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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

9 JULY 22, 1995

10 (MORNING SESSION)

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18 Taken before D'Lois L. Jones, a
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 22nd day of
21 July, A.D., 1995, between the hours of 8:00
22 o'clock a.m. and 12:45 o'clock noon at the
23 Texas Law Center, 1414 Colorado, Room 104,
24 Austin, Texas 78701.
25

COPY

JULY 22, 1995

MEMBERS PRESENT:

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

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS:

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

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 22, 1995 - MORNING SESSION

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1 CHAIRMAN SOULES: It is 8:00
2 o'clock, and we are on the record for
3 rule -- where do we want to start? Scott,
4 you-all were doing some redraft. Why don't we
5 start with that?
6 HONORABLE F. SCOTT MCCOWN: We
7 are not ready. We have got to get it printed
8 out.
9 CHAIRMAN SOULES: All right.
10 Is anybody ready on any of the sort of
11 corrective work that we were doing? All
12 right. Then we will start with Rule 22.
13 Alex, you want to give us Rule 22?
14 HONORABLE F. SCOTT MCCOWN:
15 Luke, it might be good if I gave you Rule 22.
16 CHAIRMAN SOULES: Okay. Give
17 us Rule 22, Judge.
18 HONORABLE F. SCOTT MCCOWN: All
19 right. Rule 22 is physical and mental
20 examinations, and I don't think that the
21 content or form of the rule is the least bit
22 controversial. What we have, if you will look
23 behind Tab 22, we have a policy difference
24 between the committee and Judge Brister, who
25 is making a suggestion. Judge Brister wants

1 to go to a request and response system for
2 physical and mental exams because -- and I
3 will let him explain and tell why, but
4 basically because they are routine, and it
5 would be more efficient, and he makes the same
6 suggestion with regard to entry on property.
7 So it will be the same issue when we get to
8 the entry on property rule.
9 The committee considered and rejected
10 that suggestion because of two reasons. These
11 rules in part are designed to curtail
12 discovery and set a standard, and if you go to
13 a request system, it suggests or sets the
14 standard that they ought to be pretty
15 routinely granted, and we thought that when
16 you are saying that the court is going to
17 order somebody to go in a room with a doctor
18 and take off their clothes and be physically
19 examined or when the court is going to order
20 somebody to let other people onto their
21 property to inspect or take a video camera,
22 that there ought to be a heightened standard,
23 and so we stayed with the present formulation
24 of motion, good cause, court order.
25 Even though we recognize that that's

1 often going to be routinely negotiated by the
2 parties or routinely granted by the court, we
3 thought that the standard nevertheless ought
4 to be motion, good cause, and court order.
5 Once you decide whether you want a request and
6 response system or whether you want a motion,
7 good cause, court order system then you have
8 made all the decisions because I don't
9 think -- and correct me if I am wrong, Alex --
10 that really we have made -- I don't see any
11 redline changes on either of these rules.
12 PROFESSOR ALBRIGHT: No.
13 CHAIRMAN SOULES: So these
14 redlines that we are looking at on Rule 22 and
15 Rule 23 are the present rule except for the
16 changes shown; is that correct?
17 PROFESSOR ALBRIGHT: No. I
18 think that's not correct.
19 HONORABLE F. SCOTT MCCOWN: No.
20 They are the rules as we approved them last
21 time.
22 CHAIRMAN SOULES: Oh.
23 PROFESSOR ALBRIGHT: We did not
24 talk about these rules last time, and I think
25 that's a redlined draft from -- yeah. That's

1 a redlined draft from the last meeting. At
2 the last meeting in the main meeting you got a
3 redlined draft from the current rule, and I
4 have it in front of me right now, and there
5 are virtually no changes except adding the "at
6 no time later than 30 days before the end of
7 the applicable discovery period" at the very
8 beginning and then just changes to the numbers
9 and letters.
10 CHAIRMAN SOULES: Same on 23?
11 In other words, the alterations of the
12 existing rule are really timing so that they
13 fit the discovery window?
14 HONORABLE F. SCOTT MCCOWN:
15 Right.
16 PROFESSOR ALBRIGHT: That's
17 exactly right. That's the only change that
18 this has from the current rule.
19 CHAIRMAN SOULES: From the
20 current rule. Okay. Judge Brister, response?
21 HONORABLE SCOTT BRISTER: Well,
22 I think Scott said it fairly. I mean, these
23 are routine. At least they are in Houston. I
24 mean, an IME is an IME, and they do it in
25 every case. Entry on property just doesn't

1 come up that often, but when you say, well, we
2 think it ought to be more difficult, what
3 you're really saying is we think it ought to
4 be more expensive and time consuming. Why
5 should we make something more expensive and
6 time consuming? If somebody has a problem
7 with it, you just object.
8 The problem with -- I would assume most
9 people in this room on most of your cases do
10 it in exactly the form. A request and
11 response system would be involved or maybe
12 even less formally where you just call up and
13 say, "When can we come out and look at it?"
14 But as we all know, there is 25 percent of the
15 Bar who have an office policy they don't
16 return phone calls, period.
17 Now, you can call them up and try to set
18 the deposition and an IME up 'til you are blue
19 in the face. You can send them the motion.
20 They will not respond, and you will not find
21 out if they have a problem until you go down
22 to the court to get the order and then they
23 will say something like, "That's fine. We
24 will be happy to do it," and you have just
25 spent hours and thousands of dollars, and

1 there is no reason to do that when you can
2 simply send them a request. If they don't
3 respond, then you do it.
4 CHAIRMAN SOULES: Anything
5 else, Judge Brister?
6 HONORABLE SCOTT BRISTER: No.
7 CHAIRMAN SOULES: Okay. Joe.
8 MR. LATTING: Scott McCown, I
9 have a question for you based on something
10 that Judge Brister said. I think that in my
11 practice that a motion and an order costs $500
12 at least by the time you get -- and I can
13 defend that. It probably costs more than
14 that, but my question is could we put -- would
15 it satisfy your concern if we put a footnote
16 or a comment that said that this ought to be a
17 serious matter, and because I am concerned
18 about having to go to court if you don't have
19 to go to court.
20 HONORABLE F. SCOTT MCCOWN:
21 Well, maybe the motions and orders you are
22 filing cost $500, but it wouldn't cost $500 to
23 file this kind of motion.
24 MR. LATTING: Not to file it,
25 but to set it, to talk to Robert, to find out

1 when you can find a judge, to go over there to
2 wait 'til a court's available to order it, to
3 get back to your office. By the time you have
4 done that you have burned up a lot of time.
5 HONORABLE F. SCOTT MCCOWN:
6 Okay. Well, I think my response to that would
7 be, though, that most of these, either IME's
8 or entries on property, most of these are
9 negotiated now. Part of what makes it
10 possible to negotiate those is that the
11 requesting party knows that they have got to
12 cut the responding party some pretty good
13 terms as in who the doctor is going to be or
14 when we are going to go on your property,
15 because if they can't get a deal then they
16 have to go to court to get an order.
17 When you shift to a request system you
18 lose that nuclear deterrent, if you want to
19 call it that, that helps negotiate those
20 deals; and part of what this committee has
21 been about is cutting costs, and so I
22 recognize that maybe there is a little extra
23 cost here, but a big part of what we are also
24 about is that the public has felt that
25 discovery is too intrusive; and in this day of

1 property rights to say that we are going to
2 have a new rule that to go on a person's
3 property all you have got to do basically is
4 request and then they have got the burden, and
5 this applies to nonparties, too, by the way.
6 They have got the burden of going to
7 court if they have the objection, is to me to
8 shift the cost in the wrong area, the wrong
9 way, that when you are talking about searching
10 property, when you are talking about searching
11 a body, that you ought to have to file a
12 motion and get an order. If you can't work it
13 out, you ought to have to go to court.
14 HONORABLE SCOTT BRISTER: Let
15 me just --
16 CHAIRMAN SOULES: Since we are
17 on a -- the system today requires court
18 invention absent agreement. You have to go
19 get an order from the court. Could we hear
20 from the district judges and maybe the lawyers
21 who actually are in the personal injury field,
22 how often is one of these motions denied
23 outright? Does it ever happen?
24 HONORABLE DAVID PEEPLES:
25 Seldom.

1 HONORABLE F. SCOTT MCCOWN:
2 They are seldom denied, but they are
3 often -- you often pick between what kind of
4 doctor, which doctor; or with entry on
5 property, the judge often is making decisions
6 about when, where, what kind of cameras, who's
7 going to be there. Entry on property --
8 CHAIRMAN SOULES: I asked about
9 personal injury.
10 HONORABLE F. SCOTT MCCOWN:
11 Well, it's true with both. It's the same with
12 both.
13 CHAIRMAN SOULES: Okay. Could
14 I get a response on personal injury first?
15 John, what's your experience, Marks, on IME's?
16 Are they generally granted even though you
17 resist or granted in your favor even though
18 the plaintiff --
19 MR. MARKS: Usually I get one
20 when I want one.
21 CHAIRMAN SOULES: Judge
22 Peeples, what's your experience?
23 HONORABLE DAVID PEEPLES:
24 Almost always granted but there is almost
25 always an issue about who the doctor is going

1 to be. That's the reason they are there.
2 CHAIRMAN SOULES: Now, that
3 issue, if that's driving the court hearing
4 process, we would at least by a notice
5 provision get rid of those hearings where who
6 the doctor is going to be is not an issue. Or
7 not?
8 HONORABLE F. SCOTT MCCOWN:
9 Well, if who the doctor isn't going to be is
10 not an issue, they send in an agreed order.
11 CHAIRMAN SOULES: Whether there
12 is going to be an IME is never an issue. It's
13 always who the doctor is. Is that what you're
14 saying?
15 HONORABLE SCOTT BRISTER: I
16 think that's right.
17 HONORABLE F. SCOTT MCCOWN:
18 Well, I wouldn't quite go that far.
19 CHAIRMAN SOULES: Mike
20 Gallagher.
21 MR. GALLAGHER: I want to say
22 that that's not my experience at all. The
23 only time that I have found that trial judges
24 will grant an IME is in a circumstance in
25 which the plaintiff has in effect had an IME

1 by the plaintiff's -- by a doctor to whom the
2 plaintiff was referred by the plaintiff
3 lawyer; and in the circumstance in which I
4 have treating doctors that I did not refer the
5 plaintiff to, I resist strongly any -- because
6 it's not an IME to begin with, but and my
7 experience has been that the trial judges in
8 Harris County do not routinely grant them
9 unless they feel, well, okay, the plaintiff
10 got examined by the plaintiff's doctor, and
11 now they need to be examined by the
12 defendant's doctor.
13 HONORABLE DAVID PEEPLES: Luke,
14 I find that the issue of good cause is
15 asserted by the plaintiff a lot of the time.
16 I mean, what's the good cause for this
17 request? I mean, it's just an ordinary case,
18 and why do they want to examine my client? So
19 that's an issue in addition to who the doctor
20 is going to be.
21 CHAIRMAN SOULES: Okay. Judge
22 Brister.
23 HONORABLE SCOTT BRISTER: To me
24 this -- I mean, it used to be you had to do
25 that for depositions. You had to have good

1 cause and a court order. I am just suggesting
2 we bring this out of the Forties into the
3 Eighties and Nineties. Then you may want to
4 put other limitations eventually on it, but I
5 mean, it used to be all discovery was that
6 way, and yes, it's intrusive, the IME or the
7 entry on property. A lot of people don't like
8 oral depositions either, where you have got to
9 sit there and be grilled for hours and days,
10 but we don't allow them to just say, "Oh,
11 well, I don't want to." It's discovery, and
12 if we want to go back to court order only,
13 yeah, we could cut a lot of discovery if you
14 have to get my order on all depositions and on
15 all interrogatories, but that's all I am going
16 to be able to do.
17 CHAIRMAN SOULES: Rusty.
18 MR. MCMAINS: Well, the
19 assumption it seems is that because you have a
20 motion practice that you are going to have
21 hearings. That's not my experience either.
22 MR. GALLAGHER: No.
23 MR. MCMAINS: A lot of times
24 they are just submitted in writing anyway. I
25 mean, the judge will not give you a hearing on

1 such things. So if you don't have any genuine
2 basis for contesting it, it's kind of
3 routinely granted anyway. So I don't know
4 that it saves that much to go through request.
5 You don't have oral hearings on all of these,
6 do you?
7 HONORABLE SCOTT BRISTER: Sure.
8 MR. MCMAINS: Oh, do you?
9 HONORABLE SCOTT BRISTER: Sure.
10 And the reason I do is because the judges that
11 don't have a submission docket that they have
12 to wait a month to make sure they have got all
13 the responses up from downstairs in the
14 clerk's office, or they are not playing with a
15 full deck; and my experience is if you want me
16 to rule one something within a week or ten
17 days of when you filed it, you have to have an
18 oral hearing because submission I have to wait
19 a couple of weeks to make sure I have got all
20 the papers.
21 MR. MCMAINS: Well, that just
22 may depend on the particular county that you
23 are in. I mean, in the smaller counties in
24 South Texas we don't have that.
25 CHAIRMAN SOULES: Well, we

1 looked at this ten years ago, or I guess
2 before because these rules became effective in
3 '84, when we changed -- see, document request
4 used to be on court order only, and that was
5 changed in the mid-Eighties, and these were
6 not changed for the very reasons that Scott
7 McCown is talking about, but that doesn't mean
8 it's not time to change them now, but this
9 very issue has come up before, and it's an
10 important issue. Which is less costly, which
11 is less offensive, I think is probably the
12 issue. Scott McCown.

13 HONORABLE F. SCOTT MCCOWN:
14 Well, keep in mind that with IME's we have
15 included now already in the present rules
16 psychiatrists and psychologists. So you are
17 talking about getting inside people's heads as
18 well as getting inside their bodies, and I
19 agree with Judge Brister that we have a
20 general policy of open cheap discovery, but
21 any policy carried to its complete logical
22 conclusion begins to cut against other
23 important policies, and you have to balance;
24 and when you are talking about getting in a
25 body, getting in a head with the shrink,

1 coming onto property, I think the public would
2 be shocked to know that we had abandoned the
3 motion, good cause, order practice.
4 CHAIRMAN SOULES: Rusty
5 McMains.
6 MR. MCMAINS: Well, the other
7 problem is that I don't think, as Scott points
8 out, certainly the entry on property motion is
9 one that can be done to nonparty, and there
10 just isn't any way in the world we could have
11 it noncourt intervention in trying to go on
12 somebody else's property. I don't see how
13 that's an acceptable procedure.
14 CHAIRMAN SOULES: Just give
15 notice you are going to trespass.
16 MR. MCMAINS: Yeah. Notice to
17 trespass.
18 CHAIRMAN SOULES: Judge
19 Cornelius.
20 JUSTICE CORNELIUS: With
21 respect to mental and physical examinations, I
22 don't know if you want to address this problem
23 or not, but you might want to consider it. We
24 recently had an application for writ of
25 mandamus seeking to require the trial judge to

1 allow the plaintiff to take her lawyer with
2 her to the examination, and the trial judge
3 refused to so order, and we refused to change
4 his order, but it's a matter that is not
5 addressed in the rules, and it's probably
6 something that's going to be more frequent,
7 you know. So I don't know if you want to
8 consider that in connection with that rule or
9 not.
10 CHAIRMAN SOULES: Okay. Anyone
11 else? Let's get a show of hands. Those who
12 feel that we should go to -- stated either
13 way, that we should retain motion and order on
14 one hand and just talking about -- let's take
15 them one at a time, on the IME rule first, or
16 go to a notice.
17 HONORABLE F. SCOTT MCCOWN:
18 Luke, if it would be more official, why don't
19 I just move the adoption of the committee's
20 Rule 22?
21 CHAIRMAN SOULES: All right.
22 MR. MCMAINS: Second.
23 CHAIRMAN SOULES: Moved and
24 seconded. Any further discussion on this?
25 HONORABLE DAVID PEEPLES: Luke,

1 I might want to talk about the good cause
2 requirement. I'm inclined to vote for the
3 proposal, but I think maybe good cause is a
4 little more than you ought to have to show,
5 but I do think going to court is a good idea
6 on this, and I will just tell you, I am
7 concerned about the idea that you can just
8 send out a request for a "jillion" documents
9 going back to the year one, and the burden is
10 on the other side to come in and whittle it
11 down, but we have got a different regime on
12 this and property.
13 And maybe, you know, the exam of a person
14 and property is different from the right to
15 just rummage through documents, but I am not
16 sure it was a good decision that was made 10
17 or 15 years ago to go from a motion and order
18 practice to just request and response on
19 documents. We may need to revisit that
20 sometime, but this right here I think is good.
21 CHAIRMAN SOULES: Okay. Well,
22 if the current rule is on motion for good
23 cause shown, make a different motion. Let's
24 take this a piece at a time, Scott, because
25 apparently there is some other issues, and we

1 are not ready to pass on the rule yet.

2 HONORABLE F. SCOTT MCCOWN: I

3 think with maybe the exception of Judge

4 Peeples' comment if I could just address it

5 and see if I could satisfy his concerns. We

6 have got a body of jurisprudence about what

7 good cause is, and so it's pretty clear. I

8 don't think we need to change the standard,

9 and if we change the standard, we might create

10 unintended consequences with that

11 jurisprudence.

12 HONORABLE DAVID PEEPLES: I

13 think you're right.

14 CHAIRMAN SOULES: Okay. Here

15 is the question. Here is the question.

16 Motion and order or notice only? Those in

17 favor of motion and order show your hands.

18 14. That's 14. Those in favor of notice,

19 show of hands. Four. 13 to 4 to retain the

20 motion and order practice.

21 MR. SUSMAN: We have a motion

22 on the floor. There is a motion on the floor

23 seconded, to adopt the rule now.

24 CHAIRMAN SOULES: That's right.

25 MR. MEADOWS: But we were

1 discussing it, and I think the vote would be
2 different if there was some sort of -- if
3 there was a distinction between the issue as
4 it relates to parties and as it relates to
5 nonparties. I mean, I think it's a very good
6 point about not being able to go onto
7 someone's property without jumping through
8 some hoops.
9 CHAIRMAN SOULES: We are only
10 talking about 22, physical and mental
11 examination at this point.
12 MR. SUSMAN: Of parties.
13 MR. MEADOWS: Of parties. I am
14 wrong then. The vote would not be different.
15 CHAIRMAN SOULES: Now, Judge
16 Peeples' question about good cause and
17 retaining the standard of good cause --
18 HONORABLE DAVID PEEPLES: Luke,
19 you know, Scott McCown makes a good point.
20 There is a lot of discretion there, and there
21 is jurisprudence on it, and in the final
22 analysis courts are going to decide if they
23 think it's right or not if we change the
24 standard, and I take back what I said. I am
25 not for changing it.

1 CHAIRMAN SOULES: Okay. Any
2 other discussion on Rule 22? Judge Brister.
3 HONORABLE SCOTT BRISTER: Yes.
4 The subcommittee rule says you can only
5 request a psychologist IME if the other side
6 has designated a psychologist, and I have had
7 folks who don't designate a psychologist but
8 are going to admit the psychiatric records
9 from the doctor saying whatever they are going
10 to say about the emotional anguish and trauma.
11 Do we mean to say you can't -- you're, in
12 effect, admitting the testimony of a
13 psychologist, but you are not designating him
14 as an expert. The other side can't respond to
15 that? It seems to me it ought to be if you
16 are presenting psychological expert opinions,
17 whether by records or by designation, the
18 other side ought to be entitled to rebuttal.
19 MR. MARKS: Or alleging a
20 psychological injury.
21 HONORABLE SCOTT BRISTER: Well,
22 I am not ready to go that far just every time
23 you say emotional anguish you ought to --
24 HONORABLE F. SCOTT MCCOWN:
25 Judge, which provision of the rule is that?

1 HONORABLE SCOTT BRISTER: Last
2 sentence of the first paragraph.
3 CHAIRMAN SOULES: We are
4 looking at the last paragraph of sentence one.
5 This is the Franklin Jones sentence.
6 HONORABLE SCOTT BRISTER: It
7 just seems unfair to -- okay, I am not going
8 to call the expert, but I am going to admit 40
9 pages of narrative reports and et cetera from
10 the expert, and the other side can't rebut it.
11 CHAIRMAN SOULES: This is just
12 talking about independent medical examination
13 by a psychologist.
14 HONORABLE SCOTT BRISTER:
15 That's right.
16 CHAIRMAN SOULES: You can still
17 call your psychologist to testify about what
18 the records say.
19 HONORABLE SCOTT BRISTER: And
20 what's the first problem with that witness
21 going to be? You never even talked -- you
22 couldn't point to who they are in the
23 courtroom, could you? That's not going to be
24 very effective.
25 CHAIRMAN SOULES: Just as long

1 as we have got it said. John Marks.
2 MR. MARKS: I would move we
3 delete the sentence. Is that in the rule now?
4 That's not in the rule now, is it?
5 CHAIRMAN SOULES: Yes.
6 HONORABLE SCOTT BRISTER: Yes.
7 It's there.
8 MR. MARKS: I think it ought to
9 be taken out because I think any time that a
10 psychological injury of any kind is alleged I
11 think it becomes fair game, and you ought to
12 be entitled to get an examination by a
13 psychologist under the same terms that you can
14 get a physical examination.
15 CHAIRMAN SOULES: Well, there
16 is the debate, and we have had it before, and
17 that's why it's in here because it was voted
18 to -- John Marks' position was voted down
19 years ago, and this was put in to protect
20 against that very thing, but we have got a
21 different -- our committee is differently
22 constituted now, and it may be time to make a
23 change, but that's exactly the debate we had,
24 and John, are you making a motion?
25 MR. MARKS: I move that we

1 delete that sentence.

2 CHAIRMAN SOULES: Is there a

3 second?

4 MR. LATTING: Second.

5 CHAIRMAN SOULES: Moved and

6 seconded. Okay. Discussion. Judge McCown.

7 HONORABLE F. SCOTT MCCOWN: I

8 disagree with John Marks, and I think this is

9 a very important cost issue in family law in

10 particular, that in every family law case, you

11 know, you could be asking for a psychological

12 examination, and this was put in there to say

13 only if the other side is making that an

14 issue. I do, however, agree with Judge

15 Brister and think that we could modify it, and

16 instead of saying "as an expert who will

17 testify," change it to "who has identified a

18 psychologist whose opinions may be offered

19 into evidence," so that whether they come in

20 through testimony or come in through report,

21 if you are offering their opinions into

22 evidence. So I'd like to vote down John Marks

23 and vote up Judge Brister.

24 CHAIRMAN SOULES: Further

25 discussion? Steve Susman.

1 MR. SUSMAN: You know, I mean,
2 there is -- I mean, I think we have kind of a
3 due process issue here because these rules
4 have not -- the last few rules we did not
5 change because we didn't see anything wrong
6 with them basically. There has been very
7 little publicity about even talking about
8 changing them and very little opportunity for
9 people to comment on them. I mean, I don't
10 know what the family lawyers would say about
11 that rule or personal injury lawyers or anyone
12 would say about that rule because no one has
13 known anyone is trying to change it until this
14 very moment.
15 In fact, there were no comments received
16 on that rule in connection with your
17 procedure. So I am just reluctant to see us
18 go change these rules where obviously there
19 was a debate at some other time. I don't
20 really care. I never get involved in this
21 practice. It's just someone is going to say
22 this wasn't a fair process.
23 CHAIRMAN SOULES: Rusty, and I
24 will go around the table.
25 MR. MCMAINS: Well, I think

1 that there is a significant difference to me
2 between the intrusion that a psychologist does
3 into the head of an individual just because
4 they have alleged mental anguish or something,
5 as distinguished from when somebody is trying
6 to offer evidence of a psychological injury,
7 and I believe that you get into the judge's
8 comments about, you know, when the
9 psychologists who want to put somebody on the
10 couch and ask them a lot of questions and then
11 share that with their -- share their
12 observations with the opposing lawyers that
13 they are going to say, "I want a lawyer
14 there."
15 Now, that's one thing about having a
16 lawyer there when somebody is taking their
17 clothes off or when they are doing some kind
18 of objective physical testing, but when all
19 you are doing is getting a hired gun to ask
20 questions of the other side outside the
21 presence of their lawyer, that to me
22 implicates a lot of things that unless the
23 person has essentially voluntarily put that in
24 issue in terms of the issue of psychological
25 injury or psychiatric injury and to the point

1 where they have expert opinion on it, I don't
2 think it's appropriate, and that's why we
3 rejected it before. In addition to which
4 there was a lot of questions about whether
5 psychologists ought to be in there at all. I
6 mean, this was actually moved -- psychologists
7 were never in there before, per se. People
8 primarily were using psychiatrists only and
9 then they moved to psychologists, but they had
10 this limitation.
11 CHAIRMAN SOULES: Steve
12 Yelenosky.
13 MR. YELENOSKY: I agree with
14 Rusty, and I guess the only other thing I have
15 to say is, why do we make the distinction here
16 between psychiatrist and psychologist? Up
17 above we say "physician or psychologist," and
18 physician, M.D., would include psychiatrist.
19 Down here we say that you can't get a
20 psychologist except when they have designated
21 that expert, and I am unclear on why that
22 doesn't also say "psychiatrist" and why the
23 next section also doesn't say "psychiatrist."
24 CHAIRMAN SOULES: Well, I think
25 Rusty's statement is the real response to

1 that. Psychologists were put in. It had to
2 be a physician before putting in psychologist,
3 and there is -- the committee has not regarded
4 psychologists as equivalents to psychiatrists
5 in terms of examinations historically in the
6 past. So they put more strings on getting a
7 psychologist IME.
8 MR. YELENOSKY: Well, I guess
9 what I'm asking, if we are protecting and
10 making it harder to get an examination by a
11 psychologist does somewhere in the rule make
12 it equally hard to get an examination by a
13 psychiatrist?
14 CHAIRMAN SOULES: No.
15 MR. MCMAINS: No. There is
16 still a good cause requirement.
17 CHAIRMAN SOULES: Mike
18 Gallagher, did you have your hand up?
19 MR. GALLAGHER: I think Rusty
20 has already said what I wanted to say.
21 CHAIRMAN SOULES: Judge McCown.
22 HONORABLE F. SCOTT MCCOWN: The
23 rule draws a distinction between psychiatrist
24 and psychologist for a reason, because
25 psychiatrists -- and this won't be true in

1 every case, but generally speaking
2 psychiatrists make true diagnoses of true
3 mental illnesses, and psychologists talk about
4 personality and feelings, and so the thought
5 was that, you know, good cause for a
6 psychiatrist, you are getting somebody to talk
7 about whether a person is schizophrenic is
8 different than a psychologist to talk about
9 whether they are a good person or a bad
10 person.
11 MR. YELENOSKY: Yeah. But you
12 could ask a psychiatrist to examine somebody
13 and talk to them about their emotional life.
14 HONORABLE F. SCOTT MCCOWN:
15 Right. But the reason --
16 CHAIRMAN SOULES: Just a
17 minute.
18 MR. YELENOSKY: How do you
19 protect against that?
20 HONORABLE F. SCOTT MCCOWN: The
21 reason that's not a problem is because
22 psychiatrists cost an incredible amount of
23 money, and psychologists are a dime a dozen,
24 and so it doesn't matter.
25 CHAIRMAN SOULES: Okay. Judge

1 Brister.

2 HONORABLE SCOTT BRISTER: Yeah,

3 a couple of things. No. 1, I am not

4 convinced -- at least most of the

5 psychological IME's I order are this couch

6 thing. I mean, most of the ones I see are,

7 "We want to give them the MMPI test."

