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

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 22, 1994

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

Taken before Anna L. Renken, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 22nd day of January, A.D. 1994, between the hours of 8:30 o'clock a.m. and 12:35 o'clock p.m., at the Texas Law Center, 1313 Colorado, Austin, Texas 78701.

SUPREME COURT ADVISORY COMMITTEE

INDEX TO TRANSCRIPT OF MEETING HELD

JANUARY 22, 1994

JANUARY 22, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
David J. Beck
Honorable Scott A. Brister
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Dan R. Price
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Pamela S. Baron
Professor Elaine Carlson
Michael T. Gallagher
Donald M. Hunt
Franklin Jones Jr.
Thomas S. Leatherbury
John H. Marks, Jr.
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
David B. Jackson
Hon. Doris Lange
Hon. Austin McCloud
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

J. Shelby Sharpe
Paul Gold
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt, Soules & Wallace
Denice Smith for Mike Gallagher
Carl Hamilton for J. Shelby Sharpe

CHAIRMAN SOULES: Good morning. We'll be convened. If anyone was here yesterday and failed to sign this list, please sign it that you attended yesterday; and we'll send another sheet around for those attending today. I talked with Tommy about the matter we left yesterday on Number 2, Paragraph 2 of 166d and to Joe, and let's see. Where is -- Tommy was here a minute ago. Well, anyway, he says that he thinks that the sanctions should go both ways and that -- where was that language we were looking at?

HONORABLE SCOTT A. BRISTER: Luke, I think it does go both ways after rereading it. It's 2(d).

CHAIRMAN SOULES: 2(d).

HONORABLE SCOTT A BRISTER: I'm sorry. 2(c).

CHAIRMAN SOULES: (c). Okay.

HONORABLE SCOTT A. BRISTER: Part 2, the last phrase, "the position of the party against whom such relief is sought." And what was confusing me is I thought such relief was the motion to compel or the motion

to quash which would say only the person moving to compel or quash could win. But I think in rereading it he's referring to such relief to expenses, the parties, that the expenses, the party against whom expenses are sought.

CHAIRMAN SOULES: Well, I think that's ambiguous.

HONORBLE SCOTT A. BRISTER: Yes. I think that's right.

CHAIRMAN SOULES: And we ought to make it specific so that it's clear that it applies to either the motion or the opposition. And why don't we just leave that to the Committee, okay Joe, to write.

MR. LATTING: I'm going to ask Tommy to draft that.

CHAIRMAN SOULES: All right.

MR. LATTING: And I don't know if I can bring myself to. I'll try, but I'm not sure I can.

CHAIRMAN SOULES: Joe, where it's stated specifically in you're 2 it says in it sort of the negative, "shall not award expenses if the unsuccessful motion or

opposition was reasonably justified" and so forth. And this doesn't -- Tommy's draft doesn't say anything about "unsuccessful motion or opposition," and it doesn't say anything about "motion or opposition," successful or not successful. So we need to make it clear that sanctions would be -- could be applied to either the Movant on his motion or the opponent Respondent on the opposition.

MR. JACKS: Yes.

CHAIRMAN SOULES: However you put that in there, that's the idea. And is there any dissent from that? Okay. Everybody concurs.

MR. LATTING: Luke, there is one more issue.

CHAIRMAN SOULES: All right, Joe.

MR. LATTING: I said yesterday when we talked about this Committee draft that there was one of the comments that I thought we should -- maybe we could discuss all of them briefly. There are three of them proposed; and I was going to voice my opposition to the middle one which says

"Parties and counsel should exercise caution before filing motions for sanctions, which may have serious, unintended consequences. Thus, a litigant should file a motion for sanctions only after exhausting other reasonable measures to resolve pretrial disputes."

I don't think we need that. I think that's sort of Hectoring and preachy, and we have already got that in the motion about the attempts to exhaust other, using other measures; and I don't know what it even means when it says filing sanctions motions may have unintended consequences. Somebody may know. I don't know what that means.

CHAIRMAN SOULES: Any discussion on this? Joe, are you suggesting that the comment in its entirely be deleted?

MR. LATTING: Yes.

CHAIRMAN SOULES: Or the words "which may have serious unintended consequences" be deleted?

MR. LATTING: I don't think we need any of the comment. I suggest we delete the whole comment.

CHAIRMAN SOULES: What's the

sense of the Committee on that? Someone address the issue. No one cares to speak this morning?

CHIEF JUSTICE AUTIN MCCLOUD: I agree.

CHAIRMAN SOULES: You agree.

CHIEF JUSTICE AUSTIN MCCLOUD: Yes.

CHAIRMAN SOULES: Okay. Leave it outcome completely?

CHIEF JUSTICE AUSTIN MCCLOUD: (Nods affirmatively.)

CHAIRMAN SOULES: Anyone feel otherwise? All right. That's unanimous then that that comment should be omitted from the text.

MR. LATTING: The other two comments I think are non-controversial, and I think we've discussed these or touched on them at our last meeting of the whole Committee, this Committee, the one about the availability of mandamus, and the other one just mentions the type of exhibits. But I want to invite comments, especially about that last one, because I'm not sure I'm correct about that.

MR. JACKS: Which are you referring to as the last one, Joe?

MR. LATTING: On this sheet here that we passed out, the bottom one, comment three, the one that "Although subparagraph 1(a) deletes reference to the types of exhibits that may be filed with a motion, subparagraph 1(b) makes clear that the parties may file, and the court may consider, such materials."

PROFESSOR ALBRIGHT: Took that out.

MR. LATTING: Yes. That's gone, isn't it?

PROFESSOR ALBRIGHT: Right.

MR. LATTING: So is that comment not superfluous?

CHAIRMAN SOULES: No, not superfluous because it recognizes that the references have been deleted, and they have been deleted. I don't know whether you want to say anything about it. I'm not commenting on that part of it.

MR. LATTING: Let's see. Well, I think what Alex is saying is that we

took that.

HONORABLE SCOTT A BRISTER: 1(b) is gone.

MR. LATTING: That 1(b) is totally gone based on yesterday.

MR. HERRING: Yes. That was keyed into that, so you really don't need that comment.

MR. LATTING: So it is superfluous, isn't it, if 1(b) is out? We talked about subparagraph 1(a) in the comment though.

MR. HERRING: Well, what it was, look Joe, on 1(a), the first sentence, what we had done was take out the language about exhibits that may be attached to the motion.

MR. LATTING: Yes.

MR. HERRING: And the comment says that's because we were referring to it in 1(b). Well, we don't have that provision in 1(b). Do you need to refer to it anyway? Do you need to say what you can attach to the motion?

MR. LATTING: I would think

not.

MR. HERRING: So you can just leave out the comment then.

MR. LATTING: Does everybody agree with that?

MR. ORSINGER: Can I comment? I don't know whether it was everyone's sense that we should never consider affidavits or whether even absent saying we can consider affidavits we could, but that's a pretty major change in the Rules; and I think that the Courts are probably going to assume that because we removed affidavits that therefore they can't be considered, and if -- I don't think it would be harmful if we clarify what our intent is in removing that sentence, because I can't see any other reason to remove the sentence than to preclude the use of affidavits.

MR. LATTING: Well, I don't mean to be facetious, but yesterday I wasn't sure what the sense of the Committee was on that. I thought we sort of kind of ran down into a pasture --

CHAIRMAN SOULES: The sense of

the Committee on that yesterday was to duck, and we ducked.

MR. LATTING: That's what I thought. Should we say that in the comment, or is it just too complex?

CHAIRMAN SOULES: I think we might as well, because we have really blown a hole in the discovery litigation practice by leaving that out. That's a big, big problem. Now then anybody that tries to introduce an affidavit in a discovery hearing or have an affidavit considered in a discovery hearing is going to be faced with the Supreme Court opinion that says it's not admissible and it's hearsay, inadmissible hearsay; and good luck.

MR. LATTING: Well, I for one --

CHAIRMAN SOULES: Talking about sending costs through the skies, boys, we have just done that, and girls.

MR. LATTING: I'm of the opinion I don't think the Committee is helping clarify the jurisprudence of the State by doing that.

CHAIRMAN SOULES: We're not.

We just ducked.

MR. LATTING: I move we un-duck and either get it --

HONORABLE SCOTT A. MCCOWN: No.

MR. LATTING: No. I'm not finished, if the Court, please. I move that we reach a decision on this, maybe not this morning. It may need to be something we defer. We should not just duck that issue, it seems to me.

CHAIRMAN SOULES: We ducked in the face of it being right out there in the open, everybody looking at it. And the vote was, what was it, 14 to 7 to take out the paragraph that gave guidance.

CHIEF JUSTICE AUSTIN MCCLOUD: I think we had 10 that wanted to keep it.

HONORABLE F. SCOTT MCCOWN: With all due respect to the Chair, I don't think we ducked it at all. I think we decided it, and I think the people on the losing end now want to go back and revisit it. I thought it was real clear what we said, which is that the question of a discovery hearing is exactly

like a hearing on a motion for continuance or a lot of other procedural hearings, and that on certain issues affidavits are going to be appropriate, and on certain issues they're not, and it's too complex to try to write a Rule on that; and if we need a comment, Chuck gave us one yesterday straight out of some case or some Rule about how due process is going to require different kind of hearings based upon the nature of what people were asking for and what they were alleging, something like that. Do you remember reading that, Chuck?

MR. HERRING: (Nods affirmatively.)

HONORABLE F. SCOTT MCCOWN: And we can write a comment that makes clear that the nature of the hearing is going to turn on the nature of what it is about. But I do think we were actually very clear yesterday about what we were doing and why we were doing it.

CHAIRMAN SOULES: Anybody have a suggestion on this comment so we can get on to discovery?

MR. ORSINGER: Luke, I would propose that we have a comment saying that affidavits may be appropriate depending on the issue or something to make it clear that we're not precluding the use of affidavits from all hearings.

HONORABLE F. SCOTT MCCOWN: Sure.

MR. LATTING: So take it out of the Rule, but put it in the comment.

MR. ORSINGER: If we can't have it in the Rule, I'd rather have it in the comment than not have it at all.

MR. SOULES: All right. So then would we include this comment and say "Although subparagraph 1(a) deletes the reference to the types of exhibits that may be filed with a motion, the court may consider," and then make some sort of a laundry list about what the Court may consider? Specifically what are you suggesting that we do in language?

MR. MEADOWS: I thought the vote was taken yesterday on the basis we were going to take it out of this Rule, but that

there was going to be a separate Rule dealing with this for all such situations.

MR. LOWE: That was my understanding.

MR. MEADOWS: And that it was not going to just evaporate. I don't think that was the sense of the Committee.

MR. LOWE: No.

CHAIRMAN SOULES: I know Bill said that could be done.

MR. HERRING: No. Bill agreed to do it.

CHAIRMAN SOULES: Did he?

MR. HERRING: Unwillingly, but yes.

CHAIRMAN SOULES: Okay.

MR. LATTING: Well, if it is going to be there, then we wouldn't need to have a comment if it's going to be covered in another Rule.

CHEIF JUSTICE AUSTIN MCCLOUD: Well, I sort of got shot down on this. But if we're going to list these things such as affidavits, et cetera, that it occurred to me that from listening to some of the trial

judges that they -- it's not uncommon for them to simply ask questions. And if you're going to list them, if I were out there and I see affidavits, this, this and this and the judge takes over and just starts asking questions and getting informal answers, I think you have created a problem because counsel is going to look at that and say, "Well, Judge, you know, that's not an affidavit; that's not live testimony."

So one of the judges was concerned about having that in there. I just -- I don't know with all this stuff and judges feel like that they would like to have the opportunity to decide these matters based upon their questions and informal answers. I think you better be careful that you don't put it in, it seems to me, because I know if I were out there and the judge started doing that and you had affidavits listed and you had hearings listed and you had this list listed and you had that listed, the best way I knew how I'd tell the judge that it is not listed.

I don't know. I just pitch that out. You people are trial judges and

lawyers. I don't see this where I'm coming from, and I think you ought to think about it.

HONORABLE C. A. GUITTARD: I think there is great value in having some certainty as to what can be heard under certain circumstances at least. If you're going to let affidavits be used in some cases and not be subject to the Hearsay Rule on that ground alone, we ought to say so. If the representations of counsel can be considered, we ought to say that.

CHAIRMAN SOULES: Okay. Well, we covered most of this yesterday, and now we're just trying to give guidance to Joe whether to have any comment addressing the issues in 3, in this third comment, or have nothing. Let's just leave it to Joe to draft something up and put in there whatever you want and then we'll look at that.

MR. LATTING: I guess I'll draft a comment along the lines of what judge McCloud and Judge Guittard have said and give it to the Committee and let the Committee do with it what they choose. I don't know anything else to do.

CHAIRMAN SOULES: Okay. Then If we get a Rule that says how or what evidenciary information can be used, if that's the proper term, what information can be used by a judge to decide certain types of motions, then the comment could be just revised to say the type of materials that the judge can consider is in Rule X, Y, Z. If that materializes and works, then we'll have it. If not, then we could put the specifics here.

MS. BARON: I just have a general comment on comments. We have got five pages of comments in the Task Force Report that aren't before us. I think on the subcommittee we're just going to need to go through those with a fine tooth comb and alter them, because we've made so many changes to the Rule that we can do this and we can do that, but I think that the comments really need to wait until the Rule is fixed.

I also would like to propose Chuck's ABA language that he read on what kinds of evidence can be considered, and I will incorporate that as an alternative version to what Joe writes.

CHAIRMAN SOULES: So you're going to do that then in the interim between now and the next meeting and we'll take a look at it then?

MS. BARON: Yes.

CHAIRMAN SOULES: Anything else? Judge Brister.

HONORABLE SCOTT A. BRISTER: I had several parades of horribles of things that might happen under our new 2. Is that something we can just discuss in the subcommittee and bring back next time?

CHAIRMAN SOULES: Please. I think so.

HONORABLE SCOTT A BRISTER: I won't ruin your Saturday morning with horribles today.

CHAIRMAN SOULES: Well, I think we are going to have that discussion anyway at the next meeting; and we're trying to get this finalized, and we do want to hear from the Discovery people today, if possible, and that's the only reason I've been putting that off, Judge, if that's okay.

MR. LATTING: We're through as

far as I know.

CHAIRMAN SOULES: Pardon?

MR. LATTING: We're through as far as I know about this Rule. You'll have drafting and --

MR. LATTING: No. I mean this morning.

CHAIRMAN SOULES: This morning. Okay. I see. I agree. Okay. Now, Steve Susman and David Keltner, why don't you-all give us a status, one or the other, however you-all have it organized or conceived to give your report this morning. I think the Committee would like to get informed what Rules have been studied by the Discovery Task Force and the Subcommittee, if it's done much on that yet, what Rules have been studied and what recommendations for change are being made or are anticipated to be made; and then at our next meeting we're going to get down to the real specifics of the Discovery Rules. We need some orientation. And if this takes a couple of hours, whatever it take to give us the details of your progress and your status at this time. So however you-all want to

proceed between the two of you is fine.

MR. SUSMAN: As the Chair of the subcommittee I have not done anything, waiting for the Task Force Report. So I think at your suggestion the subcommittee has done nothing until we get the final work production of the Task Force, which I understand is almost ready. So I think David should report.

CHAIRMAN SOULES: All right. David Keltner.

MR. KELTNER: Let me go over them in fairly good detail. Let me sum up basically where we are. We had reached a consensus on basically everything except limitation on discovery; and we had some problems about how to limit it in terms of numbers of certain kinds of discovery requests or some further limitation on what was in fact discoverable. We haven't been able to reach a consensus on that, so I have drafted, taken the liberty of drafting it both ways and have submitted it to the Committee members or Task Force members. That is the last issue we had to address other than the pretrial Rule 166 as it dealt to discovery matters. We had some

problems with that, but we are making a recommendation that is somewhat different than current Rule 166. I've also taken the liberty of drafting that and have sent it to the members, and we will have one last meeting to discuss those.

There will not be a consensus on those two items, and let me explain briefly why. On Rule 166, the pretrial Rule we're evenly divided, and the division is not along Plaintiff/Defendant lines. It is where you live. And this is the basis: Really it's awful. I mean, if you live in a town that has two words in its name, literally San Antonio, El Paso, Corpus Christi, Fort Worth there are no problems with 166. All the other hand, if you live in Houston, we can't find a lawyer that is happy with the way Rule 166 is being administered. If you live in Dallas where it in most instances it is applied by trial judges unilaterally to every case, and in fact once your case is set you have a scheduling order and then subsequently a -- in which discovery issues are discussed, lawyers seem to have no problem with it; but the same

action in Houston has everybody mad. So we have come up with a modification of that that is based to the type of case, and we'll discuss that in a minute.

But after having told you that and told you that the limitations on discovery are a problem, let me run over the rest of the report which is already complete and has already been reviewed by the entire Task Force; and I think some of you have seen that report, but nonetheless let me go over it. I'm going to limit this in the major changes. Almost every Rule is changed to some extent. Some of these changes border on open revolution. Some of them aren't much changes at all.

This first one is a limited mandatory disclosure. That sounds much like the new Federal Rules. It really isn't. It would essentially be this, that any party on request, and the request would be done by a letter, not a set of interrogatories or the like, could get four items of information, and there would be no objections to getting this. Those items would be the identity and location

of persons with knowledge of relevant facts, the identity and location of expert witnesses, and the subject matter of the expert's testimony; but that is in only in general terms on experts, very general terms, not specific, not something that could be used to exclude testimony later. Then three, all the matters in Rule 166(b)(2)(f) which are those regarding insurance settlement agreements and contracts, the information in 166(b)(2)(h) which regards medical records if they're in dispute. In other words, in a personal injury action you can require the Plaintiff to give you the medical records or a release to get those. A statement of the correct names of the parties to the lawsuit; and if a suit is based on a written obligation, copies of the instrument on which the lawsuit is based.

