because we decided it was redundant,
10 because all pleadings and responses have to be
11 signed by attorneys, so the only time you have
12 to set it out that something has to be signed
13 by an attorney is if it has to be signed under
14 oath or something. It's always signed by an
15 attorney. I think that's why we struck it
16 out.

17 HON. F. SCOTT McCOWN: The
18 interrogatories are the only thing that we
19 require be signed by a party. Everything else
20 including objections are just signed by an
21 attorney, so you don't have to say it every
22 time. It's just by exclusion.

23 HONORABLE SCOTT BRISTER:
24 Yeah. It's in (3), you're correct, "signed by
25 the party or his attorney."

1 PROFESSOR ALBRIGHT: So that
2 means there's a general rule that says
3 everything has to be signed by the party or
4 the party's attorney. Are you happy?

5 HON. SCOTT A. BRISTER: Oh,
6 yeah. As long as there's a rule saying it
7 somewhere.

8 MR. SUSMAN: That's all we have
9 on Rule 13.

10 HON. F. SCOTT McCOWN: I move
11 its adoption.

12 CHAIRMAN SOULES: Any
13 opposition to Rule 13? No opposition. It
14 carries. Rule 14.

15 MR. SUSMAN: The comments on
16 Rule 14 are from Scott.

17 HON. SCOTT A. BRISTER: The
18 first one was just to reinsert the definition
19 of who can attend the deposition.

20 MR. SUSMAN: I don't know why
21 we took it out.

22 HON. SCOTT A. BRISTER: It's
23 the only place it appears in any rules and it
24 seems to me it ought to stay in.

25 CHAIRMAN SOULES: Where is

1 that? Paragraph what?

2 HON. SCOTT A. BRISTER: It's
3 Part 2(b).

4 PROFESSOR ALBRIGHT: I think it
5 just got moved.

6 MR. SUSMAN: Did it move
7 somewhere?

8 HON. SCOTT A. BRISTER: I
9 didn't see it in here.

10 CHAIRMAN SOULES: Other
11 attendees. If any party intends -- it's on
12 the second page. "Other attendees."

13 PROFESSOR ALBRIGHT: That must
14 have been deleted by accident, because we have
15 not intended to do that.

16 HON. SCOTT A. BRISTER: Yeah.
17 I can't -- it's on my Tab 14 on the right-hand
18 side, 2(b). It says the parties and their
19 spouses and counsel and their employees can
20 show up.

21 MR. SUSMAN: It's in there.
22 It's in (b).

23 HON. SCOTT A. BRISTER: It
24 wasn't in the 2(b) I got.

25 PROFESSOR ALBRIGHT: It got

1 deleted by accident.

2 HON. SCOTT A. BRISTER: I move
3 we put it back in.

4 CHAIRMAN SOULES: Is it
5 red-lined out?

6 HON. SCOTT A. BRISTER: It's
7 just out. It didn't get red-lined out. It's
8 just out completely.

9 MR. SUSMAN: It just says
10 "other attendees."

11 HON. SCOTT A. BRISTER: It
12 doesn't say who they are.

13 CHAIRMAN SOULES: Okay. Oh, I
14 see, there's a sentence, the last sentence of
15 Rule 14, paragraph 1, starts with the word
16 "Notice." Okay. The last sentence of that
17 paragraph is shown stricken and we're going to
18 put it back in.

19 MR. SUSMAN: It will be
20 inserted on the following page after the words
21 "Other attendees."

22 PROFESSOR ALBRIGHT: Yeah. It
23 was supposed to be moved, but it somehow got
24 deleted.

25 HON. SCOTT A. BRISTER: On your

1 red-line version, "if any party intends to
2 have any other persons," something got dropped
3 out in there, because you haven't defined who
4 can attend.

5 MR. SUSMAN: What got dropped
6 out was that sentence.

7 PROFESSOR ALBRIGHT: And it was
8 intended to be included and it got deleted and
9 it should be in there.

10 HON. PAUL HEATH TILL: Say it
11 again, please.

12 MR. SUSMAN: All right. What
13 is now scratched through on our red-line copy
14 as the last sentence of paragraph 1, "The
15 notice shall," goes back in as the first
16 sentence on the following page of
17 subsection (b) after the words "other
18 attendees."

19 MR. PRINCE: No. The second
20 sentence.

21 CHAIRMAN SOULES: Let me give
22 it to you this way: At the end of -- okay.
23 Excuse me, please. At Rule 14, paragraph 2(b)
24 on Page 2, at the end of the first sentence
25 after the word "persons," we will insert from

1 Page 1 not all of the sentence, but part of
2 the sentence that says "other than the
3 witness, parties, spouses of parties, counsel
4 of parties and employees of counsel, and the
5 officer taking the deposition"

6 PROFESSOR ALBRIGHT: It's
7 written correctly in Scott Brister's
8 right-hand version of Rule 14(2)(b).

9 CHAIRMAN SOULES: That's right.
10 So we're going to use Judge Brister's
11 14(2)(b). Any opposition to that? It
12 carries. No opposition.

13 MR. HAMILTON: I have a
14 question.

15 CHAIRMAN SOULES: Carl
16 Hamilton.

17 MR. HAMILTON: There's an
18 argument over whether or not invoking the rule
19 applies to depositions. And I don't think
20 there's a whole lot of case law on that;
21 there's a Bar Journal article on it. And it
22 looks like it reaches two different results.

23 It seems like this rule ought to have
24 something in there that will speak to that
25 question as to whether or not the rule can be

1 invoked during depositions and that other
2 witnesses that are not parties are excluded.
3 By this statement here you kind of imply that
4 by designating that other parties can be
5 there, maybe that's intended to abrogate
6 anyone from invoking the rule.

7 CHAIRMAN SOULES: It was. And
8 this Committee debated that before that
9 language was put in the rule, and that was the
10 resolution as to whether the so-called rule
11 exclusion would apply.

12 MR. HAMILTON: Well, why don't
13 we say that in the rule. It doesn't really
14 say that.

15 CHAIRMAN SOULES: Well, I don't
16 know why it wasn't put in the rule, but that
17 was the outcome of the somewhat debate. It's
18 in the record of the past years, about this
19 same issue you have come up with, and that was
20 if somebody else was going to take somebody to
21 the deposition, they would give reasonable
22 notice that they would be at the deposition
23 and then they would take it to the court.

24 But the rule of exclusion doesn't apply.
25 This didn't use to be in the rule. It's been

1 in since about 1990. It's about a 1990
2 change, and I can send you the debate on that
3 if you like.

4 Okay. Anything else on Rule 14? Any
5 opposition to Rule 14?

6 HON. SCOTT A. BRISTER: I
7 had -- the first -- I had some changes to
8 2(d), the first of which is just a parallelism
9 change. If you all want to look at that and
10 accept it, otherwise I'll drop it. I'll take
11 it either way.

12 CHAIRMAN SOULES: 2(d).

13 HON. SCOTT A. BRISTER: It's
14 just to change the first phrase to say "the
15 party may in the notice request," since
16 everything you're talking about in that part
17 has to do with the notice, and it makes it
18 more parallel to say "a party may in the
19 notice request production" rather than "the
20 deponent may be compelled to produce."

21 PROFESSOR ALBRIGHT: I accept
22 that.

23 CHAIRMAN SOULES: All right.
24 That change will be made. The Committee
25 accepts that.

1 HON. SCOTT A. BRISTER: The
2 second -- the only other one really would
3 probably make more sense if it were taken up
4 in connection with Rule 24.

5 CHAIRMAN SOULES: Taken up with
6 Rule 24?

7 HON. SCOTT A. BRISTER: Yeah.

8 CHAIRMAN SOULES: And (3) also?

9 HON. SCOTT A BRISTER: Yeah,
10 same thing.

11 CHAIRMAN SOULES: Okay.
12 Anything else on Rule 14? Any opposition to
13 Rule 14 as now amended? There being no
14 opposition, that carries unanimously.

15 And we'll take 10 minutes. We'll take a
16 10-minute recess.

17 (At this time there was a
18 recess.)

19 CHAIRMAN SOULES: Rule 15, is
20 there any opposition to Rule 15? The motion
21 is made to drop the third and fourth sentences
22 of Rule 15, paragraph 3. The sentences deal
23 with conferences between deponents and their
24 attorneys.

25 HON. SCOTT A. BRISTER: I've

1 kind of taken a straw poll of folks showing up
2 in my court on Monday morning hearings, and
3 everybody recognizes that they hate that when
4 opposing counsel whispers to them, and they
5 want that rule to apply to opposing counsel.
6 But when you turn it around to apply to them,
7 they don't -- they always want the right to
8 confer with their own client, so my experience
9 is that everybody always wants this to apply
10 to the other guy but never to me.

11 HON. F. SCOTT McCOWN: Why
12 don't we just say opposing counsel may not
13 hold private conferences?

14 HON. SCOTT A. BRISTER: But the
15 real quandary is, I wonder how this will
16 work. Okay. Joe is sitting next to the
17 deponent, and I ask the question, and Joe
18 leans over and whispers, which is okay if
19 they're discussing whether or not to assert a
20 privilege, but not okay if they're discussing
21 anything else.

22 I go, "Stop. What are you all talking
23 about?"

24 And Joe naturally says, "What I'm talking
25 with my client about is an attorney-client

1 privileged matter and I'm not answering that
2 question."

3 CHAIRMAN SOULES: Okay. Steve
4 Susman.

5 MR. SUSMAN: I believe that the
6 rule as written has a wonderful effect. I
7 mean, we want to make the deposition room look
8 like the courtroom. Okay? I'm not allowed to
9 go up and whisper in my witness' ear when he
10 is on the witness stand. I've got to sit
11 there and grin and bear it as he gets
12 demolished and taken down, and it's the
13 truth. I mean, cross-examination really works
14 because it's a tool for discovering the
15 truth.

16 I mean, I would like to forbid
17 conferences altogether. That would be what I
18 would do. Alternatively, I might provide
19 that, well, if you're going to have
20 conferences, make sure that the videotape of
21 that conference is shown to the jury.

22 HON. SCOTT A. BRISTER: Sure.

23 MR. SUSMAN: But people didn't
24 want to do that to that extreme, you know, so
25 this is a compromise position.

1 HON. F. SCOTT McCOWN: And let
2 ask you this --

3 CHAIRMAN SOULES: Let Steve
4 finish.

5 MR. SUSMAN: But basically I
6 think that a court -- it's pretty easy to see,
7 I think, if the conference is designed to
8 remind the witness -- that's what's usually
9 done then. You usually lean over and tell
10 your witness, "And don't forget you also
11 talked to Joe and Blow."

12 And then the witness says, "Oh, yeah. I
13 also talked to Joe and Blow."

14 Okay. It's pretty easy to see that that
15 wasn't to invoke -- my conference with him was
16 not to invoke -- advise him whether it invoked
17 a privilege or not. And I think if a judge
18 saw that, he would let that part be played --
19 the sanction that the judge would have for
20 that kind of conference would be "You weren't
21 supposed to have it. I'm going to let the
22 jury see you whisper into his ear those other
23 two things."

24 And if it continued, I might stop the
25 deposition. But I mean, I think it's the way

1 to go. I mean, I sat through a deposition on
2 Monday. I haven't had to defend many
3 depositions recently, but I did one Monday
4 under these rules basically, and there was a
5 good lawyer deposing my client, and there were
6 some times when I wanted desperately to reach
7 over. There was a video camera going, and I
8 was afraid to do it because I was afraid
9 someone would hear what I've been saying on
10 these speaking tours and play it to the jury.
11 But I mean, you know, and Julius Glickman took
12 the deposition. He got some great stuff from
13 a lawyer. And I was dying to reach over and
14 tell the guy, "Did you forget everything I
15 told you yesterday?"

16 And yes, there is -- it is going to put a
17 huge premium on preparing witnesses, just like
18 there is a huge premium on getting them ready
19 to be cross-examined at trial, but I still
20 think it's the way we ought to go, and I do
21 not think we ought to change that portion of
22 the rule.

23 HON. SCOTT A. BRISTER: Let me
24 just say one other thing just briefly.

25 CHAIRMAN SOULES: Judge

1 Brister.

2 HON. SCOTT A. BRISTER: I mean,
3 our training and the thing that we are
4 excoriated for is the very technical, precise
5 use of words, and that is not anybody else's
6 training. And in a question and answer,
7 writing it down, that's to me the much more
8 dangerous game than an attorney warning his
9 client or reminding his client of something.
10 I mean, this can't be a rule that's aimed at
11 getting the attorney who tells the client to
12 lie. This is aimed at the attorney, stopping
13 the attorney from reminding or helping, and it
14 just seems to me to put an unfair advantage to
15 the side asking the questions whose training
16 is for a lifetime on very precisely phrasing
17 the questions for something that a layman
18 might not catch. I mean, that's all lawyers
19 do, and I'm concerned that this may shift the
20 burden the wrong way.

21 I like the idea of having the video
22 playing to the jury somebody that's coaching
23 too much, and if it's too much, then you can
24 stop the deposition and do something about
25 it. But just a flat prohibition of -- so when

1 the lawyer asks an unfair tricky question,
2 that you just have to let your client answer
3 it and devastate the case, even though you can
4 say, "Well, I didn't understand that question"
5 later, I think that's a bad idea.

6 CHAIRMAN SOULES: Okay. Judge
7 McCown and then Joe Latting.

8 HON. F. SCOTT McCOWN: I don't
9 think, Scott, that that's going to be a
10 problem. We may have a little bit different
11 deposition practice under this rule than we do
12 presently, and what we may have under this
13 rule is a little redirect or recross that we
14 wouldn't have had.

15 Under the present system you present your
16 witness for deposition, you're defending, you
17 may well not ask any questions. Under this
18 regime, you may well come back and ask a few
19 clarifying questions where you think your
20 witness misunderstood or was misled or got
21 tricked up. And I think that juries cut
22 witnesses a lot of slack and see through
23 that.

24 And so if the lawyer asks a technical
25 question and the witness slips up a little,

1 rather than correct it through a private
2 conference, where you may be doing more than
3 just what is legitimate, you come back when
4 it's your turn to ask a few questions and you
5 correct it, and the jury hears that
6 contemporaneous correction, not to mention
7 that you still have the safeguard that the
8 witness can change his answers and sign the
9 deposition. Now, I know he's subject to
10 impeachment. But again, juries are pretty
11 forgiving. They can hear the ring of truth
12 and they can hear the clank of falsehood
13 generally.

14 CHAIRMAN SOULES: Joe Latting.

15 MR. LATTING: I take a lot of
16 depositions and I've been to a lot of them,
17 and this is not a major problem in my life.
18 That's number one. So I think we're fixing
19 something that's not very much broken. That's
20 what I think.

21 Number two, I think that this is like a
22 rule forbidding undergraduates from kissing; I
23 think it's just kind of silly.

24 Number three, what this is going to do is
25 exactly contra to what your stated purpose was

1 earlier. It's going to make me spend a lot
2 more time before my clients go in and give
3 depositions, because I am now not -- if this
4 is the way that the law is going to be read
5 and enforced, then I'm going to have to think
6 about and consider all of the things that
7 might come up and rehearse my client much more
8 carefully than I would now because I can't
9 just correct things that get off course. And
10 so it's going to require much more preparation
11 time and it's going to be more expensive for
12 my clients. But if we think this is a real
13 good idea, well, okay.

14 MR. MARKS: Well, I have a
15 question.

16 CHAIRMAN SOULES: John Marks.

17 MR. MARKS: You know, when
18 you're taking a deposition and the lawyer is
19 sitting there virtually telling the client
20 everything to say, can't you get that in
21 anyway? I mean, doesn't that affect his
22 credibility? That can be got into evidence
23 right now.

24 MR. LATTING: And plus, what
25 are you going to do with that guy at trial?

1 If you have to sit there and tell him
2 everything, you can make hash out of him in
3 front of the jury anyway, so it's not going to
4 do any ultimate good. I don't -- it's not a
5 big deal to me. It just doesn't seem like
6 it's going to make much difference.

7 And really what are you going to do about
8 it? Because it says that if the lawyers and
9 witnesses do not comply, the court may allow
10 discussions conducted during the oral
11 deposition that reflect upon the veracity to
12 be introduced in evidence. And I take it that
13 that will mean that for an oral deposition
14 that you will be able to say "discussion
15 between lawyer and witness" and that the court
16 reporter's notes will show "Whereupon, a
17 discussion was held."

18 And then I have this question: Will the
19 court be able -- or will the jury be able to
20 hear that this rule was in effect, or will
21 they just know that there was a discussion
22 without more? That's what I -- Steve, what do
23 we do about that?

24 CHAIRMAN SOULES: Steve Susman.

25 MR. SUSMAN: Well, I mean, I

1 think it will be -- I think this provision is
2 good because I think it will be a good
3 prophylactic. There are some lawyers who do
4 abuse the privilege of talking to their
5 witness a lot, coaching them a lot. Not a
6 lot. I mean, it doesn't happen a lot.

7 We're talking about limiting lawyers to
8 taking depositions in a very short time frame
9 and in a short number of hours per deponent,
10 so I don't want my time eaten up by the other
11 guy talking to his lawyer and coaching him. I
12 know the court reporter is supposed to keep
13 track, but I would just warn the other side,
14 you know, that there's a rule that says you
15 can't do that.

16 If I had a video deposition and I thought
17 it was done in an inappropriate place, I would
18 ask the judge for permission to show that to
19 the jury on the ground that -- I mean, that's
20 why the rule is made. It affects the
21 credibility of this witness' answer, the fact
22 that half of the answer came after he talked
23 to his lawyer.

24 If it continued so much that I felt it
25 was eating into my time and interfering with

1 my business and my ability to really
2 cross-examine the witness thoroughly, I'd
3 adjourn the deposition and go to the court.

4 I think you have those remedies, and I
5 just think what we ought to tell the bar is
6 that you're going to get a very limited time
7 to depose witnesses and we're not going to
8 tolerate anything that interferes with your
9 right to go in there just like at trial and
10 cross-examine like at trial. Why shouldn't it
11 be just like court? I have never heard a good
12 reason for it not being just like court.

13 MR. LATTING: I've got another
14 question.

15 CHAIRMAN SOULES: John Marks.

16 MR. MARKS: My problem with
17 this is that I think the abuse is going to
18 come from the other direction; that if a
19 lawyer is there with his client and virtually
20 hamstrung, the abuse is going to be coming
21 from the questioner, not from the answerer and
22 his lawyer. And I think that's the problem
23 with this. And that's the biggest problem I
24 have now, is the abuse from the questioner,
25 and that's been more my experience than the

1 other way, and I think this just makes it a
2 lot easier for him to do that.

3 CHAIRMAN SOULES: Joe Latting.

4 MR. LATTING: Here is a
5 question I have, and it's not meant to be
6 rhetorical. I really don't know what we do
7 about this. It says, "Private conferences may
8 be held, however, during agreed recesses and
9 adjournments." A squabble comes up during a
10 deposition. I think somebody is beating on
11 this witness unfairly, and I lean over and
12 there's a row about this, and I say, "Well, I
13 want to have a recess here. We need a
14 recess."

15 And the other side says, "I don't
16 agree."

17 Now, am I in violation of this rule if I
18 say, "Well, we're taking one. We're going to
19 go walk down the hall."

20 It looks to me the way this is written
21 that I'm in violation of this rule if I talk
22 to my client without the agreement of the
23 other side. Now, that's what it says and
24 surely we don't mean that. I guess we don't.
25 I hope we don't.

1 MR. YELENOSKY: Well, if we
2 don't mean that, then what you're saying is
3 that you can just take a recess whenever you
4 want and talk to your client and there is no
5 prohibition on consulting with your client
6 except that you say, "I'm taking a recess."

7 MR. LATTING: That's what
8 happens now in my world and the sun keeps
9 coming up just fine.

10 CHAIRMAN SOULES: Steve
11 Susman.

12 MR. SUSMAN: If the lawyer on
13 the other side of the deposition table says,
14 "We're out of here. It's time for me to take
15 a recess," and I'm just hot in the middle of
16 asking a good line of questioning, I mean, I'd
17 be -- I would go crazy. It's not going to
18 happen in the courtroom. Why should it happen
19 in the deposition room?

20 What happens in depositions is that there
21 are agreed recesses. We go for an hour, an
22 hour and 20 minutes. There gets to be a
23 rhythm, and you stop, and everyone says, "Are
24 you ready? Are you through with that line of
25 questioning, Mr. Susman?"

1 "Yeah."

2 "Let's take a recess."

3 And then you can talk all you want.

4 MR. MARKS: Isn't that what
5 happens now, Steve, that generally you agree
6 on recesses?

7 MR. SUSMAN: Yes.

8 MR. MARKS: I mean, is it
9 really a problem, I guess, is what Joe is
10 asking.

11 MR. SUSMAN: The problem I have
12 is the lawyer who on the record,
13 particularly -- and it's a particular problem
14 if it's not videotaped, where you have a --
15 where you don't take a videographer to a
16 deposition, where the lawyer frequently with
17 impunity can lean over and tell his client,
18 "You just gave two reasons, Dummy. There's a
19 fourth reason. There are two other reasons.
20 Don't forget it."

21 And he says, "Oh, yeah."

22 And you know, you say, "Well, I want the
23 record to reflect that so and so just
24 conferred with his client."

25 Usually that's totally beyond the jury,

1 apart from the jury. The judge never even
2 let's you read it in at trial. I mean, it's
3 not a very effective remedy, because the
4 lawyer is doing the testifying under those
5 circumstances and telling the witness what to
6 say, and I think we ought to try to put a stop
7 to it.

8 CHAIRMAN SOULES: Okay.
9 Anything else on this? Okay. Judge Brister
10 has moved that we delete the third and fourth
11 sentences from paragraph 3, and I didn't get a
12 second.

13 MR. LATTING: I'll second it.

14 CHAIRMAN SOULES: Joe Latting
15 seconds it. Any other discussion on this?
16 Okay. Those in favor show by hands. Nine.
17 Those opposed. Nine. Nine in favor. I need
18 to take a count again. I'm not sure I got
19 that.

20 MR. YELENOSKY: I didn't
21 understand the vote and I was hoping to
22 understand it before you finished.

23 CHAIRMAN SOULES: Okay.

24 HON. SCOTT A. BRISTER: My
25 proposal was to drop the two sentences that

1 begin "Private conferences." That will still
2 allow you to --

3 CHAIRMAN SOULES: Okay. Look
4 at paragraph 3. There are two sentences
5 there. The second one is "Counsel are
6 expected to cooperate with and be courteous to
7 each other and to the deponents." Okay. Then
8 the next two sentences start with the words
9 "Private conferences." Drop that out until
10 you get to "recesses and adjournments."

