1
2
3
4
5
6
7 * * * * * * * * * * * * * * * * *
8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 MAY 21, 1994
10 * * * * * * * * * * * * * * * * *
11
12
13
14
15
16
17
18 Taken before D'Lois Lea Nesbitt,
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 21st day of
21 May, A.D., 1994, between the hours of 8:30
22 o'clock a.m. and 12:30 o'clock p.m. at the
23 Capitol Extension, Room E1.002, 1400 North
24 Congress Avenue, Austin, Texas 78701.
25

COPY

SUPREME COURT ADVISORY COMMITTEE

MAY 21, 1994

INDEX

Rule	Page(s)
Discovery Subcommittee Report	2262-2296 2317-2441
State Bar Court Rules Committee Response	2296-2317

MAY 21, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta, Jr.
Prof. Alexandra W. Albright
Honorable Scott Brister
Professor Elaine Carlson
Honorable Ann Cochran
Professor William V. Dorsaneo
Anne Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
John Marks
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen Susman
Paula Sweeney

MEMBERS ABSENT:

Charles L. Babcock
Pamela S. Baron
David J. Beck
Michael T. Gallagher
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
Stephen Yelenosky

EX OFFICIO MEMBERS:

Doyle Curry
Paul Gold
Honorable Nathan L. Hecht
David B. Jackson
Thomas Riney
Bonnie Wolbrueck
Honorable Sam Houston Clinton
Honorable William Cornelius
Doris Lange
Honorable Paul Heath Till

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly H. Duderstadt, Soules & Wallace
Carl Hamilton
Denise Smith for Mike Gallagher

1 CHAIRMAN SOULES: Let's be
2 in session. It's about 8:45. I passed a
3 sign-up list. It's somewhere in circulation.
4 Okay. Welcome back everyone. Steve, we're
5 happy to have you here and know you've got
6 your report from the Discovery Subcommittee.
7 Why don't I just give you the floor this
8 morning. We have got materials up here to my
9 right, three different items for those of you
10 who didn't bring yours, and Holly and I will
11 try to give you a list of what materials to
12 bring next time because by now we have got so
13 much paper that it's hard to carry all of it,
14 but we will need you to bring the materials
15 each time to the meeting because we are
16 getting some complaints about the cost of
17 producing and reproducing copies. Okay.
18 Steve, go ahead. What should we --
19 MR. SUSMAN: Let me give you a
20 little overview before we turn to the draft
21 itself.
22 CHAIRMAN SOULES: Okay.
23 MR. SUSMAN: In an effort to
24 give this entire committee a package that as
25 we discussed changes, maybe even modified,

1 adopted, at this meeting the Discovery
2 Committee has held three meetings in Austin
3 since our meeting here on March 18, a number
4 of long telephone conference calls, and I want
5 to begin by especially thanking Alex Albright
6 for the work she did in putting this all
7 together. She fortunately was not teaching
8 this semester and was able to give us a
9 package. We would never have accomplished it
10 in this amount of time without Alex's help.
11 Jeff Harrison -- Jeff, I want to introduce
12 you. Jeff, will you stand? A young lawyer
13 with my law firm that attended all the
14 meetings and served as our scrivener, keeping
15 minutes so we had minutes of each of our
16 meetings, which helped us recall what we had
17 already covered and avoided the anticipated
18 backslide.
19 And then the members of the subcommittee
20 themselves all drafted parts of what you have
21 before you, Paul Gold, David Keltner, Scott
22 McCown, and David Jackson, spent a lot of time
23 working on this. Our guiding principle in
24 doing these changes to the discovery rules was
25 to remain loyal to the sense of this body as

1 expressed in the meeting on March 18th. And
2 Richard Orsinger did a wonderful job of
3 maintaining detailed minutes of that meeting,
4 particularly our discussions. So we went back
5 to that frequently to see what you-all thought
6 the first time around.
7 We carefully considered the work of the
8 State Bar Committee on Rules, Court Rules,
9 which we had a draft of and the Discovery Task
10 Force, task force for which also we had some
11 draft rules from. And then finally we were
12 aided kind of accidentally because there was
13 some recent publicity in the TEXAS LAWYER
14 about the general outlines of what we were up
15 to recently. We had a lot of letters from
16 members of the Bar, judges, law professors,
17 making suggestions and criticisms, and we
18 considered them all. We rejected some,
19 adopted others.
20 Our final version does reflect what we
21 considered to be the best and brightest among
22 the input we got. We got a lot of input from
23 the Bar. Now, the package before you consists
24 of both a red-lined version and an unred-lined
25 version. Probably it's easiest to begin with

1 the unred-lined version because so many of the
2 rules you have are brand new, and we do not
3 have a counterpart. You should have a package
4 of materials with a cover memo from Alex
5 Albright that makes it distinct which just
6 does a great job summarizing a phrase or two
7 of our changes, and then she has enclosed two
8 versions, the red-lined version to show
9 changes from the existing rule, where we took
10 an existing rule and modified it, and then
11 there are some brand new rules. The package
12 is pretty much ready and complete except for
13 some minor changes which I spotted this week
14 in looking at the final product, so I will
15 give them to you as we go.
16 We basically left unchanged Rule 166(a)
17 and any attempt to modify the permissible
18 scope of discovery. We removed request for
19 admissions as a permissible discovery device
20 in the belief that interrogatories seeking a
21 "yes" or "no" answer which are unlimited in
22 number under our plan accomplish the same
23 thing. We had to make changes in certain
24 related rules for adding parties and amending
25 pleadings, and we tried to simplify the

1 pretrial conference rule.
2 As an overview our premise in doing what
3 we did was that neither the courts nor counsel
4 can be relied on to eliminate discovery. We
5 must, we think, have rules which operate by
6 default and impose limits, arbitrary limits
7 where courts are unwilling or disinclined to
8 micromanage their dockets or where counsel,
9 though cooperative and kissy-kissy, still
10 cannot agree on mutual rules of engagement,
11 and all of these rules are default rules and
12 can all be changed by agreement of counsel or
13 court order.
14 The overriding goal is to reduce the
15 expense of discovery without too much
16 sacrifice of justice. Although, we don't live
17 in a perfect world and there may be some
18 slight sacrifices as there is always that
19 possibility when you impose limits. We
20 recognize that in most cases our time limits
21 will allow too much time for discovery. Not
22 every case, indeed few cases, justify 50 hours
23 of depositions per se, but we felt it too
24 difficult to adopt a system which classifies
25 cases on the front end and imposes limits

1 which vary depending upon the complexity of
2 the case.
3 We also found it important to start
4 somewhere. Our fear to do more should not
5 justify our feeling to do something at this
6 time. These limits work for most cases
7 indeed. Most complex cases, it is our hope
8 that future amendments can be devised which
9 will fine tune these limits even further for
10 cases that do not justify so much. We felt an
11 urgency to act now. The courts of our state
12 as you know have been under attack as being
13 user-unfriendly, and the principal features of
14 our proposal is a six-month discovery window,
15 a limitation of 50 hours per side depositions,
16 the restrictions on interrogatories that
17 require the marshalling of evidence, and a
18 relaxation of the exclusionary rule we believe
19 may not deliver better justice but will
20 certainly and demonstrably save litigants in
21 this state millions of dollars a year.
22 These proposed rules are neither
23 pro-plaintiff nor pro-defendant. Objections
24 have been indeed voiced from both sides. The
25 old-time defense lawyers say we are telling

1 them how to prepare their cases for trial, and
2 they don't want that. Plaintiffs products
3 liability lawyers tell us cases -- stories
4 about when they got their confession of guilt
5 in their 53rd hour of depositions. So from
6 both extremes there is resistance mainly to
7 changing the way we do business, and to that
8 the subcommittee answers the public is
9 demanding.
10 There is no question that these rules
11 will change the way we do business. Maybe we
12 can't handle as many cases as we are used to.
13 Maybe we will have to more carefully plan whom
14 to depose and what to ask when we take
15 depositions. Maybe we will have to do a
16 better job of preparing our clients for their
17 depositions before we put them up in a no
18 objection regime. That's a dawning task for
19 trial lawyers, but again, it would be, I
20 think, a default for us not to undertake it.
21 Now, let's begin with the summary. Let
22 me walk you through these rules and tell you
23 about the principal features. I would like to
24 begin with the rule that appears on page 5,
25 again, using the unred-lined version, and I

1 begin with this rule because of it is
2 important that everyone realize that the whole
3 scheme is that by agreement of the parties or
4 order of court anything can be changed. We
5 have used the concept of good reason as
6 recommended at our last meeting on March 18
7 rather than good cause as the standard for the
8 court changing the limits. Obviously we will
9 have to develop a body of caselaw on what good
10 reason means. I assume we could put some
11 things in the comments about good reason, but
12 if we put anything in the comment at all it
13 should be very clearly good reason does not
14 mean that counsel is too busy or didn't have
15 time or that witnesses are too busy or don't
16 have time.
17 We believe that if the lawyers and judges
18 cooperate cases can be discovered in a compact
19 period of time. We believe that the most
20 inefficient -- one of the most inefficient and
21 expensive parts of litigation is starting and
22 stopping in that -- and the fact that I have
23 tried a lot of complex cases in my short
24 career, I do not know of any case that I could
25 not have completely discovered in a two-month

1 period of time, period, no exceptions, if
2 that's all I had to do. If witnesses were
3 available and judges would cooperate. Those
4 are some big if's.
5 The function of these rules is to make
6 the if's come true, to make the witnesses
7 available, and to urge the judges in view of
8 these short discovery windows to rule
9 promptly. The notion is we can prepare a case
10 for trial, put it in the can, put it on the
11 shelf, so that when the court's docket can
12 reach the case for trial, it's ready. You
13 will see in a rule that now appears, a new
14 rule, at page 7, subpart 4 our provision for
15 retouching the film before it is exhibited.
16 This is the refreshener, the cleanup. It is
17 essentially a re-opener of the discovery
18 period 60 days before trial for the purpose of
19 discovering information which has changed
20 since you put the film in the can. A little
21 more on that rule in a minute.
22 Rules 37 and 38 which appear at pages 1,
23 2, and 3 -- 37, 38, and 63, 1, 2, and 3 of
24 this handout, we changed to make clear that
25 parties can be added and pleadings amended

1 freely without leave of court as long as it's
2 done during the first three months of our
3 discovery period. Keep in mind we have always
4 been based upon the notion that there will be
5 a discovery period of six months. It will
6 commence when documents are produced or the
7 first -- in response to a request for
8 production of documents or the first
9 deposition taken. It will not commence if
10 interrogatories seeking certain standard
11 information are asked and answered, nor will
12 it commence if certain types of voluntary
13 disclosure are made, but it will commence --
14 which basically means that it opens when
15 counsel want it to open, and it goes for six
16 months.
17 In any event we had to have some way of
18 making sure the parties were not adding
19 pleadings willy-nilly at the end of the
20 six-month period and then you are extended
21 indefinitely. So we did that by providing
22 that, you know, for three months you can do
23 anything without leave, and after that time
24 leave must be sought, and we provided it
25 should be freely granted, the concept in both

1 Rule 37 and 63 for both the addition of
2 parties and the amending of a pleading. It
3 should be granted where -- it certainly should
4 be freely granted where the addition or
5 amendment requires no extension of the
6 discovery period. If an extension of the
7 discovery period is required, then leave
8 should also be granted and the discovery
9 period extended unless that will interfere
10 with the trial of the case. That's an
11 overview of what we did to Rule 37 and 38.
12 Rule 166 regarding pretrial conferences,
13 a brief overview of that rule. Basically here
14 we simply shortened the rule because we wanted
15 to emphasize that, as the rule says, "Any
16 matter that may aid in the disposition of the
17 action may be considered." Having said "any
18 matter" it seemed to us unnecessary to make
19 the list of illustrations exhaustive. We have
20 shortened the list of illustrations. We
21 believe that the rule as we have written it
22 allows the court at pretrial conference to do
23 anything that it now can at a pretrial
24 conference. We give a hint but not an
25 encouragement in section 1(c) that this is the

1 place for a court order, a court consideration
2 of modifying the discovery limits. The court
3 may consider the development of a scheduling
4 order including discovery. We do not want to
5 encourage pretrial conferences to be used
6 usually or customarily to modify the time
7 limits, but this is the appropriate vehicle to
8 get a modification if you need one.
9 While it was beyond the scope of our
10 committee I personally and I speak -- and this
11 is a personal note that someday, somehow this
12 group will consider adding to 1(e) of Rule 166
13 that the court may consider limiting the time
14 allowed for trial of cases at the pretrial
15 conference. If we simply added some language
16 to that effect in 1(e) most of the discovery
17 problems would go away, I believe.
18 The rule appearing -- now, I would like
19 to skip to the discovery period rule that
20 appears at page 6. Let me ask you to make
21 these changes in your rule to make it make
22 sense. The rules should be added. The blanks
23 should be 37 and 38, and the last sentence
24 should read like this. The last sentence,
25 something got missed on the last sentence, say

1 "Neither the addition of a party nor" and then
2 circle "after the first three months of the
3 discovery period" to say "Neither the addition
4 of a party nor the amendment of a pleading
5 after the first three months of the discovery
6 period, nor the intervention of a party shall
7 effect the duration of the discovery period
8 unless the court so orders."
9 Try it again: "Neither the addition of a
10 party nor the amendment of a pleading, after
11 the first three months of the discovery period
12 nor the intervention by a party shall effect
13 the duration of the discovery period unless
14 the court so orders." We have provided that
15 if you add a party without leave of court
16 during the first three months that party gets
17 an automatic -- automatically gets six months.
18 Now, that does not extend the time you get,
19 but the added party gets the six-months. If
20 you add a party after three months, how much
21 time you get or even whether you can add a
22 party depends on the court's order.
23 So the rule operates -- you don't have to
24 go to the court if you add a party during the
25 first three months. That party automatically

1 gets six months, and you can freely add.
2 After three months you must get the court's
3 permission, and the court giving you
4 permission has got to say how much time that
5 party gets. That was what we were trying to
6 accomplish here in the discovery period.
7 Now we turn to the next rule that appears
8 at page 7. And that is the rule entitled
9 "Response, Amendment, Supplementation to
10 Discovery Requests." This is new. Subpart 1
11 of this rule at page 7 makes clear that the
12 information reasonably available both to
13 counsel and the client is required in response
14 to mandatory expert disclosures. Our only
15 mandatory disclosure, by the way, are expert
16 disclosures. We will get to that in the
17 expert rule.
18 Interrogatories and document requests.
19 It also makes clear that an objection to
20 certain disclosures does not relieve the
21 objecting party of the duty to provide
22 unobjectionable information. The duty to
23 supplement and amend does not apply to
24 mistakes or errors made in depositions. We
25 distinguish in this rule between two concepts,

1 an amendment which is a term which we apply to
2 an answer which when given was incorrect or
3 incomplete and which must be amended as soon
4 as you realize the mistake, and a supplement
5 which refers to a situation where a discovery
6 response when given was accurate and complete
7 but additional things have happened in the
8 world which now make it incomplete or
9 incorrect.
10 New information, change of events, that
11 kind of supplementation must be made, but you
12 don't make them when they occur. You save
13 them up and you make them under rule
14 subpart 3, the duty to supplement discovery
15 responses. You make them 60 days before
16 trial. So again, an amendment must be made at
17 the time it is discovered whether during or
18 after the discovery period. A supplement is
19 made only at the 60-day time frame before a
20 trial. The effect of making a supplement or
21 an amendment is dealt with in subpart 4.
22 Before I get to that I forgot to say that both
23 subparts 2 and subpart 3 make it clear -- at
24 the last sentence of both make it clear that
25 you need not amend or supplement to provide

1 information which the other side has gotten
2 anyway during the discovery process or in
3 writing, and we define during the discovery
4 process as to include depositions. So if you
5 heard it by the grapevine, the grapevine
6 happened to be in writing or part of the
7 discovery process or a deposition, you heard
8 it, and there is no duty to amend or
9 supplement.
10 We provide that if there is an amendment
11 or supplementation that there is, and again
12 this refers to subpart 4, a limited right to
13 reopen discovery on an expedited basis.
14 Whatever additional discovery needs to be
15 taken must be sought within 10 days of the
16 amendment or supplement, and the response must
17 be made in 20 days, not the usual 30, and if
18 it involves depositions for the new matter
19 only, you get five hours, five additional
20 hours. Again, these are default rules
21 designed to operate in those cases where they
22 have not been discovered by agreement or some
23 court order. We think that this timetable is
24 necessary to assure that in most cases the
25 refreshening of the film that has been in the

1 can for 18 months or a year can be done in a
2 timely fashion to avoid delaying trial.
3 Subpart 5 of this rule on page 7 is the
4 subcommittees's effort to provide a gentler,
5 kinder exclusionary rule. Under subdivision
6 (a) exclusion is tolerated only when the
7 omission has been deliberate or wreckless.
8 Otherwise under subsection (b) the remedy is a
9 continuance, but only where the failure to
10 disclose is likely to create a risk of an
11 erroneous fact finding. So the most extreme
12 thing is exclusion, but you must show
13 deliberateness or wreckless indifference.
14 If you're worried, then the next remedy
15 is a continuance, but you only get a
16 continuance if proceeding with the trial with
17 the last minute disclosure really presents a
18 danger of an erroneous fact finding and if
19 that occurs -- otherwise you go ahead, and you
20 know, deal with it like a real trial lawyer au
21 natural; but if there is a delay occasioned by
22 an inadvertent nondisclosure, which the court
23 punishes by a continuance, we have provided
24 that the party causing the continuance pays
25 the expense including any differential between

1 pre-judgment and post-judgment interest. We
2 want to make sure that it is not to a party's
3 advantage to cause continuances. Indeed it's
4 to their great disadvantage.
5 Rule 9, the rule which appears at page 9,
6 which I will point you to briefly, is our
7 effort to deal with the subject of mandatory
8 disclosures. We opted against mandatory
9 disclosure because many of us on the
10 subcommittee felt that there were many cases
11 where who the hell needed all of that
12 information anyway, that it just didn't
13 justify the make work of all this disclosure.
14 Instead we provided that certain types of
15 disclosure which must be specifically
16 requested are not objectionable, and those are
17 listed in subpart 1 of the rule that appears
18 on page 9. You will recognize many of those
19 subparts as having a genesis either in the
20 task force, the Discovery Task Force draft or
21 the court committee, State Bar Court Committee
22 draft. Some, but not all. We have provided
23 that disclosures of this type do not count
24 against the limit on the number of
25 interrogatories nor commence the discovery

1 period.
2 Rule 167, page 10. The subcommittee felt
3 that this was the most -- the document request
4 and production was the most useful discovery
5 device and one that should be limited --
6 should not be limited as long as the expense
7 of compliance or inspection is properly
8 allocated between the parties. We felt we had
9 to modify parts 1 and 2 to deal with the
10 subject of electronic data, and there are
11 modifications in 1 and 2, and basically what
12 we did is you can get electronic data which
13 includes everything but the lies and bowels of
14 your little laptop computer including the hard
15 disk, but you have got to specifically ask for
16 it.
17 Subpart 3 of this rule, 167, is
18 self-explanatory. We have added some
19 provisions. In most cases we believe
20 documents today are produced -- people produce
21 copies, not originals, and so we have a
22 specific rule that deals with what happens
23 when you produce copies in lieu of originals.
24 The documents must be produced in a certain
25 organized way as subpart 3(b) says. It's

1 nothing new. That comes from our existing
2 rules.
3 We have subpart (b), objections and
4 responses, is new, and basically we provide --
5 that together with the first sentence of
6 subpart 3 provides for distinct deadlines, and
7 here they are: Objections to the manner,
8 time, or place of production must be made
9 within 10 days of the time you receive the
10 request. Objections as to the substance must
11 be made within 30 days of the time you receive
12 the request. If an objection is made as to
13 the manner, time, or place, a response -- a
14 response, not objection -- a response, written
15 response, must nonetheless be made in 30 days
16 describing what documents you have and where
17 they are kept and how many there are. The
18 fourth deadline is if you don't object to
19 producing the documents, you must produce them
20 at the time and place requested, which could
21 be whatever date is set in the document
22 request.
23 Subpart 6 on page 11 allocates costs
24 between the producing and expecting parties.
25 Generally you pay -- the party who is

1 producing pays that cost. The party who's
2 expecting pays that cost.
3 Now, we turn to interrogatories, 168,
4 page 12. And this interrogatory you ought to
5 add to this interrogatory the following phrase
6 at the beginning. I'm sorry. It got dropped
7 out, and it should be "At any time prior to 30
8 days before the end of the discovery period."
9 That makes it exactly equivalent to our
10 document request any party may file.
11 MS. SWEENEY: Say that again.
12 MR. SUSMAN: Try again, "At any
13 time prior to 30 days before the end of the
14 discovery period, any party may file with the
15 court and serve upon the other party," et
16 cetera. I noticed the last sentence of
17 paragraph 1 of subpart 1, Alex, we probably
18 ought to eliminate, although it needs to be
19 there. I mean, the committee agreed that
20 interrogatories and document requests can be
21 served with the citation of potential, but I
22 think we cover that by saying at any time
23 prior to 30 days before the end of discovery
24 window that can be done. If we want to say it
25 expressly, we can. We need to get these rules

1 conformed as to request and interrogatories,
2 which we intend to treat the same, but there
3 they are treated the same.
4 We also have to provide there is a little
5 more time when you have -- when they come with
6 the petition. The defendant has more time as
7 the current rules do, 50 days rather than 30
8 days to respond. We have to look at our
9 timetables for things served with a petition.
10 We have retained the limitation of the current
11 rules of limit of interrogatories may not
12 exceed 30 in number. We have, however, made
13 two noticeable exceptions. One is if you are
14 asking the other side to identify or
15 authenticate specific documents. You have an
16 unlimited number of interrogatories to do
17 that.
18 If you frame an interrogatory that seeks
19 a "yes" or "no" answer, a contingent
20 interrogatory, for example, unlimited in
21 number. Our feeling there was that the burden
22 of that question is more on the person who
23 frames it than on the person who answers it.
24 As any law student knows you can finish a
25 yes/no exam in about an hour. Hundreds of

1 questions can be finished in a very quick
2 period of time. The hard thing is to ask the
3 question, and so if one wants to ask a zillion
4 yes/no questions, fair, and we will allow
5 that.
6 We have retained party verification of
7 the answers but have required that the
8 attorney sign the objections. Also we have
9 eliminated from the current rule any limit to
10 number of sets of interrogatories. Our
11 general notion, and this goes back to the
12 depositions, too, rather than -- we do impose
13 limits, but we try to impose kind of gross
14 limits so that there is some creativity among
15 the lawyers as to whether they are going to
16 divide their 50 hours into 8 depositions or 50
17 depositions, an hour each. It's your choice.
18 You are not limited as under the federal
19 regime to so many depositions, nor are you
20 limited to so many sets of interrogatories.
21 You can ask 30 sets if that's your preference,
22 but you certainly are not limited to two as
23 under the current regime, again allowing
24 lawyers to maintain maximum flexibility within
25 these outer limits.