Now, this is a lot short of where the Federal Rules have gone on this, tremendously so. And we had quite frankly with both representatives of the TTLA and TADC when we used the term "mandatory disclosure" we got a lot of bad reaction. I must tell you to the people we had explained it to and how

it would work I think we have quelled most of those fears. Again, the way this would work is you simply file a letter and say "I want one of these four items," and it could be all, or it could be less than all, and you can't expand on it. You can't say "I want facts known about a specific thing." It's just those four things. So anybody could conduct discovery by sending a letter; and the obligation to answer those is in more time period than normally allowed. It would be 60 days. So you're guranteed to get that information, but the Defendant gets the period of time to put it all together as well. Again, there would be no change of that. In the mandatory disclosure once you ask for it, you just ask for those particular things.

We think that will be helpful in cutting down some of the objections that we already get. We're finding we get a lot of prophylactic objections from both Plaintiffs and Defandants. We're trying to do away with those. As we go through the Rules you'll see how we've tried to take the trial court out of some of these situations so there's not as

many discovery hearings.

Again, we had the problem again based on location about how bad discovery hearings were. If you were in West Texas out from Austin McCloud country you didn't have much of a problem. If you were in Houston or Dallas, you hated every other lawyer that was around you even if they were on the same side as you. In San Antonio and Austin really not much problems; and interestingly of all things we found the subject matter differentiation as well.

We were told basically that most of these problems arise in personal injury cases. When we dealt with family law, and we luckily had a number of family law people on the Task Force, we found that some of the problems we were solving didn't really exist where they were. So we tried to borrow some of the things they use like the list of inventory and appraisements and put it in here, and that's one of the reasons for the mandatory disclosure Rule. That's basically taking something from them and putting it here; and I think it will work well for us.

On expert witnesses we radically changed the law; and you're going to have I think depending on your view of experts you're going to have radical action one way or the other. First off, we have decided that we would do away with the requirement for a party to provide reports of expert witnesses. The reason we did that was we were finding more and more in more types of litigation the expert testimony that was used was not the classic expert testimony that you go hire a hired gun. It was the person who had treated the Plaintiff, for example, or a person who had done other types of things that had expert opinion about the subject matter, but wasn't under control of one of the parties. And as a result we were applying the exclusionary Rule and also sanctions and the like to the party who intended to use that testimony, but that party also had absolutely no control over the production of the report and how complete the report was. So we were finding in fact in talking to trial judges that they were saying motions to exclude part of the expert opinions testimony that was not adequately decribed in

the reports, and it was becoming more of a ploy. And as we discussed this with judges they indicated that and also the lawyers that expert reports although helpful at some time weren't really all that helpful in preparing a case for trial, especially if you're going to depose them in any event.

Now, remember this doesn't do away with the reports that they would routinely have in their files things like all their factual findings and any opinions that made it into their notes in any event, just the requirement that they file a formal report. There was some disagreement on this, because in one instance the whole idea of this Rule, and we can look back to see what it was, the whole idea for this part of the Rule was that one ought to be able to get the expert's report and not take the expert's deposition; but we found that that in fact was not what was happening and the Rule didn't have that benefit anymore, so we took that part out.

Additionally we decided to limit on interrogatory responses what you could get. For example, we have said that you

now could get only general explanations of the facts known and opinions of the expert. If you want to go into more detail, you're going to have to go ahead and take the expert's deposition. So that is a limitation in things you can get in written discovery. Unfortunately it does -- it may increase the amount of depositions; but according to lawyers we talked to they don't think so. They think all these depositions are being taken anyway, and there are a whole lot of battles over reports that ought not to be taking place, so that is a pretty large change.

We changed all written discovery by an amendment to Rule 166. Well, before I get to that let me talk about privileges generally. We have eliminated or propose to eliminate the witness statement privilege. In reviewing this again with trial judges and lawyers we find two things. It doesn't have any application at all in family law matters, never used. Second, any innovative lawyer can get around the witness statement rule pretty easily; and that's what

happens. So what happens is it's now used more as a trap than anything else, and we recommend the elimination of that. By the way, the Committee was unanimous on that and with an awful lot of Defense and Plaintiffs people on it, which amazed me.

On work product we have changed work product up to more look like the opinion in National Type vs. Brother and to put in that anticipation of litigation is an exception, because it is as the Court noted in that opinion it is not now so under the Rule; and in fact I think probably -- I don't know what the intention was, but it will be there and be on its face to avoid that trap.

We have also suggested though, and this appears to be an unanswered question and we may be getting into the Court's business to say that undue hardship in the other and substantial need not be an exception to the work product Rule. That's different from the Federal Rules. That is basically what Texas practice is now, but we propose to say it to make it clear on its face.

As to all written discovery,

let me change now to all written discovery. We have again by amendment to Rule 166 proposed to say that work product in attorney/client matters are deemed not to be requested in any written discovery, so if you -- unless you do so expressly using those words. So there is now no need. There would be no need for the prophylactic objection when you get a question of "I want your entire file" assuming you can ask that. You really can't. But if somebody asked something like that, that you're saying "Well, wait a minute; that includes work product, and that includes attorney/client." Under the Rule by definition it will not. So there is no obligation to answer under in that regard, and there is no obligation to objection.

Now, if a lawyer or party wants to ask specifically for that information, they still can do that, but they must ask by asking specifically for that information and have to go to the judge when they have the hearing and say, "Yes, I am asking for things that may be attorney/client privilege; I don't know what they may be, but

I am asking for those, and I want you to require the other person to prove up that exception." What that's going to be I think is if you're asking for things that on their face are privileged and you mean to do that and they may have some exception to them, you're going to have to go to the judge and convince the judge that you're entitled to those.

And we all know there are some kinds of things like insurance bad faith litigation and the like in which that type of information is more discoverable, if you will, than in other types; but you're going to have to do it expressly. We did not include party communications in this limitation, and the reason we didn't is because reasonable minds certainly do differ and the facts of each case do differ about whether certain information even on a time continuum was under the party communication Rule. So we omitted that; and again, interestingly that was unanimously accepted by the Task Force.

On duty to respond to all discovery we found in looking at the Rules

that there currently is no duty to respond expressly set out in the Rules. I didn't believe that, but after looking at them for long periods of time, that is true. There are consequences for not responding, but that's it. So what really happens in many instances and unfortunately in some jurisdictions is lawyers very much believe that they can wait until 30 days before trial to answer any discovery no matter whether they had the answer before, except in expert where we have the Builder's Equipment vs. Onion situation and the Mother Frances case going the other way.

So we decided that we would try to clarify that. So here is what we have done. There is an absolute duty to respond within the time period for that particular vehicle. That's one. Two, you don't need to make prphylactic objections. And remember, we've taken out work product and attorney/client from the necessity of being objected to on written discovery, so what happens is that if you think a privilege may arise at some time in the future, which

happens quite alot especially in professional malpractice situations, a peer review committee report that's going to be prepared during the pendency of the litigation or something else, there is no need to object to it then. You only have to object for those things for which you have a good faith belief at that time are objectionable. But that good faith belief is not the lawyer's. It is the party's good faith belief. So if the lawyer has not invested the time to look about what is objectionable, that's too bad; but the party has the obligation to do that.

So there is an initial duty to respond. If you break that, the Court has the opportunity under 215; and we've got a suggestion to go with the sanctions report for sanctions there; and those sanctions can range from fairly severe to fairly minor. Additionally if you object to a specific discovery request, and you say for example some of the information maybe is privileged due to the party communications privilege, you have an obligation that is basically unstated in the Rule now to produce everything else the

request called for. So your objection stalls only the things you are objecting to. Not the entire request.

In locking about how that would affect the Court's decision in McKinney vs. National Union we don't think it will affect it; and when you see the entire report and the comment to that portion you'll see why. We ran that down fairly well.

Now, let me turn now to objections. You have when you make an objection you are certifying that you have a good faith factual and/or legal basis for making the objection. You can make supplemental objections if you find that something asked for something you didn't understand it asked for, and that again is based on a good faith belief. That dulls the line. There is no doubt about that. It has the effect of partially overruling Hobson & Locke vs. Moore, but at the same token our position is that there are some things that are created after the discovery request is submitted and you ought to have an opportunity to object to that and not waive that

objection. I don't think Hobson & Locke vs. Moore addressed that, but nonetheless certainly litigants around the state are saying it did.

So again, the part of the response Rule and the objection Rule is to take out the need for prophylactic objections that don't ever need to be made in the first place that we spend a lot of time in front of trial Courts increasing the cost of litigation arguing about.

On supplementation, and this is a radical change, we felt that supplementation really was the response Rule for discovery. The real truth of the matter is under 215(5) and 166(6) that we were seeing lawyers around the State wait until 30 days before trial or in accordance with the 166 pretrial order waiting until those times to make what their serious responses were; and again, we hope we have taken that away.

The other thing, the other objection we had most from in-house counsel and from clients that we contacted in most of those since I have to tell you are

institutions, and they are because it's difficult. Most personal injury Plaintiffs don't have a whole lot of repeat business despite allegations to the contrary, but so we did talk to people involved in litigation quite a lot. They said one of the major problems they had was the cost of constantly supplementing discovery and that they thought that while that had been a good change in the Rule, that the cost of complying with it was astronomical.

So we made this change: First off, the 30-day Rule goes, and instead we have suggested at least a 60-day Rule with I guess about 30 to 40 percent of the Committee saying that 90 days out is a better trial time. The problem we had, the difficulty we had with that is depending on where you practice law, that time period changes. Quite frankly, in many courts which can get relatively quick trial settings even a 60-day Rule would mean at the time the case was set for trial it was already too late to supplement. So we're going to have to standardize that practice. I know this Committee has dealt with that in the

past. I think we're going to have to standardize some type of practice there. We felt a little bit helpless to do so.

And by the way, it was our thought that in some of those, and my experience in that regard is more in West Texas, it's very helpful to be able to get to trial in six to eight months, and it's the 30-day Rule works well there. But if you're in one of the metropolitan areas, that can really end up being a problem.

The second thing we've done is this: There remember is an immediate duty to respond that is not now in the Rules that we talked about earlier. There is now an absolute duty to supplement by 60 days under our new proposal to you with an option for 90 days. But additionally we have added there is periodic supplementation. So each party is entitled, and there is some precedent for this under the Rule, each party is entitled to ask for complete supplementation for all discovery as to a certain date once every six months. And we have a provision in the Rule that I won't try to get into in detail. If the case

is on file for less than that period of time, 90 days after the Defendant answers there is an opportunity to do that as well. So even if a case goes to trial before that, there is an opportunity for response.

We think that does two things. First of all, there is some downside to this. I think big downside. If something major breaks in the case, a party could hide it and could arguably hide it for as much as six months, and there is some gamesplaying that could go on there. We think that's already occurring. And in fact there was universal fingerpointing across the table in our meetings about that saying "Plaintiff do it." Say, "Oh, no. It's always Defense lawyers that do it." And all the family law lawyers said the other side always did it, but they never did.

But a fascinating point, this is a compromise. It's got some bad things in it. You could hide something for six months without any meaningful sanction. There is no doubt about that. The benefit of the Rule as it is now is there is arguably some type of

sanction depending on which trial judge you're sitting in front of. But the up side is there is no obligation to sweep your entire file, update all discovery all the time.

We looked at one case in which there were 106 -- now, this is with all parties -- 106 supplementation responses filed, 106. That case was on file 18 months before it was tried. We found in larger case that went on for longer periods of time there were even more; but I was amazed in 18 months you could get 106. So our theory would be to limit that, but the duty is absolute. And if you bust it, our suggestion again to the Sanctions Task Force is going to be very severe sanctions including something akin to a death penalty sanction. That would be a change from the Sanction Task Force Report to you.

On the Exclusionary Rule we took a very hard look at the Supreme Court's invitation to review in Alvarado, to review the sanctions available for failing to list and completely designate a witness. There is disagreement on the Committee about this.

Some of us felt that there was a possibility for a lesser sanction. Others thought that the exclusionary Rule, that if there is one thing that had worked in the new Rules Of Procedure, this was it. It kept people very honest. The vote on our Committee was to go, keep the Exclusionary Rule the way it is. It was I would say roughly a 70/30 split on that percentage factors.

However, we have drafted some narrow, some rather narrow exceptions. Parties who were names parties, people who have already been deposed or persons who have already been deposed are excluded from the Rule as are with less force and in fact by roughly a 50/50 split on the Committee persons who were their merely records custodians to prove up the authenticity of records and things. That follows the Tingle vs. Henderson case which basically excluded those in any event. We thought it's possible even under Tingle vs. Henderson and the Giden cases to draft a response that would recall for that answer.

Let me tell you in that regard

since we're talking about the Exclusionary Rule which primarily is dealt with witnesses in application, there was a suggestion and a lot of conversation about allowing the question that this Committee has I noticed reviewed on two prior occasions, and that is to ask the ultimate question of "Who do you intend to call to testify." We decided since you voted it down twice that we wouldn't put it up to you again; but I think that's an open question that ought to be looked at.

If you look at the application of the Exclusionary Rule, that's the whole reason for the Exclusionary Rule to exist. The Courts in applying it assumed that you were telling the other side who is going to testify. That's also obviously work product. Our thoughts were that if that was going to -- obviously that can now be done under Rule 166. We had decided to leave it under Rule 166 for exceptional cases, that there were cases in which you ought to be able to do that. We also found that most good lawyers exchange that information in any event and thought that that was something we ought to

look at.

Let me now get to the individual vehicle Rules. There are some minor changes in those. I'm not going to -- we rewrote all of those to follow the same format. These Rules were drafted at different times, and they don't all look the same. I mean, if you want to look for -- some of the scope provisions are in those Rules, and if you wanted to look there, you look at the Rules different places to make those determinations.

We tried to move all of the scope matters into Rule 166b, and in fact we do limit what you can get in some of the vehicle Rules substantially, but let me go over those individually. First off, this is where the numbers issue came up. There is substantial sentiment on the Committee, and this is where we broke down, about limiting the numbers of interrogatories further than what they are now, because remember you have a limited mandatory disclosure limiting the request for admissions to 30 a case, but they could be asked at any time and any number.

Interrogatories could be asked at any time. They did not have to be of two sets of 30. They could be either one at a time. They could be the whole bunch at a time.

We also on request for production we would substantially limit those, or one part of the Committee wanted a very severe limitation on those. There was one feeling for 30, another for 60. Everybody realized that in some products litigation and quite frankly also in a lot of family matter proceedings that that might not be appropriate. That's where we really had a breakdown. One of our members, and a member of the Committee, David Perry, suggested another way of doing that; and we also have an alternate Rule that will come to you to eliminate contention discovery. Anything that would go into the contentions the parties would not be allowed in discovery. There is a further modification of that to allow only in interrogatories with one set of 30. That's the only way you could ask a contention.

We did -- if the Committee would like to recommend that to the Supreme

Court, we have also recommended a change to Rule 45 regarding pleadings. There is a further, even a further modification of that that would say that you can ask for a matter of clarification that would not be a discovery matter, not be a special exception as we used to know that awful practice of spending four hours in the judge's chambers saying "I don't understand what he means" when in fact we all really did. We just wanted him to plead out several matters, asking for clarification on certain particular matters in the pleadings that were itemized.

We have taken, and Rule 167 is radically changed. We have taken the entry to land provisions out and done them separately, because some of the provisions of Rule 167, and if you're involved in any litigation resulting land, you'll find that most of Rule 167 doesn't apply to that and in fact is almost contraindicated, so we took that completely out of Rule 167.

We also have another Rule that everybody agreed on that would be in cases in which a Plaintiff, this would be basically

civil cases, personal injury, contract, DTPA, tax collection and the like, and there is a list of seven items, that if the Plaintiff certified that the recovery was less than $30,000, and that is exclusive of attorney's fees, statutory penalties and costs, then a separate track would be available for discovery in which a limited number of interrogatories were permitted, a single request for production of no more than 10 items and four depositions were allowed per party.

The depositions I think we were a little high on, and I think the consensus was we were, and that mandatory disclosure would have to be used as well. There was another provision suggested that did not carry; and that was to award the use of the mandatory disclosure provision by saying if you use mandatory disclosure and you got certain information, that -- excuse me. Not "awarded it."

Let me backtrack. If you use mandatory disclosure, you cannot ask for that information in other ways. That failed, and I

think wisely so, because obviously in some litigation you will want to follow up on what you learned in the mandatory disclosure items.

On depositions we proposed that we recognize that two things were true. Depositions are used in a lot of cases, and in fact now moreso now even in family law than they were before. In fact, one member of the Task Force indicated that he had come to the conclusion that depositions really were the best way to pinpoint and get discovery done. I've got to tell you that a lot of our Committee felt that way, and felt that what was once the most expensive discovery device probably was now the most in a time cost analysis the most effective, because you could pinpoint what you wanted to know.

There was a suggestion that we allow, specifically allow contention-type discovery in depositions such as you could ask if you were deposing a personal injury Plaintiff, you could ask "Who do you intend to call at trial," if that were permissive and all kinds of other things, your contention X,

Y and Z "Who is persons with knowledge of relevant facts." That did not carry; and I think it's wise that it did not, because we all know that in deposing a party you're not really deposing the person who has that type of information, yet that will come to you as a minority report, because a very strong group or I would say 40 percent of the Committee felt that that ought to be done.

Those are most of the Rule changes. I guess the part that again we disagreed on is how to limit discovery to make it more cost effective. Taking contentions out of discovery is one way to do that. Does it adversely affect the trial of the case? Heavens, I don't know. But you'll see two provisions on that.

The other fear we had is to do a numerical limitation on the discovery vehicle Rules like 30 interrogatories, 30 requests for admission and 30 requests for production was too many for some cases, too few for a lot of others in that Rule 166 came into play. But every time we got into Rule 166 all the lawyers in Houston would pick

up and leave literally. They'd say, "No. No. No. You don't know. We have a judge down here that does X, Y. You just wouldn't believe what he makes us do."

HONORABLE ANN TYRELL COCKRAN: Don't look at me.

