MINUTES OF THE

SUPREME COURT ADVISORY COMMITTEE

JULY 15-16, 1994

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Friday, July 15, 1994, pursuant to call of the Chairman.

Friday, July 15, 1994:

Supreme Court of Texas Justice, and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Chair Luther H. Soules III, Professor Alexandra Albright, Pamela Stanton Baron, Professor Elaine Carlson, Professor William V. Dorsaneo III, Sarah B. Duncan, Honorable Clarence A. Guittard, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, Tommy Jacks, David E. Keltner, Joseph Latting, John H. Marks, Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Harriet E. Miers, Richard R. Orsinger, Honorable David Peeples, David L. Perry, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky.

Ex-Officio Members Present: Honorable Sam Houston Clinton, Honorable William Cornelius, Doyle Curry, Paul N. Gold, David B. Jackson, Honorable Doris Lange, and Honorable Paul Heath Till.

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Honorable Scott A. Brister, Honorable Anne T. Cochran, Michael T. Gallagher, Anne L. Gardner, Franklin Jones, Jr., Thomas H. Leatherbury, Gilbert I. Low and Anthony J. Sadberry.

Ex Officio Members absent: Thomas C. Riney and Bonnie Wolbrueck.

Also present: Lee Parsley, Holly Duderstadt, Carl Hamilton, Denise Smith for Mike Gallagher and Jim Parker.

Meeting called to order by Luther H. Soules, III.

Mr. Soules had the final report on Civil Rules 226, 226a, 236 and 271 - 279 (the jury charge rules) distributed to the members of the Committee and asked that the Committee members review the report and suggest revisions before final approval. Mr. Soules referred the Committee to page 756 of the Agenda and recognized Paula Sweeney for the recommendation of her subcommittee regarding the items contained in the Agenda.

Ms. Sweeney referred the Committee to page 759 of the Agenda (12/30/89 letter from Judge Bull Coker to Luther Soules). Judge Coker recommended that jury requests be filed not later than 30 days after the live pleadings are filed or 30 days before trial, whichever was earlier. Ms. Sweeney recommended that the suggestion not be accepted. VOTE: FAVOR SUBCOMMITTEE RECOMMENDATION TO REJECT PROPOSAL - MANY (no count taken); OPPOSE - NONE.

Mr. Soules referred Committee to page 410 of the Supplement to the Agenda - copy of page from *Rules of Court* with suggestion to delete "on the non-jury docket" from the first paragraph. Ms. Sweeney moved adoption of recommendation. VOTE: DELETION APPROVED UNANIMOUSLY.

Ms. Sweeney referred the Committee to page 760 of the Agenda (4/18/91 memo from J. Patrick Hazel to Administration of Justice Committee). Mr. Soules asked if the work of Mr. Hazel had been reviewed by the subcommittee in drafting the revised jury charge rules. Ms. Sweeney said that both the subcommittee and the task force had considered Mr. Hazel's work and suggested that a copy of the final product be sent to Mr. Hazel.

Ms. Sweeney referred the Committee to page 778 of the Agenda (6/11/81 letter from Jim Parker to J. Patrick Hazel). Ms. Sweeney said that the subcommittee had not considered the matters raised in the letter, but they did not know what *Bar Journal* article was referenced in the letter. Mr. Parker was present. He stated that the letter was in response to the publication of Mr. Hazel's material in the *Bar Journal* and that his comments had been superseded by the work of the Committee.

Ms. Sweeney said that pages 782-793 of the Agenda was more of Mr. Hazel's work and had been previously addressed. Ms. Sweeney then referred the Committee to page 794 of the Agenda (12/1/92 memo from Steve Tyler to Justice Hecht) which proposes that the rule of *Batson v. Georgia* be incorporated in the Civil Rules.

