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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 17, 1997

(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 17th day of January, A.D., 1997, between the hours of 8:30 o'clock a.m. and 12:45 p.m. at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JANUARY 17, 1997

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
Joseph Latting
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
David J. Beck
Ann T. Cochran
Hon. Clarence Guittard
Charles F. Herring, Jr.
Franklin Jones, Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
John H. Marks, Jr.
Hon. F. Scott McCown
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
O.C. Hamilton
David B. Jackson
Bonnie Wolbrueck

Hon. William Cornelius
Doris Lange
W. Kenneth Law
Mark Sales
Hon. Paul Heath Till

JANUARY 17, 1997
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INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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PROFESSOR ALBRIGHT: Everybody get a disposition chart for Rules 166 through 209.

What we have here is the disposition chart for Texas Rules of Civil Procedure 166 through 209. It's disposing of all of the letters that are in the agenda beginning with the Volume 1 of the first agenda, dated November 19th or 20, 1993. So we have letters here dating from at least 1992. I think there was some from before 1992.

To start with, when you go through all of these letters a lot of them have some very good suggestions that we have debated and debated and debated as part of the discovery rules package, and I think as a general comment to a lot of these letters is what I have put at the beginning of the disposition chart, that "These comments were given substantial consideration in the development of subsequent drafts of the proposed discovery rules. Some were adopted, in whole or in part. Others were rejected after considerable debate. The Supreme Court Advisory Committee

believes that the package sent to the Supreme Court in July 1995 represents a consensus approach to discovery reform that will substantially decrease the amount and cost of pretrial discovery."

So as we go through these a lot of these a lot of times I may just refer to the general comment, that that disposes of some of these letters. Okay.

The first letter on page 8 through 10 is a letter from Lloyd Lunsford dated 3-9-92 where he's complaining of too many discovery requests and various complaints about expert witnesses and identifying experts in cases, and he also has a complaint about how it's expensive to authenticate medical records. I think the general comment is applicable here, and also, let's see, there is a -- for the medical bills I felt like this was really an evidence issue, authentication of medical bills was an evidence issue, and it should be referred to the evidence committee.

I'll assume by your silence you agree. If anybody wants to pitch in and add something else to the disposition or to change the

disposition, please hop in. Next one, pages 11 through 19 from Allen Schecter of Houston, dated February 7, 1992. This is needing a procedure to provide an inexpensive way to prove up medical bills. This is an evidence issue.

Now we jump to page 281. This is a letter from Brent Keis from Fort Worth, dated February 4, 1994. He has attached an article that he wrote for the Bar Journal just generally saying that discovery has a horrible disease, trying to identify the disease, and listing alternatives to cure the disease from no discovery to limited discovery. The general statement applies to this.

Page 293A through F, a letter from Judge Tony Lindsay of Houston, dated September 29, 1993. He lists -- and it's a long letter where he lists lots of specific requests for changes to specific discovery rules. We considered these requests in our debate, and so the general statement applies to this.

Page 294, a letter from Tom Fleming of McAllen, dated April 27, 1992, supports the committee on the administration of justice

recommendation in scheduling expert witnesses. I refer to our proposed Discovery Rule 10 which adopts a schedule for expert witness disclosure, although the number of days does differ from the committee on the administration of justice recommendation.

Page 302, requesting a provision to be added to 166 for telephone conferencing. The advisory committee has proposed a general rule allowing telephone hearings. Page 303 requests the adoption of rules similar to California rules, especially regarding expert witnesses. Refer to Rule 10 concerning expert witnesses, which adopts many of these proposals.

A letter from Jim Foreman, page 310, dated 3-20-91, requests the Court to take discovery rules in hand, simplify them, and standardize them, general comment and our general statement applies. Page 313, a letter from Jose Lopez from Houston, dated 10-3-92, wants to know if the judge can change an agreed docket control order without a hearing or notification of the parties. I have referred to Discovery Rule 2, which allows the

judge to change discovery deadlines.

I would like to skip the comments relating to 166a, which is the summary judgment rule, because I think we will be debating the summary judgment rule shortly, and I think that discussion will resolve or dispose of these comments.