MR. KELTNER: That's why I said "he" very specifically. In conclusion I think the only things that we have not been able to reach an absolute consensus on have been the ones I indicated. Those will be difficult matters to look at. We have not chosen to follow the new Federal Rules; and in fact we considered doing that, especially after the 31st day came and past, but then we were really very much by the 68 percent of the districts are now not following them and won't for a period of time, so we felt better about our decision.

These changes radically change discovery as we know it. They're going to limit it more than you suspect. They're going to put a lot of pressure on lawyers to answer discovery truthfully, but will also lighten the load in terms of what is in contention;

and that's what we wanted to do.

The limitations on discovery there is just a theoretical difference on which way to go, whether you're going to limit it at all. All of us agree in some cases it should not be limited at all. And, you know, the amount in controversy doesn't necessarily decide that, which was also something that was interesting. We learned from a number of members of the Committee including some of the Legal Services members that that was important to them not to have a limitation on some of their cases; and I think that is really true. There are a lot of things, a lot of policy decisions this Committee will have to make on that.

The other thing is since a lot of people now don't want to go to Federal Court, there is no place else to go other than state court or mediation. So that's pretty much we left those questions answered. In fairness to those Task Force members here, since we had difficulty in concluding on the last issue of limitation of discovery, I've just drafted those, and it completed that, and

am submitting it to our Task Force just saying "We can't reach an agreement. Here's a draft of both side's positions. We need to shut this down and get it to this Committee."

I've also taken a shot at four alternative drafts of Rule 166. Dale Felton from Houston has done another. That is something else I think this Committee needs to look at, because it needs a universal application in the State. We don't have problems with this issue some places. We do others.

Luke, that's about it. That's a thumbnail sketch.

CHAIRMAN SOULES: Thank you very much, David. I think Justice Hecht wants to speak now on the discovery issue. Justice Hecht.

JUSTICE HECHT: The Court feels that this is one of the most important issues that the Committee will address this year. The problems that have arisen in the conduct of discovery are not unique to Texas. They are occurring all over the United States. We have the benefit of considerable

debate on these issues as regards changes in the Federal Rules and the Rules of a number of states. The ABA has a commission that has also studied changed in the discovery Rules. The National Center For State Courts has done some statistical analysis of the conduct of discovery in a number of different state courts including Boston and L.A., so we have a lot of information to guide us here.

The principal complaints of discovery, about discovery are that it is beginning to dominate the litigation process, that the amount of time and resources expended in discovery are so eclipsing the whole conduct of the litigation and of getting the dispute resolved that it makes it difficult for ordinary Plaintiffs and Defendants to avail themselves of litigation as an effective means of resolving disputes.

My sense is that the Court either unanimously or to a very high majority believes that there have to be some effective and real limits on discovery in at least some cases. There have to be not just hoping or exhortative or mechanisms to try to encourage

lawyers to conduct less discovery. There have to be constraints. And while there is -- I don't think there is any sense on the Court that cases which need far more discovery than the routine case should not be allowed to do that. By in large our cases do not fall into that category; and there have to be restrictions, real restrictions on the number of depositions that can taken, the number of interrogatories that be asked. In fact, as I read the Task Force Report there is not much left after the voluntary disclosure that is suggested that you can ask in an interrogatory that you couldn't ask more effectively by some other means, so you question whether we should even have interrogatories at all after the voluntary disclosure that's been proposed.

But I know as I look around the United States that there is real resistance to some of these changes among some areas of the Bar, because for one thing it's what we are used to, and for another thing it's what we do, and for a third thing it has served us well and worked to provide more information for resolving cases for a long

time. However, that's not universal throughout the Bar, and besides the public is insisting on a more effective way of resolving disputes.

In my view that is why ADR does as well as it does; and while I commend ADR and am glad it's there and is doing a great job, the litigation system ought to be a little embarrassed that we have to turn to another means of resolving a dispute principally because the cost of going forward is as great as it is.

So I hope in the discussions that we have here we'll be guided by the information that has been generated around the country, the various studies that have been done, and we'll come up with some Rules that will hold the real promise to the people of Texas of reduced cost and delay in litigation; and I think the Court feels very strongly about that.

HONORABLE ANN TYRELL COCKRAN: I think one of the -- I agree wholeheartedly with what Justice Hecht said, but I also think that in talking about this we need to realize

that the Court has put those of us who are on this Committee who are practicing lawyers and not only judicial side of the fence in almost an impossible situation. It is because of the so many other considerations, professionlism, fear of claims, you know, that your failure to do something is what caused a client's loss. In some ways it is horribly unfair to ask lawyers to shoulder the responsibility of making these very tough decisions.

On the other hand it would be terribly, terribly unfair for judges of the State to "Do what we want and the hell with what you think." But I think that it's, you know, and it may be almost an insolvable problem, because it may just be too unfair to ask lawyers to make the decision. But I think that we shouldn't come to that conclusion until we have really -- I think it's important to acknowledge those factors in what makes this topic so difficult and to deal with them as best we can; but I think those problems and underlying fears and concerns need to be on the table when we are talking about this, because it is hard and it is one where I mean

judges and lawyers are used to be in an adversarial situations. There is a natural tension there that exists even in the best of relationships; but here we're talking about the tension of, you know, your clients and an incredibly growing segment of the population who are convinced that who will never be your clients because they are already convinced that the judicial system has failed them because they don't have enough money to play.

And we have -- and it's an incredibly growing number. I'm not talking about the bottom 15 percent income levels. I'm talking about the bottom 90 percent income levels and that we are reaching crisis proportions here. The public does not believe that the system serves their problems; and it's because of the cost, and the cost problem is from the discovery. And, you know, it's something that we have got to address whether we like it or not. You know, like Justice Hect said, it's a problem and it's of growing crisis proportions, and we've got to do something about it even if it is against some self interest.

CHAIRMAN SOULES: Thank you, Judge Cochran.

MR. LOWE: Ann has raised a good point. Like the doctors used to, they didn't take a lot of X-rays and so forth. They get sued. I mean, you know, if you don't do all this stuff, if you don't uncover all this stuff, you're going to get sued. If you take three depositions, "My God why didn't you take so and so? I only had three" not realizing what a reasonably prudent lawyer could. That doesn't prevent the lawsuits. And I tell you right now I look at a lot of things. It's to protect me to get a lot of that, because I don't want to get sued. I really don't.

And we're not unlike the doctors that have gotten sued, and they started practicing what they call defensive medicine, and a lot of this has given rise to it. And then when I come to that question I wonder how in criminal law we can send a man to the penitentiary, take his life and liberty, and he doesn't have all these discovery rights. I mean, you know, there are

certain mandatory things. So why couldn't there be some blending of our system of civil law to include some of those things? And I know you have your Brady motions and those things, but yet you can't get all these depositions. You don't get all that discovery, and you go to trial; and that system has lived. And I don't know anybody that is critical of the system other than people say sentences ought to be stronger. So maybe we ought to take a look at what the criminal lawyers do. They might teach us some way to cut down. I don't know.

MR. BECK: Can we ask some questions?

CHAIRMAN SOULES: Sure.

MR. BECK: Did the Committee consider a two-tier approach to discovery, a much more narrow or constricted approach of the so-called routine case assuming you can define that, and then an expanded type of discovery for the so-called complex case? The reason I ask that, some of the judges in East Texas have a system like that, and at least the experience I've had it seems to work

pretty well. Now, what it requires is a trial judge to conduct some type of pretrial conference and make a determination of whether a case is in fact routine as opposed to complex. And once it's routine, then the trial judge's decisions reflect that. And I'm just curious as to whether that was considered and whether it was rejected, and if so, why.

MR. KELTNER: Yes, it was. And let me tell you the ways it was considered. The provision regarding the $40,000 lawsuit I told you about basically come from Colorado and a combination of Colorado's Rules and Illinois' Rules. There was a lot of debate about where to draw that line, because when we said "routine lawsuit" it was a real difficult thing to define.

By the way, there is one provision that will come to you as an alternative I did not mention that garnered I guess about 20 percent support on the Committee that does that, that assumes that every case will have limitations and only larger cases will not. And those limitations are roughly -- I think those were 20

interrogatories, four or five depositions per side and the like.

With what Buddy said, and I think this is important, we did look at the criminal system to find if there were a better way to meld together, because quite frankly a lot of the good suggestions that came, came from family law practice because they routinely exchange information without a whole lot of input from the Court or without a lot of the formal discovery we do. And that's part of the reason for mandatory disclosure.

Buddy, what we found, and I think this is something the Committee needs to think about, and David, I think it answers your questions too is that if you have a limitation on depositions, for example, I think you're right. You're going to be second guessed of did you take the right ones. But it gets even worse than that because the real situation is going to be you're still going to know the persons with knowledge of relevant facts. They have to be disclosed, so you're going to have more investigators and there's going to be an investigator industry going out

talking to all these people.

We learned two things. You learn a lot about your case in two ways. One by trying it. It's amazing what you'll find out when you try the case and in your preparation; and second, what innovative lawyers are doing already, and we're seeing it in other states that have this problem and especially in Colorado and Illinois which have limited this, and by the way, there are a couple of other states as well, what they do is the good lawyers just don't take depositions. They take depositions of very mundane people that they don't think will be at trial, and then they just send investigators out to talke to the rest of them; and the person who has the best and can afford the best investigator has the best investigation, and when the case tries that person wins.

MR. LOWE: Let me follow up on that. Did you consider -- I got a call from one of the judges, Chief Judges of one of the Districts, not the Eastern District, about some ideas; and I proposed something I call

the ambush docket, and he ended up adopting it, calling it the rocket docket; and that was a situation where the lawyers would sign an agreement that they have no right to discovery but they have to get their clients to sign it and have a sheet explaining what that means, because there are a lot of lawyers who have cases that they'd like to try, just try them by ambush, and it was a lot of fun and a lot less costly, you know, with maybe the same results reached as you would if you had 10 million dollars discovery, but it would give them an opportunity to do that. And then if the lawyers agreed to take depositions, they could do it, but don't come to court saying "Okay. I want this discovery; he did that." You work it out on your own. You agree that there is not going to be that, and if your clients can afford to take 10 depositions, you do it or whatnot, but you get them on the ambush docket where there is no right. The clients sign it. The lawyers sign it, and you take off and get with it, and it gives them an opportunity to avoid those expenses if they want to.

Now, I mean, and then the criticism that it's so expensive, say okay, "Why didn't you sign this?" And, I mean, I don't know if you-all considered that or not, but one of the judges tells me he adopted it. I don't practice in that district, and maybe the lawyers in that district wouldn't want me to after suggesting that, but he claims he adopted it and calls it the rocket docket.

MR. KELTNER: Yes, sir. And that is one of the provisions in Rule 166, the pretrial rule, that you would have an opportunity to do something very similar to that. Quite frankly, we didn't have the clients signing off on it. We sort of presumed the client would like it. That's probably a bad assumption. I think having the client sign it would make a lot of sense.

MR. LOWE: 166 now provides -- 166(h) says talking about getting the list. 166 is an available remedy any lawyer has to say, "I want a pretrial schedule, and I want to know the witnesses." And the judge can order that as a tool. We don't use it; but if we need it, we've got it,

and you can have the witnesses right there except a rebuttal witness on 166(h).

HONORABLE ANN TYRELL COCKRAN: One thought that came into my mind sort of trying to think through the side of the unrepresented client here, to have the two-tier system not be whether it's simple or complex, but whether or not the clients all want to spend millions of dollars on their lawsuit, and make them take a pledge that they will never criticize the expense of litigation in the United States if they do this. To have a two-tiered system where there were strict limits on what you got unless the clients agreed in writing to waive that and that they wanted to spend a bunch more money for discovery. That would get to the person who is going to have to pay for it and make the decision.

HONORABLE F. SCOTT MCCOWN: Well, I really want to challenge the notion that discovery is as valuable as people are making it out, because I know that discovery in some cases can really get to the truth and make a difference; but in a great number of

cases, in fact most cases, the basic facts that are going to turn the decision are known, and what discovery is about is a lot of tangential facts that don't have the same kind of power and aren't going to turn the case.

The other thing it seems to me is so what if we learn it for the first time in the courtroom. As long as what we're learning we can actually ascertain in the courtroom as the truth, it really doesn't matter if we learn it for the first time there. And, you know, I just don't see that many cases where the temporary injunction hearing with practically no discovery goes one way, and the permanent injunction hearing two years later with full discovery goes another way. And so I think we just -- we have to kind of draw back a little from the notion that discovery is going to get us to the bottom of the truth in a way that makes it worth doing all this discovery.

MR. MEADOWS: I was going to comment on another point; but I disagree, and I think discovery disposes of cases. But in dealing with Buddy's issue about concern about

malpractice I believe if you have limited discovery imposed by the Rules, that that can protect a lawyer. If you have got five depositions that you can take and you engage your client in the choice on those depositions, I think you're protected more than you are now.

MR. SUSMAN: I think my basic view is that we've got to impose limits on ourselves, and lawyers have got to do it, and got to do it quick, and they've got to be arbitrary. This malpractice concern I think is totally bogus. I mean, I have never heard of a lawsuit, and maybe I haven't heard of one, where a lawyer has been sued for not taking enough depositions. I'd like to hear about it, you know.

MR. LOWE: I can tell you worse than that.

MR. SUSMAN: I mean, my basic feeling is that it is an excuse to run the clock. I think insofar as the surprise thing is concerned I agree with Scott, that I don't think discovery is that useful for eliminating surprise, or do I think you need to eliminate

surprise. There are some -- but I will say, and I don't find discovery very useful at all in my practice. I'd just as soon not have discovery. There are some segments of the Bar I think primarily of the Plaintiffs personal injury lawyers, some of them who feel that discovery, more discovery than I think is necessary they think it's necessary to find out the facts, the real discovery, not eliminate surprise, but find out the tests that were made and go to the corporation and ask 16 questions and they never get an answer. It's on the 17th or 18th deposition they finally break through and find out how it really was covered up in 1953 some laboratory did something.

I think those are the people -- I mean, we have got to identify the constituencies that you're going to have to satisfy imposing limits, and I think that is a vocal constiuency and a powerful one in the Plaintiff's Personal Injury Bar that we have got to say, "What are their concerns; what are the real problems; what have they seen in handling cases" where it would be really

unfair, for example, to limit the number of depositions to eight or the number of hours in a deposition to six. I mean, in my cases I can't think of any problems, but they do have problems. We need to figure out what those problems are so we can figure out how to accommodate them.

But that is to me a legitimate area. I think, you know -- it is a shame I think that we talk, we began the discussions of this group talking about sanctions which is the tail of the dog, not the dog, and now we're talking about discovery which again is the end of the dog, not the dog.

The trial is really what counts. The trial is the most important thing. If trials were held earlier and were quicker and limited in duration, I think the discovery problems we have would take care of themselves, because there is only so much damage lawyers can do to each other or their clients in a short period of time. If you told lawyers -- and the biggest expense in litigation today from the lawyer's perspective I think is starting and stopping. You pick up

a file and you learn it preparing for the deposition, and then you put it down, and you come to the case two months later for summary judgment, and you've got an education experience that you're billing your client for, and then put it down, come back again.

If we had a Rule in this country that all lawsuits -- discovering the lawsuit had to be done in a 60-day period of time regardless of a lawsuit and that was it; you only have 60 days; you can use whatever device you want within 60 days, I mean, as many interrogatories, as many anything, but it's got to be completed in 60 days from the time the lawsuit is filed to the time, and then it's put on the shelf, that wouldn't be a bad deal. Now, it would change the way we have to do business obviously. We couldn't handle a bunch of cases at the same time. The client would come to us and you'd say "I can't handle your case right now, because I'm in a 60-day time frame. Go see Buddy about handling your case" or someone else. But I think you could get a lot of work done; and that would obviously be a way of solving part

of our problems, just a window of time that you have.

And I think it's worth, you know -- I don't know whether it will ever come to that. It's so revolutionary, but it's certainly worth thinking about. But those are my feelings.

CHAIRMAN SOULES: I'd like to hear from Carl Hamilton. I know that the State Bar of Texas Court Rules Committee has been looking at discovery for some time; and you've been the subcommittee Chair I guess, Carl, that or active in it. Could we hear what your focus has been in some of the decisions?

MR. HAMILTON: Well, we've been looking at much the same things as David has said. We've been looking at limits on depositions. We've been looking at mandatory disclosures. We've been looking at preparing standard sets of interrogatories. We've also focused to some extent on where discovery problems start, and they all seem to start at the initial, in the beginning of the lawsuit because the parties don't know what their case

is about.

Typically a Plaintiff files a lawsuit that is a shotgun pleading. Just as an example let's just say it's a suit against General Motors, and he says "My client was riding in the automobile and lost control and hit a tree, and now he's a quadriplegic. It doesn't tell you anything about the defect of the automobile, just that it happened. So the Defendant serves the Plaintiff with admissions and interrogatories and says "Admit that you don't have any evidence that there was any defect in the automobile." The Plaintiff promptly denies that admission. "Well, if you deny it, tell us what the defect was." And then the Plaintiff says, "Well I haven't got my experts yet. I'll tell you about it later." And then the Plaintiff promptly serves the Defendant with requests for production of 500,000 documents on every part in the automobile, and the big discovery fight starts.

And we're looking at the concept of requiring both Plaintiffs and Defendants to do more of their homework before

discovery starts to articulate what their claims and defenses are; and this is going to require the judges to take an active part in these pretrials and to get involved at the outset to try to head off a lot of these discovery problems before they start.

One way of doing that is to get the pleadings in shape and permit discovery only on certain narrow areas in the pleadings that have been properly articulated and alleged. Another idea that we've looked at is to have the judges, require the judges to enter scheduling orders much like is done it Federal Court where times are set for the taking of these various depositions, times are set for designation of experts.

That's another big fight is experts always wait until the designated 30 days before trial, and then there is a mad scramble for everybody to take depositions; and invariably the trial has to be put off. So there needs to be an ordinary schedule of experts. Plaintiffs designate first, Plaintiffs are taken first, Defendants designate, and the Defendants are taken in

some kind of an orderly schedule.