Ms. Sweeney suggested that the procedure to use *Batson* was troublesome -- if the *Batson* challenge is exercised after the jury is empaneled, a juror must be removed and the wrongfully stricken juror seated. Therefore, Judge McCown has been working on a draft of a *Batson* rule which would require the *Batson* challenge to take place before the jury is seated.

Professor Carlson noted that *Batson* allows two remedies: (1) return the juror to the jury or (2) bring in a new panel. The Code of Criminal Procedure provides only for a new panel, and a new court of appeals decision suggests the Code of Criminal Procedure should allow for the first remedy as well. Ms. Sweeney stated that one of the procedural problems is whether the striking party gets that strike back if the first strike is ruled improper. Professor Carlson stated that there is a case pending before the Court

of Criminal Procedure regarding applying *Batson* to a person with disabilities and that it might eventually apply to religious affiliation.

Committee discussed whether it was appropriate to require the attorneys to exchange their lists of jurors, showing their strikes, so that *Batson* challenge could be stated before panel seated. Committee also discussed whether party should get the strike back. Ms. Sweeney stated that there is a problem with judges not allowing sufficient *voir dire* in civil cases and that a sufficient *voir dire* is necessary to make a record to support jury strikes. Judge Keltner noted that if the attorney gets the strike back, that attorney has the "technical advantage" of knowing who the other side has stricken when exercising that returned strike. Mr. McMains suggested that the party who strikes a juror is entitled to a reversal under current law if the judge seats that juror and it is later held that the judge should not have seated the juror. However, if that party is given another strike, that party would not be entitled to reversal.

Professor noted that Rules 216 through 235 have been carried forward since the last century without significant change.

Some discussion of the use of juror questionnaires followed. Mr. Orsinger suggested that the rules should allow the use of questionnaires.

Mr. Soules referred the entire matter to subcommittee for further work.

Mr. Soules called on Mr. Susman to discuss the proposed changes in the discovery rules.

Mr. Susman stated that the subcommittee wanted guidance from the Committee on the big issues. First of those issues is a discovery "window."

Mr. McMains opined that creating a rule which is subject to change by agreement of the parties or by the trial judge was a problem because members of the bar see it as an effort to limit their discovery while some attorneys could always find a way out. It introduces politics into a system perceived to by full of politics anyway. Mr. Jacks stated that the rule would hurt many litigants, would do little to lower the costs of litigation, and would increase friction among attorneys.

Professor Dorsaneo stated that the current discovery window is governed by trial date and that the real problem is the uncertainty of trial settings. Mr. Perry stated that mandatory and arbitrary time limits are counter-productive, that much of the cost of discovery is related to "friction costs or transaction costs" and that this rule will only increase transaction costs. Mr. Marks agreed with Mr. Jacks and Mr. Perry that the proposal will not decrease discovery costs, but would encourage gamesmanship and that the Committee really did not know what effect the window would have. Mr. McMains stated that the people who benefit from limits on discovery are those with the information.

Justice Hecht stated that the public perception is that discovery benefits the attorneys and not the litigants and that litigation costs too much. If the trial setting is realistic and sets a time limit on discovery, that is a good solution, but definite trial settings is not realistic in many counties. Mr. Soules opined that attorneys will loose their voice to the Legislature if the Supreme Court does not restrict discovery through the rules process.

Mr. Marks stated that he had not talked "with a single attorney outside this room" who thinks a window is a good idea. Mr. Orsinger stated that if we are not going to limit the number of interrogatories, or requests for production, then the window would not reduce the costs of discovery, but merely compress the costs. Judge Keltner stated that much of the cost is having to prepare for trial numerous times.

Mr. Jacks agreed with sentiment that costs of litigation must be lowered, but is of the opinion that it must be done through definite trial settings. A discovery window is just "window dressing." Mr. Perry stated that the Committee should make specific changes in the rules to address specific problems. We are "using a meat axe rather than a scalpel." Don't want to create more problems than we are solving. Mr. McMains opined that much of the cost of discovery is "resisting appropriate discovery." Mr. Latting stated that the cases that cost the most are the ones which stay around too long, and that the rules must force the disposition of cases more quickly. Professor Dorsaneo concurred with Mr. Perry that the Committee must address specific problems; and that the rules can reduce "friction costs" by eliminating "formal problems."