8 Basically we want to sit them down, do a bunch

9 of fill in the blanks, the kind of tests you

10 took in seventh grade to see whether you got

11 in accelerated classes or not, and then they

12 are going use a computer to read and say, "Oh,

13 well, you are a depressive" or you are

14 whatever.

15 It is by no means routinely that

16 invasive. "Tell me about your childhood and

17 your sex life." Now, that's not to say

18 somebody might not misuse it at that, but I do

19 think this needs to be addressed. This is a

20 growing area, and correct me if I am wrong,

21 Mike, but I think the plaintiffs Bar more and

22 more designates these people because of the

23 cases out there that are seeming to say

24 emotional anguish is more than just being

25 embarrassed or something like that. You have

1 got to do more than that, which then puts the
2 pressure on the plaintiffs attorneys to have
3 somebody with a license say, "This is more
4 than mere embarrassment," et cetera, but then
5 the defendant is -- you can't let one side
6 call a psychologist and not the other.
7 To say this person has been terribly
8 injured emotionally and tell the defendant,
9 "No, sorry. You can look at the records and
10 make a few guesses." I think it's got to be
11 addressed. It's going to be a growing
12 problem, and you know, I mean, I knew this
13 rule was in play. I read the rule. If you
14 want to just flush it out of the subcommittee
15 report completely, that's one thing, but if we
16 are going to discuss it and pass it, we need
17 to address this issue.
18 CHAIRMAN SOULES: Mike
19 Gallagher.
20 MR. GALLAGHER: It seems like
21 the fix has been suggested, that being one in
22 which if one side is going to call a
23 psychologist, the other side has the right to
24 have an examination of that nature inquiring
25 as to those matters is appropriate, and I do

1 not believe -- I agree with Rusty, and I said
2 I wasn't going to echo what he had said, but
3 in every case in which someone claims mental
4 anguish as a component of a personal injury
5 claim that you are entitled to a psychological
6 examination, but if you do claim some
7 psychological injury of a specific nature or
8 even of a general nature, if it goes beyond
9 that in your allegation, then one is called
10 for.
11 But unfortunately my experience has been
12 when someone is submitted for a psychological
13 examination, the psychologists generally go
14 far beyond just an inquiry as to the
15 relationship, say, between an injury and a
16 psychological response, and it does get to be
17 sort of a very broad type of examination, but
18 I think the fix that we have been talking
19 about is far better than what my friend,
20 Mr. Marks, has suggested.
21 CHAIRMAN SOULES: John Marks.
22 MR. MARKS: Well, thank you, my
23 friend Gallagher. Okay. What if you have got
24 a bunch of medical records and you have got a
25 physician saying Mr. Jones came in highly

1 distraught today, very angry, very upset, you
2 know, and something -- I think this all goes
3 in with his injury and the problems he's
4 having. Well, this is not a psychologist
5 saying it. It's not a psychiatrist saying it,
6 but it is evidence of a psychological injury,
7 and that happens a lot. I mean, that is not
8 just out of the air. That happens quite a
9 bit, and what happens then?
10 You have got these medical records. You
11 have got a physician testifying about this in
12 the medical records, and yet, you have no
13 recourse. Also, I think that a psychologist
14 needs to go into background. I think a
15 defendant -- if somebody is alleging a
16 psychological injury and psychological mental
17 emotional problems arising out of an accident,
18 you need to know what his background is; you
19 know, was he molested as a child, you know,
20 that sort of thing. All of that stuff you
21 need to know because that goes into his
22 psychological makeup, and if you are not
23 entitled to get that evidence then you are
24 left bare, and the plaintiff is just going to
25 have a field day with you.

1 CHAIRMAN SOULES: Joe Latting.
2 MR. LATTING: I was going to
3 ask, does everybody agree that if
4 psychological records are coming into evidence
5 that the party against whom they are coming in
6 ought to have the recourse that Scott Brister
7 asked for; that is, are we all at Scott
8 Brister's point? Scott McCown said he was
9 against John Marks, but he was for Brister.
10 Is everybody in agreement with that?
11 MR. KELTNER: Yes, I am in
12 agreement with that.
13 MR. SUSMAN: Could we have
14 Judge Brister state it again?
15 MR. LATTING: Yeah. Brister,
16 could you state that again so we could see
17 what --
18 HONORABLE SCOTT BRISTER: Well,
19 McCown had it correctly.
20 HONORABLE F. SCOTT MCCOWN: In
21 paragraph (1) where it says "as an expert who
22 will testify," the last words, "as an expert
23 who will testify," delete those words and
24 instead have it read, "identified a
25 psychologist whose opinions may be offered

1 into evidence."

2 CHAIRMAN SOULES: Okay. Well,

3 anything else?

4 MR. GALLAGHER: "Whose opinions

5 or records."

6 CHAIRMAN SOULES: Okay.

7 Anything else on Marks' motion? John Marks'

8 motion is to delete the last sentence. Those

9 in favor show by hands. Five. Those opposed?

10 16 to 5 it fails. Okay. Now, is there --

11 MR. SUSMAN: Second Scott's

12 motion.

13 CHAIRMAN SOULES: State your

14 motion, please, Judge McCown, in the form of a

15 motion.

16 HONORABLE F. SCOTT MCCOWN:

17 Okay. I would move that on paragraph (1) we

18 delete "as an expert who will testify" and add

19 "a psychologist whose opinions may be offered

20 into evidence," and I wouldn't want to go any

21 farther than "opinions maybe offered into

22 evidence" because I don't want to get in a

23 fight about what is or isn't a record, what is

24 or isn't psychological. If there is some

25 psychologist whose opinions are somehow going

1 to get in front of the jury then you could
2 make the motion for good cause to get your own
3 psychologist to do anything.
4 CHAIRMAN SOULES: Is there a
5 second?
6 MR. LATTING: Second.
7 CHAIRMAN SOULES: All in favor
8 of --
9 HONORABLE DAVID PEEPLES: Luke,
10 there is a distinction we need to talk about,
11 and that's whether plaintiff, let's say,
12 offers the psychologist's records, but there
13 aren't opinions in there, but you can tell
14 good and well where the psychologist comes out
15 by looking at it, but there are no Loden V.
16 Andrews opinions in there, and frankly, I
17 think that if records of a psychologist are
18 coming in, the other side ought to have a
19 right to an IME. You have got good cause of
20 the court that's still standing in the way of
21 it, and I don't think people are going to run
22 rampant on this. It seems to me if they are
23 offering anything on the records, we shouldn't
24 get into the opinions.
25 CHAIRMAN SOULES: Judge

1 Peeples, can you put that in the form of a
2 motion to amend?
3 HONORABLE DAVID PEEPLES: I
4 would either use the language that's in Judge
5 Brister's paragraph (2), which says "or
6 introduces a psychologist's records," or I
7 would say if they want to do it the way Judge
8 McCown does, "identify the psychologist
9 whose" -- yeah. I think the way Judge Brister
10 has it would be better.
11 CHAIRMAN SOULES: Where is that
12 language in Judge Brister's?
13 HONORABLE SCOTT BRISTER: It's
14 my paragraph (2), the second sentence.
15 CHAIRMAN SOULES: Okay.
16 "Examination by a psychologist may be
17 requested only when the party responding to
18 the motion has identified a psychologist or a
19 psychologist's records that may be used at
20 trial." Okay. Is there a second to the --
21 MR. LATTING: I've seconded it.
22 CHAIRMAN SOULES: -- substitute
23 motion?
24 MR. LATTING: Well, is that the
25 substitute motion?

1 CHAIRMAN SOULES: Yes.
2 MR. LATTING: Then, yes, I
3 second that. I have already seconded it.
4 CHAIRMAN SOULES: Okay. Those
5 in favor of using then the second sentence of
6 Judge Brister's recommendation show by hands.
7 HONORABLE F. SCOTT MCCOWN:
8 Could I speak just briefly against it before
9 we vote on it?
10 CHAIRMAN SOULES: Yes.
11 HONORABLE F. SCOTT MCCOWN: I
12 guess I don't feel strongly, but there is just
13 lots of things in records that may not open
14 the door in any way for opinion or diagnoses,
15 how many office visits there were, for
16 example. It seems a little broad to me, but I
17 guess if you have got good cause, maybe that's
18 enough.
19 CHAIRMAN SOULES: Okay. Any
20 other discussion on this? Those in favor show
21 by hands.
22 MR. YELENOSKY: Could you
23 please restate what we are -- what Judge
24 Brister said?
25 CHAIRMAN SOULES: We are

1 proposing to amend the last sentence of the
2 committee's Rule 22 by deleting -- by
3 substituting for the last sentence in
4 paragraph (1). So that would be taken out and
5 in its place --
6 HONORABLE SCOTT BRISTER: Well,
7 if you wanted it.
8 CHAIRMAN SOULES: Except as
9 provided in Rule 4. Well, we have got -- it's
10 got to have this "except as provided in
11 subparagraph (4) of this rule" because that's
12 family law.
13 HONORABLE SCOTT BRISTER: If
14 you wanted to make it psychologist's records
15 you would just leave the last sentence as is
16 except drop the last six words, "as an expert
17 who will testify" and substitute in "or a
18 psychologist's records that may be used at
19 trial." So it's a psychologist or a
20 psychologist's records that may be used at
21 trial.
22 CHAIRMAN SOULES: Okay. Those
23 in favor show by hands. 18 for. Those
24 against? To two -- three. We have Marks and
25 Gallagher voting --

1 HONORABLE SCOTT BRISTER:
2 Together?
3 CHAIRMAN SOULES: -- together
4 on it.
5 MR. GALLAGHER: Together again.
6 CHAIRMAN SOULES: Okay. Now,
7 anything else on Rule 22? Those in favor show
8 by hands. 22. Those opposed? Opposed, one.
9 Motion carries by a vote of 22 to 1. Let me
10 just get my notes straight here.
11 MR. MARKS: He just forget to
12 take down his hand is what he was doing.
13 MR. GALLAGHER: I was answering
14 the question. I wasn't opposed.
15 CHAIRMAN SOULES: Oh, okay.
16 The vote was 22 to nothing. So let me get my
17 records straight here. The last sentence will
18 read, "Except as provided in subparagraph (4)
19 of this rule, an examination by a psychologist
20 may be ordered only when the party responding
21 to the motion has identified a
22 psychologist" --
23 HONORABLE SCOTT BRISTER: "Or a
24 psychologist's records."
25 CHAIRMAN SOULES: "Or a

1 psychologist's records."

2 HONORABLE SCOTT BRISTER: "That

3 may be used at trial."

4 CHAIRMAN SOULES: "That may be

5 used at trial."

6 MR. KELTNER: Luke, I am

7 not -- I may have a problem there. How do you

8 identify a record that may be used at trial

9 other than in the provision of proving them up

10 through a records custodian?

11 MR. MCMAINS: I think it's a

12 standard disclosure.

13 HONORABLE SCOTT BRISTER: You

14 are going to have to go to court on this

15 anyway, remember. That's what you have

16 already voted, and if your deal is so when you

17 see the psychologist's records you say, "I

18 want to do one" in your motion. The other

19 side says at the hearing, "but I'm not going

20 to use them at trial," is how you find out.

21 CHAIRMAN SOULES: That will

22 work.

23 HONORABLE SCOTT BRISTER:

24 Remember, you have got to go through the step

25 of going to court anyway with this.

1 MR. KELTNER: Close enough.
2 CHAIRMAN SOULES: That will
3 work. Okay. Close enough. Rule 23. Steve
4 Yelenosky.
5 MR. YELENOSKY: Excuse me. We
6 have just printed out the new rule that you
7 asked me to put down the writing that relates
8 to medical records of nonparties, and it
9 segues nicely with what we just finished if
10 you would want to consider it now. Otherwise,
11 whenever you want to. It's very short.
12 CHAIRMAN SOULES: Okay. Have
13 you got it distributed, and where will this
14 go? This goes in Rule 25?
15 MR. YELENOSKY: Well, it's
16 No. 25, but logically it would probably follow
17 what we just finished, but obviously the
18 number isn't of concern, at least not for us
19 right now, and I guess I could -- if you do
20 want to consider it now, I could speak to it
21 while it's being handed out.
22 CHAIRMAN SOULES: Just a
23 moment. Let Alex and I get our records
24 straight here.
25 MR. YELENOSKY: Okay.

1 CHAIRMAN SOULES: Okay. Now,
2 where are you suggesting that this go, so we
3 can get it in context?
4 MR. YELENOSKY: It would be new
5 Rule 23, I guess, or it should follow what we
6 just did or just before what we just did on
7 physical and mental examination, or it could
8 follow 21. It would precede the motion for
9 entry upon property. Yeah. Since we
10 eliminated (e), it establishes only a
11 procedure. As it said, nothing in the rule
12 authorizes a court -- although a statute might
13 or good cause might, but the rule is not an
14 authorizing rule. It's just requiring service
15 upon a nonparty.
16 We just got done saying that you might
17 require an order before you could get a
18 psychologist to do an IME of someone. Yet, if
19 a psychologist had already examined someone
20 and had such records or a psychiatrist did and
21 the person were a nonparty, you might be able
22 to get those records without them even knowing
23 it under current procedure.
24 In a case I am in right now involving an
25 insurance company I could issue subpoenas on

1 Monday against large insurers around the state
2 compelling production of possibly your medical
3 records without you knowing it. There is no
4 requirement that I give you any notice that I
5 am looking for your medical records, and there
6 are only so many insurers. You might be able
7 to get them just by guessing who insures
8 someone.
9 MR. LATTING: I have a
10 question.
11 HONORABLE SCOTT BRISTER:
12 Question.
13 MR. LATTING: Luke, can I ask a
14 question?
15 CHAIRMAN SOULES: Just a
16 moment. Let me see something. This was a
17 part of 24, and it was 24(e) that we rewrote.
18 MR. YELENOSKY: Well, 24(e) was
19 broader. It didn't address just medical
20 records, and the discussion was there were a
21 lot of problems with, well, people won't know
22 whether the records you are requesting or what
23 you are requesting is, in fact, confidential.
24 Everybody knows medical records have some
25 confidentiality protections. That was what I

1 was most concerned about. So rather than have
2 the whole thing tabled I suggested that we at
3 least address a rule to medical records in the
4 way that we address a rule to entry upon
5 property and the way that we address a rule to
6 IME's by psychologists and psychiatrists.
7 CHAIRMAN SOULES: Okay. Did
8 your committee rewrite anything for a rule
9 like bank records, something other than
10 medical records?
11 MR. LATTING: No.
12 CHAIRMAN SOULES: We are just
13 going to drop that. Okay.
14 MR. LATTING: I have a
15 question, Luke.
16 CHAIRMAN SOULES: So why
17 doesn't this just go down where (e) was?
18 PROFESSOR ALBRIGHT: It also
19 requires a request.
20 CHAIRMAN SOULES: It what?
21 PROFESSOR ALBRIGHT: It also
22 requires a request.
23 CHAIRMAN SOULES: Oh, okay.
24 HONORABLE SCOTT BRISTER: It
25 really would be part of Rule 11 or something

1 like that, wouldn't it, production of records?
2 PROFESSOR ALBRIGHT: Yeah. We
3 could -- it probably would be a section of
4 Rule 11 and Rule 21, but we can figure that
5 out after we have talked about the concept.
6 CHAIRMAN SOULES: Okay. Well,
7 let's talk about the concept first. Looks to
8 me like this is pretty much what we directed
9 you to do. Who's got a different view on
10 this?
11 MR. LATTING: I have a
12 question.
13 CHAIRMAN SOULES: Joe.
14 MR. LATTING: Steve, what is
15 the idea of including the phrase "that are in
16 the possession of a party"; that is, "Before
17 requesting the production of medical records
18 of a nonparty that are in the possession of a
19 party."
20 MR. YELENOSKY: Yeah. You
21 could take that out. I just thought it
22 was -- because the rule combines both request
23 for production and a subpoena of the custodian
24 of records.
25 MR. LATTING: But you would

1 want to cover a situation where Parties A and
2 B, Party A may want to get Nonparty C, who is
3 the custodian of records of D, and you would
4 want this to cover that, wouldn't you?
5 PROFESSOR ALBRIGHT: And that's
6 the second phrase.
7 MR. LATTING: That's the
8 second -- what did you say?
9 PROFESSOR ALBRIGHT: That's the
10 subpoena.
11 MR. YELENOSKY: Yeah. It's a
12 subpoena.
13 MR. LATTING: But don't you
14 want the notice of the subpoena to go to the
15 person we will say whose records are being
16 subpoenaed?
17 MR. YELENOSKY: Yes.
18 MR. LATTING: So don't you want
19 to take this out, this "that are in the
20 possession of a party," and just make this
21 apply across the board? "Before requesting
22 production of medical records of a nonparty,"
23 whether or not those records are in the
24 possession of a party or nonparty.
25 MR. YELENOSKY: Okay. Yeah.

1 Yeah. That could go out unless somebody else
2 sees a problem with that.
3 CHAIRMAN SOULES: Okay. You
4 are agreeing to that deletion?
5 MR. YELENOSKY: Yes.
6 CHAIRMAN SOULES: Anybody
7 opposed to that deletion? Okay. That comes
8 out. "That are in the possession of a party,"
9 those words are deleted in the second line.
10 Okay. Any further discussion on this
11 rule? Judge Brister.
12 HONORABLE SCOTT BRISTER: The
13 problem I see with this is the way this is
14 normally handled -- let me give you an
15 example. You are suing the employer saying
16 you were terminated because you filed a
17 worker's comp. claim. Now, what the plaintiff
18 normally wants on that, they want to prove a
19 pattern, and so they want the records of other
20 people who filed worker's comp. claims and
21 were fired within a year or two.
22 Normally, employers will agree to that
23 with the names X'd out, especially in
24 companies that hire lots of temporary workers,
25 you know, high turnover rate, unskilled labor,

1 folks that don't have addresses. This appears
2 to me it's going to require them to say, "No,
3 sorry, plaintiff. You can't gets those
4 records because you have got to contact every
5 one of those people even if you are whiting
6 their name out, and we don't know who it is,
7 you have got to get their approval before you
8 can get any of those." It's really going
9 to -- the vast things where you are wanting to
10 see what the party is doing, and you don't
11 care who the individuals are, that the records
12 are --
13 MR. LATTING: Couldn't we
14 correct that?
15 CHAIRMAN SOULES: Let Judge
16 Brister, please.
17 HONORABLE SCOTT BRISTER: You
18 are going to put -- which is handled pretty
19 routinely without really violating the rights
20 in my view of the people involved since nobody
21 knows who they are. You are going to put a
22 stop to all of that because you just won't be
23 able to find all of those folks and get their
24 consent.
25 CHAIRMAN SOULES: Joe Latting.

1 MR. LATTING: Would you take a
2 friendly amendment to make an exception for
3 that when you can't tell who the parties are?
4 MR. YELENOSKY: Yeah. I would,
5 but the good cause exception may encompass
6 that. I would think that general good cause
7 would apply there, but I would certainly
8 accept an amendment if people don't think the
9 good cause language is sufficient.
10 CHAIRMAN SOULES: Okay. Anyone
11 else? John Marks.
12 MR. MARKS: This sort of points
13 out what I was talking about yesterday. This
14 hasn't really been thought through, and it
15 should be, and it seems to me that we ought to
16 table this and not make it a part of what we
17 are sending up to the court right now and have
18 somebody look at it and come with some
19 recommendations at a later time.
20 MR. YELENOSKY: Okay. Then I
21 am going to subpoena your records.
22 CHAIRMAN SOULES: Motion to
23 table.
24 HONORABLE SCOTT BRISTER: I
25 would second that. I would like to think

1 about this some more and get some feedback
2 from people about it.
3 CHAIRMAN SOULES: Those in
4 favor of the motion to table show by hands.
5 14. Those opposed? To two. Okay. Tabled by
6 a vote of 14 to 2. What are we -- who's going
7 to work on this for the next meeting?
8 MR. YELENOSKY: I think
9 somebody needs to work on it who disagrees
10 with me.
11 CHAIRMAN SOULES: John Marks,
12 you're in charge.
13 MR. MARKS: I was thinking
14 Judge Brister.
15 HONORABLE SCOTT BRISTER: No,
16 no, no, no.
17 CHAIRMAN SOULES: It's your
18 motion to table and think about it. Think
19 about it and bring us something next time.
20 Make some phone calls and try to get some
21 input from Steve and Judge Brister, and
22 anybody else who wants to be on John's list to
23 give some input?
24 MR. LATTING: Make Gallagher be
25 on it so they can work this out.

1 CHAIRMAN SOULES: Okay.
2 Gallagher has 24 hours to return your call.
3 Is anyone else interested in this so that you
4 want to be a part of the drafting? If so, put
5 your hands up so John can make a note of it.
6 Okay. That will go to the court behind
7 probably the other rules, the other discovery
8 rules, but we will get it there in time for it
9 to catch up.
10 MR. SUSMAN: Rule 23, motion
11 for entry on property. The only comment was
12 from Judge Brister. We have already crossed
13 that bridge. I move the adoption of
14 subcommittee Rule 23 as written.
15 CHAIRMAN SOULES:
16 Subcommittee's motion needs no second.
17 HONORABLE F. SCOTT MCCOWN:
18 Second.
19 CHAIRMAN SOULES: Those in
20 favor show by hands. 13. Is that right? 13.
21 Those opposed? To two. Rule 23 is approved
22 by a vote of 13 to 2.
23 MR. SUSMAN: I now call your
24 attention to Rule 166.
25 CHAIRMAN SOULES: Could I ask a

1 question first? Are any of the specifics of
2 existing Rule 166 omitted from this proposal?
3 HONORABLE F. SCOTT MCCOWN: I
4 thought we were just going to take 166 out of
5 this package. We haven't changed anything.
6 It's the present rule, and it ought not to be
7 on the table.
8 HONORABLE SCOTT BRISTER:
9 Second.
10 MR. SUSMAN: Is this the
11 present rule?
12 PROFESSOR ALBRIGHT: This is
13 the present rule.
14 MR. SUSMAN: Fine.
15 HONORABLE F. SCOTT MCCOWN:
16 Yeah. It shouldn't have been in the package.
17 Our mistake. Never mind.
18 PROFESSOR ALBRIGHT: The reason
19 it was in the package is because I thought
20 people might want to know that we had
21 withdrawn the original 166.
22 MR. SUSMAN: All right.
23 MR. LATTING: You had withdrawn
24 the original?
25 PROFESSOR ALBRIGHT: We had

1 drafted a shorter version of Rule 166.

2 MR. SUSMAN: We took it back.

3 PROFESSOR ALBRIGHT: And there

4 was discussion that it was too short, that it

5 wasn't detailed enough. So it was sent back

6 to Scott McCown to consider, and he

7 recommended that we just leave the rule as is,

8 and that's what we decided to do.

9 CHAIRMAN SOULES: The committee

10 recommends no change to Rule 166. Any

11 opposition to that? Okay. 166 will stay as

12 is, unanimous.