This has to be done by the trial judge, because for the most part -- well, a lot of good lawyers on both sides can agree to these things; but if you don't have good lawyers on both sizes, you can't ever reach an agreement. So the judges are going to have to take an activate part and like the Federal judges do in entering these pretrial orders.

So I think that we do have some problems that we need to address as far as pleadings. This also kind of bears on the Rule 13, that if these Plaintiffs or Defendants have not done their homework, they don't know what their lawsuit is about, they really should not have filed the lawsuit at that time, or there may be some objections and some exceptions to that if you have a statute of limitations problem that comes up, and the suit is filed at the last minute. But then the judge has to take care of those. But if it's a timely filed lawsuit and the Plaintiff has had plenty of time to investigate the facts, the issues ought to be more narrowly

defined by the pleadings, and the judges ought to require that. That's just kind of some of the things that we've looked at.

HONORABLE ANN TYRELL COCKRAN: I think one thing that might help to sort of focus the discussion without providing any suggestions on where it would go is if we were to agree that we're talking right now about the 80 percent or 85 percent of the lawsuits. We're not talking about the top tier, and that we'll promise that we'll come back later if we can ever figure out what to do with the 80 percent and talk about special treatment, if any, the real complicated stuff, which really means knowing the caliber of practices represented around this table that we're not talking about your cases right now. We're talking about the cases that you handled the first three years you were practicing law.

MR. LATTING: You're talking about some of my cases right now, I'm sorry to report.

CHAIRMAN SOULES: Mine too.

HONORABLE ANN TYRELL COCKRAN: Or the cases that maybe you have, but you

truly should have a brand-new associate you could, you know, pass it off to. We're talking about what your newest associate is handling or what you handled your first two or three years practicing law. And I think if we could focus on that, because one of the problems is that the caliber of practices on this Committee is so extraordinarily high that you-all are in the stratosphere. You know, most of what is going on doesn't have any of the complications that your cases do.

HONORABLE SCOTT A. BRISTER: That's right. And I've kept statistics in the last three years on trials. Over 50 percent of the cases tried in my court in Harris County are two kinds, car wrecks and slip and falls. That's over 50 percent of the cases that go to jury trial are car wrecks and slip and falls. And of course 80 percent of the car wrecks are rearenders. So if you want to talk about this, your kind of cases are really 10 or 15 percent of the jury trials.

CHAIRMAN SOULES: And you don't try family law cases; is that correct?

HONORABLE SCOTT A. BRISTER:

No, I do not.

CHAIRMAN SOULES: In San Antonio, of course, all the judges try all the cases, which would skew it on out to --

HONORABLE SCOTT A. BRISTER: Make it even.

CHAIRMAN SOULES: Of the cases tried in Harris County to juries what would you estimate the percentage would be car wrecks, slip and falls and family law?

HONORABLE SCOTT A. BRISTER: Well, it's skewed just -- I'll be real brief. It's skewed just a bit, because of course, some judges prefer to try bigger cases. Some try these other cases, that kind of thing. I keep stastistics on my own. 50 percent is car wrecks and slip and falls. Eight percent is medical malpractice, and about five percent is products liability, and the remainder are contract, worker's comp.

CHAIRMAN SOULES: Is there any statistic on how many cases the family law courts try to verdict?

HONORABLE ANN TYRELL COCKRAN: We don't know them.

MR. PRICE: Gene Cook says one out of -- said at one point one out of every two cases filed were family law. I don't know how many of those get to the jury.

HONORABLE SCOTT A. BRISTER: Not many get to jury trial.

MR. ORSINGER: There is probably 35 family law jury trials in the entire state each year.

MR. SUSMAN: Ann, you're right obviously. Scott is right too. Okay. But what is driving public opinion in this country about lawyers and the cost of litigation are not the 80 percent. It's the 10 percent. It's the large corporations and their legal departments and their lobbiests in Washington and the CEOs of large companies that are taking out the ads and influencing legislation against and making the complaints. In my opinion that's where I mean the general counsel of big companies who are involved in these complex cases and tell these horror stories and go testify before Congressional Committees, I think that they are making a lot of policy that is affecting the system.

HONORABLE ANN TYRELL COCKRAN: I agree with you entirely. And I didn't in any way mean to imply that we should not have any restrictions on discovery in the upper 20 percent. I just said that it might help our discussion to talk first about what to do in the easier situations and then to talk separately about the top 20 percent. I think they need limits, and I think there are some real problems there, but I think it would help our discussion and that it might be a whole lot easier to reach a consensus in the 80 percent and then to tackle the more complex problems in the top 20 percent.

MR. PRICE: I certainly am not here to argue with Mr. Susman. But I do family law, and where the average citizens facing the courtroom so often in family law they're getting divorced or their friends are. And there was an article that came out one time that didn't quote anything, but it said that Texas had the highest family law fees in the nation, and that we were more than double the second highest state. Now, I don't know if that is true or not, but I do think

that we have astronomical fees in family law, and I think a whole lot of it has to do with discovery.

When I go to other parts of the country and talk to other family law attorneys out there they have all sorts of rules that cut through all this, help people through a lot of this. So I think we need to -- I think Steve is right, but I think another factor is the average, everyday guy trying to muddle through his divorce taking, you know, how long it is in Houston, two years or something before you can get to trial.

And second of all, one of the things that I think David mentioned but didn't emphasize was that on these limitations we on that Discovery Task Force we tried to emphasize the fact that anybody can go to court and ask that they be limited or increased. It's not like these are set in concrete. So we were trying to write these restrictions for the average case. And understand always you can always go to a court and get them increased, decreased or modified.

MR. JACKS: I'm very strongly

of two minds on the issue of discovery and its limits. I am one that, I mean, I don't get paid by the hour in the cases I do, so I don't do it because I have a clock running. I believe in short trials. I was talking to Judge McCown earlier. Between my law partners and me I don't know how many cases we've tried, but it's a lot. And neither of us has ever taken more than a week to put on the entire case from start to finish, and we have tried what would pass in some places as complex cases.

And so I'm not a big advocate of lawyers dragging things out. And at the same time there are those cases where, and Steve mentioned in Plaintiffs personal injury practice it is the case that sometimes for me to make my case I must have discovery from the other side, because that is where the witnesses are who know the facts about the issues in the case; and in that kind of case it doesn't work, the suggestion Judge Cockran had in many cases if the parties agree they want more elaborate discovery, but where one of the parties has the facts and the other

party doesn't, and they know that that party can't make their case. You know, they aren't going to agree. They're not crazy.

I'd be all for limiting the number of depositions in a lot of cases; and yet there are those cases where it would be really unfair and would really hinder the search for truth if that happened.

I had a case several years ago. There was an explosion at a plant, big employer, small town; and my client was dead, so he wasn't able to tell me anything, but his widow -- he was a plant superintendent. His widow knew that the other people at the plant knew that the stuff they worked with was combustible and would explode, because there had been some other incidents. So when I would ask people on deposition about that, why nobody had ever heard of a thing like that ever happening before. It was totally a surprise to them. I took 52 depositions before I finally took the deposition of a man, a black man in his 60s, and he had been given the job at that plant by my client, and an honest man, and he had been an eye witness to

four prior explosions in that plant, and he told me about it; and the case took a sudden turn for the better after that point, and in an eight- or ten-deposition limit case I would never have found that man. I was actually prohibited from doing investigation, sending investigators out to talk to the employees, so that was not a possibility for me.

And whatever Rules we work with need to accommodate the array of cases in doing what we as lawyers and judges should be about, and that's trying to bring out the truth, and then let the jury fairly determine the truth in those cases where we can't dispose of the case an alternative way.

HONORABLE F. SCOTT MCCOWN: I was just going to come back to Steve's comment. And he may be right about who is articulating public opinion, but the best example is the small business facing a DTPA case. They are just stuck because the cost of resolving that DTPA case is going to be astronomical. And in any case where attorney's fees are an issue at the end as a judge I don't feel like I can do justice,

because I have to assess attorney's fees which are always by the end way out of proportion to what the ultimate amount in controversy judgment is.

And I think what Judge Hecht said is what people are facing. They've got a dispute -- and I'm thinking of a case where I had two brothers fighting over whether there was or wasn't an easement -- they've got a dispute, but they cannot afford to get it resolved in the courthouse, and so this system that we have which is supposed to provdie for the dispute resolution doesn't work for them, and they're either left -- these two guys were shooting at each other.

MR. LATTING: I'm just going to say I'm in agreement with almost everything I've heard, and I think that's the problem. It seems to me that what we have to do is we have to state the problem correctly if we're ever going to get to the correct solution. And one thing, I agree with -- I'm enthusiastically in agreement with what Steve said with one exception, and that is I don't think the trial is the dog. I do thing that

sanctions are the tail, and discovery is probably the hind end, and the trial is somewhere forward of that; but really what's at the front is the disposition of people's disputes. And I don't think we need to be dedicated, and this is another problem. It's a macho problem, a testosterone problem. I don't think that we need to think that the trial is what this is all about. I think what it's all about is a dispute resolution, and what I think we have to do as members of the Bar is create a system or at least suggest a system that encourages and mandates that lawyers try to get these things worked out, and get them worked out fairly soon, and that Buddy -- and protects them if they're operating within the Rules.

And, Tommy, while I sympathize with that case, I really do, I don't think we can have perfect justice anymore. I don't think that -- we all are too expensive, so I think we're going to have to come to a compromise that doesn't fit everything. We are going to have to say "This is how it's going to be, and you get this much crack at

it, and after that we're going to get on about our business and move on down the road." Otherwise we're going to spend hours and hours and years resolving these cases; and people aren't standing for it anymore.

MR. LOWE: I think we ought to confine our discussion to how we can cut down, because if we all start telling our own stories about how we need more and more, we get indoctrinated into this. And what gave rise to discovery to start with was that people couldn't go out and talk to the plant manager because the Rules prohibited that. Ethically you can't talk to the other side. So they said, "Well, we need some way to equalize things," and that is when the discovery came about. And it got out of hand.

But what we need to do now is not talk about cases we need more discovery, but concentrate on just how to cut it down if we could talk about that, just that.

MR. ORSINGER: I had so many things I wanted to say that I have forgotten. But I'd like to say a succession of things;

and one is that Judge Brister's comment that 50 percent of his cases involve slip and fall and automobile accidents cases. And I'd like to ask Judge Brister whether there is discovery abuse in those cases.

HONORABLE SCOTT F. BRISTER: Very rarely. There is rarely more than a handful of witnesses. Rarely do the attorneys pick up the file more than two months before the trial. I rarely send them to mediation, because I can try them cheaper and faster than they can prepare and go to mediation. Frankly I can process all the car wreck cases you can file without any more staff, without any more cost or any more expense. We can do them all.

MR. ORSINGER: Okay. Well, that points up to me --

MR. MCMAINS: You've never had David Perry in your court.

MR. ORSINGER: That points up to me that I'm not sure that we have focused on what it is about our litigation system, where it is in our litigation system that the discovery abuse is occurring. I personally

don't think the discovery abuse is occurring in the small cases like the ones that Judge Brister just described, and I think we're all conceding that products liability cases against major manufacturers can't be tried with four depositions on each side. So we've got maybe 50 percent of our system that's the low end that doesn't have any discovery abuse. We've got a certain number of cases that are at the high end that we're going to exempt from these restrictions, and I wonder where the discovery abuse is occurring and whether we should be focusing on that segment of the litigation. That's one thing I wanted to say.

HONORABLE SCOTT A. BRISTER: Just real briefly, Richard, Scott is exactly right. It's the DTPA and account cases --

HONORABLE ANN TYRELL COCKRAN: And commercial litigation.

HONORABLE SCOTT A. BRISTER: Car wreck cases work fine because the Plaintiff's attorneys have it on contingency 100 percent of the time, and they're not running up cost. The Defendants have it on

insurance, so it's not costing the Defensive driver anything. And so those, the account cases, the DTPA cases and those people don't have insurance and sometimes do and sometimes don't have contingency cases; and I've never had an account case where they didn't schedule $50,000 per $10,000 of account dispute at issue.

HONORABLE F. SCOTT MCCOWN: And it's not abuse. It's cost. You may never see the courtroom.

HONORABLE SCOTT A. BRISTER: It just takes that long to sort it out.

CHAIRMAN SOULES: So everybody gets a fair chance to be heard, Richard, you finish, and then we'll go around the table, and I'll pick up the hands as we go counterclockwise.

MR. ORSINGER: Okay. The next thing that I would like to respond to is Joe Latting's comment that the purpose of the litigation system is to resolve the dispute; and this is something that Buddy was talking about a little bit before. Maybe what we need to do is refocus our litigation system so that

the lawyers are either forced or encouraged to themselves define what the issues are and to agree what is really not in contest.

MR. LATTING: Here. Here.

MR. ORSINGER: Because the way Texas litigation is set up as compared to Federal litigation is that in Texas litigation as a litigator you can sort of refuse to take a position on what is important. The classic example is you never tell the other side who you are going to call as a witness, so they've got to figure out that everyone you list might be a potential witness, and then they've got to either have an investigator or a deposition.

Now, I hate Federal Court. I don't practice there. I don't like the way they do it. I think it's very expensive and everything else; but one thing that I will say about the Federal system is that through the pretrial requirements they force lawyers to sit down and take a position with each other as to what is really an issue and what is ancillary, and then both sides can prioritize what they want to expend their energy on. And

if you list 75 people as potential witnesses but only 15 that you may call, then discovery instead of 75 depositions or 75 interviews, now all of a sudden you have a smaller number.

Perhaps not in lieu of but in conjunction with controlling discovery we could do something about the way pretrial hearings are handled or the way pleadings are handled or the way that contentions are sought by letters or other ways to force lawyers or to make the entire system force lawyers to narrow their disputes to what is really in dispute earlier in the process making it easier to mediate earlier, making it easier to settle earlier and eliminating the necessity of doing a bunch of discovery that at least one side knows is unnecessary; and maybe a coordinated approach that involves something about our entire litigation system might be better than just simply imposing limitations on the number of interrogatories or depositions.

MS. DUNCAN: Two points. One might meet with a lot of resentment here. I

had a case with my dad. I didn't actually have it. It was a $3,000 DTPA case. He feels that he knows his business better than any of us will ever learn it. He wanted to try the case for himself. Goes down to the County Court at Law. He's been appearing at all the pretrial hearings. He gets down there. Everybody knows he's doing this. He gets down there. The County Court says, "You're not a lawyer. You can't represent yourself. Sit down and shut up." They then go. There was no discovery in the case. It worked fine not to have any discovery. The Plaintiff gets up, puts on his case, puts on his expert and doesn't meet his burden of proof. It gets reversed and rendered on appeal.

We've increased the limits of the County Court jurisdiction, but we're still saying you have got to have a lawyer representing you; and frankly I think that is a big part of the problem. There are people out there, small business people who are fully capable of representing themselves in a DTPA action, in a small sworn account, in a lot of their daily life problems, but we're making

them go hire a lawyer and spend all the money, whereas if it were just in Municipal Court, one step lower, they could do it by themselves. And the docket in Municipal Court moves real quick or in JP Court.

HONORABLE PAUL HEATH TILL: Thank you.

MS. DUNCAN: It does. These types of disputes get resolved.

The second point is maybe my litigation practice was different from other people's, but I found in my cases if you would give me the documents, the depositions were icing on the cake. But I also found that most people weren't looking at those documents, and that I had a real advantage because you can go through and piece together what happened in the document base; but that is where it comes back to what Carl was saying. If lawyers, you know, get into the discovery process and going to depositions and having phone calls and doing that kind of stuff, it's very isolated and sometimes boring to look at the documents; and I also think that is part of the problem.

MR. KELTNER: I think what the

three judges have told you really is what we found, that the real abuses when you looked at the system were isolated to certain types of cases. On the high-end cases everybody thought except for the most exceptional lawyers that there were abuses and too much was done, and that's an issue that is difficult to resolve.

On the bottom 50 percent I'll tell you that everybody we talked to even including trial judges throughout the state told us "No problem. We don't have a problem with discovery abuse in these kinds of cases."

HONORABLE ANN TYRELL COCKRAN: What kind of cases?

MR. KELTNER: Until you get to sworn accounts, DTPA, that kind of thing every judge in the State says that is a horrible problem because of the discovery that is done that slows down the case; and I think that's true, and I think there are a number of reasons that's true. I think Scott Brister said the main reason is you have insurance companies who now want to hold costs down, and that is a new situation. You have Plaintiff's

lawyers who it's not in their best interest if they're on a contingent fee to incur costs in those kinds of cases, and that's the reason.

But I think you need to look at some other things. I think we need to limit discovery. I think there is no doubt about that; and I think we ought to think about doing it in a fairly severe way that takes care of Buddy's problem at malpractice and the like, and I think it can be done.

But remember, we have got to focus on what the purpose of discovery is. When you're limiting depositions remember one of the reasons, in fact the primary reason we allowed depositions was to preserve testimony; and in cases in which there is any medical doctor testifying the real hope of getting a doctor to trial is becoming remote. And the fact of the matter when you get into other experts and fact witnesses preserving testimony is an issue we have to focus on, and it makes a difference.

Authenticating records and the like is also something that we don't have a problem with. No one in this whole system

have we heard that authentication is a problem. Now, we can exempt that I think and be okay, because that's a pretty easy thing. And remember the other thing. If you're not discovering your case through formal discovery, you're doing what criminal lawyers do. You are investigating it another way. I think we ought to encourage that. I think that's what real lawyering is about, but it's expensive and it's something that the people with the funds to do it will do more of than the other side; and we're going to shift some expenese that are hidden, and let's not forget that, because quite frankly in talking to businesses that's one of the things they pretty much advocate. It is now easier to do it, and in a formalized way it's more expensive, but that expense is still going to be there.