Judge McCown stated that trial settings are a function of the number of judges and the number of cases; the Legislature was not going to fund any more judges and there is no likelihood that the number of cases will decrease. Therefore, the problem with trial settings would continue and could not be relied upon to solve the discovery problem. Real problem is all the discovery -- temporary injunctions, meditated cases and criminal cases don't have all the discovery. Not really discovery abuse but the desire of attorneys to get all the information they can, and to use that information at trial. Justice Hecht seconds comments by Judge McCown -- cannot expect to do anything about trial settings. There must be discovery limits, but the Court does not want to do anything that impinges on the ability to get to necessary information.

Mr. Soules -- VOTE: FAVOR A WINDOW - 11; OPPOSE - 10. RE-VOTE/RE-COUNT: FAVOR A WINDOW - 11; OPPOSE - 11.

Mr. Susman. The next issue regards limiting depositions.

Mr. Soules -- VOTE: SHOULD THERE BE SOME LIMIT ON DEPOSITIONS? UNANIMOUS IN FAVOR OF SOME LIMITS.

Mr. Susman. Should the limit be on the number of total hours for depositions; or a limit on the time spent in any deposition; or something else?

Mr. Marks favors limiting number of hours per deposition. Discussion of deposition limits follows. Mr. Yelenosky suggests limiting number of hours per deposition with a reserve number of hours that can be used anytime. Further discussion. Judge McCown stated that judicial intervention was possible to avoid an overall cap, but much more difficult with per deposition cap because trial judge cannot judge how long it will take for an individual witness.

Mr. Curry suggested that the rules should differentiate between discovery depositions and depositions to be used at trial in lieu of calling the person as a witness. Ms. Sweeney suggested that a problem with the 50 hour cap on all depositions was that a party might use all his/her hours and then find that the other party was going to take depositions for use at trial and the first party wouldn't have any time left for cross examination of those witnesses. General consensus was that this would be cured by leave of court for additional time.

Soules - VOTE: FAVOR CAP OF 50 HOURS TOTAL DEPOSITION TIME - 13; OPPOSE - 7. VOTE: FAVOR PER DEPOSITION LIMIT - 21 (never finished vote because of some confusion). VOTE: FAVOR PER DEPOSITION LIMIT WITHIN 50 HOURS TOTAL - 15; OPPOSE 7.

Ms. Sweeney and Judge Keltner believe that there may have been some confusion in the prior vote and move to vote on per deposition cap with no total deposition time limit. VOTE: FAVOR PER DEPOSITION LIMIT WITH NO TOTAL LIMIT - 5; OPPOSE - 10.

General agreement that the Committee would discuss conduct at the deposition before deciding on the hour limit on individual depositions.

Mr. Susman - next issue is conduct at depositions. The subcommittee wants the deposition to be conducted as if in trial. The proposal provides that anything that occurs at a deposition may be presented to the jury.

Mr. Marks stated that attorneys would abuse this rule by making speeches at the deposition, and then show it to the jury. Mr. Gold stated that leave of court would be required before introducing material from a deposition and would take care of the problem. Discussion followed. Mr. Marks suggested that the rule mixes two concepts - how a party conducts litigation and the attempt to achieve justice. The rule could affect a litigants substantive rights for non-substantive reasons. Mr. Marks suggests that rules make conduct sanctionable, but not show improper actions to the jury. Further discussion. Mr. Soules suggests that this "takes sanctions to a whole new arena" (the jury) and opined that the Rules of Evidence would have to be amended because much

of the improper conduct is not otherwise admissible. (Mr. Soules does not favor proposal or amending the Rules of Evidence.) Professor Albright stated that any actions which relate to the witnesses credibility are currently admissible. Further discussion.