So we skip down to page 421. 421 is a letter from Judge Charles Bleil of the Texarkana Court of Appeals suggesting that any party should be allowed to call an expert identified by any other party. I have referred to Discovery Rule 10 and 6, which provides that you must identify an expert if it's requested in discovery, but the exclusion rule does add a good cause exception with no unfair surprise or prejudice. So although our rules do require everyone identify their own experts, there might be a way to get that testimony not excluded under the Rule 6 good cause exception.

Page 421 from Luke Soules suggesting an amendment to 166b concerning notice and protective orders. We have a general rule that applies to all notices being sent

according to Rule 21a, and protective orders for non-parties are addressed in proposed Discovery Rule 22. Page 422, a letter from Walter Kronzer, dated 7-21-93, about the definition of written statement -- I mean, of witness statements changing an "and" to an "or." This was rewritten in the proposed discovery rules because witness statements are now discoverable under the proposed rules.

Page 425, a letter from Robert Alden of Austin dated December 19, '92. Question, "Are depositions to be supplemented? They should not be, but a clarification would help." See proposed Discovery Rule 5 because Rule 5 applies only to written discovery under our proposed rule.

"Can a party be asked to describe facts known by a person with knowledge of facts? They should not be," he says. Refer to proposed Discovery Rule 3(c) that requires identification of a witness' connection to the case rather than a fact summary.

Page 428, this is a letter from James Kronzer dated October 1991. He suggests an alternative to in camera inspection, having

the opponent review privileged documents with a strong protective order. We did not change the method for in camera review in the proposed discovery rules.

Page 429, also from James Kronzer in September of 1991, the only discovery should be by depositions and interrogatories. General comment, see the proposed discovery rule that limits discovery. He also suggests that a lawyer representing a deponent should not be allowed to object to anything except for privileges, which we have adopted to some degree in Rule 15.

Page 430, this is just a note about proposed amendments to the Federal Rule of Civil Procedure concerning official records. This is really a -- it's an authentication rule, so I think it's really an evidence rule.

Page 431, is a letter from Burt Berry, which it's a copy of his letter to an opposing lawyer noting that discovery is a mess and trial by ambush is not so bad, and he didn't request any action, but see our discovery rules which will hopefully solve the problem forever and ever.

Page 433, Robert Martin from Dallas, dated June 1991, general concern for today's unbridled discovery. He seeks major surgery, and we have done major surgery as requested.

MR. LATTING: Boy, I'll say. Unfortunately.

MR. BABCOCK: Now, now. Now, now.

PROFESSOR ALBRIGHT: Now, now. We are not going to go back over that. We have already voted. Page 437, Judge Scott McCown seeks a rule concerning disclosure of grand jury testimony, and I think this is really a Rule 76a issue, and it should be referred to that committee. Page 450 is the same as the previous letter.

Page 454 is a letter from me about the changing a rule to 166b(4), and the Supreme Court did change that retroactively in 1990.

Page 461 from Edward M. Lavin in 1990 is the same issue -- no. Proposes amending the rules to provide that a person who's identified as a witness with knowledge of relevant facts should also have to state a summary of those facts; and, again, Rule 3

allows a person's connection to the case to be stated, or requires that, rather than a fact summary.

Page 462, Richard Tulk in 1990. It's the same complaint of my letter about the amendment that was retroactively changed and then also proposes having a pretrial order and statewide rule on what should be in the pretrial order and wants summaries of testimony, and refer to all the discovery rules, particularly Rule 3 and perhaps Rule 1 for generalized orders.

Page 470, complaining of a rule change regarding objections to discovery, wants a provision in the rule halting an abusive discovery request when a clearly objectionable discovery request is met by a proper objection. This is a letter by Dana Timaeus dated 5-1-90. See proposed Discovery Rule 7, presentation of objections. We now have proposed a better two-tier system for objections to improve the situation that is being complained of.