We need to think of the other purposes of discovery, and let me just give you a couple of ideas. One of the ideas is to get at the truth. Remember our Rules now on response only require you to designate witnesses, and the only penalty is you don't

get to call them to testify. Well, what about the Deep Six witness? You don't care. You don't want them to testify. Under our current Rules we encourage that practice, and it happens, and in fact one of the changes we have is based on that.

We also need to think about the purpose of discovery, and one of the other earlier purposes of discovery was to settle cases. We know a couple of things on that now. We know that today in the 1990s we settle a larger percentage of the cases than we ever have at any other time, but we do so much later in the process than we have done. And I think one of the things is, and I think what Steve was saying and I think Susman is absolutely right, we need to back that process up and settle them earlier. We know what percentage of cases settle in Texas. The problem is, and those cases have no less discovery problems than the ones that go to trial, and in fact I'll argue they have more.

If we settle those at an earlier period of time and backed up what the lawyer's obligations were to an earlier period

of time, I think this system would work a lot better. I also do think we're going to have to do something regarding pleadings and notification of what the case is about and whether it's done with what Steve Susman said or what Richard Orsinger said, that's something that is going to have to be taken care of quickly. It's a little bit out of discovery. And my thought is it has got to be outside of special exceptions to. It's got to be a motion for a more definite statement, something like that that gets the issues that are going to be litigated out of the way.

What Sarah said is also true we found. There are sure a lot of cases that could be tried and don't have to be tried in courts of record that ought not, that are in our system now. They could be quicker renditions earlier places. The advent of People's Court and the idea that "Don't get even; go to court" was a great concept, and I'm all for it, but we are now settling things in the judicial system that have no reason to be there, family disputes in businesses, family disputes in divorce cases, things like

that. I mean, we really are. We took -- if you rewrote the Bible now, Solomon's splitting the baby wasn't that tough a decision.

HONORABLE PAUL HEATH TILL: It was for the baby.

MR. KELTNER: It would be tough for the baby. But there are other things that are more difficult we're asking judges and juries to do. That's outside of what we do, I guess.

PROFESSOR DORSANEO: I think some of what I have heard here lately is probably the most important part of the debate. We need to consider what kind of a dispute mechanism resolution system we're going to have. If you take the car wreck cases and slip and fall cases, apparently the people involved in those cases like to resolve the disputes if they can't settle relatively early on by going through the trial adjudication process. Other litigants apparently find that method of dispute resolution to be very uncomfortable and would prefer to delay and avoid it in expectation that something better will happen to them

eventually. Maybe the other side will give up.

I think we need to focus on the types of cases that are problematic and try to see what could be done to the system discoverywise and otherwise to deal with them. What is there about an action on an account, an open account, a stated account sworn under Rule 185 or otherwise that creates difficulties? What is there about a DTPA case that creates the problem? Until we do that we're really just talking about a lot of mechanical repair work without regard to what the real problem is; and I think it's very important to focus on are we going to have a trial system. Are we going to have essentially a settlement system? Will it depend upon the type of case we have? And at the Federal level Arthur Miller sold the changes to Federal Rule 16 with respect to scheduling orders by pointing out to the assembled group that in that system there isn't a trial system. It's essentially a settlement system.

Any professor drawing the

modern system on the board would draw a block for pleadings, a very large block for discovery and pretrail, a very small block for trial over here at the back end. The way the Federal system and our system now to a certain extent copies and has been designed is just talking about the Federal pattern it's quite common. Probably the most problematic pattern is a pleading phase where you find out only very general things that will lead into a very complex discovery phase that will ultimately yield -- I mean, I'm talking as originally designed, yield some sort of a trial plan and a pretrial order that would supplant the pleadings and then a trial.

Now, the redesign of that system is to require scheduling and planning of the discovery much earlier with the apparent current view being that the system as designed in 1937 is no good, a bad system that talked about solving the problems of someone not being able to plead their claims, that they didn't have enough information yet, so discovery is a good thing, and you know then later.

What we see at the Federal level and in our system and at the Court Rules Committee level and at David's Task Force is people trying to figure out a way to schedule the matter and get it set earlier, because presumably that the is thing that is most dispositive of the determination of the case if it's set for trial, as Steve said. It makes, you know, perfectly good sense.

So at a general level wouldn't it make sense to focus on pretrial practice, planning and scheduling, get cases, get cases set while at the same time focusing on the particular types of litigation where the system doesn't appear to be working? Maybe the answer is for those cases that they shouldn't be, that people don't want a day in court. They want something else as a way to resolve their problem.

Sitting listening to David all these things about changing party communications, work product, let's move that around a little bit, let's do something about witness statements; and I don't know if any of that ends up making much of a difference until

we focus on what the real problem is and what kind of system do we want to have. And then if it is a trial system, well, then we want to elevate. Then trial is supposed to be the dog, and that people when they're -- it's in my experience people will settle cases when they have to go to trial. I mean, that's really when they'll do it, because they don't want to do that. They don't want to get on the witness stand. They don't want to go to the courthouse. They don't like that. But anything else perhaps -- and some people want to go to trial, because that's how they get their money. Other people want to avoid it.

A lot of rambling, but I think that the focus ought to be on the overall problem and not on these details alone.

MR. BECK: One thing I've learned, if you don't sit at the table it's tough to get recognized. I'll be here early for the next meeting.

MR. MCMAINS: The table will be smaller, David.

CHAIRMAN SOULES: David, here is a vacant chair right up here (indicating).

Come up and make yourself comfortable.

MR. BECK: I just wanted to say a couple of things. Regardless of which cases are causing the so-called discovery abuse, whether it's the top 20 percent or the bottom 80 percent or somewhere in the middle, and regardless of the reasons why the discovery abuse is occurring whether it be out of fear of a legal malpractice claim if you don't do certain things, or let's assume that an attorney wants to run up attorney's fees -- let's assume that is an improper motive -- it seems to me that all of these things can be dealt with by something that Carl mentioned earlier, which is the judges need to take a more active role in their cases at the beginning of the cases.

You know, I sit down there in Monday morning docket call down in Houston; and when I see what our judges have to deal with in terms of discovery disputes, I mean it's ridiculous; but the fact of the matter is our judges are going to spend time on cases at the beginning, or they're going to spend time on cases throughout; and it seems to me that

we've got to beef up Rule 166 to give our trial judges more discretion, and if it's a kind of case that a party ought to get two depositions, the trial judge ought to say that. And if a deposition ought to be limited to four hours, the trial judge ought to say that; and trying to come up with all these hard and fast Rules that are going to cover every conceivable case just doesn't work in my judgment.

So I think that we've got to get away from a system, and I never thought I'd ever say this, where the lawyers run the system. I mean, the problem is that the lawyers run our discovery system, not the judges as a practical matter. All they deal with is the abuses.

The Federal system on the other hand gets the trial judge involved at the beginning, and you have instances where trial judges will make these hard and fast rules, but they're tailormade for the most part to each case. So I would urge us to really try to pick up on the suggestion that Carl's Committee is dealing with, and that is

really beefing up Rule 166.

MR. SUSMAN: I don't have a -- I'm like David Beck. I mean, I think that's a wonderful idea if you got judges to be very active; but I don't have a lot of faith that that's going to happen. I don't have a lot of faith that we have enough uniformity in the judiciary either temperment or quality to get judges without law clerks and any real assistants to manage their dockets and really figure out what is involved in the case and sit down.

I think it's also difficult, David, and I think it's difficult where we have an elected judiciary to put judges in the position of having to impose limits on lawyers. I mean, it's very easy for Federal judges, because they're for life, to say "You're only going to have 30 minutes for voir dire or none," or "you're going to try your case in two days," or "you're going to only take six depositions," or "you're going to only depose people for three hours." It's another thing to ask judges who are elected and who depend upon campaign contributions of

lawyers to impose those kinds of limits. Some do, but I don't think you can rely on it.

And I agree with you also that lawyers, I don't think lawyers are going -- we aren't going to agree. I mean, it will be the rare case that two lawyers on the opposite side will agree to police themselves. I think it's got to be done by Rules. I mean, I think the only way of doing it is the Rules. "You can only take"; and it's not perfect, because it would be much better. I think you're right. It would be much better if the judges did it. It would be even better if the lawyers did it themselves. I don't think any of those things are going to happen than arbitrarily Rules.

MS. MIERS: Interesting dialogue here. I want to go back to Steve's earlier comments, because I agree with them with one footnote, and that is that another component of the public opinion problem is the media. And when you see the Mendez brothers in trial for months and then a hung jury and the public perceiving a lot of resources and not much result, that is just one example

where I think as bright as this group of people is I don't think we can solve those kind of humongous issues. So I think we have to content ourselves with to some extent what Steve is suggesting which is the mundane tinkering with some of our Rules; but I'm not as hopeless I don't think as Steve is in terms of the role of the Judge, because every case I see where discovery is out of control it's because the judge isn't involved. And if the judge is there, there is a big difference; and what I'd like to see us do is not forget to maybe make use of some of the more innovative things that are happening some places like telephone conferences during depositions or discovery Masters. And I know the issues of cost and other things that get raised in those procedures, but I would suggest that the discovery Rules alone will never solve these problems if you don't -- we've heard a lot about the lawyers today. I really do think we need to hear a lot more about the judges, because if pressure would be there for judges to afford access when it's just a simple -- usually the dispute will go away if

you just know you're going to get to talk to a judge, where if you know you're not going to see a judge for a month, you never resolve the issue. It lingers for a month.

So I would hope that we as well as focusing on the discovery Rules would talk about what we can do in the Rules to encourage access to a decisionmaker whether it's the judge or a Master or the alternatives that we might suggest, the increased use of telephone conferences, those kinds of things that give us a decision.

CHAIRMAN SOULES: Anyone else around the table?

PROFESSOR ALBRIGHT: I just want to talk for a second about what cases for which the system does not work. And I think it seems from what people have been saying that the system works when there are institutions as clients, as litigants, where there are insurance companies or Plaintiff's lawyers who are on a contingency fee, and that seems to work a lot better, but it doesn't work when there are real people paying the bills out of their own pockets.

I was sued last year. It's absolutely the most horrifying thing in the world when you think you have to pay legal bills out of your own pocket. You can't do it. And I have a lot more resources than most people in the world or in the United States. And so I think what we need to do is do something to the Rules so that lawyers can't use the Rules to bankrupt the other side, which is what happens in business litigation and in personal litigation whether it be family law or DTPA or whatever, so that there does have to be some real limits so that people can't bankrupt each other and cases don't get settled on matters of cost as opposed to what the law and the facts are.

HONORABLE PAUL HEATH TILL: Somebody is going to run the courtroom. It's either going to be the court or the judge, or it's going to be the Bar. Discovery is so great because it puts the agenda and the scheduling and the events that occur primarily within the scope and the balance of the Bar. Now my courts just are probably totally alien to all of you in that I doubt you've spent any

time in it, or if it has been, it's been very casual if it has been.

So I see it from an entirely different point of view like I'm a visitor from another world to some extent from what I hear here. First off Small Claims Court is the only court that a corporation can appear without an attorney representing them, not Civil Justice Court. I do both. In Civil Justice Court we're fully under the Rules of Civil Procedure. In Small Claims Court under Chapter 28 of the Government Code. It is somewhat more relaxed. Both are not courts of record.

I try a great number of cases every year, and the reason that I can do that is because I take a very active and direct control over my docket. I set things for trial. I set pretrial hearings. I require the parties to be there. I require the attorneys to make an appearnces.

In Small Claims Court I have the authority to set cases for trial, and I do so. There is no discovery in Small Claims Court unless the Court gives prior consent.

Read Chaper 28 of the Government Code. It's very clear. The reason I know it says that is because I got the legislature to pass it that way. Well, I did. I mean, to be candid with you I felt that there are times when there should be some discovery. That is very true. Somebody files a case, and it's very clear that from the pleadings that I have to deal with and the other side has to deal with that there is no way that they could figure "Who in the heck you are and why in the heck are you suing me," bluntly put.

And so, yes, we have some discovery, but it is obviously very limited. The maximum that we deal with is $5,000. If you think that means that the maximum of legal complexity that I have to deal with is somewhat less and it's a simple little thing, you're totally confused.

The amount of money involved has nothing to do with the legal principles unfortunately, but it gets to be very complex at times. But it moves along, and the reason that it does is quite candidly I take an active role in my court. I go after it. I

set things for trial and I move them along.

Now, you know, I've heard the debate and I've heard the comments on both sides, and it's very interesting, but it still boils down to this: You either sooner or later are going to have to make up your mind whether or not you're going to have the confidence in the Court to be able to have the tools to manage the docket to move cases along in a fairly rapid and straightforward manner, because most of the discovery really takes it within the parties, because that allows them to set in for depositions, file interrogatories, require the necessary time to do it, and the necessary notice. All of these things happen off docket out of sight, out of the control of the Court.

That's fine up to a point, but there should be some limit to the amount of time that discovery can be done. There should be some limit. There should be some limit to the amount of discovery with the understanding that if you have an exceptional case, petition to the Court, give notice, have a hearing, and get a ruling that it is allowed to perhaps be

extended if it's necessary, but most times it won't be necessary. Most times it will just be a matter of being able to -- excuse me.

CHAIRMAN SOULES: David, I apologize. I think I missed your hand.

MR. JACKSON: You know, I've been a court reporter for about 25 years, and in my feeling the most honorable resolution to litigation is settlement; and there are a lot of times when we're taking a deposition and the witness says either the wrong thing or the right thing, and we get a call that night saying not to transcribe the deposition. We've settled it.

CHAIRMAN SOULES: It sure happens. Rusty.

HONORABLE PAUL HEATH TILL: Excuse me. The other thing was that setting them for trial, and he's absolutely right, or he's absolutely correct. People don't want to go to trial. If you set them for trial, it has a wonderful effect that people suddenly decide that "Well, maybe we can work this out," and they tend to go away if you set them for trial and the Court has the authority to

do it.

CHAIRMAN SOULES: Thank you, Judge Till. Rusty McMains.

MR. MCMAINS: I wanted to basically ask to some extent a question of David, but in the context of whether or not they considered anything, any radical changes in the system, which by the same token I don't think are beyond our experience in other areas. Specifically what I am hearing is that the system isn't working, there are various reason why the system isn't working, and nobody has a great deal of confidence that we can fix it. What I'm wondering -- because we don't have the resources. I mean basically either economic, time resources, and therefore that quote perfect justice is simply not available, et cetera.

My experience in the last three years, and I think probably a number of people in this room's as well, is that surprisingly enough so long as there is some discovery or significant amount of discovery underway alternative dispute resolution has worked rather amazingly well in many respects,

but secondly it is a mechanism by which we, that is the Courts, impose upon the parties the cost and burden of litigation in terms of having to pay for the mediator and his time.

My question basically is if you had a period and if you considered this, if you had a period of mandatory disclosure and supplemental discovery, say, six months, mandatory disclosure within 90 days, three more months to conduct that, and then if you want more discovery you have to go through a mediation for one day, cost to the parties, parties are going to have to pay for that, that mediator then can decide whether or not as you when you're in conference.

In the mediation context and the way it's been working the one thing is the mediator serves basically as a surrogate judge without taking judicial time. He's told things privately by each party. He's bound by his obligations. Why can't that mediator if the case can't be settled narrow the issues that discovery will be taken on, do in essence what 166 pretrial orders would do where the parties basically are paying the cost of that

individual to make those recommendations, and you would have if you could not get an agreement with regards to settlement, then the second task of the mediator is to get an agreement with regards to scheduling, and the third task if that's not doable is to narrow the issue on which the mediator believes that the genuine issue of discovery should be done on, make that recommendation to the judge, let them argue about it, but where most of the resources are paid for by the parties who are causing the problem.

And I don't know if anything like that was ever proposed. But why wouldn't a change in that direction be a more efficient system?

MR. KELTNER: It was discussed generally in terms of Rule 166 and with the -- also with the idea that mediators are a great help to the system. And let me tell you what the experience around the State is, because we looked at that in detail. In Dallas there are a number of individual judges who do something very similar to that. They refer every case to mediation within 90 days

of it being filed. The mediator's assignment is, and they serve free of charge at the judge's will to determine pretrial orders under Rule 166 scheduling and the like and the likelihood of what time the case might be sent back to mediation.

There are I am told judges who have attempted something like that in Houston to bad effect with lawyers. The lawyers in Dallas, by the way, none of them that we talked to were at all offended by this process. Merrill Hartman is one of the ones who had started, and Merrill has had great success with it. There were three problems we identified. First if you have a mediator who is going to attempt to resolve the case in settlement mediation, probably ought not to be doing things that are more judicial like scheduling orders and the like, because he or she is affecting the merit of the case arguably while attempting to resolve it, and that's a problem that we've had with mediation and one of the few problesm, I think.

We thought that building in, and one of the versions of 166 that you'll see

includes something much like this, with a grace period in which in a certain period of time you can only do two things, the mandatory disclosure is supplementation of that, a scheduling order, and there was one other matter that went on. But we didn't go into it as far as you did; and yours is quite frankly a better solution I think, Rusty, than what we were looking at, and it's not a bad idea. There are some problems that would have to be worked out in that, but I think it would work.

MR. MCMAINS: Well, basically I guess what I was proposing was that we just step back and look at it much like Bill suggested like we were designing the system to begin with. We can draft the Rules to have absolute limitations, and basically I think we cannot design the Rules to take into account all that is possible that the limitations are going to preclude. So that it seems to me that maybe we can design a system where there are abolute limitations, and the parties are responsible for determining whether or not they think those are too restrictive, and they

need to bear the cost. If the parties bear the cost of the revision of those in this kind of a mediation process, then we have solved the problem of limited judicial resources. We have solved the problem to some extent of divergence of performance by the trial courts.

MR. KELTNER: Yes. I think you will see that one of the TRAC provisions at the end of our report will contain something not unlike what you're talking about. It just won't go to the same length you did with the mediator. It basically puts the burden on the parties to expand discovery. The presumptoin is that you get less discovery.