Mr. Yelenoski queried how the rule would work in practice: "Now we will have a video of how a lawyer was abusive of a witness." Judge Peeples queried if the proposal would allow the victimized party to not use a deposition except to show five minutes of abuse by a lawyer. Mr. Susman suggested that the rule should be limited to matters having to do with the veracity of a witness. Mr. Latting and Ms. Sweeney opined that matters having to do with the credibility of the witness may be shown to the jury under current law.

Mr. Susman suggested the Committee consider other deposition conduct proposals. The subcommittee has proposed that an attorney can instruct a witness to not answer a question in only four circumstances: (1) to assert a privilege; (2) to enforce a court ordered limit on evidence/discovery; (3) to protect the witness from abuse; and (4) to assert a motion to terminate or limit a deposition. The proposal would allow a party to terminate a deposition if deposition done in bad faith, to annoy or harass. The proposed rule would allow a private conference between the attorney and client only to determine if a privilege was to be asserted. The proposed rule does not allow objections during a deposition -- all objections were reserved to trial. If a narrative objection were made, it would preserve nothing. The parties could agree to make objections.

Mr. Curry opined that the no objection rule was a real problem for leading questions and non-responsive answers and that allowing those objections did not slow the deposition. Others concur.

Mr. Susman distributed a second proposal which allowed objections for leading questions, non-responsive answers, and "mischaracterization." Debate followed regarding the meaning of a "mischaracterization" objection. Judge McCown explained that it was a blanket objection which provided some ability to preserve error for review at trial on matters other than leading or nonresponsive. Professor Dorsaneo suggested that an objection to compound questions, and assuming facts not in evidence should be added to the list. Judge McCown stated that cross-examination would be used to correct the compound question problem and that the subcommittee was trying to avoid a dialogue between attorneys and to stop the practice of coaching witnesses through objections. Mr. Meadows suggested substituting an objection to "form" for "mischaracterization." General agreement that objections should be limited to form, leading and non-responsive. The penalty provision should also be in the rule. The subcommittee will work on another draft.

Mr. McMains expressed concern about a deponent being able to terminate a deposition with no meaningful punishment if done improperly. Judge Keltner stated that the goal of the proposed rule was to put the inconvenienced party in the position he/she

was in before the deposition was terminated and that sanctions could be used to punish improper conduct.

Mr. Soules suggests reference to "objecting party" should be changed to "moving party" in the 4th line of (5). Mr. Susman agreed.

Professor Dorsaneo stated that rules should not encourage terminating depositions.

Mr. Jacks suggested the provision regarding conferring with the client during "normal breaks" in the deposition was unworkable because there was no standard for a "normal break." Mr. Susman agreed.

Judge McCown stated that the purpose behind the proposed rules, in part, was to convey to the bar the idea that attorneys do not have an absolute right to confer with their clients and that the deposition should be conducted like trial testimony.

Soules - VOTE: FAVOR (6) AS WRITTEN - SEVERAL; OPPOSE - NOT AS MANY. (No count taken).

Mr. Susman referred Committee to paragraph (8) of the proposed rule. Judge Keltner stated that the proposed rule had the effect of partially overruling two Supreme Court decisions. Mr. Soules queried whether the proposed rule limited when a discovery master could be appointed. Judge McCown said that it did not, but Judge Keltner said that it did. Mr. Susman said the subcommittee would work further on the rule to correct the problem.

Mr. Susman referred the Committee to proposed Rule 171 regarding designation of experts. The issue is whether the defense should be allowed to designate an expert after the plaintiff or if they should be designated simultaneously. The rule eliminates the expert report in favor of depositions of experts. Upon designation, the expert will be required to turn over a substantial amount of information. Proposed rule does not limit the number of experts, but allows 6 additional hours per expert deposition time for more than two experts; and if additional experts are not used at trial, may recover costs of the deposition of the additional experts not used at trial.