11 And then the last sentence goes out, too,
12 doesn't it?

13 HON. SCOTT A. BRISTER: No. I
14 would leave that in.

15 CHAIRMAN SOULES: Okay. Just
16 those two sentences, "Private conferences
17 between deponents and their attorneys during
18 the actual taking of the deposition are
19 improper except for the purpose of determining
20 whether a privilege should be asserted.
21 Private conferences may be held, however,
22 during agreed recesses and adjournments."

23 The motion is to delete those from
24 Rule 15. Those in favor show by hands to
25 delete it. 10 to delete. Those opposed to

1 deleting it; in other words, those in favor of
2 leaving it in. 11. It fails by a vote of 10
3 to 11, so those sentences will be kept in the
4 rule, Rule 15.

5 Next Judge Brister suggests that we drop
6 the first sentence in Paragraph 4 on the next
7 page.

8 HON. SCOTT A. BRISTER: And
9 substitute the last sentence in its place.

10 CHAIRMAN SOULES: And
11 substitute the last sentence in its place. In
12 other words, move the last sentence up to
13 number one and delete what's now the first
14 sentence.

15 Judge Brister, is there a reason for
16 this?

17 HON. SCOTT A. BRISTER: Yes.
18 The reason for that is to -- to me, as I said,
19 it's draconian to say you can't say anything
20 other than the following six words, objection,
21 leading; objection, form; objection,
22 nonresponsive; that to start, and then try to
23 see if the problem, in the places where this
24 is a problem, can be cured by saying
25 objections or explanations that coach, et

1 cetera, can be grounds for termination.

2 In other words, urge people not to do it
3 first before you make a bright-line hard and
4 fast rule, no words may be uttered other than
5 the following six words, and see if that works
6 as an intermediate step.

7 CHAIRMAN SOULES: Is there a
8 second?

9 MR. MARKS: Second.

10 CHAIRMAN SOULES: John Marks
11 seconds it. Okay. Discussion. Steve Susman.

12 MR. SUSMAN: I want to remind
13 you again that this provision has been voted
14 on repeatedly by this group with a large
15 majority, you know, like 18 to three. I mean,
16 we have been through this a lot of times, and
17 I mean, it is a major departure from the way
18 we have gone to now allow more conversation in
19 deposition.

20 HON. SCOTT A. BRISTER: I'm
21 just -- and the only reason I bring them up is
22 I've given two or three talks on this now and
23 people would rather have limited deposition
24 hours than not be able to do this. This will
25 be the most controversial thing, when you tell

1 attorneys you may not say with your own client
2 sitting there in a deposition anything other
3 than the following six words. They will hit
4 the roof. But that may be good for them to
5 hit the roof. I don't know.

6 I just think there are more important
7 things in trying to cut cost and expense of
8 litigation rather than -- this is something
9 that bothers lawyers. This doesn't bother
10 clients. They would like to be told if it's a
11 tricky question. This just bothers lawyers.
12 I don't like having to take depositions
13 bickering with people. My understanding of
14 our duty from the Supreme Court was not to try
15 to make lawyers' lives less bickersome but to
16 save money for their clients, and that's the
17 only reason I raise it. It's going to be
18 vigorously contested by most lawyers.

19 CHAIRMAN SOULES: I think
20 there's some concern that these speaking
21 objections are going to eat up a lot of your
22 time that's now very precious.

23 MR. SUSMAN: And even the ones
24 that aren't -- you know, there are lawyers
25 particularly from other jurisdictions that

1 will get in there and every question you ask
2 they will say, "That question is too
3 complicated. You asked three questions in
4 one. Would you break it down. What do you
5 mean by form?"

6 MR. LATTING: Or "I don't
7 understand your question."

8 MR. SUSMAN: "I didn't
9 understand your question." I mean, you can
10 never be expected to finish that deposition in
11 three hours. That's unfair.

12 HON. SCOTT A. BRISTER: And my
13 proposal says exactly what yours does. If
14 they do that, you go to court and say there,
15 "This guy is being abusive. Make him stop
16 it." I'm not going to say that's okay. All
17 I'm saying is that it's one thing to say you
18 shouldn't do that; it's another thing to say
19 you may not say any words except the following
20 six, period. That's what this says.

21 MR. SUSMAN: But the problem
22 is, Scott, I mean, really the problem with it
23 is, if you can get all the judges' attention
24 and get them to read the deposition so that
25 they will say, "Yes, that is abusive." All we

1 have now is the deponent who was here for
2 three hours and he went back to New York City,
3 and I've got to persuade a judge that "I was
4 short-changed, Your Honor, because" -- and no
5 judge is going to sit there and read the
6 deposition to see how many times the guy, you
7 know, jacked me around with some "Well, I
8 didn't understand the question. That question
9 is very confusing. That's misleading. It
10 states something that there's no basis in the
11 record." I just think it's unnecessary.

12 And listen, I mean, on this rule
13 particularly, this rule is in effect in
14 numerous jurisdictions and I haven't heard
15 anyone say that life is miserable in those
16 jurisdictions and that there's any real
17 problem. I mean, this is not a rule that we
18 came up with on our own. It is a rule in
19 effect in many places.

20 CHAIRMAN SOULES: John Marks.

21 MR. MARKS: Well, I've been in
22 depositions where this rule is in effect, and
23 as I say, the questions can be very abusive.
24 And sometimes the lawyer has no ability to
25 protect his client, and then the other side

1 goes to the court and you get these draconian
2 sanctions against you because you tried to
3 protect your client. I understand exactly
4 what you're saying, Steve, but I think there
5 should be some protection from that.

6 And just to only be able to sit there and
7 say, "Object to form, object to form, object,"
8 that really doesn't help and really it's not
9 enough. So maybe a comment or something in
10 the rules that, you know, it is expected that
11 the objections will be this or something along
12 those lines to give the court some direction
13 on what they should be looking out for, that
14 might work. But to make a rule like this I
15 think would be a mistake.

16 CHAIRMAN SOULES: Steve
17 Yelenosky.

18 MR. YELENOSKY: Well, there is
19 one other thing you can do, and it comes in
20 (5), which is that if it's abusive, you can
21 instruct your client not to answer. And it
22 may not do that much now, but in this new
23 regime where it's understood that that's the
24 remedy you have when you're abused, I think
25 that that will be the threat upon the abusive

1 attorney.

2 MR. MARKS: Well, is asking the
3 question over four and five and six times
4 abusive?

5 MR. YELENOSKY: Well, you know,
6 like anything else, it may not be clearly
7 black and white. You may have to take some
8 chances.

9 MR. MARKS: Well, a lot of
10 times that's what happens. They ask a
11 question five, six or seven times the same
12 way. They keep asking the same question, and
13 all you can do is sit there and say, "Object
14 to form, object to form, object to form."

15 MR. SUSMAN: For three hours?
16 For three hours? They can ask the same
17 question for three hours as far as I'm
18 concerned if they want to use their time that
19 way.

20 CHAIRMAN SOULES: Carl
21 Hamilton.

22 MR. HAMILTON: I think at least
23 that lawyers ought to be able to articulate
24 what's wrong with the form. You know, it
25 could be a multifarious question, and the

1 witness ought to know whether he's answering
2 the first or the second or the third. It
3 could be a question that assumes facts not in
4 evidence and the witness probably doesn't
5 perceive that and an affirmative answer to
6 that is misleading. At least as to form we
7 ought to be able to explain without having to
8 have a request to do so of what is wrong with
9 the form of the question.

10 CHAIRMAN SOULES: Justice
11 Duncan.

12 HON. SARAH DUNCAN: We have a
13 later sentence that says, "Upon request, the
14 objecting party shall explain the grounds of
15 the objection clearly and concisely in a
16 non-argumentative and non-suggestive manner."
17 If someone wants to know what it is that's
18 wrong with the form, they can ask.

19 MR. HAMILTON: Does that mean
20 that the client can ask? If the client can
21 ask, then that's all right.

22 CHAIRMAN SOULES: John Marks.

23 MR. MARKS: But as I understand
24 the rule, I can't state the basis unless
25 somebody requests it. Is that what this

1 means?

2 MR. SUSMAN: That's what it
3 means. But why would you want to state the
4 basis unless it's to coach the client? Honest
5 to God, if I'm asking your client a question
6 and I'm willing to take the chance that the
7 form is okay -- okay? -- and I'm not even
8 curious as to what your form objection is
9 about because I'm convinced I've asked a good
10 question and I'm willing to risk having the
11 answer stricken at trial because it was not a
12 good question, and you preserve the objection
13 by saying "objection, form," the only possible
14 reason that I can think of that you would want
15 to tell me what's wrong with my question by
16 not having expressed any curiosity is you want
17 to tell the witness, alert the witness to the
18 fact that this is some kind of tricky
19 question, be careful, watch out.

20 And you know, John, my point is that when
21 this happens at trial -- you know, it doesn't
22 happen at trial because no good trial lawyer
23 is going to do it in front of the jury. You
24 pay too high a price.

25 And I also say I don't care what goes on

1 in the deposition if you all will agree that
2 the full videotape of everything that goes on
3 in the conference room is playable to the
4 jury. If you will agree to that, cut this
5 out. Okay? Fine. But we have eliminated
6 that a lot. We have cut that down a lot now,
7 the right to play the whole video to the
8 jury. But if you don't mind the jury seeing
9 everything you do in a deposition, I mean, the
10 other lawyer, I don't have any problem with
11 taking this out.

12 MR. MARKS: Well, I think that
13 certainly the jury ought to see things like
14 that that affect the veracity of the witness,
15 and I think that's covered, and I think that's
16 perfectly appropriate that that be done. But
17 this limits too much right here.

18 HON. F. SCOTT McCOWN: Luke.

19 CHAIRMAN SOULES: Scott
20 McCown.

21 HON. F. SCOTT McCOWN: From a
22 trial judge's point of view, and I think you
23 all know it's true, the trial judge is going
24 to be much more limiting on what they're going
25 to let the jury see. You may say it goes to

1 veracity, but it may look a lot like to the
2 trial judge like squabbles between the lawyers
3 or squabbles between the lawyer and the
4 witness. So don't look to that as a big
5 remedy, because from the trial judge's point
6 of view, it prejudices the jury against the
7 lawyers, it's time consuming, and it's a lot
8 of controversy for very little gain.

9 CHAIRMAN SOULES: Okay.

10 Anything else on this? Anything new?

11 Okay. The motion is made to drop the
12 first sentence and substitute the last
13 sentence in place thereof in paragraph 4.
14 Those in favor show by hands. 10. Those
15 opposed. 10. It fails on a vote of 10 to
16 10.

17 If anybody wants a recount I'll do it.

18 Okay. By the way, in terms of our
19 scheduling, we've persuaded them to keep the
20 garage open until 7:00, so we'll work until
21 6:30 as indicated in the letter. We've got a
22 sign-up list. Anybody who hasn't signed or
23 who may have come in late, please put your
24 name on the list showing your attendance
25 today.

1 That takes us to --

2 MR. SUSMAN: Let's do Rule 15.

3 CHAIRMAN SOULES: Okay. Those
4 in favor of Rule 15 show by hands. 12. Those
5 opposed. Six. It passes by a vote of 12 to
6 six.

7 CHAIRMAN SOULES: Rule 18.

8 MR. SUSMAN: 16.

9 CHAIRMAN SOULES: Rule 16?

10 HON. SCOTT A. BRISTER: It's
11 been renumbered.

12 CHAIRMAN SOULES: Rule 18,
13 Nonstenographic recordings.

14 HON. SCOTT A. BRISTER: No.

15 CHAIRMAN SOULES: No?

16 HON. SCOTT A BRISTER: Didn't
17 we switch these around, Alex?

18 PROFESSOR ALBRIGHT: That's why
19 the numbers are switched, but they're still in
20 the same order, so we can either go ahead and
21 take nonstenographic recording now or we can
22 do it later.

23 HON. SCOTT A. BRISTER: That's
24 fine.

25 CHAIRMAN SOULES: So what

1 number is it?

2 PROFESSOR ALBRIGHT: We
3 decided, Scott Brister and I decided that it
4 really belonged more in the place of No. 18,
5 but I wanted to keep everything together
6 because everybody has tabs with all these
7 rules.

8 CHAIRMAN SOULES: Well, let's
9 take it as we go. Nonstenographic recording.

10 HON. SCOTT A. BRISTER: Yes.
11 It's our Tab 18.

12 PROFESSOR ALBRIGHT: Well, it's
13 in several different places.

14 HON. SCOTT A. BRISTER: It's
15 under several different numbers.

16 CHAIRMAN SOULES: Okay. It's
17 going to be in the Brister comments under
18 Tab 18.

19 HON. SCOTT A. BRISTER: And my
20 comments are just primarily that since this is
21 the least used discovery device, I think I can
22 say categorically in Texas, it ought not be
23 the longest rule, and so I suggest dropping --
24 the only difference in (a) and (b) on
25 paragraph 4, besides dropping some unnecessary

1 verbage, is if you want to use the
2 nonstenographic -- now, this is a deposition
3 where no court reporter was present. And if
4 you want to use a transcript from it, the
5 Subcommittee draft said if it's trial or
6 summary judgment, you have to get the whole
7 thing typed up. If it's some other hearing,
8 you only have to get a part. And I just
9 suggest that if you want to use it anytime,
10 anywhere, you have to get the whole thing
11 typed up. And that was because of a
12 discussion we had on the Appellate Rules about
13 the problems that come up if there's no
14 transcript and a cheater wants to pull out two
15 sentences of it and type it up and submit it
16 as a partial transcript, it shifts the burden
17 and expense to the noncheater to have to get
18 the rest typed up and put it in context.

19 And besides, it's a rule that ain't used
20 much and it ought to be a short rule. It just
21 makes it shorter and easier this way to read.

22 CHAIRMAN SOULES: Okay. Can
23 you put that in the form of a motion?

24 HON. SCOTT A. BRISTER: I
25 propose that we substitute my Rule 18 on the

1 nonstenographic recording for the
2 Subcommittee's Rule 18.

3 MR. PRINCE: Second.

4 CHAIRMAN SOULES: It's been
5 moved and second by --

6 HON. F. SCOTT McCOWN: I think
7 the Subcommittee can probably accept that,
8 can't we, Alex?

9 PROFESSOR ALBRIGHT: Yeah.

10 HON. SCOTT A. BRISTER: It
11 makes no substantive changes.

12 MR. SUSMAN: What is the
13 substantive change? I'm trying to figure out
14 where the substantive change is.

15 MR. PEACOCK: If you're going
16 to use the nonstenographic transcript at all,
17 you've got to get the whole transcription.

18 PROFESSOR ALBRIGHT: Steve,
19 when we discussed this, you pointed out that
20 if you were using it, there might be a
21 situation where you might want to get only one
22 part of it transcribed. And this requires you
23 to get the whole thing transcribed instead of
24 just part of it.

25 CHAIRMAN SOULES: Okay. Moved

1 and seconded that we change Rule 18 to the
2 short form, which is on the right side of
3 Page 2 under Tab 18, for what's printed by the
4 Committee. Is there any discussion?

5 MR. SUSMAN: Well, let me ask
6 that question. Let me -- I mean, I don't feel
7 strongly about this, but I do ask the
8 question. I mean, if the goal is to cut down
9 the expense of discovery and there are -- and
10 we want to encourage and hopefully this will
11 encourage and have the effect of encouraging
12 some lawyers to take depositions by
13 nonstenographic means as a way of cutting down
14 the expense of discovery, because so many
15 times cases get settled or settle at mediation
16 or go away before any depositions at all are
17 utilized or needed, I mean, what's wrong with
18 a regime that would say you get the
19 depositions transcribed on an as needed
20 basis?

21 And I can see where you definitely will
22 need the transcription for trial, a full
23 transcription for trial and summary judgment,
24 because it would you unfair, I think, to pick
25 and choose. But I can think of a lot of other

1 purposes, motion purposes, for which you would
2 not need a whole transcript. And so why
3 require a whole transcript under those
4 circumstances? It just -- isn't that an
5 unnecessary expense?

6 HON. SCOTT A. BRISTER: Well,
7 the idea was to save money by doing it. But
8 when you take a part out of context you save
9 your money, but you make the other side pay to
10 get it all typed up. It's the same as if you
11 had a deposition with a court reporter and
12 told them, "Only type up my direct and make
13 the other side pay for their own cross." I
14 mean, you could go through with that on
15 everything, but it's just that that's not the
16 way it works in all the other deposition
17 circumstances. That's not the way it's going
18 to work on trial and summary judgment. Why
19 create a special little niche for nontrial,
20 nonsummary judgment, nonstenographic hearings
21 that nobody takes? Let's just forget about it
22 and keep the rule simple.

23 CHAIRMAN SOULES: Okay. I
24 think the line is pretty well drawn. Two
25 people have stated their positions. John

1 Marks.

2 MR. MARKS: Maybe this is just
3 part of the same problem, but let's say
4 somebody decides he wants to take a bunch of
5 witness depositions by nonstenographic means.
6 He wants to tape them. And I say, "Well, you
7 know, I'm not so sure I like that, so I'm
8 going to bring my own court reporter."

9 And so you bring your court reporter and
10 you have your court reporter do all of this.
11 And then down the line this fellow that took
12 the deposition says, "Well, you know, I think
13 I want to use those transcripts."

14 Well, you've gone to the expense of
15 getting it done because you want to have that
16 record, and now this guy wants to use them,
17 and yet he was the one that took the
18 depositions in the first place.

19 Shouldn't there be some provision in the
20 rule that requires him, if he wants to use
21 that deposition, to pay you for the cost of
22 using that court reporter and doing the
23 transcript by that means?

24 CHAIRMAN SOULES: Any other
25 discussion? Okay. Those in favor --

1 MR. MARKS: Well, I move that
2 we add a provision like that in this.

3 HON. SCOTT A. BRISTER: They
4 could recover it as costs in any event, right?

5 MR. MARKS: Well, I don't know.

6 HON. SCOTT A. BRISTER: Yeah,
7 it's a cost. I mean, it's a cost.

8 MR. LATTING: Say it again,
9 John. You want to add a provision that does
10 what?

11 MR. MARKS: Well, let's say you
12 notice a deposition that you're going to tape,
13 just use a tape recorder. I take a court
14 reporter and I have it transcribed properly
15 and I've got that deposition. And then the
16 other side says, "Well, I think I'll use
17 that," yet he hasn't paid for it.

18 HON. SCOTT A. BRISTER: I bet
19 they'll have to pay the court reporter before
20 they get a copy.

21 CHAIRMAN SOULES: Well, why
22 don't you just notice --

23 MR. MARKS: But not for the
24 taking of the deposition, which is a major
25 cost.

1 MR. JACKSON: Because they'll
2 just want to buy a copy.

3 MR. MARKS: That's right.

4 HON. SCOTT A. BRISTER: And
5 then you just assess them costs. I mean, the
6 court reporter's fee -- in other words,
7 there's no reason to put a shifting provision
8 in here if they're going to be reshifted after
9 the trial or settlement is over anyway.

10 MR. MARKS: Well, it seems to
11 me that if they want to use it, they should
12 pay for it then and then let costs deal with
13 it, is my thought on it.

14 HON. F. SCOTT McCOWN: But the
15 rules already allow you for good cause to add
16 certain costs to the loser, and so you could
17 already under the rules hit the losers for
18 this as they stand now. That would be good
19 cause.

20 MR. MARKS: But that rule
21 doesn't really address the problem, and that
22 is, I've gone to the expense of doing this and
23 he's taking advantage of it.

24 HON. F. SCOTT McCOWN: But you
25 get reimbursed.

1 MR. MARKS: Not necessarily.
2 You settle the case or a lot things happen to
3 the case before it gets to the point where you
4 get reimbursed. That's my problem with it.
5 And if they want to use it as though, you
6 know, it's their deposition and they want to
7 use your transcript, my motion is they have to
8 pay for the deposition costs.

9 MR. MEADOWS: John, as a
10 practical matter, how do they get the
11 transcript? If it's your court reporter,
12 surely that court reporter is not going to let
13 them have it without paying the fair costs.
14 And if you have it, it's within your
15 discretion not to let them use it unless they
16 pay for it; so therefore, they're stuck with
17 using a transcription of their recording.

18 MR. JACKSON: The way the rules
19 are now, the court reporter is obliged to give
20 anybody there access to that transcript.

21 HON. SCOTT A. BRISTER: But you
22 would charge them.

23 MR. MEADOWS: But they would
24 charge them. They would --

25 MR. JACKSON: We charge them

1 for a copy. We charge them a lot less rate.
2 It's like less than a fourth or like around a
3 fourth of the O-and-one cost to prepare the
4 original transcript for the attorney that
5 hired us. Our firm charges 4.15 a page to the
6 attorney that hires us, and a dollar and a
7 quarter for the other side if they want a copy
8 of what we've prepared.

9 So you will have lawyers noticing
10 depositions by tape knowing that John is going
11 to bring a court reporter, and they probably
12 won't even bother setting up their tape
13 because they know John is going to bring a
14 court reporter and they're going to get their
15 discovery done for a buck and a quarter a
16 page.

17 MR. YELENOSKY: Well, actually,
18 though, under the current rules, can't you
19 even get the deposition from the other side?
20 Can't you just tell the other side, "I want to
21 get your deposition," and copy it yourself?
22 That encourages it. So it's not a buck and a
23 quarter; it's cheaper.

24 HONORABLE SCOTT BRISTER: By
25 the way, this is not a new rule. This is

1 existing rule. And again, it ain't a problem
2 because nobody does it.

3 HON. F. SCOTT McCOWN: This has
4 never come up.

5 HON. SCOTT A. BRISTER: I've
6 had it once in six years. Somebody suggested
7 it, and the other lawyer was astounded that
8 such a thing could even be done. Even after
9 reading the rule he could not believe it, and
10 came in and did what you can do, like in
11 John's case, which is come into court and
12 object and say, "I don't want to do it, and
13 make him pay for it," and all this other stuff
14 which you can do under the rules no problem.