Page 473 is a letter from Pat McMurray from Dallas, dated May 1, 1990. It has four

specific requests. A party should not be required to swear to interrogatory answers outside his knowledge. This was rejected by the committee, but see proposed Discovery Rule 12 saying that parties need not verify objections, although they do still have to verify answers to interrogatories.

He wants to identify experts outside of interrogatories. See proposed Discovery Rule 10 making expert discovery subject to standard requests for disclosure. Request for admissions should not be used to contravene pleadings. This was rejected. This committee felt that the request for admissions rule was working well, and we made no substantive changes in that rule. Judicial discretion should be broadened to allow introduction of undisclosed testimony. See proposed Discovery Rule 6 where we did expand the judicial discretion.

Page 476, a letter from Stephen Mendel, 2-28-90, from Houston. He thinks the definition of witness statement should be clarified. It is clarified in the proposed rule.

A letter from Dan Price, 8-21-90. Again, this is the issue about the amendment to Rule 166b(4) that was later withdrawn. That's the same for page 490, Jeff T. Harvey, and 492, Pat Hazel.

Page 493 is a letter to the editor from the Texas Lawyer from Reed Jackson, allow discovery of trial witnesses and exhibits. Proposed Discovery Rule 3(d) allows discovery of trial witnesses, but this group rejected discovery of exhibits to be used at trial.

Page 494. This is a sealing issue which is really a 76a issue, I think, rather than a 166b issue. Page 495, a letter from Bruce Anderson, July 1993. He is from San Antonio, recommends that once someone be -- someone is identified as someone having knowledge of relevant facts or an expert witness then any party should be able to use that witness. It's been addressed in earlier letters. This committee rejected that.

Page 498. This is -- I can't tell who this was from. Oh, a letter from Glen Wilkerson from Austin, dated January 1990, proposed changing Rule 166b(6) on

supplementation from 30 days to at least 60 days. The proposed discovery rules keep the 30 days supplementation requirement except for some experts because of the 45-day notice of trial rule.

Page 499, Dan Price, November 1989, believes 166c needs clarification. This is about agreements that are taking the deposition enforceability. This is a Rule 11 issue, and I believe this was disposed of in the amendments to Rule 11 that we have already passed.

Page 500, Glen Wilkerson, January 1990, proposed a new Rule 166c for pretrial statement of witnesses, experts, and documents. See proposed Discovery Rule 9, standard request for discovery that adopts many of these ideas expressed in this letter.

Page 504 is Mark Schnall advising that the statute -- there is a statute that requires the Chief Justice to appoint a committee for mandatory sets of interrogatories and requests for production in medical liability cases. The subcommittee did not address this. This committee didn't

address it because there is another committee that is working on that and has been working on it for a long time. So we did not feel it was part of our job at this point.

Page 507 suggested -- this is a letter from LaDonna Ockinga from Dallas, dated December 1991, suggests a rule to provide that documents be required to be produced at either the time of the -- the time stated in the request or if not then, then the responding party has to identify three times, and they will produce the documents. Our proposed Rule 11 requires the responding party to set a time and place for compliance if they are not going to produce them at the time requested.

Page 508 is a copy of Federal Rule 34 to provide the non-party production of documents and things. We have adopted much of this rule in our proposed Rule 19. Page 509, a letter from Edward Lavin from San Antonio suggests that the Supreme Court promulgate a rule -- a short set of generic interrogatories that are not objectionable. See proposed Discovery Rule 9, standard requests for discovery. Page 510 suggests -- wait just a second.

Okay. Page 510 proposes adding the language, "Responses, including objections, should be preceded by a request." This is wanting to add that language to Rule 167 as it is in the Federal rules. Proposed Rule 5 requires that the response include the request only if a disk is sent.

Page 513 suggests that Rule 167, -68, and -69 be redrafted to be consistent so that it allows the defendant 50 days after service of the citation to respond to any discovery requests. This is the issue of if you are served with process on day one and then served a set of interrogatories on day two you only have 30 days to respond instead of 50 days if you had been served the interrogatories with the citation. We discussed this and rejected it.