Mr. Gold stated that the federal rules require simultaneous designation and that it is a practice peculiar to Texas courts which allow the defendant to designate after the plaintiff. Mr. Gold opined that defense attorneys usually know what experts they will need to call and have often consulted with the expert from the outset; and if the defendant can show that he/she could not have anticipated the issue presented, it should be good cause for later designation of an expert by the defendant. Mr. McMains stated that in many cases, the distinction between plaintiff and defendant is not significant - like divorce cases or much commercial litigation. Further discussion.

Mr. Jacks suggests that there is a difference between experts who also happen to be fact witnesses (like the treating physician) and the "hired gun" expert. Mr. Perry suggests making the rule applicable only to hired guns, and let fact witness experts be treated like other fact witnesses.

Further discussion on requiring designation by a date certain rather than "as soon as practicable." General consensus that the "as soon as practicable" standard should be abandoned. General agreement that a date certain is appropriate and that the date may be modified by agreement of the parties or court order.

Judge Guittard suggested requiring only written reports from hired gun experts and not allow depositions of those people. Judge Keltner stated that the task force had looked at this issue in detail and decided it was better to allow the deposition. Mr. Soules prefers that the rules allow for either a report or a deposition. Judge McCown stated that we want to avoid the litigation over the quality of a report and get away from excluding information because the report was not adequate. Further discussion followed.

Mr. Latting queried whether there would be any exclusion of evidence based summary of the expert's testimony which is required by the proposed rule. Mr. Latting was of the opinion that the expert should not be allowed to testify on any issues not disclosed in the summary unless the expert had been deposed, in which case the expert could testify about an issue. Discussion followed, but no clear consensus developed.

Judge Peeples stated that the tenor of the discussion was from attorneys with damage cases and that other cases were being forgotten. For example, family law cases often use written reports and it would be a major change in the law to not allow a party to request a written report from his/her opponent.

Soules - VOTE: RULES ALLOW ONLY DEPOSITION (in other words, accept subcommittee proposal) - FAVOR - 12; OPPOSE - 7.

Adjourned until Saturday, July 16, 1994, 8:30 a.m.

The Advisory Committee of the Supreme Court of Texas convened at 8:30 o'clock a.m. on Saturday, July 16, 1994, pursuant to call of the Chairman.

Saturday, July 16, 1994:

Supreme Court of Texas Justice, and Liaison to the Supreme Court Advisory Committee, Justice Nathan L. Hecht was present.

Members present: Chair Luther H. Soules III, Professor Alexandra Albright, Pamela Stanton Baron, Professor Elaine Carlson, Sarah B. Duncan, Michael A. Hatchell, Charles F. Herring, Jr., Donald M. Hunt, David E. Keltner, Joseph Latting, John H. Marks,

Jr., Honorable F. Scott McCown, Russell H. McMains, Anne McNamara, Robert E. Meadows, Harriet E. Miers, Honorable David Peeples, David L. Perry, Stephen D. Susman, Paula Sweeney and Stephen Yelenosky.

Ex-Officio Members Present: Honorable William Cornelius, Doyle Curry, Paul N. Gold, David B. Jackson, Honorable Doris Lange, and Honorable Paul Heath Till.

Members absent: Alejandro Acosta, Jr., Charles L. Babcock, David J. Beck, Honorable Scott A. Brister, Honorable Anne T. Cochran, Professor William Dorsaneo III, Mike T. Gallagher, Anne L. Gardner, Honorable Clarence Guittard, Franklin Jones, Jr., Thomas H. Leatherbury, Gilbert I. Low, Richard Orsinger and Anthony J. Sadberry.

Ex Officio Members absent: Thomas C. Riney and Bonnie Wolbrueck.

Also present: Lee Parsley, Holly Duderstadt, Carl Hamilton, Denise Smith for Mike Gallagher and Jim Parker.

Meeting reconvened, Saturday, July 16, 1994. Called to order by Luther Soules.