Again, I cannot emphasize to you, and this was a remarkable group of people on the Task Force, the difference of opinion regarding whether Rule 166 should exist at all.

MR. MCMAINS: I understand.

MR. KELTNER: And I've got to tell you that the people from various -- and it cut across every other line no matter what

kind of cases they did with the exception of family law. It cut across every. It cut across Defense/Plaintiff. It cut across business versus tort. If you were in one part of the state, you hated Rule 166; and if you were in the northern part of state, you liked it, which is interesting.

MR. SUSMAN: I have two questions, David, about -- I mean, two things, two of the specifics that the Task Force did concern me a little. One was the notion of eliminating expert reports in favor of expert depositions for the reason that we're taking expert depositions anyway, so have the reports. Now, I agree if you're going to take the deposition anyway, why the reports. But did the Task Force consider eliminating expert depositions? I mean, originally they were set up to have expert reports, and the expert deposition would be the exception, not the Rule. It would be difficult to get an expert's deposition. One side would have to pay for it. We've changed that. And it seems to me very abusive.

Again, I believe that an

expert if you have a detailed report from an expert, you certainly don't need a deposition for two or three days or a day. The report would be sufficient. So that was one question I had. And it seemed to me the solution was kind of a cop-out. "Well, we're doing the depositions anyway, so let's eliminate the report."

MR. KELTNER: Let me answer that before you go on. Yes, we did consider it the other way. I gave one of the reasons. I probably should have given more. The situation was what really happens with expert reports now and how they're being used according to trial judges are that if it's not in the expert's report in black and white, it's excluded from the testimony. And the big thing that we find the judges would complain about delaying trials was that all of a sudden you're showing the expert report and say "Judge, look. It's not in here." And then the response would be "But, judge, we deposed that expert. They didn't ask him that question." The expert report has everything in it. It has all the basis of his

conclusions and it has what his conclusion is, okay, but it didn't have part of the basis for it.

So we decided that it was being used, and in fact by one estimation of judges -- and this was one that was statewide. This was one all judges everyplace agreed. All the trial judges we talked to said that happens in 100 percent of the cases that go to trial in my court that involve expert testimony, and it would be resolved if you deposed them instead.

MR. SUSMAN: I understand. It seems to me too that one of the things we've got to think about as we go through discovery issues is if the consequence, I mean, if we are so scared of surprise at trial that allows Courts to exclude expert testimony because it wasn't everything the guy said when he put it in the report or to exclude witnesses because people didn't identify them properly, I mean, if you put, give so many Draconian powers to judges to punish litigants in outcome determinative ways for not having done discovery, you are going to encourage and put

a premium on discovery. You can't cut down discovery and at the same time put big penalties on people for not having done it.

So we've got to think those things it seems to me go hand in hand. I mean, if we're going to go with fewer depositions, less discovery to try to curtail discovery abuse and expense, we also have to loosen up a little on disclosures in connection with trials, whatever it is. Those things go hand in hand.

Another thing that concerned me about what I heard the Task Force Report was that somehow you want to kind of put a curb on discovery of contentions. Now, to me contention discovery is the cheapest discovery in the world, and we ought to know what the other side is contending. We ought to have ways of figuring out whether you have to ask a person at a deposition or interrogatories or whatever it is "What in the hell are you really contending here," you know, because lawyers, and that's where we have these lawyers playing games, because they don't want to tell you. They're lazy. They haven't made

up their minds. They can't decide what they're contending, and we ought to put that -- to me, it seems to me, we ought to really beef up. "You've got to tell us what your contentions are in some form." Take the lawyer's deposition. I mean, maybe that's the way to do it. Take the lawyer's deposition for 30 minutes. "What are you contending? Under oath I want to know it right now."

MR. KELTNER: Our problem putting a lawyer under oath we thought did no good. Steve, we did consider that. And let me tell you what we did. The idea about contention interrogatories was in the form of limitation on discovery. It was part -- it was as an alternative. By the way, David Perry was the author of that, and it was as an alternative to numerically limiting the number of discovery requests. It is one that the Committee could not agree on.

We all agreed that one of the problems that we saw with discovery though was something that should be handled outside of discovery, but during the pretrial process, and that is something as an alternative again

to special exceptions it required a more definite statement with a lot of penalties attached to it that you had to decide.

And I think Steve is right. I think it's lazy lawyering more than hiding the ball. I think it's "I don't want to make that decision now". And we think that there ought to be a time early in the proceedings that a lawyer has to decide what he or she is going to argue, and we think that is crutial and is part of our Report. It's not necessarily a discovery mechanism, but we think that that is probably one of the things that we see that has to be done, and it would help judges too.

CHAIRMAN SOULES: Let's take about a 10-minute break here and when we come back try to start focusing more on the specifics, if possible.

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

CHAIRMAN SOULES: Let's convene.

HONORABLE F. SCOTT MCCOWN: Luke, can I make one point on the role of the

judge before you move to the specifics?

CHAIRMAN SOULES: Yes, okay. And this responds to David's point. There is just a tremendous difference between the Federal judge and the Federal system and the State judge and the State system, and it begins with the fact that a Federal judge has approximately 250 cases on his docket, whereas the State judge has generally speaking I have over 4,000 cases. And so my ability -- and in that 4,000 cases I have got 250 that are at least as big as the 250 the Federal judge has, so it's not necessarily complexity.

The ability, the sheer ability to have the time to manage the docket is different. The Federal judge is also going to have the supporting staff. I don't have any of the supporting staff; and the Federal judge generally speaking overall is going to have a higher quality Bar than the State judge has overall, and that's before you even get to the question that the Federal judge has life tenure, whereas the State judge has to run for office.

And I really think we have to

look at or before you get to the difference that Federal judges arguably overall are going to be of general higher quality than State judges overall. Even if you don't look at those kind of things and look just at the numbers, we have got to have Rules so that the cases can resolve themselves without too much judicial intervention; and that's not to say that there's not an important role for the judge to set and that the judge can't do some things that make a big differences, but we've got to look first to the Rules and secondarily to the judge.

And just one last comment related on the pretrial conference issue: It's very hard to effectively use pretrial conferences when you're trying to manage a docket of 4,000. That's very hard to do. In addition the pretrial conference adds a lot of cost to the case that the State case may not bear; and so I think we've got to set up some kind of self-run system to govern most of the cases most of the time and look at pretrial conferences and judicial intervention on a kind of as-needed basis.

MR. BECK: Judge, let me just ask. I wasn't suggesting that a State judge have a pretrial conference in every case at the beginning. What I'm saying is in the automobile accident case or the slip-and-fall case that Judge Brister talks about that probably doesn't need a pretrial conference early on. But I'm talking about in the ones that you know are and have been the subject of discovery abuse, like the DTPA cases. Why can't you take those cases early on, put limits, because it seems to me it's a tradeoff. You're going to spend the time either sooner or later on those cases.

HONORABLE F. SCOTT MCCOWN: Okay. Here's the reason. It's not discovery abuse that's the problem. A lot of the discovery costs comes from very reasonable, under our Rules and under our mores, very reasonable use of discovery that a State trial judge does not have the time to get inside that case and make any kind of informed decision that this cost is not worth this in this instance, nor does the State trial judge not have the time and ability to get in and

make that kind of informed decision, but just politically you can't expect the State trial judge to be able to do that.

So it's not abuse we're talking about. It's cost and the inability of the judge on a case-by-case basis to make those kinds of cost decisions both for resource reasons and political reasons.

JUSTICE HECHT: And I agree with that. I agree with David that there are times when a judge can get involved in it in the State system which are very helpful, but there are two problems. One is that -- and they're related, the constraint of his other docket, which in many courts in this State is very heavy; and the second one is it is very difficult for the judge to know as much about the case and the problems in it as the lawyers do. And the time it takes to get up to speed on that so that you can arbitrate between two conflicting views is such that it needs to be reserved to issues that are going to be more serious rather than less. Whereas if there are constraints in the Rules that force the lawyers who know that they're under the

contstraints to alter their action accordingly, that takes care of a lot of those problems.

For example, if you know that you're only going to have a limited time in a deposition, you may not start by asking the witness about his career in junior high school and high school. You may start with something more directly related to the complaints in the case; but if you've got unlimited time, and if you or a party has a motive to drag it out as long as possible to try to wear down the other side or whatever the motive might be, then of course you may start with the guy's kindergarten experience and trace it on through. And the point of the limits it seems to me is to replace what is now missing in the system.

I was interested in Bill's comments earlier. I think it's interesting to focus on what really is wrong with the system. The system that we created in 1937 is really not fundamentally flawed. You still have to make allegations. As between pleadings and discovery there is probably more

advantage to asking people in a less formal way what their contentions are than making it turn on pleadings and special exceptions; but in 1945 there was a limit on how much you could ask. If you had to send interrogatories to the other side which were typed on a manual typewriter with carbon paper, there are just fewer that you're going to ask than if you can send them with a word processor and you've asked in the last 15 cases and they come out of your laser printer at 12 pages a minute.

The same way with much of discovery it seems to me just the technological constraints have been removed so that you can ask for more in the hopes that you you'll get something. So that now instead of fishing with a rod and reel like we did in 1945, we fish with a dragnet which we hope will catch a fish.

But the whole idea of managed care being debated in the medical world it kind of carries over here. There has got to be some managed justice here. And there may be circumstances where a whole lot needs to be asked in order to be sure that the ground has

been covered, and there certainly are circumstances where one party has all the facts; but there need to be some kinds of limits on those, and to be sure that at some point we get to resolving the dispute.

CHAIRMAN SOULES: Okay. Let's try to get to some specifics now, if possible; and I will go around the table obviously. This Committee, our jurisdiction is to make Rules recommendations for Rules changes. I don't think we're going to write a Rule that directs the trial judges to be more active maybe. That doesn't seem a likely thing that we will do. It may be something we do, but probably not likely. I do think that if we in trying to fix the discovery Rule somehow, whatever that process may be, if we have to go to other Rules and fix them, so that they mesh or function together with the discovery Rules in a better way and by fixing those other Rules we make the entire system less costly, more efficient, whatever our objectives may be, that we need do that as Bill and others have suggested.

Specifically and in the

materials that are loose materials not necessarily coming from the Task Force there are suggestions of this sort, a suggestion that we be permitted to ask in an interrogatory who are going to be your witnesses at trial. We can't shoot at the bull's-eye with an interrogatory and ask who your witnesses are going to be. We have to ask who are persons with knowledge of relevant facts; and so we've got this shotgun, and there are so many types of questions, what are your -- why not ask what are going to be your exhibits at trial. We generate a lot of information that the other side may not be even planning to use.

Obviously you don't get in those interrogatories the things that they're not going to use. Maybe you have to do some additional work for that, but it seems to me that we ought to be able to answer specifically that. We have all had some experiences where we get a list of persons with knowledge of relevant facts, and it would be 100 people.

MR. LATTING: 32 days before

trial.

CHAIRMAN SOULES: Right. And there are reported cases of that sort. And we're not even allowed to ask "Who are you going to call so that I can try to focus on those people first." Why not? All we have to do is write a Rule and have the State Court adopt the Rule, and we could get that. Even though it is work product, there is a lot of work product that's discoverable. A person with knowledge of relevant facts that information may have been developed absolutely by the lawyer, but clearly it's discoverable even if it is the lawyer's work product.

So the exhibits to be used for the trial, the witnesses. Another issue right now the party resisting discovery has the burden to show that the discovery that's being sought is not relevant. Why shouldn't it be the burden on the party who drafts the discovery request to go to court if there's going to be a court proceeding about it and explain and justify the request that was made instead of trying to prove a negative, the party resisting discovery trying to prove in

the negative? The reason why it's that way right now is because the Supreme Court says so; but that seems to me to be a waste of resources. And if the party really had to come to court and justify it, maybe some of the hearings would be reduced.

I think there are specific ways that we can get at the focusing discovery better than it is. Obviously we're going to have some recommendations at least from the subcommittees that there be numerical, arbitrary numerical limits, and we're going to be discussing that as well. But who sees these as being any kind of worthwhile ideas or any other ideas that could specifically focus discovery and narrow discovery if properly used by parties?

MR. ORSINGER: Let me say something preliminarily and then pick up one of your points. I think that we should provide that you send your request for production or your interrogatories with a floppy disk so that the other side doesn't have to type all that in. It costs virtually nothing, and it does take a lot of

administrative time to type up whatever discovery you receive. I try to do that by agreement often by calling the other side; and sometimes they'll agree, and sometimes they won't. Why don't we just mandate it.

A comment you just made struck me. One of the big changes that occurred in discovery since I've been practicing law was that at some point, and I don't remember exactly when, it became very easy to request discovery, and the cost and the burden of doing the discovery all fell on the party who was targeted with the request. They had the burden to make the objections. They had the burden to go out and get all of the evidence. If that was expensive, they had the burden to file a motion for protective order. For a while they even had a burden to get an immediate hearing, although that Rule change went away.

I think maybe one of the reasons why we have so much discovery right is that it costs virtually nothing to request something, and the other side has to move heaven and earth at their expense to produce

it; and perhaps we ought to do something about shifting the cost of discovery so that the party who is requesting discovery if it's going to be expensive or time consuming, can more easily be made to share in that cost, and then that might cause requesting parties to narrow the scope of their requests.

In terms of identifying witnesses and exhibits before trial I think that that would be a good idea as long as you let lawyers have last-minute development. Don't say that six months before trial they have to know who all their witnesses are going to be. Let them come forward as the case goes along, and then as they get refinements or realizations or as other sides are putting their witnesses in line, then you have the opportunity to respond. Don't cut them off too early, because many lawyers as a practical matter don't prepare their cases nine months in advance, and in fact in probably 60 percent of the cases they're prepared all in the last 30 days, and probably a lot of us don't even care about those cases.

And so let's be sure that we

allow the people that don't have a lot of money, the ones who are doing the slip and falls and everything that we don't make the cases burdensome for them when in reality we are targeting a different kind of case.

PROFESSOR DORSANEO: Well, viewing this thing from a historical perspective I think around 1970 depending upon the system that you're in we started taking a very different approach to what I think is the larger problem area, the discovery of documents. A decision was made by some group or another, probably from my own personal perspective like the decision to do depositions of experts rather than getting reports, because the report thing is not working, we'll do something else that won't work either, to go to a request of response procedure for documents rather than to get the judge in play to decide whether or not particular documents are discoverable. I think the assumption was that that would be helpful to the judges, because they are too busy to do this, but I think as David Beck said that is just "Pay me now or pay me

later." The judge is going to be involved with that; and probably in our system now the judge gets involved at a sanctions hearing, a motion to compel hearing, and it's a whole big kind of thing in comparison to what once was the case.

This is related to what Richard is talking about too and the overall problem of getting the judges involved; and it seems to me that if we had some sort of a scheduling order practice that required the judge to be engaged at the threshold on important matters, but that didn't require the judge to prepare or the lawyers to prepare a full scale Federal style, academically oriented pretrial order that covers everything in the case, a lot of it could be handled by Rules, we would go a long way forward.

So my recommendation, and this comes from working with the Committee On Court Rules, would be to focus some more on our Rule 166 and to see if we can do something there that would get the judge in play earlier to resolve real problems that likely would involve documents maybe in a warehouse in

Detroit or in Chattanooga, Tennessee before people go there and don't discover them, and come back and move for sanctions, but that wouldn't require the judge to do as much as the Federal Rules and what many other Rules have looked like they require.

I think notwithstanding the Houston lawyer's difficulty in coping with this concept that we might consider the scheduling order approach that has worked in North Texas and apparently in Nueces County and other areas, and that that is an important policy decision that this Committee ought to consider as to whether that's something that could be done. To me that would backtrack on some things that had been done in the past to say this is for the lawyers to handle and not for the Judge to be involved, and I think that ought to be the focus or a focus.

CHAIRMAN SOULES: Are you suggesting that we go back to requiring a court order in order to get a document request?

PROFESSOR DORSANEO: I think that if we had one of these hearings and

scheduling order and order early discussion with the judge where the judge tried to ascertain what the problems are going to be with discovery, somebody is going to say, "Well I needed to get these documents that relate to this or that or whatever," and there is going to be immediate resistance to that -- there always is resistance, typically is, and find out what the problem is and do something about it, that will be like the formalized -- it will deal with the same kind of problem as an old motion to produce would deal with it, I think.

CHAIRMAN SOULES: Are you suggesting that documents be, that we should go to a court order predicate to get documents?

PROFESSOR DORSANEO: Not all the time. But I think that assuming the documents are not going to be a problem is a silly assumption, that they are going to be a problem, and maybe at that meeting the judge "Do we any problems with documents," and say "Yes. We have got all this stuff in a warehouse in Chattenooga, and we think that

all we need to do is to let you into the warehouse in the morning and you root around for a few days, and that that takes care of it." And the other side, "Well, no. No. I have to have more than that. I want them here" or whatever, and you could cut through a lot of it.

CHAIRMAN SOULES: But haven't some people been in big document cases where the actual litigation over the scope of documents has been pretty minor?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: And huge efforts involving documents.

PROFESSOR DORSANEO: That's what I said. You don't need a hearing every time or a motion to produce practice; but assuming that the judge does not need to be involved in discovery and that that's a good thing in some respects doesn't make a lot of sense. You could assume that with respect to many forms of discovery, but many things, but in a document area I think that could identify that was not a good thing to happen. That was a mistake to go to the request response

procedure. All that did was delay the problem and turn it into a sanctions problem. That's what it did.

CHAIRMAN SOULES: Okay. If we could spend some time here giving direction to Steve and David by stating what specifically could be changed in terms of scope of discovery other than arbitrary numeric numbers which has already been discussed to some extent here today and probably will get a lot of discussion later? What else do we think should be done? I think the expert report thing, to delete that would be a step in the wrong direction. I mean, I guess everyone here has had some experience, at least we have, where we get the expert's report. We have confidence that the trial judge is going to contain the expert's testimony to what is in that report, and we don't need the expert's deposition. We're happy that it's going to be limited to what we have here. We don't even want to go to a deposition and possibly expand the four corners of that report; and there is a major cost savings, and this is where experts are crucial in a case. They will be

in all likelihood determinative of big dollar issues in the case, but we do not take their depositions because we're more comfortable right where we are when we get their reports.