15 MR. MARKS: Well, why are we
16 even honoring it?

17 CHAIRMAN SOULES: At the
18 present time it says nothing -- the present
19 rule says a nonstenographic transcript doesn't
20 prevent the other party, it says, from getting
21 a stenographic one at his own expense. Let me
22 see what it says.

23 HON. DAVID PEEPLES: Can I ask
24 why this rule needs to be rewritten in the
25 first place?

1 CHAIRMAN SOULES: "Such order
2 shall not prevent any party from having a
3 stenographic transcription made at his own
4 expense." That's the current rule.

5 HON. DAVID PEEPLES: I'd like
6 to know why this existing rule in this book
7 needed to be tampered with in the first place.

8 PROFESSOR ALBRIGHT: I think
9 what happened was originally there was
10 discussion about making nonstenographic
11 recordings more available than under the
12 present rule and making them less expensive.
13 What happened was that this rule kind of got
14 put off, and then we also had two very
15 different views of nonstenographic recordings
16 on the Committee.

17 And I also wanted to bring this up,
18 because we haven't talked about this, but Paul
19 Gold is not here, but Paul Gold is one person
20 who definitely wants to have nonstenographic
21 recordings available very cheaply, and he does
22 not want to require a court reporter.

23 Under our rule, we have required a
24 transcript be made by a certified court
25 reporter. Well, that makes it as expensive or

1 more expensive than having a court reporter
2 there in the first place, so I can't imagine
3 people using this rule very often.

4 If we were going to require -- allow
5 nonstenographic recordings with people letting
6 their secretaries or a transcription service
7 transcribe it, then perhaps that would be less
8 expensive and then we would need all these
9 other safeguards that we have in the rule.
10 That's why we changed it.

11 Ultimately, the way the rule came out of
12 the Committee was we required a certified
13 court reporter to transcribe it, and so I
14 think a lot of this may be superfluous.

15 I think there's a philosophical decision
16 that this Committee needs to make. Are we
17 going to accept it like the Subcommittee
18 drafted it, requiring a court reporter and
19 making nonstenographic recordings, you know,
20 basically nonexistent, or are we going to
21 allow the other kind of nonstenographic
22 recordings with a court reporter -- I mean,
23 with someone other than a court reporter
24 transcribing those? And I think once you've
25 made that decision, then the rules that you

1 need are very different.

2 CHAIRMAN SOULES: Judge
3 Peeples, in the current Rule 202(1)(e), it
4 says, "The nonstenographic recording shall not
5 dispense with the requirement of a
6 stenographic transcription of the deposition,
7 unless the court so orders." And I guess
8 that's being interpreted to mean that a
9 stenographic transcription is to be done by a
10 certified court reporter.

11 HON. DAVID PEEPLES: Unless you
12 go to the court first?

13 CHAIRMAN SOULES: Unless you go
14 to the court first. And this proposed rule
15 eliminates the need for that.

16 HON. DAVID PEEPLES: It would
17 seem to me, then, that in big money cases
18 nobody, neither side is going to want an
19 important deposition to be taken this way.
20 And I'm just wondering if what John Marks is
21 worrying about is going to happen, where one
22 side is going think, "I'm going to notice it
23 nonstenographic, and they will probably,
24 because of the importance of it, pay for a
25 reporter." And we're going to get into that

1 kind of jockeying.

2 CHAIRMAN SOULES: Well, and
3 then the current rule says that nothing
4 prevents another party from having a
5 stenographic transcription of the deposition,
6 of having it taken stenographically as opposed
7 to -- or I guess concurrently with the
8 taping. So 202 as it is presently written
9 doesn't maybe save expense like Steve
10 Yelenosky and others have commented about
11 before.

12 But under the rule that's proposed by the
13 Subcommittee, it indicates, I believe, that a
14 portion of the tape can be transcribed and
15 used for whatever purpose. And Judge Brister
16 is saying that if any part of the transcript
17 is going to be -- any part of the deposition
18 is going to be taken, the entire transcript
19 has to be typed up by somebody and shared.

20 Steve Yelenosky.

21 MR. YELENOSKY: Yeah. I just
22 wanted to say that you're right, I mean, it
23 probably doesn't come up in big money cases.
24 But I was at Legal Services for 10 years, and
25 hopefully it will survive, but at this point

1 we don't know that Legal Services is going to
2 survive.

3 But if it does, the way in which
4 nonstenographic recordings were used, I think
5 one thing was, people would go into -- let's
6 say there was an eviction proposed or
7 something and they would go do a deposition of
8 the apartment manager without any real
9 expectation that it would go to trial or to
10 the Public Housing Authority. And if
11 something came up, they would later take the
12 tape and the secretary would transcribe it
13 without the expense of a court reporter. And
14 in some instances you would do a
15 nonstenographic recording intending to have it
16 later transcribed by a secretary.

17 What has developed over the years, with
18 the good graces of the court reporters in
19 Austin anyway, was a pro bono court reporting
20 service, and that has spread pretty far and
21 wide across the state, although I haven't been
22 with Legal Services for a year now, I think
23 it's still around, and maybe David could speak
24 to that, so that Legal Services do have access
25 to certified court reporters. If they don't,

1 then being able to get nonstenographic
2 recordings and transcribe them in house is an
3 important cost saving measure.

4 MR. HERRING: Well, in line
5 with that, I hate to analogize Legal Services
6 and big law firms, but we now have the divorce
7 clinics in Austin and in Dallas. In Austin at
8 least they advise you, because we've overused
9 the court reporters, the pro bono services, to
10 do it nonstenographic, and so it's done in
11 house or was being done in house at the big
12 firms.

13 MR. YELENOSKY: But even now,
14 even with the cutbacks at Legal Services, you
15 could normally do them nonstenographically.
16 The problem was you only had one secretary for
17 five lawyers or something like that and they
18 didn't have the time to do it, so I don't
19 know. I mean, in some instances it would be
20 helpful to still have it.

21 MR. MARKS: Well, my suggestion
22 does not impact that at all, because what
23 concerns me is that Paul Gold wants to have
24 it, because Paul Gold handles big cases. And
25 I don't know what he has in mind along those

1 lines, but my suggestion and my motion would
2 certainly prevent someone from taking
3 advantage of the rule to get some cheap
4 discovery.

5 CHAIRMAN SOULES: All right.
6 To get us focused, state your motion, John.

7 MR. MARKS: I move that --

8 MR. KELTNER: Are you saying
9 you don't want cheap discovery?

10 MR. MARKS: Well, no. I'm
11 saying that --

12 CHAIRMAN SOULES: What's your
13 motion, John? Please state your motion.

14 MR. MARKS: Okay. I move, and
15 I need to be sure I say this correctly, I move
16 that in the event that a nonstenographic
17 recording is made at a deposition by notice by
18 a party, that if the other party brings the
19 court reporter to the deposition and has the
20 deposition done by a stenographic reporter, if
21 the noticing party wants to use that
22 deposition that you paid for, then the
23 noticing party has to pay the entire cost for
24 the taking of the deposition up front, not as
25 a court cost thing, but has to pay the lawyer

1 for doing it, if he's going to use it.

2 CHAIRMAN SOULES: Okay. Is
3 there a second?

4 MR. HAMILTON: Second.

5 CHAIRMAN SOULES: Moved and
6 seconded. So the party taking the
7 nonstenographic deposition has to make a
8 decision whether to use your court reporter
9 transcript and pay for it or have somebody
10 else type it up and use his own version.

11 HON. SCOTT A. BRISTER: Another
12 way you might say that is you can bring a
13 stenographic reporter for your own use and it
14 ain't discoverable.

15 MR. YELENOSKY: Yeah.

16 CHAIRMAN SOULES: No, that's
17 not what he's saying.

18 HON. SCOTT A. BRISTER: It's
19 the same thing. In other words, I get a
20 stenographic record, I take it, I get it typed
21 up. Now, you've got a tape. If you want to
22 get it typed up, you go to a court reporter
23 and get it done that way.

24 CHAIRMAN SOULES: Well, of
25 course, the current -- the proposed rule

1 doesn't require that the tape be typed by a
2 stenographer.

3 HON. SCOTT A. BRISTER: No, but
4 the Subcommittee rule does.

5 MR. YELENOSKY: But one party
6 would come in with a transcript and the Legal
7 Services attorney sitting over there with a
8 tape recording wouldn't be able to look at it,
9 I guess, until trial, and it may be -- I mean,
10 how do you handle that?

11 HON. SCOTT A. BRISTER: The
12 deal, as I understood it, was the Subcommittee
13 requires a court reporter to type it up.

14 CHAIRMAN SOULES: Excuse me a
15 second. I'm trying to locate in the
16 Subcommittee's version where it is that --
17 let's see --

18 HON. SCOTT A. BRISTER: 4(a)
19 and (b) both; the first sentence of both 4(a)
20 and 4(b). And as I understood it from Alex,
21 the reason for that was to avoid bringing in
22 court reporters into this fight over the new
23 rules, because that's a big issue if you say
24 you cut out court reporters from discovery.
25 Correct, David?

1 MR. JACKSON: I'm sorry?

2 CHAIRMAN SOULES: It's been
3 moved and seconded. Any further discussion on
4 John's motion? Carl Hamilton.

5 MR. HAMILTON: I would like to
6 make an amendment to the motion that it
7 include that that transcribed deposition by
8 the court reporter is not discoverable by the
9 other side.

10 CHAIRMAN SOULES: The amendment
11 has been made. Is that acceptable to you,
12 John? Okay. Then we vote on the amendment
13 first. Those in favor of the amendment show
14 by hands. Any other discussion on the
15 amendment?

16 CHAIRMAN SOULES: Judge
17 Guittard.

18 HONORABLE C. A. GUITTARD:
19 Regardless of whether it's discoverable, can
20 the party that initiates the deposition
21 nonstenographically say at the trial, "I offer
22 the stenographic transcript that I haven't
23 seen, but I know that that court reporter is a
24 good fellow and he does it well, so I offer
25 his transcript"? Can you do that?

1 MR. LATTING: A nondiscoverable
2 deposition? This is a new concept.

3 CHAIRMAN SOULES: Any other
4 discussion on the amendment? Alex Albright.

5 PROFESSOR ALBRIGHT: After
6 hearing all this discussion, and I don't have
7 any experience with nonstenographic
8 depositions and I was hoping Judge Brister
9 would get involved because he uses
10 nonstenographic recordings in his court, but
11 it seems to me that what we're talking about
12 is a much more expensive and much more
13 burdensome procedure than just leaving it like
14 it is, because we have heard no one say that
15 it is a problem right now; that it just
16 manages to work out in the cases that it needs
17 to work out in and it's not a problem in other
18 cases; where it may be that we're creating
19 horrible problems in some cases.

20 So I would rather see that we leave the
21 rather vague rule that we have now than
22 creating this very cumbersome procedure with
23 these concepts of nondiscoverable deposition
24 transcripts.

25 CHAIRMAN SOULES: Okay.

1 Anything else on Carl's amendment? Steve
2 Yelenosky.

3 MR. YELENOSKY: Yeah. I mean,
4 if we're going to write the rule just so that
5 it allocates costs, let's not do it, or at
6 least put it somewhere in costs. I mean, now,
7 if you really think that Paul Gold is going to
8 do this and you want to go to the judge and
9 ask him to pay for it, fine. But let's not
10 write the rule for that specific circumstance.

11 CHAIRMAN SOULES: Okay. Those
12 in favor of Carl's amendment show by hands.
13 Two. Three -- no, two. Those opposed. 15.
14 It fails 15 to two.

15 HON. DAVID PEEPLES: Does Alex
16 speak for the Subcommittee? I mean, do you
17 want to withdraw this and leave this as is
18 (indicating)?

19 PROFESSOR ALBRIGHT: I don't
20 know if I speak for the Subcommittee or not.
21 I would make a motion to substitute the
22 current nonstenographic recording rule for our
23 nonstenographic rule.

24 MR. JACKSON: And I would
25 second that.

1 MR. MARKS: If you do that,
2 I'll withdraw my motion.

3 CHAIRMAN SOULES: Any other
4 discussion on this? Okay. Anyone opposed
5 to -- go ahead, Steve.

6 MR. SUSMAN: I mean, we began
7 with the notion of trying to save people
8 money, and I mean, I like the Subcommittee's.
9 Our approach was somewhat compromised. It
10 still has to be typed up by a certified court
11 reporter, but at least for certain hearings
12 you don't have to get the whole thing typed
13 up. It seems to me sensible that for a motion
14 to transfer venue, why do I need to get the
15 whole guy's deposition, especially if I just
16 want to quote one thing? I give them 20 days'
17 notice.

18 That was the intent, that maybe there are
19 lawyers who will use this and save money by
20 using it by not having the entire deposition
21 transcribed. It seems to me quite different
22 when you're talking about these kinds of
23 motions where you give ample notice and they
24 aren't knock-out motions. They aren't like
25 appeals or summary judgments or trials. And

1 the notion was to save money.

2 Now, Scott's doesn't do that, but at
3 least Scott gives you the alternative of
4 taking all your depositions by nonstenographic
5 means and getting them transcribed later. You
6 don't have to do it at the same time. You
7 take it by nonstenographic means, and if you
8 want to get it transcribed, if you want to use
9 it for any purposes, you're going to have to
10 get it transcribed by a court reporter. That
11 won't save us as much money as the
12 Subcommittee's formulation, but I think it is
13 an improvement over the current rule.

14 As I understand the current rule, you
15 have to have both a court reporter and a
16 videographer in the deposition room, I assume.

17 HON. SCOTT A. BRISTER: Unless
18 you've gone to court and gotten an order to
19 the contrary.

20 MR. SUSMAN: Yeah. And I think
21 that's -- I mean, I don't understand why you
22 need to go through with that, because in fact
23 there are court reporters, I think, who can
24 probably -- I mean, it just stands to reason
25 that there are court reporters who, if they

1 can transcribe things on their own time rather
2 than on your time schedule, on the weekends
3 and in the evenings, and people who can't get
4 to the deposition using help, that can't come
5 in, so they can give you cheaper transcripts
6 than if you insist that the court reporter be
7 sitting there during the deposition. And so
8 why wouldn't we try and save people money? I
9 mean, why insist on the formality of having a
10 court reporter there?

11 CHAIRMAN SOULES: Let's see, I
12 guess the first motion made -- or you're
13 moving for a substitute motion to Judge
14 Brister's amendment?

15 MR. MARKS: Well, I'm moving
16 for my motion if they're going to keep the
17 Subcommittee's motion on the table. If
18 they're going to withdraw it, then --

19 PROFESSOR ALBRIGHT: Well,
20 John, why don't you make a motion to
21 substitute current Rule 202 for the
22 Subcommittee's rule and we can vote on that.

23 MR. MARKS: Okay. Let's do
24 that one first. Okay. I move that we
25 substitute current Rule 202 for the

1 Subcommittee's rule.

2 CHAIRMAN SOULES: Is that an
3 acceptable substitute motion for you, Judge
4 Brister? Your motion is on the floor.

5 HON. SCOTT A. BRISTER: Oh, I'm
6 happy to vote on that one first.

7 CHAIRMAN SOULES: Okay. Those
8 in favor of using current Rule 202 in place of
9 the rule in the Subcommittee's report show by
10 hands. 10. Those opposed. 10. It fails on
11 a tie vote.

12 Now we've got Judge Brister's versus the
13 Subcommittee's. Those in favor of Judge
14 Brister's proposal on the right-hand side of
15 this page show by hands. 13. 13 for. Those
16 opposed. Six. 13 to six that carries.

17 Okay. So we use Judge Brister's
18 Rule 18.

19 MR. MARKS: Did I get
20 procedured out of my motion?

21 CHAIRMAN SOULES: And your
22 motion is to amend that by providing language
23 that you put on the record earlier as to the
24 nonstenographic -- the party moving for the
25 nonstenographic -- the party taking the

1 nonstenographic deposition, if you take your
2 court reporter, they can't get a copy of the
3 transcript without paying for the original.
4 Those in favor show by hands. Three. Those
5 opposed. 10. It fails by a vote of 10 to
6 three or four. I think we had some hands
7 coming up early.

8 Mike Hatchell.

9 MR. HATCHELL: Luke, I would
10 propose that we eliminate from either version
11 of this rule the words "or for summary
12 judgment, at the time other evidence must be
13 filed with the court," because as I read the
14 rule, if I am in a toxic tort case with 300
15 defendants and 2500 plaintiffs and I intend to
16 move for summary judgment under (a), myself as
17 against five other plaintiffs, I've got to
18 serve God only knows how many copies of this
19 nonstenographic recording, and I don't think
20 that that is efficient.

21 I believe that we could solve the
22 laudable goal of the drafters in requiring
23 that the matter be reduced to written usable
24 form by substituting the language "the party
25 using a nonstenographic deposition as summary

1 judgment proof must provide a complete
2 transcription to an opponent upon request."

3 CHAIRMAN SOULES: Mike, where
4 is that?

5 MR. HATCHELL: It's on (4),
6 "Use," the very last sentence of either
7 version.

8 HON. SCOTT A. BRISTER: I
9 would --

10 CHAIRMAN SOULES: Okay. Let me
11 just try to get this understood first.

12 HON. SCOTT A. BRISTER: It's
13 the last sentence of the paragraph, part 4.

14 CHAIRMAN SOULES: "Or for
15 summary judgment," and you would want to
16 insert some language there or where?

17 MR. HATCHELL: Or eliminate the
18 phrase having to do with summary judgment and
19 substitute language that says, "The party
20 using a nonstenographic deposition as summary
21 judgment proof must provide a complete
22 transcription to an opponent upon request."

23 HON. SCOTT A. BRISTER: Let me
24 suggest, how about this, Mike, if you just say
25 "the complete transcript must be filed."

1 MR. HATCHELL: That's an
2 alternative that I would suggest, yes. That
3 works as well, because actually that's
4 probably more consistent with what we use with
5 deposition transcripts today, so that might
6 even be better.

7 HON. SCOTT A. BRISTER: So the
8 complete transcript must be filed within
9 30 days.

10 PROFESSOR ALBRIGHT: What do
11 the clerks think about filing complete
12 transcripts?

13 MS. WOLBRUECK: Well,
14 personally, we would prefer that they not be
15 filed. But right now we are receiving
16 depositions that are filed for summary
17 judgments. The statute is there --

18 HON. SCOTT A. BRISTER: I
19 suggest we worry about that when people start
20 taking these by the hundreds, which is not
21 going to be any time this century.

22 MR. HATCHELL: But Scott,
23 30 days doesn't work in a summary judgment
24 context.

25 HON. SCOTT A. BRISTER: That's

1 why I say 30 days before trial, or for summary
2 judgment, at the time the other evidence must
3 be filed, which will be either 21 or seven or
4 whatever.

5 CHAIRMAN SOULES: Is that --
6 what he said makes it fine?

7 MR. HATCHELL: That's fine.
8 But Steve has some concerns.

9 MR. SUSMAN: My concern is
10 this: I take a nonstenographic deposition.
11 The case does not settle at mediation. I
12 decide I need to get it transcribed. What we
13 want to do is make it as if that were like I'm
14 in no worse position than I would be had I had
15 a court reporter attending the deposition, in
16 which case the court reporter takes the
17 original, gives it to the witness to correct
18 or sign, and anyone who wants a copy orders it
19 from the court reporter and pays for it. I
20 mean, I don't want to be in a worse position
21 by having to provide people with a bunch of
22 copies of these things at my expense.

23 HON. SCOTT A. BRISTER: I just
24 copied that out of the Subcommittee's rule.
25 That was you all's idea, not mine. That's

1 directly from your 4(a). If you want, I'm
2 happy to make it a lot less than 30 days.

3 CHAIRMAN SOULES: Just a
4 moment, please, we've got to have only one
5 person speaking.

6 MR. SUSMAN: My only point,
7 Scott, is we ought to make it like as if the
8 reporter were there taking the deposition
9 originally, which is you notified all the
10 other parties that the deposition has been
11 transcribed and the original is filed with the
12 court or something like that. I mean, that's
13 what we ought to provide. And then anyone who
14 wants a copy can get it from the court
15 reporter, so can we do that? Does anyone have
16 any problem with that?

17 CHAIRMAN SOULES: State it
18 again. I didn't quite follow it.

19 MR. McMANS: Well, that
20 doesn't completely solve Mike's concern,
21 though. Even if you've got to notify 2500
22 people, that's still pretty burdensome, so I
23 mean, there's some problem with that. I mean,
24 you don't have to do that if you have a court
25 reporter there, so by not having a court

1 reporter there trying to save money and then
2 later on it turns out you want it transcribed
3 and all of a sudden you've got to notify 2500
4 people, that's obviously not what you want to
5 do.

6 CHAIRMAN SOULES: Steve
7 Yelenosky.

8 MR. YELENOSKY: I mean, when
9 you have a court reporter there from the
10 start, everybody knows if I want a copy I can
11 always ask for it because there was a court
12 reporter there and they're going to get it
13 transcribed. But if you've done it
14 nonstenographically and you don't notify them
15 that you've transcribed it, they may think
16 that it was never transcribed. You've got to
17 send notice to them. But there's no reason
18 for you to have to send a copy unless they've
19 requested it and there's no reason to file
20 it. And they can always request it from the
21 court reporter.

22 CHAIRMAN SOULES: Judge McCown.

23 HON. F. SCOTT McCOWN: The tip
24 of the tail is wagging the dog. I think we
25 ought to go with the present rule and leave it

1 alone.

2 CHAIRMAN SOULES: Okay. But
3 we've already voted that down.

4 HON. F. SCOTT McCOWN: But it
5 may look better now.

6 CHAIRMAN SOULES: Let me ask
7 you this: Does anyone want to remove the
8 requirement that a certified court reporter
9 transcribe it? We don't do that for the
10 appellate record, the audio record at trial.
11 Anybody can type it up, and it goes forward to
12 an appellate court for just disposition on the
13 merits.

14 MR. LATTING: Does anyone want
15 to move that that requirement be taken out?

16 CHAIRMAN SOULES: Yes.

17 MR. LATTING: Yes, I do.

18 MR. HERRING: That's the change
19 they made in the 1993 federal rules. You just
20 present a transcript to the court and you can
21 have anybody type it up. And the other party
22 can contest it or can have their court
23 reporter come up with another one. That would
24 be a lot cheaper.

25 CHAIRMAN SOULES: Okay. Moved

1 and seconded that the requirement for a
2 certified court reporter to make the
3 transcript be deleted so that anybody can make
4 a transcript and use it. Those in favor show
5 by hands.