1 Subpart 4 of this Rule 168 is our effort
2 to limit contingent interrogatories that
3 require more than a "yes" or "no" answer. We
4 rewrote this subpart 4, contingent
5 interrogatories, at least a dozen times
6 because we were trying to deal -- we were
7 trying clearly to prohibit the interrogatory
8 that requires the marshalling of evidence,
9 that says please state every fact you have
10 that supports the third paragraph of the
11 second count of your petition. At the same
12 time we were trying to provide a device which
13 allows one to get a little more specific
14 pleading in this state than is currently the
15 rule. So we have tried to say that the
16 interrogatories can require that the party,
17 responding party, state the factual and legal
18 theories upon which that party bases
19 particular allegations. Alex Albright assures
20 us that there is such a thing as a factual
21 theory. There was some question in the
22 subcommittee, but there is caselaw there are
23 factual theories, and the test is sufficient
24 to apprise the requesting party of the
25 positions the answering party will take to

1 trial, essentially a more definite statement.
2 Subpart 5 tracks the current rule except
3 for the last clause of subpart 5 as written
4 which now requires that not only if you
5 refer -- instead of answering the
6 interrogatory you refer the requesting party
7 to documents it's your obligation to tell them
8 where the documents are and that they will be
9 produced within 10 days, and that's what the
10 last sentence does.
11 Rule No. 170 on page 14, experts, is new.
12 Subpart 1 establishes a timetable for
13 designation. I'm sure this will be heavily
14 debated because there are defense lawyers who
15 would honestly, I am sure, believe that they
16 cannot designate experts until they depose the
17 plaintiff's experts and then it takes them a
18 great deal of time to travel around the
19 country and locate the hired gun who is
20 willing to refute what the plaintiff testified
21 to. It was the sense of the subcommittee that
22 there is an exaggeration, that any defense
23 lawyer worth his salt can identify experts to
24 respond to the plaintiff's experts perhaps
25 before the plaintiff designates but certainly

1 within 15 days of the time the plaintiff
2 designates, given the kind of information we
3 require at the time of designation.
4 We are trying to get the job done within
5 the 60 days. We put the time limits as close
6 to the end as we could. So basically the
7 notion is a plaintiff designates 60 days
8 before the end of discovery period, and
9 plaintiff's experts are deposed during the
10 following 45 days. The defendant then
11 designates 45 days before the end of discovery
12 period, and the defendant's experts are
13 deposed during the last 45 days of the
14 discovery period. The designation requires
15 under and our -- the only kind of mandatory
16 disclosure we have in these rules are subparts
17 2 and 3 of Rule 170. 2, information; 3,
18 documents. At the time of designation you
19 will provide the information in 2(a) to (e)
20 whether it's asked for or not, and that
21 includes two days on which your experts will
22 be available for their deposition during the
23 next 45.
24 It also includes a general -- a
25 description of the general substance of the

1 expert's mental impressions and opinions.
2 That is something more than he will testify
3 about damages and something less than a long
4 expensive report that requires the experts
5 spend a great deal of time preparing, and that
6 is going to be rendered superfluous by a
7 deposition anyway. It is essentially
8 something sufficient to allow there to be a
9 meeting for deposition, which these rules say
10 is a preferred way to engage in discovery of
11 experts.
12 Item No. 3 though is very, very
13 significant. Item 3 says at the time you
14 designate an expert everything that the expert
15 has looked at, written, considered, been
16 provided, must be turned over to the other
17 side. Okay. Now, if you can't figure out
18 what kind of expert -- if defense lawyers
19 can't figure out what kind of expert to
20 designate when they see that little treasure
21 trove of goodies they really need some work.
22 These are very crucial documents there will be
23 no arguments about in the future. They must
24 be turned over, and not only must they be
25 turned over at the time of designation, but if

1 they are prepared after designation it's a
2 constant -- here is a continuing, like the
3 duty to amend an erroneous answer, the duty to
4 make mandatory disclosure of what your expert
5 consults, reviews, prepares, continues during
6 the discovery period, but before and after his
7 deposition and after the discovery period up
8 to trial. So there will be no more expert
9 waltzing in on the eve of trial with new
10 charts and new studies. You will get them as
11 you go under this rule.
12 Subparts 5 and 6 are our efforts to
13 discourage the proliferation of experts. More
14 than two experts give the other side -- the
15 designation of more than two experts gives the
16 other side additional time to depose the
17 additional experts, six hours per expert, and
18 of course, we provide in subpart 6 that the
19 failure to call an expert who has been
20 designated and whom the other side has went to
21 the expense of deposing could, but not
22 necessarily will, but could result in the
23 court charging you the expense of having
24 designated an unnecessary expert.
25 The deposition rules, Rules 200 and 201.

1 No major changes here. We have made subpart
2 2(b) of Rule 200 and subpart 4 of Rule 201
3 conform to the federal rules. Rule 202,
4 non-stenographic and telephone depositions.
5 This is largely new. The principal here is
6 that depositions -- there is no sacred,
7 magical way about taking and preserving a
8 deposition. The deposition taker can take the
9 deposition by whatever means he wants,
10 including smoke screen, sand scrit, Ouija
11 board, whatever he wants. He pays for it.
12 If the other side wants something else,
13 certified court reporter, a videographer, you
14 bring whoever you want to take the deposition,
15 and the court will decide at some appropriate
16 time on who is paying for what. That's
17 basically what these rules say. You just
18 simply have to give notice to how you are
19 going to do it so the other side can come in
20 with their counter means of preserving the
21 testimony.
22 Telephone depositions basically we now
23 allow to be taken without leave of court or
24 agreement of party, just like any other
25 deposition. You can take a deposition over

1 the telephone, and we provide that the officer
2 taking the deposition need not be located with
3 the deponent but instead can be located with
4 the interrogators as long as there is some way
5 of identifying the deponent and as long as the
6 deposition is going to be submitted to the
7 deponent sooner or later for verification
8 under oath.
9 Rule 204 may turn out to be one of our
10 more controversial provisions. Hopefully not.
11 Subpart 2 contains our limitation of 50 hours
12 per side for a deposition, and you will notice
13 after our discussion at the last meeting we
14 have now added 10 hours for third party
15 defendants for discovery that is unique to
16 issues between the defendants and the third
17 party defendants. It doesn't just extend the
18 defendant's side to 60 hours.
19 Subpart 3, and basically "a side" we mean
20 plaintiffs and defendants, and if you want, we
21 struggled with how to define and decided best
22 just to call them plaintiffs and call them
23 defendants and leave it to the good sense of
24 the court to figure out what we were trying to
25 say. Plaintiffs get 50 hours. Defendants get

1 50 hours, and third party defendants get 10
2 hours on issues that are between them and the
3 defendants.
4 Subpart 3 makes the deposition conference
5 room as close to the courtroom as we can get
6 it by providing that -- and the sanction, by
7 the way, if -- the sanction for that is
8 contained in the last sentence on page 20 of
9 subpart 6, "All statements, objections and
10 discussions during the oral deposition shall
11 be on the record, count against the examining
12 party's deposition time, and may, upon leave
13 of court, be presented to the jury during
14 trial." This does not -- if this does not
15 dispense with the notion that a video camera
16 cannot be on the examining counsel as he
17 examines, then we ought to make an express
18 note saying that it is intended to make the
19 deposition room look like the courtroom and
20 not some fake thing where the actor is on
21 center stage in the camera, and the stage
22 director is sitting to his left off camera
23 passing directions, which is what happens so
24 often.
25 Now, the subpart 4, 3 should provide the

1 protection that people may feel they lose by a
2 no objection regime. Subpart 4 says you may
3 instruct a witness not to answer an abusive
4 question. "When did you stop beating your
5 wife?" You do not have to sit there while
6 your witness answers that question. You can
7 instruct the witness not to answer that
8 question. If those questions are asked with
9 frequency, you can terminate the deposition
10 under subpart 5.
11 The last sentence of subpart 4 and
12 subpart 5, which are the same, make it clear
13 that you do have some risk in instructing a
14 witness not to answer or stopping a
15 deposition, and the risk is that the
16 re-adjourned deposition once your silly
17 instruction or objection is overruled, the
18 re-adjourned deposition will not count against
19 the time limit of the deposition taker whose
20 efforts were so rudely interrupted when you
21 instructed the witness not to answer or
22 terminated the deposition. That is not
23 automatic, but the court -- we suggested that
24 as an appropriate remedy.
25 We have basically -- on subpart 4

1 certainly there can be conferences
2 between -- actually we saw a lot of various
3 local rules, and one rule provided that during
4 the entire time of the deposition from 9:00 in
5 the morning 'til 5:00 the witness cannot
6 confer with the lawyer. That seemed a little
7 extreme because conferring goes on even in the
8 courtroom at various breaks, so we provide for
9 certainly there can be conferences during the
10 deposition during normal recesses and
11 adjournments, but on the record conferences
12 should be only for the purposes of determining
13 whether a privilege should be asserted and
14 should be on the record. I mean, in the sense
15 that the jury should be aware of what's going
16 on.
17 Rule No. 7, our no objection rule
18 provides that basically all objections are
19 reserved until time of trial except for
20 objections to leading questions, and the way
21 you preserve an objection to a leading
22 question is by advising everyone at the
23 beginning of the deposition, not repeatedly
24 during the deposition, that this is not -- you
25 are dealing with a friendly witness, not a

1 hostile witness. You are not entitled to lead
2 this witness during this deposition, and if
3 you do ask leading questions, while I'm not
4 going to object, when it comes time for trial
5 I'm going to ask the court to exclude your
6 leading questions. That's how we deal with
7 that. Otherwise we do not provide for any
8 objections.
9 Our notion was that objections are
10 coaching. They are an attempt to subvert
11 justice. They will make a 50-hour limit on
12 depositions unworkable, and that's why we
13 opted for the no objection regime, and then,
14 of course, subpart 8 of this rule allows -- I
15 mean, if this is the kind of case or the kind
16 of animosity between lawyers or browbeating of
17 witnesses that justifies objections, it
18 justifies the court appointing a junior judge
19 to come sit in the conference room qua
20 courtroom and rule on the objections as they
21 are made assessing the cost of that junior
22 judge to the parties who have made it
23 necessary.
24 Rule 208, if you will look at the marked
25 up version of this, the blue line version,

1 there are very few -- there are not many
2 changes in this rule, and so I'm not going to
3 go over it. It pretty much is taken from the
4 existing rule.
5 And that, Mr. Chairman, constitutes an
6 overview of the subcommittee's recommendation.
7 THE COURT: Carl, would
8 you like to reply? I know that your committee
9 has done a great deal of work and has some
10 different concepts of the State Bar of Texas
11 Court Rules Committee, and the chair would
12 really like to hear your response or concerns
13 of this product so we will have the benefit of
14 that two years of work that you-all have done.
15 MR. HAMILTON: Yes, sir. We
16 have been working probably about three years
17 on this. Our task, I guess, was to -- was put
18 the brakes on discovery and those who abuse
19 it, to do something to try to reduce the cost
20 of the satellite litigation as it develops
21 probably, with the light in mind, though, all
22 the time though to insure fairness to both
23 sides and that we ultimately get justice and
24 not just a trial by who's the best lawyer, and
25 to reduce the acrimony among the lawyers.

1 Now, our committee has looked at a number
2 of different ways of doing things. We first
3 looked at standard interrogatories. I think
4 Paul Gold worked on some of those. He was on
5 that committee. We looked at standard
6 definitions, which he also worked on, and I
7 think we finally adopted a set of standard
8 definitions which include view and
9 identification and those things that you-all
10 have been furnished copies of. We looked at
11 the concept of doing something about making
12 parties plead more specifically the claims and
13 the defenses with the idea that maybe we could
14 somehow limit discovery to what's in the
15 pleadings, but that didn't seem to be a
16 workable solution because sometimes and in
17 some cases it takes some discovery before you
18 can finalize the pleadings.
19 We talked about limits on the number of
20 depositions that ought to be taken and various
21 ideas that were handed back and forth among
22 the lawyers, and I think one of the
23 philosophical problems that we recognized was
24 the philosophical problem that arises from the
25 fact that years ago we virtually had no

1 discovery. When I started practicing law we
2 never took depositions. We took it to trial,
3 and we tried the case based upon what each
4 side could develop, and that was called trial
5 by ambush, and at some point along the way the
6 Supreme Court or some courts told us we are
7 not going to have trial by ambush anymore. So
8 this has created kind of a war between the
9 role of the lawyer as an advocate and this no
10 trial by ambush concept.
11 In the advocacy situation that we have
12 and that has developed over a period of years
13 the lawyer gives up as little as possible by
14 way of discovery. You have to pry things out
15 of him, and the lawyers go to great measures
16 to keep information from being furnished from
17 one side to the other, and yet the courts tell
18 us we can't do this anymore. We can't have
19 trial by ambush. We have to have complete
20 disclosure. You know, so herein lies the
21 problem. Are we going to have lawyers that
22 are going to be advocates during the discovery
23 stage, or are we going to de-emphasize the
24 advocacy during the discovery stage and
25 perhaps let lawyers be advocates at the time

1 of trial but during the discovery stage be
2 more like an officer of the court who's role,
3 and the role of lawyers on both sides, is to
4 see to it that all the facts and all the
5 information is discoverable by both sides so
6 that we can have a trial based upon the facts
7 of the case and not by the absence of the
8 facts of the case.
9 We don't think that there is any art
10 particularly in disclosing the facts. The art
11 comes in how you avoid disclosing facts, and
12 so our approach is a little bit different from
13 Steve Susman's approach in that we don't think
14 that setting limits on discovery as his
15 committee has done does anything except
16 continue the promotion of advocacy during the
17 discovery period. It just gives the parties
18 less time to fight, less things to fight
19 about, but we don't think that that really
20 promotes justice to try to set arbitrary
21 limits on discovery.
22 We agree that the discovery process needs
23 to be contained. It has been allowed to run
24 wild, but we think that the better approach is
25 to do it kind of like when you build a house.

1 You get a set of plans, and you get a set of
2 specifications before you ever start, and then
3 our approach, we think that each case has to
4 be designed according to the particular case,
5 according to the nature of it, according to
6 the complexity of it. We think that there
7 should be a pretrial-type proceeding where
8 potential discovery problems need to be
9 identified and dealt with before they blossom
10 into real discovery disputes, and that in our
11 philosophy we have got to get the judge
12 involved at some point in this early on in the
13 design phase of this litigation or it's not
14 going to work because he has to make rulings,
15 and we have to set the design of the
16 litigation so that it can proceed in an
17 orderly manner and reduce the cost of the
18 litigation and the time that's involved.
19 So our approach was that you start out
20 with a set of mandatory -- or we call them
21 mandatory disclosures where it's triggered by
22 a request. It's not like the federal rules
23 where immediately upon filing of the suit the
24 clock starts running and you have to disclose
25 all this information. Our approach is that

1 the disclosures would be by request, and we
2 have set out the time limits in that. One of
3 the key elements in this disclosure is similar
4 to what Steve has got in his, the factual
5 basis or the legal basis for the claims or the
6 defenses. Many times a pleading is very
7 vague, very broad, very general, and the
8 parties really don't know where to focus
9 discovery until such time as a more precise,
10 particular statement of facts is given and
11 legal theories upon which the claim or defense
12 is based. This is somewhat like a motion for
13 more definite statement in Federal Court.
14 If the party does comply and furnishes
15 the factual basis and legal theories upon
16 which the claim is based, then this may
17 eliminate special exception practice and may
18 to some extent focus and limit the discovery
19 in the case when the parties know precisely
20 what facts and what legal theories would one
21 be fighting about. Hopefully this type of a
22 disclosure will eliminate disputes over
23 attempts to not provide information because
24 they are essentially nonobjectionable. You
25 simply have to furnish the information.

1 Now, in designing all of these rules we
2 have to keep in mind, too, that we are talking
3 about what's the rule that's going to fit most
4 cases, not what's going to fit the simple
5 cases or the more complex cases, but what's
6 going to fit most cases, and that's what we
7 have tried to provide is a list of information
8 that ought to be furnished in almost all
9 cases, which in many cases we think will
10 provide special information to move the case
11 to a resolution without perhaps the necessity
12 of any further discovery. In other cases,
13 depending on the case, then it will suggest
14 other discovery that needs to be had in the
15 case. So the first step is one of disclosure
16 of as much information as we provided for in
17 that particular rule.
18 The second step in the procedure would be
19 to have a scheduling order. This can be
20 entered into by agreement of the parties
21 without the intervention of the court or
22 without taking the court's time, or it can be
23 done through the court if that's necessary,
24 but we feel like the scheduling order is
25 important because that's the first stage in

1 the design of this litigation is to try to set
2 an orderly plan for when things need to be
3 done. Each case is going to be different, but
4 it needs to deal with such things as
5 completion of discovery rather than an
6 arbitrary limit designed for that particular
7 case. It needs to deal with the times that
8 each parties will designate experts, the times
9 that experts' depositions are to be taken,
10 other depositions that are to be taken,
11 pleadings and so forth, and that's all listed
12 in the rule as to each of these things that
13 ought to be listed in this scheduling order.
14 Now, shortly after the scheduling order
15 we think that when the parties have had an
16 opportunity to participate in the mandatory
17 disclosures, they have had an opportunity to
18 look at their case, talk to their witnesses,
19 that there needs to be an early pretrial
20 hearing, not like we have now where it's done
21 two weeks before the trial date, but it needs
22 to be an early pretrial hearing where the
23 lawyers have to come prepared to really put
24 the final touches on the design of this
25 litigation, and it does require court

1 participation. It's at this time that the
2 parties ought to be required to identify
3 actual witnesses that they are going to call
4 at the time of trial.
5 The court ought to rule on exception if
6 there are any and require that the pleadings
7 be put in the proper form within a reasonable
8 time. The court should deal with discovery
9 problems, should either limit discovery or
10 broaden discovery or set whatever rules the
11 court needs to make to define the discovery in
12 this particular case, including in some
13 instances dealing with expenses and who is
14 going to pay expenses for what experts, where
15 depositions are going to be taken of experts,
16 when they are going to be taken; and at that
17 time I think it's important although it's not
18 in the rule that the court adjust the trial
19 date because by that time the parties are
20 going to know fairly well how long it's going
21 to take the case to be prepared and when the
22 case ought to be set for trial.
23 Now, the trial date is important because
24 many, many hours are wasted in litigation when
25 the parties both get ready for trial and get

1 to the courthouse and they don't get to go to
2 trial, and then six months later we go through
3 the same routine again, maybe six months later
4 the same routine again. So we have got to
5 have a system where the trial date is set.
6 It's reasonable. It's realistic. The court
7 can do it. The parties can do it, and it goes
8 to trial at that time and doesn't get put off.
9 This is all part of the design phase, and it
10 does require that the court get involved in
11 it, take charge of it when the lawyers can't
12 agree, and help the lawyers fashion the plan
13 for this particular case.
14 Now, how does that differ from what we
15 are doing now? Well, first of all, it
16 provides for nonobjectionable disclosures of
17 very important, very basic information that's
18 needed in almost every case. Second thing it
19 does, it designs the suit because each suit is
20 different and requires judge participation,
21 and then hopefully heads off discovery
22 disputes at that point. In the pretrial
23 hearing the parties ought to know how many
24 witnesses they are going to have, how many
25 people they are going to call as experts. It

1 gives some guidance to the parties as to what
2 discovery they need to do at that point.
3 The other thing that it hopefully will
4 do, since there is going to be a court order
5 entered in it, is give the lawyers some
6 protection from malpractice claims. Take, for
7 example, the 50 hour limitation rule. If a
8 lawyer guesses wrong on how to use his 50
9 hours he is susceptive to a malpractice case.
10 If the court designs this program for
11 discovery and enters an order saying "Here is
12 how many depositions you're going to be able
13 to take in this case and no more and here is
14 whose depositions you can take in this case,"
15 then I think the lawyer has some protection
16 from malpractice.
17 These approaches are not unlike some in
18 federal courts and then the Arizona courts.
19 The Arizona court has much the same plan on
20 these disclosures, and Roger McKay, who's on
21 our committee, talked to -- or I guess he was
22 out in Arizona and talked to some lawyers out
23 there not long ago, and they told him they
24 liked the system. It worked very well and cut
25 down on discovery. He looked at one of the