So I think to eliminate the reports is a step in the wrong direction; and that is just my idea, but I'd like to get those kinds of ideas out. How can we contain discovery by making changes in scope somehow, or whatever that is?

HONORABLE C. A. GUITTARD: It seems like to me we're probably coming to a consensus on some specifics. Number one is for the routine case, that non-exceptional case have arbitrary limits by Rules. If anybody wants anything more than that, if it's an exceptional case, let them get the judge into that. If you just leave it to the judges, you are not going to have consistency of the administration. So you have to bring the judge in some way. The way you do it the one that wants the more discovery than the routine he makes an application for more discovery. If he cannot get his opponent to agree, then the judges decide this. That's

the way, the general way it ought to go.

MR. LATTING: I would like to see at some point before trial everybody have to give to the other side a list of persons that they intend to call as witnesses in the trial, a statement of what they expect to prove by those witnesses, and a list of the exhibits which they intend to introduce in trial with the statement of what they feel that those exhibits, the bearing on their case, and I would like for that list to be given to the jury at the trial. And I'll guarantee you that that will cause us to think real hard about divulging things to the other side. That is, "I want to know who you're going to call and what you're going to prove by them, and I'll tell you the same thing. Here is my written evidence, and here's what I think the significance is." And this will get to what Steve is talking about. "What is it we're fighting about here, and how are we going to prove this?" And I wouldn't be including -- I wouldn't be cutting real fine lines when we get to a witness and I told you I was going to prove A and B by him, and now

he starts to testify to C and D, but I think it would be a good idea for the trier of facts to see that I told him one thing and I did another.

CHAIRMAN SOULES: What would you think about an additional disclosure --

MR. LATTING: Gets you honest.

CHAIRMAN SOULES: -- that if to object to those exhibits in advance of trial? If there are going to be objections to those exhibits, what are they going to be and --

MR. LATTING: I don't have any problem with that.

MR. SOULES: Because a big stack of these exhibits that are going to be admitted at trial we wind up wasting time at trial because we don't have pretrial orders, and they get automatically admitted. Putting in exhibits and going through the routines before the jury, "What is going on here" whenever nobody really has an issue about them going in.

MR. LATTING: The more typical thing that happens to me in cases is I get a

list, and I got one just the other day. About 36 days before trial I get a list of 36 persons who have knowledge of relevant facts. What am I supposed to do with that? I can't go take 36 depositions, and I don't know who is going to be called. I have a pretty good idea. Why don't we just tell each other "Here is what I am going to prove at this trial, and here is how I'm going to prove it"?

CHAIRMAN SOULES: What other ideas? Sarah Duncan.

MS. DUNCAN: Bill and I rarely disagree. But I'd go just the opposite on documents. To me all relevant documents should be produced on letter request, and if there are any documents withheld, then you can go fight about those. I would also require and I'd like to suggest to the subcommittee that they consider and they can bat back and forth that there not be any other type of discovery until the litigants have certified that they have reviewed the documents.

I've been on the other side of interrogatories such as what Joe has suggested, and I think those are going to

increase the cost, not decrease it. I also think that from my own perspective, and maybe this isn't legitimate for a system to consider, but I became very resentful representing Plaintiffs and working and spending my client's money putting together a case and having the Defense lawyers sit there, not review the documents, not investigate their own case and want me to basically show them what defense to prepare. And I think there is a lot of cost shifting going on through the interrogatory discovery process that is really not fair.

HONORABLE SCOTT A. BRISTER: I have a question. David, what happens in a case limited to four depositions? The thing I'm starting to see in a lot of cases is people calling an extravagant number, literally 17 moaners and groaners they want to call on a case. Another case where reasonable and necessary medical expenses was stipulated to, but "We want to call all 11 doctors to describe in detail what procedure they did." The four limitation makes sense in that "I am only going to use four to discover my case;

but if they're calling 28 moaners and groaners, doctors, et cetera, it seems unfair to limit me to four, but I'm going to be confronted by 24 people at trial testifying against me without any." You know, what happens if you limit to four? Is there also a limit give me the four that are really the heart of your case or what?

MR. KELTNER: Yes, Scott. We had a big problem with that, and the reason we did was especially with the experts it's difficult. One of the disciplinary Rules is of course you can't talk to anybody else's expert, so the investigation of that isn't really going to work. You didn't get to question him. All you got to see maybe was a report perhaps. So we had problems with that, and realize that any hard and fast Rule was going to be problematic. I think it would have been the consensus of the Task Force to disclose what witnesses were going to testify late in the proceedings and have an opportunity to maybe depose with some limitations even on hours additional folks; but that is a difficulty and a downside of the

numerical limitation.

The other thing again with numerical limitation is remember preservation. You are just not going to get these people, and it's current now. We don't get people for trials to testify; and that's something that's just the case, so that's a down side.

HONORABLE SCOTT F. BRISTER: There is some sense in the routine case saying you can only take four depositions, and you can only call four witnesses. Now, if you want to call 17 additional, to come in and have the hearing to describe to the judge and find out if a judge is going to let you call 11 doctors to testify in detail about everything. It seems to me there ought to be some tie limited on what I can take, and they're limited on who they can call. There ought to be some connection.

MR. KELTNER: I agree.

CHAIRMAN SOULES: If you had a witness list requirement and a four-deposition limit and the party came in and says "Look, they've named 17 witnesses, and I'm restricted

to four depositions," it seems to me at that point the judge could do some management.

HONORABLE SCOTT A. BRISTER: Yes.

CHAIRMAN SOULES: "What are they going to say that's cumulative? You're going to have to pick two, one, whatever, five."

HONORABLE SCOTT A. BRISTER: "Call two doctors. Don't waste any time on these depositions. Pick your two best, and you can take your depositions."

CHAIRMAN SOULES: And if they justify they've got to have whatever, 9 out of 17, then you manage that to increase the number of depositions; or get their reports first, look at those, and say "I think I'm just going to hold you to this report." It seems to me like again maybe this witness thing is an idea.

HONORABLE ANN TYRELL COCKRAN: A smaller universe within that 80 percent that I was talking about, but an awful lot of the cases that are, you know, the trial judges see, but the rest of you just don't. The

appellate judges never see them, because nobody knows how to perfect an appeal much less does any client think what is at stake is important enough to when trial is over the last thing the client wants is to do anything that is going to incur another dollar in legal fees. But there is an awful lot -- in the cases that we've identified as being perceived by the trial Bench as being the trial cases, the DTPA, the family business, really all the business and commercial and collection litigation including, you know, the suits by by and against banks, securities, all the stuff -- a lot of the stuff that used to be filed in Federal Courts now in State Court, all the non-personal injury litigation.

An awful lot of the over discovery that occurs occurs because the lawyers start, you know, requesting all the documents and taking deposition before any of the lawyers involved have really sat down and figured out if the State of Texas even recognizes this cause of action or not, and if so, what are the elements. I mean, how could they even figure out what the relevant

documents are? And a lot of that -- and I think it's because what Susman said earlier. You know, a lot of time lawyers just -- you know, it's almost easier to go get after the case and get to the human interaction part of the case rather than actually having to sit down and figure out, you know, what is at issue here. First of all, you know, what are the legal claims here? You know, which of this, is there really no dispute? Where is the dispute, you know?

Most cases have one issue in them, one. The rare case has two, and I'm talking about the issue the case is really going to be won or lost on. Sometimes it's a legal issue. Usually it's a factual, one issue in most cases. You know, if sitting down and figuring out, and whether this is done through the request for a more definite statement or an early conference with the Court, something to figure out first of all is there a legal issue that if the trial Court could tell us how she is going to Rule now, would really let everybody focus even though appellate courts do not make partial summary

judgments, a very workable way to do that, but at least say, "Well, Judge, how are you going to Rule on that?" You know, "Is there ambiguity in the document?"

The Court has got to make that call before anybody should waste any time in doing the 15 depositions on what the intent of the parties was. And if we could have a way to focus, and again concentrating on the places we've sort of identified as being where the primary problems are, of identifying what the issues are and the questions of fact, where is there going to be a dispute, and the lawyers probably have talked enough to their clients to be able to make a pretty safe prediction of that even if lawyers would not be comfortable being bound by that early on, and you know, identifying is there any dispute about what the law is that relates to this case, and would it help you focus your discovery to get some early ruling on the legal issues so that you'd know whether or not to go at least in the early stages of the case to even waste your time.

To me if there were a

procedure that would make everybody sit down and figure out what is the issue in this case, there's only going to be one 90 percent of the time. What is the issue, and concentrate their discovery on that.

CHAIRMAN SOULES: That would be a fundamental change in the scope of discovery in Texas if we did discovery on the issues.

MS. DUNCAN: That's right.

CHAIRMAN SOULES: There are two systems. There are discovery -- there are systems that operate where you do discovery on the issues of the case. Then there are systems that operate where you do discovery on the subject matter of the case; and the subject matter is much broader. I guess it's just anything that could be about the transaction whether the issues have been raised related to that or not. And we've got subject matter scope of discovery here.

There is a lot of frustration I think in attempting to size the case early on. There is really no mechanics. Motions for summary judgment don't work very well for

that. Special exceptions don't work very well for that. Where is the key to the courthouse where you can go and open the door and go in and say, "Size my case and let me do discovery on this size case"? Well, you can't get that done in most cases, because the Rules don't give the judges much authority to do that.

Some judges do it and do a good job of that. But I think most don't in my experience anyway. So we wind up doing discovery on the subject matter in the broadest senese; and maybe we could come up with some idea on how to get a case sized and then discovered within the constraints of that size case. I'm talking about size in issues. Not size in dollars, and that might help.

PROFESSOR DORSANEO: This really does get back to what we, our Committee On Court Rules discussions over a long period of time. We actually did draft a new Rule 166 to try to incorporate some of these ideas; but the main idea simply stated was that after a relatively short beginning period for the case when there is paper discovery or disclosure, perhaps paper discovery pursuant to approved

forms that would involve questions about witnesses and documents there would be a mandatory meeting between counsel and the judicial officer where somebody would point out "Any problems; what are the problems." "Well, I have this problem. I have that problem. I have that problem." And at that point there would be some guidance from a much more experienced and capable lawyer than might otherwise be the case, and that would shortcut a lot of difficulties, and that was the idea.

Now, the scheduling, the order that we had contemplated would come out of that to the extent it would even be a formal kind of a thing would not look like a very long 10- or 12-page Federal pretrial order that probably was designed to be done much later, you know, right before trial talking about everything under the sun, because obviously that's not going to happen, and that is way too much engineering. But the simple idea of taking a look at the case at a relatively early state. Maybe in a given case, slip-and-fall case or a car wreck case

involving lawyers who do this all the time who don't really need to take more than a two-second look at it; and some of these other kinds of more problematic cases the role of the judge at the judge's discretion, you know, would be different, but something at the threshold and then proceed from there.

And all the rest of the ideas that you talked about could be, you know, supplemental or of assistance in that respect disclosurewise at the outset, discoverywise later, limit the number of depositions. And Rusty's idea, and at some point later do something else to try to get the case settled with the mediator or perhaps with the judicial office; but that was our idea, the Committee On Court Rules as to how to deal with the overall kind of problem.

ANNE GARDNER: Another idea that the Committee On Court Rules has been working on, and I think this might respond to what Judge Cockran was talking about, is Rule 166a, the proposed revision that we've done that I believe the Task Force On Recodification has incorporated in its

proposal, and that's to revise the summary judgement Rule to go to a modified system like the Federal Rules where after an early but adequate time for discovery, and that's what the Federal system provides, but it would be earlier than is contemplated under the Texas Rules right now. A motion for the summary judgment could be filed whereby the burdens of proof would be the same as they are at trial on the parties; and under the Federal system this virtually forces the Plaintiff as well as the Defendant where they have the burden to prove to get their investigation done early and contentions settled, and it enables the Court to decide what really are the disputed issues of fact and what really are the contentions of law.

And I've been on both sides in Federal court, and it does force the parties early on to develop their case, and I think that that is something that could go hand in hand with the other parts that are being discussed.

MS. DUNCAN: On that same line and picking up on what Judge Cockran was

saying which I strongly agree with there are a lot of cases that can be decided early on. For instance, if you knew that a two-year statute of limitations applied, you knew you couldn't make it, get a ruling from the trial judge maybe on a summary judgment motion. If you could then certify that, get a final ruling, you can get rid of that case rather than than having to depose 52 people over a five-year period to get every piece of evidence you can possibly get showing why you can fit within the four-year statute when you don't even know that the four-year statute applies.

And picking up on what you were saying, Luke, as long as people can revise their pleadings even post judgment which is happening more than I can believe, you can't size the case upfront. When somebody can come in after a jury verdice of 10 million in punitives when none or when a million dollars were pled, and the trial judge say, "Well, there's no real surprise there, because punitives have always been pled and you've always known you had bad facts," you're

never going to be able to size the case upfront.

And the other thing that I would like to just ask the question is have we rejected the idea of having, of deciding when a case is filed what track that case is going to be on in terms of discovery? Because it seems to me in an awful lot of cases the lawyers could agree that we're going to have -- you know, "We're either no discovery without consent, we're limited arbitrary numbers of depositions, interrogatories, whatever," or "This is full discovery." Both parties know that they're not going to -- four depositions just isn't going to do it. And it seems to me that if we either accept or reject the tracking upfront, that's going to lead us to different places in revising Rules.

CHAIRMAN SOULES: Are you suggesting that maybe the Plaintiff when the Plaintiff files say "We are on Track 1 or 2 or 3"?

MS. DUNCAN: Actually what I'm suggesting is that at the time the Defendant files his or her, its answer that if the

parties can agree on a track, that's the track. If the parties can't agree, then they will have to have a judicial officer as Bill is saying make that decision in consultation with them, but I think in most cases people are going to agree. You know, if there is a Tommy Jacks involved on one side and a David Beck involved on the other side, the chances are very good that that is not a Track 1 or Track 2 case because nobody is going to pay their fees on a Track 1 or Track 2 case.

So and they're both good lawyers. They can agree; and they can probably even agree on what documents need to be produced, who is going to need to be deposed, and what is going to go on in the case.

MR. ORSINGER: In order to make limited discovery work I think we need to retool our whole litigation process to encourage or even require the litigants to define the legal contentions earlier in the process so that you can do your discovery with more of an idea of what the true contentions are. And I think that that fundamental change

in philosophy about discovery in Texas should occur, but I don't think we should abandon inquiry into facts. I just think we ought to permit the avenue for lawyers to force other lawyers to tell them what the legal framework of their case is; and that can be done by changing the summary judgment procedure. That can be done by requiring different kinds of pleadings, maybe letter requests; but I think interrogatories requiring contentions to be set out would be essential, and I also would suggest that depositions of parties to define contentions are very ineffective, because the parties frequently will not understand definitions or legal concepts. And I've had clients asked, you know, "Why did you allege this in paragraph 15 or your original petition?" And they don't have the faintest idea, because they don't understand the legal phraseology or anything else, but there should be.

And I don't think it's such a bad idea. I mean, it's facetious to take the deposition of the other lawyer; but I've sometimes put a lawyer in the case, other

lawyer up on the witness stand in the preliminary hearing or even in a trial to ask them to explain their contentions and wish there was some way that you could have a forced dialogue with the lawyer on the other side to tell you "My theory is this, but not this" early enough so that you could actually structure the discovery of your case.

Rule 166 hearings would be very important on that. I was very attracted to Rusty McMain's suggestion that we have a mediation process earlier in the case not so much to revolve the entire case, but to put it on track for discovery and disposition.

Now, when mediation came on, and it's been very popular in family law which I do a lot of, I was very skeptical. I felt like if two lawyers can't settle the case, then why are three lawyers going to be able to settle the case? I found that cases that were insoluble lawyer to lawyer have settled in mediation; and I think, and this could be wrong and everybody may disagree with me, but I think it's because there is a semblance of having your day in court. There is a

semblance of having a third party even though they're not adjudicating, they're somebody different, and they have a chance to hear what you say, and then they come back and say "Well, what you say is good, but the other side is saying this, and you have to understand there is some risk in going to trial, and there is some cost, blah, blah, blah, blah." And I think the clients psychologically can moderate their position better when they have an outsider whether it's a judge or a mediator; and I think that we ought to have in Rule 166, we ought to specifically say that the trial Court can order the parties into a mediation process to define the issues and to scope out what the discovery is going to be and to try to figure out what can be agreed on without depositions and what deposition have to be taken and whatnot, and failing that then report back to the Court for resolution of something you can't figure out in mediation.

My experience on mediation on settlement is that may take a lot of these cases and get these issues defined and the

discovery narrowed without ever bothering the trial judge; and then only the ones you can't do through that mediation would you go to the trial judge on, and it really isn't going to impair anyone's development, because it's largely being done consentually forcing the sides to communite with each other on contentions.

CHAIRMAN SOULES: Another idea might be to put in Rule 166, that at a Rule 166 hearing the trial judge could assign the times to be allocated for trial. That's not done much in the State practice. It's done regularly in the Federal practice.

MR. LATTING: Yes, it is.

CHAIRMAN SOULES: But if the judge says "I'm going to give each party some 20 hours on the record to try the case"; and the usual way to count it Cross is on a party Crossing, Direct on a party Directing, and time for objections go to losing party, that's the way if works most places. Then what's the use of 60 depositions if you're only going to have 20 hours on the record at trial? I don't know whether that could have any influence.

What other ideas do we see that might cause constraints on discovery?

MR. JACKS: Well, one thing I'd like to comment about, and it's not intended as a criticism of Richard's suggestion that you try to develop the contentions more and then tether the discovery to the contentions, than it is to point out that there could be some intended consequences when you set about trying to do that.