6 MR. JACKSON: Well, can we
7 discuss it?

8 MR. YELENOSKY: I thought we
9 had.

10 MR. JACKSON: Not that motion.

11 CHAIRMAN SOULES: Any
12 discussion?

13 MR. JACKSON: We haven't
14 discussed that.

15 CHAIRMAN SOULES: Okay. Let's
16 have discussion on it. Mr. Jackson.

17 MR. JACKSON: Then you get into
18 the situation where anybody is typing up these
19 tapes. You're not complying with Rule 205,
20 206, and getting the witness' signature, and
21 you've got to go back into rewriting all these
22 other rules to try to accommodate the fact
23 that you're not complying with all the
24 certification rules for submitting the
25 deposition to the witness so the witness has

1 the opportunity to read it and sign it before
2 he gets to the courthouse.

3 Some lawyer has some secretary type up
4 what part of the tape they want typed up.
5 They try to impeach a witness on the stand and
6 test his credibility and veracity with the
7 typed tape transcript that he's now put to the
8 burden of typing up his version of it. You're
9 going to get into the battle of the
10 transcripts.

11 CHAIRMAN SOULES: Scott
12 McCown.

13 HON. F. SCOTT McCOWN: Well, of
14 course, this goes to kind of philosophically
15 how you feel about requiring court reporters
16 or not, and I do come down on the side of
17 court reporters. And I would just point out
18 that taking a tape and producing a written
19 word, there's a lot of skill and training that
20 goes into doing that right about paragraphing
21 and punctuation, and it is a lot harder, I
22 think, than people may realize.

23 We may have done that in the Appellate
24 Rules, but at least in the Appellate Rules the
25 tape is the court's tape with all of the

1 safeguards we have about the court experiment,
2 and you've got a court officer running the
3 tape, et cetera. Here we're talking about
4 somebody's little tape machine out in the
5 world as they take the nonstenographic
6 recording.

7 I'd rather see us continue to require
8 that the court reporter do the transcript.
9 Even though that has added costs, it also has
10 a lot of safeguards about accuracy.

11 CHAIRMAN SOULES: Chuck
12 Herring.

13 MR. HERRING: Yeah. But the
14 protection against that is that the other side
15 can have a court reporter. The way the
16 federal rule works, it's really two parts. It
17 says a party offering deposition testimony may
18 offer it in stenographic or nonstenographic
19 form. But if in nonstenographic form, the
20 party shall also provide the court with the
21 transcript of the portion so offered. Upon
22 the request of any party in a case tried
23 before a jury, deposition testimony offered
24 other than for impeachment purposes shall be
25 presented in nonstenographic form, if

1 available, unless the court for good cause
2 orders otherwise.

3 That's a little bit too complicated, but
4 the whole goal of that change in the federal
5 rule was to save money, and if it's good
6 enough -- if we're going to be doing it anyway
7 in federal court, it seems to me we can do it
8 in state court.

9 CHAIRMAN SOULES: Any other
10 discussion? Judge Peeples.

11 HON. DAVID PEEPLES: Present
12 Rule 202 and this rule both deal with both
13 videotaped depositions and tape recorder
14 depositions, which are at opposite ends of the
15 spectrum. A videotape is probably a big money
16 case that's used for trial. A tape recorder
17 is when you just want to talk to a witness
18 under oath and get it on tape and it's a
19 no-money case frequently. In a lot of family
20 law cases they do it. And I don't think the
21 same considerations and rules ought to apply
22 to both of them.

23 Now, we've got an existing Rule 202 that
24 is not causing problems. And this rule here,
25 18, I think this is the first time we've

1 discussed it. Now, we're making a mistake
2 changing something that's not causing
3 problems, when we have, as Scott says, more
4 important things to do. I think we ought to
5 reconsider and go with Rule 202 as written.

6 CHAIRMAN SOULES: Any other
7 discussion? Okay. Those in favor of
8 eliminating the requirement of a certified
9 court reporter to transcribe a nonstenographic
10 deposition show by hands.

11 MR. YELENOSKY: I need to ask a
12 question before I can vote on this.

13 CHAIRMAN SOULES: All right.
14 It's yours.

15 MR. YELENOSKY: Because the old
16 rule says "stenographic," and I'm hearing from
17 some people that they read that to mean that
18 it requires a certified court reporter,
19 although it doesn't actually say that. Is
20 that what it means? Because the practice has
21 been to accept things that were not
22 transcribed by a court reporter at least from
23 my experience. Does anybody have an answer to
24 that?

25 CHAIRMAN SOULES: Apparently

1 the practices are different. They differ.

2 MR. YELENOSKY: Because the old
3 rule then offers -- I mean, if the old rule
4 allows for that, then that might be a reason
5 that I might prefer the old rule.

6 CHAIRMAN SOULES: Okay. Those
7 in favor of eliminating the requirement that
8 the transcripts of a nonstenographic
9 deposition be done by a certified court
10 reporter show by hands. 10. Okay. Those
11 opposed to that. 12. Okay. By a vote of 12
12 to 10, transcripts must be prepared by a
13 certified court reporter as written in
14 Rule 18.

15 Are there any other changes to Rule 18 as
16 proposed by the Discovery Subcommittee? Judge
17 Peeples.

18 MR. HATCHELL: Well, you didn't
19 deal with my problem about --

20 CHAIRMAN SOULES: We didn't
21 deal with that, but Judge Peeples moved for a
22 reconsideration. Were you -- which way did
23 you vote for originally, for the Rule 18 as
24 proposed?

25 HON. DAVID PEEPLES: I voted

1 for 202.

2 CHAIRMAN SOULES: You voted for
3 202. The motion for reconsideration needs to
4 come from somebody who voted for Rule 18 as
5 proposed. Is there a motion?

6 HON. PAUL HEATH TILL: Yes, I
7 do. I voted for the Subcommittee rule, and I
8 make that motion right now to resubmit it.

9 CHAIRMAN SOULES: You're moving
10 to reconsider and to ask that Rule 202 be left
11 as is. Is that right, Judge Till?

12 HON. PAUL HEATH TILL: That's
13 right, in place of the Subcommittee rule.

14 CHAIRMAN SOULES: Okay. Those
15 in favor of the judge's motion show by hands.

16 HON. SCOTT A. BRISTER: Let me
17 just -- I'm a little concerned about this,
18 because, you know, on all of these we could
19 discuss them for two hours and then at the end
20 move we ought to drop the whole thing and go
21 back to where we started and that would
22 probably always win. I mean, you know, at
23 6:30 I'm ready to say, "Let's vote on whether
24 we do any of these," and we'll get a majority
25 on not touching them.

1 So let me again briefly say the advantage
2 of the Subcommittee rule. It doesn't go all
3 the way towards cost saving, as Steve
4 explained, but it is a step towards there, and
5 it would at least allow you in the poor folks'
6 case to take the deposition even with a cheap
7 tape recorder on the bet that 99 percent of
8 the cases settle, don't go to trial, and you
9 don't have to have a court reporter to do a
10 deposition. And for poor folks who are not
11 anticipating ever going to trial, it will save
12 money to do the Subcommittee's as amended.

13 HON. DAVID PEEPLES: Scott, why
14 can't you do that right now under 202? That
15 happens right now under 202.

16 HON. SCOTT A. BRISTER: No.
17 Under 202 right now you have to have a court
18 reporter unless you get a court order.

19 HON. DAVID PEEPLES: You do
20 have to go to court?

21 HON. SCOTT A. BRISTER: You
22 have to go to court for an order, which for
23 the Legal Services people, sure --

24 CHAIRMAN SOULES: What now?
25 Are you saying that you have to have a court

1 reporter under 202?

2 HON. SCOTT A. BRISTER: Yes,
3 sir. 202(1)(e) says a nonstenographic notice
4 does not dispense with having a court
5 reporter.

6 CHAIRMAN SOULES: Hold it,
7 please. Rule 202(1) says, "Any party may
8 cause testimony to be taken
9 nonstenographically without leave of the
10 court."

11 HON. SCOTT A. BRISTER:
12 Paragraph (e).

13 CHAIRMAN SOULES: But it can't
14 be used unless a stenographic transcription is
15 made?

16 HON. SCOTT A. BRISTER: Look,
17 read the first sentence of paragraph (e).

18 MR. YELENOSKY: But the way
19 that has been interpreted was that you needed
20 to get it typed up later from the recording.
21 And that may be wrong, but in practice that's
22 what happens. We go and we do a tape
23 recording, and then you would have to do a
24 type-up by a secretary of the tape recording,
25 if in fact it was going to go anywhere. But

1 we didn't go in for a court order.

2 I mean, to me "stenographic" doesn't mean
3 the same as that it was taken down by a court
4 reporter, but I may just be wrong.

5 CHAIRMAN SOULES: Those in
6 favor of Judge Till's motion show by hands.

7 MR. YELENOSKY: That's why I
8 was asking that question earlier.

9 Now, what's the issue we're voting on
10 now?

11 CHAIRMAN SOULES: We're voting
12 on no change to 202, just using 202 as the
13 rule.

14 HON. SCOTT A. BRISTER: We're
15 voting to substitute in Rule 202.

16 CHAIRMAN SOULES: That's right.

17 MR. PRINCE: For the
18 substitution of the substitution.

19 CHAIRMAN SOULES: Nine. Those
20 opposed. 13. Okay. The Committee's draft
21 still prevails by a vote of 13 to nine.

22 And Mike, would you provide some language
23 to take care of your summary judgment
24 problem. And I think the Committee has agreed
25 that we will accept that to the effect --

1 state it again for the record -- to the effect
2 of what?

3 MR. HATCHELL: Well, I just
4 think that the notice provisions and the
5 service provisions of the rule are just
6 inoperable in a summary judgment context. But
7 I think it can be very easily handled by just
8 requiring the party using the nonstenographic
9 deposition to have a copy available to be
10 provided in some reasonable way, whether it's
11 filed or it's supplied, either one.

12 If they're filed, you junk up the files
13 and you make it a little bit more difficult
14 for them responding to the summary judgment in
15 Houston and going down there and having to
16 read it, so I personally prefer that the party
17 using it just has to make it available to the
18 summary judgment opponents, but this is pretty
19 simple.

20 PROFESSOR ALBRIGHT: What about
21 for trial? Does it offend you to have to mail
22 it to everybody to use it at trial?

23 MR. SUSMAN: I think we ought
24 to write some language that nothing ought to
25 be more cumbersome than having the court

1 reporter there in the first instance. I mean,
2 you don't want to make it more expensive so
3 that I pay a penalty for not having a court
4 reporter there.

5 MR. JACKSON: Mike, in 166a(d),
6 doesn't that solve the problem already there
7 as far as you're concerned?

8 MR. HATCHELL: Well, if we
9 eliminate that from this rule.

10 CHAIRMAN SOULES: "If the
11 deposition is to be used as evidence at trial,
12 the complete transcript must be served on all
13 parties at least 30 days before trial."
14 That's what the rule says now.

15 MR. SUSMAN: I suggest Alex
16 work on the language.

17 PROFESSOR ALBRIGHT: I don't
18 see why we can't -- since it has to be typed
19 up by the court reporter, I don't see we can't
20 just adopt the regular deposition rules where
21 the court reporter sends a notice to everybody
22 asking if they need a copy and then sends the
23 original to the opposing attorney who then has
24 to make it available to everybody again.

25 CHAIRMAN SOULES: Okay. And

1 that's what you're going to do. And then if
2 somebody wants to use that transcript, they
3 use it just like it was taken by the court
4 reporter in the first instance.

5 Okay. Does everybody agree with that?
6 Does anybody disagree? No disagreement.
7 Okay. So that passes, so we're through with
8 Rule 18.

9 MR. SUSMAN: Rule 17.

10 CHAIRMAN SOULES: Okay.

11 Rule 17.

12 MR. SUSMAN: Rule 17, the only
13 issue we have from anyone is Scott's
14 suggestion about --

15 HON. SCOTT A. BRISTER: That's
16 better taken up with Rule 24. Skip it. It
17 really only applies to Rule 24. Let's take it
18 up there.

19 MR. SUSMAN: Okay. Then we
20 have no additions to Rule 17.

21 CHAIRMAN SOULES: Okay. Those
22 in favor of Rule 17 show by hands. 13. Those
23 opposed. None opposed. It's unanimous.

24 And now 18.

25 PROFESSOR ELAINE CARLSON: Is

1 that really 16?

2 PROFESSOR ALBRIGHT: Yes. Now
3 we go back to Rule 16 in the bound volume.

4 HON. SCOTT A. BRISTER: What
5 happened there, Luke, is it was just -- it
6 makes more sense to have the rules go in
7 order, how to notice an oral deposition, how
8 to conduct an oral deposition, which is 15,
9 and 16 would be how to certify and sign and
10 file an oral deposition before you go on to
11 depositions on written questions and
12 nonstenographic stuff, rather than the current
13 system where they're all kind of stuck in
14 mixed amongst.

15 CHAIRMAN SOULES: Nobody
16 disagrees with that new organization, do
17 they? Okay. There being none, it's
18 unanimous.

19 Looking at Rule 18, Signing,
20 Certification, and Use of Depositions, is
21 anybody opposed to Rule 18, Signing,
22 Certification, and Use of Depositions.

23 MR. JACKSON: Isn't that
24 Rule 16, though?

25 HON. SCOTT A. BRISTER: Did you

1 all agree with me on paragraph 2 there, Alex?
2 Doesn't that need to go in?

3 PROFESSOR ALBRIGHT: Yes,
4 that's correct. We'll accept that.

5 CHAIRMAN SOULES: Paragraph 5?

6 HON. SCOTT A. BRISTER: No.
7 Paragraph 2, little roman numeral (v). It's
8 just a technical addition that needs to be
9 stuck in.

10 The only suggestion I have was on
11 paragraph 6.

12 CHAIRMAN SOULES: Wait a
13 minute, I don't understand what we just did.

14 HON. SCOTT A. BRISTER: Look at
15 the Subcommittee's paragraph 2. I'm adding in
16 another thing for the court reporter to
17 certify, which is the amount of time used in
18 the deposition. Since we say in another rule
19 the court reporter is supposed to do that, we
20 need to put that in here saying that's one of
21 the things that they certify.

22 CHAIRMAN SOULES: So it's the
23 amount of the deposition officer's charges and
24 the amount of time used by each party at the
25 deposition?

1 HON. SCOTT A. BRISTER: I was
2 going to say it as a separate one, but you can
3 stick it on the same one if you want.

4 PROFESSOR ALBRIGHT: We can
5 accept it as that.

6 CHAIRMAN SOULES: Any
7 opposition to that? There being no
8 opposition, it will be declared unanimous.

9 And then on paragraph 5 --

10 HON. SCOTT A. BRISTER:
11 Actually, this does what we were talking about
12 with Mike, which is drop the parenthetical
13 about the 30 days before, since you're just
14 going to treat it like the same court reporter
15 certificate, et cetera.

16 CHAIRMAN SOULES: So in the
17 beginning towards the end of the second line
18 in paragraph 5, we would delete "(30 days if
19 the deposition" --

20 PROFESSOR ALBRIGHT: No, wait.
21 What this does is make a distinction between a
22 nonstenographic one and a stenographically
23 recorded deposition. I think the thought was
24 that you needed more time to look at your
25 nonstenographically recorded deposition to

1 make sure that it accurately reflected the
2 nonstenographic recording. But it may be that
3 since it's being transcribed by a court
4 reporter nobody cares, so just file it the day
5 before.

6 HON. SCOTT A. BRISTER: That's
7 what I would anticipate.

8 CHAIRMAN SOULES: Okay. So
9 Judge Brister is proposing that we delete the
10 words "(30 days if the deposition was recorded
11 by nonstenographic means)." Is there any
12 opposition to that? There being none, that
13 will be declared unanimous. And that was
14 paragraph 5.

15 Now, paragraph 6.

16 HON. SCOTT A. BRISTER: One of
17 these is really substantive and the others are
18 just -- this paragraph has lots of -- it seems
19 to me the second and the last sentence both
20 say the Rules of Evidence shall be applied to
21 depositions. I assume the Rules of Evidence
22 apply to everything so there's no reason to
23 say it.

24 But the substantive one, this when you
25 can use it against a party that's not present,

1 the Subcommittee version in the middle of
2 their paragraph 6 says: A deposition is
3 admissible against a party joined after the
4 deposition was taken (1) if they have a
5 similar interest; or (2) had a reasonable
6 opportunity to redepose. Now, that is a
7 change in current law, right, which requires
8 (1) and (2)?

9 PROFESSOR ALBRIGHT: Well, what
10 we determined is that the current law, when
11 you read it, really is nonsensical, so we were
12 trying to interpret what we thought it might
13 mean.

14 HON. SCOTT A. BRISTER: Okay.
15 Well, I've always read current law to require
16 (1) and (2), and my proposal is that the rule
17 would only require (2), which is, in other
18 words, if they have a chance, plenty of
19 opportunity to redepose, who cares whether
20 they had a similar interest or not. The
21 question is, you can use it against somebody
22 if they have a reasonable opportunity to
23 redepose after they're joined and they don't.

24 CHAIRMAN SOULES: Isn't that in
25 the Rules of Evidence also?

1 HON. F. SCOTT McCOWN: It's not
2 exactly in the Rules of Evidence.

3 MR. HERRING: I think it's just
4 in the deposition rules.

5 CHAIRMAN SOULES: Well, it is.
6 It's in 804(b)(1), I think, which, when this
7 language was put into the current rule, the
8 language out of 804(b)(1) was tracked
9 verbatim, and it says --

10 HON. F. SCOTT McCOWN: Right.
11 For former testimony, you have to have had a
12 similar interest so that you get a fair
13 cross-examination. And what Judge Brister is
14 saying is that in the same proceeding all you
15 ought to get is an opportunity to redepose.
16 It shouldn't matter that the people had the
17 same interests or not, because you can read
18 the deposition and decide if you want to
19 redepose or not. So there's a little bit
20 different factors when you're talking about
21 former testimony and you're talking about the
22 same proceeding.

23 CHAIRMAN SOULES: Well, this
24 says: Former testimony in a deposition taken
25 in the course of the same proceeding, if the

1 party against whom the testimony is now
2 offered, or a person with a similar interest,
3 had an opportunity and similar motive to
4 develop the testimony by direct, cross or
5 redirect examination.

6 And then the language that was changed
7 was "after becoming a party, to redepose and
8 has failed to exercise," in the place of "had
9 an opportunity and similar motive to develop
10 the testimony by direct, cross or redirect."

11 HON. F. SCOTT McCOWN: So what
12 you're saying is it ought to just be what
13 804(b)(1) is now?

14 CHAIRMAN SOULES: Well, except
15 it is an opportunity to redepose depending on
16 how you read that rule.

17 MR. PRINCE: No. I don't read
18 the Rule of Evidence as dealing with
19 depositions taken in this proceeding and then
20 later added parties in this proceeding.

21 CHAIRMAN SOULES: Isn't that
22 what (b)(1) is talking about?

23 MR. PRINCE: No. It says,
24 Testimony given as a witness at another
25 hearing of the same or different proceeding,

1 or in a deposition taken in the course of
2 another proceeding.

3 CHAIRMAN SOULES: "The same or
4 another proceeding," is what my book says.

5 MR. PRINCE: Do I have an old
6 book? Oh, old book. Sorry, never mind.

7 HON. SCOTT A. BRISTER: I think
8 mostly that paragraph is addressed in the
9 Rules of Evidence.

10 PROFESSOR ALBRIGHT: Well,
11 let's leave it out.

12 CHAIRMAN SOULES: You start off
13 with the command that any part or all of the
14 deposition may be used for any purpose in the
15 same proceeding in which it was taken. It
16 doesn't say "subject to the Rules of
17 Evidence," so is the problem. The concern
18 with this, again, was that we could just use
19 that first sentence so that it would compel
20 the induction of any part of the deposition.
21 So this Committee went on and wrote more than
22 in the current rule. What is the current rule
23 on this? 207.

24 HON. F. SCOTT McCOWN: Well,
25 can't we just say "subject to the Rules of

1 Evidence the deposition may be used"?

2 MR. SUSMAN: Any part or all of
3 the deposition may be used for any purpose
4 subject to the Rules of Evidence.

5 HON. F. SCOTT McCOWN: Yeah.

6 CHAIRMAN SOULES: That misses
7 one piece of what's in the current rule and
8 what's in the proposed rule, and that is, "had
9 a reasonable opportunity after becoming a
10 party to redepose and failed to exercise the
11 opportunity." That's not in the Rule of
12 Evidence.

13 PROFESSOR ALBRIGHT: The Rules
14 of Evidence don't address a late added party.

15 CHAIRMAN SOULES: Well, let me
16 see if I can understand Judge Brister's
17 comment.

18 HON. SCOTT A. BRISTER: In
19 other words, I have had hearings about whether
20 somebody added later has a similar interest to
21 somebody else, to which my response was, if
22 you can retake the deposition, who cares? I'm
23 not going to decide this. Just retake the
24 deposition.

25 CHAIRMAN SOULES: Well, "or" is

1 correct in here, because, I mean, that's the
2 current rule. But the current rule does have
3 an interest similar to that of any party and
4 says a deposition is admissible against him
5 only if he has had a reasonable opportunity
6 after becoming a party to redepose and has
7 failed to exercise.

8 And you're problem in your court has been
9 what, Judge Brister?

10 HON. SCOTT A. BRISTER: Well,
11 satellite litigation over whether they had a
12 similar interest; I want to use this
13 deposition against them; I've told them that
14 this guy is available and they can take extra
15 parts of the deposition or more if they want
16 to; and they say no, he can't use that
17 deposition at all; throw it away because I
18 don't have a similar interest to somebody in
19 the litigation, which is crazy.

20 CHAIRMAN SOULES: Well, if
21 you've got the disjunctive "or" which gives
22 you two bases for requiring the use, doesn't
23 that take care of your problem?

24 HON. SCOTT A. BRISTER: Except
25 that means that a deposition can be used, the

1 person has died, and if I find you've got a
2 similar interest, though you don't think you
3 do and you don't have a lot of questions
4 answered that you would have liked to have
5 answered on an asbestos case, for instance,
6 tough, we're going to use it against you on
7 this dead man anyway. And I think that goes a
8 little too far. I understood you have to have
9 both, but the main point is, if you can
10 redepose, it's an easy question.