1 mandatory disclosures that they made and said
2 he could have gone to trial at that time with
3 the detail of the information that was
4 provided in the mandatory disclosure.
5 The Eastern District also adopts a
6 similar plan. Theirs is more mandatory, and I
7 might point out that in the Eastern District
8 plan the information that's required to be
9 disclosed is information that's both favorable
10 and unfavorable to your clients. So you have
11 got to put all the cards on the table, the
12 good and the bad, so that everybody is playing
13 with the same deck of cards instead of hiding
14 the ball. Now, we had some lawyers tell us
15 that over in the Eastern District people
16 stopped filing cases in that court because of
17 that rule, but Judge Brown who's the judge
18 over there talked to us one day and said that
19 wasn't true. He said it was working very
20 well, and they really did like that approach.
21 Now, Steve's committee has done a good
22 job in putting together everything that they
23 have put together. It's just it differs a
24 little bit from our committee's approach, and
25 it differs in our philosophy. We, for

1 example, don't think that a six-month window
2 on discovery is fair to both sides. We think
3 that it does give plaintiffs an advantage who
4 have had years perhaps to look into their case
5 and prepare their case and line up their
6 witnesses, their experts, and then the case
7 gets filed and then in a six-month time
8 period, which really doesn't give the
9 defendant the same advantage that the
10 plaintiff has.
11 Whereas if the court and the lawyers
12 design that particular case, if the defendant,
13 for example, says, "Well, yeah, Judge, six
14 months is fine for me," the judge can put that
15 in as a time limit; but if the defendant says,
16 "Well, I can't do it in six months. I need 8
17 months or 9 months or 12 months," or whatever
18 it is according to the case, then that's how
19 much time the judge gives them. Also, in some
20 cases you may have a court that may set the
21 case for trial in three months or four months,
22 and what happens to the six months discovery?
23 That really ought to only be done if the court
24 gets the consent of the lawyers to do it, and
25 they agree they can finish the discovery in

1 that amount of time.
2 We think that these kinds of limitations
3 on six months and 50 hours really promote
4 trial by ambush rather than eliminating it
5 because it really does not in some cases give
6 the litigants the adequate opportunity to
7 prepare their cases in an adequate amount to
8 properly represent their clients, and if they
9 don't have that time, then justice has really
10 been denied even though we may have saved some
11 time as to the 50 hours. We have discussed
12 that. We think that that's not practical for
13 a lot of reasons, and one of the arguments is
14 who's on what side when there is a side, who's
15 going to keep the time, do we keep it right,
16 if you didn't guess right on how you might use
17 your 50 hours, you might be exposed to
18 malpractice claims.
19 Problems with experts, Steve has referred
20 to some of them from the defense standpoint,
21 which is where I am. I don't think 15 days is
22 enough time for a defendant to find an expert
23 after he knows who the plaintiff's expert is
24 and has taken his deposition. Sometimes it
25 takes two or three months to find an expert

1 that's not already booked up. It's just not
2 that easy to find experts. Their approach
3 seems to be to eliminate written reports from
4 experts. We think in many cases written
5 reports from experts are very good, that they
6 avoid the necessity of taking an oral
7 deposition of an expert.
8 Many experts, lawyers know pretty much
9 what they are going to say, and Steve's
10 comment was, "Well, any lawyer worth his salt
11 can find an expert in that amount of time,"
12 and that may be so with a lot of good, really
13 experienced lawyers. What about the lawyers
14 who just started out practicing that haven't
15 tried very many cases? All of the sudden they
16 take an expert deposition, and all they have
17 got is 15 days to find one, and they can't
18 find one in 15 days. They don't have the
19 experience to anticipate two months in advance
20 the kind of expert that they may need in the
21 case. So we just think that the time period
22 for that is extremely short, and that these
23 time periods and time constraints and
24 limitations are going to create more satellite
25 litigation than they discourage, that we are

1 going to get into arguments over what's good
2 cause or what's good reason to extend the
3 discovery time, arguments over the 50 hours,
4 arguments over who is on what side, arguments
5 of when an expert is not available, you can't
6 get one in that period of time.
7 There are going to be motions after
8 motions after motions filed with the courts to
9 resolve these problems that through our
10 approach we think could be solved in the
11 beginning. Now, the court is going to have to
12 spend more time in the beginning. You know,
13 this pretrial may take two or three hours or a
14 half a day, but we think to spend the time at
15 that point and properly design the case start
16 to finish is a more efficient way to spend the
17 time than all of these disputes and fights
18 down the road as to who did this on time, who
19 used too much time, who's on what side, you
20 can't take this deposition because you have
21 already taken two, and why do you need to take
22 another one, and all of these things.
23 So our approach is do the design first,
24 get a plan that's workable for both sides, get
25 the sanctions, enter an order on it, and

1 that's the architectural plan for that case
2 which ought to be followed, and then, of
3 course, there are going to be incidents when
4 you have to deviate from that plan because of
5 conflict or witnesses not available and so on,
6 and there are going to be reasons why you do
7 have to go back to court. I guess that's
8 inevitable in every system, but our philosophy
9 is just different in that respect.
10 Now, what we have provided to you is
11 several different rules, and I guess you have
12 copies of them, but essentially what our rules
13 do is Rule 63 changes the pleading deadline
14 from 30 days to -- seven days to 30 days or
15 whatever is in the pretrial order, and it may
16 be more than 30 days prior to trial. It could
17 be 60 or 90 days. Rule 90 makes a requirement
18 that the court hear special exceptions at
19 least 30 days before trial or as stated in the
20 pretrial order, which could be a much longer
21 period of time also.
22 We have a rule which sets out the purpose
23 of discovery. That's an unnumbered rule, and
24 that kind of gets back to the philosophy I was
25 talking about earlier, and that is whether or

1 not we are getting to the point where our
2 philosophy is that lawyers should be more
3 officers of the court in the pretrial period
4 and only advocates at the time of trial so
5 that as officers of the court they would have
6 the duty to be sure that all the facts are
7 disclosed for both sides and really not engage
8 in this advocacy proceeding at that point as
9 we have been doing in the past, which is the
10 art of hiding the ball and disclosing as
11 little as possible. That's the unnumbered
12 rule that you have which is called "The
13 Purpose of Pretrial and Discovery Rule."
14 The other rule is Rule 166, which is one
15 of the major rules under this plan. It's a
16 pretrial and scheduling rule, and it provides
17 in the beginning part on page 2 for the
18 scheduling order to be entered and suggests
19 what can be included in that. It then
20 discusses the pretrial hearing and what's to
21 be considered at the pretrial and finally just
22 the court trial, and this really doesn't have
23 anything to do with discovery. There is a
24 joint pretrial statement filed, which is a
25 modified version of the federal rules and

1 doesn't require quite as much in it, but the
2 pretrial scheduling offered does require the
3 setting up of schedules. It does require that
4 in the pretrial order the court and parties
5 deal with discovery problems that they can
6 anticipate, try to design their litigation so
7 that they head off the discovery problems,
8 identification of witnesses, and so forth.
9 Now, Rule 166(d), which is the so-called
10 mandatory disclosure and disclosure by request
11 rule, is one that the subcommittee has
12 approved, but it has not yet been approved by
13 the full Court Rules Committee, and one of the
14 controversial parts of that rule is Rule
15 166(d)(a)(1) in disclosing information about
16 persons with knowledge of relevant facts, and
17 that requires that the person be identified
18 together with the general subject matter about
19 which that person has knowledge and a summary
20 of the main facts about which the person may
21 have knowledge favorable to the requested
22 party.
23 HONORABLE F. SCOTT MCCOWN:
24 May I interrupt just a second to ask the chair
25 a question?

1 CHAIRMAN SOULES: Sure.
2 HONORABLE F. SCOTT MCCOWN:
3 This is really a procedural question. The
4 subcommittee took the task force report and
5 took the court rules report, and we have
6 really put a revolutionary proposal on the
7 table, and I think Carl's opening comments
8 about the philosophy of his proposal versus
9 ours were very helpful, but if we try to
10 compare all three systems at once before we
11 understand the subcommittee's system I think
12 it's going to be real difficult, and you know,
13 we're your subcommittee. We put a lot of time
14 on this. We have got it on the table. I
15 would like to talk about the subcommittee
16 report and get an understanding of it first,
17 and if we want to go to comparisons, that
18 would probably be useful. It's going to be
19 hard to try to talk about each system in
20 detail at the same time, so I'm kind of
21 wondering if Carl might yield the floor to
22 focus on the subcommittee's report and then if
23 we get direction to do something different,
24 that's fine, but this is what we have brought
25 you.

1 CHAIRMAN SOULES: Okay. Carl,
2 will you go on with your report? Just go
3 ahead and go forward.
4 MR. HAMILTON: I'm just about
5 through. I just wanted to point out that one
6 thing that's a controversial thing as to
7 whether one ought to have to disclose the main
8 facts about which person has knowledge
9 favorable to your case. The federal rules
10 require favorable and unfavorable. We opted
11 for a compromise to at least allow the lawyer
12 not to disclose unfavorable facts, and make
13 the other side go find those. Rule 166(g) is
14 standard definitions, and I might also point
15 out that Rule 166(d), this disclosure rule, is
16 a combination of another rule that was
17 previously called 166(e). 166(e) was a rule
18 which was written at the request of Judge
19 Phillips to implement that statute that the
20 Legislature passed in medical claim cases
21 where the Legislature had set up a requirement
22 that standard interrogatories be prepared.
23 We prepared some in response to that
24 request under Rule 166(e) and then a
25 suggestion was made that that be incorporated

1 into our old 166(d), which would combine both
2 medical malpractice or medical claims as well
3 as just general litigation claims. So the
4 rule that you have is a combination of what
5 was 166(e) and 166(d), putting them altogether
6 in the one rule. That's essentially the basis
7 of our approach, and that's all I have to say
8 at this time.
9 CHAIRMAN SOULES: All right.
10 Is there -- let's see. David Keltner I don't
11 think is here. Is there anyone here from the
12 task force that wants to give a general
13 overview of what the task force's work was?
14 Okay. No one. Okay. Then let's go
15 ahead and go with -- Steve, let's develop an
16 understanding then that you feel more needs to
17 be said about your subcommittee report in
18 order to get that before the committee as a
19 whole.
20 MR. SUSMAN: I yield to Scott
21 to do that.
22 HONORABLE F. SCOTT MCCOWN:
23 Well, I think what Carl's opening comments
24 really focused the debate real well because we
25 concluded and thought that it was the sense of

1 this group that discovery cannot be
2 effectively court-supervised and that you
3 can't design a discovery plan on a case by
4 case basis, and I think we hashed that around
5 several meetings ago, but just to hit the
6 highlights of that, there are too many cases
7 in the state court system. Say, compare a
8 civil docket of 2,500 in a state court to a
9 civil docket of maybe 200 in a Federal Court.
10 The judge has known too little about the
11 individual cases. The judges, unlike in the
12 Federal Court, have no support staff to help
13 whatsoever, and then state judges being
14 elected have certain problems imposing limits
15 and supervising discovery.
16 So we rejected kind of a court-supervised
17 model in favor of what I would think is best
18 described not as arbitrary limits but is
19 presumptive limits, limits that would apply to
20 the case absent agreement or absent court
21 order, and I think it's real important to
22 remember because it kind of gets lost as you
23 think about the details that everything can be
24 changed by agreement. Everything can be
25 changed by court order. So to the extent that

1 a case needs to be designed or tailored for
2 its individualness that can be done, but
3 presumptively the great bulk of cases would
4 not come before the court and would operate
5 under the standard.
6 The six-months window, you have to
7 remember when you think about it you have got
8 to remember four things. You have to look at
9 all of the standard disclosure you get merely
10 by asking without opening the window. So
11 there is standard disclosure that's going to
12 tell you a whole lot about your opponent's
13 case without opening the window. The lawyers
14 control opening the window. Now, it's true
15 that really it's more accurate to say one side
16 controls it because a side can choose to open
17 whether the other side wants to open or not,
18 but it's not judge-controlled. It's not tied
19 to any arbitrary thing like the answer date.
20 It's a lawyer-opened window.
21 Once the window is closed it's reopened
22 at the end tied to the supplementation for
23 that discovery to get it ready for trial, and
24 of course, as I said, anything can be modified
25 by agreement or court order, and what we

1 envisioned happening, the kind of change we
2 envisioned seeing, is that once the discovery
3 was done and the case was in the can so to
4 speak, that you would then increase
5 settlements at that point. It doesn't matter
6 how far the trial date away is. If nothing
7 else can be done, if you can't work on that
8 file, if you can't build that file, if the
9 discovery is concluded, that's going to
10 increase settlement. We envisioned that
11 parties might use 80(r) at that point in an
12 effort to get their case resolved and then, of
13 course, it's going to sit in the can until
14 tied to the trial date you've got the
15 reopener. So it's a real different thing than
16 just thinking about a six-month window when
17 you add all of those features.
18 MR. SUSMAN: Luke.
19 CHAIRMAN SOULES: Steve Susman.
20 MR. SUSMAN: Just one more
21 thing. I think that we really -- I think
22 people need to really think seriously about
23 whether the federal paradigm is something we
24 ought to strive for. The speech that Carl
25 just gave about the way courts ought to be

1 fine architects of a case and tailor-make a
2 discovery plan and keep on top of it has been
3 a speech that's been given for three decades
4 to federal judges over and over and over
5 again. The federal rules where they have a
6 much lighter docket and have exactly that kind
7 of regime -- and the fact of the matter is any
8 trial lawyer knows that it costs more money to
9 prepare a case in federal court today, not
10 less money. It takes more time to get a case
11 ready for trial in federal court, not less
12 time. You don't get any better quality of
13 justice from a federal court now than you get
14 in state court.
15 So why do we even think that system will
16 work if it hasn't worked in a regime where, a,
17 judges are elected for life and don't have to
18 worry about political contributions from
19 anyone; b, have 250 or 300 cases, not 2,000
20 cases. It simply has not worked on the
21 federal -- and have law clerks to help them do
22 all of this tailoring. It hasn't worked, and
23 I mean, there is the best example you can come
24 up with. We have got to do something. I
25 mean, we have to set the objective, and if the

1 objective is to streamline the process, make
2 it less expensive, and produce results
3 quicker, I just don't think the federal
4 paradigm -- and in fact, the best federal
5 judges, the best, judges like Sam Kent in
6 Galveston, are developing their own little
7 home-baked rules very much like our rules.
8 Okay.
9 In fact, some of our rules came from
10 looking at federal judges' rules dissatisfied
11 with the federal regime. They go back to
12 telling lawyers depositions will last from
13 9:00 to 5:00. There will be a lunch break at
14 noon to 1:30, no deposition may last of an
15 expert more than eight hours, of a fact
16 witness more than six hours. Look at the Sam
17 Kent rules in Galveston which are much more
18 limiting and detailed in a default kind of
19 basis than even the rules we have proposed
20 because they are dissatisfied. Even the
21 federal judges recognize they do not have the
22 ability to design this architectural plan.
23 You know, the fact of the matter is if
24 you sit down, I mean, I have been asked to
25 take over some big case, and I sat down two

1 days this week and talked to the lawyers who
2 are in it. I have no more idea after spending
3 two full days with these lawyers about what we
4 need in the way of additional discovery. I
5 mean, one lawyer says 60 depositions. Someone
6 says, "Maybe that's too much." It's
7 impossible to design a plan. You can't do it
8 even if you had two days on a case, and as a
9 result if it's going to be meaningful you are
10 going to have so many change orders in this
11 architectural drawing that the exceptions are
12 going to overwhelm the rules. I mean, because
13 they are going to have to be constant
14 revisions, and you know, I just don't think
15 you get a very good drawing for your house
16 when you sit down with a judge two hours and
17 explaining what's up.
18 CHAIRMAN SOULES: Excuse me.
19 Chuck Herring.
20 MR. HERRING: Well, I think
21 Steve is right in terms of the change. I
22 think philosophically federal courts
23 traditionally did feel that a managed system
24 was better, and I think in theory it is, but I
25 think practice has shown that we don't have

1 enough judges. We can't handle the dockets
2 that way in most cases. In big cases you have
3 to do that. You can't fit under a default
4 system, but if you look at the Civil Justice
5 Reform Act, the plans that are coming up in
6 the different districts that we now have in
7 Texas, they are going to default systems in
8 whole or in part as applied to certain tracks
9 of cases or certain groups of cases, and I
10 think really a default system is kind of,
11 perhaps, a sadly recognized fact of life, but
12 I think that's where we are in terms of docket
13 management.
14 Nationwide that's the current trend, and
15 I think that's what the subcommittee has come
16 up with, and I think that's probably the way
17 to go, recognizing that what you are dealing
18 with are the vast majority of cases which are
19 not the cases that a lot of us deal with in
20 terms of size and scope and magnitude, and
21 therefore, you need to have an escape hatch.
22 You need to have, as you have tried to build
23 it in, you need to have a system to get to
24 those big cases which are a minority of
25 dockets out of it, but I think in terms of a

1 general approach that makes sense, and I
2 thought we had agreed at least as a general
3 proposition on this committee last time that
4 we thought that's the way we had to go. It
5 seems to me then to move things along that's
6 one of the first issues, do we want a default
7 system approach as the subcommittee has come
8 up with, or do we want to go to an
9 individually case-managed pretrial order
10 approach, and I've come down on the side of
11 the former, I believe.
12 CHAIRMAN SOULES: Bill
13 Dorsaneo.
14 PROFESSOR DORSANEO: Well, I
15 like what I heard from both committees in some
16 respects. The one question I would have for
17 Steve's committee is why is disclosure, that
18 concept, not something that you thought would
19 be a good idea, disclosure on request or
20 mandatory disclosure on request in lieu of our
21 current paper discovery? And the management
22 problem is a real problem, but if there was,
23 at least in theory, a way where disclosure
24 could work to provide a lot of basic
25 information for typical cases in such a way

1 that you wouldn't have lots of battles about
2 the form of requests, in such a way that you
3 wouldn't have lots of claims that that's not
4 relevant in the discovery sense, that there is
5 no privilege argument that would come up all
6 the time.
7 If you could have the mandatory
8 disclosure work, then you would obviate the
9 need for judicial management except when it
10 didn't work, and the judicial management,
11 frankly, it's going to be required at some
12 point in the process when the system breaks
13 down. You just can't say that the judge is
14 not going to ever be involved in this. At
15 some point you are going to get back to the
16 judge who's going to have to do things in
17 order to get the case to conclusion. So
18 that's my question. Why the disclosure
19 aspect?
20 MR. SUSMAN: The answer is
21 page 9, Rule blank, which is entitled
22 "Standard Request" reads, subpart 1, "The
23 following matters are subject to disclosure by
24 a party upon request from any other party";
25 and then Rule 2, subpart 2, says, "An

1 interrogatory asking for the standard
2 information does not count against the
3 limits." I mean, these
4 are -- I guess these are the disclosure,
5 mandatory disclosure upon request. The only
6 difference between this and the federal rule
7 is in the federal rule, as I understand, you
8 have got to do it whether you are asked for it
9 or not, and we felt that there are some cases
10 that it's so simple to ask for it if you want
11 it why make it automatic, and there is nothing
12 sacred about the list. If people want to
13 expand (a) through (f), I mean, we didn't
14 really have a big argument over what would be
15 there.
16 PROFESSOR DORSANEO: It just
17 seems to me that disclosure is a real solution
18 to a lot of these problems and that there
19 isn't any completed compatibility between the
20 views expressed here. It's a question of
21 maybe looking at both proposals and taking the
22 best from each.
23 HONORABLE F. SCOTT MCCOWN: And
24 if I could add a couple of things to Steve's
25 answer, the standard request rule you see on

1 page 9 is modeled exactly on what the task
2 force did. In fact, we added a few things to
3 what the task force did rather than take away,
4 and second, we did require it to be done by
5 interrogatory or by production request only
6 for the purpose of the importance of having a
7 record so that when the trial court has to
8 superintend discovery disputes there is a
9 record of what was asked and a record of what
10 was answered, and it's filed with the court on
11 the theory that it's not any harder to put a
12 caption on it and call it an interrogatory or
13 put a caption on it and call it a production
14 request or response, but that's exactly what
15 the task force did.
16 PROFESSOR DORSANEO: Well, the
17 Committee on Court Rules' work on the
18 disclosure proposals seems to me to be a lot
19 more detailed and perhaps in that sense
20 further along. You have been focusing on a
21 different part of this problem really more in
22 terms of deposition discovery and limits
23 there, and I don't see that these are
24 inconsistent approaches at all.
25 CHAIRMAN SOULES: Then we have