Mr. Susman referred the Committee to page 12 of the subcommittee report, proposed Rule 168, the interrogatory rule. Mr. Susman explained that the proposed Rule allows unlimited interrogatories which can be answered "yes" or "no" and that other interrogatories would be limited to 30 in number; contention interrogatories which required the party to marshall his/her facts are eliminated, but interrogatories can still be used to require a party to provide more particular information in support of pleadings; and requests for admissions are eliminated. First issue, advisability of interrogatories which require only a yes or no answer.

Mr. Marks and others expressed the opinion that clever attorneys will ask questions which really cannot be answered yes or no and will force the other side to write extensively to answer an unlimited number of interrogatories. Mr. Soules inquired why this was necessary. Mr. Susman explained it was an attempt to provide one side an ability to get more information about the other party's pleadings, while eliminating contention interrogatories. Discussion followed, and several members expressed concern about a new discovery device which is unlimited in number.

Mr. Perry suggested that the rules distinguish between interrogatories seeking facts and contention interrogatories; proposes unlimited fact interrogatories and strictly limited contention interrogatories. Judge McCown stated that the problem was clearly distinguishing between facts and contentions.

Judge Peeples and other members of the Committee expressed view that this is a pleading problem which the Committee is trying to fix by a discovery rule. Mr. Soules explained that the contention interrogatory practice was created in 1984 as an alternative

to special exceptions which did not require court intervention. He suggested that it was a "failure" and possibly should be abandoned. Discussion continued.

Ms. Albright opined that the problem was not contention interrogatories as much as it was the rule requiring exclusion of evidence. Under subcommittee proposal, exclusion of evidence would not occur as often. Ms. Duncan stated that it was not only exclusion of evidence, but the amount of time a diligent attorney spends answering contention interrogatories, and the attendant expenditure by the client for fees.

Mr. Soules - TAKE A CONSENSUS -- HOW MANY FAVOR RULES ELIMINATING CONTENTION INTERROGATORIES ALTOGETHER -- SEVERAL; HOW MANY IN FAVOR OF RETAINING THEM TO SOME EXTENT -- A FEW MORE (no count taken).

Mr. Soules opined that "we can't tell the public we are going to give them unlimited interrogatories." Mr. Susman queried "how do we preserve contention interrogatories and not create this evil?" Refers Committee to the footnote on page 12 of the subcommittee draft. Discussion follows regarding the provisions of paragraph (4) of the proposed rule. Mr. Marks suggests that the standard discovery should inquire into the contentions of the pleadings and the facts which support those contentions.

Mr. Latting queried whether failure to disclose information will result in exclusion of evidence at trial. Mr. Susman refers Committee to page 7 of the subcommittee report, Rule 166b(a). Proposed language excludes evidence only if "deliberately" withheld or withheld through "conscious indifference." Otherwise, a continuance is in order. Discussion continues.

Mr. Yelenosky queried if the party deliberately refuses to disclose information, but the other side learns it anyway, is it excluded? Judge McCown answers that it is not, but Mr. Susman opines that deliberate withholding should result in exclusion. Judge McCown then suggests that it would be excluded because rules require "timely disclosure."

Mr. Susman - the next big issue is whether we preserve requests for admissions. Subcommittee proposal eliminates them.

Mr. Soules, joined by several others, is of the opinion that requests for admissions are not a problem area and therefor should not be eliminated; and that they are very useful for laying foundation for admission of documents.

Mr. Soules - VOTE: FAVOR RETAINING REQUESTS FOR ADMISSIONS - UNANIMOUS.

Further discussion of requests for admissions. Ms. Sweeney inquired whether a request for admission which said "admit you were negligent" is improper, and if so, should

the rule state that it is improper. Ms. Baron suggests unlimited requests for admission to authenticate documents, but otherwise limited. Mr. Marks favors no change to the rule.