11 CHAIRMAN SOULES: Well, I think
12 you do have to have both under the current
13 rule. This is 207(1)(c), which is different
14 than what I was looking at earlier, which was
15 804(b)(1).

16 HON. C. A. GUITTARD:
17 Mr. Chairman.

18 CHAIRMAN SOULES: Is it on this
19 point, Judge?

20 HON. C. A. GUITTARD: Yes. I
21 have a question as to whether the Discovery
22 Rules should deal with questions of
23 admissibility that, it seems to me, should be
24 dealt with in the Rules of Evidence. If
25 something shouldn't be admitted into evidence

1 or should be admitted into evidence, then the
2 Rules of Evidence should say that, not the
3 Discovery Rules.

4 CHAIRMAN SOULES: I'm not sure
5 that the Rules of Evidence say you can use a
6 deposition.

7 PROFESSOR ALBRIGHT: Judge
8 Guittard, wouldn't you address it, if this
9 issue came up, if you were in a trial and a
10 party says, "You can't use that deposition
11 against me because I was joined after it was
12 taken," then wouldn't you just do it within
13 your discretion as to whether to allow it or
14 not?

15 HONORABLE C. A. GUITTARD: I
16 would consider whether they had the same
17 interest.

18 PROFESSOR ALBRIGHT: So you
19 take these things into account even if there's
20 not a rule that specifically says it?

21 HONORABLE C. A. GUITTARD: Or
22 you can make a specific rule or a specific
23 amendment to the Rules of Evidence.

24 PROFESSOR ALBRIGHT: That makes
25 more sense.

1 HON. SCOTT A. BRISTER: It's a
2 little bit procedural, because it's kind of
3 like, Who can you use admissions against?
4 Well, you can use admissions against only the
5 party that they were directed to. Who can you
6 use interrogatories against?

7 HON. C. A. GUITTARD: Same
8 question.

9 MR. SUSMAN: Well, we have to
10 do something on this, don't we, because there
11 is a provision in Rule 207. If we don't do
12 something, then we need to put something in
13 there. 207(c) requires that later joined
14 parties in the same proceeding, you've got to
15 both have the same interest and the
16 opportunity to redepose. We have put
17 either/or. And Scott's version drops the same
18 interest because it's silly to require both.

19 HON. SCOTT A. BRISTER:
20 Basically.

21 CHAIRMAN SOULES: Is "same
22 proceeding" defined in the Rules of Evidence
23 anywhere?

24 HON. SCOTT A. BRISTER: The
25 Rules of Evidence say for the definition of

1 "same proceeding," see the Rules of Civil
2 Procedure.

3 MR. HERRING: If you look under
4 801(e)(3) --

5 CHAIRMAN SOULES: Okay. What
6 we could do --

7 MR. SUSMAN: I think Scott is
8 right.

9 CHAIRMAN SOULES: -- is x out
10 (6) altogether, and move the definition of
11 "same proceeding" to Rule of Evidence
12 801(e)(3).

13 MR. HERRING: No, because it's
14 a backwards cross-reference.

15 CHAIRMAN SOULES: Well, let's
16 see, 207, if we just move this definition of
17 "same proceeding" into the Rule of Evidence,
18 then it works here, and use of deposition will
19 then be governed by the Rules of Civil
20 Evidence which includes -- Justice Hecht just
21 pointed out to me under 801 a deposition taken
22 in the same proceeding can be used, and then
23 you've got these other factors. But nowhere
24 in the Rules of Evidence does it talk about
25 opportunity to redepose. That's the one thing

1 we would lose from doing what I'm saying.

2 Judge Guittard.

3 HON. C. A. GUITTARD: Couldn't
4 the Rules of Evidence be amended to provide
5 that? Wouldn't it be more appropriate to do
6 it there? Couldn't this Committee recommend
7 that for the Rules of Evidence?

8 MR. SUSMAN: I don't really
9 think the Subcommittee much cares. We want to
10 get this product out, enacted and in effect as
11 soon as possible. And my problem is that if
12 it's dependent -- if we are taking something
13 out of the existing rule, I'm a little
14 concerned about when they will get around to
15 amending the Rules of Evidence. I mean, it's
16 a long process. And in the meantime, what do
17 you do?

18 So I would rather work under the
19 assumption that the Rules of Evidence will not
20 be amended. We need to have these rules speak
21 as a whole here, and at such time as they are,
22 then this can be changed. So it seems to me
23 that I would move we adopt Scott Brister's
24 proposal for 16, for Rule 16(6), which I think
25 is fine.

1 MR. PRINCE: Second.

2 CHAIRMAN SOULES: Again, Judge,
3 what is the need to delete the similar
4 interest requirement if you've got a
5 disjunctive?

6 HON. SCOTT A. BRISTER: Well,
7 because it means even if you had a chance to
8 redepose -- well, let me see --

9 CHAIRMAN SOULES: It's the dead
10 guy.

11 HON. SCOTT A. BRISTER: You
12 didn't have a chance to redepose, yeah, the
13 dead witness. You didn't have a chance to
14 redepose. But if I can get a judge to decide
15 your interests were similar enough, I can use
16 that depo.

17 CHAIRMAN SOULES: Well, it is
18 admissible under the Rules of Evidence now
19 under those terms.

20 HON. SCOTT A. BRISTER: Well,
21 again, I haven't really studied the Rules of
22 Evidence in relation to this. Under the Rules
23 of Civil Procedure it ain't. You've got to
24 have both.

25 CHAIRMAN SOULES: Under the

1 Rules of Evidence it gets in if the party
2 against whom the testimony is now offered, or
3 a person with a similar interest, had an
4 opportunity or a similar motive to develop the
5 testimony by direct, cross or redirect.

6 HON. SCOTT A. BRISTER: And I
7 think, you know, when you're working on the
8 Rules of Evidence you need to see how these
9 cross-reference. But I'm like Steve; it's in
10 the Rules of Civil Procedure.

11 MR. SUSMAN: But that's a
12 different issue now. We ought to fix it,
13 because we have a defective Rule of Civil
14 Procedure then, Scott, because it's in
15 conflict with the Rules of Evidence.

16 HON. SCOTT A. BRISTER: Let me
17 see --

18 MR. SUSMAN: You're saying you
19 can get -- you can use a deposition --

20 HON. SCOTT A. BRISTER: First
21 of all, 804(b)(1) is only if the declarant is
22 unavailable. I mean, I'd have to think about
23 this overnight to see. All I was focusing on
24 was, if the Rule of Evidence is "or," it's
25 different from the Rule of Civil of

1 Procedure. If the Rule of Evidence is
2 "and" --

3 MR. SUSMAN: -- it's stupid.

4 HON. SCOTT A. BRISTER: -- it's
5 the same thing, and it's a dumb rule, yeah.

6 MR. SUSMAN: Can we pass on
7 this overnight? You're planning on bringing
8 back the group even if we finish these rules
9 tonight, aren't you?

10 CHAIRMAN SOULES: Oh, yeah.

11 MR. SUSMAN: I think that's a
12 good idea.

13 HON. SCOTT A. BRISTER: We've
14 still got a lot of drafting to do.

15 MR. SUSMAN: I think that is a
16 good idea, which is to quit pretty soon. We
17 will definitely finish this tomorrow, we're
18 making good progress, but we just have some
19 redrafting of the rough places.

20 CHAIRMAN SOULES: How many
21 redrafting groups do we have?

22 MR. SUSMAN: Three.

23 HON. F. SCOTT McCOWN: Rule 4
24 is done.

25 CHAIRMAN SOULES: Rule 4 is

1 finished, isn't it?

2 HON. F. SCOTT McCOWN: No. You
3 asked us to redraft it, but the redraft is
4 done.

5 CHAIRMAN SOULES: The redraft
6 is done. Okay. Well, we're going to keep
7 working.

8 MR. SUSMAN: I would suggest
9 that we come back to this one and let Scott
10 think it through.

11 HON. SCOTT A. BRISTER: Well,
12 Chuck Herring just pointed out to me that the
13 unavailability of the witness, I mean, that's
14 addressing a different problem than this Rule
15 of Civil Procedure, which is just we've taken
16 depositions, we've added some new parties, and
17 should we throw them away or not.

18 And the thing is, if they've got a chance
19 to redepose, let's don't throw them away and
20 let's not have a big hearing about whether
21 your interests are exactly the same, whether
22 the interests of the asbestos distributors are
23 the same as the interests of the asbestos
24 manufacturers.

25 CHAIRMAN SOULES: Here is what

1 I think ought to be done: No. 1 in the
2 paragraph 6, "A deposition is admissible
3 against a party joined after the deposition
4 was taken (1) if that party has an interest
5 similar to that of any party present or
6 represented at the taking of the deposition or
7 who had reasonable notice thereof" -- is that
8 what our current rule says?

9 PROFESSOR ALBRIGHT: The
10 current rule is "If one becomes a party after
11 the deposition has been taken and has an
12 interest similar to that of any party
13 described in (a) or (b) above, the deposition
14 is admissible against that party only if that
15 party has had a reasonable opportunity after
16 becoming a party to redepose the deponent and
17 has failed to exercise that opportunity."

18 That is an "and" requirement now, which
19 we feel like doesn't really make much sense.

20 CHAIRMAN SOULES: I think,
21 Judge Brister, can you look at 804(b)(1)?

22 HON. SCOTT A. BRISTER: Yeah.

23 CHAIRMAN SOULES: Okay. If we
24 change (6) to say a deposition is admissible
25 against a party joined after the deposition

1 was taken pursuant to -- maybe I haven't got
2 that in the right place -- 804(b)(1), or if
3 the party has had a reasonable opportunity to
4 redepose, because your example is clearly
5 the --

6 HON. SCOTT A. BRISTER:
7 -- unavailable witness.

8 CHAIRMAN SOULES:
9 -- unavailable witness, so that's taken care
10 of by 804. But what we would want to take
11 care of also is if the party came in and they
12 may have had the opportunity to redepose and
13 didn't, then the deposition ought to be able
14 to be used against that party too.

15 HON. SCOTT A. BRISTER: I
16 missed the last part.

17 CHAIRMAN SOULES: Well, the
18 last part is what's now written in the draft,
19 if the party has had a reasonable opportunity
20 after becoming to party to redepose and has
21 failed to exercise the opportunity.

22 So either under 804(b)(1), or if the
23 party has the opportunity to redepose and
24 doesn't, then the deposition ought to be used.

25 PROFESSOR ALBRIGHT: But the

1 distinction is if the witness is available or
2 not. If the witness is unavailable, then you
3 have to use 804(b)(1).

4 CHAIRMAN SOULES: That's right.

5 PROFESSOR ALBRIGHT: But if the
6 witness is available, then you would have an
7 opportunity to redepose, and we don't care.
8 Just we redepose them.

9 CHAIRMAN SOULES: Well, the
10 witness may not be available, but maybe they
11 had two years to take his deposition before he
12 died and didn't do it. So the court would
13 decide whether there is all this similar
14 interest and if it's developed by
15 cross-examination by a similar -- or if the
16 party just didn't take care of business, then
17 the deposition could be used.

18 And that's what we're trying to do, is to
19 keep from having to start all over again. The
20 purpose of this is whether we have to ditch
21 all the depositions when a party is added even
22 if that party has the opportunity to redepose
23 and doesn't.

24 HON. SCOTT A. BRISTER: You
25 see, the "or," the similar interest, if it is

1 disjunctive, it adds nothing unless you posit
2 that you didn't have an opportunity to
3 redepose. To say that another way, in other
4 words, if you have the opportunity to
5 redepose, it doesn't matter whether you have a
6 similar interest or not if it's "or."

7 CHAIRMAN SOULES: Right.

8 HONORABLE SCOTT A. BRISTER: So
9 you only want to add the first one in if you
10 posit by definition you didn't have a chance
11 to redepose. You got added late, you didn't
12 ever have the chance to take this person's
13 deposition, but we're going to use it against
14 you if I think it's a close enough interest.

15 MR. HAMILTON: I believe that
16 207 and 804 both require that you have an
17 opportunity to redepose, so that's all you
18 really need, is an opportunity to redepose.

19 HON. SCOTT A. BRISTER: That's
20 the current rules.

21 MR. HAMILTON: You don't need
22 the other part, the similar interest part.

23 CHAIRMAN SOULES: That's right,
24 because 804(b)(1) takes care of that.

25 HON. SCOTT A. BRISTER:

1 804(b)(1) would be an added requirement if
2 they died.

3 CHAIRMAN SOULES: So what I'm
4 suggesting is that we just take (6) as it is
5 with this change; that we delete from the (1)
6 that's in parentheses all of that, "if the
7 party has an interest similar to that of any
8 party present or represented at the taking of
9 the deposition or who had reasonable notice
10 thereof."

11 HON. SARAH DUNCAN: Say that
12 again, Luke.

13 CHAIRMAN SOULES: And
14 substitute "A deposition is admissible against
15 a party joined after the deposition was taken
16 (1) as provided in the Texas Rule of Evidence
17 804(b)(1); or (2)" and then the rest of the
18 paragraph. Does that work, Mike?

19 MR. HUNT: Do you really mean
20 "taken"?

21 CHAIRMAN SOULES: After the
22 deposition was taken. What word would you
23 use?

24 MR. HUNT: Well, state how you
25 propose to substitute for (1) again.

1 CHAIRMAN SOULES: Okay. Let's
2 just read the sentence in its entirety. It
3 starts with "A deposition is admissible."

4 "A deposition is admissible against a
5 party joined after the deposition was taken
6 (1) as provided in Texas Rule of Evidence
7 804(b)(1); or (2) if the party has had a
8 reasonable opportunity after becoming a party
9 to redepose the deponent and has failed to
10 exercise that opportunity."

11 MR. HUNT: But it says if the
12 deposition were taken as provided in 804?

13 CHAIRMAN SOULES: No.

14 MR. MARKS: Just delete "after
15 the deposition was taken."

16 MR. PRINCE: Luther, how about
17 this, just to paraphrase what you just did on
18 section 1, have section 1 read, "If
19 Rule 804(b)(1) of the Texas Rules of Evidence
20 applies;" and then "or 2." Does that work?

21 CHAIRMAN SOULES: Okay. That's
22 fine with me. "A deposition is admissible
23 against a party joined after the deposition
24 was taken (1)" --

25 HON. C. A. GUITTARD: -- as

1 provided in Rule 804.

2 CHAIRMAN SOULES: -- "if
3 admissible under TRE 804(b)(1); or if the
4 party" -- that's sort of a lot of "if" -- "if
5 the deposition is admissible under
6 TRE 804(b)(1), or if the party" -- okay.
7 Would that work, Don Hunt?

8 MR. HUNT: Yeah.

9 CHAIRMAN SOULES: Okay. Those
10 in favor of adjusting that sentence in that
11 way show by hands. Okay. Anybody opposed?
12 Okay. There's no opposition. That passes.

13 Now, with that change, those in favor of
14 paragraph 6 show by hands. Is anybody
15 opposed? No opposition.

16 MR. HUNT: Are we voting on
17 Judge Brister's substitute or the --

18 CHAIRMAN SOULES: I think this
19 fixes it. Does this fix your problem, Judge
20 Brister?

21 HON. SCOTT A. BRISTER: Yeah.
22 It's, you know, acceptable; it's fine. I just
23 think this whole paragraph makes -- it says
24 several things are governed by the Rules of
25 Civil Evidence that are unnecessary because,

1 of course, admissibility is governed by the
2 Rules of Civil Evidence. That's what you have
3 the Rules of Civil Evidence for. But I don't
4 mind having extra words in if nobody else
5 does.

6 CHAIRMAN SOULES: Okay. Excuse
7 me, let me confer.

8 MR. SUSMAN: He has his
9 substitute for Rule 6.

10 PROFESSOR ALBRIGHT: Part (6).

11 MR. SUSMAN: And instead of
12 writing your interlineation, just substitute
13 his. Instead of writing your interlineations
14 on the Committee's draft --

15 PROFESSOR ALBRIGHT: See,
16 they're exactly the same. The last sentences
17 that you're changing are exactly the same, so
18 let's just make your amendment to his --

19 CHAIRMAN SOULES: -- to his
20 16?

21 PROFESSOR ALBRIGHT: Right.

22 CHAIRMAN SOULES: Okay.
23 Anything else on Rule 16? Is anybody opposed
24 to Rule 16 as now constituted on the record?
25 No opposition, so that's unanimous. Rule 16

1 or Rule 18, we've used it both ways, but we're
2 talking about the Signing, Certification, and
3 Use of Depositions Rule, and that's now
4 passed.

5 And we go now to Rule 21, is that right,
6 Compelling Production from a Nonparty?

7 MR. HAMILTON: Is there no
8 Rule 19 or 20?

9 MR. HERRING: No.

10 PROFESSOR ALBRIGHT: Rules 19
11 and 20 got combined at Judge Brister's
12 suggestion, I might add.

13 MR. SUSMAN: Let me just ask
14 this, Judge. I hate to go back to Rule 16,
15 but there is in Rule 16 of the Subcommittee's
16 draft a reference to depositions taken in
17 different proceedings. There are same
18 proceedings and different proceedings. Now,
19 we've taken out any reference to different
20 proceedings, but we still mean that they can
21 be used the way the Rules of Civil Evidence
22 say they can be used, right?

23 HON. SCOTT A. BRISTER: Sure.

24 MR. SUSMAN: Okay. I'm just
25 wondering if maybe we should say that. I

1 don't know why we had that in there in the
2 first place.

3 HON. SCOTT A. BRISTER: Because
4 it's been in there for years probably.

5 PROFESSOR ALBRIGHT: Yeah. The
6 current rule addresses same proceedings and
7 different proceedings. They're also addressed
8 in the Rules of Evidence. What Judge Brister
9 did was delete all of the situations that were
10 dealt with under the Rules of Evidence, and
11 what we have done is we have kept the same
12 proceeding, I'm not sure why, but we have also
13 addressed the situation of late joinder, which
14 is not addressed in the Rules of Evidence.

15 MR. SUSMAN: My only question
16 is, is someone going to say since we have
17 dropped out 207(2) in its entirety, which is a
18 provision that says "Use of Deposition
19 Transcripts Taken in Different Proceedings,"
20 okay, that that was an intentional act on our
21 part to say that essentially it can't be done
22 any more, when in fact we aren't doing that.
23 But I'm just concerned that somebody is going
24 to make that argument, because it's no longer
25 referenced at all.

1 MR. PEACOCK: Why not just add
2 that last sentence, "Depositions taken in
3 different proceedings may be used subject to
4 the provisions in" --

5 MR. SUSMAN: Would you accept
6 that, Scott --

7 HON. SCOTT A. BRISTER: That's
8 fine, sure.

9 MR. SUSMAN: -- that we add
10 that one sentence that says, "Depositions
11 taken in different proceedings may be used
12 subject to the provisions in the Texas Rules
13 of Evidence?"

14 HON. SCOTT A. BRISTER: As long
15 as it doesn't happen again, that's fine.

16 CHAIRMAN SOULES: And then what
17 depositions include, that's coming out, right?

18 MR. SUSMAN: Yes.

19 CHAIRMAN SOULES: Okay. Is
20 everybody in agreement? Okay. Rule 16 or 18,
21 or anyway, the rule called Signing,
22 Certification, and Use of Depositions is
23 unanimously approved without dissent.

24 Now we go to Rule 21.

25 HON. SCOTT A. BRISTER: My

1 suggestion on this was to combine it, since 24
2 has to do with subpoenas and since the only
3 way you get production from a nonparty is to
4 subpoena them. It made more sense to me.
5 Rather than saying when you could do it, what
6 the notice said and where the time and place
7 was here and in 24, let's just do it in one
8 place.

9 If you look at the first part of 24, you
10 do have to -- this might be the best time to
11 look at the first -- on Tab 24, in my notes on
12 paragraphs 1, 3 and 4, I indicate all of the
13 parts that are identical to previous rules,
14 and it's just repeating the same thing, it
15 seems to me.

16 PROFESSOR ALBRIGHT: Scott, can
17 I tell you the reason why that's in there?

18 HON. SCOTT A. BRISTER: Sure.

19 PROFESSOR ALBRIGHT: The reason
20 why there is a Rule 21 is because we need a
21 mechanism to make sure that the other party
22 has notice that there was a subpoena going
23 out; because when you file this notice
24 compelling production, it requires service on
25 all of the parties. It may be that we have

1 now changed the subpoena rule to require a
2 copy of the subpoena to go to everybody. But
3 traditionally copies of the subpoenas do not
4 have to be served on all of the parties. And
5 there was a concern that this subpoena rule
6 concerned both trial subpoenas and then
7 discovery subpoenas. And I think people did
8 not want to require service of trial subpoenas
9 on all parties, because you want to be able to
10 not disclose who you were subpoenaing for
11 trial as a strategy decision, so that is the
12 history behind Rule 21.

13 CHAIRMAN SOULES: Why does this
14 have to start with a subpoena? That's not the
15 way the old rule worked.

16 HON. SCOTT A. BRISTER: How do
17 you get documents from a third party, from
18 somebody who is not in litigation?

19 CHAIRMAN SOULES: First you
20 have to probably serve a citation that carries
21 a motion to produce directed to a nonparty.

22 PROFESSOR ALBRIGHT: No. We
23 have changed that.

24 CHAIRMAN SOULES: I understand
25 you have, but -- and then there's a hearing.

1 PROFESSOR ALBRIGHT: Under
2 current law.

3 CHAIRMAN SOULES: And then the
4 court can order the party to do it. And it's
5 not "Gather up all your documents and bring
6 them to the courthouse," which is what a
7 subpoena says, or "Gather up all your
8 documents and bring them over to my office."
9 It's "Come on down to the court and talk to
10 the judge about this notice because I want
11 your documents," which to me is simpler than
12 saying to somebody, "Gather up all this stuff
13 and bring it to me," which I think is a
14 subpoena.

15 PROFESSOR ALBRIGHT: Okay. We
16 wrote this, the subpoena rule, to be like the
17 federal rule that allows parties to subpoena
18 documents from nonparties without a motion and
19 without a deposition. There was some
20 discussion at one of the big meetings to try
21 to draft the rule that way. I know some
22 people are of the opinion that we should not
23 have that procedure, but we drafted the rule
24 at the request of the Committee.

25 I don't think we have ever really

1 discussed and voted as to whether that even
2 was a good idea or not, but there were several
3 people that suggested that we might draft it
4 and see what we got.