1 another handout that Pat Hazel provided for
2 disclosure upon request. That's also in the
3 materials, and it's somewhat detailed. Is
4 this Pat Hazel's?
5 MR. HAMILTON: That's the one
6 that our committee put together.
7 CHAIRMAN SOULES: Okay.
8 MR. HAMILTON: He just put the
9 final touches on it and sent it out, but
10 that's the one. 4, Rule 166(d) is our
11 committee's request.
12 CHAIRMAN SOULES: State Bar of
13 Texas Court Rules Committee, Pat just made a
14 distribution of it for our work here?
15 MR. HAMILTON: Yes.
16 CHAIRMAN SOULES: Okay. Good.
17 So the State Bar's is under the University of
18 Texas Austin telecopy letter from Pat Hazel
19 and looks like this inside. (Indicating)
20 Judge Guittard had his hand up and then
21 we will go around the table.
22 HONORABLE C. A. GUITTARD: I
23 wonder if either of the committees has made
24 allowance for the different kind of judges you
25 have. There are judges that are interested in

1 their cases and read their files and are
2 prepared and are sort of activist judges and
3 like to take the lead and get their cases
4 disposed of. There are other judges that,
5 perhaps, weren't very successful in the
6 practice. They just like to hold onto their
7 jobs. They like to go fishing or play golf
8 later in the week, and they are not going to
9 do anything until somebody comes to them and
10 asks them to. Now, I don't know how to solve
11 that problem unless you give the judges some
12 discretion as to whether they are going to be
13 active or passive, and perhaps the scheduling
14 orders ought to be at the discretion of the
15 judge. Okay.
16 MR. SUSMAN: The answer for our
17 committee is that we would welcome an activist
18 judge, and I don't know how we can make it any
19 clearer that he has absolute discretion to
20 call the parties in for pretrial conference
21 under Rule 166 and to say, "In my opinion none
22 of the work of the -- none of these new rules
23 on limits ought to apply in this case. Here
24 is how we are going to do it," and he can
25 write -- he can design a tailor-made plan with

1 as much beauty as he pleases, absolute
2 discretion to do that.
3 HONORABLE C. A. GUITTARD: So
4 the nonactivist judge, it works with him, too,
5 although he is not active?
6 MR. SUSMAN: What now?
7 HONORABLE C. A. GUITTARD: I
8 say your rules will work with the other kind
9 of judge as well.
10 MR. SUSMAN: Yes. For the
11 judge who wants to go play -- the nonactivist
12 judge. The nonactivist judge, yeah. These
13 rules would protect the client from the
14 lawyers bent on running up billable hours in a
15 case where the nonactivist judge was not
16 providing that protection, and we owe it to
17 the public to give them that protection.
18 CHAIRMAN SOULES: Anyone else
19 here? Joe Latting.
20 MR. LATTING: I have a question
21 about this, and this is a little bit of a
22 silly question, but on page 7 -- it's the
23 subcommittee's page 7 at the bottom, "Failure
24 to Provide Discovery." This Rule 5 is a
25 pretty cataclysmic kind of a change from what

1 the body of law says. What's the thinking of
2 the subcommittee? As I understand this if you
3 get a lawyer on the other side who is not
4 willful or intentional, just careless, and you
5 find out the day or two days before trial that
6 he's got some very important witness he didn't
7 disclose under this rule, I'm thinking to
8 myself explaining to my clients why we are not
9 going to trial, and what's the thinking of the
10 subcommittee on this?
11 MR. SUSMAN: Well, I think, it
12 seems to me -- if it's not wreckless
13 indifference, I mean, you would have to talk
14 to your clients and say, "Okay. We have got a
15 choice. We can either go to trial. Okay. Or
16 we can take a continuance," and he's going
17 to -- I think the judge will make him pay for
18 it. Okay. Frankly, I think many, many, many
19 lawyers, many, in the the majority of the
20 cases will opt to go to trial because, in
21 fact, his great big surprise is no big
22 surprise at all, and good trial lawyers know
23 how to handle it, but if you opt after talking
24 to your client say, "Look this is really going
25 to be a problem. We need some more time" and

1 go for the continuance route. I think it's
2 then fair that you go to court and the courts
3 be encouraged to make sure that this does not
4 cost you or your client anything. Now, that
5 may be paying for witnesses to travel to town,
6 getting a trial office, as we talk about the
7 differential between pre- and post-judgment
8 interest. I don't know. I mean, there may be
9 other things that the law will develop should
10 be considered in the costs.
11 MR. LATTING: Let me ask the
12 question a different way. We have gone
13 through a lot of agony in the state, and maybe
14 that's a strong word. There has been a lot of
15 writing in the appellate opinions about
16 excluding testimony, and this is a radical
17 change from that. I take it the sense of the
18 committee is that where we are today is not
19 satisfactory.
20 MR. SUSMAN: Yeah. The sense
21 is that we have rules that are trapping and
22 unwary. They are "gotcha" rules that they
23 really -- I mean, they make discovery an end
24 of itself. I mean, it's a very, very
25 important thing in and of itself so no stone

1 gets -- I mean, every lawyer is worried about
2 malpractice and these great claims that
3 something is going to happen if I don't do it
4 right, that basically we ought to be a little
5 more forgiving, that it's great -- we do not
6 want trial by ambush, but at the same time a
7 few surprises wouldn't be terrible. I mean,
8 that's kind of the feeling.
9 MR. LATTING: So you really
10 meant to do this?
11 MR. SUSMAN: No. This was
12 intentional to say, you know --
13 HONORABLE ANN TYRRELL COCHRAN:
14 It was not wreckless indifference.
15 MR. SUSMAN: Unless you are
16 going to, I mean, one way -- I mean, if you
17 are prepared to spend a zillion, zillion
18 dollars in discovery you can guarantee there
19 will be no surprises. Okay. But the public
20 is not ready, doesn't want to do that anymore.
21 It's better we spend a little less and have a
22 few surprises.
23 MR. LATTING: Well, I agree
24 with that. I will agree with that statement.
25 CHAIRMAN SOULES: It seems to

1 me that this paragraph 5, I mean, we have
2 rules right now that are driving disclosure,
3 and what else they drive I suppose we can
4 debate, but they are driving disclosure, and
5 they are driving disclosure of documents that
6 will be used at trial. They are driving
7 disclosure of witnesses and experts that are
8 going to be used at trial, and if a party
9 doesn't perform his driven duties properly,
10 that party is at risk. What this rule does is
11 transfer the risk from the failing party or
12 guilty party. It may even be deliberate to
13 the innocent party who is now going to have to
14 ask the judge "drop my trial setting" because
15 I'm at risk because the other party didn't do
16 something they were supposed to do. And I'm
17 on both sides of the docket. I represent as
18 many plaintiffs as defendants. You do, too,
19 Steve, I guess, in your firm anyway.
20 MR. SUSMAN: The deliberate --
21 CHAIRMAN SOULES: I don't
22 think that -- and I would like to hear some
23 discussion from the committee. I don't think
24 that the risk should be changed. I think it
25 ought to stay with the nondisclosing party,

1 the noncomplying party, as opposed to
2 transferring it to the complying party because
3 the loss of a trial setting is devastating in
4 representing plaintiffs if you're faced with a
5 six-month or a one-year delay in your trial.
6 You don't have a choice, and as a matter of
7 fact, if it's in federal court in some state
8 courts you don't know when you will ever get
9 back on the docket. So you can't even tell
10 your client who's been injured, damaged in the
11 business case when you are ever going to get
12 back on that docket. So you have to go to
13 trial against information that you have not
14 been able to prepare to defend on.
15 MR. SUSMAN: Luke, I would
16 think that most plaintiffs lawyers would opt
17 for the trial rather than the continuance
18 which means, usually, I think, that we think
19 we can handle the new information. I mean, I
20 think it means -- yeah. I mean, I wished I
21 had learned it three months earlier.
22 CHAIRMAN SOULES: Well, why not
23 just keep it out just like we do now? You
24 can't use it if you didn't disclose it.
25 MR. SUSMAN: Because we think

1 that is too big of a punishment for -- too big
2 of a punishment for an inadvertent
3 nondisclosure in a system, in a regime, which
4 says let's get things done quickly, let's get
5 them done fast, let's put the case in the can,
6 let's not have this case have a life of its
7 own for three years, that that's typical
8 punishment, and that we are going to have to
9 soften up a little if we want this system to
10 work. That was our response.
11 CHAIRMAN SOULES: And another
12 problem here, and I will just get them all on
13 the table for discussion is that, you know,
14 defendants, to me this encourages gamesmanship
15 on the part of defendants. They don't usually
16 care whether the case goes to trial, sometimes
17 but seldom do they care. So the plaintiffs
18 are going to be making all of their
19 disclosures because they are afraid if they
20 don't defendant is going to move for a
21 continuance and get it from the judge, and
22 they probably will.
23 The defendants, on the other hand, are
24 not going to make their disclosures because
25 they are going to try to pop the plaintiff

1 with a big surprise at the end and force the
2 plaintiff to do only one thing, ask for a
3 continuance or go to trial against the big
4 surprise that they are not prepared for, and
5 it just seems to me to be imbalanced.
6 Whenever it's keep the witnesses off, it's
7 balanced. The side can't use it. If the
8 plaintiff can't disclose, he can't put the
9 proof on. If the defendant doesn't disclose,
10 he can't put the defense on, but the case goes
11 to trial. Neither side gets that advantage.
12 Anyway. David Perry.
13 MR. PERRY: Luke, the approach
14 that had been taken by the Discovery Task
15 Force on this particular point was a little
16 bit of a mixed approach. What the Discovery
17 Task Force, as I recall it, had recommended
18 was that with respect to a witness that was
19 not disclosed, that if the witness was not
20 disclosed 30 days before trial -- now, they
21 might have been disclosed late. Maybe
22 somebody should have disclosed them two years
23 ago, and they really disclosed them 35 days
24 before. We didn't count that, but we had said
25 that if the witness was not disclosed 30 days

1 before trial, they could not be used, although
2 we then excluded from that natural parties,
3 natural persons who are parties, anybody who
4 had been deposed, anybody who had been
5 disclosed by anybody else earlier on. So once
6 the name was out there just because you didn't
7 list it in your own list didn't work against
8 you.
9 We recommended a similar exclusion for a
10 tangible thing such as a document. There was
11 a lot of discussion in the Discovery Task
12 Force, however, that there is coming to be a
13 lot of unnecessary disputes over whether
14 certain lines of testimony had been properly
15 disclosed in depositions, and we didn't feel
16 like the exclusionary rule should apply to
17 that, but the Discovery Task Force had
18 recommended that the exclusionary rule be kept
19 with regard to witnesses but that it be
20 modified to eliminate some of the draconian
21 effects of it.
22 CHAIRMAN SOULES: Judge
23 Brister.
24 HONORABLE SCOTT BRISTER: A
25 couple of comments. No. 1, I agree with

1 Chuck. I mean, there is a lot of details on
2 this I would like to address, but it seems to
3 me the first question is which direction are
4 you going to go, managed where I hold a
5 pretrial conference in every one of my 1,200
6 cases that are filed every year or where I
7 issue this is what the rules are and if you
8 don't like it, come see me, put the burden.
9 Obviously the way I present that I'm in
10 favor of the second, and I think in the urban
11 counties there is just not much choice. I
12 mean, the only -- I think Judge McCorkle
13 basically holds -- I mean, he is the only
14 living person I know of that tries to hold
15 pretrial conferences, and he apparently is
16 able to do it. I can't say it's impossible.
17 Now, he doesn't try many cases because he
18 spends months on pretrial conferences.
19 Now, on the other hand maybe he gets more
20 settlement because he does it that way, but he
21 is the only living person I know of that would
22 actually probably do that, and the rest of us
23 would -- and we have for about a year had this
24 process where we have had roughly the idea has
25 been the tracking system and put you on a

1 track and if there is some problem, I'm not
2 sure how realistic the tracks are, but if you
3 are on that phase and have some problem with
4 that track, come let us know.
5 I, at least, have hardly heard a word,
6 and so I think the default system will
7 basically take a lot of this, a lot less
8 burden on me, a lot less time coming down to
9 the courthouse, and there are cases with
10 thousands of plaintiffs and class actions and
11 stuff like that that are going to have to be
12 handled, but let the lawyers find that out and
13 come tell me rather than the other way around.
14 Two other comments: No. 1, on the trial
15 continuance as you point out, which I think is
16 correct, especially in the urban counties, I'm
17 seeing in some written opinions and in some of
18 the rules the idea is that there is such a
19 thing still as a 30-day continuance. I'm not
20 sure. I know in my court that really doesn't
21 exist. A combination of the process where you
22 want to give people firm and realistic trial
23 dates, which means you can't set 50 cases
24 every week because it's not realistic anymore
25 with the combination of scheduling things far

1 in advance because the idea is that people
2 know when the trial date is and they can back
3 up and do their discovery means you are
4 setting cases 6, 8, 12 months in advance, and
5 if you continue cases, you've got -- those
6 months are filled.
7 You can stack them up, but that makes
8 them less realistic. Plus the fact, in Harris
9 County at least, we have got one month a year
10 set aside for asbestos trials. All of us have
11 scores of asbestos cases still. That's the
12 only one you can try. You want to try them
13 you have to do it then. The same rule, two
14 months a year on silicon implant cases. We
15 have all got a hundred silicon implant cases.
16 We can try three or five at a time, and that
17 is the only months. We have got three months
18 a year where the attorneys can cancel
19 previously set trial settings with vacation
20 letters; five weeks a year that are dead
21 weeks. I have got about 12 weeks I can set
22 trials without somebody doing something about
23 it, and when somebody comes in "I want a
24 30-day continuance." They don't understand.
25 I would love to give it, but

1 unfortunately all of these -- it is not my
2 schedule anymore, and I want you people to
3 understand, keep in mind, that a lot of
4 attorneys apparently are not aware of that
5 fact. Just say, "Well, set you off for a
6 couple of weeks," and it won't be a problem.
7 Last comment was, one of the things I
8 liked most, small matter perhaps, in the task
9 force report was the deal about construing all
10 discovery requests to exclude attorney/client
11 privilege unless you specifically say, "I want
12 the attorney/client documents," assuming it's
13 all out so you don't get all the dot responses
14 on all that. Is that in the -- I didn't see
15 that in the subcommittee report.
16 MR. SUSMAN: That is not in,
17 but we didn't intentionally discuss it and
18 reject it. It's just -- I mean, I'm sure
19 there were bells and whistles through this
20 stuff that we just omitted, but I don't
21 think -- we did not consider that.
22 HONORABLE SCOTT BRISTER: Okay.
23 PROFESSOR ALBRIGHT: We haven't
24 talked about privileges or scope of discovery
25 at all.

1 MR. SUSMAN: That's right.
2 HONORABLE SCOTT BRISTER: Okay.
3 CHAIRMAN SOULES: And just to
4 add to what you say, I mean, sure those are
5 problems in the urban counties. The rural
6 counties have a different set of problems that
7 produce the same result. You have got a judge
8 who has got regular priority to criminal
9 cases. You have got to give priority to
10 family law cases.
11 HONORABLE SCOTT BRISTER: Or
12 one civil jury week every two months.
13 HONORABLE ANN TYRRELL COCHRAN:
14 Or judges who have three and four counties,
15 and they might not even be at that courthouse.
16 CHAIRMAN SOULES: So whether
17 it's urban or rural, there is an array of
18 problems that are there. Just getting the
19 30-day or a short continuance is in most
20 venues unrealistic. Tommy Jacks.
21 MR. JACKS: In some ways I wish
22 we could enact both rules and then let the
23 lawyers in every case decide, pick and choose
24 among them about which ones they would
25 enforce, but I know we can't do that. Did you

1 guys consider instead of having a six-month
2 window that opens with either the first
3 deposition or the first produced document in
4 response to a request and closes six months
5 later, did you consider instead the
6 possibility of gearing scheduling to trial
7 dates?
8 HONORABLE F. SCOTT MCCOWN: May
9 I answer?
10 MR. SUSMAN: Go ahead.
11 HONORABLE F. SCOTT MCCOWN: We
12 did consider it to scheduling to the trial
13 dates, but I think, as Judge Brister points
14 out, trial dates aren't firm and really can't
15 be firm under almost any system, and so what
16 we wanted to do was have every case with a
17 window that was definite, that opened at a
18 definite time and closed at a definite time,
19 with the thought that after it closed the
20 parties were going to settle that case or go
21 to alternative dispute resolution, and if they
22 weren't, if they were going to get it tried,
23 that once you stop discovery the chances of
24 resolution of the dispute went up
25 astronomically, but if they were going to have

1 to get it tried that there would be a reopener
2 tied to the real trial date.
3 MR. SUSMAN: And also, also it
4 was our hope that someday with cases in the
5 can accumulating on the shelf judges will
6 figure out how to be a little more efficient,
7 maybe limiting the length of trial, whatever
8 it is, so that the trial date instead of being
9 18 months or two years hence from filing can
10 be moved closer to filing, closer to the
11 six-months, the end of the window, and that,
12 you know, we could go to a judge and say,
13 "Judge, how many cases in the can do you have?
14 How many ready cases do you have in your
15 court?" And maybe begin building some
16 pressure to get a quicker drop.
17 MR. JACKS: Let me tell you
18 what really, really bothers me about this, and
19 that is that a very similar system was tried
20 in Harris County in state courts, and it was
21 an abysmal failure.
22 HONORABLE ANN TYRRELL COCHRAN:
23 And we have done a lot of stupid things in
24 Harris County.
25 MR. JACKS: And this was the

1 stupidest thing that a group of judges has
2 ever done in the time that I have practiced
3 law, and what they did was they set up a rule
4 that you could not request a trial setting
5 until you had finished your discovery, and
6 which is -- in many cases it's going to amount
7 to the same thing because there are many
8 courts where you cannot get a trial
9 setting -- you know, if you get a trial
10 setting a year and a half from the time that
11 your window would open under your rule, you're
12 doing good, and that's if things are going
13 pretty well, and the reason is because as
14 Judge Brister points out, I mean, there are
15 just not enough settings as there is a demand
16 for them.
17 And what happens -- you know, and the
18 idea was you have got to have your discovery
19 in the can and then we will give you a trial
20 setting, and so you would get your discovery
21 in the can, and your trial would be, you know,
22 9 months, 12 months off, and in real life
23 lawyers, one, will -- it doesn't work. I
24 mean, you put it in the can, but life marches
25 on, and you know, you've allowed for this five

1 extra hours of deposition discovery based upon
2 what was supplemented in the 60 days out
3 supplemental discovery, but I've got concerns
4 about some of that because all that's
5 supplemented is that which isn't known through
6 the grapevine or because you learned about it
7 some other way, and but I don't see where you
8 get any refresher discovery for those things.
9 For experts you've got this continuing
10 supplementation, and I'm a little confused
11 about that. Does that mean in a malpractice
12 case every time my guy, you know, re-evaluates
13 and has got some article that could pertain to
14 the case that might possibly be mentioned at
15 some point in trial that he's got to send it
16 to me, I've got to send it to the other side,
17 and if I don't, what happens to me, and but
18 the expert supplementation is a part of the 60
19 day supplementation, but it's already taken
20 place. But if the expert's done more work do
21 you get to go back and depose him again on his
22 new work or don't you?
23 And while I know your effort was to avoid
24 the court-managed plan for what I agree are
25 some good reasons, the fact is in every case

1 where there is not agreement between the
2 lawyers and where one side or the other feels
3 that they have been put at a disadvantage with
4 the 50-hour or the six-month rule, it could be
5 defendants as Carl pointed out, or it could be
6 the plaintiffs depending on the facts and the
7 circumstances of the case. In every one of
8 those cases you're under court management
9 because that's the only place you can go to
10 get relief.
11 If you can work it out by agreement and
12 you've got the window closed, and it may be on
13 your neck, then you are back to court-managed
14 operations with the same judge who has got
15 2,000 cases on the docket, doesn't know
16 anything about your case, has got 15 minutes
17 to hear your problems before the next guys
18 come in for their problems, and it's -- I
19 guess all the things that concern me about the
20 subcommittee's proposal, the potential for
21 some of the same kind of problems we
22 experience in Harris County. What happened in
23 Harris County was eventually after about two
24 years or so under this system the lawyers rose
25 up in rebuttal and the judges recognized, some

1 sooner than others, that this case in the can
2 was a bad idea.
3 CHAIRMAN SOULES: Let me ask
4 you a question about that. Are you saying
5 that the bad thing was that there was a
6 schedule of how discovery had to be completed
7 or it was connected --
8 MR. JACKS: The bad thing
9 was --
10 CHAIRMAN SOULES: Excuse me, or
11 there was a certain -- you had to certify that
12 the discovery was complete to get a trial
13 setting?
14 MR. JACKS: The bad thing,
15 Luke, was that there was -- that you had to
16 get your discovery in the can, to use this
17 expression, and then there was a considerable
18 time span between the time that happened and
19 the time when the trial occurred, and I
20 believe that would be true under both systems
21 in many cases.
22 CHAIRMAN SOULES: Okay. That
23 problem was recognized by this committee, and
24 this committee had the paragraph in Rule 245,
25 and it was statewide. It wasn't only in

1 Harris County. It was some other places, too,
2 where you had to certify that you were ready
3 to go to trial before you get a trial setting,
4 and we recommended that the state go ahead and
5 adopt the second paragraph of Rule 245, takes
6 care of that. That says the trial judge
7 cannot require any certification other than we
8 reasonably expect to be ready for trial to get
9 your trial setting.
10 MR. JACKS: I understand that,
11 but the effect I believe is the same under
12 either system, the time when the discovery has
13 to be in the can. There it's because of
14 certification. Here it's because you have got
15 a window closing, and the time when you are
16 really going to kick off the trial is a very
17 long time. I guess the other concern I've got
18 is I don't buy the premise which underlaid
19 this, which is that once the discovery is in
20 the can the case is going to settle.
21 What settles cases is trial notice. Even
22 mediation is most effective when it is
23 scheduled at a time when the trial is at least
24 within sight on the horizon, if not impending,
25 and it is -- and that's simply because those