VOTE: Agree with Mr. Marks - 9; disagree - 9.

Mr. Soules - Is anyone in favor of an unlimited number of interrogatories for any reason? No. General agreement that Committee will discuss numbers of interrogatories after deciding on disclosure provisions. Mr. Soules asked Ms. Duncan and Mr. Gold to work on language for sending discovery by floppy disk.

Mr. Susman then refers Committee to proposal governing requests for production, page 6 of report. The proposal no longer allows discovery to be served with the petition, but allows the party filing the petition to notify the defendant(s) not to destroy or dispose of certain classes of documents.

Mr. Marks and other expressed opinion that this will create "a whole new practice" with more expense to litigants and that parties are under a duty now to not spoil evidence.

Mr. Susman asks for VOTE - should rules prohibit filing of document request with petition? No one in favor.

Mr. Susman referred Committee to page 10 of report, request for production provisions. Mr. Susman states that the subcommittee was of the opinion that this practice was working fine and the subcommittee did not make many changes in this rule. Committee briefly discussed provisions for discovery of "electronic data."

The proposal requires the objections and the actual production of documents to occur at different times. Committee discussed requirement. Mr. Soules - VOTE: Is anyone against having all due 30 days after request? No opposition (stay with 30 days).

Mr. Latting, Judge Peeples and others were of the opinion that the request for production practice was working and that a revision of the rules were not in order. They viewed the work of the subcommittee as a substantial revision of the rule. Ms. Albright stated that this was not intended to change the practice, but to make the rule more understandable and to correct some problems, such as electronic data and who pays for copies.

Ms. Sweeney, Mr. Gold and others were of the opinion that the request for production practice was not working so well. Mr. Gold suggested that the answering party be required to answer specifically if the requesting party is required to request specifically; he would not allow the response "documents will be produced."

Discussion follows regarding method of production, including whether rule should require bates stamping documents. Judge McCown opines that document production is a key area of cost and intrusiveness and that the new rule should make the practice no more costly or intrusive than it is now.

Mr. Susman proposed that the subcommittee take the old rule and detail/redline the proposed changes; and subcommittee will justify any suggested changes. Mr. Soules agrees and sends matter back to subcommittee. Mr. Susman asked Justice Hecht to provide the subcommittee a one page memorandum on problems with document production from the Court's perspective.

Mr. Susman refers Committee to page 7 of the report, proposing rules for supplementation. Mr. Susman explains proposed rule. It does not apply to supplementation of depositions. It differentiates between amendments, which correct information which was wrong when provided, and supplementation, which provides information which has arisen since discovery. Committee discusses that concept. Some concern among Committee members that everything is an amendment, and that the rule therefore requires continuous supplementation (like the current rule).

Soules - VOTE: FAVOR NO DUTY TO "AMEND" - 9; OPPOSE - 8.

Mr. Perry suggests Committee consider the task force proposal which had a duty to supplement 30 days before trial and then supplementation on a regular schedule otherwise. Discussion proceeds. Mr. Perry suggests supplementation 30 days before trial and upon request by other party, with the number of such requests being strictly limited. Discussion of requiring supplementation 60 days before trial. Mr. Soules pointed out that initial notice of trial setting is 45 days before trial, and 60 day discovery cut-off would move the initial trial setting to 75 days. General consensus that this is inappropriate. Further discussion.

Mr. Susman moves adoption of subcommittee proposal. VOTE: FAVOR - 5; OPPOSE - 8.

Judge Peeples, Ms. Duncan and Mr. Marks state that they voted against simply to have more time to consider the proposal, but do not necessarily oppose.

Committee moves to discussion remedy of continuance, rather than exclusion of evidence, for failure to disclose information. Mr. Soules of the opinion that continuance can be devastating in some cases and rule should not encourage continuance; gives the defense a "powerful tool for delay." Judge McCown states that the defense is not entitled to delay if withheld information deliberately simply to force a continuance.

Meeting adjourned.