5 CHAIRMAN SOULES: Okay. I see
6 what you're proposing, which is we just
7 subpoena without ever having a court order.

8 HON. SCOTT A. BRISTER: You get
9 a subpoena, and then what I proposed was you
10 to have subpoena them and then the other
11 party, the nonparty, does exactly what a party
12 does when they get -- in other words, when you
13 say -- if you serve a notice of production on
14 a party, it's treated the same as a subpoena.

15 And so what I'm saying is why not just
16 say then -- and if you get a subpoena and
17 you're a nonparty, you act the same way as if
18 you got subpoenaed and you were a party. In
19 other words, you do withholding statements,
20 et cetera, which is what I understand the
21 Subcommittee's plan was anyway.

22 PROFESSOR ALBRIGHT: So include
23 it in the request for production of documents?

24 HON. SCOTT A. BRISTER: Yes.
25 What I was doing on 24 was referencing

1 everything. Subpoenas, if you're a nonparty,
2 you just follow the same rules in 14 or 11 for
3 production of parties or depositions or
4 whatever it happens to be. You get your
5 30 days, you do a withholding statement, and
6 just, you know, you file your objections; you
7 don't produce privileged stuff; you don't have
8 to go to the court for a hearing if the other
9 side is satisfied with what you actually
10 produce subject to those objections,
11 et cetera.

12 PROFESSOR ALBRIGHT: I think
13 the way the subpoena rule is written now, it
14 does not require nonparties to do as much in
15 response as it requires parties. It makes for
16 a more cumbersome procedure, but everybody
17 should read Rule 24 and compare it with what
18 we require parties to do in Rule 7 and decide
19 whether it's okay to make nonparties do what
20 parties do in Rule 7.

21 HON. SCOTT A. BRISTER: The two
22 definitely operate together.

23 CHAIRMAN SOULES: They should
24 be combined, because we even have the
25 protection provisions as to nonparties over in

1 24.

2 PROFESSOR ALBRIGHT: Because I
3 think that's a policy decision. Are you
4 saying Rule 21 and 24 should be combined?

5 CHAIRMAN SOULES: Right.
6 That's right. That's been suggested.

7 PROFESSOR ALBRIGHT: Well, not
8 necessarily, because these subpoenas are
9 concerning trial subpoenas, deposition
10 subpoenas and compelling production subpoenas,
11 so the subpoena is broader than Rule 21. We
12 have a vehicle to notice a deposition. We
13 have a vehicle now for compelling production
14 of a nonparty; and subpoenaing for a trial,
15 you just bring them to the courthouse. So
16 Rule 21 is strictly a vehicle to file and give
17 notice to all the other parties, and then the
18 subpoena is then issued to the nonparty. All
19 the nonparty has to look at is Rule 24 to find
20 out what that nonparty has to do in response
21 to that subpoena.

22 MR. SUSMAN: What I suggest we
23 do is go through Rule 21 and see what in it we
24 like and don't like.

25 PROFESSOR ALBRIGHT: I think it

1 makes more sense to go through Rule 24.

2 HON. SCOTT A. BRISTER: I agree
3 with Alex.

4 PROFESSOR ALBRIGHT: Because 21
5 is just a vehicle that we can deal with
6 depending upon what we do with 24.

7 CHAIRMAN SOULES: Okay.

8 MR. SUSMAN: Then let's go
9 through 24 first.

10 CHAIRMAN SOULES: Rule 24,
11 Subpoena, and so forth. Okay. Step us
12 through this, Steve. This is the first time
13 we've looked at this.

14 MR. SUSMAN: Okay. Alex, why
15 don't you do section 1 from the red-line
16 version, "Subpoena."

17 PROFESSOR ALBRIGHT: Okay. We
18 have the form and the issuance of the
19 subpoena. The subpoena -- what the subpoena
20 looks like is kind of -- what this rule is is
21 kind of a combination of the Texas rule and
22 the federal rule. The subpoena commands the
23 person to whom it is directed to attend and
24 give testimony for a deposition, hearing or
25 trial, so this would be a deposition subpoena

1 or a trial subpoena or a hearing subpoena, or
2 simply to produce and permit inspection and
3 copying of designated documents or things. So
4 the difference between this rule and the
5 current rule is that this allows you to
6 subpoena a nonparty to simply produce
7 documents just like parties do without taking
8 their deposition.

9 MR. SUSMAN: In other words,
10 this is very important. I think this is a
11 very important change we ought to make. I got
12 in a fight today with an attorney that --
13 we're trying to get some documents from a
14 third party, and the other side is objecting
15 that there's not enough notice to attend the
16 deposition. Well, I don't want a deposition
17 from a third party; I just want his documents,
18 so it's a big hassle. Go ahead.

19 PROFESSOR ALBRIGHT: Okay.
20 Then (b) and (c) are simply administrative,
21 who serves it, et cetera.

22 "Service." Here we have David Perry's
23 suggested alternative service provision. The
24 way the Subcommittee had it, we had a sheriff
25 or constable or any person not a party and is

1 not less than 18 years of age may serve a
2 subpoena. This is current rule. And David
3 Perry's suggestion is that when the witness is
4 a party, that service be upon the party's
5 attorney instead of upon the witness.

6 And I'm going to let -- is Scott McCown
7 still here?

8 HON. F. SCOTT McCOWN: Yeah.

9 PROFESSOR ALBRIGHT: Scott was
10 the one that was concerned about that because
11 of the power of the court issue, I believe.

12 HON. F. SCOTT McCOWN: Well,
13 the remedy if somebody doesn't comply with a
14 subpoena is attachment, and to come into court
15 and ask the judge to send out the constable to
16 grab somebody is a lot to ask the judge to
17 do. And so I think a subpoena ought to be
18 served on the party that you're commanding and
19 the party that you would attach.

20 Serving the subpoena on the lawyer
21 leaves -- you all wouldn't believe some of
22 these lawyers that we see, and there can be a
23 big slip between the lawyer and the client.
24 So what you might wind up doing if you change
25 the rule is undermining your remedy, because

1 judges are going to be hesitant to attach if
2 there wasn't personal service of the subpoena.

3 CHAIRMAN SOULES: When you've
4 got a document request and the notice is duces
5 tecum to the parties anyway, it can be served
6 on the party's lawyer.

7 PROFESSOR ALBRIGHT: These
8 would be basically trial subpoenas, trials and
9 hearings. If I want you to come to -- if I
10 wanted your client to come to trial, I say,
11 "Here is a subpoena for your client."

12 HON. F. SCOTT McCOWN: This is
13 different. This is if they don't come, then
14 you're sending out the constable to get them.
15 And as a trial judge, if I'm going to do that,
16 I'm going to want to know that the command for
17 them to come was served on them personally.

18 CHAIRMAN SOULES: I don't want
19 to be a witness on whether or not I told my
20 client to be there. That's absurd. I think
21 that's your job to get him served.

22 Joe Latting.

23 MR. LATTING: As a trial
24 lawyer, I don't think we ought to impose a
25 requirement to go have somebody found and

1 served. I think that the whole notion of
2 dealing with the lawyer on the other side is
3 that you can serve the witness -- I mean,
4 serve a party by handing papers to his
5 lawyer. That's the way we do everything
6 else.

7 And don't we have enough troubles that we
8 don't have to go find somebody when we're
9 dealing with his lawyer every day? There are
10 a lot of times when I want people to come to
11 court and I just give his lawyer -- really
12 what I do is say, "Are you going to have him
13 there?" And if they say yes, they always
14 come. But I just don't see any sense in
15 having to hunt somebody down if he's got an
16 attorney in court.

17 CHAIRMAN SOULES: Steve Susman.

18 MR. SUSMAN: I think Joe is
19 right. I mean, in 90 percent of the cases, if
20 you tell a lawyer, serve the lawyer a
21 subpoena, he's going to bring his client. I
22 mean, you're not going to have a problem.
23 You're not going to have to send someone out
24 to attach him or arrest him.

25 In the case where he doesn't show, it

1 seems to me the trial judge can look at
2 whether he was personally served or served
3 through his lawyer before he imposes any kind
4 of sanction or arrest or attachment, so why
5 make it cumbersome? Why should someone have
6 to actually go serve a corporate client of
7 mine when you can just let me have it.

8 CHAIRMAN SOULES: Well,
9 Orsinger is not here, but in a family law
10 context, sometimes my client ain't coming and
11 I can't find him. But when I'm served, I'm
12 served, and I don't think that I ought to get
13 in the middle of that. I think that's just --
14 I've still got to go protect his rights if
15 he's not there because I have a fiduciary duty
16 and some other responsibilities to him and to
17 the court to be there if I've got notice of a
18 hearing, but I may not have a clue where the
19 person is if he's hiding from me like he's
20 hiding from everybody else.

21 MR. LATTING: But Luke, you are
22 in the middle of that. You're in the middle
23 of that when I hand you that document. And if
24 he doesn't show up, as Steve says, probably if
25 your client doesn't come, probably Scott

1 McCown is not going to go have him arrested,
2 but Scott McCown can say, "Well, Mr. Soules,
3 did you get his subpoena?"

4 "Yeah. But he's not here."

5 We can deal with that. I just don't want
6 to stack more requirements on us there.

7 MR. SUSMAN: Unnecessarily.

8 MR. LATTING: And if I want to,
9 I can serve him. This doesn't prevent me from
10 serving him.

11 CHAIRMAN SOULES: Now, this is
12 a change.

13 HON. F. SCOTT McCOWN: That's
14 right, this is a change. Right now, you have
15 to work it out with the other side or subpoena
16 him. Now, if you can work it out now, you can
17 work it out under this rule. But what you're
18 saying, and I don't -- maybe Judge Brister and
19 Judge Peeples feel differently, and I'd like
20 to hear them say it, but it is a big deal for
21 me to sign a writ of attachment for the
22 constable to go out and forcibly bring
23 somebody to court, which is the remedy for a
24 failure to respond to a subpoena. And if I'm
25 going to do that, I want to know that they

1 were summoned personally.

2 PROFESSOR ALBRIGHT: And then
3 also this would deal with parties or people
4 that are really outside your subpoena range.
5 If you're subpoenaing a party or someone that
6 is in the control of a party, they may be in
7 another state, but we're providing a mechanism
8 for them to be subpoenaed, and somehow then
9 there's a court order bringing them to you in
10 Judge McCown's court.

11 HON. F. SCOTT McCOWN: And let
12 me add one other thing. This is kind of the
13 difference on what part of the elephant you're
14 working at. While you're all working up at
15 the top of the elephant, I'm down there at the
16 back end of the elephant. And for a lot of
17 lawyers and a lot of clients, the "let's work
18 it out" doesn't happen. The lawyer loses
19 touch with his client because the lawyer
20 screwed up or the lawyer loses touch with his
21 client because the client screwed up.

22 MR. SUSMAN: I just got -- she
23 was just telling me what the consequences of
24 this are. Perry's idea is ridiculous. The
25 consequences are for trial, okay, where I

1 represent General Electric or IBM as a
2 defendant in a trial, okay, the other side
3 can, by serving a subpoena on me, have me
4 bring every single executive to Houston,
5 Texas; where now I can make a choice of
6 whether I want to have them hang out at their
7 home office because they're outside of the
8 subpoena range. This would be a big change.
9 I take it back. It would be -- I agree.

10 PROFESSOR ALBRIGHT: Can we
11 vote up or down on that proposal?

12 CHAIRMAN SOULES: All right.
13 Is there any motion to adopt David Perry's
14 suggestion? Okay. There's no motion, so
15 that's --

16 MR. SUSMAN: -- out.

17 CHAIRMAN SOULES: -- out.

18 CHAIRMAN SOULES: If David
19 Perry makes it, does anybody want to second
20 it? Okay. There are no seconds.

21 PROFESSOR ALBRIGHT: Okay.
22 Then we have part 3.

23 MR. SUSMAN: Wait a minute,
24 what about (b), (c) and (d)?

25 PROFESSOR ALBRIGHT: Well, (b),

1 (c) and (d) are just how do you serve them,
2 how do you prove up service. These are just
3 the technicalities of serving subpoenas.

4 MR. SUSMAN: Okay. 3.

5 PROFESSOR ALBRIGHT: Okay.

6 Well, then I guess (d) is significant. (d) is
7 the reason we have that Rule 21, because a
8 subpoena for appearance at a deposition or for
9 the production of documents or things other
10 than at a trial or a hearing shall be issued
11 only after service of a notice of deposition,
12 or after service of a notice to compel
13 production. So this is what -- you have to
14 have that vehicle where you've requested --
15 this is on 2(d) -- where you've requested this
16 activity to happen, because the subpoena only
17 gets issued after proof that this has been
18 filed and served.

19 So that means that all of the parties
20 that are in the lawsuit have notice that
21 someone is being subpoenaed either for a
22 deposition or subpoenaed to compel production,
23 so you know what's going on. You can't just
24 issue a subpoena to get production of
25 documents and not let everybody else know

1 what's happening.

2 HON. SCOTT A. BRISTER: Well,
3 see, I think -- well, go ahead.

4 PROFESSOR ALBRIGHT: Okay. 3.

5 CHAIRMAN SOULES: Is that
6 nonparties only or parties?

7 PROFESSOR ALBRIGHT: No, this
8 is -- well, for parties you don't need a
9 subpoena.

10 MR. SUSMAN: It's just a
11 notice.

12 CHAIRMAN SOULES: For trial?

13 PROFESSOR ALBRIGHT: No. No.
14 For trial, you can get a subpoena issued for
15 trial and not let anybody know that you're
16 doing that. You can go down to the clerk's
17 office, get a trial subpoena, get it served.
18 Only when it's returned does it appear in the
19 file of the clerk.

20 MR. SUSMAN: For either
21 appearance or documents?

22 PROFESSOR ALBRIGHT: Right, for
23 appearing or documents at the trial or a
24 hearing. We decided that's okay, because
25 that's your trial strategy. If you're going

1 to subpoena somebody, that's your trial
2 strategy. It may be you had to identify them,
3 you know, as a trial witness someplace else.

4 CHAIRMAN SOULES: But this is
5 just discovery.

6 PROFESSOR ALBRIGHT: Right.
7 But for discovery, if you're going to bother a
8 nonparty to get them to produce documents,
9 everybody should know that you're bothering
10 them so that they can get the documents that
11 they want from that party; and also they can
12 make objections to the request. They may have
13 some valid objections to your request. Okay.
14 So the only people you have to subpoena are
15 nonparties, and that's in the other rule.

16 MR. SUSMAN: Right.

17 PROFESSOR ALBRIGHT: Okay. So
18 part 3 is Protection of Nonparties Subject to
19 Subpoenas. This kind of comes from the
20 federal rule. What the federal rule does is
21 it says we want one place where if a nonparty,
22 somebody from out of the blue, is served with
23 a subpoena, they can look to one rule to find
24 out what they have to do to comply with that
25 subpoena.

1 The Texas rules right now do not have
2 such a thing, so what this does is it says,
3 "Okay. I'm a nonparty, I've been served with
4 a subpoena. I know to look at Rule 24."

5 And Rule 24(3) tells me what I have to
6 do. Okay. Part (a), this is from the federal
7 rule, says, "A party responsible for the
8 issuance and service of a subpoena shall take
9 reasonable steps to avoid imposing undue
10 burden or expense upon a nonparty subject to
11 that subpoena."

12 Then what the rest of the rule does, and
13 I have not read it recently, but it provides a
14 procedure whereby nonparties who have been
15 served with subpoenas have to respond to
16 subpoenas and make their objections and make
17 withholding statements, et cetera. And I
18 think we maybe just ought to take a minute and
19 read it, because I can't remember exactly how
20 it came out on the top of my head.

21 Okay. A nonparty commanded to produce
22 and permit inspection and copying of
23 designated documents and things, within 10
24 days after service or before the time
25 specified for compliance if such time is less

1 than 10 days after service, may serve upon the
2 party at whose instance the witness is
3 summoned written objections to inspection or
4 copying of any or all of the designated
5 materials. If the objection is made, the
6 party at whose instance the witness was
7 summoned shall not be entitled to inspect and
8 copy the materials except pursuant to court
9 order. And after the objection is made, the
10 party serving the subpoena may, upon notice to
11 the person commanded to produce, move for an
12 order to compel the production.

13 So this is different from the way you
14 would treat a party. A party has an
15 obligation to figure out what part of the
16 request they can comply with, and comply with
17 that request. What this does is, if a
18 nonparty objects to a request, the nonparty
19 then doesn't have to do anything else unless
20 the party gets a court order commanding the
21 production. If a nonparty objects, it
22 automatically goes to the court for the court
23 to decide whether there has to be production
24 and the extent of the production.

25 HON. SCOTT A. BRISTER: And

1 it's different from parties because it can
2 be -- they may have to respond under this
3 version real quick. They don't get the
4 30 days that a party gets.

5 CHAIRMAN SOULES: Why not?

6 HON. SCOTT A. BRISTER: That's
7 my question.

8 MR. SUSMAN: Because, in the
9 first place, that's the way it has operated
10 under current law. And a lot of times third
11 parties do not object to giving over those
12 documents quickly. I mean, they don't.

13 I think that when a party, when you are
14 being sued in a lawsuit or you're the
15 plaintiff who brings a lawsuit, there's much
16 more attorney involvement to find out what the
17 contentions are and thinking about where the
18 documents are than there is when you're a
19 third party. If your law firm gets subpoenaed
20 for some records as a third party or
21 something, there's not so much attention paid
22 to it and you frequently don't hire a lawyer.

23 HON. F. SCOTT McCOWN: When you
24 think about the kinds of records, you realize
25 by and large you don't need 30 days. The

1 police accident reports that are day in and
2 day out subpoenaed from the city; doctors
3 records that are day in and day out subpoenaed
4 by the records service. The 30-day
5 requirement would slow down the world too
6 much, and so for nonparties you've got a
7 10-day requirement or before time of
8 compliance they have to object, and most of
9 them won't.

10 MR. LATTING: Why are we
11 changing the subpoena rules from what they are
12 now?

13 PROFESSOR ALBRIGHT: With the
14 subpoena rules now there are several different
15 subpoena rules; and one, they don't allow for
16 this subpoena without a deposition.

17 MR. LATTING: Is that a
18 problem?

19 PROFESSOR ALBRIGHT:
20 Apparently. We were asked to draft one so you
21 didn't have to have a deposition, but I don't
22 know if it's a problem.

23 HON. F. SCOTT McCOWN: It's
24 designed to reduce costs. There are a lot of
25 records that people want to get, but they

1 don't want to have a take a deposition to get
2 the records, and this will save costs.

3 PROFESSOR ALBRIGHT: And
4 another thing this does is provide one rule
5 that nonparties who are served with subpoenas
6 can go to to figure out what they have to do
7 to respond to it.

8 Part (c). Okay. Part (b) was the
9 objection, and part (c) is if the nonparty,
10 instead of making an objection and then
11 waiting to see if the party that served the
12 subpoena gets that objection heard, the
13 nonparty can file a motion for protective
14 order either in the court where the action is
15 pending or in a district court in the county
16 where the subpoena was served, so they can
17 file -- they can take the initiative and file
18 a motion for protective order in their own
19 county to determine the scope of the
20 production under this subpoena.

21 Part (d) is if the subpoena directs them
22 to come to trial or a hearing less than
23 10 days after the date of service, if they
24 don't have 10 days, then you just hear these
25 objections at the hearing or the trial.

1 HON. F. SCOTT McCOWN: Can I
2 explain (e), Alex?

3 PROFESSOR ALBRIGHT: Yes.

4 HON. F. SCOTT McCOWN: Steve
5 Yelenosky originally raised the red-lined (e).
6 If you look at the red-lined (e), you will
7 remember that came up early on; which is, you
8 are a hospital and you were served with a
9 subpoena for confidential records that belong
10 to a third party. The third party doesn't
11 know about that subpoena, and so we developed
12 (e), which talks about the specific Rules of
13 Civil Evidence 509 or 510.

14 We realized that really that's just
15 illustrative of a broader problem, and so we
16 developed an (e) that addresses the problem;
17 and that is, you are a records custodian and
18 you were served with a subpoena for somebody
19 else's records that you hold. But you are
20 under a duty imposed by law either in a rule,
21 regulation or statute to keep those
22 confidential. You're confused. You're told
23 under the law that they have to be
24 confidential. You're also given a subpoena
25 told by the court to produce them. They're

1 not your records, so you really don't care
2 much. And so what (e) says is that when you
3 serve that kind of a subpoena on a records
4 custodian, you also have to serve the nonparty
5 whose records they belong to.

6 If you don't do that, then the records
7 custodian has to notify the nonparty, so that
8 the nonparty can come into court and say,
9 "These records that are confidential by law
10 ought to stay confidential because you can't
11 compel their production."

12 So that would be mental health records,
13 drug treatment records, certain banking
14 records, and we felt like we couldn't catalog
15 all the endless kinds of statutory
16 confidentiality provisions that there were,
17 and so what we developed instead was a
18 procedure.

19 If you know they're confidential, you've
20 got to serve the nonparty. If you don't know
21 but the records custodian knows, then the
22 records custodian has to alert the nonparty
23 giving the nonparty a certain amount of time
24 to get in.

25 MR. LATTING: Just a point of

1 order here. This is already the law under the
2 Bank Privacy Act, and I don't know if anybody
3 has looked to see if this is consistent with
4 the Bank Privacy Act itself. It's in the
5 Banking Code.

6 HON. SCOTT A. BRISTER: Funny
7 should you ask. That's my item there on
8 paragraph 3(e). It mostly is consistent,
9 except that the Bank Privacy Act requires
10 10 days' previous notice.

11 MR. LATTING: That's right.

12 HON. SCOTT A. BRISTER: And
13 there's no whatever limitation; this does not
14 require that you give 10 days' notice. You
15 could subpoena and get them in less time.

16 MR. LATTING: So it doesn't
17 seem to me we ought to pass a rule that's
18 contra to the Bank Privacy Act.

19 HON. F. SCOTT McCOWN: Well,
20 let me argue it just the other way around.

21 MR. LATTING: I mean, I don't
22 care, but I don't think -- what's the court
23 going to do when the Act says you have to have
24 10 days' notice?

25 CHAIRMAN SOULES: You have to

1 provide both, this and the Bank Privacy Act
2 and whatever other stuff, the federal statute,
3 the DOJ rules. I mean, this doesn't get us
4 through the DOJ and the Bank Privacy Act.