1 who are paying for it would rather keep it
2 from paying when they are not under proposal
3 to pay.
4 CHAIRMAN SOULES: Let me get a
5 consensus on the issue that Judge Brister
6 raised, and Chuck Herring, of course, has said
7 that one of the predicates or premises was
8 Carl Hamilton and the State Bar's proposal,
9 and that is whether or not we ought to have
10 trial judges managing the cases up front,
11 whether we ought to impose that burden because
12 of how realistic it may really be, and I
13 wanted to go around the table on that issue
14 really, if anyone has got anything else they
15 want to say about that because it's so
16 fundamental to the State Bar's plan.
17 Now, that doesn't mean that there are not
18 a lot of other good things in the State Bar's
19 plan that can be blended into what this
20 committee ultimately does. There are some
21 really good things, and so everything about
22 the State Bar's plan is not -- we don't have
23 to have the first piece, that is, court
24 management, in order to get a lot of other
25 good ideas out on the table and perhaps blend

1 them into our work. So this isn't whether or
2 not to reject the State Bar plan but just
3 whether or not that's going to be an
4 acceptable premise to managing discovery.
5 Anyone else want to talk about that?
6 Harriet Miers.
7 MS. MIERS: Well, just
8 listening to a lot of the comments that have
9 been made and made extremely persuasively this
10 morning it does seem to me that there is
11 something we as a committee need to keep in
12 mind, and that is that although we want to
13 listen and be responsive to outcries from the
14 public, it's the judges and lawyers that
15 really know what justice is all about and the
16 system of justice, and there are a lot of
17 misconceptions on how the system works, and it
18 strikes me that we could make some pretty
19 massive changes to procedural rules that have
20 been in place a long time reactive, and I
21 would suggest maybe overreactive, to public
22 sentiment without solving the problems for one
23 thing, but also only to find that the public
24 sentiment eight or nine years from now is
25 totally different after they have had a few

1 experiences under a new set of rules that
2 afford them what they think is less than fair,
3 and how this -- I mean, at the national level
4 what we are talking about a lot is simply the
5 underfunding of justice systems throughout the
6 United States, including the not having state
7 judges have access to law clerks.
8 And so I just think we are doing a lot of
9 good thought, but whether we are really trying
10 to fix some systemic problems with rule
11 changes that can never fix those problems is a
12 big question in my mind, and one of the
13 problems I've got with the default system
14 which is suggested is that it depends on
15 cooperation among lawyers, which we see is
16 very difficult to achieve sometimes, or the
17 judge steps in, and I might supplement Judge
18 Guittard's comment to say that without regard
19 to the judge who wants to play golf at the end
20 of the week there are some judges whose either
21 fret elections or mindsets or sheer
22 arbitrariness is not something that I want to
23 put the fate of a client with.
24 So I guess the bottom line on all of this
25 for me increasingly is that you can't treat

1 all cases the same. I mean, 50 hours of
2 depositions is a substantial amount of time in
3 many cases, but in a lot of cases I think a
4 lot of the lawyers around this table deal with
5 it's not a lot, depending on the issues.
6 So with respect to the general question
7 of court control one thing that hadn't gotten
8 mentioned yet but is in some of the
9 suggestions is the increased use of discovery
10 masters or auxilliary means of getting the
11 kind of pressure that was talked about just a
12 minute ago, which is the reality of having a
13 judge that will make a decision. So it may
14 not be practically possible because we won't
15 pay enough to fund a system that works, but I
16 think a lot of this is the failure of judges
17 to responsibly deal with their dockets, and
18 our community is asking judges to do the
19 impossible, which is to handle an enormous
20 number of cases without the resources to do it
21 and fixing the -- tinkering, even massively
22 changing the rules doesn't solve all of those
23 problems.
24 So with a general statement about what I
25 think is essential to classify cases and

1 treating different type of cases differently
2 we do need judges to act like judges, and you
3 can't fly around judges that won't with any
4 kind of rules.
5 CHAIRMAN SOULES: Carl.
6 MR. HAMILTON: I just want to
7 talk about the judges just a minute and
8 respond to Judge Guittard. We had a lot of
9 discussion about judges that don't want to
10 take charge and do things and recognize that
11 that's there, but I guess we kind of think
12 that under both systems, either under Steve's
13 committee's system or our committee's system
14 it's going to evolve into the lawyers putting
15 together these pretrial orders and these
16 scheduling orders.
17 In his system it's going to evolve into
18 lawyers getting together and saying "We are
19 going to waive all of these rules. We don't
20 want any limitations on us" and getting
21 together and entering an order waiving all of
22 these rules, or they are going to go to the
23 judge and say, "Judge, we can't do it in this
24 time. Let's waive the rules," in which event
25 you have got judge involvement there, so why

1 not have it to start with.
2 Our approach is that the lawyers don't
3 even have to go to the judge for the
4 scheduling order if they can agree to it. If
5 not, that doesn't take much time with the
6 judge. Secondly, at the pretrial stage
7 initially it may involve some time for the
8 judge, but I think as a system goes on the
9 lawyers will get to where they can anticipate
10 their needs in the case better than the judge
11 can, but they are going to fill in the blanks
12 as to when all of these things have to be
13 done, what witnesses are going to be deposed,
14 and really all the judge is going to do is
15 sign the order on it and take care of the
16 disputes as to several of the items or one or
17 two items in the whole order.
18 So while it may take the lawyers two or
19 three hours to put this together we don't
20 envision that the judge is going to be
21 involved that whole time but will be available
22 to iron out disputes on certain items that
23 have to go into the pretrial order. So we
24 think that even though judges that don't want
25 to participate are going to have to, and

1 that's why we have provided in the rule that
2 it's mandatory that the judge do that pretrial
3 hearing even if he only wants to spend five or
4 ten minutes on it, he's got to spend some time
5 on it. He's got to sign the order after the
6 lawyers fill in the blanks.
7 CHAIRMAN SOULES: Okay. John
8 Marks.
9 MR. MARKS: I would like to
10 follow-up a little bit on what Harriet said
11 and just raise this question. Are we really
12 satisfied that we have identified the problem
13 with the system, and if we haven't identified
14 the problem with the system, maybe we need to
15 spend some time doing that before we look at
16 the fix.
17 CHAIRMAN SOULES: Okay. I
18 think what I really want to try to get a
19 consensus on is whether there should be
20 mandatory involvement by the trial judge early
21 on in the case.
22 MR. MARKS: Let me just finish.
23 Let me say one more thing. I don't know at
24 this point considering what's been said around
25 this table that it's really appropriate to ask

1 that question right now, Luke, because if
2 everybody is like me, I'm confused.
3 CHAIRMAN SOULES: Judge
4 Cochran.
5 HONORABLE ANN TYRRELL COCHRAN:
6 Well, I would like to try to answer anyway.
7 One of the real problems that trial judges
8 have and that trial judges give to lawyers
9 is -- and I'm afraid what a mandatory
10 conference or order or anything will do is
11 that judges have tended -- and it's only been
12 in the last ten years that any kind of trial
13 management theory has come to Texas -- that
14 initially the response has either been
15 complete laissez-faire. You know, let the
16 lawyers bring me the problems, and I will try
17 whatever case it is the lawyers say are ready
18 to be tried, and that's all I'm going to do,
19 or the micromanagement that ends up taking
20 simple, fairly inexpensive cases and, you
21 know, judicial involvement ends up making
22 those cases cost as much as a federal court
23 case when the lawyers wouldn't have done it.
24 That's what I'm afraid happens if you get
25 a mandatory report this needs to be -- and a

1 lot of this for those of us who have sort of
2 gone through a, you know, go to some court
3 management seminar that they had California
4 and the experts are telling you what to do,
5 and you come back, and I did this. I mean,
6 years ago I came back and said, "By God we are
7 going to get organized and make everybody fill
8 out the same," and then I realized that all I
9 was doing was wasting everybody's time and
10 money on things that I didn't need to know who
11 their witnesses were.
12 I want to know how many and how long they
13 thought they would take so I could tell the
14 jury how long they thought they would be
15 there, but as long as the lawyers knew why
16 should I be requiring the extra work to be
17 federal judging and go make it and that, you
18 know, after working through the disaster of
19 the certification system and the individual
20 case management, you know, finally although
21 I'm a slow learner, it took me years of just
22 experimenting and watching what experiments my
23 colleagues were doing, you know, to finally
24 realize that for this area the essence of good
25 judging was taking the time not to have a

1 pretrial conference in any case, but taking
2 the time and having the sensitivity to figure
3 out which cases would be helped by this and
4 which would, you know, be nothing but
5 harassment and unnecessary expenditure of
6 money.
7 That's something that I don't think any
8 rule can write, but the rule needs to
9 recognize that there are those two types of
10 cases and not two types of cases from your
11 point of view of, you know, the very
12 complicated cases that the people here in this
13 group handle versus the 95 percent of what
14 trial judges have to deal with, but even with
15 that, I mean, some of the most complicated
16 cases with the best lawyers in the state
17 require a judge to do nothing but declare a
18 recess from time to time, and you know, rent
19 them the hall, you know, and bring the jury
20 panel over, you know, require less judicial
21 intervention.
22 And some of my most complicated cases in
23 the last 11 years have been ones that all this
24 was going to be done by agreement. The
25 lawyers had it all worked out, and my

1 requiring it to be -- so you can't categorize
2 it by rule, but there are some times when this
3 needs to be done and some times when it's
4 silly. So as far as the mandatory, I have a
5 big objection to that.
6 CHAIRMAN SOULES: Just keep in
7 mind we have got, I guess, thousands, at least
8 hundreds of tax cases.
9 HONORABLE ANN TYRRELL COCHRAN:
10 I know, but not even counting tax cases. They
11 are just on their own list. What I am talking
12 about --
13 CHAIRMAN SOULES: Family law
14 cases.
15 HONORABLE ANN TYRRELL COCHRAN:
16 Yes. That's right.
17 CHAIRMAN SOULES: Suits on
18 promissory notes, collection cases.
19 HONORABLE ANN TYRRELL COCHRAN:
20 Consumer cases.
21 HONORABLE SCOTT BRISTER: Car
22 wreck cases.
23 HONORABLE ANN TYRRELL COCHRAN:
24 Slips in the grocery store.
25 CHAIRMAN SOULES: Hundreds and

1 hundreds of others of those cases.
2 HONORABLE ANN TYRRELL COCHRAN:
3 And those are most of what get tried. Most.
4 HONORABLE SCOTT BRISTER: The
5 majority of my jury trials in the last two
6 years were car wrecks and slip and falls.
7 CHAIRMAN SOULES: Doyle Curry.
8 MR. CURRY: I wanted to just
9 make a comment if you are going to ask that
10 question that what's really going on in the
11 Eastern District. The scheduling conferences
12 they call them, I've been to maybe half a
13 dozen now in the last two years. Other people
14 at my firm have been to them, and to my
15 knowledge, not just ours, but anywhere in the
16 Eastern District I don't know one that's
17 lasted two hours. I do know one that's lasted
18 20 minutes one time. That's the longest one.
19 They are usually five, seven, eight minutes,
20 and they are over.
21 And what it amounts to, it's usually
22 handled by a magistrate, which is another
23 problem. We don't have the facilities to do
24 it, but they ask a series of questions, and
25 the parties are required to bring the people

1 who make money decisions. That means the
2 plaintiff has got to bring his client if it's
3 an injury case or whoever makes the money
4 decision, and the defendant has to be there
5 and listen to the answers to those questions,
6 and one of the questions they ask is "Starting
7 from today forward how much do you anticipate
8 this will cost both expense and lawyer fees
9 through the entry of judgment?" And many
10 times the people listening to what their
11 expenses are going to be will wind up settling
12 the cases.
13 It's not so much to schedule a case as it
14 is it's making the two lawyers do enough
15 preparation in the case to get together for
16 the scheduling conference. Everybody is
17 there, and you have to say, "All right. Have
18 you discussed settlement?" You don't tell
19 them what it is necessarily, but you say "Have
20 you discussed settlement" and so on, and all
21 of those things, bam, bam, bam. It goes
22 within five to seven minutes you are out of
23 there, but the important thing is it settles a
24 lot of cases, and the scheduling deals are
25 usually mechanical, as Carl pointed out, to

1 both plains borrowed heavily from the federal
2 system.
3 I believe Steve pointed out they got
4 theirs from the judges local rules, but the
5 management conferences are really not pretrial
6 conferences as such. Everything is pretty
7 well set out in the plan, and they run through
8 the schedule, and it works pretty well except
9 in some areas, and what Carl pointed out is
10 that what we are trying to do is make things
11 cheaper, make things cheaper, and if we
12 adopt -- and this is, I think, pretty well a
13 unanimous feeling in the State Bar Rules
14 Committee. If we adopt a substantial
15 disclosure provision that's strict and
16 requires a substantial disclosure, that it
17 will give all the information that you need in
18 most cases. You won't have to do much other
19 discovery, and with that there won't be much
20 need to limit discovery.
21 CHAIRMAN SOULES: By mandatory
22 you mean upon request?
23 MR. CURRY: Well, no. The
24 mandatory one is according to the State Bar
25 Rules Committee. Why make a request for

1 something if the lawsuit is important enough
2 to be filed?
3 MR. HAMILTON: Well, it's on
4 request.
5 MR. CURRY: Oh, I did not know
6 that. We had discussed that both ways, but to
7 me, why go through the process of making a
8 request? That's just another lawyer billable
9 effort that you have to make. If you have got
10 a lawsuit filed, you are going to need some
11 basic information.
12 MR. HAMILTON: The reason for
13 the request is that you may not need all the
14 items in the list and you just specify which
15 ones.
16 MR. CURRY: That's true, but
17 when you are responding and you know that,
18 too, and you can just write "not applicable"
19 if it doesn't apply to your case. The other
20 thing that I wanted to mention is that the way
21 we operate nowadays -- and I think you all do
22 the same thing. We operate from the date of
23 the trial back, and I do only personal injury,
24 and that's why it's so effective. If you do
25 contracts or things of that nature when you

1 can put it in the can, and it doesn't matter.
2 Once it's in the can you can use it later on,
3 but in a personal injury case if you are the
4 defendant, and you want a medical exam, and
5 you get your medical exam, and then you depose
6 your doctor, and six or eight or nine months
7 later or a year later, and probably a year
8 later you are going to trial.
9 Then you are up there with your defensive
10 tool that's not worth the paper it's written
11 on because the guy who was going to testify
12 said "Oh, my condition has changed since then.
13 I have got so and so and so and so.
14 CHAIRMAN SOULES: Or death.
15 MR. CURRY: And you throw that
16 away. The same with the plaintiff. If you
17 are talking about medical information that's a
18 year old or testimony that's a year old, well,
19 what's happened in the interim? That
20 plaintiff has either gotten completely well or
21 he's gotten completely worse or three
22 surgeries since or anywhere in between. So
23 none of this works in a personal injury case.
24 So that's the problem, and it was a general
25 feeling of the Rules Committee that if we had

1 really substantial disclosure provisions,
2 request or otherwise, a substantial disclosure
3 provision, that that would get enough
4 information to settle a lot of cases, and you
5 would not really need to limit anybody on
6 their discovery, and you could then start from
7 the trial and come back, though we have some
8 areas we are working on on all of that. Isn't
9 that basically what we were talking about?
10 MR. HAMILTON: Yes.
11 MR. CURRY: And get in the
12 situation where instead of moving trial by
13 ambush at the trial, you are moving it to
14 trial by ambush in discovery, and that's what
15 we were trying to get away from and make it a
16 little bit, as Steve put it, a kinder, gentler
17 system.
18 CHAIRMAN SOULES: Okay.
19 Everyone is going to have an opportunity to
20 discuss all the issues across this whole
21 panorama of problems, but the chair would like
22 to get some consensus on whether or not
23 mandatory involvement by the trial judge is
24 going to be a predicate to whatever we do.
25 Now, we can revisit that. We are going to

1 talk about these rules for a lot of hours
2 before this is all said and done, but just to
3 give us some guidance of your disposition at
4 this time is there anybody else who wants to
5 speak to that issue that hadn't been heard on
6 that issue?
7 MR. JACKS: I have a question I
8 want to ask Carl.
9 CHAIRMAN SOULES: On that
10 issue?
11 MR. JACKS: On that issue.
12 CHAIRMAN SOULES: Okay. Go
13 ahead.
14 MR. JACKS: And that is, Carl,
15 in your committee's approach would it be
16 consistent with that to have conferences more
17 like the ones that Doyle is describing where
18 the judge basically is -- you know, it really
19 is more of a scheduling than a full-blown
20 micromanaged pretrial exchange between the
21 judge and counsel?
22 MR. HAMILTON: Yes. Our rule
23 provides for both. It provides first for the
24 scheduling order which the judge doesn't have
25 to be involved in, and the lawyers put that

1 together, and all the judge has to do is sign
2 it, but then the second thing it provides is
3 the management conference, which does deal
4 with any motions, dilatory pleas, discovery
5 schedules, trying to define the issues of the
6 discovery, identify the witnesses, so that the
7 witnesses are going to be identified and may
8 cut down on the number of depositions that are
9 going to be taken. Stipulations, identify
10 legal issues, all of that is in that
11 management conference.
12 MR. JACKS: Would it be
13 permissible for a judge at the management
14 conference to basically have the lawyers walk
15 in and say, "Lawyers, do you have any
16 problems? Is there anything you need me for?
17 Do you know where you're heading?" And if the
18 answer to the first two questions is "no" and
19 the last one is "yes," "Thank you. I will see
20 you later."
21 MR. HAMILTON: All he has to do
22 is sign their order, just sign their order.
23 Then that sets everything out.
24 MR. CURRY: You can do it
25 without even appearing, just do it in advance.

1 MR. HAMILTON: That's right.
2 MR. JACKS: And it seems to me
3 much of that can even be done by Rule 11
4 agreement and the judge wouldn't even have to
5 sign the order if the system would provide for
6 that, and it's fully as enforceable.
7 MR. HAMILTON: Well, the reason
8 for the order is if there is going to be
9 limitations on discovery the lawyers need some
10 protection by court order that here is what
11 the judge has ordered by way of limitation.
12 MR. JACKS: But if the lawyers
13 have worked all of that out and they are in
14 agreement, why should the judge have to sign
15 an order about it?
16 MR. HAMILTON: Well, what if
17 you get off and didn't take the right
18 deposition, didn't schedule the right
19 witnesses? At least you have the protection
20 that the judge has ordered and done this way.
21 MR. JACKS: I guess to me it
22 seems as enforceable. A Rule 11 agreement is
23 as good as the pretrial order in that sense.
24 It's easily enforceable.
25 MR. HAMILTON: It could, but it

1 may have a different connotation in the
2 malpractice arena.
3 CHAIRMAN SOULES: All right.
4 Paula Sweeney.
5 MS. SWEENEY: To answer your
6 question or the question that you are asking
7 from my standpoint, we run, I think, a huge
8 risk when we try to make everything a square
9 peg because we have got some square holes and
10 we have got some round holes, and I don't
11 think we can put the same designation and the
12 same procedure on every case. If you try to
13 get the judge involved -- and that's one of
14 the things you are trying to do. By trying to
15 force the judge's involvement in every case
16 somewhere early the vast majority of cases
17 don't merit it, don't need it, don't want it.
18 It's going to cost money. You can't get
19 before the judge. Once you do get before the
20 judge you are not going to get anywhere. It's
21 not going to accomplish anything except to
22 cost people, cost the litigants, a lot of
23 money that they don't need to spend. In the
24 cases where it is necessary there ought to
25 be -- court intervention ought to be

1 available. It ought to be an option that the
2 parties, any party can opt to enter, and then
3 involve the court, but if you try to make it
4 mandatory in every case you are going to end
5 up, I think, increasing the cost and slowing
6 down the system rather than the other way
7 around.
8 CHAIRMAN SOULES: Anyone else
9 on this issue? Robert Meadows.
10 MR. MEADOWS: Luke, a moment
11 ago what I wanted to address, which is in the
12 context of the question on the floor, is
13 whether or not there is a problem, and I think
14 it's indisputable that lawyers, judges, and
15 the public believe that litigation costs too
16 much and takes too much time, and the reason
17 for that is discovery, and I think it's the
18 mandate of this committee -- at least it's my
19 understanding that it's the mandate of this
20 committee to do something about that, but we
21 have to do something about it that will work
22 in the state courts. That's my problem with
23 what Carl's committee is proposing.
24 I think what we need to do is to agree
25 which direction we are going and devise some

1 plan as to how to get there rather than
2 bogging down in sort of a random discussion of
3 the details of the subcommittee report, but in
4 terms of the mandatory disclosure, I don't
5 like it for the very same reason that Paula
6 said, that it's not right for every case, and
7 I don't like it because lawyers don't like it.
8 I think that there should be some
9 nonobjectionable matters that you have to give
10 up, but I think you should have to give them
11 up only if you are asked to, and that's the
12 way I would rather go, and I would also like
13 us to figure out which direction we're going
14 and devise some approach to orderly proceed so
15 that we are either going to work off the
16 subcommittee report and talk about it because
17 there is a lot in it to talk about. There is
18 a lot in it I want to talk about. There are
19 parts of it I don't like, but I think we can't
20 discuss these two approaches in tandem. I
21 think we need to figure out which way we want
22 to go and devise some thought as to how to get
23 there, but in answer to your question, I'm not
24 for mandatory disclosure in every case.
25 CHAIRMAN SOULES: In response

1 to that what the chair is trying to do is get
2 at least a start on the philosophical issues
3 by trying to determine whether or not we are
4 going to have early involvement of the trial
5 judge, not mandatory disclosure but early
6 involvement of the trial judge by some
7 scheduling order either submitted by agreement
8 of the parties that you just sign, he or she
9 just signs, or require that in the absence of
10 that that there be court intervention soon
11 after the case is filed in order to get that
12 set up and going.
13 That's what I would really like to talk
14 about so that we can -- because if we are
15 going to require that, then that's a big
16 departure from the subcommittee's report. If
17 it's not going to be required, that's a big
18 departure from the State Bar's report, but it
19 does give us a basis on which to start
20 blending these from the predicate of early
21 involvement of the trial judge or not, and
22 that's what I really want to talk about until
23 we -- and then maybe we can't get a consensus,
24 but I would like to see if we can't get a
25 consensus on that. David Perry.