13 MR. SUSMAN: Rule 63, the

14 committee on Rule 63 which is before you which

15 has been discussed before, we have done very

16 little changes since our last discussion of

17 this rule. It basically says that you can

18 amend a pleading at any time within 60 days,

19 before 60 days of the end of the applicable

20 discovery period, and thereafter you need

21 leave of court or agreement, and leave shall

22 be granted unless there is insufficient time

23 to complete discovery that will be made

24 necessary by the amendment, in which case

25 leave shall be denied or the discovery period

1 extended. Leave shall not be granted if it
2 would unreasonably delay the trial.
3 The only comments on this rule come from
4 Alex Albright, our fifth column, who has
5 written a commentary that she has some
6 comments on the rule. Alex, you want to say
7 what you have done?
8 PROFESSOR ALBRIGHT: Well, what
9 I did, we have talked about this a little bit
10 in connection with Rule 1 is I rewrote Rule 63
11 so that it follows the same procedure that is
12 available under the current rule, and Steve
13 has just told me that he would prefer not to
14 have the same procedure that we have under the
15 current rule. So I think that's one of the
16 basic differences.
17 The procedure under my version of Rule 63
18 would be that you can file new pleadings any
19 time up to 60 days before the end of the
20 applicable discovery period. Then the
21 opposing party can file a motion to strike,
22 which will be granted unless discovery made
23 necessary by the new pleading cannot be
24 completed within the applicable discovery
25 limitations and the new pleading will

1 otherwise prejudice the opposing party in
2 maintaining its action or defense upon the
3 merits."
4 I think I said that wrong. This would
5 retain the same presumption under the current
6 rules in favor of allowing pleadings and not
7 striking pleadings. So the party filing the
8 motion to strike would have the burden to show
9 surprise and prejudice to not allow the
10 pleading. Then within 60 days before the end
11 of the discovery period the party who wants to
12 amend the pleadings has to file a motion for
13 leave to file the pleadings, and then that
14 motion would be allowed unless the opponent
15 could show surprise or prejudice.
16 Then at the end it says that "If
17 discovery made necessary by the new pleading
18 cannot be completed within the applicable
19 discovery limitations or if the new pleading
20 will otherwise prejudice the party in
21 maintaining its action or defense upon the
22 merits either, (1), the pleading should not be
23 allowed or, (2), specific additional discovery
24 shall be allowed if it will not unreasonably
25 delay the trial." So I tried -- I was putting

1 into the rule the same standard that we have
2 under the original subcommittee version.
3 CHAIRMAN SOULES: I hate to
4 break here, but they are telling me that they
5 are going to move a crane into the parking lot
6 on the west side of the building to do some
7 construction work, and there are about ten
8 cars sitting out there. If anybody has got a
9 car on the west side of the building, you need
10 to move it. So we will stand at ease for
11 about ten minutes.
12 (At this time there was a
13 recess, after which time the proceedings
14 continued as follows:)
15 CHAIRMAN SOULES: While we are
16 settling down here, listen to something here
17 on Rule 166 and just see if we can get it up
18 or down without debate. Judge Guittard
19 suggests that we add another item for the
20 court to consider, which is the verbiage that
21 starts the long list that now goes through to
22 (p). He would add "reference to mediation or
23 other method of nonbinding alternate dispute
24 resolution." Any problem with putting that in
25 166? Any opposition? Okay. That's done.

1 MR. MARKS: Excuse me. I'm
2 sorry, Luke. Could you repeat that?
3 CHAIRMAN SOULES: "Reference to
4 mediation or other nonbinding alternate
5 dispute resolution" will be (p). The old (p)
6 is "such other matters made," and this being
7 the case, that would be the last one. So we
8 will have a new (p) that will read "reference
9 to mediation or other nonbinding alternate
10 dispute resolution," and the old (p) will be
11 relettered to (q). Okay. And can you send me
12 sort of a redline on that and then we will
13 send it to the Court accordingly?
14 PROFESSOR ALBRIGHT: Well, I
15 have it here. I have it on my computer. So I
16 can do it.
17 CHAIRMAN SOULES: Okay.
18 MR. SUSMAN: I mean, you just
19 want us to now include this as part of our
20 package?
21 CHAIRMAN SOULES: Right.
22 MR. SUSMAN: Okay.
23 CHAIRMAN SOULES: "Reference to
24 mediation or other nonbinding alternate
25 dispute resolution." Send a copy of it to the

1 chair of the subcommittee on Rule 166 so it
2 will go in their package, too.
3 Okay. Back to 63. Alex had spoken about
4 her reasons for wanting her suggestions
5 considered by the committee. Further
6 discussion on Rule 63? Steve.
7 MR. SUSMAN: Let me just give
8 you -- let me just go back to where we came
9 from on this and remind everyone. When we
10 began out our discussions of limiting the
11 amount of time that would be available for
12 discovery there was a feeling that -- well, by
13 a number of people, and I am not sure I like
14 that, and I certainly don't like it if the
15 plaintiff is constantly changing his or her
16 theory of the case, and the quid pro quo that
17 we thought that probably the plaintiff had to
18 give as the price of limiting the amount of
19 discovery, the plaintiff could be subjected to
20 was the willingness to come forward at some
21 time and say, "This is what my case is about,
22 period. I am not going to change it again."
23 And so that's why we felt that we had to
24 do something as part of our discovery rules
25 with the amendment of pleadings to make it

1 fair. After all, discovery cuts off in the
2 default situation, Tier 3 cases, in nine
3 months after it begins, and typically that
4 will be -- or typically it may well be a while
5 before or months before the case is set for
6 trial. Clearly the pleadings under the rule
7 that allows amendments up to seven days before
8 trial would be unfair. Discovery has ended
9 five months ago and then someone is still
10 amending their pleadings.
11 We originally picked a time, the 60-day
12 time period from the end of the discovery
13 period, which as you know could be a long time
14 before trial, was picked because we thought
15 that would give people enough time to engage
16 in written discovery vehicles, many of which
17 take 30 days to get a response; and those
18 discovery vehicles our rules make clear have
19 to be served at such a point in time within
20 the discovery period so they can be responded
21 to within the discovery period, not served
22 within the discovery period so they can be
23 responded to outside the discovery period. So
24 we picked the 60-day time period.
25 The way the subcommittee drafted its

1 rules was it said up to 60 days until the end
2 of the discovery period you have carte blanche
3 to amend your pleadings. After that time you
4 have got to get leave of court, but the
5 standard for getting leave of court under the
6 subcommittee's draft is, I think, fairly
7 relaxed in that leave should be granted unless
8 there is insufficient time to complete the
9 discovery, in which case you either deny leave
10 or extend the discovery period.
11 And I would assume in most cases where
12 someone wants to amend their pleading after
13 the 60 days that someone is going to first
14 suggest to the other side and second suggest
15 to the court if you can't reach amendment that
16 as a condition of changing my theory within
17 the 60-day time period I am willing to accord
18 to the other side an extension of the
19 discovery period, which is going to be no
20 problem where there is no trial set right at
21 the end of the discovery period. Yes, I want
22 to amend, but I am willing to give you another
23 30 days or 60 days to engage in any necessary
24 discovery. So that's the way the subcommittee
25 draft is set up, and now Alex.

1 PROFESSOR ALBRIGHT: Steve and
2 I have talked, and I have looked at my
3 proposal and the subcommittee's proposal, and
4 what I would like to do is withdraw my
5 amendment that is in your package and work
6 from the current version of Rule 63, but I do
7 have some specific suggestions for it.
8 One, I would delete the language
9 that's -- where it says "no later than 60 days
10 before the end of the applicable discovery
11 period or five days after receipt of the
12 notice of the first trial setting, whichever
13 is later," I would delete "or five days after
14 receipt of notice of the first trial setting,
15 whichever is later" because that was in
16 connection with an earlier version of
17 discovery limitations. At one time we were
18 talking about a discovery period that ended 30
19 days before the first trial setting. So
20 delete that.
21 CHAIRMAN SOULES: Okay. Let's
22 just talk about that specific. Any opposition
23 to that? Mike Gallagher.
24 MR. GALLAGHER: Yes. As a
25 trial lawyer it's been my experience in the

1 limited number of circumstances that while I
2 generally have a pretty good idea of what the
3 case is about before I really begin the
4 discovery, there are times when I discover the
5 identity of new parties, and frequently, I
6 will wait until I have completed my discovery
7 before I file and prepare the pleading on
8 which I intend to go to trial; and the
9 language that is sought to be deleted, "or
10 five days after the receipt of the first trial
11 setting" is what I think is the saving grace
12 of this rule.
13 This rule presupposes that discovery is
14 driven by pleadings. That's not the case in
15 all circumstances. There are at least equally
16 as many circumstances in which pleadings are
17 driven by discovery by responsible lawyers.
18 We are taught and told and admonished not to
19 file pleadings that are frivolous in nature
20 and to file pleadings that are based upon
21 evidence or at least upon a firm conviction
22 and belief as to what the evidence is going to
23 be, and in this circumstance what you are
24 telling trial lawyers to do is file your last
25 pleading -- and you may have 20 depositions to

1 take before the discovery is completed, and we
2 want you to file your last pleading in this
3 circumstance, and I don't care about the good
4 cause exception.
5 I agree with Judge Brister. There are
6 too many times we are having to go to court
7 and have a hearing and argue over basically
8 very petty differences that should not require
9 the court's intervention, and Steve's deal
10 here that "or five days after the receipt of
11 notice of the first trial setting" at least
12 gives you a later time period in most
13 circumstances in which to deal with that.
14 PROFESSOR ALBRIGHT: Mike, if I
15 could respond?
16 CHAIRMAN SOULES: Okay. You
17 respond and then we will go around the table.
18 PROFESSOR ALBRIGHT: I don't
19 think notice of the first trial setting gets
20 where you want to go because the reason we
21 don't deal with the notice at the first trial
22 setting anymore is because people were talking
23 about in places like Dallas County you get a
24 notice of the first trial setting ten days
25 after you file your lawsuit. So that's not

1 going to help you. It may --

2 MR. GALLAGHER: If that's the

3 experience in some counties then I would

4 recommend that something else be done that we

5 give someone at least until the completion of

6 discovery as a period of time within which to

7 file an amended pleading.

8 CHAIRMAN SOULES: Okay. David

9 Keltner and then we will go around the table.

10 MR. KELTNER: Mike, I

11 understand your concern, and I think it was

12 well-taken in most instances, but part of the

13 problem that occurs is we have a discovery

14 window that is open for nine months. This

15 would force you to have to amend at the

16 seventh month after you have done most of your

17 discovery. If you amend and have something I

18 have got to do discovery on as a defendant, I

19 can't do it if it's much later than that.

20 And I understand what you're saying in

21 terms of filing frivolous pleadings and the

22 like, and I think that's well-taken; but there

23 has got to be some time fairly far out in the

24 discovery period. One of the problems with

25 the rules that we have always had with the

1 discovery window has been that it's not backed
2 up to the trial setting. In fact, it's likely
3 to be in most counties way before the trial
4 setting. So what happens is I don't get to do
5 discovery based upon your trial pleadings, and
6 that's what bothers me because you can get
7 something new in there that I really don't
8 have a realistic opportunity to discover.
9 CHAIRMAN SOULES: Okay. Rusty,
10 you had your hand up.
11 MR. MCMAINS: Yeah. In the
12 first place, that isn't a new issue because
13 with our current rules allowing pleading as a
14 matter of right ten days before trial, you
15 basically have conducted the entire case with
16 the absence of the specific pleadings. So
17 that really is not any kind of a new complaint
18 and a new justification. The problem that I
19 have with it is that you don't even -- you
20 don't even know what the other side's experts
21 are at the 60-day time limit if you are the
22 plaintiff.
23 CHAIRMAN SOULES: We are really
24 talking about, unless we need to talk about
25 them together, the five days after the trial

1 setting.

2 MR. MCMAINS: Well, I think

3 that we are still talking about the same

4 issue, which is the date. I mean, I think we

5 should broaden it. The real issue is whether

6 there is a real date and what that date should

7 be, and from the standpoint of should that

8 date be 60 days before the end of the

9 discovery period, we have already gone through

10 this about the designation of experts and when

11 that occurs and whatever, and basically you're

12 not even going to know whether there are

13 experts on the other side. You are not going

14 to have done, as a practical matter, complete

15 expert discovery of any kind, and then you are

16 locked into trial pleadings in terms of as a

17 matter of right, and you are subject to the

18 discretion of the court as to whether they are

19 going to allow you to amend it.

20 In fact, the way the rule is drawn, it

21 appears that if they don't allow you the

22 discovery then they ain't going to allow you

23 the amendment; and that's before any of your

24 experts have testified; and your expert, even

25 though you may have designated him in 60 days

1 if you're the plaintiff, he may change his
2 mind before he testifies as to exactly what
3 his theory is; and you are sitting there; and
4 if you have been answering special exceptions
5 or something and then pleadings specifically
6 about what the theory is and your expert
7 changes his mind, you are stuck with it. Now,
8 that really is an outrageous thing which is
9 not going to -- it's not a surprise to anybody
10 as a practical matter.
11 MR. KELTNER: I will admit that
12 that part on experts is a problem that we need
13 to take into consideration. I think Rusty is
14 right about that part.
15 CHAIRMAN SOULES: We need to
16 pick a date to freeze the pleadings within the
17 discovery window at some time, and it has to
18 be late enough that people have a pretty good
19 understanding at least of what the proof is
20 going to be but early enough that if there are
21 any surprises in the pleadings discovery
22 activity can be conducted still within the
23 discovery window without an extension by the
24 court to fix the surprise. That would be our
25 default rules, and the judges can give relief

1 where that can't work. The rules now say that
2 the paper discovery has to be served in time
3 for the responses in time to file to occur
4 within the discovery window. In other words,
5 paper discovery has got to be filed 30 days
6 before the end of the discovery window or 31.
7 I don't know how it would be calculated,
8 frankly, but --
9 HONORABLE SCOTT BRISTER: But
10 the responses aren't due.
11 CHAIRMAN SOULES: Responses are
12 due within the discovery window, not later
13 than that. 60 days is 15 days after the
14 affirmative experts are designated but not
15 within the 30 days that you have to give some
16 deposition dates for them, and 60 days is
17 before the rebuttal experts even have to be
18 designated. So it seems to me that it's going
19 to have to be a shorter period before the
20 discovery window closes than 60 days; but
21 whether it should be 30, which is the same
22 day -- which is the last day for serving paper
23 discovery is a problem, too. I am just trying
24 to put these timetables, time deadlines, that
25 occur towards the end of the discovery period

1 in sequence so that we have those in mind for
2 this debate. Joe, and then I will go around
3 the table. Joe Latting.
4 MR. LATTING: I think that --
5 CHAIRMAN SOULES: It's a tough
6 issue.
7 MR. LATTING: It's a tough
8 issue because we are trying to do something
9 that is not a good idea, in my opinion. I
10 have a case going to trial the 31st of this
11 month on Monday, July 31st. It arose out of
12 events that happened in December of 1992.
13 Under what we are talking about here I
14 calculated that I would have had to have my
15 discovery completed in August of '93 and my
16 pleadings finished in, what would that be,
17 July of '93.
18 We're in Texas state court, oddly enough,
19 against the FDIC, and they week before last
20 amended their pleadings, and I amended mine
21 yesterday. Now, what we are talking about is
22 a whole new world for the lawyers and the
23 litigants in Texas, and this Rule 63 points up
24 in my judgment the basic policy mistake that
25 we are making in this whole proceeding, and I

1 don't mean to be a Luddite, and I don't mean
2 to be a fifth columnist, but this just isn't
3 going to work, I don't think; and I think that
4 the reason we are having trouble with this
5 issue is that we are going to -- this is just
6 the least of our troubles.
7 When we start trying to prepare cases
8 months and even years before they are set for
9 trial and expect that that's going to save the
10 people of this state money and our clients
11 money and make the jurisprudence run more
12 smoothly, I wish I didn't say this because I
13 don't guess it's popular among certain
14 quarters, but I don't think I would be a
15 responsible member of the committee if after
16 having practiced law for 29 years I didn't
17 make -- at least, I feel better about saying
18 it. I think we are headed in a wrong
19 direction, and I don't think it's a matter of
20 5 days or 30 days.
21 I think we have got a much more serious
22 problem here. So having said that, I think
23 that this Rule 63 just shines a spotlight on
24 what we are really about here, and I would ask
25 you lawyers who are practicing law and those

1 of you who have practiced law and who may
2 again some day practice law to think about
3 what this really means in terms of what you
4 have to do and how much of your clients' money
5 you have to spend and when you have to spend
6 it.
7 It's the notion that -- it always reminds
8 me that people say that if you get to Federal
9 Court they have this good system where
10 everything is more ordered, and the worst
11 thing that happens to my clients from the
12 standpoint of spending money is to land over
13 there, and with all of our foibles I think the
14 state court system -- myself, I think it works
15 pretty well. I want to say this, and that's
16 all I am going to say about it, but I think
17 that the problems that we have with discovery
18 and pleading deadlines are pretty well drying
19 up.
20 I think if you look at the litigation
21 that goes on around the state you will see
22 that over the last several years I think we
23 have had a lot of problems, but I think they
24 are getting pretty well worked out, and I
25 think the cure that we are proposing here in

1 general is much worse than the disease, and
2 it's a bad idea. So there, I said it.
3 CHAIRMAN SOULES: Okay. No
4 response to that. The chair is not going to
5 entertain any response to that. We are going
6 to pass these rules to the Supreme Court
7 approved as we did yesterday. The issue now
8 is what is this pleading cutoff. That's
9 what's before the committee on Rule 63. Does
10 anybody want to propose a different pleading
11 cutoff than we have before us in the
12 subcommittee draft? Mike Gallagher.
13 MR. GALLAGHER: Yes. I propose
14 that the date for the cutoff for pleadings be
15 ten days after the completion of the
16 defendant's experts. The normal order of
17 discovery, Luke, in cases of the type that
18 we're talking about, that people who try
19 products liability cases and other complex
20 personal injury cases engage in, is that you
21 take the fact witnesses and the corporate
22 depositions first. Then you present the
23 plaintiff's experts for deposition, and the
24 last depositions that are taken in a case when
25 you are preparing it for trial in significant

1 litigation is that of the defendant's experts.
2 And I think I should have, until I find
3 out what their experts are going to say, the
4 right to amend my pleadings based upon
5 something that I discover during the course of
6 those depositions, and I don't see that that
7 impedes our desire to get cases ready two or
8 three years before they go to trial. To do
9 that in Harris County, which is what this
10 committee has voted, then we are going to do
11 it, but let us at least have the right to get
12 a pleading on file after the discovery is
13 completed.
14 CHAIRMAN SOULES: All right.
15 Your deadline is 15 days. That's what you're
16 talking about?
17 MR. GALLAGHER: All right.
18 Yes.
19 CHAIRMAN SOULES: Because
20 you're saying the defense or the rebuttal
21 experts -- it could be either way. It could
22 be counterclaims, but anyway, the rebuttal
23 experts are designated 45 days before trial
24 and have to give you two days for depositions
25 within 30 days of that. That 30 days expires

1 15 days before trial. I said trial. Before
2 the end of the discovery period is where that
3 ends. Is that what you are suggesting?
4 MR. GALLAGHER: After I have
5 whatever that date is. I wasn't here
6 yesterday, but whatever that day is.
7 MR. MCMAINS: That's it.
8 MR. GALLAGHER: Okay. That's
9 it. Yes.
10 CHAIRMAN SOULES: The
11 affirmative experts have to be designated 75
12 days before the end of the discovery period,
13 right?
14 MR. SUSMAN: Uh-huh.
15 CHAIRMAN SOULES: The rebuttal
16 experts, 45 days before the end of the
17 discovery period, and in both of those cases
18 the designation has to include two suggested
19 dates for depositions within 30 days.
20 MR. SUSMAN: It doesn't say
21 "within 30 days." We could add it.
22 CHAIRMAN SOULES: All right. I
23 thought it said that.
24 MR. SUSMAN: No. I think we
25 took that out at one time.

1 CHAIRMAN SOULES: Okay. Assume
2 that's in there or would get in there, but
3 your date would be 15 days ahead of trial
4 because by then you have had an opportunity to
5 take the rebuttal expert's deposition. Is
6 that what you are proposing?
7 MR. GALLAGHER: Yes.
8 CHAIRMAN SOULES: Okay. Any
9 other -- let's go around the table. John
10 Marks.
11 MR. MARKS: Would there be
12 something wrong with amending after the close
13 of the discovery period and take care of any
14 surprises that might occur by allowing
15 additional discovery for a period of time
16 after the close of the discovery period?
17 HONORABLE SCOTT BRISTER: It
18 will never close.
19 MR. MARKS: Never close? I
20 mean, if you amend after the close of the
21 discovery period, after you have got
22 everything, and then if there was something
23 new that had to be responded to, you could go
24 to the court and say, "Look, they have amended
25 something that's new. I haven't had an

1 opportunity to do any discovery on it. I need
2 an additional period of time to complete that
3 discovery."

4 CHAIRMAN SOULES: Rusty and
5 then we will come around the table.

6 MR. MCMAINS: Well, I want to
7 make primarily a comment with regards to the
8 assumed structure of the committee's attack on
9 Rule 63; that is, it assumes that all
10 pleadings are alike, you know, that all of
11 them have an impact on discovery, which I
12 think is garbage. Most of the time they
13 don't. If they add new causes of action, they
14 bring in new parties, there are certain things
15 obviously in which it has an impact. When you
16 are cleaning up stuff, any kind of amendment,
17 any kind of supplementation, anything that may
18 be responsive to stuff that you have that's
19 new that is produced in response to
20 supplementation, that doesn't change anything
21 with regards to discovery, and you shouldn't
22 have to be going to the courthouse and ask for
23 leave to do it.

24 That to me is so that -- the first
25 problem I have with the rule is treating all

1 amendments alike. They are not alike in my
2 judgment, and you do need to concern yourself.
3 This does not decide the issue of the other
4 rules either. There are other rules
5 implicated. There are joinder rules that we
6 have. We have intervention rules, and these
7 rules allow you to intervene automatically.
8 One could intervene in a lawsuit after the
9 discovery period is over under our current
10 intervention rules.
11 We don't treat that at all in these
12 rules, and you have the class action rule.
13 The class action rule, the court on its own
14 may change who the representatives are, and if
15 you previously had representatives of parties
16 that were the class representatives and the
17 court decides to change who the class reps.
18 are then that makes a difference as to who
19 your discovery is directed to because under
20 the current rules with regard to the absent
21 class members, they aren't subject to
22 discovery.
23 If some of those who are absent all the
24 sudden become parties -- and they don't
25 require an amendment. That's done by the

1 court. The court just can do it. We are
2 implicating a number of rules when we are
3 talking about changing the structure of the
4 lawsuit, and it's not just the amendment of
5 the pleadings. So I don't think that a
6 discussion of an absolute date in which the
7 lawsuit is put in a can makes any sense unless
8 we are talking about precisely what issues are
9 impacting discovery, and then we have to focus
10 on all the rules that that relates to, and
11 this isn't all of them.
12 CHAIRMAN SOULES: Well, we have
13 to start somewhere.
14 MR. MCMAINS: I don't disagree
15 with that, but you tell me that I am not going
16 to be able to file an amended pleading when,
17 as is frequently the case, the Supreme Court
18 changes what the components of the pleadings
19 are in the interim, and you tell me I have got
20 to rely on a trial judge to be able to do it,
21 and I have got to go to a trial judge to get
22 leave to do it, and that's garbage. If they
23 change the components of the pleading
24 requirements, it doesn't change a damn thing
25 with regard to discovery. I ought to be able

1 to replead. Period.

2 CHAIRMAN SOULES: Okay. Come
3 around the table. Anyone else? Alex
4 Albright.

5 PROFESSOR ALBRIGHT: I'd like
6 to echo some of what Rusty said because I had
7 just thought about that there is a difference
8 between an amendment that conforms a pleading
9 to the discovery that's been taken and a
10 pleading that introduces new areas upon which
11 you need new discovery, and that's why I like
12 the structure of the current rule because it
13 allows amendments for a long period of time,
14 but then gives a party, the opposing party, an
15 option to file a motion to strike if it is one
16 of those amendments that brings up new
17 situations, new areas upon which you need to
18 do discovery.

19 I would think we could have a pleading
20 deadline that says you can plead without leave
21 of court 'til 14 days, 7 days before the end
22 of the discovery deadline but give an
23 opportunity for a motion to strike. So you
24 can say, if you are at the end of the
25 discovery period, you can say, "My God, here

1 we are seven days before the end of the
2 discovery period and they have completely
3 changed the lawsuit on me." You either allow
4 that amendment and give us a whole new slew of
5 discovery, or you don't allow the amendment,
6 and that's the way that issue then is
7 addressed.
8 Then after the discovery period or after
9 this deadline the party has to have leave to
10 amend. Okay. That's what you do right before
11 trial now. Your motion for leave to amend
12 might say, "This doesn't change anything that
13 has to be discovered. All I am doing is
14 refining my pleadings." Probably there won't
15 be any opposition to that, but if you do add
16 new causes of action upon which you need new
17 discovery, it makes sense to have to have a
18 motion to do that because the court needs to
19 address or the parties need to address what
20 new discovery is going to be needed.
21 So then you would allow the amendment
22 with specific new discovery that's going to be
23 allowed or don't allow the amendment because
24 it would unreasonably delay the trial, and so
25 I think we can work with our rules to allow

1 what everybody wants to allow.

2 I think we do need to just pick a day
3 where we shift the burden as to when you have
4 to file a motion for leave as opposed to
5 having the burden on the opposing party to
6 file a motion to strike, and then that's
7 really then all we are talking about, is at
8 what point the burden is on the party to file
9 a motion to strike and what point the burden
10 is on the party to file a motion for leave.

11 MR. MCMAINS: But in the
12 current rule, Rule 63 has things in it like
13 motions for suggestions of debt, other
14 representatives, change of executors, for
15 instance. All of those things, they are all
16 gone out of this rule. Now, that's just --
17 you know, we just say, "Well, we will take
18 care of that another day." I am not prepared
19 to just say, well, we are going to start
20 someplace; and we are going to start,
21 therefore, with this rule. We will just drop
22 out all of this other stuff and hope that we
23 can catch it later.

24 PROFESSOR ALBRIGHT: Well, I
25 think the reason that was dropped out is

1 because it was -- Lee Parsley and I talked
2 about that and decided it was probably just a
3 pleading. We can add that back in. I don't
4 think that's the major problem.
5 CHAIRMAN SOULES: Judge McCown.
6 HONORABLE F. SCOTT MCCOWN:
7 Present Rule 63 is on page 24 of the red book
8 if you have got it, and I wonder why it
9 wouldn't work just to keep present Rule 63 as
10 it is and add a comment that says that in
11 assessing surprise that the court has to
12 consider whether additional discovery is going
13 to be necessary, you know, where we are at in
14 terms of the discovery window, whether there
15 is sufficient time to conduct additional
16 discovery, and make an appropriate order so
17 that the discovery window, really to me, the
18 issue about the discovery window is just a
19 subset of surprise.
20 If the amendment is coming at a time that
21 it merely conforms what's already been done to
22 the evidence, no problem. If it's coming at a
23 time where it's going to necessitate
24 additional discovery then the question is, is
25 there enough time to do additional discovery?