5 HON. F. SCOTT McCOWN: Right.

6 CHAIRMAN SOULES: It only gets
7 us to --

8 HON. F. SCOTT McCOWN: It sets
9 up a procedure, though, where you alert the
10 nonparty whose records somebody is trying to
11 get. And what often happens is the nonparty
12 doesn't know that these confidential records
13 of his have been subpoenaed. The people that
14 are getting the subpoena may not be very
15 motivated to protect the confidentiality, or
16 may be confused by the fact that, yeah, it's
17 confidential, but here I've got a court
18 summons to turn it over. And so we have a
19 procedure that protects them. It obviously
20 doesn't override any provisions in the law,
21 and you can come into court and assert those
22 provisions.

23 MR. LATTING: As it's written,
24 does it protect the rights of a party whose
25 records are subpoenaed from a third party or

1 nonparty? That is, if you ask a hospital to
2 produce the records of some party, do you have
3 to notify the party?

4 MR. SUSMAN: The party will get
5 notice.

6 PROFESSOR ALBRIGHT: The party
7 will get notice of it.

8 MR. LATTING: In all cases?

9 MR. SUSMAN: In all cases.

10 CHAIRMAN SOULES: Okay. Steve
11 Yelenosky.

12 MR. YELENOSKY: Before you get
13 to that, I mean, as Scott mentioned, this came
14 about because of my concern. Now I'm wearing
15 my other hat where I am now at Advocacy, Inc.
16 with people with disabilities. And one of our
17 lawyers has written a letter about this a
18 couple of years ago. And there is one
19 drafting comment I should have written to you,
20 but I'll bring that up in a minute.

21 But overall on this, first of all, the
22 custodian isn't confused. Well, they may be
23 confused, as Judge McCown suggests, but if
24 they get a subpoena, the confidentiality rules
25 say you don't release this stuff unless by

1 court order. Well, a subpoena is a court
2 order, so they're not so confused and they
3 turn it over. The custodians at MHMR aren't
4 going to wait a second before they turn over
5 somebody's mental health records.

6 And that's what's happened in whistle
7 blower cases, for example, where an employee
8 there says, "I was fired because I reported
9 abuse of a patient," and the plaintiff's
10 attorney gets the mental health records of
11 that patient without the patient ever
12 knowing. So it is important to have the
13 procedure that he's saying that people get
14 notice.

15 Secondly, as far as overlap, you know, we
16 have the Bank Privacy Act apparently, which
17 covers that. We have a whole rule in here
18 that talks about what you've got to do to walk
19 on somebody's front lawn, but we don't have
20 anything in here that protects a nonparty's
21 medical records, in particular mental health
22 records, so I don't know. I mean, if it were
23 addressed in a statute perhaps that would
24 solve the problem, but I think we still need
25 the procedure.

1 The drafting point that I'm concerned
2 about here is that it says, "If the party
3 serving the subpoena does not serve it in
4 accordance with this rule," and then the
5 custodian goes on, and I'm not sure how the
6 custodian knows whether or not the nonparty
7 has been served.

8 It would have to be -- even if you put it
9 on the subpoena itself that this is being
10 served on the other party, the custodian also
11 wouldn't know whether in fact that service was
12 accomplished, and therefore might release the
13 records without any extension of time for the
14 person to respond. So I have some thoughts
15 about that, but that's my drafting problem.

16 HON. F. SCOTT McCOWN: Well,
17 what is your drafting solution?

18 MR. YELENOSKY: Well, and I
19 don't know if this will work, but within this
20 context, since there is a problem that -- I
21 mean, first you could put on the subpoena
22 certifying that it's being served on the
23 nonparty, but that wouldn't solve the problem
24 of whether service was accomplished. And the
25 only way to solve that problem that I can see

1 would be if before you serve the subpoena on
2 the custodian that you certify that notice has
3 been served on the nonparty, if you want to
4 get into that.

5 MR. MARKS: Well, I have a
6 question about the power that you have over a
7 nonparty anyway. In other words, can you tell
8 a nonparty who is not in court, who is not a
9 party to the lawsuit, that he has to do
10 something?

11 HON. SCOTT A. BRISTER: With a
12 subpoena you can.

13 MR. MARKS: Well, I mean, you
14 can subpoena a party, but you can't -- I mean,
15 can you require him to give notice to somebody
16 else under the rule, a nonparty?

17 MR. YELENOSKY: Well, you can
18 certainly create a situation where the
19 custodian at MHMR would be concerned about his
20 or her liability if they didn't, but that's
21 true. I think that's the only way in which it
22 would be enforced.

23 The other concern that's not really
24 addressed here, and I'm not -- I think this
25 has to be addressed through MHMR, is when you

1 have individuals who are mentally ill and
2 notice to them isn't going to be effective
3 because they're not competent. The way in
4 which I think we might -- some of them are not
5 competent; obviously, a lot of them are. But
6 the way in which that might have to be
7 accomplished is through an agreement with MHMR
8 that they're going to copy the individual's
9 documents so that somebody can then contact an
10 attorney, somebody who is competent can
11 contact an attorney. But yeah, I mean, it's
12 true. I don't know how you force the
13 custodian other than through fear of
14 liability.

15 CHAIRMAN SOULES: Doris Lange.

16 MS. LANGE: You also have
17 juvenile records going through the court.
18 Both mentally ill and juvenile records both go
19 through our court.

20 MR. YELENOSKY: Well, as far
21 as -- Scott, what do you think?

22 HON. F. SCOTT McCOWN: I think
23 you raise a real good problem, and I think
24 John Marks raises an important issue too. And
25 I think they both can be solved by saying in

1 the third line, instead of saying "also," make
2 that "first." Change "also" to "first."

3 "When a party serves a subpoena upon any
4 custodian of records concerning a nonparty
5 that are protected from disclosure by a rule,
6 regulation or statute, the party serving the
7 subpoena shall first serve a copy of the
8 subpoena upon the nonparty to whom the records
9 pertain, or if the nonparty is represented by
10 an attorney, upon the attorney. The nonparty
11 may make any objection or motion for
12 protective order in the same manner as the
13 records custodian served with the subpoena."
14 And then just delete that last sentence and
15 not require the nonparty to do anything.
16 Because if he is served, then he knows that
17 you have first served a copy upon the
18 nonparty.

19 MR. YELENOSKY: That may work.

20 CHAIRMAN SOULES: What if you
21 can't find the nonparty but you can find the
22 custodian?

23 HON. F. SCOTT McCOWN: Then I
24 think you have to get a court order.

25 CHAIRMAN SOULES: Steve

1 Yelenosky.

2 MR. YELENOSKY: Well, the only
3 thing I can think of here, which I think
4 pertains to what you said initially, is the
5 custodian may know, but the plaintiff or the
6 requesting party or his attorney may not know
7 that it's protected by confidentiality. I'm
8 not really concerned about that because what
9 I'm concerned about is medical records.
10 Everybody knows they're protected and that
11 they better serve it first under your version
12 on that person.

13 In a situation, though, where the
14 requesting party didn't know and the custodian
15 just gets a subpoena, the requesting party
16 didn't know that it was confidential and the
17 custodian will assume by virtue of the fact
18 that he's got a subpoena that it's already
19 been served on the party who has the
20 confidentiality interest. But I can live with
21 that because everybody knows that medical
22 records are confidential and they're going to
23 have to serve the individual first.

24 CHAIRMAN SOULES: So you can
25 live with what?

1 MR. YELENOSKY: I can live with
2 Scott's proposal.

3 HON. F. SCOTT McCOWN: And let
4 me add one alteration to take care of Luke's
5 point, because I think it's a good one. At
6 the end of that first sentence, "shall first
7 serve a copy of the subpoena upon the nonparty
8 to whom the records pertain, or if the
9 nonparty is represented by an attorney, upon
10 the attorney, unless excused by court order,"
11 because there may be instances where you just
12 can't find the nonparty.

13 HON. SCOTT A. BRISTER: Then I
14 think it's especially important that we add in
15 there somewhere that this doesn't -- to the
16 extent this conflicts with any other statute,
17 it's overridden, because unless everybody has
18 reviewed every one of these statutes and
19 regulations, et cetera, we're going to end up
20 passing a rule that's contrary to something
21 that the legislature has done, which is not a
22 good idea.

23 HON. F. SCOTT McCOWN: But I
24 think the way it's rewritten now, that's
25 impossible, because all we're saying is that

1 before you serve the subpoena you've got to
2 first serve the nonparty. We're not saying
3 anything about compliance or deadlines.

4 HON. SCOTT A. BRISTER: But you
5 just said "unless the court orders otherwise."

6 MR. YELENOSKY: Well, that part
7 I disagree with, because I think the routine
8 is going to be just to go into court and say,
9 "We need these medical records," and the
10 judge is just going to sign it. So if you're
11 really in a situation where the person can't
12 be found, you can figure out a way to get the
13 court -- and it's implicit that the court will
14 have some authority, but it's going to be a
15 little harder, I think.

16 But as far as your point -- I mean, I
17 don't think it will be in conflict with any
18 other law. It will only be additive that you
19 first require the subpoena to be served.

20 HON. SCOTT A. BRISTER: How do
21 you know? I mean, there's got to be hundreds
22 of these. I'm not so confident what we just
23 agreed to doesn't conflict.

24 MR. YELENOSKY: Well, if you
25 don't know, if you don't know that there's a

1 law requiring this, then you're not going to
2 serve the person, right?

3 HON. SCOTT A. BRISTER: And
4 then you're going to be in violation of the
5 Bank Privacy Act, which says before you can
6 get them, period, you have to serve them.

7 MR. YELENOSKY: Right. Well,
8 if you follow Scott's latest wording on it,
9 you're going to, if you know that there's a
10 Privacy Act, you're going to serve it on them,
11 right? I mean, you know it's protected by the
12 Privacy Act, therefore you're going to serve
13 them before you serve the custodian.

14 HON. SCOTT A. BRISTER: And if
15 you don't know, you still have to serve them.

16 MR. YELENOSKY: Right. Sure
17 you do. But you're absent the knowledge -- I
18 mean, this doesn't -- I don't see how that --
19 if you don't know about the Bank Privacy Act,
20 that's a separate matter, isn't it? I mean,
21 this can't cause you to do anything
22 differently, would it?

23 HON. PAUL HEATH TILL: Why
24 would it not?

25 CHAIRMAN SOULES: Judge Till.

1 HON. PAUL HEATH TILL: If they
2 didn't know, they're going to serve the notice
3 on whoever has the records. They're going to
4 assume that the people who have an interest in
5 privacy have already been notified. They
6 haven't been. Yes, it would definitely have
7 an effect. How could it not have an effect?

8 Furthermore, whoever serves this subpoena
9 or whoever issues the subpoena, they're going
10 to have to explore it to make sure whether
11 this is all right.

12 Would not the party that has the records
13 be in a much better position to know whether
14 there is any privacy or confidentiality in the
15 records?

16 MR. YELENOSKY: They may be,
17 but they're under court order to turn it over,
18 which overrides whatever knowledge they have.

19 HON. PAUL HEATH TILL: They
20 should be able to file with the court a notice
21 that these are under confidentiality and go
22 from there.

23 CHAIRMAN SOULES: One at a
24 time.

25 MR. YELENOSKY: But they won't

1 do that.

2 CHAIRMAN SOULES: Okay.

3 Ms. Lange.

4 MS. LANGE: A subpoena will not
5 cause me to turn over any juvenile or mentally
6 ill records. It's going to take a court order
7 from that court to do that because the statute
8 requires that. And Judge Brister is right.
9 You need to tie it in to any legislation that
10 has passed that causes that to be
11 confidential. A subpoena will not cause me to
12 turn it over, and I'd be concerned about
13 mentally ill hospitals doing it.

14 MR. YELENOSKY: Well, they're
15 doing it.

16 CHAIRMAN SOULES: Okay. Who
17 else wants to speak? Judge McCown and then
18 I'll get to Steve.

19 HON. F. SCOTT McCOWN: Well,
20 maybe we can add a sentence that says this
21 doesn't authorize anything that contravenes
22 the law.

23 But right now our rules allow you to
24 subpoena anything from anybody and they don't
25 say that confidentiality statutes trump. So

1 again, the disadvantage you're pointing out
2 here is not unique. It's a problem in our
3 present rule. It's a problem in this rule.
4 But what we've at least done in this rule is
5 add some procedural safeguards so that the
6 real party in interest, the nonparty whose
7 records they are has some opportunity to
8 inform the court.

9 And in a lot of instances the court may
10 not know. The guy who subpoenaed them may not
11 know. The records custodian may not know.
12 The nonparty may not know. I mean there are
13 lots of these little laws, but at least this
14 way everybody is told, and hopefully one of
15 them is going to know and assert the issue.

16 MR. LATTING: Well, just for
17 clarity then, would it hurt --

18 CHAIRMAN SOULES: Wait a
19 minute, Steve is next. Steve.

20 MR. SUSMAN: My only concern
21 here is, I mean, I don't think we are going to
22 take away some privacy rights that a federal
23 statute or other particular statute like the
24 Bank Privacy Act has given by virtue of
25 anything we put in these rules. I mean, it

1 would trump whatever we have in the rules.

2 My concern is that we may make it more
3 difficult to subpoena records from third party
4 custodians if we require that everyone who has
5 an interest, the real owners of the records,
6 all be served with a subpoena in person
7 first.

8 I can think of things where you would
9 want to subpoena records from a stockbroker
10 that has customers all over the United
11 States. Now, shouldn't we really rely on that
12 stock -- you know, the brokerage house to come
13 in and assert the privacy rights of its
14 customers, or do I first have to serve all of
15 these customers?

16 HON. F. SCOTT McCOWN: Well,
17 but --

18 MR. SUSMAN: I mean, it's
19 usually in the custody of -- I mean --

20 HON. F. SCOTT McCOWN: That's
21 what the "unless excused by court order" can
22 mean. If you've got a good argument for why
23 the nonparty shouldn't be served because it's
24 \$100 worth of records and 2,000 nonparties,
25 you can make that pitch to the court and be

1 excused.

2 And then I would add this language at the
3 end to cover Judge Brister's comment: Nothing
4 in this rule authorizes a court by subpoena or
5 order to compel production of records made
6 confidential by law.

7 CHAIRMAN SOULES: Okay. Joe
8 Latting.

9 MR. LATTING: Well, I was just
10 going to ask if it wouldn't be good for
11 clarity to say that this rule does not take
12 away from any statute or some words to that
13 effect.

14 HON. F. SCOTT McCOWN: How
15 about the words that I just used?

16 HON. SCOTT A. BRISTER: Well,
17 because it's not just confidentiality, it's
18 the procedure too.

19 MR. LATTING: That's what I had
20 in mind.

21 HON. SCOTT A. BRISTER: The
22 Bank Privacy Act requires 10 days. The
23 subpoena rules would allow less than 10 days.
24 I do agree with you, the problem is this isn't
25 in the current subpoena rule at all. When you

1 add it in, it does look like you're changing
2 something unless you say we're not intending
3 to change it. And it does apply to
4 procedures, because a lot of these
5 confidentiality things have procedures on how
6 you get them and how you do notice in addition
7 to a definition of what is confidential.

8 HON. F. SCOTT McCOWN: Okay.

9 CHAIRMAN SOULES: Rusty
10 McMains.

11 MR. McMAINS: Well, the
12 additional problem I have along the line of
13 what Steve said is that to require us to first
14 serve the person to whom the records pertains
15 assumes that we know to whom the records
16 pertain before we've got them. I mean, we
17 ain't got them. They may pertain to somebody
18 that we're -- that's not what we're doing them
19 for. It just so happens that the scope of the
20 subpoena embraces perhaps or implicates
21 somebody that we had no intention of doing. I
22 mean, we can't possibly require us to first
23 serve somebody that we've got no reason to
24 know that they're there.

25 I mean, I have a serious problem with the

1 idea that -- it's like chicken and egg; that
2 we're supposed to know what's in the records
3 before we get them. And a lot of times we
4 don't know what's in them. If we did, we
5 might not want them. But that's what we
6 subpoena them for frequently, is to find out
7 what's in them and who is implicated in them
8 or who it pertains to.

9 I mean, this rule is drafted as if it's
10 only dealing with medical records or someone
11 where you're talking about a particular
12 custodian or a particular person. But once
13 you get beyond that and it's merely a
14 tangential "pertaining to," then it seems to
15 me that you've really kind of trumped the
16 entire procedure anyway.

17 CHAIRMAN SOULES: Justice
18 Duncan.

19 HON. SARAH DUNCAN: I'd just
20 like to say a word on behalf of the nonparties
21 who aren't here. I think we would all agree
22 that as lawyers, yeah, we want every document
23 out there that we can get and we really don't
24 care how inconvenient or expensive it is for
25 anyone else. And what we're doing is we're

1 forcing someone to get a lawyer simply because
2 we decide to send them a notice that we want
3 their documents, and I think this is
4 misguided.

5 CHAIRMAN SOULES: Steve
6 Yelenosky.

7 MR. YELENOSKY: Well, two
8 things, and maybe what's appropriate, and I
9 thought of this as a fall-back position, is
10 that we have a rule that speaks to medical
11 records like we have a rule that speaks to
12 entry on property. And if it's confined to
13 that, then maybe there's something we can
14 agree on.

15 Secondly, something Doris Lange said
16 reminded me that this same issue comes up
17 outside of the subpoena context. It comes up
18 when MHMR is a party and you merely have a
19 request for production, so that you need the
20 same kind of notice to the nonparty written
21 into the request for production provisions
22 there, like if you have a whistle blower
23 case.

24 In fact, I have an example of one. If
25 the whistle blower case is against MHMR,

1 they're going to be getting a request for
2 medical records via a request for production,
3 not by a subpoena, so that part needs to be
4 parallel.

5 But I guess what I would maybe propose is
6 that we have something that speaks to medical
7 records and that that specifically requires
8 notice to the nonparty.

9 CHAIRMAN SOULES: John Marks.

10 MR. MARKS: It seems to me we
11 need to talk about this more and it's not
12 something that we need to send up to the
13 Supreme Court. And maybe you ought to appoint
14 a subcommittee to look at this a little bit
15 closer, because it obviously involves a lot
16 more than anybody has thought of around this
17 table.

18 HON. SCOTT A. BRISTER: I'd
19 second that. I think we should drop this
20 out. It's not in the current rules. Let's
21 focus on it separately.

22 CHAIRMAN SOULES: Does anybody
23 disagree with that? Steve Yelenosky.

24 MR. YELENOSKY: Well, I do,
25 because there are a lot of things here that,

1 you know, maybe we could come together on some
2 language on. But there are a lot of things
3 here that we ventured out to make suggestions
4 on and I think this is important, not just
5 from the perspective of mental health
6 records. I think Judge Duncan has pointed out
7 quite appropriately that certainly the Supreme
8 Court is interested in how the public at large
9 is affected by what we do, and not just those
10 people that happen to be involved in
11 litigation.

12 CHAIRMAN SOULES: Judge McCown.

13 HON. F. SCOTT McCOWN: Well,
14 kind of in answer to Sarah's point, she's
15 saying, "Hey, we don't want to be serving
16 these nonparties and making them get lawyers."
17 But when you stop and think about it, if we
18 don't serve them, then we're potentially
19 taking their confidential records without
20 telling them and breaking their
21 confidentiality.

22 I don't feel strongly about whether we do
23 (e) now, which is, I'll admit, complicated and
24 difficult, or whether we do (e) later. But i
25 don't know if you can make (e) much better. I

1 mean, it's just a notification procedure.
2 It's not going to accomplish everything. It's
3 just going to provide some additional
4 protection that we don't have now, but I'm
5 happy to postpone it.

6 CHAIRMAN SOULES: I think we
7 can make it better in several ways. Justice
8 Duncan.

9 HON. SARAH DUNCAN: Just to
10 clarify, my comment was not restricted to
11 confidential records. My comment was meant to
12 encompass the records of all nonparties,
13 because what we're doing is saying you no
14 longer have to get a court order or send out a
15 notice of deposition with a subpoena duces
16 tecum, as you did under the old rules. All I
17 have to do is send somebody a request for the
18 documents with a subpoena, and unless they
19 object within 10 days, which is a very short
20 time fuse for at least a lot of the business
21 people that I know, they're going to have to
22 produce.

23 I know people who are legitimately out of
24 town for two weeks every month. Now they
25 either have a notice of deposition, or you

1 have to go get a court order and someone in
2 the judicial system has to determine that
3 these documents are discoverable.

4 CHAIRMAN SOULES: Let me see
5 where we're at on Rule 24. But for this
6 debate on (e), are we otherwise satisfied with
7 Rule 24? Is there anyone --

8 HON. PAUL HEATH TILL: I have a
9 small correction.

10 CHAIRMAN SOULES: Okay. A
11 small correction from Judge Till.

12 HON. PAUL HEATH TILL: I don't
13 think this has anything to do with the
14 substance of it, but it's on (a) -- no, let's
15 see, (c). You have a list that it starts "The
16 clerk of the district or county court, or
17 justice of the peace," and I believe it should
18 be the clerk of the district, county or
19 justice court, since we all have clerks now.

20 CHAIRMAN SOULES: District,
21 county or justice court?

22 MR. PEACOCK: But keep "justice
23 of the peace"?

24 HON. PAUL HEATH TILL: No.

25 CHAIRMAN SOULES: Okay. We'll

1 make that change. Any other changes to
2 Rule 24 other than our concern about the
3 item (e)? Judge Brister.

4 HON. SCOTT A. BRISTER: Yeah.
5 Two things. One is substantive, and that's
6 the 10 days or actually it can be much less
7 than 10 days for nonparties to respond.
8 Again, I think it ought to go the same way as
9 a party. Somebody who is not a party doesn't
10 know anything about case, et cetera. I agree
11 on medical records. It's not a problem.
12 They're used to copying them, et cetera. But
13 when it's a big oil company case and they just
14 subpoena records from some other oil company
15 because they want to compare a million records
16 and we want them this week too, and you have
17 to hire somebody to run in immediately and
18 file an objection to it, this shifts all of
19 that to them without enough time to look at
20 it. Now, it may be taken care of.

21 The other differences I read between
22 parties and nonparties is that a nonparty can
23 just say, "I object," period, and do nothing,
24 which again, I don't think is the way they
25 normally do it. They normally do it like a

1 party does, which is the direction we're going
2 in on our Rule 11. They object to the extent
3 they disagree, produce to the extent they
4 agree, go to the court if they can't work out
5 the rest. And it just seems to me a very
6 short fuse and the absolute you don't have to
7 do a thing if you say the words "I object"
8 means it definitely will go to court or will
9 go to court more often than it is currently.