1 MR. PERRY: Will you accept a
2 motion?
3 CHAIRMAN SOULES: Sure.
4 MR. PERRY: I move that we
5 operate on the premise that the rules should
6 cover most of the cases including most major
7 cases and that the need to go to court for
8 special assistance with scheduling orders and
9 that sort of thing be an exception rather than
10 the rule.
11 CHAIRMAN SOULES: Is there a
12 second?
13 MR. SUSMAN: Second.
14 CHAIRMAN SOULES: Steve
15 seconds, Steve Susman. Any further discussion
16 on that? Okay. Those in favor show by hands.
17 17, I think. Those opposed?
18 17 to 2. So that motion carries. Why
19 don't we take a 10 minute break and try to
20 hold it to 10 minutes, and we are going to
21 adjourn at 12:30. So let's be back here at
22 11:20.
23 (At this time there was a
24 recess, after which time the proceedings
25 continued as follows:)

1 CHAIRMAN SOULES: Let's get
2 back to work. Okay. The next thing I would
3 like to go to because I think it's -- and
4 there could be disagreement about this. If
5 there is, so be it, but the next thing I would
6 like to go to is the scope of information to
7 be disclosed, call it voluntarily, whatever
8 word we want to use. First of all, I would
9 like to get a consensus of the committee on
10 whether or not that information should be
11 mandatory in every case or available upon
12 request. So far I think everybody is in
13 agreement that it should be done upon request,
14 but we don't need debate on that.
15 How many believe that whatever is the
16 scope of information that's disclosed, rather
17 than discovered, if we can use the words to
18 contrast what I am talking about, how many
19 feel that should be only upon request? Show
20 by hands. 17. How many feel that it should
21 be mandatory in all cases?
22 So that's unanimous. Okay. Now, let's
23 go to -- we have got Steve's report on page 9,
24 the subcommittee report on page 9 captioned
25 "Standard requests," and we have got Pat

1 Hazel's draft under his May 13th, 1994, fax
2 transmission that starts on -- well, it's
3 numbered page 1, but it's about the fifth page
4 back.
5 MS. SWEENEY: Say again.
6 CHAIRMAN SOULES: Fifth page
7 back on this one, Paula. Everybody got that?
8 MR. GOLD: Turn it so I can see
9 it. Oh, I've got it.
10 CHAIRMAN SOULES: Okay. On
11 about the fifth page back it says "Proposed
12 rule on disclosure," and this proposed rule on
13 disclosure is a rule that the, what, Discovery
14 Subcommittee of the State Bar Committee on
15 Rules has drafted and approved that has not
16 been approved by the entire committee, State
17 Bar Rules Committee, but it's got a lot of
18 work in it, and Steve's also likewise is here
19 on page 9, and they have done work on that,
20 too, and I don't have the task force's. Does
21 the task force vary much from these? Anyone
22 know?
23 MR. PERRY: It's very similar
24 CHAIRMAN SOULES: Very similar.
25 Okay. So we can work on these as concepts or

1 ideas maybe.

2 MR. PERRY: I think both of

3 these are derived from the task force, and I

4 don't think it would serve any useful purpose

5 to go get the task force.

6 CHAIRMAN SOULES: Okay. Good.

7 Appreciate that input. Alex Albright.

8 PROFESSOR ALBRIGHT: On the

9 State Bar Committee you-all had put in the

10 mandatory disclosure in health care suits, and

11 I know Tommy Jacks has been working on that,

12 and I'm just wondering how they fit together,

13 and if it does make sense to put them into

14 mandatory disclosure, or it was my

15 understanding that the Legislature had the

16 Supreme Court appoint a committee that had the

17 authority to work on that, and I'm wondering

18 if it should be separate from our rules

19 because that makes two parallel tracks going

20 at the same time.

21 MR. JACKS: I mean, ultimately

22 that's going to be up to the Court obviously

23 because in either event it's the Court that

24 promulgates whatever is done either from our

25 panel or from one of these committees. The

1 approaches that have been taken are different,
2 and I don't think it affects what we do here.
3 I guess all I would say is that it probably
4 would make sense for this committee not to
5 expend a lot of time on that issue because the
6 Court is going to have it pretty well
7 developed from both committees and then can
8 make a determination, and Justice Hecht may
9 feel differently, I don't know, about it.
10 JUSTICE HECHT: No. They do
11 point out two things, though. Two of the
12 philosophical issues and the approaches are
13 how thorough should they be. Should the
14 disclosure be more thorough or should it be
15 more bare bones, basic kind of information, or
16 I guess, a third alternative is staged where
17 there is even stages of disclosure, and
18 secondly, should it be tailored to particular
19 kinds of cases, should there be a different
20 set of disclosure rules or at least a
21 different second or third stage set of
22 disclosure rules for family cases versus
23 medical malpractice cases, and all we have,
24 all we are dealing with, is whether there
25 should be standard form disclosure, basically,

1 interrogatories in medical malpractice cases.
2 PROFESSOR ALBRIGHT: If I can
3 make a procedural motion based on those
4 responses that we for now take this health
5 care stuff out of here because I think that
6 gets into a bunch of nitty gritty questions
7 that we may not want to decide right now. Why
8 don't we focus our attention now on mandatory
9 disclosure that affects all cases?
10 CHAIRMAN SOULES: Okay. I
11 think that's a good point, so for now let's
12 just set aside that there will or may be
13 special provisions for health care provider
14 suits and talk about other suits or suits in
15 general. When we get done it may be that the
16 health care provider suits only need some
17 modest amount of additional mandatory
18 disclosure, or they may need a lot more, but
19 we can get to that later on. Steve Susman.
20 MR. SUSMAN: As I see that, I
21 mean, once you take out -- I mean, if you take
22 out the funky health care kind of stuff,
23 issues, and say that you are going to leave it
24 for a different day there may be special
25 cases, family law cases, health care cases,

1 that will develop their own special set, and
2 basically what we are talking about is we are
3 not talking about mandatory disclosure.
4 That's a misnomer. Okay. We are talking
5 about types of information that you cannot
6 object to providing. That's what we are
7 talking about. Types of information that you
8 cannot object to providing, stuff that would
9 be asked for.
10 It seems to me that the big difference
11 between the Hazel report, which I'm just
12 looking at now, and what we have done is the
13 Hazel report will require a great deal more
14 information to be provided upon request at the
15 front end than ours will. For example, we
16 require the disclosure of potential parties
17 and persons with knowledge of relevant facts.
18 Hazel requires that you also provide a summary
19 of the main facts about which the person may
20 have knowledge or discoverable information
21 which are favorable to the requested party.
22 That to me strikes me as very much like
23 make work that the marshalling kind of
24 contingent interrogatories that say "Marshal,
25 tell us everything you know, lay it out in

1 advance," but that's one big difference. If I
2 look over here, factual bases, I'm sure -- at
3 the top of page 3, item 6 of the Hazel report.
4 "The factual basis upon which, if proven at
5 trial, would establish each claim or defense
6 of the requested party." Even in our
7 contingent interrogatories we only ask factual
8 theories, kind of general pleadings. This is
9 marshalling facts, again, I am convinced.
10 "The claims or defenses of the requested
11 party and the legal theories upon which each
12 claim or defense is based. Such legal
13 theories shall be set forth with sufficient
14 specificity to give the requesting party
15 adequate notice to prepare for trial with
16 respect to such legal theories, and when
17 necessary for a reasonable understanding of
18 the theories, citations of pertinent legal or
19 case authorities." Again, I think that
20 probably we have dealt with this under the
21 heading of contingent interrogatories, but I
22 suggest that this is much more comprehensive
23 and would require much more work I think than
24 ours.
25 The damages, "Each element of damages to

1 be listed," and then there is a whole list of
2 damage things there. So I believe that ours
3 is -- we don't have that kind of information.
4 Otherwise, those seem to be, on a quick
5 reading, Luke, the main differences, and I
6 mean, I guess the real question is does it
7 make sense to require as much disclosure as
8 Pat suggests. My sense of the matter is that
9 that's -- his suggestion requires too much and
10 that, in fact, what it requires will not be in
11 lieu of depositions but in addition to.
12 CHAIRMAN SOULES: Okay.
13 Richard Orsinger. I'm sorry. I cut you off.
14 MR. SUSMAN: I'm through. I'm
15 through.
16 CHAIRMAN SOULES: Okay.
17 Richard Orsinger.
18 MR. ORSINGER: I was just kind
19 of evaluating these proposals at a broad
20 level, and I ran some quick numbers on the
21 deposition limitations. If the lawyers are
22 billing an average of $200 an hour and they
23 are limited to 50 hours per side and assuming
24 there is two lawyers at every deposition, we
25 have just limited deposition expenditures on

1 discovery to $40,000 of lawyer time and maybe
2 another 8 to $10,000 in court reporter
3 expense. So our deposition limits have
4 limited the deposition part of discovery for a
5 lawsuit to $50,000.
6 The time window we are talking about, six
7 months, right now in San Antonio in a family
8 law case I can get a jury trial setting 90
9 days to 120 days after I request it. I could
10 see that the six-month discovery window is
11 probably going to shoot that, and I will
12 probably have to at least wait six months to
13 get a jury trial. The nonjury trials I think
14 are running about 10 to 12 months. Non-family
15 law trials, non-family law jury trials are
16 running, say, 10 to 12 months after you
17 request a jury.
18 This whole subcommittee approach, I
19 think, is dealing effectively with the big
20 litigation that requires a lot of depositions
21 and a lot of lawyer involvement in discovery,
22 and it may very well address the discovery
23 abuse that's occurring at that level of our
24 legal system, but that the bulk of our cases
25 are going to be beneath these limits and that

1 the subcommittee proposal doesn't do as much
2 for the smaller cases to contain them or to
3 make them cheaper and more efficient as it
4 does the bigger cases.
5 And having thought that, then I said,
6 well, what can you do to make the smaller
7 cases cheaper, too, as well as making the
8 bigger cases cheaper, and it seems to me that
9 the only thing you can do is to substitute
10 deposition time, which is probably one of the
11 most expensive forms of discovery, substitute
12 deposition time, get something else besides
13 sitting around and blindly asking witnesses
14 questions and trying to elicit information a
15 morsel at a time with 400 hours -- $400 an
16 hour being billed for that process.
17 If that's right, if everybody agrees with
18 that, then that ought to incline us toward
19 broader-based mandatory disclosure with more
20 of a responsibility on the lawyer to marshal
21 his facts and present them, maybe not from the
22 standpoint of interviewing 30 potential fact
23 witnesses and saying what they are going to
24 say, but maybe just being more precise about
25 what your contentions are, about what you

1 think the bases for your contentions are,
2 more -- I don't know what, but I guess I'm not
3 suggesting solutions here. I was just
4 suggesting a focus.
5 My inclination is that the smaller cases
6 are going to be more reachable through
7 mandatory disclosure than they are through
8 limitations on deposition time that don't kick
9 in until you have already spent $50,000. So
10 while I have some severe problems with the
11 State Bar Committee proposal on gathering
12 what's in the mind of your potential fact
13 witnesses and all that and putting that all in
14 in the mandatory fashion, I'm inclined to have
15 more detail than what Steve's subcommittee
16 does because Steve's subcommittee is really
17 bare bones in terms of mandatory disclosure
18 upon request, and that if we are going to
19 reach the small to medium cases where a lot of
20 money is being wasted and a lot of
21 dissatisfaction is being generated we may only
22 be able to reach it by putting more
23 responsibility on the lawyers to either plead
24 more specifically or to file answers to
25 interrogatories that set out in a clear

1 picture what their contingents are and what
2 evidence supports it.
3 CHAIRMAN SOULES: Okay. My
4 impression of disclosure versus discovery is
5 that whatever we write as being within the
6 scope of disclosure, that's not going to be
7 objectionable because the court is going to
8 say "If somebody asks you for that" -- I mean,
9 the rules are going to say if I ask Orsinger
10 for this information that's in the disclosure
11 list, he has to give it to me.
12 MR. ORSINGER: And you don't
13 have to bill your client a ton for drafting
14 what's in the rules already. I mean,
15 theoretically you shouldn't bill $500 to send
16 a letter saying "I want everything in Rule 166
17 subdivision 3.
18 CHAIRMAN SOULES: David Perry.
19 MR. PERRY: Let me just relate
20 briefly the philosophy from the task force
21 that is carried over in the subcommittee's
22 report is basically -- there are a couple of
23 points that I think everybody ought to have in
24 mind. The task force came to be of the
25 opinion that one of the real important things

1 to do was to try to reduce the amount of
2 paperwork, that the paper discovery that goes
3 back and forth was one of our major problems.
4 The task force also came to be of the
5 opinion that discovery of facts is much more
6 useful than discovery of legal theories and
7 contentions, and that a lot of the needless
8 time spent on paperwork has to do with trying
9 to discover other people's contentions and
10 other people's legal theories as opposed to
11 facts. The use that was envisioned of the
12 disclosure concept was that it would be
13 primarily applicable in the smaller and
14 routine cases.
15 Chuck Herring was around here earlier
16 with a law review article that says that in 50
17 percent of the cases no discovery at all is
18 filed and in about another 25 or 30 percent
19 only three items of discovery are filed, and
20 the concept that the task force had was that
21 this would give people handling those kinds of
22 cases the opportunity with one instrument or
23 one letter request to get very basic, bare
24 bones stuff; that in a major case, which is
25 the place where we have all the problems that

1 we need to write the rules for, that this
2 would be a reasonably good starting place.
3 I think we also discussed the concept of
4 trying to develop disclosure that would force
5 the other side to disclose what is detrimental
6 to them and largely decided that that probably
7 wasn't ever going to work, and therefore, why
8 try to make that happen when it's not going to
9 happen in reality. So the result, it was that
10 kind of a thought process that ended up with
11 the very simple bare bones stuff that is
12 embodied in the subcommittee standard
13 requests.
14 CHAIRMAN SOULES: Okay. Paul
15 Gold.
16 MR. GOLD: I just wanted to say
17 to the committee some insights that I have
18 because I served on each one of these
19 committees involved.
20 CHAIRMAN SOULES: Speak up a
21 little bit, Paul. The court reporter is
22 having trouble hearing you.
23 MR. GOLD: And the idea of the
24 great request that is brought to you from the
25 Administration of Justice Committee was my

1 idea, and I want to tell you what the thought
2 behind it was because I think that the thought
3 process that's now being advocated for it is a
4 little bit different than the idea that I
5 originally had. The thought behind the
6 standard form type interrogatories when I
7 proposed it was with a goal to eliminate as
8 best as possible the involvement of the court
9 and having to rule on nonsensical objections
10 to very, very standard type of requests.
11 We were seeing that people were
12 objecting, for instance, to an interrogatory
13 that stated "Please identify all individuals
14 with knowledge of facts relevant to the
15 subject matter of the lawsuit," and people
16 were going down and having to get rulings from
17 the court on this type of interrogatory when
18 it was obvious from the rules that that type
19 of a request was on its face proper. So what
20 the original intent was merely to make certain
21 requests prima facie proper and that it would
22 be only with a showing of good cause that you
23 could come with an objection to certain
24 requests and that that would allow people to
25 get the information that they needed.

1 It was never my intent and I would resist
2 any attempt to have to make someone on one
3 side of the case do the leg work for the other
4 side, to have to reveal to the other side what
5 their thought process is for trial. If it's
6 not politically correct, then I apologize, but
7 I just believe that a certain degree of
8 advocacy still needs to remain in this.
9 Otherwise, I personally don't want to have to
10 practice trial law anymore. I don't want to
11 just be someone who marshals all the evidence
12 that my side can get and produce it to the
13 other side. That's not what I'm in this to
14 do. I think there is an art to what we do,
15 and I think that a certain amount of that
16 should be preserved.
17 What I think should be discouraged and
18 what we should be trending toward is the ways
19 in which advocates conceal things that
20 shouldn't be concealed, and by concealing
21 things through nonsensical, frivolous
22 objections to basic requests that should be
23 responded to, and there is a correlary to
24 this, and taking from something else that was
25 said earlier from Carl on court intervention,

1 there are certain cases. I mean, David Perry,
2 Paula, Tommy, I, Doyle practice in these types
3 of areas where it may be appropriate in a
4 particular case to go a little bit beyond just
5 who are the individuals with knowledge of
6 facts.
7 It may be important to have a meeting
8 with the judge both sides to say, well, who
9 are the individuals who could best inform us
10 about the type of crash testing that was done?
11 Who would be the individual who would be most
12 knowledgeable about the type of records that
13 this hospital keeps or doesn't keep? Those
14 types of threshold questions that help direct
15 you in a meaningful direction in the
16 litigation but I believe that if you get into
17 a situation where you are having to have each
18 side say "This is what's helpful to me, and
19 this is what's not helpful to me through these
20 facts. These are what the facts show. This
21 isn't what the facts show," I believe that all
22 you're doing is setting up a procedure that's
23 going to result in a need for more court
24 involvement than less, and I wanted just to
25 say what one of the original goals was, and it

1 may no longer be a goal, was to try and devise
2 a system whereby there was an opportunity to
3 get more information out on the table without
4 the need for court intervention, and that was
5 what was one of the original goals.
6 CHAIRMAN SOULES: Paul, is this
7 list that was distributed by Pat Hazel, is
8 that consistent with what you're saying here
9 or not?
10 MR. GOLD: The basic framework
11 of it with the exception of factual bases and
12 claims, all of these were things that when I
13 was on the committee that we originally talked
14 about, certain basic things that you would
15 need. Now, the degree of information that's
16 requested under each topic is something that's
17 been developed since I've not been on the
18 committee, and I do have some concern about
19 the depth of information that's requested
20 because I think one of the things we all have
21 to keep in mind, one of the levels of
22 resistances that the Bar has to this, or maybe
23 not.
24 Let me say one of the resistances that I
25 have is that a litigant has to be concerned

1 about how this is used against them at time of
2 trial, and people are concerned that what's
3 going to happen is this is setting a litigant
4 up, say, "Okay. What is your case about and
5 what is the complete factual basis? Disclose
6 all of this." Then when they disclose all of
7 that two things are going to happen. Either
8 they are going to get a motion for summary
9 judgment in which case the other side is going
10 to use their disclosure to say, "Well, you
11 don't have enough facts to have a case. You
12 are out of court." In which case they are
13 going to be very discreet about this whole
14 process, or two, it's going to be used to
15 impeach them at time of trial saying, "Well,
16 this is what you disclosed at the beginning.
17 Now your theories are this and this.
18 Obviously you have had a change of heart."
19 And it's an exclusionary thing, and
20 that's what I think a lot of people are
21 concerned about. If there weren't that
22 concern about how it's going to be used to
23 exclude evidence or better yet knock them out
24 of court I think that people would be more
25 forthcoming, and I think that some

1 consideration might be given into how that's
2 protected, but I think that's a legitimate
3 concern on the part is how it's ultimately
4 going to be used. Is it case, issue,
5 witness -- is it a case, issue, witness form
6 of preclusion? And that's a real concern
7 about this disclosure thing, but I don't have
8 an answer to it. I just merely wanted to say
9 what the original thought was in my head when
10 I originally proposed the thing about
11 interrogatories, and as Steve, I think, very
12 appropriately pointed out it's not what's in a
13 mandatory disclosure concept. It was a
14 concept that if you ask these things someone
15 could not, except for an extremely good
16 reason, object to it.
17 CHAIRMAN SOULES: Carl
18 Hamilton.
19 MR. HAMILTON: Let me just
20 respond to a few things. The reason for the
21 paragraph 1 or 166(a)(1) with the broad, if
22 you will, disclosure of persons with knowledge
23 of relevant facts is this: that we now have a
24 rule which says all you have to do is list
25 persons with knowledge of relevant facts, and

1 that's all, and so in some cases you will get,
2 depending on the size of the case, 20 or 30
3 people listed. Some may have three or four
4 hundred people listed. The whole purpose of
5 this is to try to devise a way that you don't
6 have to go take 400 depositions, to try to
7 force the party to tell us enough information
8 about these people that we will know who do we
9 want to go depose, who are going to be the key
10 players in this litigation.
11 Paul suggested perhaps going before the
12 judge and doing that and then I have no
13 problem with that. There just has to be some
14 way though that we narrow the list from 400
15 people down to a number that's workable that
16 people can afford to depose, and one way that
17 we have done it is to require that you give
18 the general subject matter about which the
19 person has knowledge and the main facts about
20 that witness that if you were going to call
21 him for trial why would you be calling him,
22 aand I think in most cases you put a witness
23 on for a particular point or two that you want
24 to make in your case, and that's the idea, is
25 that you disclose the main facts about which