1 If it's coming at a -- if the answer to that
2 is, no, there is not enough time to do
3 additional discovery then the judge has to
4 decide, well, am I going to extend the
5 discovery window? Am I going to provide
6 additional time for discovery, or am I not
7 going to allow the amendment? So I think
8 Rule 63 works as long as we make clear what
9 the decision tree is under the term
10 "surprise."
11 CHAIRMAN SOULES: David
12 Keltner.
13 MR. KELTNER: Scott, that may
14 work. I am not sure that a comment completely
15 gets that done, but I think what Rusty and
16 Mike Gallagher said makes sense in that
17 most -- very many pleadings at the last minute
18 are to conform the discovery to the things
19 that will go in at trial.
20 In specifics, though, it seems to me that
21 everybody's comments indicate two things.
22 First off, perhaps the five days after notice
23 of the trial setting is illusory time. It's
24 going to be different every place, Mike, and
25 I'm not sure that's workable. I agree with

1 you that 60 days before the cutoff of the
2 period is not workable given the designation
3 of experts, and that makes great sense to me.
4 The thing that I think most of the
5 defense Bar has a real problem with is the
6 fear that they won't be able to amend later to
7 meet the plaintiff's amendment, and in some
8 instances that's a problem because new
9 affirmative defenses come up. You have to
10 allege certain things, and that needs to be
11 taken care of, and that would be a change in
12 Rule 63, I think.
13 The other thing is -- and, Alex, I think
14 this is important. The suggestions of death
15 and changes in representatives of parties will
16 not be anywhere in the rules if it's not in
17 this rule, and that's important. We got to
18 have that in or we lose that jurisprudence.
19 PROFESSOR ALBRIGHT: That's no
20 problem.
21 MR. KELTNER: So but I think
22 that's easy to put back in. So my suggestion
23 would be that we get -- as you suggested a
24 moment ago and I think we have talked this out
25 enough where we are ready to do it, is get a

1 date certain by which an amendment can be done
2 by right, and I would suggest that it can't be
3 60, but it also can't be tied to a trial
4 setting because that's going to be something
5 we can't control.
6 Second, that we have a determination in
7 some easier standard for the court if the
8 court finds that it is going to necessitate
9 additional discovery, that the court can make
10 the appropriate orders to do that and extend
11 the discovery period for a period of time.
12 We also need to make sure that any
13 pleading can be responded to within the period
14 because that's going to be important to the
15 next to last person to amend. If we get those
16 under consideration, we have got this deal
17 licked, and we are really not too far from it.
18 I think some of the fear of this rule has been
19 although we have discussed it tangentially, we
20 haven't gone fully into it, and I think it's
21 something if we get those four things down, we
22 have got this deal done. Now, that's sort of
23 the concept without specific suggestions, but
24 I think we are getting closer.
25 HONORABLE F. SCOTT MCCOWN: I

1 have a motion. I have a motion. I move that
2 we take Rule 63 in its present form and add
3 the following language at the end of the rule:
4 "Surprise includes insufficient time to
5 complete discovery made necessary by the
6 amendment. If the court finds that the
7 amendment would leave insufficient time to
8 complete the discovery, the court may allow
9 the amendment and extend the discovery time."
10 MR. SUSMAN: Second.
11 CHAIRMAN SOULES: Well, we are
12 not ready to do this. This is too
13 complicated. This is going to have to be
14 worked on awhile. I do think we are ready to
15 do one thing, though. I think experts are
16 designated too late. Once we get to these
17 pleading issues, 75 and 45 is too late in the
18 discovery period. Some few days earlier is
19 going to have to be done before we can work
20 out these other issues. We just don't have
21 enough room in the discovery period left after
22 that to work out these problems, and it's a
23 good thing we talked about them today to come
24 to that reality. How many days earlier than
25 the 75/45 should we make this? This is going

1 to be a change to Rule 10 that we have already
2 passed. Don Hunt.
3 MR. HUNT: I want to suggest we
4 look at 90 and 60, and going back to Alex's
5 draft. As I have heard the discussion here
6 and listened to all the various arguments both
7 ways, what Alex had drafted, it seems to fit
8 if we move this to 60 and 90 for the experts
9 and then maybe go to 30 for the amendments. I
10 don't offer that in the form of a motion, but
11 I would like to know why Alex withdrew her
12 amendment.
13 PROFESSOR ALBRIGHT: I withdrew
14 my amendment because Mr. Susman was so
15 persuasive, and now I disagree with him again.
16 Now I remember why I made the changes I did in
17 the first place. That's what happens when you
18 work on too many of these rules at one time.
19 CHAIRMAN SOULES: At the
20 conclusion of this meeting we are going to
21 send the discovery rules to the Supreme Court.
22 So and these rules are not going to go with
23 them. The pleading, intervention, joinder of
24 parties, those things are going to have to get
25 worked out. David Beck is the chair of that

1 subcommittee. I am going to need another
2 volunteer because we all know how consumed
3 David is with what he's doing today. So I am
4 going to work on that in a little while, but
5 we have got a few things left in the discovery
6 rules that we have not fixed, some things that
7 were left over from yesterday.
8 One of those things which was not left
9 over from yesterday but has become clear here
10 in this discussion is that we need to change
11 the expert designation dates. Let's get that
12 done first now and then deal with the other
13 issues that spread into discovery and then we
14 will come back to these other issues in a
15 minute. Okay. How early should experts be
16 designated? Don Hunt says 90 and 60 rather
17 than 75 and 45.
18 PROFESSOR ALBRIGHT: I second
19 that.
20 MR. LATTING: 90 what?
21 CHAIRMAN SOULES: 90 days for
22 affirmative, 60 days for rebuttal experts,
23 before the end of the discovery period.
24 HONORABLE SCOTT BRISTER:
25 Understanding that the parties and the court

1 can agree otherwise.

2 CHAIRMAN SOULES: 90 and 60.

3 Any other ideas on that? Carl Hamilton.

4 MR. HAMILTON: I think

5 plaintiffs ought to designate 60 days after

6 the beginning of the discovery period and then

7 give the defendant 60 days after that.

8 MR. GALLAGHER: The only

9 comment I have is that I would agree that we

10 need to try to get things expedited as quickly

11 as possible, and then the problem you have is

12 that it varies so much from case to case.

13 Often times you don't get discovery completed

14 or even partially completed in complex

15 litigation, which maybe this is not going to

16 apply to, and there are other circumstances in

17 which it may. I just don't agree that the

18 60-day time limit is sufficient.

19 CHAIRMAN SOULES: Okay. Don,

20 is your proposal on these time limits in the

21 form of a motion?

22 MR. HUNT: No.

23 CHAIRMAN SOULES: Let's make a

24 motion.

25 MR. SUSMAN: Wait a second.

1 CHAIRMAN SOULES: Somebody make
2 a motion and then we will talk about it.
3 MR. MARKS: Well, I move that
4 we do 60 days after the beginning of the
5 discovery period.
6 MR. HAMILTON: I second it.
7 MR. MARKS: We have got a
8 second.
9 CHAIRMAN SOULES: Moved and
10 seconded.
11 MR. SUSMAN: I thought we had
12 already passed over this.
13 CHAIRMAN SOULES: It won't
14 work, so we have got to fix it.
15 MR. SUSMAN: Why are you saying
16 it won't work?
17 CHAIRMAN SOULES: Because we
18 can't get these other amendments and
19 interventions and joinders.
20 MR. SUSMAN: How do you know?
21 How do you know?
22 CHAIRMAN SOULES: We tried to
23 do the amendment, and it won't work.
24 HONORABLE F. SCOTT MCCOWN:
25 Well, Luke, I think I offered a solution and

1 got a second. When you say it won't work I
2 think what's happened is that we have worked
3 on these rules a long time, and now we have
4 got a slightly different group here than we
5 have had here in the past, and it's a group,
6 as Joe said, that has some fundamental
7 problems with the concept, and now we are
8 unraveling it and unweaving it from the back,
9 and what we are going to be left with is we
10 are not going to have a packet at the end of
11 the day.
12 CHAIRMAN SOULES: Yes, we are.
13 Well, maybe not at the end of this day, but by
14 Monday morning we will. Rusty.
15 MR. MCMAINS: Luke, I don't
16 disagree that the joinder rules and all of the
17 other rules that have not been thought about
18 perhaps need some more work, but the
19 fundamental issue, it seems to me, still needs
20 to be resolved by the committee before we send
21 a discovery packet up if you are not going to
22 carry these rules with it because the joinder
23 issue, for instance, which the joinder rules
24 aren't affected, has always been to me one of
25 the biggest problems with these rules because

1 they allow gamesmanship.
2 It allows people in the middle of the
3 discovery period after one, quote, "side's"
4 amount of discovery has been used a lot up to
5 bring in the real defendant late, and I mean,
6 in essence gang bang them in such a way that
7 they realize that they have been had. They
8 have very little discovery time. I know that
9 everybody says, well, you can go to the judge,
10 but that's of very little comfort to a
11 defendant who comes in with 30 days left or 40
12 days left in the discovery period and 10 hours
13 left in the discovery that he could do and
14 that he has to be bound by all the discovery
15 that's been done by everybody else. Those are
16 fundamental to whether or not this system
17 makes any sense and works, and to send these
18 up on the assumption that we can make it work
19 I think is wrong.
20 CHAIRMAN SOULES: Okay. Let's
21 try to do our cleanup work on the rules of
22 discovery and then we will get back to this.
23 We were going to define "written discovery"
24 under Rule 3. Let's get that done. Is it now
25 all discovery except oral depositions? We

1 have got to finish these rules.

2 MR. MARKS: Made and seconded

3 but not recognized.

4 CHAIRMAN SOULES: Well, we have

5 got a command from the Supreme Court to get

6 the discovery rules done today or before

7 Monday morning anyway, and we are going to do

8 that except for Steve's --

9 MR. MARKS: It was a friendly

10 inquiry.

11 CHAIRMAN SOULES: Except for

12 Steve's point that's going to be carried over.

13 That will catch up. We will get that done

14 next time. Okay. Under Rule 3 is written

15 discovery all discovery except oral

16 depositions?

17 HONORABLE SCOTT BRISTER: No.

18 CHAIRMAN SOULES: What else?

19 HONORABLE SCOTT BRISTER: IME's

20 and entry on property.

21 PROFESSOR ALBRIGHT: I think we

22 leave it like it is.

23 MR. SUSMAN: I do, too.

24 CHAIRMAN SOULES: All right.

25 We say, "Written discovery as used elsewhere

1 in these rules means request for standard
2 disclosure."
3 MR. SUSMAN: "Standard request
4 for disclosure."
5 CHAIRMAN SOULES: "Standard
6 request for disclosure, request for production
7 of documents and tangible things,
8 interrogatories to a party, and request for
9 admissions." Now, Judge Brister was concerned
10 that didn't work.
11 HONORABLE SCOTT BRISTER: And
12 again, I don't think that's necessary if the
13 concern is -- if the whole reason for this
14 structure of separating written discovery,
15 creating two new concepts, written discovery
16 and nonwritten discovery is so you don't have
17 to supplement deposition answers, that's real
18 easy to say on the supplementation rule or the
19 deposition rule. On the supplementation rule
20 you say, "This doesn't apply to oral
21 depositions." On the deposition rule you say,
22 "notwithstanding anything in Rule 5 concerning
23 supplementation."
24 There is no sense in saying
25 supplementation doesn't apply to entry on

1 property. There is nothing to supplement, or
2 supplementation needs to not apply to IME's.
3 There is just -- we are heading off on two
4 different kinds of discovery. If the whole
5 purpose is just to say you don't have to
6 supplement depositions, just say that. Don't
7 create two categories of discovery which may
8 have differing rules or cases that apply to
9 them, et cetera.
10 CHAIRMAN SOULES: But we have
11 got a structure here that we have already
12 passed on.
13 MR. SUSMAN: Right.
14 CHAIRMAN SOULES: And --
15 HONORABLE SCOTT BRISTER: Luke,
16 you asked me for my opinion. I gave it to
17 you. If you don't want my opinion, don't ask.
18 CHAIRMAN SOULES: I do want
19 your opinion. I apologize to you. Okay. Is
20 there -- does anyone want to make a motion to
21 change this sentence defining "written
22 discovery" to say something else?
23 HONORABLE SCOTT BRISTER: Yeah.
24 I -- well, we voted on whether to drop it
25 before. So, no. I mean, unless you want me

1 to raise it again I am not going to.

2 CHAIRMAN SOULES: Okay. No

3 motion. Okay. It stays as is.

4 MR. SUSMAN: Rule 4.

5 MR. KELTNER: Luke, we did have

6 another deal with Rule 3.

7 CHAIRMAN SOULES: What was

8 that?

9 MR. KELTNER: That was the

10 expert witness issue that Rusty had raised

11 that you asked us to look at on 3(2)(e), and I

12 think we have got a proposal. Let me pass it

13 out.

14 While this is being passed out let me

15 tell you basically what we were asked to do

16 and what we tried to do. In the scope of

17 discovery rule at 3(2)(e), unlike the other

18 ideas in the scope rule we just merely

19 said -- didn't say what expert witnesses were.

20 It's no place else in the rule. So we

21 expanded it to say that basically you can get

22 discovery of an expert witness, and what you

23 can get are facts known, mental impressions,

24 and opinions. That's nowhere else in the

25 rule, and that needed to be in.

1 Then we defined basically what a
2 testifying expert is. That's the only place
3 that's in the rule. Consulting expert is a
4 privilege in Rule 4, and we refer to that
5 definition, and then we dealt with the problem
6 that is in the current rules of the expert
7 that has knowledge of relevant facts that they
8 didn't get in preparation for trial or in
9 anticipation of litigation.
10 In other words, it's an expert, but the
11 expert has factual knowledge, and remember, we
12 had put "personal knowledge," which had caused
13 a problem. So we redefined that that he
14 didn't get it, he or she didn't get the
15 knowledge in anticipation for the lawsuit, and
16 that could either be a testifying expert or a
17 consulting. That would be a person with
18 knowledge of relevant facts, and to that
19 extent that knowledge would be discoverable,
20 and then finally, the determination of the
21 status is controlled by Rule 9 and 10, and we
22 indicate that here, and I would move adoption
23 of this as a replacement for current 3(2)(e).
24 CHAIRMAN SOULES: Okay. Let us
25 take time to read it for a minute.

1 PROFESSOR ALBRIGHT: I second.
2 So that's done.
3 CHAIRMAN SOULES: Moved and
4 seconded. Let's take time to read it and
5 understand it and then we will talk about it.
6 Okay. Is everybody ready to start
7 talking about this? Okay. Who wants to
8 start?
9 Okay. Let me ask a question. David, in
10 (e)(2) --
11 MR. KELTNER: Yes, sir.
12 CHAIRMAN SOULES: We say in the
13 fourth line "who will not be called to
14 testify." What you mean is who is not a
15 testifying expert --
16 MR. KELTNER: Right.
17 CHAIRMAN SOULES: -- as defined
18 in (1).
19 MR. KELTNER: Yes.
20 CHAIRMAN SOULES: So we should
21 change that "who will not be called to
22 testify" to say he's "not a testifying
23 expert."
24 MR. KELTNER: I think that's a
25 very good change.

1 CHAIRMAN SOULES: On the next
2 sentence, "A consulting expert's identity,
3 mental impressions, and opinions are not
4 discoverable." Why not just stop there,
5 period? Because they are not discoverable,
6 are they?
7 MR. KELTNER: No, they are not,
8 and that's what 4(2)(a)(3) says. That's fine.
9 PROFESSOR ALBRIGHT: Well, I
10 think we need to refer to the privilege rule,
11 don't we?
12 CHAIRMAN SOULES: Okay.
13 MR. KELTNER: That's fine. It
14 makes no difference either way.
15 PROFESSOR ALBRIGHT: Or I guess
16 we could put the consulting expert privilege
17 here and not --
18 MR. KELTNER: No. It needs to
19 be -- people are going to look at the
20 privileges. They need to see a list of those.
21 They are used to doing that, and I think
22 that's important.
23 PROFESSOR ALBRIGHT: And I
24 think it's important then to refer to that
25 rule.

1 MR. KELTNER: Either way.

2 HONORABLE F. SCOTT MCCOWN: It

3 should be under the new Rule 4. It's in

4 4(2)(c). So instead of (a)(3) it would be

5 (c).

6 MR. KELTNER: Is that right?

7 CHAIRMAN SOULES: I just wonder

8 if that suggests that they are discoverable

9 some other way.

10 MR. LATTING: Yeah. That's my

11 concern.

12 CHAIRMAN SOULES: David, what I

13 am concerned about, we say it's not

14 discoverable pursuant to this rule. Does that

15 suggest that they may be discoverable some

16 other way?

17 MR. KELTNER: That's how I read

18 your comment.

19 CHAIRMAN SOULES: That's why I

20 would say period.

21 HONORABLE F. SCOTT MCCOWN:

22 Easy fix.

23 CHAIRMAN SOULES: What?

24 HONORABLE F. SCOTT MCCOWN: Say

25 "Pursuant to Rule 4(2)(c), a consulting

1 expert's identity, mental impressions, and
2 opinions are not discoverable," period.
3 CHAIRMAN SOULES: I don't know
4 if that helps it.
5 HONORABLE SCOTT BRISTER: Yeah,
6 it does.
7 MR. PRICE: Yeah, it does.
8 MR. KELTNER: Actually, it
9 does.
10 HONORABLE DAVID PEEPLES: You
11 could just add the words "or otherwise" at the
12 end of that sentence.
13 MR. LATTING: That really fixes
14 it if you say "or otherwise." Why don't you
15 do that? That way you don't need to know how
16 they are not discoverable. They are just not.
17 CHAIRMAN SOULES: Okay.
18 HONORABLE F. SCOTT MCCOWN:
19 Well, wait. I don't think you can do the "or
20 otherwise" because they are discoverable under
21 4(2)(c) if a testifying expert has reviewed
22 the consulting expert's work.
23 CHAIRMAN SOULES: Judge, we
24 have defined that consulting expert as not a
25 consulting expert anymore.

1 MR. LATTING: That's a
2 testifying expert.
3 HONORABLE F. SCOTT MCCOWN:
4 Okay.
5 MR. KELTNER: And actually
6 interestingly that's the way the rules
7 currently read, too.
8 HONORABLE F. SCOTT MCCOWN:
9 Well, you want to just take it out of 4
10 altogether then?
11 MR. KELTNER: I see Luke's
12 concern, and it's a good concern.
13 CHAIRMAN SOULES: I think if we
14 just put a period after "not discoverable"
15 that gets it.
16 MR. KELTNER: I think that's
17 fine.
18 CHAIRMAN SOULES: That will
19 eliminate the confusion and just take out
20 "pursuant to." Okay. And then in the
21 paragraph (3), one, two, three, four, five.
22 It's essentially the same issue, "location and
23 a brief statement of the expert's connection
24 with the case are discoverable." Why not just
25 say period instead of "upon proper request

1 from a party retaining experts."

2 MR. KELTNER: Let me tell you

3 why it's there.

4 CHAIRMAN SOULES: Is that a new

5 request?

6 MR. KELTNER: And I'm not

7 saying that that's -- we have to have it one

8 way or the other. You ought to be able to get

9 from a party if they have a consulting expert

10 who has knowledge of relevant facts the same

11 information you get from a person with

12 knowledge of relevant facts the same way, and

13 that's what you can do. You can only get that

14 discovery from the party. Anything more you

15 want to know about the details of the facts

16 you are going to have to depose or otherwise

17 get discovery from the consulting expert him

18 or herself, but if you don't like that

19 distinction, that's fine, and I would be happy

20 to cut it off there.

21 CHAIRMAN SOULES: Well, what we

22 are saying is they are discoverable, period.

23 Is this some new different kind of request

24 that's not someplace else?

25 MR. KELTNER: No. In fact,

1 this mirrors what is in the scope rule for
2 persons with knowledge of relevant facts. It
3 just takes the same definition or the same
4 matters to be discoverable. I have got some
5 issues with that, but that's another issue for
6 another time.
7 CHAIRMAN SOULES: Robert
8 Meadows.
9 MR. MEADOWS: David, I don't
10 see what this adds. I mean, a consulting
11 expert who has knowledge of relevant facts is
12 a person with knowledge of relevant facts.
13 MR. KELTNER: Except, Robert,
14 you're right except that the way we had the
15 rule in rule -- both 10 and in 3 there was an
16 indication that was not the case, and we are
17 trying to cure that.
18 MR. MEADOWS: Well, I mean, if
19 I have an engineer who worked on a project,
20 built a platform, and then that platform
21 explodes ten years later, that engineer is a
22 person with knowledge of relevant facts by
23 virtue of his employment on that project.
24 MR. KELTNER: That's right.
25 MR. MEADOWS: I have got to

1 list him as a person with knowledge of
2 relevant facts.
3 MR. KELTNER: That's right.
4 And there are cases that would back that up.
5 MR. MEADOWS: So I don't see
6 what this adds other than the fact that I now
7 have to make some sort of determination of how
8 I am going to describe that person's
9 involvement with the case.
10 MR. KELTNER: Well, here's the
11 issue. In a number of relatively recent cases
12 the Supreme Court has noted that you can have
13 a dual capacity witness, one that is providing
14 expert testimony and one that also has
15 personal knowledge -- and let me use that as a
16 term of art -- of facts involving the case,
17 and the discovery from those witnesses takes
18 two different tracks.
19 Under the proposal that we currently have
20 adopted the inference is, no, if he's a
21 testifying expert, you get a different type of
22 discovery. You get to designate them later
23 and the like. That was the fear that this
24 group mentioned yesterday and wanted change.
25 My thought was let's say we never had in the

1 rules what's testifying, what's consulting,
2 and let's put that in, and let's also
3 acknowledge that somebody could be a little
4 bit of both, which cases hold, and just say
5 so. If they do have knowledge of relevant
6 facts, let's disclose them.
7 MR. MEADOWS: Here is my
8 problem with it and then I will turn it over,
9 but the way this works now and the way that it
10 works best, I think, is I am representing a
11 construction company on the very issue that I
12 have described. I list that person among
13 those with knowledge of relevant facts in the
14 initial discovery. The plaintiff or the
15 opposing side is on notice that this
16 person -- you know, of these people who have
17 knowledge. If I want to use that person as a
18 testifying expert to give opinion testimony, I
19 have to then designate that person under that
20 category. That sort of lifts the importance
21 of that particular witness.
22 MR. KELTNER: That's right.
23 MR. MEADOWS: And if the
24 plaintiff wants to conduct a different kind of
25 discovery or more extensive discovery with

1 that person, they are on notice that I am
2 going to use that person not only as a person
3 with knowledge of relevant facts but also as
4 an expert, but I mean, I think that's the way
5 it ought to work.
6 MR. KELTNER: It is, and I
7 think everybody agrees with that. Under the
8 current rule that we discussed yesterday, that
9 might not be the result. That's the reason
10 that we spelled it out.
11 MR. MARKS: But it seems to me
12 that if you did exactly what you said, it
13 would comply with this rule. If you
14 identified the person as a person with
15 knowledge of relevant facts, that would comply
16 with the rule.
17 MR. KELTNER: John, it would,
18 but the part that we adopted yesterday, the
19 sentence in Rule 10 and the provision that's
20 current Rule 3(2)(e) that has the U-turn that
21 you come back to it, would indicate that if
22 they are an expert, they are an expert, and
23 that's it. They have to have personal
24 knowledge, and that's not appropriate, and
25 that's not what the case law is.

1 MR. MEADOWS: Well, I think we
2 ought to look at those points to see whether
3 or not it's a problem before we -- I mean,
4 this way I have got to -- if I am receiving
5 advice from someone in the company of an
6 expert nature but I don't intend to call that
7 person as an expert, so he is a consulting
8 expert at least as far as I am concerned, but
9 I have identified him as a person with
10 knowledge of relevant facts, that ought to be
11 enough.
12 MR. KELTNER: I agree with
13 that, and this doesn't change that.
14 MR. MEADOWS: Except I have got
15 to give a -- I have now got to highlight that
16 person as someone who has --
17 MR. KELTNER: Knowledge of
18 relevant facts.
19 MR. MEADOWS: No. I have got
20 to give a statement of that expert's
21 connection with the case.
22 MR. KELTNER: Here is the
23 reason for that. That's what we voted on
24 yesterday to do for persons with knowledge of
25 relevant facts. It's no different than what

1 you would do with a person with knowledge of
2 relevant facts. I disagree with that
3 personally, but we voted on that yesterday,
4 and to make it -- if it's a person with
5 knowledge of relevant facts, it's a person
6 with knowledge of relevant facts, and you have
7 got to give a statement of their connection
8 with the case.
9 MR. MEADOWS: But is this
10 person to be somehow designated as a
11 consulting expert?
12 MR. KELTNER: No.
13 MR. MARKS: Would you say he
14 worked on the platform?
15 MR. KELTNER: Yes.
16 MR. MARKS: That would be it,
17 period.
18 HONORABLE SCOTT BRISTER:
19 Question.
20 CHAIRMAN SOULES: Let's see if
21 maybe we can get this articulated to where it
22 just says he's a person with knowledge of
23 relevant facts in that capacity.
24 MR. KELTNER: That would be
25 fine.

1 CHAIRMAN SOULES: Let's try
2 this. "When a person who is a testifying or
3 consulting expert," and we will just call him
4 a person, "has acquired knowledge of relevant
5 facts not in preparation for trial or in
6 anticipation of litigation, the identity,
7 location, and a brief statement of the
8 person's connection with the case" --
9 MR. KELTNER: That's good for
10 me.
11 CHAIRMAN SOULES: -- "are
12 discoverable as a person with knowledge of
13 relevant facts."
14 MR. KELTNER: I think that's
15 better.
16 CHAIRMAN SOULES: Period.
17 MR. KELTNER: And then end it
18 and not have anything after that, Luke.
19 MR. MARKS: Now, what are you
20 doing, Luke?
21 CHAIRMAN SOULES: Before I
22 answer that, if I could, we still probably
23 need the last sentence so that we don't
24 limit -- it's not taken as a limitation.
25 That's where it stops for that type of person

1 with knowledge of relevant facts.