If you really, and in the first place I've not found in my practice at least that there is a lot of confusion on either side about what the case is about or what the issues are either legally or for that matter factually. I think generally in most cases by a pretty early time in the case lawyers on both sides have a pretty good idea of where things are headed in that regard. But if you try to create some bottleneck at the beginning through which things must be filtered before discovery can take place, then what we'll have as actual practice is you'll get to the deposition of the witness, and 10 minutes into the deposition questions asked,

and the lawyer says "Oh, no. You can't ask him about that now. That's not one of the issues about which we're going to be making any discovery." And so you end of certifying those questions. You go back in. You have your discovery hearing. The judge sorts it out. You go back. You start re-deposing witnesses.

You know, I mean in real life some of this stuff sounds good when suggested by a Commission somewhere, but it doesn't really work. There is a practical aspect to that that has to be borne in mind.

CHAIRMAN SOULES: That's the problem that -- I think that's why Texas has subject matter discovery rather than issue discovery. That's exactly the problem with issue discovery. And you may be somewhere way away. You may be in New York taking a deposition when those limitations get imposed. It's obvious that you can amend your pleadings, but you can't get back to Texas in time to do it, so you come back and amend, and then you've got to go back to New York to do discovery on the new issues. That's the

tradeoff.

MR. ORSINGER: What Rules says that you can only do discovery on what's in your pleadings? Discovery is also for what your possible causes of action are.

CHAIRMAN SOULES: Unless we fundamentally changed the practice to make discovery only on the issues.

MR. ORSINGER: I don't agree with that. I think that we can have full discovery on the development of the facts including possible issues that you haven't pled yet while at the same time structuring the litigation system to cause people to take a position earlier rather than later about what their contentions are and not limit them arbitrarily to what they think when they first file the lawsuit, because frequently they won't figure out how many causes of action they have until after they do a little discovery.

I don't see why issue discovery has to limit the discovery of facts. I don't think that's inherent in reality. That's just an arbitrary decision.

And if you say you're not limited in your discovery to your pleadings but we still encourage people to disclose their theories in their pleadings earlier on in the case, I don't think that either one is hurting the other. They're both helping.

CHAIRMAN SOULES: Do we have any other ideas?

HONORABLE ANN TYRELL COCKRAN: I think the problem is so wide and so deep and so overwhelming that I think we need to at least spend a good deal of time, and this isn't -- we took this route. We couldn't get closure early, but to not be thinking in terms of what changes in the existing Rule on this detail could we do that might have some slight impact on ultimate cost of litigation, but talk about just a radical, you know, really talk about, you know, we are going to a planet that's never had a judicial system, and we want the majority of people in the country to be able to opt into this system for dispute resolution. What do we do? And really think in terms of at least exploring radical alternatives. And I just say that.

I'm really not much of a bomb thrower anymore, but I think the problem is such a threat to the entire system that we're to the point where we have got to think in terms of radical change.

MS. DUNCAN: If that is a motion, I second it, radical.

JUSTICE HECHT: Which is asking a lot of lawyers.

HONORABLE ANN TYRELL COCKRAN: Yes.

JUSTICE HECHT: Because whenever this has been asked, it was hard. And we don't want -- what we don't want to do is cram something down on to people who have to live with it that is either not going to work or not going to do justice. By the same token, the people whose legal system this is don't have a representative in most of the forums in which decisions are made, and so it falls upon us to try to shoulder that responsibility.

I know that, for example, my friends on the Supreme Court in Arizona say that the Bar was almost wholeheartedly opposed

to the changes that were made out there, and my problem is I sympathize with the Bar on some of those issues, because I for one do not see how mandatory disclosure works as a general rule. I hear the arguments of the lawyers, and it seems to me that they are pretty persuasive. But we have got to do something, and I agree with Ann. It's got to be fairly radical to move this into a posture where we can show the people that we are responding to the cries that the expense and the way of litigation is just unacceptably great.

HONORABLE ANN TYRELL COCKRAN: If I could add one other thing to my proposal. I would like to as a specific proposal, would like to suggest that we set aside one of our scheduled meetings to have a discussion with invited guests who will include a CEO or general counsel of national corporations, some small business owners who have been, you know, representative people to talk about from their point of view how serious the cost problem is, where they see it, and to get -- I mean, I think one of the

dangers of talking about something radical is that we were to craft a change that only addresses our limited experiences, and that we broaden the base of voices of hearing where the problems are to get a fuller appreciation of the problems before we even start talking about where we might change.

CHAIRMAN SOULES: Before it just gets bypassedl here, we are under -- the legislature passed a resolution I guess or a statute I guess. I don't guess it is a resolution, directing the Supreme Court to design, stop discovery in med mal cases.

Has anything been done on that, David?

MR. JACKS: I can report on that. I'm on that panel. The answer is that we viloated in a pretty flagrant way the schedule that the legislature had set out; and I blame myself for that mostly because I wrote the legislation and then was on the panel that was supposed to implement it, so I guess either way I'm stuck with the responsibility for having missed the deadline.

We did convey to the Supreme

Court about a week ago a set of discovery documents both from Defendants to Plaintiffs and from Plaintiffs to Defendants in med malpractice cases about which there was a consensus on the panel. The panel for your information was comprised of three Plaintiff's and three Defendant's lawyers who are heavily involved in medical malpractice litigation; and on the Plaintiff's side it was me, Paula Sweeney and Jim Purdue, and on the Defendant's side it was Terry Tottenham, Stretch Lewis from Galveston and Jim Cannon from here in Austin.

Justice Hecht and I visited yesterday to take a preliminary look at it. He suggested that a meeting would be in order and said an invitation would be issued from the Courts. The concern was from the Court that our discovery sets from both sides were too elaborate and too extensive. The idea behind that legislation which was an agreement basically between trial lawyers, TMA and medical malpractice insurers and with representation by Defense lawyers, Plaintiff's lawyers, the whole nine yards was that we

wanted to ty try to arrive at a susbstitute for the first stage of written discovery in the medical malpractice litigation that would be largely unobjectionable and automatic and that every case would be filed within 45 days of either suit being filed or an answer being filed depending on which side you're on.

And the idea was inspired on my part by the experience in Judge Cochran's court in the Silicone Breast Implant litigation in Houston where there is quite elaborate discovery that takes place in fully an automatic way, and there by and large are no hearings, no objections, no nothing. It just happens. 30 days after I file a case I file an answer to a long stream of interrogatories, and I file a stack of documents, and I send it to all the parties in that case, and we move on.

So that's where things stand. Because we were late in getting the information to the Court, there may be some slippage in the other statutory deadlines which had called for this system to go into effect I believe it was the 1st of April, if I

recall correctly, Justice Hecht, but that's where things stand at present.

It was a fascinating process going through this series of discussions over a period of months with other good lawyers on both sides of the docket; and we found far more common ground and far less disagreement I think than any of us expected and spent most of our time on finetuning rather than arguing about major issues. That's where it stands.

CHAIRMAN SOULES: Did you want to address that, Justice Hecht?

JUSTICE HECHT: The Court hasn't had a chance to consider it together. I know each of us has a copy of it, and a number of us have looked over it. I mentioned to Tommy yesterday we have some immediate concerns about the submission, because the interrogatories that have been submitted are appropriate, probably appropriate in major malpractice, medical malpractice litigation, but there is some concern on our part whether they're appropriate in every single medical malpractice case that gets filed. And our concern once again is that the top end of the

litigation is dominating the whole structure, so that if you've got a $100,000 claim, then this sort of discovery makes sense. If you've got a $10,000 claim, it's questionable whether is does.

Now, in talking with Tommy we're sensitive to the fact also that it is helpful to try to eliminate objections to discovery and multiple variations of some of the same inquiries that could be standardized. So there is something to be said for having standardization that goes all the way to the most, some of the more complicated cases. But we also need to accommodate, I think the Court feels, the simpler cases where filling out the answers to this kind of discovery would be a burden.

And so we have -- I told him we're probably going to visit with them about it and his Committee in the next few days. It seems like to me the deadline was January the 1st. I think it's already passed, but --

MR. JACKS: I think the April 1st deadline, if I remember correctly, was the deadline for when the discovery once

promulgated could actually be used or would be required to be used, if I remember right, but there were some intermediate dates. You're correct. And one of those may well have been the 1st of January.

JUSITCE HECHT: The people who participated in the drafting of this legislation have not found it possible to trust one another completely in the past, and there was a good bit of guardedness I think in the drafting of the legislation; but the Court apart from the statute and the deadlines it imposes is interested in seeing whether this makes sense in this context in the family law context, in any specific context where it can be used, and will probably want the Committee's input on this at some point even though the statute does not call for that.

CHAIRMAN SOULES: Is there any provision for delaying the discovery in the face of a motion for summary judgment, for example, on standard of care or limitations? There seems to be a lot of cases coming through the advance sheet where motions for summary judgment are sustained on appeal in

med mal cases based on absence of affidavits, on standard of care, and also on limitations where the discovery Rule is restricted. I don't practice in the area really at all.

MR. JACKS: Luke, the sets that we drafted really would precede the summary judgment phase by and large, although they were done with what we hoped was a pragmatic eye, so that even though a request might be made in the initial discovery set of documents, the documents themselves would provide that the compliance need not take place until sometime later in the case. For example, with respect to expert witnesses it's while we asked a pretty good set of questions about expert witnesses and documents pertaining to expert witnesses, we also provided that you're not in any trouble with anybody if seven days before the time when you schedule that expert deposition you provide a CV list with the publications and a report, and that you -- which as a practical matter in this kind of litigation is what most lawyers would agree to anyhow as being reasonable, and it just seemed to work.

There is the other set of facts you wouldn't have to do two drafts of, or some period of time before trial. So there has been a bit of a phasing built into these discovery documents, although they would be something you would be addressing at the beginning of the case. It would not interfere I don't think with those cases in which fairly early consideration by the Court of summary judgment is appropriate; and I think most trial Courts would take the view that some initial discovery is appropriate before they grant a summary judgment.

CHAIRMAN SOULES: Anyway logistically as I'm understanding it this is coming if it comes to our Committee at all, it will come on a different track than the discovery subcommittee that Steve was the Chair of and David is the vice chair of.

JUSTICE HECHT: I can't speak for the Court, but I think and anticipate that is right.

CHAIRMAN SOULES: So it's not something that your subcommittee I guess needs to be thinking about at this time. It's

already in the process some other way.

MR. ORSINGER: I've always been in favor of a standard set of interrogatories and requests for production for divorce and custody cases; and California has done that, and the Supreme Court of California has promulgated a checksheet, and the lawyers in California it's 1 through 55 or whatever, and they just check off the ones that they want to apply, and it seems to work pretty well.

I mean, I evaluated that in the context of the Texas practice; and I think their form, you know, could be very easily used with us. If there is a possibility that we could get the empermateur of the Supreme Court on a standard set of interrogatories and requests for production for a divorce or a custody case, if that is procedurely and politically feasible, then I can go back to the Family Law Council and tell them that lines of inquiry are being made and would the Council like to undertake to put together a checklist item like that.

And one of the things that's

good about the checklist even as compared to the family practice manual form is that the checklist is a preprinted form that you really can't justify charging your client $150 for checking off a few blocks and mailing it; and if that does 80 percent of your gut level discovery in a discovery case is checking that form, then that's going to reduce the cost, and it's also going to help the lawyers who have the marginal divorces that don't even want to fool with the 15- or 30-page set of interrogatories.

So but I think it's fairly important if we could get some authoritative support for the idea that this checklist can be used. If that's possible either to report back now or to tell me -- report back late or tell me now, I can go back, because I serve on the Family Law Council, and tell these people that "There is some interest in getting a standard checklist for discovery for divorce and custody cases. Let's come up with something."

CHAIRMAN SOULES: I think there is interest in seeing a proposal.

MR. ORSINGER: Okay. Then that's enough. Then I'll go back.

CHAIRMAN SOULES: Beyond that, I don't know.

MR. ORSINGER: Okay. Then I'll say that we don't have any commitment that it will ever come to anything, but there is an interest in seeing what it would look like if we were to go that route.

CHAIRMAN SOULES: I think that is consistent with the suggestions Judge Cochran made. Let's see what suggestions may come from different quarters about how to do something different that may make a contribution. Do you have any problem with that?

JUSTICE HECHT: No. And as we move in this direction it ought to become apparent that we are narrowing, if not eliminating, any remaining need for interrogatories. If we are able to specify in particular cases and maybe even in general cases what kinds of questions you can ask on interrogatories, then it is possible that we kind of return to the pre 1963 situation where

"These are the questions you can ask, this is the information you're entitled to," nothing else at least perhaps without a showing of good cause or some reason why it needed to be conducted by interrogatories.

CHAIRMAN SOULES: Okay.

JUSTICE HECHT: If we can do it for interrogatories, maybe we can do it for documents and some other things too.

CHAIRMAN SOULES: David, do you want some guidance from the Committee on any specific propositions that are before your group? We have 10 or 15 minutes here.

MR. BECK: We have so many Rules. I mean, our Commitee has Rule 15 through 165; and we have been building up suggested changes and complaints about problems now for over a year, so you know, five minutes, there is no way we could cover this. What I'd like to do is subject to your approval is I'd like to get up pretty early on the agenda for our next meeting and just try to clear our docket, because frankly what we need guidance on is whether or not conceptually you want to make certain changes

in the Rules.

I think the wording is going to be relatively easy. It is just the concept we need some guidance on. For example, Rule 18 which deals with the disqualification of judges apparently under our Rule at least how it's been construed by Courts is that you must file a motion to disqualify your trial judge at least 10 days prior to trial unless the judge is only named within that period of time. Well, query: What happens if you find out as in that case out of Texarkana where one of the parties hired I believe it was the son-in-law of one of the judges as an attorney who is going to be involved in the case? Well, apparently in that case there was immediately a motion made to disqualify the trial judge at least at the trial level as I understand it. The answer was "Too late. You didn't file it 10 days prior to trial." The response, "Well, he just hired him."

Well, anyway query: Do we need to change our Rule to provide for some type of good cause exception? Those are the kind of concepts our Committee needs some

guidance on. We can rewrite the Rule and submit it for final approval by this Committee, but just need some guidance on the concepts.

PROFESSOR DORSANEO: Well, my preference as a Committee member would be to do the sanctions material and get that finished including the other sanctions Rules that we haven't gone over; and I think for the Appellate Rules and I asked Judge Guittard what he thinks about it, but we'll be ready to report next month, and we have enough material to take up at least a day, I think. And but I think we will be in a position with specific proposals to -- it may take a little longer than a day to finish our agenda. My recommendation to the Chair would be let's get those two things done first.

MR. BECK: Yes. Luke, I'm not suggesting that we go ahead of that. All I'm simply saying is that our material is going to take maybe as much as two hours to get through, maybe less.

CHAIRMAN SOULES: Okay. I think at our next meeting we will try to

finalize the sanctions issues and at least those that are in 166d, and then that's going to just send the Sanctions Committee back to look at all the other work that has been done by the Sanctions Task Force that's not restricted to 166d. It's also 13 and some other places. We'll probably want to take that up next time; and then we'll try to do the Appellate Rules and some more on discovery, and then whatever time we have.

MS. LANGE: I know this hasn't been discussed or anything, but you-all's conception of what the people think out there, the radical changing of the procedures before someone gets down too far on the line, you might give it some thought. People are very upset when a jury is called off when they've already been summoned. And if the attorneys all knew there was a deadline of 72 hours before a trial time, if they haven't called off the jury, that they need to proceed with the jury, I think that would help the situation a lot. Like I said, I know it isn't here now, but it's out there for you-all to think about.

CHAIRMAN SOULES: Does anyone else have anything to bring to this meeting?

PROFESSOR ALBRIGHT: I was just going to ask if it was possible before meeting if we could have some better guidance as to what exactly we were going to consider so we could read whatever it was before we came. If Committees Rules that we could get beforehand and read them and think about them before we get here, I think that might help the discussions.

CHAIRMAN SOULES: We're going to have to have the Appellate Rules in final form in advance of the meeting in order to really do justice to them. And we're going to have them is my understanding.

HONORABLE C. A. GUITTARD: That's right.

CHAIRMAN SOULES: Maybe a couple of weeks ahead of time?

HONORABLE C. A. GUITTARD: That's our goal.

PROFESSOR DORSANEO: The mailing I suppose I could do that. I don't want to do that to people who aren't actually

going to read it. I don't want to mail things to people, A, that they're not going to read, and B, that they're going to leave home. And my suspicion is that that would be the largest forum of behavior.

MS. DUNCAN: It's thick.

CHAIRMAN SOULES: Well, everybody has got to bring their own materials every time to the meeting. We can't re-do these materials. It was about a $4,000 bill for the first meeting to prepare and mail and prepare and deliver.

So if you will send to me your materials, we'll distribute them to everyone, and everyone has got to bring them.

PROFESSOR ALBRIGHT: And I think if everybody knows we are going to talk about those Rules specifically, they will read them.

CHAIRMAN SOULES: By the 1st of March more or less I'd like to see the sanctions Rule 166d in final form so that I can put that in the package and the Appellate Rules as well, and David you and Steve's report.

MR. KELTNER: Yes, sir.

CHAIRMAN SOULES: We need all that by the 1st of March. I'll send that then to all the people on the Committee in advance of the meeting. And we will then be in recess until 8:30, Friday, March 18th; and we'll have a day and a half meeting the 18th and 19th. Thank you very much for you help.

- -

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, ANNA LOUISE RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committe on January 22, 1994, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for this hearing are $ 1090.00.

CHARGED TO: Luther H. Soules, III; Soules & Wallace

Given under my hand and seal of office on this the 12th day of February 1994.

ANNA RENKEN & ASSOCIATES
3404 Guadalupe
Austin, Texas 78705
(512) 452-0009

Anna Renken

ANNA L. RENKEN, CSR
Certification No. 2343
Certificate Expires 12/31/94

#0001,571AR