1 this witness knows if I were going to be
2 calling him as a witness, here's why I would
3 call him. That gives the other side enough
4 information to know do I want to go depose
5 this person or not.
6 Now, we didn't go the next step and say
7 "Tell us also the unfavorable facts that the
8 witness knows" as the federal rules do because
9 like they say there would be too much
10 opposition to that. That would never pass,
11 and this one may not either, but that's the
12 reason for that being in there. We do not
13 intend by these rules to create a situation
14 where people are afraid to do anything because
15 it's going to come back to haunt them at the
16 time of trial, but that just may be the nature
17 of the beast because if you are going to make
18 proper, correct disclosure of what the facts
19 are and what the information is then you
20 should be bound by that at trial, and if the
21 facts change, then this rule provides that you
22 have a duty to supplement, and you can
23 supplement at any time whenever the facts
24 change so that once you get to the time of
25 trial theoretically if things have changed in

1 the disclosures then you should have filed
2 something that would get it up to date.
3 Now, on the question of summary judgment,
4 yes, that's part of the intent. If a lawsuit
5 is filed without a reasonable investigation,
6 without a reasonable basis, shotgun pleading,
7 then these requests are served upon the
8 plaintiff, and the plaintiff answers or
9 doesn't answer or doesn't provide sufficient
10 facts which will support him at the time of
11 trial, then a summary judgment may be proper.
12 And it's my understanding that this
13 committee has a subcommittee working on
14 summary judgment rules that are moving toward
15 the adoption of the federal system rather than
16 the system that we have now, which would go
17 hand in hand as the way that this rule is
18 written so that this does require a plaintiff
19 to do his homework, get his facts together so
20 that if he does have a case, he can state what
21 the case is in response to these requests, and
22 he's not going to get a summary judgment
23 against you, and that comes over on page 3,
24 which is the factual basis, which I mentioned
25 earlier is designed to take the place of

1 special exceptions and is designed to require
2 that a party articulate the factual basis
3 which if proven at trial would establish the
4 claims of defense.
5 I think it should start with the legal
6 theories, and you know, this is not something
7 that's hard to -- there is big objections to
8 people stating legal theories. That's not
9 going to make a great deal of difference, but
10 our committee thinks that in some cases it's
11 important if you don't understand the nature
12 of the claim or the nature of the defense and
13 some weird statement is made as to why the
14 party is not liable or what the basis of the
15 claim is, it's helpful if the party can
16 articulate some legal theory or basis for it
17 or basis for the defense.
18 It may avoid the filing of an unnecessary
19 motion for summary judgment, or it may avoid
20 some other disputes when a full disclosure is
21 made as to here is what my case is, here is
22 what the claims are, and here is what I think
23 the law is to support them, and defendant has
24 to do the same thing, and so that's the reason
25 for these; and with respect to damages, Item

1 No. A, this is a claim -- I mean, this is a
2 matter that is argued about continually
3 because the defendant claims that the
4 plaintiff hasn't given him enough information
5 about what the damages are, how you are going
6 to calculate it, what the theories are, what
7 the basis for the claim is, and all this is
8 designed to do is to require a plaintiff to
9 set forth in particular form what the basis
10 for the damage is and how you calculate it,
11 and that -- I don't know why that should be a
12 problem.
13 We are not asking you to do things like
14 damages on the amount of pain and suffering or
15 anything like that, but it's that that's
16 capable of being determined by some
17 calculation ought to be disclosed and how you
18 calculated it. I think everything else is
19 pretty standard in those interrogatories
20 anyway. The item that I think the motion was
21 addressed to is Item 12 on health care
22 provider suits, which we will leave out of
23 this, but the other things I think are fairly
24 nonobjectionable, but that's the reason for
25 some of these things being here.

1 CHAIRMAN SOULES: Okay. Steve
2 had his hand up first, then I will get to you.
3 MR. SUSMAN: I guess my general
4 attitude is that if Carl and I were
5 negotiating and he would agree to my 50-hour
6 limitation, six-month limitation in exchange
7 for my agreeing to whatever goddamn disclosure
8 he wants, I would make the deal. Okay. But
9 I'm afraid that he wants both. I'm afraid he
10 wants the disclosure. Then he wants more than
11 50 hours, and he wants more than six months,
12 but if I had to swap him on a negotiation, and
13 say, "I will make whatever disclosures you
14 want as long as it's going to be a real
15 substitute for the more expensive depositions
16 and other things." Fine. We will do it that
17 way.
18 So, I mean, that's my -- my first
19 question would be is this going to be a
20 substitute or in addition to? If it's in
21 addition to, you have not done anything to
22 control discovery. You have not done anything
23 to eliminate discovery dispute or anything at
24 all. You've just -- I mean, this is just more
25 icing on a cake which is already too big, in

1 fact. Insofar as the particular disclosures
2 that he's talking about Footnote 3 on the
3 first page demonstrates the real problem of
4 this whole idea of disclosure. I mean, by the
5 way of the public largely viewing that
6 Footnote 3 we would as a profession would be
7 made to look like fools.
8 You have to disclose things that are
9 favorable to your side. But if there is any
10 unfavorable on your side, you say, "Ya-ya
11 ya-ya ya-ya. It's your job to come find it
12 out." What kind of officers of -- what kind
13 of officers of what kind of courts are we to
14 have the hudspeth to put this in writing, that
15 you better disclose things that are favorable,
16 but if it hurts your client's position, you
17 can be -- you can tell a half truth. Okay.
18 Tell a half truth. That is the whole problem
19 with this whole deal about trying this
20 disclosure.
21 That's why there has been such resistance
22 to it on the federal level because somehow it
23 seems a little -- it's just not quite the
24 adversary system, and that's why there has
25 been such an uproar among the Bar, and that's

1 apparent here in the Texas regime. Solved it
2 with Footnote 3, which I hope never sees the
3 light of day. Insofar as, you know, things
4 are -- I mean, again, I don't think there is a
5 big difference on -- I mean, on factual basis
6 of claims and defenses we can probably
7 basically we are talking -- I don't think
8 that's so terribly different than our
9 contingent interrogatories. I mean, maybe
10 it's a little more detailed.
11 I acknowledge we had problems writing
12 those to begin with, but certainly -- and I
13 think it again is a question of are you making
14 a party pretry their -- totally just marshal
15 their facts in having gone to that extent.
16 But I think that, you know, the images, I
17 mean, sooner or later that those are, I guess,
18 appropriate questions to ask as long as it's
19 mutual, goes both ways. The other side has
20 got to make their claims about damages, too.
21 I would have no problem, by the way, with
22 a rule, Carl, that said at the beginning of
23 the case both sides have to identify as best
24 they can by pain of something the witnesses
25 they will call at trial if the trial were

1 tomorrow and have to update that monthly.
2 Okay. That is quite different than a list of
3 all people with knowledge, a 400 list where
4 you have got to describe people you hardly
5 know what knowledge there is, but if we had a
6 system where at the very beginning you had a
7 "Here's who we will call as witnesses if I go
8 to trial tomorrow," and it was periodically
9 updated every month, I don't have any problem
10 with that system. I think that may be fine if
11 there is some way of enforcing it.
12 MR. CURRY: Can Steve
13 comment to the time in the federal system that
14 they have got in the Eastern District? Both
15 parties disclose 30 days after the answer is
16 filed, and in this one it's proposed by the
17 subcommittee to the Rules Committee. The
18 Rules Committee hasn't gone through it yet.
19 It's just a subcommittee deal. The plaintiff
20 discloses a certain time after request which
21 can be furnished with the answer, and then the
22 plaintiff can't make his request until 45 days
23 after the party has answered in court in this
24 one. Do you have a comment to make about
25 those changes, those differences and the

1 difference in yours?
2 MR. SUSMAN: I'm not sure there
3 was intended to be -- all of this information,
4 all of our information would be gotten through
5 interrogatories, and interrogatories can be
6 served with the petition obviously. I think
7 when they are served with the petition the
8 defendant has 50 days to answer.
9 MR. CURRY: But the problem
10 with it is the disclosure is supposed to save
11 the necessity of a lot of discovery, and if we
12 are going to do that, they need to come in
13 earlier. At least that's what the purpose of
14 the disclosure is, and in this rule we have
15 got a 45-day gap between when defendant does
16 his disclosure --
17 MR. SUSMAN: Which rules?
18 CHAIRMAN SOULES: You are
19 talking about the State Bar proposal?
20 MR. CURRY: No. I'm talking
21 about the subcommittee for the -- yeah. The
22 State Bar proposal. Page 5. That's
23 different, and it's different from your rule,
24 too, and I would like for you to comment on
25 that what your feeling was.

1 MR. SUSMAN: Yeah. I mean, we
2 would make ours -- ours, the timing would be
3 different on ours, and that is the timing on
4 ours would be whenever you can currently under
5 the rules serve an interrogatory. You can ask
6 for these nonobjectionable things, but
7 plaintiff can serve an interrogatory with his
8 petition. When he serves it with the petition
9 my understanding is defendant has 50 days in
10 which to respond. The defendant can serve it
11 at any time, and the plaintiff's got 30 days
12 in which to respond. So if --
13 MR. CURRY: You would just use
14 whatever rules we have got?
15 MR. SUSMAN: Yeah. If
16 plaintiff's counsel is alert and wants this
17 kind of information they will routinely serve
18 us with a petition. Defense counsel as soon
19 as they get hired will fire off a set of
20 interrogatories, one set to the plaintiff
21 seeking the same kind of information.
22 CHAIRMAN SOULES: Going to,
23 Steve, your initial point there about if you
24 and Carl were negotiating how this might work
25 out, that really gets to the organizational

1 approach that the chair is trying to take to
2 this. I think that the degree of detail and
3 the, what, nonobjectionable disclosure to use
4 that phrase is going to drive some of the
5 considerations as to if we get this level of
6 detail and the mandatory disclosures upon
7 request, then how many hours of depositions do
8 we need, how many more interrogatories. In
9 other words, how much discovery do we need
10 once we establish the disclosures that we are
11 going to be required to have as a predicate to
12 discovery? Disclosures and discovery being
13 conceptionally now two different things.
14 MR. SUSMAN: Well, I will give
15 you the position of the subcommittee. We are
16 willing to deal, and we will swap off
17 specificity for the time limits. How about
18 Carl? Let him talk.
19 CHAIRMAN SOULES: I think the
20 committee is going to -- excuse me. I think
21 the committee is going to -- I mean, my sense
22 of this committee's attitude as a whole is
23 that if we can get enough disclosure then
24 discovery is going to be limited. That's the
25 approach that basically the State Bar started

1 out with, and they haven't reached the issues
2 of exactly how much time of depositions.
3 MR. CURRY: No. This is a
4 subcommittee report; is it not? And then the
5 State Bar Committee has not gone through this
6 yet.
7 CHAIRMAN SOULES: Haven't
8 reached that.
9 MR. CURRY: And there is a
10 substantial pending in the State Bar Committee
11 right now that the stronger and broader we
12 make the disclosure the less need there is to
13 limit any kind of discovery there because you
14 get so much there that automatically will
15 eliminate the need.
16 MR. SUSMAN: The less need
17 there is to limit it?
18 MR. CURRY: To limit other
19 discovery.
20 CHAIRMAN SOULES: I don't think
21 that's the sense of the committee.
22 MR. SUSMAN: I would think the
23 other way. See, they are using disclosure to
24 justify no limits. That seems to me to be
25 saying things off their head.

1 MR. CURRY: That's not the
2 committee's feeling. There is a substantial
3 group that feel that way.
4 MR. SUSMAN: All I'm saying is
5 that means give me something and then if I
6 want something else I will get it, too, and
7 that's not right.
8 CHAIRMAN SOULES: Okay. Let me
9 tell you what direction I am trying to give
10 our committee and that is to get a basis of
11 disclosure and then to take that to
12 consequential limitations on discovery or
13 correlary limitations on discovery. Now, that
14 may not work, but that's where I think we are
15 headed, and that's where I am trying to get
16 to, and I don't think we can get to
17 limitations on discovery until we have some
18 predicate for what's not going to be discovery
19 but what's going to be disclosure, and I agree
20 with you that it's going to have to be a
21 trade-off and a compromise, and so what I
22 would like to do is try to focus on the scope
23 of disclosure and then go to the issues of
24 their -- if we have that, what kind of
25 limitations on discovery can we have as a

1 correlary to the scope of that disclosure.
2 That's where -- just organizationly that's the
3 path I'm trying to take with the committee as
4 a whole.
5 John Marks and then I will go around the
6 table this way.
7 MR. MARKS: I will be brief.
8 First of all, I'm also on the Rules Committee,
9 and the Rules Committee was not in complete
10 agreement about the way these are drafted, but
11 in general I think that the purpose as stated
12 by Paul is where we ought to go, and that is
13 to require certain disclosures upon request
14 that are already required under the rules so
15 that you get that out of the way. And the
16 problem I have about, for example, identifying
17 persons with knowledge of relevant facts, it
18 goes much further than the rules now provide
19 and really creates all the traps and problems
20 that Paul was talking about, but if we cut
21 that out and go through this, in general what
22 is being proposed by the Rules Committee is
23 good. I think it's a good place to start, but
24 I just wanted to make a point that the Rules
25 Committee is not in total agreement about

1 this.

2 CHAIRMAN SOULES: Judge

3 Brister.

4 HONORABLE SCOTT BRISTER: I

5 vote for bare bones disclosure. I think

6 it's -- a couple of reasons. The concept that

7 we are going to have a long list and attorneys

8 then, "Oh, this is on Case No. 406 I'm filing

9 this year, responding to this year, I'm going

10 to check off items 1, 3, and 7 that I want to

11 request" is unrealistic. I mean, you know, I

12 get contract cases where the interrogatories

13 are if anybody died what's their funeral

14 expenses and stuff like that because the

15 interrogatories are on their word processor,

16 and that's the cheapest way to do it. It's

17 most cost effective to tell the secretary to

18 send out the standard interrogatories on them.

19 And 98 percent of the cases the request

20 sent out is going to be all items listed in

21 rule whatever. Therefore, I think it should

22 be bare bones. What is it we need? In all of

23 my hurt neck, back, slipped at the grocery

24 store on a grape, cases what that -- the

25 things you need for that case are requested

1 ought to be all that's in here, and everybody
2 else in the handful of cases where people
3 really work on things like this and spend time
4 on interrogatories, do that under the
5 extensive interrogatory practice procedure
6 that's in the subcommittee draft.
7 I have two things I want to suggest. One
8 is I like the State Bar's -- it's just a
9 request. I think we get this subcommittee
10 thing to talk about either an interrogatory
11 production, actually items (a) and (b) are
12 interrogatories, (c) and (d) are
13 interrogatories and request for production,
14 and (e) and (f) are request for production.
15 It ought to just be a request, and it includes
16 a list that you have to generate like an
17 interrogatory answer and documents you have to
18 produce like a request for production rather
19 than getting mixed up in what to call it.
20 And last comment is I like the State
21 Bar's on medical records. I don't know of any
22 defendants that are going to be satisfied with
23 getting the medical records from the
24 plaintiff. No. 1, they don't believe that the
25 plaintiff gave them the right records. They

1 are going to request them all themselves.
2 No. 2, if you ask the plaintiff which
3 ones, medical records, are reasonably related
4 a certain number of plaintiffs will say, "Oh,
5 no. Those low back records weren't because
6 this is an upper back case. So I'm not
7 telling you anything about those low back car
8 wreck accident we had a year ago because we
9 are not claiming a low back in this case."
10 Juries don't always agree with that, and so I
11 think the State Bar makes more sense, the list
12 of the doctors you've seen, who you saw, what
13 hospitals you went to, and the defendants are
14 going to want to get those themselves.
15 CHAIRMAN SOULES: Okay. Next
16 coming around the table. Tommy Jacks.
17 MR. JACKS: I'm concurring and
18 descending. I agree with Steve that at some
19 point I think it makes perfectly good sense to
20 tell each other who we are going to call at
21 trial and who we think we may call at trial,
22 and I think that's in practice how we deal
23 with the 300 people, the people who nod and
24 roll at the back of the book, usually by
25 picking up the phone and calling the other

1 lawyer and saying, "Look, who really knows
2 something and which ones do you think you are
3 going to use?"
4 I don't think that the list of witnesses
5 is a substitute for people with knowledge of
6 relevant facts because we are now under the
7 duty to divulge even those witnesses whose
8 information could kill our case, and we should
9 be, and you don't get that with the "Who are
10 you going to call" because there is no way I
11 am going to call them. When hell freezes over
12 I'm going to call them.
13 CHAIRMAN SOULES: You are
14 suggesting now that we have a requirement for
15 both persons with knowledge of relevant facts
16 and witnesses?
17 MR. JACKS: Yes. But --
18 CHAIRMAN SOULES: Is there any
19 disagreement with that on the committee?
20 MR. JACKS: I wouldn't do the
21 witness list from day one. I would do it
22 sometime when your are --
23 CHAIRMAN SOULES: At some
24 point.
25 MR. JACKS: At a more developed

1 stage in the case.
2 MR. PERRY: I think you need to
3 talk about the witnesses separately because
4 people, especially with smaller cases, said
5 that that creates a lot of problems with it.
6 CHAIRMAN SOULES: Okay. We
7 will talk about that separately. Go ahead.
8 MR. JACKS: Secondly, I think
9 that in the State Bar's drafts the summary of
10 the main facts is make work and is by and
11 large needless, and there are so many examples
12 where it doesn't make sense. I mean, for
13 example, along the way we are going to be
14 deposing people. Does that mean I have got to
15 go back and summarize every part of every
16 deposition that was favorable to me? It
17 doesn't work well with all of these.
18 Many people that you list because they do
19 have knowledge of relevant facts, but frankly,
20 you know, like some of the doctors that have
21 seen your client in the past you are going to
22 list them because they may have, but
23 truthfully I'm not going to go out and talk to
24 them, and I'm probably not going to know
25 whether they have facts favorable or not. Am

1 I under some duty to find out and summarize
2 it?
3 And then finally I agree with the
4 "gotcha" problem, and that is you are going to
5 have more and more lawyer friction fighting
6 over it. Go to trial and then "Now, Judge,
7 that wasn't in their summary and so this
8 witness can't testify to that." And I don't
9 think it's a good idea.
10 The others that I have a problem with in
11 the State Bar set are the factual bases and
12 the claims for defenses. That strikes me as
13 much more trial brief type things. It's more
14 onerous even than federal pretrial orders,
15 which is one of the things that makes federal
16 court litigation more expensive and certainly
17 more of a pain in the posterior, and we are
18 importing that into every case if we do this.
19 I don't think we need to do that.
20 I have even got problems with the factual
21 theories part of the subcommittee's approach.
22 I think it's a slim line between factual
23 theories and factual basis and state all the
24 facts that underlie your pleading of such and
25 such, and I think it's such a thin line that

1 we ought to just forget about it and not allow
2 any of it. Find out about your case by
3 talking to your witnesses and all the things
4 lawyers do to go to trial and not by doing a
5 lot of choreographic kind.
6 On the damages part of the State Bar deal
7 I don't have any trouble with the elements and
8 where they are calculable and saying you have
9 to calculate them but having to say how much
10 is for each element. How much for physical
11 pain and suffering on the one hand versus
12 physical impairment on the other, you don't
13 care. You have got to plead how much we are
14 suing you for, and that's all that matters,
15 and again, it's a "gotcha" deal.
16 If the jury comes back with 3,000 in one
17 category and 4,000 in the other and you had
18 reversed them, you know, there is going to be
19 the argument, "Judge, you ought to cut it
20 back. That's what he answered in the
21 interrogatories." You know, we don't need
22 that kind of tricks. If the defendant knows
23 how much they are going to get stuck for total
24 of those elements, that's all they need to
25 know.

1 And the last, 8(c), is make work, too,
2 producing all the documents upon which your
3 damages are based. I mean, hell, that
4 can -- you could go down to check stubs and
5 all kinds of things that you don't need, and
6 it doesn't make any sense. That's what I've
7 got to say on the subject. Thank you.
8 CHAIRMAN SOULES: Sarah Duncan.
9 MS. DUNCAN: This is not going
10 to come as a surprise to most people. I
11 strongly disagree with 6, 7, and 8 in the
12 Court Rules Committee for the same reason I am
13 against contention interrogatories. I think
14 it's a way of shifting preparation of the case
15 from one party to the other, and I don't think
16 that's fair.
17 MS. SWEENEY: Can you speak up?
18 MS. DUNCAN: Oh, I'm sorry. I
19 don't think it's fair to shift the burden of
20 preparing a factual and legal understanding of
21 the case from one party to another. There is
22 an omission in my view, and I'm not sure how
23 to get to it, that relates to factual basis
24 and claims and defenses, and that's an
25 exchange of proposed charges a lot earlier

1 than I -- I recently was in a case where I
2 didn't get the plaintiff's charge until the
3 day it was going to be submitted to the jury,
4 and it didn't work very well. It was a
5 complicated legal theory case, but I think you
6 can have an exchange of charges as a part of
7 unobjectionable disclosure in a way and get to
8 what can legitimately in my view be asked as
9 far as the factual and legal basis of the
10 claim, and I don't know if that's something
11 the subcommittee would consider putting in
12 here or someplace else.
13 CHAIRMAN SOULES: Judge
14 Guittard.
15 HONORABLE C. A. GUITTARD: I'm
16 concerned about the scope of these
17 interrogatories as to whether or not they
18 should have a statement of what the witness is
19 expected to testify to. My question is, is
20 the party that answers to be limited by that
21 statement? If so, it would seem to me that
22 there is -- as Tommy Jacks suggested, there is
23 going to be a lot of satellite litigation and
24 a lot of problems with respect to
25 admissibility of evidence and motions and so

1 forth as distinguished from the case where you
2 merely disclose the witnesses. Can you answer
3 that for me?
4 MR. HAMILTON: Yes, Judge. I
5 think that that's the most troublesome area of
6 this whole plan is the having to state what
7 your witnesses are going to say or what people
8 with knowledge of relevant facts are going to
9 say, and I agree with Steve's assessment that
10 when we leave it only to favorable information
11 and not unfavorable, that's bad. We recognize
12 that. The federal system provides that you
13 have to disclose both favorable and
14 unfavorable.
15 Consensus, however, seems to be that
16 nobody wants to do that, and even on our
17 committee we are divided on that score. So I
18 suppose that the best way to handle that
19 problem is just to eliminate that portion of
20 (a)(1) and just require that the witnesses and
21 the people with knowledge of relevant facts be
22 listed together with the subject matter about
23 which they have knowledge and just eliminate
24 the rest of that, which I think would dispel a
25 lot of controversy.