2 MR. KELTNER: We probably ought

3 to go back and do that for persons with

4 knowledge of relevant facts in Rule 4 as well

5 because we indicate the only thing you can get

6 discoverable on that is the statement of their

7 connection when obviously you can depose them,

8 but I mean, this comes directly from the -- I

9 will give it to you. So everybody will know

10 where we are, if you will look at current

11 Rule 3.

12 HONORABLE SCOTT BRISTER: Yeah.

13 You're right.

14 CHAIRMAN SOULES: 3(2)(c).

15 MR. KELTNER: 3(2)(c). We left

16 out -- if you read this literally, it would

17 mean that the only thing you can get from a

18 person with knowledge of relevant facts is a

19 statement regarding their connection with the

20 case.

21 HONORABLE SCOTT BRISTER:

22 That's true.

23 MR. KELTNER: That's probably

24 true when you ask the party for that, but

25 obviously you can get additional discovery.

1 HONORABLE SCOTT BRISTER:
2 Defining the scope of discovery.
3 MR. KELTNER: Right. This is
4 defining the scope. I think we left that out
5 unintentionally, and we ought to go back and
6 change that.
7 HONORABLE SCOTT BRISTER:
8 That's right.
9 CHAIRMAN SOULES: All right.
10 Well, let's go ahead and look at 3, and, John,
11 now I will answer your question. It would
12 read, "When a" -- insert "person who is a,"
13 and then pick up "testifying or consulting
14 expert has acquired knowledge of relevant
15 facts not in preparation of trial or in
16 anticipation of litigation, the identity,
17 location, and a brief statement of the
18 person's" -- instead of "expert's" --
19 "connection with the case are discoverable as
20 a person with knowledge of relevant facts."
21 MR. MARKS: Would you want to
22 insert "who" between "expert" and "has" on the
23 first line?
24 CHAIRMAN SOULES: Say that
25 again.

1 MR. MARKS: "When a person who
2 is a testifying or consulting expert" -- no.
3 Okay. I'm sorry. Disregard that.
4 CHAIRMAN SOULES: And then "The
5 facts known by the person, not acquired in
6 preparation for trial or anticipation of
7 litigation are discoverable." We say "by
8 deposition from the person."
9 MR. KELTNER: I personally
10 think you can put a period after
11 "discoverable," but I think probably
12 "deposition" doesn't hurt.
13 CHAIRMAN SOULES: Because
14 that's the only way.
15 MR. KELTNER: Yeah. It pretty
16 much is.
17 CHAIRMAN SOULES: Alex
18 Albright.
19 PROFESSOR ALBRIGHT: Well,
20 David, is the problem that you are trying to
21 fix that consulting experts whose only
22 knowledge of relevant facts was obtained in
23 anticipation of litigation or in preparation
24 for trial? You don't want those people's
25 knowledge to be discovered, right?

1 Because the problem is, is we have a
2 person with knowledge of relevant facts is
3 someone whose only knowledge is even hearsay
4 knowledge, but if you have a consulting expert
5 whose only knowledge of relevant facts was
6 obtained in anticipation of litigation you
7 don't want the other side to be able to
8 discover the facts known by that consultant as
9 a person with knowledge of relevant facts.
10 MR. KELTNER: No. That's not
11 the only thing, and let me explain. We left
12 out testifying expert in the scope of
13 discovery as a defined term. That's the
14 suggestion Scott made yesterday, and after
15 looking at it, it's no place else in the rules
16 in the way that we have defined. So we have
17 to have that in.
18 PROFESSOR ALBRIGHT: No. But I
19 am talking just about No. 3.
20 MR. KELTNER: I understand, but
21 your question I think was more directed in
22 what was the problems we were trying to solve,
23 and that certainly is one. The second problem
24 I think that you were zeroing in on is
25 additionally we have to indicate that an

1 expert, whether it be testifying or
2 consulting, that had knowledge outside of his
3 expert retention of the facts of the case --
4 in other words, outside of anticipation of
5 litigation and preparation for trial --
6 whether that knowledge be personal or
7 otherwise, that person becomes a person with
8 knowledge of relevant facts, and that is
9 happening more and more in litigation, and we
10 had to have that as an exception to the rule
11 somewhere, and that's the reason for 3.
12 PROFESSOR ALBRIGHT: Let me see
13 if this does it. Okay. "When a consulting
14 expert whose knowledge of relevant facts was
15 acquired only in preparation for trial or in
16 anticipation of litigation, that expert is not
17 a person with knowledge of relevant facts
18 under," 3.2 point whatever. "The facts known
19 by an expert not acquired in preparation for
20 trial or in anticipation of litigation are
21 discoverable."
22 MR. MEADOWS: Let me tell you
23 why that's important, David. Let's say in my
24 example I list John Doe as the engineer expert
25 who worked on the platform. The platform

1 explodes. That's my only contact inside the
2 company with what happened so I can understand
3 the issues in the case. I list that person as
4 a person with knowledge of relevant facts.
5 Plaintiff takes his deposition.
6 Under this rule he's entitled, as he
7 would be under our current system, to explore
8 what he knew about the construction of the
9 platform and get his opinions about that.
10 Then he gets into discussions he's had with me
11 about his opinions about the cause of the
12 accident and so forth, and I tell him not to
13 answer. He's a consulting expert. I could be
14 confronted with the fact that this last
15 sentence says he has to answer those questions
16 because those facts which were not -- let's
17 see.
18 MR. SUSMAN: He got them from
19 you.
20 MR. MEADOWS: If he's got them
21 from me, the facts known by the expert not
22 acquired in preparation for litigation are
23 discoverable.
24 PROFESSOR ALBRIGHT: But the
25 ones that you-all talked about --

1 MR. MEADOWS: Well, that's a
2 different privilege. Okay. But he has
3 opinions. He has opinions about the cause of
4 the accident because he's an expert, and he's
5 acquired those opinions in preparation for the
6 trial as my consulting expert. He's got to
7 disclose those.
8 MR. KELTNER: No. I think the
9 result is absolutely different under the
10 proposed rule, but if Alex's version makes you
11 feel better, there is not a substantial
12 difference between Alex's version and mine.
13 It just reverses the way you go at it. So
14 either one is fine.
15 CHAIRMAN SOULES: Let me hear
16 what you said again, Alex.
17 PROFESSOR ALBRIGHT: What mine
18 does is it --
19 CHAIRMAN SOULES: Just read the
20 words.
21 PROFESSOR ALBRIGHT: "When a
22 consulting expert whose knowledge of relevant
23 facts was acquired only in preparation for
24 trial or in anticipation of litigation, that
25 expert is not a person with knowledge of

1 relevant facts."

2 CHAIRMAN SOULES: But that

3 doesn't answer the question. That doesn't get

4 to the problem of separating. Suppose you

5 have got a consulting expert that has both.

6 MR. MARKS: How about a

7 "nothing herein" statement? "Nothing herein

8 shall require the consulting expert to give

9 opinions," blah, blah, blah.

10 CHAIRMAN SOULES: Justice

11 Duncan.

12 HONORABLE SARAH DUNCAN: "A

13 testifying or consultant expert who has

14 acquired knowledge of relevant facts not in

15 preparation for trial or in anticipation of

16 litigation is a person with knowledge of

17 relevant facts and subject to discovery in

18 accordance with Rule 3(c) and these rules as

19 to the knowledge and facts not acquired by the

20 expert in preparation for trial or in

21 anticipation of litigation." I think that

22 separates out only that which is discoverable.

23 MR. KELTNER: I will accept

24 that as a friendly amendment.

25 HONORABLE SARAH DUNCAN: But it

1 says that they are a person with knowledge of
2 relevant facts, which they really are.
3 MR. LATTING: Does that suit
4 you, Robert?
5 MR. MEADOWS: Yeah. Is that
6 all right, David?
7 MR. KELTNER: Yeah. That's
8 fine with me.
9 CHAIRMAN SOULES: Okay. Read
10 it back again so that we get it on the record,
11 and Alex gets it down. Slowly.
12 HONORABLE SARAH DUNCAN: "A
13 testifying or consulting expert who has
14 acquired knowledge of relevant facts not in
15 preparation for trial or in anticipation of
16 litigation is a 'person with knowledge of
17 relevant facts,'" in quotes, "and subject to
18 discovery in accordance with Rule 3(c) and
19 these rules as to the knowledge and facts not
20 acquired by the expert in preparation for
21 trial or anticipation of litigation," and you
22 might want to add instead of just "as to" but
23 "only as to."
24 CHAIRMAN SOULES: That's fine.
25 Second to that?

1 PROFESSOR ALBRIGHT: Can you
2 read it one more time?
3 HONORABLE SARAH DUNCAN:
4 Uh-huh. Why don't I just give it to you?
5 PROFESSOR ALBRIGHT: Oh, okay.
6 CHAIRMAN SOULES: Is there a
7 second for that motion?
8 MR. LATTING: Yes. I second
9 it.
10 CHAIRMAN SOULES: Okay. Joe
11 seconds it. Any further discussion? Rusty
12 McMains.
13 MR. MCMAINS: Is the purpose of
14 that to still preclude the disclosure of facts
15 acquired during the preparation?
16 CHAIRMAN SOULES: Yes.
17 MR. MCMAINS: I mean, because
18 facts in terms of like observations like
19 measurements, testing results, test results,
20 those things, those are discoverable.
21 HONORABLE SCOTT BRISTER: Not
22 from the consulting expert.
23 MR. MCMAINS: From a testifying
24 expert they are. Hers, a testifying expert
25 doesn't get to give those. Well, that's

1 ridiculous.

2 MR. MARKS: Yeah, but they do

3 under a new rule.

4 MR. MCMAINS: No. We don't

5 have a scope rule on that.

6 CHAIRMAN SOULES: I really

7 think what Sarah has dictated, that really

8 deals with consulting experts. It doesn't

9 have anything to do with testifying experts.

10 MR. KELTNER: That's right.

11 This is all a very good point. Here's how we

12 can cure it, though, and it's pretty simple,

13 but what we are trying to deal with now is the

14 idea of the dual capacity expert, whether they

15 be consulting or testifying, who also have

16 knowledge of relevant facts just because of

17 their connection with the events of the case.

18 Rusty has got a good point. The

19 testifying expert is going to have to disclose

20 everything he or she knows no matter how they

21 know it, whether it be in anticipation of

22 litigation or independently. We have got to

23 make that distinction and then we have got it.

24 MR. LATTING: Yes. Yes. Yes.

25 HONORABLE SARAH DUNCAN: Can we

1 just take out "testifying or"?

2 HONORABLE SCOTT BRISTER: But

3 doesn't that get you back to the problem

4 originally? Then you have got an expert with

5 knowledge of relevant facts that you don't

6 have to do anything 'til 75 days before trial.

7 MR. KELTNER: Give me a couple

8 of seconds, and I think I can figure that one

9 out.

10 HONORABLE SCOTT BRISTER: Let

11 me ask one more thing while you are figuring

12 that. Do we have a problem with which trial

13 that we have in work product cases with

14 preparation for trial? In other words, this

15 is the doctor or expert we have used in five

16 previous trials that, oh, we are not going to

17 go into their knowledge of preparation because

18 it wasn't preparation for this trial, how they

19 found out things. I just raise that.

20 MR. KELTNER: If you will look

21 at Rule 10, 10 deals with that issue to some

22 extent, Scott, and I think makes clear that

23 you can get biographical information,

24 background, and things like that, but I think

25 that's an excellent point.

1 CHAIRMAN SOULES: Okay. So we
2 are going to substitute at 3, and I guess it
3 would be "Consulting Expert with Knowledge of
4 Relevant Facts," would be the title of it,
5 wouldn't it?
6 MR. MARKS: Do we now have the
7 problem we were talking about yesterday?
8 MR. KELTNER: We may have a
9 cure on Rusty's concern. He is going to look
10 at it quickly.
11 MR. YELENOSKY: Luke.
12 CHAIRMAN SOULES: Let Rusty and
13 David work through this because we have
14 something on the table.
15 (At this time there was a
16 recess, after which time the proceedings
17 continued as follows:)
18 MR. KELTNER: Yes. He agrees
19 that it solves it.
20 CHAIRMAN SOULES: Okay. So we
21 say, (3), Consulting Experts with Knowledge of
22 Relevant Facts," colon, and then Justice
23 Duncan's language is what?
24 MR. KELTNER: Alex has that,
25 and it would be now 3(2)(e)(3), same heading,

1 we put Sarah's comments there or version
2 there.
3 CHAIRMAN SOULES: 3(2)(e)(3),
4 the heading is "Consulting Expert with
5 Knowledge of Relevant Facts," and the
6 substance that follows the colon --
7 MR. KELTNER: No. It would be
8 "Expert Witnesses with Knowledge of Relevant
9 Facts."
10 PROFESSOR ALBRIGHT: It would
11 be "expert witnesses"?
12 MR. KELTNER: Yeah.
13 CHAIRMAN SOULES: We really are
14 only talking about consulting experts, aren't
15 we?
16 MR. KELTNER: Not really.
17 CHAIRMAN SOULES: All right.
18 MR. KELTNER: Sarah, would you
19 come up, and I will show you what -- we are
20 going to make one small change.
21 HONORABLE SARAH DUNCAN: I'm
22 sorry?
23 MR. KELTNER: Would you come up
24 and take a look at this for a minute? You
25 have great credibility.

1 HONORABLE SARAH DUNCAN: It's
2 just the grammar that's driving me crazy for
3 the last two days.
4 CHAIRMAN SOULES: Okay. This
5 will be 3(e)?
6 MR. SUSMAN: 3(2)(e)(3).
7 CHAIRMAN SOULES: 3(2)(e)(3),
8 and it reads as follows. Go ahead, Alex.
9 PROFESSOR ALBRIGHT: "Expert
10 Witness with Knowledge of Relevant Facts. An
11 expert who has acquired knowledge of relevant
12 facts not in anticipation of litigation or
13 preparation for trial is a person with
14 knowledge of relevant facts and subject to
15 discovery in accordance with Rule 3(c) and
16 these rules only as to those facts."
17 CHAIRMAN SOULES: Okay. Is
18 there a second?
19 MR. SUSMAN: Second.
20 CHAIRMAN SOULES: Moved and
21 seconded. Further discussion?
22 MR. LATTING: What about
23 opinions? Do you mean to leave those out?
24 PROFESSOR ALBRIGHT: That's
25 right.

1 MR. MCMAINS: Yes. Out of that
2 rule, yes.
3 MR. KELTNER: Out of that rule
4 because they are generally discoverable under
5 a previous one.
6 HONORABLE DAVID PEEPLES: Do we
7 want the word "is" before "subject"?
8 CHAIRMAN SOULES: Okay. We
9 took out the word "only" and we add "is"
10 before "subject."
11 Okay. Here it comes again. "Expert
12 Witness with Knowledge of Relevant Facts. An
13 expert who has acquired knowledge of relevant
14 facts not in preparation for trial or in
15 anticipation of litigation is a person with
16 knowledge of relevant facts and is subject to
17 discovery in accordance with Rule 3(c) and
18 these rules as to those facts." Those in
19 favor show by hands. 19. Those opposed?
20 Okay. That's unanimous. That is the new
21 3(2)(e)(3).
22 HONORABLE SCOTT BRISTER: Wait,
23 wait, wait. Let me just make sure. And we
24 are agreed preparation for trial is
25 preparation for any trial?

1 HONORABLE C. A. GUITTARD: Yes.
2 HONORABLE SCOTT BRISTER: It
3 seems like it has to be if the in-house
4 engineers helped you on two previous cases but
5 wasn't involved in the design. That's not a
6 person with knowledge of relevant facts. So
7 preparation for trial would include
8 preparation for prior trials.
9 MR. GALLAGHER: How about in
10 "anticipation for litigation"?
11 HONORABLE SCOTT BRISTER: And
12 again, does anticipation of litigation have to
13 be before it was filed?
14 HONORABLE F. SCOTT MCCOWN:
15 Can't we leave that?
16 CHAIRMAN SOULES: Yeah. This
17 gets into a --
18 HONORABLE F. SCOTT MCCOWN:
19 That's a big problem. Can't we leave that?
20 MR. KELTNER: Scott, I will
21 tell you I left that intentionally that way
22 because that is an issue that is currently
23 still alive with the consulting expert that
24 has not been resolved by the Court.
25 MR. SUSMAN: Yeah. I would

1 leave that.

2 MR. LATTING: This is the

3 proverbial can of worms.

4 CHAIRMAN SOULES: Okay. Does

5 this get the U-turn completed now that we were

6 going to make?

7 MR. KELTNER: Yes.

8 CHAIRMAN SOULES: Okay. That

9 takes care of that problem. And then Rule 4.

10 HONORABLE F. SCOTT MCCOWN: You

11 have a copy of Rule 4 in front of you, and let

12 me walk you through it and the changes that

13 were made yesterday. Big subdivision (1) just

14 sets out the general rule that any matter

15 protected from disclosure by any privilege,

16 that's not discoverable.

17 Then big subdivision (2) sets out the

18 specific work product privilege. Subdivision

19 (a) defines work product. Then subdivision

20 (b) sets out the protection of work product.

21 Subdivision (1) says that an attorney's mental

22 processes are protected, period. You cannot

23 get attorney mental processes even if you can

24 prove undue hardship and substantial need.

25 Protection of other work product then is

1 protected, and we took Luke's suggestion to
2 make it parallel and say "may not." So a
3 judge may not order discovery of any other
4 work product except on a showing of
5 substantial need and undue hardship.
6 Now, paragraph (3) is the difficult one
7 because it's a concept that could itself go up
8 in paragraph (1) or could be a separate
9 paragraph, and we have had it both places half
10 a dozen times, but we decided that the easiest
11 way was to put it as its own paragraph because
12 what paragraph (3) is, is when (1) and (2)
13 interact together. In other words, you can't
14 get attorney mental processes. You can get
15 other work product if you show substantial
16 need and undue hardship. When you make that
17 showing, there may consequently be attorney
18 mental processes that you can figure out from
19 the stuff you are getting. That's the
20 Occidental situation.
21 And so what we say is notwithstanding
22 subdivision (1) if you have disclosure ordered
23 pursuant to subdivision (2), that it may
24 incidentally disclose by inference attorney
25 mental processes that would otherwise have

1 been protected under subdivision (1), but then
2 we make clear that in such a circumstance the
3 judge shall protect against the incidental
4 disclosure of attorney mental processes to the
5 extent possible. We don't try to define it
6 because there may be all kind of things,
7 limited disclosure, redaction.
8 And then paragraph (4) says that any time
9 you're ordering discovery of work product you
10 shall to the extent possible protect against
11 the disclosure of any mental impressions
12 opinions, conclusions, or legal theories even
13 of a party or a party representative. So that
14 would be nonattorney. So that's protection of
15 work product.
16 Then I would recommend we take
17 subdivision (c) completely out because now we
18 have the consulting expert, and it really
19 doesn't fit here, and then (d) would become
20 the exceptions, and that will actually have a
21 much better organization. So then you have
22 the exceptions to protection of work product,
23 and we have gone back and done what Steve
24 Susman asked. We have made them all parallel
25 nouns, and they are the eight exceptions

1 listed. It's a hard rule to write, but I
2 think that gets it, and I would move the
3 adoption of Rule 4 as before you.
4 MR. SUSMAN: Second.
5 CHAIRMAN SOULES: Moved and
6 seconded. Discussion? Judge Guittard.
7 HONORABLE C. A. GUITTARD: In
8 (b)(1) -- on (b)(2), "a judge may not," that
9 indicates that a judge may or may not. Should
10 it say "a judge shall not"?
11 HONORABLE F. SCOTT MCCOWN:
12 Okay.
13 MR. SUSMAN: Yes.
14 HONORABLE F. SCOTT MCCOWN: I
15 will accept that friendly amendment.
16 CHAIRMAN SOULES: In (1) and
17 (2)?
18 HONORABLE C. A. GUITTARD: Just
19 in (2).
20 HONORABLE F. SCOTT MCCOWN:
21 Well, we could do it in both, couldn't we,
22 Judge?
23 HONORABLE C. A. GUITTARD:
24 Yeah. Both. Both, "shall."
25 HONORABLE F. SCOTT MCCOWN: I

1 will accept that friendly amendment and change
2 the "may" to "shall" in both (1) and (2).
3 MR. LATTING: Scott, would it
4 be a good idea to modify (4) in some way to
5 make it clear that that was for other than
6 attorney mental processes?
7 I was a little confused when I read that
8 because I guess now that you have explained
9 it, it's clear enough, but when you open this
10 rule book three years from now in Goldthwaite
11 it may not be quite so clear. No offense to
12 Goldthwaite.
13 HONORABLE F. SCOTT MCCOWN: You
14 want to say "nonattorney mental processes"?
15 MR. LATTING: Well, I am just
16 asking the question of you and the rest of the
17 committee. Would that be a good idea? Would
18 that make it clearer what we are trying to say
19 and trying to do?
20 MR. KELTNER: I'm afraid that
21 might give a different meaning than you intend
22 because it could mean that it is the thought
23 processes of others, not attorneys, even
24 though they work closely with the attorneys,
25 and we have gotten away from that.

1 CHAIRMAN SOULES: Judge McCown,
2 would you explain? I missed apparently
3 something in your explanation. What's the
4 difference between the last sentence in (3)
5 and all of (4)?
6 MR. LATTING: Yeah. That's it.
7 HONORABLE F. SCOTT MCCOWN:
8 That's a good question. You could
9 theoretically take out the last sentence of
10 (3) because (4) does include the last sentence
11 of (3), but the reason we had that in is
12 because of the committee's desire to do
13 everything we could to protect attorney work
14 process, but you are right. (4) subsumes the
15 last sentence of (3). It's going to be very
16 rare that -- here is the situation you have to
17 have to use (4) for nonattorneys, and it's
18 just not going to come up much, but No. 1,
19 it's going to have to be a communication that
20 wouldn't already be protected by
21 attorney-client privilege. Attorney-client
22 privilege is going to protect most of that.
23 No. 2, it's going to have to be one where
24 you show that you have got substantial need
25 and undue hardship, which is a rare showing,

1 and then, No. 3, you are going to have to have
2 a client who somehow has some mental
3 impressions, opinions, conclusions, or legal
4 theories that get tied up in what you are
5 producing through substantial need and undue
6 hardship that weren't preserved by
7 attorney-client privilege. I mean, it's kind
8 of hard to imagine what that would be, but we
9 have protected it if it comes up.
10 But I would accept, Luke, if you want to
11 take that last sentence out in (3), we could
12 do that if you think that makes it clearer.
13 MR. SUSMAN: In fact, is the
14 law such that mental impressions of a
15 nonattorney are entitled to any special
16 protection?
17 HONORABLE F. SCOTT MCCOWN: If
18 they come into (a). It's mental impressions
19 that are prepared in anticipation of
20 litigation or for trial.
21 MR. MCMAINS: Mental
22 impressions isn't in (a).
23 HONORABLE F. SCOTT MCCOWN:
24 "Work product is any communication or
25 material..."

1 MR. SUSMAN: You're saying that
2 mental impressions and facts are treated
3 differently even when a nonattorney is
4 involved. We protect -- we give some special
5 protection to a mental impression like the
6 light was green or, you know, some impression.
7 He was angry. The person was mad.
8 HONORABLE F. SCOTT MCCOWN: Let
9 me tell you what I can do on this, and then I
10 will let Alex speak to it. You can either
11 take the last sentence out of (3) and have
12 only (4). That's fine with me. Or you can
13 delete (4) entirely and leave the last
14 sentence of (3) in. That's fine with me, but
15 Alex can explain why she thinks it's important
16 to have (4) for nonattorney.
17 PROFESSOR ALBRIGHT: It's
18 important because think about Flores V. Fourth
19 Court of Appeals in that that was a party
20 communication opinion. The Supreme Court put
21 into the party communications rule the
22 need -- in the need and hardship exception
23 that applies to party communications the
24 distinction between mental impressions and
25 opinions and facts. In that case they didn't

1 apply it in that case, but that was an
2 insurance adjuster's pre -- let's call it a
3 prelitigation report.
4 Let's assume that that one wasn't done in
5 anticipation of litigation, but let's assume
6 we have an insurance adjuster who is reporting
7 to his or her boss about the litigation
8 preparation, and part of that is the reserves
9 that they are holding, that the insurance
10 company is holding. Well, reserves are a
11 mental impression and opinion because it says,
12 "This is what I think this case is worth."
13 Or if the vice-president of -- let's say
14 if it doesn't apply to that for insurance,
15 let's say that you are a vice-president
16 reporting to the CEO, and so what you have to
17 do is report how much you think the potential
18 liability is in a particular lawsuit. That's
19 a mental impression and opinion about the
20 lawsuit that is prepared in anticipation of
21 litigation or preparation for trial that would
22 not be discoverable, should not be
23 discoverable. So it is a -- I think there are
24 particular situations. They may be rare, but
25 you do want to protect these people's mental

1 impressions and opinions.

2 MR. SUSMAN: If that's the

3 case -- I mean, I will accept that that's the

4 law. I am not even arguing against it. If it

5 is the law, if it is in protection, I think

6 the last sentence of (3) ought to come out

7 because it's confusing. It is accomplished in

8 (4).

9 HONORABLE F. SCOTT MCCOWN:

10 Okay. I agree. Done.

11 CHAIRMAN SOULES: Okay. If we

12 do that then I had a couple of questions still

13 about (4). Beginning with the first sentence,

14 "If a judge orders the discovery of work

15 product," we are talking about pursuant to

16 subdivision (2), right?

17 HONORABLE F. SCOTT MCCOWN: Or

18 (1). No.

19 Yeah. Yeah. Pursuant to (2).

20 CHAIRMAN SOULES: Why don't we

21 say "subdivision (2)" instead of "this rule"?

22 We use that style -- well, really the order is

23 under (2), not (3).