Page 514, Ernest Sample, December 1989, various suggestions on how to limit discovery, and, again, the general comment about the proposed discovery rules. Page 516 suggests amending Rule 169 to eliminate the requirement of filing requests for admissions. In our rules all responses and all requests are filed

with the clerk.

Page 520. Federal Rule 35 is amended to authorize the district court to require physical and mental examinations by anyone suitably licensed and certified rather than just by a physician or psychologist. We rejected this. In our Rule 20 we continued to just allow physicians and psychologists.

Page 521, Stephen Mendel from Houston, February 1990, proposed a new rule permitting vocational rehabilitation experts. Again, this was rejected. See Rule 20.

Page 524, Daniel Tatum, May 7, 1993. He is concerned because lawyers serve both the first and second set of interrogatories at the same time, which make him have to respond to 60 interrogatories at once. Proposed discovery Rule 1 generally limits to 30 interrogatories, and they can be served all at once or one at a time.

Page 526, this is just a copy of the draft bill with health care liability and procedures. No action required.

MR. ORSINGER: Alex, can we stop for a second? Tommy, are you on that

Supreme Court committee on medical malpractice discovery?

MR. JACKS: Yes.

MR. ORSINGER: Would you mind telling us what the heck has happened? I understood that you guys did your work like two years ago, it was rejected and then nothing has happened.

MR. JACKS: No. Actually, to make a long story short, there was essentially a stalemate between the Court and the committee which was never resolved, and as a consequence nothing happened. The statute actually contemplated that possibility as one of the possibilities and gave the last -- essentially gave the committee the option of not doing something in that circumstance, and that's what we elected to do or not do as the case may be.

MR. ORSINGER: So that's a dead-end?

MR. JACKS: Yes.

MR. ORSINGER: Okay. Thank you.

PROFESSOR ALBRIGHT: Okay.

Page 530 proposes amending the rule permitting discovery of a witness' connection with the events or occurrences. Robert Alden. Again, we have amended the rule to allow that discovery. Larry York, Austin, November 15, 1991, proposes amending the rule to allow representatives of business entities to sign interrogatory answers without requiring them to swear that they have personal knowledge of facts. This is -- we have addressed this. We do require verification of interrogatory answers.

Page 535, Danny Wash, from Waco, September 5, 1991, proposed eliminating the requirement that answers to interrogatories be preceded by the question. Rule 5(1) requires it if a disk is sent. Page 537, Jim Foreman, requesting or complaining about supplementing answers with additional experts requires you to provide address, telephone number, and the substance of their testimony. He would like to see simplification and standardization of the rules. We have simplified and standardized it in Rule 10.

Page 539 is from John Wright, February

'91, proposes a procedure on how to -- what you should do when you are served with more than 30 interrogatories in a set. We did not adopt this language. Interrogatories are limited even further in Rule 1, and we didn't feel like this was really much of a problem anymore. In 1991 the limitation on number of interrogatories was still fairly new.

Page 542, Stephen Mendel from Houston, February 1990, says there is a conflict between Rule of Evidence 703 and Rule of Civil Procedure 168. This was not addressed in our committee; and I think the feeling is, is that we should go ahead and address it here in this committee and get it done; and I have to admit I don't even -- I have not looked at this carefully enough to really understand the problem. There is a question of whether an expert witness may rely on hearsay in the form of interrogatory answers filed by a non-adverse party. It proposes that Rule 168 should yield to 703. Anybody want to address this? Paul Gold.

MR. GOLD: I'm speculating here, but I think that what he's saying is

that an expert should only be allowed to testify upon things that are customarily relied upon by experts in the field.

You shouldn't typically be allowed to introduce your own interrogatory answers, and interrogatory answers would not be something that an expert typically relies upon; therefore, an expert should not be allowed to rely upon a co-party -- say a defendant's expert should not be able to rely upon a co-defendant's answers to interrogatories in support of their opinion; but I think that that's probably addressed by Daubert and Robinson; and similarly, simply because you rely upon the interrogatory doesn't give you the opportunity to introduce the interrogatory into evidence.