1 CHAIRMAN SOULES: Why don't
2 we -- what we are trying to accomplish here
3 seems to be, and maybe I don't have it right,
4 is we want enough information to know whether
5 we pick up the phone and call this person and
6 find out what they know or go interview them
7 or take their deposition. Should we follow up
8 because if they were an eyewitness to the
9 collision, okay. We have got to talk to them,
10 or you don't have to talk to them, whatever
11 your decision is.
12 MR. HAMILTON: But as a
13 practical matter it's still not going to solve
14 the problem.
15 CHAIRMAN SOULES: But when you
16 start marshalling facts then you really get
17 into a quagmire of problems, and the cases are
18 pretty much juxtaposed now about whether you
19 can get subject, which you can. How much more
20 than that you can get is probably very little.
21 Richard Orsinger and then I will come around
22 the table.
23 MR. ORSINGER: These are kind
24 of cumulative comments, but I agree, Luke,
25 with your suggestion that we ought to try to

1 focus on the mandatory disclosure before we
2 address the issue of limits, but in support of
3 what Steve was saying it seems to me if we can
4 move a lot of our work and preparation into
5 these mandatory disclosure areas, that ought
6 to be a reason to have more severe limitations
7 on other forms of discovery and maybe even
8 reduce below the 50 hours per side, not to
9 just lift the ceiling and let everybody go.
10 But there is a double value to that because I
11 also think the bulk of our cases are smaller
12 cases that are never going to hit the 50 hour
13 limit anyway, and the mandatory disclosure is
14 the only thing we are talking about that's
15 going to make a difference to those cases.
16 The 50-hour limitation won't hit the smaller
17 cases.
18 CHAIRMAN SOULES: Okay. When I
19 get around the table I'm going to -- oh, I'm
20 sorry. Were you not through? Go ahead.
21 MR. ORSINGER: No, I didn't. I
22 have to disagree with Sarah about the claims
23 or defenses. I think that right now there is
24 a lot of guesswork that goes on in a lawsuit
25 where you have multiple theories and you don't

1 know exactly what someone's claims or defenses
2 are, and then you take the deposition of
3 another party and they say, "Well, I don't
4 understand all of these legal terms," and so
5 you are kind of frustrated about not being
6 able to find out what the elements of the
7 causes of actions or defenses are.
8 I think the lawyer ought to understand
9 their case intellectually. They ought to be
10 able to explain by name, or you know, name
11 whatever statutes they are relying on or
12 constitutions or regs, and if it's a
13 recognized cause of action, they ought to be
14 able to say, "This is for a breach of
15 contract. This is for the tort of fraud" or
16 whatever, and let's eliminate that guesswork.
17 I frankly don't think that ought to be in
18 discovery. I think we ought to do that in
19 pleadings. I think we ought to require that
20 the pleadings set out any statute,
21 constitutional provision, or reg, and if it's
22 a recognized cause of action or defense they
23 ought to name it, and that would eliminate the
24 problem of how do you make the pleadings
25 equate to these disclosures. And I don't

1 think that's unfair, and that's what a jury
2 charge does anyway.
3 If you send your proposed jury charge to
4 the other side, you are setting out crystal
5 clear what your claims and defenses are and
6 what your legal theories are and what the
7 elements are. So to me it's not unfair. To
8 me it's fair and the earlier we do that we
9 make lawyers understand their own cases. And
10 if they haven't got a case or if they haven't
11 got a theory, let's get it out early on and
12 stop wasting extra time discovering it.
13 And then I would like to agree with what
14 Justice Guittard said. I'm extremely worried
15 if you are having to detail what witnesses are
16 going to say that the trial judge is going to
17 preclude you from offering testimony that you
18 didn't reveal in that answer to interrogatory,
19 and that's especially scary to me when we are
20 vouching for what third party witnesses say
21 because how am I supposed to know what 30
22 people might say if asked a certain question
23 in trial when it might not even occur to me to
24 ask that question until somebody testifies to
25 something at trial? So I'm very worried about

1 extreme detail and vouching for what witnesses
2 are going to say, but I think we ought to just
3 have a green light for lawyers to define their
4 cases and lay them out so everybody can
5 understand what your litigating. I'm
6 finished.
7 CHAIRMAN SOULES: Paula.
8 MS. SWEENEY: The word that
9 keeps coming to mind with a lot of this is
10 that we -- what Paul is talking about is
11 disclosing nonobjectionable material without
12 having to go to the courthouse to have a fight
13 over what does a relevant fact mean or is it
14 work product or not. That has absolutely
15 nothing to do with what some of these rules
16 require, which is to script the trial for the
17 other side, and the concept of scripting is
18 the concept that is eternally frustrating, and
19 it's going to run the cost up for everyone.
20 It does not advance the ball and is a
21 "gotcha," and we have to stay away and
22 discipline ourselves to stay away from the
23 temptation to ask the other side for their
24 script because we are going to have to give
25 ours up because you can never be thorough in

1 your script, because we will run into what we
2 have now with expert reports in a med-mal
3 case. There are judges who will hold the
4 report and if the word is not on that page,
5 then it can't come out of their mouth on the
6 stand. It's a script.
7 And to the extent that we are stumbling
8 periodically in that direction it is, No. 1,
9 not an adversary system anymore. No. 2, it is
10 going to do nothing but drive up costs,
11 increase disputes, waste time and money, and
12 get us completely away from the original
13 purposes which, you know, was to drain the
14 swamp, and we are still trying to drain the
15 swamp, not write somebody a script.
16 CHAIRMAN SOULES: Steve.
17 MR. SUSMAN: Mr. Chairman, we
18 have nine minutes left, and I did want to
19 speak on behalf of the subcommittee again, and
20 this is procedural, not substantive at this
21 point. We have spent and put a lot of work
22 into this, and of course, we are willing to do
23 more work. We have gotten, I don't think, any
24 sense of direction from the meeting today. So
25 my hyperactive subcommittee and I will have to

1 stand now for the next two months until we
2 have our next meeting, but I would suggest
3 this for the next meeting.
4 One, it seems unfair for this group to
5 have a subcommittee where the -- it's not the
6 subcommittee's proposal which is discussed but
7 some other proposal which is discussed, and it
8 is impossible to sit around here at a meeting
9 and deal with three different proposals. One
10 comes in with a fax from some law professor,
11 okay, on the 13th, not even time to be
12 considered by the subcommittee and becomes a
13 principal piece for discussion at this
14 meeting.
15 You are going to lose a lot of energy and
16 attention from a lot of people who have worked
17 on this, including yours truly, if we
18 don't -- and that's not to say I don't mind a
19 fair fight. Okay. And I hope we come in and
20 go provision by provision and let's vote it in
21 or vote it out, folks, and those who lose -- I
22 am a fair loser. Okay.
23 But I do sense I am frustrated at coming
24 to a meeting where various other groups who
25 are not part of -- that's not to say -- I

1 began my speech by saying we considered their
2 proposals such as they existed until May 13th.
3 We didn't consider that one because it came in
4 on May 13th, obviously, but I think it is
5 important that we begin next time with the
6 subcommittee's proposal, and I might add, the
7 subcommittee's suggested order of discussion.
8 I believe that this discussion which the
9 chair has directed at the disclosure is wrong
10 directed. Of course, I'm not the chair. You
11 are, but I think the upshot of it will be
12 that, listen, everything we did, as I said,
13 standard disclosures, standard requests, you
14 are not going to save any money at all. You
15 are just going to spend more money on the
16 discovery process, something I don't want to
17 be a part of. I have better things to do with
18 my life.
19 If we are talking about making changes
20 that save money to litigants in our system, I
21 want to be part of it; therefore, I suggest we
22 begin talking about the limitations and then
23 after you decide them, the limitations, then
24 if you oppose them, then you add as much
25 disclosure as you think is necessary to make

1 the limitations not unfair, not begin your
2 discussion with things that we all recognize
3 are going to cost more money with this hope
4 that, well, maybe if we get agreement on them
5 we can cut down the rest because obviously we
6 know that there are some groups that say if we
7 get agreement on them, there will be no reason
8 to limit the rest because we will exercise
9 such self-restraint that you won't have to
10 limit us. So I mean no one is -- that's why I
11 suggest you begin discussing the limits first
12 and then go to this issue of how much
13 voluntary disclosure, but that's -- I've said
14 my piece.
15 CHAIRMAN SOULES: All right.
16 Well, the chair wasn't -- pardon me. I was
17 not aware that there was sentiment here not to
18 limit discovery and to use the disclosures as
19 a predicate for saying, well, let's just go on
20 and have unlimited discovery. Now, the
21 approach I felt was important was to find out
22 what we would require in the disclosure
23 process and that that would justify the
24 limitations that your committee has worked on
25 hard and thought through very thoroughly and

1 get that on the table as a correlary to
2 disclosure, and if I have done that in
3 reverse, I apologize, but to me that was the
4 logical approach to it. Let me get a sense of
5 the committee. How many feel that the
6 disclosures should be used as a predicate to
7 limit discovery?
8 MR. JACKS: I don't understand.
9 I'm sorry.
10 HONORABLE ANN TYRRELL COCHRAN:
11 As opposed to what?
12 CHAIRMAN SOULES: As opposed to
13 opening discovery wide open because --
14 HONORABLE ANN TYRRELL COCHRAN:
15 But those are the two choices?
16 CHAIRMAN SOULES: Yes. Okay.
17 MR. JACKS: Say it one more
18 time, please.
19 MR. PERRY: Mr. Chairman, I
20 don't think that's an answerable question.
21 CHAIRMAN SOULES: All right.
22 Why not?
23 MR. PERRY: I think everybody
24 in the room believes that we are here largely
25 for the purpose of cutting down on the cost

1 and the expense and the needless trouble of
2 discovery, but it is not and cannot be
3 approached in a simplistic manner. The
4 discovery, you know, I sat on the Discovery
5 Task Force for about two years, and we went
6 through and identified a number of problems
7 and worked a long time on trying to develop
8 solutions, and what you end up finding is that
9 everything you do and every decision you make
10 impacts a whole lot of other areas of the
11 rules.
12 It's almost impossible to decide on what
13 is the proper starting point, and as you go
14 through the discussions you find that there
15 are many varying opinions that are not
16 anticipated from people that you don't know
17 cared about something, and I don't know that
18 there is any way for this committee to
19 approach the matter other than to start at
20 someplace and start making tentative decisions
21 and go forward with the idea that they may
22 have to come back and change some of those
23 tentative decisions as they go along.
24 CHAIRMAN SOULES: I agree with
25 that completely, and that's what I'm trying to

1 do is get some step through this with
2 tentative decisions, tentative orientations so
3 that we kind of know where we are headed even
4 though we may change directions at a later
5 time.
6 MR. PERRY: Let me also just
7 say very briefly as between these two
8 proposals that we have been talking about,
9 although there has been a lot of discussion on
10 the differences between them, if you start
11 going down them item by item the similarities
12 are very much greater than the differences.
13 Now, it may be true that the differences is
14 where we need to focus our attention, but at
15 some point if we start going through them item
16 by item I think we will find that we are
17 making a lot more progress than we think we
18 are.
19 CHAIRMAN SOULES: Well, that
20 seems to me to be the case as well, and the
21 reason that the State Bar draft has been
22 emphasized in the chair's approach is that it
23 has a lot more detail in it, and you
24 could -- we will be focusing on this issue or
25 that item and we can reject it or discard it.

1 The other one is bare bones, and it doesn't
2 have that much detail in it. So there may be
3 things that we may overlook unless we go to
4 something that has a whole lot of detail in
5 it. We look at it, and we reject it or we
6 accept it.
7 And I apologize to you, Steve, if I
8 mistreated your subcommittee in any way. It
9 certainly was not my intention.
10 MR. SUSMAN: No. You really
11 didn't. You really didn't. The approaches
12 are really totally different. Okay. We threw
13 in at the last minute this standard request.
14 It was not a keepheart of our thing. It
15 wasn't even -- it was a last minute throw-in,
16 okay, that Scott drafted. We said "Scott give
17 them some voluntary disclosure." Okay. So we
18 drafted it. Okay. It was a last minute
19 thought because that to us is not the
20 important key, crucial, anything, and
21 certainly not money-saving.
22 The State Bar on the other hand has
23 nothing about limiting the time, limiting the
24 number, nothing like that. Okay. There is a
25 vast philosophical difference between the two

1 proposals. Let's focus on that difference,
2 not on our eyewash, which was their
3 centerpiece. That's not going to move the
4 ball. That's what I'm saying. To talk about
5 this disclosure rule as a first thing is not
6 really helpful because, you know, no one in
7 our group felt strong about it one way or the
8 other very much.
9 HONORABLE F. SCOTT MCCOWN: I
10 mean, it's bare bones by design. The things
11 we left out we left out because we didn't want
12 them. We wanted a system that would operate
13 with presumptive limits, and we focused in on
14 making a system that would work for the small
15 case and the small lawyer. And my concern
16 really is sitting through this morning has
17 been frustrating for me because I think that
18 the world, the consumers who use our dispute
19 resolution system, are fed up and that what we
20 have done today is largely play inside
21 baseball and accepted a system that they are
22 fed up with, and I think that's why we have
23 alternative dispute resolution growing so
24 rapidly.
25 And if we can't come to grips with what

1 kind of changes are we going to make that get
2 at the real cost and get at the delay and get
3 at the intrusion, unnecessary intrusion, then
4 the Legislature is going to do this for us,
5 and I don't think we are getting there.
6 CHAIRMAN SOULES: Well, what's
7 your suggestion on how we get there, put the
8 limitations up front and the disclosures to
9 the rear, reverse the order that the chair has
10 taken? And I'm willing to do that. Just that
11 didn't seem to be in my logic, and that's just
12 mine and it's seldom very effective, but that
13 seemed to be the approach to take, and I will
14 reverse that if it makes more sense, and
15 certainly if it makes more sense I want to
16 reverse it.
17 HONORABLE F. SCOTT MCCOWN:
18 Well, my suggestion is we need to work at a
19 different level of abstraction, that what we
20 need to be working at in this big group is at
21 the big picture level like we began with, is
22 it going to be judge managed, is it going to
23 be limits. Then in subcommittee we can work
24 out a lot of the detail that we focused on
25 today, but I think we need to look at

1 fundamentally what kind of system we are going
2 to design.
3 PROFESSOR ALBRIGHT: Can I make
4 a suggestion?
5 CHAIRMAN SOULES: Alex
6 Albright.
7 PROFESSOR ALBRIGHT: I think
8 that Steve handled our subcommittee extremely
9 well. We got so much done in a short period
10 of time, and I think Steve has a real good
11 focus on how to take this through so that
12 you-all can understand our approach and why we
13 ended up where we did. So I would suggest to
14 kind of let Steve take everybody through and
15 to decide what votes -- you know, at what
16 point we need to decide, you know, between one
17 approach or another and the philosophical
18 decisions that need to be made because that's
19 kind of how we did it. So he's done it once,
20 and I think he did a very good job of it.
21 CHAIRMAN SOULES: Okay. Steve,
22 go ahead.
23 MR. SUSMAN: I guess, too, and
24 there is an issue, too -- I mean, I think kind
25 of an important issue, but that's the chair's

1 decision, too. I mean, to what extent do we
2 revote and revote and revote? I mean, one of
3 the reasons our subcommittee was able to move
4 forward is we made a decision. We recorded it
5 in the minutes, and we did not go back and
6 rehash it, which in this group is even worse
7 than in the subcommittee because there are a
8 different group of people that show every
9 time. I mean, obviously, so in the
10 subcommittee we had the same group at least,
11 but this group -- so to some extent, I mean,
12 we were discussing things today which had
13 already been voted on on March 18th. Look at
14 Richard's minutes. I mean, they had been
15 voted on by this group.
16 Now, a lot of this stuff is a bitter pill
17 or a hard pill or a big pill to swallow, and
18 so maybe we need some sessions like this
19 before we begin voting, just some sessions,
20 but I do suggest that once we begin voting
21 we -- that's put aside, and we go on to vote
22 on the next thing so we aren't constantly
23 doing the backsliding that depends on who's
24 here to argue their position. It's just a
25 matter of procedure. I just think we need to

1 work our way through and --

2 CHAIRMAN SOULES: Well, I agree

3 with that, and if you recall, we spent some

4 time on the charge, and that's been in years

5 past a lot of time on the charge,

6 philosophically everybody in turmoil about

7 what to do, but we finally got that done

8 yesterday, and these are policy issues, and

9 these discovery issues are big policy issues,

10 and it's important, I think, for people to

11 think and hear and talk and then we will get

12 to vote it, and when we get to that -- but

13 probably we're not ready for that now. Maybe

14 we will be ready for it by the end of the

15 session next time, and we will, you know,

16 subject to the committees's preference, but it

17 would be my preference to put this on the

18 table and get through it next time all the

19 way.

20 There may be some loose ends because of

21 the philosophical approaches that we decide to

22 take. So there are some major changes that

23 will go back to subcommittee, so it may be two

24 meetings away before we get this finalized.

25 And we didn't give you a lot of time because

1 only today was available to get there. So we
2 do have representatives of 50,000 lawyers who
3 have given us a major work product that I
4 think the committee as a whole needs to
5 consider as well as the subcommittee's
6 consideration before we get to finalization,
7 and all this I guess needs to be brought out
8 somehow before we finalize that. That's what
9 I'm trying to do, and I'm open to any
10 suggestions on how I can do it better.
11 Absolutely. David and then Carl and then we
12 will adjourn.
13 MR. PERRY: I was going to
14 suggest that we might consider approaching it
15 on a problem and solution basis, that this
16 problem has identified. This is the proposed
17 solution. Try to do that, then go to the next
18 problem and the next proposed solution, and a
19 proposed solution might deal with a group of
20 rules rather than just one rule.
21 CHAIRMAN SOULES: Carl.
22 MR. HAMILTON: I just want to
23 correct one misconception. The State Bar
24 Committee's proposal is not -- the disclosure
25 is not a predicate for any kind of a

1 CHAIRMAN SOULES: Steve, when
2 you get back from New York I should be out of
3 trial next week. If you will give me a call,
4 I will work with you on how you think this
5 ought to be approached, and we can get a
6 schedule. Thank you all very much. The next
7 meeting will be in the State Bar building.
8 (Whereupon the committee was
9 adjourned at 12:30 p.m.)
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 limitation or a broadness of discovery. It
2 has nothing to do with it. Disclosure is a
3 separate category from your mandatory time
4 limits and all, which we think philosophically
5 are wrong because each case ought to be
6 designed according to the case, but the two
7 are really not related.
8 CHAIRMAN SOULES: Okay. Anne
9 Gardner.
10 MS. GARDNER: Disclosure as
11 recommended by the Bar Committee it seems to
12 me goes to the problem that Judge Hecht
13 mentioned back in January when he described
14 one of the problems with discovery being that
15 it's a guessing game, a dragnet approach. I
16 remembered him using those words, and to the
17 extent that we can use disclosure upon
18 request, disclosure of mandatory, whatever we
19 want to call it, but disclosure in some form
20 and even whether it's by pleadings, pretrial
21 order, or whatever, it seems to me that that
22 will assist in limiting discovery and define
23 the parameters of it and then you can use the
24 limits as proposed by their subcommittee in
25 addition.

1 -

2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

3 -

4

5 I, D'LOIS LEA NESBITT, Certified

6 Shorthand Reporter, State of Texas, hereby

7 certify that I reported the above hearing of

8 the Supreme Court Advisory Committee on May

9 21, 1994, and the same were therafter reduced

10 to computer transcription by me.

11 I further certify that the costs for my

12 services in this matter are $974.00.

13 CHARGED TO: Luther H. Soules, III.

14

15 Given under my hand and seal of office on

16 this the 8th day of June, 1994.

17

18

19 ANNA RENKEN & ASSOCIATES

20 3404 Guadalupe
Austin, Texas 78705

21 (512)452-0009

22

D'Lois Lea Nesbitt

23 D'LOIS LEA NESBITT, CSR
Certification No. 4546

24 Cert. Expires 12/31/94

25 #001,681DN