24 HONORABLE F. SCOTT MCCOWN:

25 Yeah. You're right. And then --

1 MR. MCMAINS: Luke, on that
2 issue, the problem is that (1) is a general
3 rule that applies to any privilege that
4 protects something from disclosure. Well, one
5 of the ways that it ain't protected is if it's
6 waived, and you can waive work product just as
7 you can waive anything else. So if you
8 leave -- you leave (1) out if you are not
9 referring to the total rule, or at least not
10 referring to Rule 1, then in a situation where
11 there has been a waiver of any privilege then
12 really (2) doesn't come into play. So, I
13 mean, it seems to me that it is the issue.
14 CHAIRMAN SOULES: Well, waiver
15 is not addressed in here anyway.
16 MR. MCMAINS: It is addressed
17 implicitly in the sense that (1) says that the
18 way that privileges work is it's protected
19 from disclosure. Your argument is it's not
20 protected from disclosure because it's been
21 waived, and we have all kinds of waiver law,
22 and that comes in under (1), and so you don't
23 want to put in a prohibition under (2) because
24 that elevates the work product privilege to
25 twelve other privileges.

1 HONORABLE F. SCOTT MCCOWN:
2 Right. But Luke's still absolutely correct
3 because what it says is if a judge orders
4 discovery of work product pursuant to little
5 subdivision (2), the judge shall protect. If
6 he is ordering it pursuant to waiver then he
7 doesn't protect because it's been waived. So
8 I will accept that suggestion.
9 CHAIRMAN SOULES: Okay. And
10 then going on from there, "The judge shall to
11 the extent possible protect against the
12 disclosure of mental impressions, opinions,
13 conclusions, or legal theories."
14 I would add "not otherwise discoverable"
15 because there are -- if we are talking about
16 the breadth of everyone who may have mental
17 impressions, opinions, conclusions, opinions
18 or legal theories and not just lawyers, a lot
19 of those are otherwise discoverable. So just
20 three words at the end, "not otherwise
21 discoverable."
22 PROFESSOR ALBRIGHT: What is
23 otherwise discoverable?
24 CHAIRMAN SOULES: Mental
25 impressions, opinions, conclusions, or legal

1 theories. So we are saying that (4) not only
2 protects lawyers' mental impressions but all
3 protectable mental impressions.
4 PROFESSOR ALBRIGHT: Oh, okay.
5 I thought you were adding it to (1).
6 CHAIRMAN SOULES: No. Just at
7 the end of (4).
8 HONORABLE F. SCOTT MCCOWN:
9 Okay. I will accept that, too.
10 CHAIRMAN SOULES: That's all I
11 have. Justice Duncan.
12 HONORABLE SARAH DUNCAN: 2(a),
13 it concerns me that it's just a communication
14 made --
15 CHAIRMAN SOULES: I can't hear
16 you. I'm sorry.
17 HONORABLE SARAH DUNCAN: It
18 concerns me that it's just a communication
19 made or the material prepared. What about
20 things before it's the subject of a
21 communication or reduced to some material? I
22 mean, a mental process or a conclusion that is
23 only in my mind is not a communication, and
24 it's not material.
25 HONORABLE C. A. GUITTARD: Is

1 it work product?

2 HONORABLE SARAH DUNCAN: Is
3 this going to authorize deposition of the
4 attorneys? I mean, obviously it's not
5 intended to because we have got a whole
6 subdivision (b), but it just seems to me the
7 definition of work product needs to be
8 expanded.

9 CHAIRMAN SOULES: I think
10 that's right. If that's where we are going to
11 define work product, we need to push some of
12 the language in (b)(1) up repeated in (a).

13 HONORABLE F. SCOTT MCCOWN:
14 Well, wait. Rather than do that why not just
15 say, "work product is anything" --

16 MR. PRICE: "Made or prepared."

17 HONORABLE F. SCOTT MCCOWN:
18 "Made or prepared."

19 PROFESSOR ALBRIGHT: At one
20 point we had "is anything including a
21 communication or material."

22 HONORABLE F. SCOTT MCCOWN: If
23 you just say "Work product is anything made or
24 prepared in anticipation of litigation or for
25 trial."

1 CHAIRMAN SOULES: Is a mental
2 impression made?
3 HONORABLE F. SCOTT MCCOWN:
4 Sure. You make up your mind.
5 CHAIRMAN SOULES: Is it formed
6 or made?
7 MR. PRINCE: Speculated.
8 HONORABLE F. SCOTT MCCOWN:
9 Well, I think "anything made or prepared."
10 MR. MARKS: How about mental
11 impressions? Could you put that there? Work
12 product is any --
13 MR. SUSMAN: How are you going
14 to discover it without forcing lawyers to give
15 compulsory psychological exams. I mean, how
16 are you going to discover a mental impression
17 that hasn't been reduced to writing?
18 CHAIRMAN SOULES: I think it
19 ought to say, "Work product is any
20 communication made or material prepared or any
21 mental impressions, opinions, conclusions, and
22 legal theories," I think. I haven't got the
23 grammar, but it seems to me like those words
24 ought to be pushed up into (a), 2(a), as well.
25 HONORABLE F. SCOTT MCCOWN:

1 Well, I think 2(a) is a very clear definition
2 of work product.
3 CHAIRMAN SOULES: But it's not
4 all-encompassing.
5 MR. SUSMAN: It is.
6 HONORABLE F. SCOTT MCCOWN: If
7 you say, "Work product is anything made or
8 prepared in anticipation of litigation or for
9 trial," what could possibly exist that
10 wouldn't fall within that definition?
11 PROFESSOR ALBRIGHT: You could
12 say "made, prepared, or developed."
13 HONORABLE F. SCOTT MCCOWN:
14 Well, I mean, at some point common sense has
15 to operate.
16 MR. LATTING: We need three
17 words where one will do always.
18 CHAIRMAN SOULES: Rusty.
19 MR. MCMAINS: One of the
20 problems I have with even trying to allude to
21 mental impressions in the (a) part if you are
22 talking about other than lawyers, if you are
23 talking about parties' mental impressions, I
24 mean, somebody observes an event or
25 investigates an accident in terms of taking

1 down physical data and whatever, all of that
2 stuff is clearly intended to be and always has
3 been -- it's not work product with regards to
4 that, and yet you want to say "anything
5 prepared." I mean, our work product has been
6 in terms of communications and material that
7 is prepared in anticipation of litigation, but
8 it has not included the original
9 investigation. It has not included
10 observations of the scene, and if you start
11 expanding it to do that, you are basically
12 just saying, "Okay. You don't get to talk to
13 the eyewitnesses, you know, who are
14 employees." That's silly.
15 MR. GALLAGHER: More
16 importantly the experts.
17 MR. MCMAINS: Well, true.
18 HONORABLE F. SCOTT MCCOWN:
19 Yeah. I think just "Work product is anything
20 made or prepared in anticipation of litigation
21 or for trial," and then (b) sets out the steps
22 in protection.
23 MR. MARKS: I move that we add
24 the language that Luke is suggesting.
25 HONORABLE C. A. GUITTARD: Or

1 "formed or prepared." "Developed."
2 MR. MARKS: I guess it failed
3 for a second.
4 CHAIRMAN SOULES: I'm sorry.
5 I'm trying to think on this, John, at the same
6 time you are making your motion. Is there a
7 second?
8 HONORABLE SARAH DUNCAN: I
9 second it.
10 MR. MARKS: I have got a second
11 here.
12 MR. SUSMAN: Why isn't it broad
13 enough the way it is? I mean, it --
14 CHAIRMAN SOULES: Okay.
15 Discussion? Steve has got a question.
16 Somebody answer it.
17 MR. SUSMAN: I mean, my
18 question is what else -- I mean, this is what
19 you are discovering, the communication, the
20 material. Why doesn't that cover it to avoid
21 making it so broad that someone can come in
22 and say, as Rusty does, I mean, the plaintiff
23 in the accident as soon as the car ran through
24 the intersection, looked over, and that was an
25 observation formed in preparation for what she

1 knew was going to be a lawsuit. I mean,
2 someone will make that argument, that it's,
3 therefore, work product and I don't have to
4 disclose it.
5 I mean, I am just worried that we are
6 expanding it beyond any possible -- the danger
7 of having to produce something is something
8 that's become material or communication.
9 That's where you are going to have to produce
10 it.
11 MR. MARKS: The concern on the
12 other end is that it would be too restrictive.
13 MR. SUSMAN: Well, explain to
14 me how it could be too restrictive. How are
15 you going to get something that's not material
16 or communication?
17 MR. MARKS: I think your
18 analogy is -- I mean, maybe somebody would
19 argue that, but I don't think anybody would
20 get very far with that, but there are
21 certainly situations where somebody in
22 anticipation of litigation working with a
23 company, communicating back and forth, comes
24 up with ideas and thoughts about liability and
25 exposure that shouldn't be discoverable even

1 though he's not an attorney.

2 MR. LATTING: But it's not work

3 product. It doesn't exist anymore.

4 CHAIRMAN SOULES: Let me try

5 this. "Work product is" and then say "an

6 attorney's" or "an attorney's" -- no. Start

7 over again.

8 "Work product is an attorney's mental

9 impressions, opinions, conclusions, and legal

10 theories," and now that's just the lawyer, you

11 see. "And anything made or prepared in

12 anticipation of litigation or for trial for a

13 party or a party's representative, including a

14 party's attorney." So that the mental

15 impressions, opinions, conclusions, and legal

16 theories that we are adding up there is just

17 the lawyer's.

18 It would just be -- if you look at No.

19 (1), (b)(1), in the second line, the last two

20 words, "the attorney's," down to the end.

21 Insert that, leave it where it is, but also

22 put it after the word "work product is."

23 "The attorney's mental impressions,

24 opinions, conclusions, and legal theories,

25 and..." And then do what Judge McCown said,

1 "anything made or prepared" and then to the
2 end of (a).
3 HONORABLE F. SCOTT MCCOWN:
4 Luke, I will tell you why I have real trouble
5 with that. Work product is a real hard thing
6 to teach lawyers and for lawyers to work with
7 day in, day out and apply the rule. The way
8 this rule is written -- and we worked on it a
9 long time -- it seems to me you can teach it.
10 You can learn it. It's real clear.
11 "Work product," and if you want to say
12 "is anything made or prepared," that's fine
13 with me; but "Work product is anything made or
14 prepared in anticipation of litigation or for
15 trial by the party," et cetera. Now, that
16 definition is simple. It's clear.
17 Then we set out the protection of work
18 product. You automatically know that
19 subdivision (a) includes the attorney's mental
20 impressions, opinions, conclusions, and legal
21 theories because the very first thing we say
22 in (b) is "A judge shall not order discovery
23 of the work product of an attorney that
24 contains the attorney's mental impressions,
25 opinions, conclusions, and legal theories."

1 So you already know that that's work product
2 and then in (2) set out the substantial need
3 and hardship for everything else.
4 Subdivision (3), I agree with you we need
5 to take out the last line, but that's the
6 Occidental point. Then subdivision (4) says
7 if you are going to order discovery of work
8 product under this rule then the judge to the
9 extent possible will protect against that
10 disclosure. I think that's understandable.
11 CHAIRMAN SOULES: Let me see if
12 I understand John Marks' motion that was
13 seconded because we didn't put the words down,
14 and that's what I was trying to do, too. That
15 would be to insert the words "the attorney's
16 mental impressions, opinions, conclusions, and
17 legal theories" after "Work product is," and
18 then "anything made or prepared" until the end
19 of the definition of work product. Is that
20 what you are proposing? Is that what you were
21 seconding?
22 MR. GALLAGHER: I would like to
23 have that in a little more concise form on
24 something this important because I can
25 envision circumstances in which things that

1 are obviously not work product become -- it
2 becomes an issue in the litigation, and I just
3 want to make sure I understand what amendment
4 we have got and what the language is if we are
5 going to suggest --
6 CHAIRMAN SOULES: All right.
7 Get your pencil out.
8 MR. GALLAGHER: I have got it.
9 CHAIRMAN SOULES: And go with
10 me. "Work product is..." Insert "an
11 attorney's mental impressions, opinions,
12 conclusions, and legal theories, and
13 anything" --
14 MR. GALLAGHER: And anything?
15 CHAIRMAN SOULES: Yes, sir.
16 MR. GALLAGHER: Anything?
17 CHAIRMAN SOULES: You are
18 supposed to be writing, not thinking.
19 MR. MCMAINS: Just like Luke
20 did.
21 CHAIRMAN SOULES: "Anything."
22 Strike "any communication." Leave in
23 "made or." Strike "material."
24 MR. GALLAGHER: Obviously
25 somebody else was writing and not thinking.

1 CHAIRMAN SOULES: Now you have
2 got it. Now you have got what the proposal
3 is.
4 MR. GALLAGHER: Okay.
5 MR. MARKS: "Any communication
6 made or prepared"?
7 CHAIRMAN SOULES: "Anything."
8 MR. MARKS: "Anything made."
9 Okay.
10 MR. GALLAGHER: But may I
11 address this by way of example?
12 CHAIRMAN SOULES: Okay. That's
13 a motion that's been seconded. Discussion?
14 MR. GALLAGHER: Okay. By way
15 of example, my good friend Mr. Marks stated,
16 for instance, an internal memoranda that was
17 prepared before the explosion ever occurred
18 relative to some problem with a particular
19 operating unit of if we don't get this thing
20 fixed, it's going to blow up. If anything is
21 intended to extend to and include that kind of
22 documentation or that kind of information then
23 I would object to it, and I think that using
24 the word "anything" in this context certainly
25 broadens attorney-client privilege beyond what

1 Judge McCown was referring to as our common
2 sense understanding of what it means.
3 CHAIRMAN SOULES: Justice
4 Duncan.
5 HONORABLE SARAH DUNCAN: It's
6 my understanding that the old rules were based
7 upon -- okay. Everything in the world is work
8 product. Here are the aspects of work product
9 that you can discover. You can discover all
10 this stuff about experts. You can discover
11 party communications, et cetera, et cetera,
12 and I don't mean to say everything in the
13 world. I mean that it was a broad definition
14 of work product, but then there were specific
15 exceptions made, and it seems to me that we
16 have made exceptions to the protection of work
17 product, for instance, with experts and their
18 reports, and that needs to be incorporated in
19 this definition, and to say that anything made
20 or prepared in anticipation of litigation is
21 protected work product on the face of these
22 rules is wrong.
23 HONORABLE F. SCOTT MCCOWN: No,
24 no. It doesn't say protected work product.
25 That's the work product definition. What's

1 protected is in subdivision (b) and then we
2 expressly set out the exceptions. "The
3 following are discoverable, even if made in
4 preparation" --
5 HONORABLE SARAH DUNCAN: Oh, I
6 see. I see.
7 HONORABLE F. SCOTT MCCOWN: And
8 then the exceptions are listed, and experts is
9 Exception No. 1.
10 HONORABLE SARAH DUNCAN: I
11 gotcha.
12 HONORABLE F. SCOTT MCCOWN: So
13 the structure is (a) is merely a definition.
14 (B) is what gets protected, and (c) lists the
15 exceptions, and everything you-all have talked
16 about so far, the examples are in the
17 exceptions expressly.
18 CHAIRMAN SOULES: Steve, and
19 then I will get to Joe.
20 MR. SUSMAN: Well, my problem
21 is that, I mean, striving to protect an
22 attorney's mental impressions, opinions, et
23 cetera, it seems to me that in the first place
24 if it has not been reduced to writing or not
25 communicated or in material, how in the world

1 is it discoverable anyway? I mean, I wished
2 in the world that the associates in my office
3 would reduce their, quote, "work product" to
4 tangible form, and I would not have to pay
5 them or compensate them for these ideas that
6 are in their mind but never get reduced to
7 writing, but now we are going to protect that
8 from discovery. That to me is kind of silly.
9 I mean, what we are concerned about is
10 tangible work product.
11 The second thing is the way you have got
12 it written, Luke, an attorney's opinions and
13 conclusions and impressions not in connection
14 with litigation are not protected. Lawyers
15 are parties in a lot of lawsuits. Okay. They
16 are parties because they are advising S&L's or
17 they are handling stock transactions, or
18 simply because a lawyer has an opinion or
19 impression does not immunize it from
20 discovery. Okay. It's got to be tied in to
21 something he's doing to get ready for a
22 lawsuit. So you have got a drafting problem
23 right away in your version. I just don't see
24 why it's not covered fully the way Scott wrote
25 it.

1 HONORABLE F. SCOTT MCCOWN:
2 Well, now, don't say Scott. That may drag it
3 down. This was the work product of Lee
4 Parsley and Alex Albright, and we had Paul
5 Gold and Richard Orsinger. We have been over
6 this thing a thousand times with a lot of
7 people and thought of every example you could
8 think of.
9 HONORABLE C. A. GUITTARD:
10 Mr. Chairman?
11 CHAIRMAN SOULES: Okay.
12 Anything else on this, on the motion? Judge
13 Guittard.
14 HONORABLE C. A. GUITTARD:
15 Mental impressions are not work product
16 because they are not a product.
17 MR. LATTING: That's right.
18 MR. SUSMAN: Right.
19 MR. KELTNER: That's, I
20 think --
21 MR. LATTING: So are we voting
22 on your --
23 CHAIRMAN SOULES: Isn't that
24 the classical definition of work product,
25 mental impressions of a lawyer?

1 MR. KELTNER: Yes.
2 CHAIRMAN SOULES: I mean,
3 that's exactly the way we define it.
4 MR. KELTNER: Luke, if we get
5 away from mental impressions, thoughts, and
6 processes it will emasculate Occidental. We
7 can't do that. We are going to have to stay
8 within those terms as the court has been using
9 them in recent years.
10 CHAIRMAN SOULES: And doesn't
11 the court use the word "mental impressions"?
12 MR. KELTNER: Heavens, yes.
13 MR. MCMAINS: But there is --
14 CHAIRMAN SOULES: Rusty
15 McMains.
16 MR. MCMAINS: Well, there is
17 protection for the attorney-client privilege
18 independent of the work product. Work product
19 is almost subsumed in the attorney-client
20 privilege, period. I mean, we have -- this is
21 merely an expansion beyond the attorney-client
22 privilege. You already have the
23 attorney-client privilege protection.
24 MR. KELTNER: I would disagree
25 with that, Rusty.

1 MR. MCMAINS: And the attorney
2 work product is a species of the
3 attorney-client privilege, as far as the
4 attorneys are concerned.
5 MR. KELTNER: Well, I think
6 maybe at one time in historical development
7 that was the case. I think the truth of the
8 matter is now it is maybe almost exactly the
9 opposite way around. What we want to do and,
10 Luke, what your point was and what Steve
11 points are both well-taken. There is a way to
12 do them.
13 What Steve is saying is you can't get --
14 yeah, mental impressions are protected, but
15 quite frankly, they are not in a way that you
16 could discover them until they are
17 communicated or made in some tangible way, and
18 that's what Steve's saying, and he's right,
19 and I think we probably ought to look at it
20 that way in terms of protection.
21 The question comes, can you be compelled
22 to give your mental impressions if a lawyer
23 testifies, lawyer Steve, not a party
24 testifies, and that's simple. The answer is
25 "no," but there is no product there to protect

1 because it's not made or communicated. So and
2 I think that Steve is sort of on the right
3 trail, but it has to include the mental
4 impressions, conclusions, opinions, and
5 thought processes of the lawyer.
6 MR. LATTING: I have a
7 question.
8 CHAIRMAN SOULES: Let's see if
9 we have got anybody else on the motion. Carl
10 Hamilton.
11 MR. HAMILTON: Is this to vote
12 on the whole Rule 4?
13 CHAIRMAN SOULES: No. This is
14 just the changes to 2(a). Anything else on
15 2(a)? Alex Albright.
16 PROFESSOR ALBRIGHT: Well,
17 first I want to respond to Mike Gallagher's
18 concern about the word "anything." What he
19 described was a prelitigation memorandum
20 investigation. So it is anything, but it was
21 not prepared in anticipation of litigation or
22 for trial. So it would not be work product
23 under this rule.
24 MR. GALLAGHER: I disagree with
25 you. It could be prepared in anticipation of

1 litigation that might be foreseeable even
2 though the event out of which the litigation
3 arises has not yet occurred.
4 CHAIRMAN SOULES: But we have
5 got case law that deals with that.
6 PROFESSOR ALBRIGHT: But that's
7 not the problem with "anything." That's the
8 problem with "in anticipation of litigation,"
9 but in any event, I think for the reasons
10 everybody said I think including an attorney's
11 mental impressions, opinions, and legal
12 theories should not be included here because
13 it is clearly included elsewhere. I think a
14 work product is anything a lawyer does in
15 anticipation of litigation, and I consider my
16 ideas being something I do. So nobody can
17 take my deposition and get them, but I think
18 if we say, "Work product is anything made or
19 prepared in anticipation of litigation or for
20 trial," I think we are in good shape.
21 CHAIRMAN SOULES: Okay. Let's
22 vote on the motion. Those in favor show by
23 hands.
24 MR. MCMAINS: What motion?
25 CHAIRMAN SOULES: We are voting

1 on the motion that Marks made and Sarah
2 seconded that I just had Mike write down.
3 MR. LATTING: Your language.
4 MR. MCMAINS: The one that has
5 the attorney mental impressions and stuff in
6 it?
7 CHAIRMAN SOULES: Yes.
8 HONORABLE SARAH DUNCAN: Can I
9 withdraw my second?
10 CHAIRMAN SOULES: Okay.
11 Withdraw it. Anybody else want to second it?
12 HONORABLE SARAH DUNCAN: Can I
13 offer an alternative that I think gets to the
14 same place?
15 CHAIRMAN SOULES: Okay.
16 MR. MARKS: Let's see if I have
17 got a second. Is anybody going to second my
18 motion?
19 CHAIRMAN SOULES: Fails for
20 lack of a second. Okay. Any other motions on
21 2(a)? Justice Duncan.
22 HONORABLE SARAH DUNCAN: "Work
23 product is: (1), an attorney's mental
24 impressions, opinions, conclusions, and legal
25 theories developed in anticipation of or for

1 trial; and (2), any communication made or
2 material prepared by" and continue with the
3 present content of subdivision (a).
4 CHAIRMAN SOULES: Is there a
5 second?
6 HONORABLE DAVID PEEPLES:
7 Second.
8 CHAIRMAN SOULES: Moved and
9 seconded. Those in favor show by hands.
10 Nine. Those opposed? Eight. Right?
11 Okay. Let's count them again. Those in
12 favor show by hands, in favor. Ten. Those
13 opposed? Ten. Did everybody vote?
14 MR. MEADOWS: At least once.
15 HONORABLE DAVID PEEPLES: May I
16 ask, the people that voted against that, what
17 are you for?
18 MR. LATTING: I am for Scott
19 McCown's version of this rule.
20 HONORABLE F. SCOTT MCCOWN:
21 "Work product is anything made or prepared in
22 anticipation of litigation or for trial by or
23 for a party or a party's representative."
24 MR. SUSMAN: Second.
25 MR. LATTING: Second.

1 MR. SUSMAN: Let's have a vote
2 on that, see if we get the votes.
3 CHAIRMAN SOULES: Okay.
4 HONORABLE F. SCOTT MCCOWN: All
5 that is is a definition. The protection of
6 work product is set out in (b), and the
7 exceptions are set out in (c).
8 MR. SUSMAN: Let's see if we
9 get the votes on that.
10 HONORABLE DAVID PEEPLES: Luke,
11 can I --
12 CHAIRMAN SOULES: Okay. I am
13 going to try to take your deposition and find
14 out what your trial theories are because I
15 don't think it's covered. I don't think it's
16 covered.
17 HONORABLE F. SCOTT MCCOWN:
18 Well, it's protection of attorney's mental
19 processes. "A judge shall not order discovery
20 of the work product of an attorney or an
21 attorney's representative that contains the
22 attorney's mental impressions, opinions,
23 conclusions, and legal theories."
24 CHAIRMAN SOULES: Okay.
25 Because that's not work product after "or."

1 PROFESSOR ALBRIGHT: Yes, it
2 is.
3 CHAIRMAN SOULES: Anyway.
4 Those in favor of -- how did you write it
5 again?
6 MR. MCMAINS: Judge Peeples
7 wants to have a discussion.
8 HONORABLE F. SCOTT MCCOWN:
9 "Work product is anything made or prepared in
10 anticipation of litigation or for trial."
11 CHAIRMAN SOULES: Okay. And
12 then the rest of it. Judge Peeples.
13 HONORABLE DAVID PEEPLES: I am
14 genuinely curious, okay, about what anybody
15 would want from a lawyer by discovery other
16 than what Mike Gallagher said, and I think
17 Alex answered you on that. That's not in
18 anticipation of litigation. Why are we afraid
19 to protect a lawyer's mental processes just
20 generally? Now, somebody here who is voting
21 against all of this stuff is worried about it.
22 What are you after?
23 HONORABLE F. SCOTT MCCOWN: I
24 am after clarity, ease to teach, and ease to
25 understand.

1 HONORABLE DAVID PEEPLES: Okay.
2 That's one answer. Anybody else?
3 MR. LATTING: All right. I
4 have got another one. I have got another one.
5 HONORABLE DAVID PEEPLES: Okay.
6 MR. LATTING: What Steve Susman
7 said about lawyers being in lawsuits not in
8 their representative capacity but as either
9 house counsel or lawyer/litigant. That's
10 another reason. Another reason is it bothers
11 me to have it in here when we say that you
12 can't discover legal theories as it relates to
13 contention interrogatories.
14 HONORABLE F. SCOTT MCCOWN: But
15 that's an exception.
16 MR. LATTING: But the main
17 reason is that this rule as written by Lee
18 Parsley and Scott McCown and others will work.
19 It will be just fine. It will get us right
20 through all of this stuff, and it's no big
21 deal. So let's pass it.
22 HONORABLE DAVID PEEPLES:
23 What's your problem with it, Luke? Why don't
24 you like the "anything" language that Scott
25 has?