10 HON. SARAH DUNCAN: Scott,
11 they've got to know they've got to say the
12 words "I object," and they need a lawyer tell
13 them that. So you're telling them that you've
14 got to figure out what this means; you've got
15 to get to the proper person in your
16 organization; you've got to go get a lawyer.
17 The lawyer has got to read Rule 24, and then
18 you've got to say "I object." And this is
19 without any objective nonparty nonlawyer
20 saying these are discoverable records.

21 CHAIRMAN SOULES: I
22 understand. But we're not talking about just
23 discovery. We're talking about in trial
24 subpoenas while the trial is in process, and
25 we're trying to get somebody down there with

1 some records on rebuttal.

2 HON. SCOTT A. BRISTER: Which
3 is why those are two different things to me.
4 Because the problem with the subpoena rule is
5 it's in standard subpoenas for trial right now
6 and discovery stuff, and they ought to be
7 treated -- the discovery stuff out to be just
8 treated like discovery and the "show up right
9 now at trial" ought to be treated as something
10 different.

11 CHAIRMAN SOULES: And if this
12 rule passes, as I'm understanding it, there
13 will not be any standard "bring your records
14 to trial," because everybody gets at least
15 10 days.

16 HON. SCOTT A. BRISTER: No.

17 CHAIRMAN SOULES: Where is
18 that?

19 HON. SCOTT A. BRISTER: Well,
20 it says you just come to court and object
21 then.

22 CHAIRMAN SOULES: I'm sorry?
23 Where is that? I don't see it. Did I miss
24 it?

25 HON. SCOTT A. BRISTER: It's in

1 3(d).

2 CHAIRMAN SOULES: 3(d). Okay.
3 So you are you suggesting that the 10 days
4 ought to be a different number of days, Judge
5 Brister?

6 HON. SCOTT A. BRISTER: Yeah.

7 CHAIRMAN SOULES: How many?

8 HON. SCOTT A. BRISTER: Well,
9 the way I set it up under Tab 24 in my version
10 of 24, part (4), is if you get a subpoena to
11 produce documents, you respond according to
12 Rule 11 like a party would. If it's to appear
13 at a deposition, you do it in accordance with
14 14 and 15. But a subpoena to appear at
15 testimony or a hearing or trial, you just make
16 your objections when you show up at hearing or
17 trial.

18 CHAIRMAN SOULES: Steve
19 Susman.

20 MR. SUSMAN: My reluctance
21 here, Scott, is the present system is working
22 pretty well. I mean, we don't have any
23 complaints. There have not been a lot of
24 complaints. I mean, we left these rules to
25 the end. There's not been a lot of complaints

1 that third parties are harassed or have to
2 unduly hire a bunch of lawyers or that the
3 time fuses are too short, and so the notion
4 was not to change much of the current practice
5 on this third party document productions.

6 The only thing we thought really
7 seriously about changing and wanted to change
8 was the notion that you also had a deposition.
9 Now, under current practice, I can notice the
10 deposition of a third party. I give them five
11 days' notice. Okay. I can issue a subpoena
12 that requires them to produce documents at
13 their deposition. We haven't changed the
14 practice. Where has the practice been
15 changed? I mean --

16 HON. SCOTT A. BRISTER: Under
17 the current practice, you can do that with a
18 party, a lot of people think --

19 MR. SUSMAN: But we've made
20 that clear. We've made that clear that you
21 cannot do that with a party.

22 HON. SCOTT A. BRISTER: Right.
23 And why? Because you need more time than
24 that. It's not fair to expect people to do
25 what you have to do with a request for

1 production in five days for parties, but it
2 still is for nonparties who don't know a thing
3 about the case?

4 CHAIRMAN SOULES: Let's get
5 this boiled down. Has anybody got a motion on
6 this? If so, make the motion. We've really
7 debated this up and down a lot and I think the
8 policy issues too.

9 MR. SUSMAN: I move we adopt
10 Rule 24 as drafted without section (e) in it,
11 the one that we have discussed for so long.

12 HON. F. SCOTT McCOWN: Second.

13 CHAIRMAN SOULES: All right.
14 It's moved and seconded.

15 MR. SUSMAN: That's section
16 3(e).

17 CHAIRMAN SOULES: All right.
18 Does anyone have an amendment to that motion?
19 Steve Yelenosky.

20 MR. YELENOSKY: Well, I'll go
21 along with that, and then I'll move for a very
22 short rule on medical records, which I have
23 drafted.

24 CHAIRMAN SOULES: Okay. Now,
25 we're talking about making the change that

1 Judge Till suggested in 1(c), deleting David
2 Perry's suggestion, and deleting (e), which is
3 3(e), and otherwise we're voting on Rule 24 as
4 stated. Carl Hamilton.

5 MR. HAMILTON: Changing
6 Rule 1(c) is really a substantive change,
7 because the current rules don't authorize the
8 clerks of the justice court to issue
9 subpoenas. It's the justice of the peace that
10 has to issue them.

11 CHAIRMAN SOULES: Is that
12 right, Judge Till?

13 HON. PAUL HEATH TILL: That's
14 very true, because when this rule was written
15 there wasn't a clerk for the justice courts
16 and now there is one. Specifically we got one
17 appointed, and the reason I know it is because
18 I went to the legislature and I had the law
19 passed. So there is a clerk of the justice
20 courts now. They are sworn in and registered
21 with the secretary of state just like district
22 and county court clerks, and they certainly
23 can.

24 CHAIRMAN SOULES: Are they
25 authorized issued to subpoenas?

1 HON. PAUL HEATH TILL: They're
2 authorized to issue anything that's not
3 judicial, and we would like for them to be
4 able to do the same here. They receive the
5 same training and are under the same
6 supervision.

7 PROFESSOR ALBRIGHT: And this
8 is what authorizes them to do so.

9 HON. PAUL HEATH TILL: This is
10 what authorizes them.

11 CHAIRMAN SOULES: Okay. Any
12 problem with that? Does anybody see any
13 problem with that? I don't think there's any
14 problem with that.

15 PROFESSOR ALBRIGHT: Can I just
16 point out one more substantive change, is we
17 have also allowed lawyers, authorized lawyers
18 to issue and sign subpoenas like they can in
19 federal court.

20 CHAIRMAN SOULES: Okay. Those
21 in favor of 24, then, as stated hold your
22 hands up. Six. Those opposed. Eight
23 against. Somebody said I miscounted on the
24 first. Those in favor show your hands again.

25 HON. F. SCOTT McCOWN: Without

1 (e), right?

2 CHAIRMAN SOULES: Without (e).
3 Six. It fails by a vote of eight to six.

4 MR. PEACOCK: I saw eight.

5 MR. SUSMAN: Let's recount.

6 CHAIRMAN SOULES: Okay. Let me
7 stand up. Those in favor, without (e) and
8 with the change as Judge Till recommended on
9 the justice court and without David Perry's
10 suggestion, those in favor of 24 hold your
11 hands up and let me count. 10. Those
12 opposed. Hold your hands up. Eight. Okay.
13 It passes 10 to eight.

14 Okay. We have now 25 minutes to work.
15 How do we use it?

16 MR. SUSMAN: We turn to 21.

17 CHAIRMAN SOULES: 21.

18 MR. YELENOSKY: Luke, can I
19 propose the amendment on the medical records?

20 CHAIRMAN SOULES: Do you have a
21 chance to type it up overnight or write it out
22 and give it to us tomorrow?

23 MR. YELENOSKY: Yeah, I have a
24 computer; I just don't have a printer.

25 CHAIRMAN SOULES: Write it out

1 in longhand.

2 MR. YELENOSKY: That's what
3 I'll do, and I'll fax it to you.

4 CHAIRMAN SOULES: Okay. Good.
5 Rule 21.

6 MR. SUSMAN: When are we going
7 until, 6:30?

8 CHAIRMAN SOULES: Yes.

9 MR. SUSMAN: Rule 21 I don't
10 think is going to be that controversial if you
11 want to do 24. It's basically the vehicle
12 rule which allows you to get production from a
13 nonparty without taking a deposition. It says
14 you can do it at any time during the discovery
15 period. It says you serve -- you've got to
16 give notice in a subpoena just as you had to
17 do with a deposition to get documents under
18 the old regime. The place must be
19 reasonable. We've already confronted that,
20 time and place, a reasonable time and place.

21 And the last provision, subsection 4,
22 deals with the inspection and copying; that
23 is, if some party gets -- the party who gets
24 the documents has to make them available to
25 everybody else.

1 CHAIRMAN SOULES: Okay. Judge
2 Brister.

3 HON. SCOTT A. BRISTER: Yeah.
4 My proposal was that all of this rule can be
5 eliminated by two sentences in Rule 24, which
6 is that you just say the subpoena -- the part
7 I read earlier. If it's a subpoena for a
8 deposition, it's got to meet the provisions of
9 Rule 14, which state these identical time and
10 place restrictions, identical date
11 restrictions, and then say the same thing with
12 regard to producing documents, say it's got to
13 meet the notice for producing documents, and
14 the subpoena has got to meet Rule 11. The
15 first paragraph is almost word for word
16 Rule 11(1). The second paragraph is almost
17 word for word Rule 11(2). And the third
18 paragraph is exactly word for word
19 Rule 14(2)(a).

20 CHAIRMAN SOULES: So it has
21 redundancy?

22 HON. SCOTT A. BRISTER: No
23 question about it.

24 CHAIRMAN SOULES: Okay. Alex
25 Albright.

1 PROFESSOR ALBRIGHT: I think we
2 need a separate rule, because we need to make
3 it clear to everybody that this is a discovery
4 vehicle and the limitations upon it. Also
5 part 4 does not appear anywhere, and that's
6 why I think we need it.

7 CHAIRMAN SOULES: It will draw
8 attention to a new tool, we're adding a
9 separate rule, for whatever benefit that may
10 be. Judge Peeples.

11 HON. DAVID PEEPLES: Is there
12 no express time limit? I mean it says time
13 and place shall be reasonable.

14 HON. SCOTT A. BRISTER: No,
15 there's not.

16 HON. DAVID PEEPLES: The oral
17 deposition rule, Rule 14, has the same
18 provisions, but it has a protective order
19 provision that says if you get hit with this,
20 you file your motion and that gets you
21 10 days, if it's fewer than 10 days, unless
22 there's an earlier hearing. In other words,
23 you file a motion that buys you 10 days. Do
24 we want to put something like that in here?

25 CHAIRMAN SOULES: That's in

1 here too.

2 PROFESSOR ALBRIGHT: Then you
3 go to the subpoena, and the person subpoenaed
4 makes an objection and they never have to do
5 anything.

6 CHAIRMAN SOULES: Joe Latting.

7 MR. LATTING: I have a
8 question. If the case is set for trial, and
9 three days before the trial I want to subpoena
10 some nonparty to bring records to the trial,
11 is that okay?

12 PROFESSOR ALBRIGHT: Then they
13 have to go -- they make their objections at
14 trial.

15 MR. LATTING: Well, but this
16 says here that at any time no later than --
17 I'm reading from section 1 -- at any time no
18 later than 30 days before the end of an
19 applicable discovery period or 30 days before
20 trial, whichever occurs first.

21 MR. SUSMAN: This is not
22 intended to be a trial subpoena.

23 MR. LATTING: But don't we need
24 to say that then?

25 MR. SUSMAN: If it's not clear,

1 we need to make it clear.

2 PROFESSOR ALBRIGHT: This would
3 only be for inspection and copying.

4 MR. SUSMAN: Right.

5 MR. LATTING: Well, it just
6 says "Compelling Production from Nonparty,
7 When production may be compelled." And
8 oftentimes I know of situations where no
9 deposition or discovery has been done where
10 you say to somebody, "Come on down to the
11 courthouse with that stuff and we'll take a
12 look at it at the trial."

13 PROFESSOR ALBRIGHT: What if
14 you say "Compelling Production from Nonparties
15 for Discovery"?

16 HON. F. SCOTT McCOWN: How
17 about if you say "Compelling Production from
18 Nonparties other than at Time of Trial"?

19 MR. LATTING: Or hearing.

20 HON. SCOTT A. BRISTER: How
21 about "Discovery of Documents from
22 Nonparties"?

23 CHAIRMAN SOULES: Except it's
24 not just documents.

25 HON. SCOTT A. BRISTER: Yeah.

1 MR. SUSMAN: How about just
2 "Discovery of Documents"?

3 CHAIRMAN SOULES: Okay. Have
4 we got it?

5 HONORABLE DAVID PEEPLES: Can
6 somebody tell me again how the poor person who
7 gets one of these, a nonparty, knows that the
8 filing of a motion for protection will stall
9 everything, the 10-day provision that's in
10 Rule 14, which I like?

11 PROFESSOR ALBRIGHT: Rule 24.

12 HON. DAVID PEEPLES: But how do
13 you know to even look at Rule 24?

14 HON. SCOTT A. BRISTER: Hire a
15 lawyer.

16 HON. DAVID PEEPLES: How does
17 he know?

18 PROFESSOR ALBRIGHT: Or what we
19 can do, what the federal rule does is it
20 requires that the provisions of -- the
21 equivalent provisions of our Rule 24(3) be
22 stated within the subpoena, and we could
23 require 24(3) and (4) to be stated in the
24 subpoena.

25 MR. SUSMAN: That's a good

1 idea.

2 HON. F. SCOTT McCOWN: Yeah.
3 That's the only way to do it, because it
4 doesn't matter what you write in the rule.
5 They're never going to necessarily know what's
6 in the rule. The only way to do it is to
7 state it in the subpoena. Wouldn't that solve
8 a big problem?

9 PROFESSOR ALBRIGHT: 24(4)
10 concerns how they protect their privileges,
11 individuals, and designated persons when the
12 subpoena is issued to an organization.

13 CHAIRMAN SOULES: You mean the
14 federal subpoena has all this language and
15 requires all that language?

16 PROFESSOR ALBRIGHT: This is
17 much shorter than the federal rules.

18 CHAIRMAN SOULES: And all that
19 language has to be on the subpoena?

20 MR. PEACOCK: It's a long back
21 page of stuff on there.

22 MR. MEADOWS: The federal rules
23 also permit 14 days for making objections,
24 don't they, Alex.

25 PROFESSOR ALBRIGHT: I can't

1 remember.

2 MR. MEADOWS: I believe they
3 do.

4 PROFESSOR ALBRIGHT: That may
5 be correct. I can't remember.

6 CHAIRMAN SOULES: Does anybody
7 have any motions relative to Rule 21?

8 MR. SUSMAN: I move the
9 adoption of Rule 21.

10 CHAIRMAN SOULES: Pam Baron.

11 MS. BARON: I move we require
12 the language of Rule 24, part (3) or whatever
13 part it is, to be included in the subpoena so
14 that nonparties who are nonlawyers have some
15 chance of conferring with their Aunt Mabel and
16 figuring out what they're supposed to be
17 doing.

18 MR. SUSMAN: I second that
19 motion.

20 MR. MARKS: Well, are you
21 talking about restating the whole rule in
22 there?

23 MS. BARON: No. Just the
24 nonparty provisions.

25 HON. SCOTT A. BRISTER:

1 Shouldn't that be in Rule 24?

2 MR. SUSMAN: It should be in
3 Rule 24(1).

4 MR. MARKS: How about doing a
5 little plain language something there, don't
6 rewrite the whole rule, but have something in
7 there that says you have the right to do thus
8 and such.

9 MR. SUSMAN: Okay.

10 MR. MARKS: That would be
11 better.

12 CHAIRMAN SOULES: Your motion,
13 Pam, is to require a legend on a subpoena to a
14 nonparty only, a Rule 21 subpoena, to recite
15 Rule 24(3) and (4) on the subpoena?

16 PROFESSOR ALBRIGHT: On any
17 subpoena.

18 CHAIRMAN SOULES: Any subpoena
19 to a nonparty?

20 MR. SUSMAN: Yes. We're going
21 to put it on any subpoena to a nonparty.

22 CHAIRMAN SOULES: So there will
23 be, I guess, something added to Rule 24
24 saying --

25 MR. SUSMAN: 24(1), which is

1 "Form."

2 PROFESSOR ALBRIGHT: All
3 subpoenas should have on the back of them, "If
4 you are a nonparty, read this:"

5 HON. PAUL HEATH TILL: What
6 about for people who are pro se? Why don't we
7 have that on there for all people as well?

8 PROFESSOR ALBRIGHT: But these
9 are only protections for nonparties.

10 CHAIRMAN SOULES: So we're
11 going to end up having to put this on every
12 subpoena even to a party?

13 MR. LATTING: Is this a problem
14 with our state's jurisprudence?

15 CHAIRMAN SOULES: I'm just
16 trying to define what the motion is. Please,
17 please, please. Pam Baron.

18 MS. BARON: I don't see a need
19 to put it on a subpoena to a party. I'm just
20 saying that nonparties should have to fair
21 fighting chance.

22 CHAIRMAN SOULES: So Pam's
23 motion is that 24(3) and (4) be put on the
24 subpoena to the nonparty, and that something
25 in 24 should say that.

1 MS. BARON: Right. I would be
2 willing to accept a shorter plain language
3 version of those, if there is sentiment for
4 that, but I think there does need to be
5 something that says, "All you have to do is
6 say 'I object' and send it to this address."

7 CHAIRMAN SOULES: Doris Lange.

8 MS. LANGE: I would like to see
9 it on all subpoenas, and that way we wouldn't
10 have to have two different kinds of things and
11 decide if they're a party or not a party. If
12 I issue a subpoena now, it's a subpoena. And
13 that way I wouldn't have to decide which one
14 I'm sending.

15 MR. LATTING: If there's a
16 shorter plain language version that we can put
17 on the subpoena, I move we use that in the
18 rules.

19 CHAIRMAN SOULES: Well, we
20 don't have it.

21 PROFESSOR ALBRIGHT: We can
22 work on the drafting.

23 MR. LATTING: Why don't we use
24 the short plain language in the rule?

25 CHAIRMAN SOULES: So the back

1 side of the subpoena would say "Notice to
2 Nonparties" or something like that, and you
3 would use it -- or "Parties and Nonparties,"
4 Doris? I'm asking Doris.

5 MS. LANGE: I would just --
6 even on the face of it, I mean, you can refer
7 to Rule 24 or whatever it is, and within the
8 body of it. But why have two different kinds
9 of subpoenas where I have to be sure I'm
10 picking up the right one to get out?

11 CHAIRMAN SOULES: Okay. You
12 understand this notice is only for the benefit
13 of nonparties, though, don't you?

14 HON. PAUL HEATH TILL: But it
15 takes the burden off the clerk having to make
16 the decision which one to pick up and put out.

17 MS. LANGE: I understand that.

18 CHAIRMAN SOULES: Okay. So you
19 want something like a notice to nonparties
20 that would be used on all subpoenas even if
21 it's going to parties?

22 MS. LANGE: Yes. A standard
23 subpoena form.

24 MR. SUSMAN: Right. It doesn't
25 hurt the party to have the notice on the back.

1 CHAIRMAN SOULES: I just wanted
2 to be sure I understand. Pam, you had your
3 hand up?

4 MS. BARON: Well, I was just
5 wondering if we can avoid putting it on the
6 back of the subpoena. I'm just trying to look
7 for alternative ways to make it easier. I
8 think really the burden shouldn't be on the
9 clerk. The burden should be on the party that
10 wants the subpoena, and maybe in some way they
11 could be required to serve with the subpoena
12 or send or serve at the same time a copy of
13 the Rule 24, you know, subsections 3 and 4 or
14 something. I'm not sure it has to be in the
15 the subpoena, but it needs to be there with it
16 so they know what to do.

17 MR. MARKS: Do they get a copy
18 of the notice, of the subpoena?

19 MS. BARON: Who?

20 MR. MARKS: The nonparty.

21 CHAIRMAN SOULES: Okay. Those
22 in favor of Pam's motion show by hands.

23 HON. PAUL HEATH TILL: Putting
24 it on all or just --

25 CHAIRMAN SOULES: Putting it on

1 all subpoenas. 15. Anyone opposed. 15 to
2 one it carries.

3 MR. SUSMAN: Back to Rule 21,
4 please.

5 CHAIRMAN SOULES: Okay. Now,
6 that will be something that will be added to
7 Rule 24, Pam's motion.

8 Okay. Rule 21. Now, those in favor of
9 Rule 21 show by hands.

10 HON. SCOTT A. BRISTER: Well,
11 why don't we do a vote on my proposal to
12 combine it into 24 with this group, even
13 though you've deserted me on that, Luke.

14 CHAIRMAN SOULES: Okay. Those
15 in favor of folding 21 into 24 show by hands.
16 Four. Those opposed. Eight. It fails by a
17 vote of eight to four.

18 MR. MARKS: The only reason I
19 didn't vote is because I'm brain dead right
20 now.

21 CHAIRMAN SOULES: Okay. Now,
22 all those in favor of Rule 21 show by hands.
23 19. And those opposed. None opposed, so
24 that's unanimous.

25 MR. SUSMAN: Mr. Chairman,

1 could I summarize the work that we have to do
2 tomorrow?

3 CHAIRMAN SOULES: Yes.

4 MR. SUSMAN: We have for
5 tomorrow the following tasks: We've got 22
6 and 23 for tomorrow, right?

7 CHAIRMAN SOULES: Right.

8 MR. SUSMAN: We've got 166 for
9 tomorrow, we've got 63, and that's it. Oh,
10 I'm sorry, Rule 66, 67 and 170.

11 CHAIRMAN SOULES: And then
12 we've got three or four rewrites.

13 HON. SCOTT A. BRISTER: Do you
14 anticipate we're going to come back on Sunday
15 or finish tomorrow?

16 MR. SUSMAN: I think we will be
17 finished in a couple of hours tomorrow.

18 CHAIRMAN SOULES: Right now I
19 think we're coming back Sunday. But if we
20 finish by noon, we'll be finished by noon.

21 MS. DUDERSTADT: Are we off the
22 record?

23 CHAIRMAN SOULES: We're off the
24 record.

25 (MEETING ADJOURNED 6:30 P.M.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE


I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 21, 1995, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are \$1,720⁰⁰.

CHARGED TO: Soules & Wallace, P.C.

Given under my hand and seal of office on this the 9th day of August, 1995.

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