1 CHAIRMAN SOULES: Well, it sure
2 concerns me that we have a record now that we
3 are rejecting as a part of a definition of
4 work product the attorney's mental
5 impressions, opinions, conclusions, and legal
6 theories developed in anticipation of
7 litigation or for trial.
8 HONORABLE F. SCOTT MCCOWN: We
9 are not rejecting it.
10 MR. LATTING: We are not
11 rejecting it.
12 HONORABLE F. SCOTT MCCOWN: We
13 are just saying that that definition subsumes
14 that concept and that it clearly is expressed
15 in (b)(1).
16 CHAIRMAN SOULES: Not in my
17 mind and not in the minds of at least half of
18 this committee.
19 MR. PRINCE: But as somebody
20 who voted against what you said I think it's
21 included in definition in subpart (a). I
22 think it's made in anticipation of trial.
23 That's it. That was the reason for my vote.
24 I want that on the record.
25 MR. MARKS: What's the problem

1 with clarifying it?

2 HONORABLE C. A. GUITTARD:

3 Mr. Chairman, the problem with it is that

4 still you get down to subdivision (1) which

5 has absolute prohibition. You still have work

6 product. If mental -- in other words, work

7 product that contains the attorney's mental

8 impressions, opinions, conclusions, and legal

9 theories, there is still no language that

10 deals with asking a lawyer, "What was your

11 impression?" That's not work product as this

12 subdivision (a) is originally written.

13 HONORABLE F. SCOTT MCCOWN:

14 Well, but --

15 CHAIRMAN SOULES: Well, we have

16 beat this horse to death. I mean, if the

17 committee is not inclined to clarify it then I

18 guess it will go unclarified then. Those in

19 favor of Scott's proposal show by hands.

20 Eight. Those opposed?

21 HONORABLE F. SCOTT MCCOWN: I

22 got nine.

23 CHAIRMAN SOULES: Okay. I will

24 count again in a minute. 11, I think. I will

25 get to take a recount. Recount, those in

1 favor of Scott's proposal show by hands.
2 I can't count because the hands are
3 moving. Ten. Those opposed?
4 MR. PARSLEY: I got 11 that
5 time.
6 CHAIRMAN SOULES: You got 11.
7 I got 10. Sorry. I apologize for the
8 imposition on you. One more time, those in
9 favor of Scott's position. 10.
10 HONORABLE F. SCOTT MCCOWN:
11 That's a vote for going home by noon, too,
12 guys.
13 CHAIRMAN SOULES: 11.
14 MR. PARSLEY: Yeah.
15 CHAIRMAN SOULES: Okay. 11.
16 Those opposed?
17 MR. LATTING: You-all want to
18 stay?
19 MR. GALLAGHER: This is a vote
20 to go home now.
21 CHAIRMAN SOULES: 11.
22 MR. PARSLEY: I get 12 that
23 time, Luke. I'm sorry.
24 MR. GALLAGHER: Why don't only
25 one of you count?

1 CHAIRMAN SOULES: One thing
2 that's happening, everybody is waving their
3 hands and talking, and I can't count. I
4 apologize to you. Hands high those who oppose
5 it. You put your hand up late.
6 12. Fails. Fails 12 to 11.
7 HONORABLE DAVID PEEPLES: Luke,
8 I'm embarrassed to admit it. I thought I
9 voted twice on that, and I was talking when
10 you called it for the third time, and I was
11 for it, and my vote didn't count.
12 CHAIRMAN SOULES: It still
13 fails.
14 MR. MARKS: He counted it.
15 HONORABLE DAVID PEEPLES: No,
16 he didn't. My hand wasn't up.
17 CHAIRMAN SOULES: Well, even if
18 we add you to the list, Judge, it's still 12
19 to 12.
20 MR. MARKS: Where are we on my
21 vote? What happened to my motion? Well, did
22 it pass or fail?
23 MR. GALLAGHER: It failed
24 because no one wanted to second it.
25 MR. KELTNER: Could I make a

1 suggestion that we take about a five-minute
2 break and see if we can fine tune this enough
3 because I think you are going to get the votes
4 to pass it. There are two reasons that people
5 are voting against it. One of that is the
6 second is going to lose. My theory is we can
7 probably fine tune this, have this done in
8 five minutes if we take a break.
9 CHAIRMAN SOULES: Okay. Take
10 ten minutes.
11 (At this time there was a
12 recess, after which time the proceedings
13 continued as follows:)
14 HONORABLE F. SCOTT MCCOWN: We
15 have a compromise worked out that I think
16 satisfies people's concerns. Go back to "work
17 product" defined the way it's typed. So
18 forget everything. Go with it the way it's
19 typed and make the following change. "Work
20 product is any communication made or material
21 prepared or mental processes developed in
22 anticipation of litigation or for trial." So
23 the addition would be after "material
24 prepared" you would insert the phrase "or
25 mental processes developed."

1 CHAIRMAN SOULES: Mental
2 impressions or processes?
3 PROFESSOR ALBRIGHT: Processes.
4 MR. SUSMAN: Second.
5 CHAIRMAN SOULES: So we are
6 just going to look the other way, to Hickman
7 V. Taylor.
8 PROFESSOR ALBRIGHT: This
9 includes Hickman V. Taylor.
10 CHAIRMAN SOULES: Hickman V.
11 Taylor says "mental impressions."
12 HONORABLE SCOTT BRISTER: All
13 right. Change it to "impressions."
14 HONORABLE F. SCOTT MCCOWN: Or
15 "mental impressions." That's fine.
16 MR. GALLAGHER: Why don't we
17 say "see Roget"?
18 HONORABLE F. SCOTT MCCOWN:
19 That's more eloquent, Luke, and so I am going
20 to go with that, "mental impressions."
21 "Work product is any communication made
22 or material prepared or mental impressions
23 developed"?
24 MR. KELTNER: Yes.
25 HONORABLE F. SCOTT MCCOWN:

1 "Mental impressions developed in anticipation
2 of litigation or for trial."
3 CHAIRMAN SOULES: Okay. That's
4 a motion. Second?
5 MR. KELTNER: Second.
6 CHAIRMAN SOULES: Any further
7 discussion?
8 HONORABLE DAVID PEEPLES: Is
9 the word "developed" -- why that word instead
10 of "made"?
11 HONORABLE F. SCOTT MCCOWN:
12 Mental impressions developed, I mean --
13 HONORABLE C. A. GUITTARD: Do
14 you develop an impression, or do you receive
15 an impression?
16 MR. SUSMAN: More elegant,
17 Pretty. Sounds better.
18 HONORABLE F. SCOTT MCCOWN:
19 "Mental impressions developed."
20 CHAIRMAN SOULES: Those in
21 favor show by hands.
22 MR. LATTING: This is an
23 anti-Spam vote.
24 CHAIRMAN SOULES: 16. Those
25 opposed? Okay. Unanimous.

1 MR. SUSMAN: With that change,
2 Mr. Chairman, I move the adoption of Rule 4
3 with the changes as we have made it in Rule 2,
4 4(2)(a), the addition of "shall" in (b)(1) and
5 (b)(2) in lieu of "may"; the elimination of
6 the final sentence of little (b)(3); the
7 elimination of (c) in its entirety; the
8 changing the "exceptions" in section (d) to
9 (c); and correcting a typo in little (c)(8) on
10 page 2.
11 CHAIRMAN SOULES: Did you make
12 the change here in (4)?
13 HONORABLE F. SCOTT MCCOWN:
14 Yeah. We have got that change.
15 MR. SUSMAN: Right. Right.
16 And the change in (4).
17 HONORABLE F. SCOTT MCCOWN: I
18 have got it in mine.
19 MR. SUSMAN: I'm sorry. The
20 change in (4) should be "If a judge orders
21 discovery of work product pursuant to
22 subdivision (2)," and at the end, "legal
23 theories, not otherwise discoverable."
24 CHAIRMAN SOULES: Okay. All in
25 favor show by hands. Let me just do it the

1 other way. Is there any opposition? No
2 opposition. It's unanimous.
3 MR. SUSMAN: Great.
4 CHAIRMAN SOULES: Now then --
5 HONORABLE DAVID PEEPLES: Luke,
6 may I say on the second page, facts, "relevant
7 facts, however acquired."
8 HONORABLE F. SCOTT MCCOWN: We
9 got that.
10 HONORABLE DAVID PEEPLES: Did
11 you get that?
12 HONORABLE F. SCOTT MCCOWN: We
13 got that.
14 CHAIRMAN SOULES: We talked
15 about on Rule 10 where we have to suggest the
16 dates for the expert to be deposed two dates
17 within 30 days. Rusty McMains.
18 MR. MCMAINS: Luke, before on
19 this Rule 4 in the exceptions where it talks
20 about experts, once again, we say they are
21 "discoverable under Rule 10" when in reality
22 we now have the three point whatever part on
23 the experts as well.
24 HONORABLE F. SCOTT MCCOWN: So
25 it should be "discoverable under Rule 3 and

1 Rule 10."

2 MR. MCMAINS: Right.

3 HONORABLE F. SCOTT MCCOWN:

4 Okay. We will add that.

5 MR. KELTNER: Actually it

6 should be 3, 9, and 10, Scott.

7 HONORABLE F. SCOTT MCCOWN: 3,

8 9, and 10.

9 CHAIRMAN SOULES: Did you get

10 that, Alex?

11 PROFESSOR ALBRIGHT: No, I

12 didn't.

13 CHAIRMAN SOULES: All right.

14 Tell me where you are in Rule 4.

15 HONORABLE F. SCOTT MCCOWN: We

16 are on the top of the second page, experts,

17 "The information concerning experts

18 discoverable under Rules 3, 9, and 10."

19 CHAIRMAN SOULES: Okay. Any

20 opposition to that? Okay. Any other cleanup

21 here?

22 MR. SUSMAN: Where was that?

23 I'm sorry.

24 CHAIRMAN SOULES: It's down at

25 the bottom of the first page. "3, 9, and 10."

1 HONORABLE F. SCOTT MCCOWN: If
2 I go to the john, you-all won't repeal Rule 4
3 while I'm gone, will you?
4 MR. PRINCE: Do you want us to?
5 CHAIRMAN SOULES: Are we going
6 to -- in an effort to try to accommodate some
7 of the later amendment, pleading amendment and
8 that sort of thing, require that the dates for
9 the expert deposition be within 30 days or
10 not? We talked about that, making a change in
11 Rule 10 at paragraph (3)(a)(4).
12 MR. SUSMAN: I have no problem
13 with that. I mean, I don't think that that
14 was -- we thought about it. I don't know
15 what's ever happened to the idea. Do you
16 remember? Did we discuss it?
17 PROFESSOR ALBRIGHT: I don't
18 remember.
19 MR. SUSMAN: I have no problem
20 with "within 30 days."
21 MS. GARDNER: Within 30 days of
22 what?
23 MR. MCMAINS: Of your
24 designation.
25 HONORABLE SCOTT BRISTER: Of

1 your response.

2 CHAIRMAN SOULES: Okay. Now, I

3 guess we can --

4 MR. SUSMAN: "Two days, within

5 the next 30 days," comma.

6 CHAIRMAN SOULES: Okay.

7 Without trying to reopen everything about the

8 amendment rule at this point, do we want to go

9 ahead and change the expert designation days

10 to earlier or just let it go to the court at

11 75 and 45?

12 MR. SUSMAN: I would urge that

13 we let it go to the court at that, and let

14 them wrestle with the amendment rule.

15 CHAIRMAN SOULES: Okay. I

16 mean, we are going to wrestle with the

17 amendment rule.

18 MR. SUSMAN: I mean, we will

19 but --

20 PROFESSOR ALBRIGHT: It can be

21 changed with the amendment rule if necessary.

22 CHAIRMAN SOULES: Okay. Is

23 there anything -- do we have anything else

24 then on any of the discovery rules, any

25 housekeeping, any place to go back to that we

1 may have overlooked?

2 MR. SUSMAN: Yes. Mike had

3 a -- remember Mike was going to consider on

4 Rule 18 --

5 PROFESSOR ALBRIGHT: I said I

6 would draft some language, and I just haven't

7 had time to.

8 MR. SUSMAN: Okay. We had some

9 language to draft on 18.

10 MR. MCMAINS: That's on the

11 notice?

12 MR. SUSMAN: What happens when

13 you get the transcript by this nonstenographic

14 thing, making it like another deposition?

15 MR. KELTNER: Alex, did you

16 have an opportunity to review my 7, Rule 7,

17 problem with McKinney V. National Union?

18 PROFESSOR ALBRIGHT: Yeah.

19 David raised a question about whether we had

20 provided for the situation -- what was

21 your -- the issue being what is your

22 obligation in responding to a request for

23 discovery when you had made an objection or

24 filed a withholding statement and there had

25 been no hearing. If there is no ruling on the

1 objection or withholding statement, were you
2 safe as you are now in just proceeding without
3 responding to the request?

4 MR. KELTNER: And the
5 importance of that is once you object or file
6 a withholding statement then you are relieved
7 of the obligation to answer. I think that
8 part probably is in the rule. The problem
9 comes, though, in sanctions at trial by
10 exclusion of the testimony, and McKinney V.
11 National Union held that as long as you have
12 filed an objection then the party seeking the
13 discovery has to get that resolved, or
14 otherwise the objection stands, and you can
15 put on evidence from behind the objection if
16 you wanted to.

17 McKinney V. National Union is a pretty
18 important case. The language in the current
19 rule that it is based upon and is interpreting
20 has been removed from this rule, not a real
21 problem except for the fact that the basis now
22 for McKinney is no longer in the rule.

23 PROFESSOR ALBRIGHT: Except it
24 is -- that concept is still in the rule
25 because we have changed the whole way you make

1 objections. If you look at 7(1), it says, "A
2 party should comply with so much of the
3 request as to which the party has made no
4 objection unless it is unreasonable under the
5 circumstances to do so before obtaining a
6 ruling on the objection." I understand that
7 as saying that you have no obligation to
8 respond to the portion of a request that you
9 are objecting to unless that objection is
10 overruled.
11 MR. KELTNER: I agree with
12 that, Alex.
13 PROFESSOR ALBRIGHT: And then
14 that is also in No. 4, which says, "If the
15 court overrules the objection, the objecting
16 party shall respond to the request."
17 MR. KELTNER: And that's not my
18 problem. I agree with that. There is no
19 problem with that. The problem is when you go
20 to trial and you have objected and no one has
21 forced the objection, the current law is that
22 the objecting party can put on evidence that
23 would have been responsive to that discovery
24 request, and it's not excluded based on
25 166(b)(6) and 215(5). That's important to the

1 rules for a whole number of reasons because it
2 sets the burdens of who does what. That's the
3 part that I don't think that is addressed in
4 McKinney V. National Union.
5 PROFESSOR ALBRIGHT: Well, I
6 think it's addressed, but if you have some
7 specific language that you want to include, I
8 think that's fine.
9 MR. MCMAINS: What's the part
10 that drops out, that you complain drops out?
11 MR. KELTNER: Oh, Rusty, I
12 would have to look back and tell you the
13 precise part. Let me tell you how I would fix
14 it. I would have a new Rule 7(d). That's
15 probably easier. I think it's down -- let me
16 make absolutely sure. It would be 7(2)(d),
17 and I would put it that "an objection or
18 withholding statement" -- and I would put it
19 in a way -- that probably is not the way we
20 want to say it, but holds the responding
21 party's obligation to disclose the information
22 to that part of the request objected to or for
23 which there is a withholding statement until
24 the court rules or the parties resolve the
25 dispute.

1 Do you think that that's clear in the
2 rule already? If you do, there is no need to
3 put that in.
4 PROFESSOR ALBRIGHT: I think
5 it's clear in the rule already.
6 MR. KELTNER: All right. If
7 you think it's clear in the rule already, I
8 just -- I'm worried about that.
9 MR. HAMILTON: The part that
10 says "obtaining a ruling" sounds like the one
11 making the objection has to obtain the ruling
12 in paragraph (1).
13 MS. GARDNER: Sounds like it's
14 the opposite.
15 HONORABLE SCOTT BRISTER: Well,
16 but (3) says "Any party may at any reasonable
17 time request a hearing."
18 MR. KELTNER: And that part is
19 part that National Union relied on. I
20 withdraw my concern.
21 CHAIRMAN SOULES: Do we have
22 this language: "The failure of a party to
23 obtain a ruling prior to trial on any
24 objection to discovery or motion does not
25 waive the motion or waive the objection"?

1 HONORABLE SCOTT BRISTER: Which
2 part?
3 CHAIRMAN SOULES: "The failure
4 of a party to obtain a ruling prior to trial
5 on any objection to discovery or motion for
6 protective order does not waive such
7 objections or motions."
8 MR. KELTNER: No. That's not
9 in the rule.
10 PROFESSOR ALBRIGHT: We could
11 insert that sentence after the first sentence
12 of (3), and instead of saying "protective
13 order" say "objection or privilege."
14 HONORABLE SCOTT BRISTER: Why
15 is it you want that back in?
16 CHAIRMAN SOULES: Because that
17 was McKinney 1, McKinney 2, and --
18 MR. KELTNER: Right.
19 HONORABLE SCOTT BRISTER: What
20 part of McKinney?
21 CHAIRMAN SOULES: Well, oh, let
22 me see if I can remember. I think McKinney 1
23 said that if a party did not get a ruling on
24 its objection prior to trial, when trial
25 commenced the objection was waived; and this

1 committee was in session at the time that
2 McKinney 1 came down and had a good bit of
3 debate about it, and then McKinney 2 came
4 down --
5 HONORABLE SCOTT BRISTER:
6 Changed.
7 CHAIRMAN SOULES: -- and said
8 this, what's in the rule now; and we, I think,
9 had already voted to put this in the rule
10 between McKinney 1 and McKinney 2 because we
11 were concerned about the policy of McKinney 1.
12 MR. KELTNER: And it keeps the
13 burden, Scott, on the objections correct. The
14 language suggested by Luke should go in, and
15 Alex, if I understand where you want to put
16 it, that was 7 --
17 PROFESSOR ALBRIGHT: 7(3) right
18 after the first sentence. So --
19 MR. KELTNER: That would be
20 fine. That works.
21 PROFESSOR ALBRIGHT: And then
22 you had also raised that issue, David, with
23 depositions, and I think we do not ever have a
24 provision that talks about --
25 MR. KELTNER: It's fine. I

1 went back and checked that. I understand why
2 we don't have to resolve that.
3 PROFESSOR ALBRIGHT: So we
4 would insert in Rule 7(3), it would read, "Any
5 party may at any reasonable time request a
6 hearing on an objection or privilege asserted
7 in accordance with this rule. The failure of
8 a party to obtain a ruling prior to trial on
9 any objection or privilege asserted in
10 accordance with this rule does not waive such
11 objection or privilege."
12 MR. KELTNER: That cures my
13 concern.
14 CHAIRMAN SOULES: Okay.
15 Anything else on any of the other rules of
16 discovery?
17 MS. WOLBRUECK: Mr. Chairman?
18 CHAIRMAN SOULES: Yes. Bonnie
19 Wolbrueck.
20 MR. SUSMAN: Can we vote on
21 this?
22 CHAIRMAN SOULES: Yeah. Is
23 there any objection to those changes? No
24 objection. They are done. Bonnie.
25 MS. WOLBRUECK: Just for the

1 record I would be remiss sitting here
2 representing all the clerks of Texas if I did
3 not request this committee's consideration
4 that interrogatories not be filed with the
5 clerk.
6 CHAIRMAN SOULES: I doubt there
7 is anybody on this committee that disagrees
8 with you. This committee voted and the
9 Supreme Court passed a rule not to file an
10 amendment. There was pressure from the
11 district judges, some of whom said that that's
12 where they got their information about the
13 case. They actually read the interrogatories,
14 and if they weren't in the file, they couldn't
15 figure out what the case was about, or it was
16 more difficult. So the Supreme Court -- I
17 don't think we --
18 HONORABLE SCOTT BRISTER: You
19 would also be surprised by the number of
20 people that -- I mean, 50 percent of my cases,
21 "Well, I object. They didn't designate them."
22 "Yes, I did."
23 "Well, let me see it."
24 "We didn't bring it, Judge."
25 I mean, literally 50 percent of the cases

1 where I have an objection they didn't bring
2 the interrogatory, and I cannot look it up,
3 except I call my clerk in, and we go through
4 our own file. Here, let me do it. I will
5 find it. You-all just sit there, and I will
6 find out whether you have done it. All the
7 time.
8 CHAIRMAN SOULES: Well, that's
9 easy enough to fix. You don't have the proof
10 you didn't, then you did. So you have got no
11 record, huh?
12 HONORABLE SCOTT BRISTER: Well,
13 they don't have it today, but by the time they
14 want to call that witness then they will get
15 around to bringing it finally in. I would
16 rather go ahead and just have it in the file
17 and get it done with.
18 CHAIRMAN SOULES: Okay. So is
19 that a motion, Bonnie, or how do you want
20 to --
21 MS. WOLBRUECK: Yes, sir. I
22 would make that motion.
23 CHAIRMAN SOULES: She makes a
24 motion that interrogatories and responses to
25 interrogatories not be filed with the district

1 clerk. Is there a second?

2 MS. LANGE: Second.

3 HONORABLE SARAH DUNCAN:

4 Second.

5 CHAIRMAN SOULES: Doris Lange

6 seconds? Okay. Any further discussion on

7 this? Judge McCown.

8 HONORABLE F. SCOTT MCCOWN: Can

9 I just make one point on that? In addition to

10 what Judge Brister says, a lot of times there

11 are even disputes about whether the

12 interrogatories were sent, whether they were

13 obtained, and if the interrogatories are in

14 the file, it's at least some pretty good

15 evidence that they were actually sent, and the

16 interrogatories are what exclusion of evidence

17 is premised on, and I think the reason the

18 district judges felt strongly about having

19 them in the file is that if you are going to

20 premise excluding evidence and one side is

21 going to say they weren't sent and one side is

22 going to say they were, having them in the

23 file is pretty good.

24 CHAIRMAN SOULES: Anything

25 else? Those in favor of the motion show by

1 hands. Three. Those opposed? 16 to 3, was
2 it?
3 MS. DUDERSTADT: Yes.
4 CHAIRMAN SOULES: 16 to 3 it
5 fails, but it's on the record.
6 MS. WOLBRUECK: That's right.
7 CHAIRMAN SOULES: Anything else
8 on the discovery rules? Don Hunt.
9 MR. HUNT: Luke, are we
10 attempting to close by noon?
11 CHAIRMAN SOULES: We are
12 probably going to work -- we are going to have
13 sandwiches, and we are probably going to work
14 a little bit because I want to get at least a
15 preliminary report on sanctions.
16 MR. HUNT: Okay. Before we
17 stop I would like to request -- and I will do
18 the appropriate motion for an up or down
19 vote -- that in order to send a complete
20 package to the Court that at every place where
21 it has 70 and 45 we change it to 90 and 60 and
22 that we adopt Alex's amendment, the 63 with
23 the 30 instead of 60; and if we are going to
24 have two hours of discussion, let's leave it
25 as you had suggested. If there is some sort

1 of surprising majority then we have the
2 complete package to go to the Court because we
3 have solved 63. 67 and 70 don't need any
4 solving or 166 because of the current rule
5 with one amendment.
6 CHAIRMAN SOULES: Is there a
7 second?
8 MR. SUSMAN: Second.
9 CHAIRMAN SOULES: Moved and
10 seconded. Those in favor show by hands.
11 HONORABLE SCOTT BRISTER: In
12 favor of -- one more time.
13 CHAIRMAN SOULES: In favor of
14 making the experts 90 and 60 instead of 75 and
15 45 and making the Rule 63 Alex's version of
16 63, the same as it reads, except 30 days.
17 Those in favor show by hands. Eleven.
18 Those opposed? Nine. It passes by a vote of
19 11 to 9. Pardon me.
20 MR. KELTNER: You-all stuck me
21 by surprise. I would have probably voted
22 against it.
23 CHAIRMAN SOULES: Somebody want
24 a recount?
25 MR. KELTNER: No.

1 MR. GALLAGHER: I want a
2 reconsideration.
3 MR. MCMAINS: Earlier you said
4 Rule 63 was going to be discussed in Beck's --
5 CHAIRMAN SOULES: Well, I think
6 it needs to be -- well, at least this version
7 has now been passed.
8 MR. KELTNER: I have a little
9 concern there. Well, I wasn't paying
10 attention, and that's my fault.
11 CHAIRMAN SOULES: I don't know
12 why you didn't vote it down.
13 MR. MARKS: Uh-oh. We have got
14 a walk out.
15 CHAIRMAN SOULES: It's probably
16 justified on that vote,. Not near enough
17 consideration has been given to that
18 amendment.
19 MR. KELTNER: I would ask that
20 we reconsider that. I think we really are
21 going to have to look at the issues of Rule
22 63, which we have talked in and around but
23 haven't dealt with. I am not opposed to the
24 idea of especially tying the amendment rules
25 to a different like 90 and 60 days process for

1 designation of experts.
2 In fact, I had intended to vote for that,
3 but I will tell you that I think we need to
4 look at Rule 63 in much greater detail because
5 there are some other safeguards we might build
6 in. I ask everybody to remember that we are
7 changing the idea of the trial date radically
8 so that the concept of X before trial no
9 longer makes sense, and it's going to be -- we
10 are really going to be dealing with the
11 discovery period. That has a whole lot more
12 concerns that we are going to have to look
13 into, and I think the court probably
14 understands that and will appreciate it.
15 HONORABLE F. SCOTT MCCOWN:
16 Could I propose a compromise that I think will
17 solve everybody's problems? I think what Don
18 wanted to do, and I agree with him, is to get
19 a complete package, get it approved, send it
20 to the Court, but I think that perhaps we
21 could say to Luke in his transmittal letter
22 that he ought to say that Rule 63 is included
23 to tie up this package but that it's going to
24 have to have further consideration in David
25 Beck's committee and --

1 MR. KELTNER: That's fine with
2 me.
3 HONORABLE F. SCOTT MCCOWN:
4 There is obviously going to be additional
5 dialogue between the Court and the group,
6 and --
7 CHAIRMAN SOULES: It passed.
8 HONORABLE F. SCOTT MCCOWN: --
9 between the Court and the public.
10 CHAIRMAN SOULES: It passed.
11 It's passed. It's been passed by the
12 committee unless somebody who voted for it
13 wants a reconsideration.
14 HONORABLE F. SCOTT MCCOWN:
15 Well, I voted for it, and in fairness to my
16 colleagues like Dave Keltner would move that
17 we adopt that compromise.
18 CHAIRMAN SOULES: Do you want
19 to move to reconsider the vote?
20 HONORABLE DAVID PEEPLES:
21 Second.
22 HONORABLE F. SCOTT MCCOWN: And
23 I have got a second.
24 CHAIRMAN SOULES: Okay. Those
25 in favor of Don Hunt's motion show by hands.

1 HONORABLE F. SCOTT MCCOWN: No,
2 no.
3 CHAIRMAN SOULES: Yes. That's
4 what we have to take up first because it's
5 already passed. If we are going to unpass and
6 do something else --
7 HONORABLE F. SCOTT MCCOWN:
8 Well, aren't we going to vote -- wouldn't the
9 correct procedure be to --
10 HONORABLE C. A. GUITTARD: You
11 have to vote on the reconsideration of the
12 vote.
13 HONORABLE F. SCOTT MCCOWN: --
14 vote on my suggestion to the amendment?
15 CHAIRMAN SOULES: No. We have
16 got to vote on the reconsideration first
17 because if it stays passed, it's passed. So
18 those in favor of Don Hunt's motion.
19 HONORABLE C. A. GUITTARD: No.
20 Those in favor of reconsidering Don Hunt's
21 motion.
22 CHAIRMAN SOULES: Okay. Those
23 in favor of reconsidering Don Hunt's motion
24 hold up your hands. 15. Opposed? Two are
25 opposed. Or three are opposed.

1 HONORABLE F. SCOTT MCCOWN:
2 Then at this time I would urge my motion.
3 CHAIRMAN SOULES: No. We
4 haven't reconsidered it yet.
5 HONORABLE C. A. GUITTARD: Yes,
6 we have.
7 CHAIRMAN SOULES: Those in
8 favor of Don Hunt's motion.
9 HONORABLE F. SCOTT MCCOWN: I
10 move to amend Don Hunt's motion.
11 CHAIRMAN SOULES: We have got
12 to undo it first. Those in favor of Don
13 Hunt's motion show by hands.
14 HONORABLE SCOTT BRISTER: No,
15 Luke. That is not -- we don't have to
16 vote -- and then you are not going to allow
17 him to reconsider it because we have already
18 voted on it, aren't you?
19 CHAIRMAN SOULES: Well, I don't
20 think that's appropriate.
21 HONORABLE SCOTT BRISTER: Why
22 don't we vote on what he wants to vote on and
23 all of us want to vote on?
24 CHAIRMAN SOULES: Okay. What
25 do you want to vote on?

1 HONORABLE SCOTT BRISTER: His
2 proposal.
3 HONORABLE F. SCOTT MCCOWN: I
4 move that we -- and maybe Don will even accept
5 it as a friendly amendment, but I move that we
6 approve the discovery package, that we take
7 Rule 63 that Alex had as amended by Don to
8 include in that package to tie it all together
9 so the Court can see the system but that we
10 have our chair say in the transmittal letter
11 that the amendments of pleadings is a
12 tentative matter that's going to have to be
13 considered by the amendment of pleadings
14 committee and needs some further work, but we
15 are putting it in here to close up the system
16 and meet their deadline.
17 CHAIRMAN SOULES: Well, what
18 about the 90 and 60?
19 HONORABLE F. SCOTT MCCOWN: And
20 the 90 and 60 like Don said.
21 CHAIRMAN SOULES: Okay. Any
22 further discussion on that? Steve.
23 MR. SUSMAN: I mean, I
24 supported Don's because, I mean, I think there
25 is a relationship between the pleading cutoff

1 and the expert. I mean, I think there -- you
2 know, when your pleading cutoff and when your
3 experts are deposed, I think there is a
4 relationship.
5 I think in the ideal world 90 days before
6 the end of the discovery period or six months
7 after discovery begins is usually too short a
8 period of time to require the party who has an
9 affirmative issue designate experts. It's
10 much shorter than most pretrial orders that
11 are spread over a nine-month period of time.
12 It usually comes later in the day.
13 That's why we actually began -- you will
14 recall we originally began -- this committee
15 originally adopted the first couple of
16 go-arounds a 60/30-day time frame and then we
17 moved to 75/45, and the only reason I
18 supported Don's moving it to 90/60 was to
19 accommodate getting a complete package, and if
20 everybody wants to do that and we get a 30-day
21 pleading cutoff rule that works together,
22 fine, but I don't think there is any
23 justification for moving the experts.
24 I would rather try to get a pleading
25 thing that deals with a later designation of

1 experts. We are only talking about a 15-day
2 difference, but it is a short period of time.
3 The experts are the most expensive part of the
4 case. Under our rules we require a lot of
5 information to be given, more than the current
6 rules, when that expert trigger date occurs.
7 He has got to give everything he has prepared,
8 everything he has looked at, all of his
9 resumes, his old bibliography.
10 I mean, there is a whole slew of material
11 that gets delivered, and I think to require in
12 the usual lawsuit, one not controlled by a
13 docket control plan, that material to be
14 required six months after discovery begins is
15 too early. I mean, I think the way we have it
16 now, which is six months and 15 days, is
17 pushing it; but at least it gives you another
18 few weeks. I would hate to see us move that
19 up.
20 PROFESSOR ALBRIGHT: So what's
21 your proposal?
22 MR. SUSMAN: Well, my proposal
23 is if we are going to punt on the amendment
24 rule and not firmly adopt an amendment rule,
25 that we leave the discovery rules exactly like

1 we have got them and let the people who are
2 working with the amendment rule try to get an
3 amendment rule that will accommodate a later
4 designation of experts because I think it
5 makes sense. I mean, we are trying to cut
6 down the expense, and that's the most
7 expensive part of litigation. To have them
8 ready so early, I think is not -- it's a great
9 departure from current practice.
10 CHAIRMAN SOULES: Judge
11 Brister.
12 HONORABLE SCOTT BRISTER: But
13 the standard case 90 and 60, No. 1, it's not
14 that much difference; No. 2, it's not that
15 early. That's what I do about that deal on
16 all discovery scheduling orders. I do it
17 without any problem. Most experts in the
18 standard case are the doctors, the police
19 officer, that we know the first month. It's
20 not that early, 90 days before the end of
21 discovery. The ones that are complex where we
22 really have to figure all this stuff out are
23 probably going to have discovery control plans
24 anyway where you can negotiate what those
25 dates are.

1 I do want to further study the amendment
2 matter, though I am leaning toward 30 days
3 before trial because -- but, you know, there
4 is other ways that could be done, and I do
5 want to study that more; but the 75/45, the
6 reason we extended it to 75/45 was because
7 it's going to be very controversial that you
8 can wait that late to say who your experts are
9 and what they are going to say; and so 90 and
10 60 just makes that less objectionable, I
11 think.
12 CHAIRMAN SOULES: Anything
13 else? Joe Latting.
14 MR. LATTING: Do I understand
15 from the way you phrased the amendment, Scott,
16 that if we vote for this motion -- you used
17 one phrase that caught my ear. You said that
18 we are voting to approve the entire discovery
19 package and send it to the Court; that is, we
20 are endorsing it as a committee?
21 HONORABLE F. SCOTT MCCOWN:
22 Well, what I understood --
23 MR. LATTING: I just want to
24 understand what I am voting on.
25 HONORABLE F. SCOTT MCCOWN:

1 Okay. Well, let me understand what Don's
2 motion was. I thought that Don's -- the Court
3 has asked us to put a package on their desk so
4 they can start working on it. So I understood
5 Don's motion to be a vote to send this to the
6 Court. He wanted to send Rule 63 so it would
7 be a complete system and they would have in
8 mind when they were reading our discovery
9 rules that it interacted with amendment rules
10 and you had to think about that, and he wanted
11 to take Alex's version of 63 with the time
12 dates that he put in them, and I agree with
13 all of that, but I wanted to add only -- did I
14 understand your motion right, Don?
15 MR. HUNT: Yes.
16 HONORABLE F. SCOTT MCCOWN:
17 Okay. I agree with all of that, but I wanted
18 to add only that in fairness to those who have
19 a lot of problems with the amendment system
20 that our chairman say in transmitting it that
21 there are problems with how you work
22 amendments.
23 HONORABLE SCOTT BRISTER: And
24 interventions and --
25 HONORABLE F. SCOTT MCCOWN:

1 This interacts with amendments, and our
2 amendment committee needs to give that further
3 study, and we may have further specifics on
4 amendments. So that would be my motion.
5 CHAIRMAN SOULES: Judge
6 Peeples.
7 HONORABLE DAVID PEEPLES: I did
8 not understand Don Hunt's motion that way, and
9 I want to reconsider it again. I didn't think
10 I was voting on the whole package. I thought
11 I was voting on 90/60 plus Rule 63.
12 MR. HUNT: Well, that's
13 correct, but we have voted on the whole
14 package.
15 HONORABLE SARAH DUNCAN: No.
16 No.
17 HONORABLE DAVID PEEPLES: Well,
18 I did not know that.
19 CHAIRMAN SOULES: We have not
20 voted on the entire package. That's why I
21 keep asking if there is anything else, any
22 other loose ends, because when we get to the
23 point where everybody agrees there is no
24 further input that needs to be brought then we
25 will vote on the package as a whole.

1 MR. HUNT: Well, I had
2 understood we had voted on everything
3 piecemeal.
4 MR. SUSMAN: I did, too.
5 MR. HUNT: And so this was the
6 last piece that hadn't been approved, and if
7 we approved the last piece, we had approved it
8 all, but if we want to take an up or down vote
9 on the total package after we vote on Scott's
10 motion, that's fine. I don't care.
11 CHAIRMAN SOULES: Okay. State
12 your motion. Oh, Ann, go ahead.
13 MS. MCNAMARA: If you don't
14 send 63 with whatever qualifications that
15 Judge McCown is talking about, the discovery
16 time caps are going to seem to be terribly
17 radical to people because I think right now
18 the saving grace to the discovery time caps is
19 that you get to figure out what the case is
20 before discovery is over. So, you know, I
21 would urge Judge McCown's proposal just
22 because it will make the rest of it make more
23 sense to people who read the discovery rules.
24 CHAIRMAN SOULES: Okay. Any
25 further discussion? Okay. State your motion

1 again, please.

2 HONORABLE F. SCOTT MCCOWN:

3 Okay. I take it that the way the group wants

4 to do it is have a separate vote on whether

5 the whole package goes or doesn't go. So what

6 I would be moving then is to say that we send

7 Rule 63, Alex's version of Rule 63 with Don's

8 times, but that we do it with the transmittal

9 letter from the chair that this is enclosed so

10 that you have a complete package, and there is

11 going to need to be further work on amendments

12 and that he has delegated that to the

13 amendment group, but that way the court will

14 have the whole thing in mind. They will know

15 that this piece of it needs some further work,

16 and that group can go to work on it, and then

17 I would limit my motion to that so that if you

18 approved that motion then we could have a

19 separate vote on the whole rules so that those

20 who wanted to vote for them could vote for

21 them and those against them, against them.

22 MR. PRINCE: Second.

23 CHAIRMAN SOULES: I don't see

24 that that -- let me see if I can state the

25 motion so that it will be on the record

1 succinctly. The motion as I understand it is
2 to change Rule 10(b) so that affirmative
3 relief experts are designated 90 days before
4 the end of the discovery period.
5 HONORABLE SCOTT BRISTER: It's
6 actually 10(3)(b) and 10(2)(b), both.
7 CHAIRMAN SOULES: 10(2)(b) and
8 10(3) --
9 HONORABLE SCOTT BRISTER: (B).
10 CHAIRMAN SOULES: (B). And
11 that those same paragraphs be amended to
12 provide for opposing experts at 60 days
13 instead of 45 days before the end of the
14 discovery period, and that Alex's version of
15 Rule 63, changed from 60 days to 30 days, be
16 sent with the discovery package to the Supreme
17 Court as a tentative concept from this
18 committee as to what the pleadings amendment
19 will look like; is that right?
20 HONORABLE SCOTT BRISTER: Yeah.
21 HONORABLE C. A. GUITTARD:
22 Tentative recommendation.
23 CHAIRMAN SOULES: I don't think
24 it gets to -- I don't think it's a
25 recommendation yet. A tentative concept of

1 what it may look like. All right. Scott, is
2 that your motion?
3 HONORABLE F. SCOTT MCCOWN:
4 Yes.
5 CHAIRMAN SOULES: Scott McCown.
6 Is there a second?
7 HONORABLE F. SCOTT MCCOWN: I
8 had a second a minute ago.
9 HONORABLE DAVID PEEPLES: I
10 will second it.
11 MR. PRINCE: I second it.
12 CHAIRMAN SOULES: Any further
13 discussion? Okay. All in favor show by
14 hands. 18. Those opposed? Three. 18 to 3
15 that carries.
16 HONORABLE F. SCOTT MCCOWN: And
17 if it's appropriate, I would move that we send
18 these rules to the Supreme Court with our
19 recommendations.
20 MR. PRINCE: Second.
21 CHAIRMAN SOULES: Okay. That's
22 been moved. Let me ask to be clear one -- it
23 is appropriate if there is not anything else
24 to be done, and I want to be sure that no one
25 sees anything else that needs to be done.

1 HONORABLE SCOTT BRISTER: That
2 we haven't already tried to do.
3 CHAIRMAN SOULES: Yeah. That
4 you haven't already tried to do. Well, I am
5 talking about issues that were left open --
6 HONORABLE SCOTT BRISTER:
7 Right.
8 CHAIRMAN SOULES: -- as we went
9 along. Are there any other issues anybody
10 recalls being open as we went along that we
11 need to close now?
12 PROFESSOR ALBRIGHT: We have
13 talked about the addition to the
14 nonstenographic recording rule, which is
15 really pretty much mechanical. I don't think
16 that's going to be a problem.
17 HONORABLE SCOTT BRISTER: Yeah.
18 That's a draft.
19 CHAIRMAN SOULES: Will you just
20 write that?
21 PROFESSOR ALBRIGHT: I will
22 just write that.
23 CHAIRMAN SOULES: And then we
24 will at the next meeting look at what you
25 wrote, but we will send it to the Court.

1 Whatever you write we will send to the Court,
2 and if anybody has got a problem with it, we
3 will follow up later with it.
4 MR. HUNT: Ratify it.
5 CHAIRMAN SOULES: Ratify it.
6 That's right. Or unratify it, as the case may
7 be. Anything else?
8 PROFESSOR ALBRIGHT: I do have
9 one more.
10 CHAIRMAN SOULES: Okay.
11 PROFESSOR ALBRIGHT: On Rule
12 3(2)(h).
13 CHAIRMAN SOULES: 3(2) --
14 PROFESSOR ALBRIGHT: (H).
15 Witness statements.
16 CHAIRMAN SOULES: Witness
17 statements. Okay.
18 PROFESSOR ALBRIGHT: "A witness
19 statement regardless of when made is
20 discoverable unless privileged." I would like
21 to add "unless privileged under a privilege
22 other than work product" or something. I
23 think this is very confusing because it is
24 specifically excepted from the work product
25 rule. So I think this could be very confusing

1 to lawyers who are trying to figure out when a
2 witness statement is privileged.
3 A witness statement is privileged if it
4 is an attorney-client privilege or privileged
5 under some privilege other than the work
6 product privilege, and I think we need to put
7 that in the rule.
8 MR. PRINCE: I didn't
9 understand what you said, your first sentence,
10 and that is a witness statement now is not
11 work product, is not privileged under the work
12 product rule?
13 PROFESSOR ALBRIGHT: Correct.
14 MR. PRINCE: I mean, as the
15 work product rule is now written?
16 PROFESSOR ALBRIGHT: Correct.
17 MR. PRINCE: So it would not be
18 privileged?
19 PROFESSOR ALBRIGHT: It's
20 privileged if it's an attorney-client
21 communication, for instance.
22 MR. PRINCE: No, I understand,
23 but the naked words of this sentence as
24 written now is still correct in the way the
25 words are written, isn't it?

1 PROFESSOR ALBRIGHT: It's
2 correct. I just think it's confusing.
3 MR. SUSMAN: I don't think it
4 really is.
5 HONORABLE F. SCOTT MCCOWN: I
6 don't think it's confusing, and I think we
7 need to come to closure.
8 PROFESSOR ALBRIGHT: Okay.
9 CHAIRMAN SOULES: Well, we
10 don't need to come to closure if we have got
11 an open issue. So let's talk about whether
12 it's confusing or not, and whether or not we
13 ought to come to closure is a different issue.
14 HONORABLE F. SCOTT MCCOWN:
15 Then let me address whether it's confusing. I
16 don't think it's confusing because the work
17 product rule in the exceptions lists witness
18 statements and cross-references this rule as
19 an exception. So I don't think it's
20 confusing.
21 PROFESSOR ALBRIGHT: Well, I
22 withdraw -- I never made a motion. I withdraw
23 my comment. If somebody else wants to make a
24 motion, go ahead.
25 CHAIRMAN SOULES: Anything else

1 on this? Okay.
2 MR. KELTNER: Luke, at the
3 peril of not moving completely to close I have
4 got one additional matter that a number of us
5 have been discussing and I discussed with Alex
6 as well. We do not have in Rule 14 or 15
7 regarding depositions a mechanism for hearing
8 of any objections at the court. Therefore,
9 all the things that we put in Rule 7 regarding
10 objections don't apply because it's totally a
11 written discovery rule.
12 When Scott had made the suggestion that
13 we tie -- not make a distinction between
14 written and other discovery we briefly
15 discussed that and indicated that we would
16 think about doing -- that we would handle it
17 when we got to depositions, but we didn't.
18 You can basically take Item 3 on Rule 7(3) and
19 (4) with some small cosmetic changes and put
20 in (a) in either Rule 14 or 15 and cure the
21 problem, and I think it would go in Rule 15.
22 PROFESSOR ALBRIGHT: It would
23 be 15(7).
24 CHAIRMAN SOULES: You want to
25 move -- I mean, you want to include at Rule 15

1 a new paragraph (7)?

2 MR. HUNT: It would be (6) now.

3 No, it would be (7).

4 CHAIRMAN SOULES: New paragraph

5 (7).

6 MR. HUNT: (7).

7 CHAIRMAN SOULES: Provisions

8 for hearings and orders?

9 PROFESSOR ALBRIGHT: David, I

10 wrote a draft of it that you could read.

11 CHAIRMAN SOULES: Comparing the

12 rulings --

13 MR. KELTNER: Yes, you did.

14 CHAIRMAN SOULES: -- similar to

15 that in Rule 7, right?

16 MR. SUSMAN: Can we read this

17 to everyone?

18 CHAIRMAN SOULES: Okay. So we

19 have got a new paragraph (7) to Rule 15, is

20 it?

21 "Any party may at any reasonable time

22 request a hearing on an objection or privilege

23 asserted in accordance with this rule. The

24 party seeking to avoid discovery shall present

25 any evidence necessary to support the

1 objection or claim of privilege either by
2 testimony at the hearing or by affidavits
3 served upon opposing party at least seven days
4 before the hearing.

5 "If a judge determines that an in camera
6 review of some or all the requested discovery
7 is necessary to rule on the objection to the
8 privilege, the objecting party shall cause
9 answers to deposition to be made in camera or
10 to be made in an affidavit to be produced to
11 the judge in camera to be sealed in the event
12 the claim of privilege is sustained."

13 Is there any opposition to that? Being
14 no opposition, it's done.

15 MR. SUSMAN: Wait, wait, wait.
16 Wait a second. There is a mistake here. I
17 think there is a mistake because it doesn't
18 make sense to talk about rulings and
19 objections during a deposition. What are
20 you-all talking about?

21 MR. KELTNER: We are talking
22 about taking it to the court.

23 CHAIRMAN SOULES: This goes to
24 the court.

25 MR. SUSMAN: How do objections

1 during a deposition -- objections during a
2 deposition do not stop the testimony.
3 MR. KELTNER: And that's
4 covered elsewhere in the rule.
5 MR. SUSMAN: Huh?
6 MR. KELTNER: That's covered
7 elsewhere in the rule, but the situation is if
8 I direct a party not to answer, which the rule
9 provides for, then I have to wait --
10 MR. SUSMAN: That's not an
11 objection.
12 MR. KELTNER: Okay. That's a
13 good change.
14 MR. SUSMAN: I want to say that
15 the objection is "objection; leading.";
16 "objection; form." Okay. That's an
17 objection, and typically the witness answers.
18 So I don't have -- I don't bring on for
19 hearing anything. I'm just saying --
20 MR. KELTNER: Steve, it's the
21 instruction not to answer, and that's what's
22 bothering me.
23 MR. SUSMAN: Instructions not
24 to answer or assertions of privilege is what
25 you have got to limit it to.

1 MR. KELTNER: Well, the only
2 way you can assert the privilege under our
3 current Rule 14 and 15 is an instruction not
4 to answer.
5 MR. MEADOWS: Right.
6 PROFESSOR ALBRIGHT: Or
7 suspension of the deposition.
8 MR. KELTNER: Or --
9 MR. SUSMAN: Okay.
10 MR. KELTNER: Okay. Then we
11 are in accord.
12 MR. SUSMAN: It's okay. She
13 can fix it real quick. It's just
14 changing -- "objection" is not the word you
15 want to use. Okay. It doesn't make sense
16 that you are objecting in a deposition.
17 CHAIRMAN SOULES: Are we going
18 to put a ruling paragraph in here, too,
19 similar to paragraph (4)?
20 MR. KELTNER: That was my
21 intention.
22 CHAIRMAN SOULES: That would be
23 No. 8, paragraph (8). Okay. That fixes that
24 problem.
25 Is there anything else that anyone sees?

1 Okay. We are ready to vote now then on the
2 discovery package as a whole.
3 MR. SUSMAN: Can I first ask
4 you, is this really necessary?
5 CHAIRMAN SOULES: Yes. From
6 Discovery Rules 1 through 24 and -- 1 through
7 24 with the appendix of Rule 63 in its
8 conceptual form at this time. Okay.
9 MR. HUNT: Do you want to
10 include the 166 amendment?
11 PROFESSOR CARLSON: That didn't
12 change.
13 CHAIRMAN SOULES: I think we
14 will send it up later because it really
15 doesn't have anything to do with discovery.
16 It's just an ADR issue.
17 Okay. Any discussion? Those in favor --
18 MR. LATTING: Yeah. The speech
19 I made this morning I would like to put in
20 right now against this motion.
21 CHAIRMAN SOULES: Those in
22 favor show by hands. 17. Those opposed? 17
23 to 6 is the vote to refer the matter to the
24 Supreme Court of Texas with our approval.
25 Well, I want to thank Steve and Alex and

1 all the people on their committee. Scott
2 McCown, David Keltner. I don't want to leave
3 anybody out. They have really worked
4 literally hundreds of hours on these rules.
5 What we have seen of their work in this
6 committee and in the meetings of this
7 committee is just the tip of the iceberg.
8 They have had dozens of meetings -- and
9 Scott Brister. Dozens of meetings at various
10 places in the state for long sessions where
11 they have worked extremely hard to clarify and
12 follow our guidance, our wishes as to how
13 these should be constructed, these discovery
14 rules, and I want to thank all of you for this
15 committee and for the Court for all that work
16 and, I think, a splendid job of pulling
17 together a lot of difficult concepts.
18 I know there is some disagreement about
19 the approach to discovery that this takes, but
20 it has for the most part over several months
21 been the wishes of the majority of the
22 committee to bring this to closure in the way
23 that it has now been brought to closure. So
24 with that, I thank you, and I wanted to make
25 sure that we get that on the record, Steve.

1 MR. SUSMAN: Thank you very
2 much, and I thank my committee members for all
3 of their help and this committee for its
4 patience with our work. It's been a fun
5 project, and I think we have prepared
6 something which if the Court adopts it will
7 quickly and dramatically reduce the cost of
8 litigation in this state, which is something I
9 think the public deserves.
10 CHAIRMAN SOULES: Okay. We are
11 going to get a short report on sanctions
12 before we leave. We have got sandwiches out
13 there. If we could do the same thing -- oh,
14 I'm sorry.
15 JUSTICE HECHT: Let me say on
16 behalf of the Court, too, how much we
17 appreciate your time and energy. These
18 meetings have gone on over a year. I think
19 this is by far the longest session that the
20 committee has met in regular sessions,
21 bimonthly for well over a year. The Court is
22 aware of your service, each and every one of
23 you. You were selected because we felt like
24 you were suckers -- I mean, willing enough to
25 devote the kind of energy that it would take

1 to work on some of these problems and not just
2 problems in Texas but problems around the
3 country, and we are very grateful for all of
4 your efforts and look forward to working on
5 the problems that remain. Thank you, Luke.
6 CHAIRMAN SOULES: Thank you,
7 Judge.
8 Let's get a sandwich and get a short
9 report on sanctions so that we can -- it will
10 probably take us about an hour. Spend about
11 an hour on sanctions.
12 (At this time a recess was
13 taken, and the proceedings continued as
14 reflected in the next volume.)
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2 CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

3 -

4

5 I, D'LOIS L. JONES, Certified Shorthand

6 Reporter, State of Texas, hereby certify that

7 I reported the above hearing of the Supreme

8 Court Advisory Committee on July 22, 1995, and

9 the same were thereafter reduced to computer

10 transcription by me.

11 I further certify that the costs for my

12 services in this matter are $ 1,177.00 .

13 CHARGED TO: Luther H. Soules, III .

14

15 Given under my hand and seal of office on

16 this the 7th day of August, 1995.

17

18 ANNA RENKEN & ASSOCIATES

19 925-B Capital of Texas
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20 Austin, Texas 78746
(512) 306-1003

21

22 D'Lois L. Jones
D'LOIS L. JONES, CSR

23 Certification No. 4546
Cert. Expires 12/31/96

24

25 #002,323DJ