It's still not -- just because an expert relies on something, it would still be hearsay. I'm just thinking through it. I think that's what he's talking about, but I'm not sure that it's a problem that necessarily needs to be addressed in the rule.

PROFESSOR ALBRIGHT: Okay. He has written a five-page letter that has

researched cases cited.

MR. GOLD: Maybe I'm wrong.

PROFESSOR ALBRIGHT: I wonder if maybe we should let someone look at it who is interested in this issue and then make a recommendation. Paul Gold.

MR. GOLD: I'll look at it.

PROFESSOR ALBRIGHT: Okay. Great. Thank you.

MR. ORSINGER: Well, Alex, it would seem to me that whatever we do it shouldn't be to change the discovery rule to permit you to offer your own interrogatory answers. It seems to me that it ought to be a change in the evidence rules rather than the discovery rules.

MR. GOLD: I'm thinking that you can't do it now.

MR. ORSINGER: You can't. That's what the conflict is between 166b and 703. Supposed conflict.

MR. GOLD: Does he articulate what the conflict is?

PROFESSOR ALBRIGHT: Yeah. He does. It's a very long letter, but I read it

a long time ago, and I can't remember exactly what it was.

MR. ORSINGER: Well, I think he's saying that you're not permitted to rely on your -- or offer your own interrogatory answers into evidence. Can you call an expert and ask them to rely on your own interrogatory answers in rendering opinions? That's what I understand it to be.

PROFESSOR ALBRIGHT: Well, why don't we have Paul look at it, and, Richard, if you would like to as well.

MR. ORSINGER: I would be happy to look at it.

PROFESSOR ALBRIGHT: And then you-all make a recommendation.

MR. GOLD: Okay. I just don't think it's a discovery issue so much as I do an evidentiary one.

MR. ORSINGER: Me too.

PROFESSOR ALBRIGHT: Okay. Page 547. Page 547 is a letter from Edward Lavin, September 1990, requests a generic set of request for production of documents. That's our standard request for discovery.

Page 548, Pat McMurray, we have already addressed that letter. It also appears at 473.

Page 552, no action is required. It applies to a different rule, so I think we address it someplace else. Page 554, another duplicate. Page 558, Lewin Plunkett from San Antonio, April 1992, proposes amending Rule 169 to provide that in the absence of a court order no answers are required within 30 days from the date of the receipt of the request for admissions. No action required.

If this does occur, I think what he's talking about is a rather -- an unusual situation for service where the service days are counted to end up giving you less than 30 days. If this occurs, a court order would be available to allow a withdrawal of the deemed admission. It seemed that this was a rather quirky problem that could be dealt with on an individual basis rather than by amending the rule.

Page 560 is the letter from Pat McMurray we have already addressed. Page 563, a letter from Harold Hammett from Fort Worth, June

1989, proposes amending the request for admissions rule to restore a pre-1984 requirement of a sworn statement when the party receiving a request for admission denies a request or states that he cannot truthfully admit or deny, and the signature and oath should be by the party and not the attorney. Our proposed Discovery Rule 13 has no substantive changes from Rule 169, so we reject this proposal.

Page 564, I believe we have already addressed this. This is having a request preceding responses. Rule 5(1), says you do it only if you have a disk. 568 is in the wrong place. 572 is a letter on a proposed new Rule 170 on motion in limine. It's just assigning Steve McConnico to draft it, and motions in limine are not our rules, and I don't know -- I think there is another subcommittee considering the motion in limine rule. Page 573 is again a new -- regarding a new motion in limine rule.

Page 575, these rules, pages 575 through 5 -- let's see. I guess I will do it by rule. Rule 171 involves masters. We began to

address the masters rule, as I recall, the very first meeting when we addressed discovery, and we put it -- we tabled it, and we never went back to the issue of masters. So I think that may be something that needs to be addressed at some other time. I don't know if we should defer that until a subcommittee has had a chance to address masters. Does anybody feel differently?

MR. ORSINGER: Alex, if we can go back for just a second, it's unclear to me what committee the motion in limine would fit under because there is no motion in limine rule right now that I'm aware of, and perhaps we ought to decide. Is there --

MR. LATTING: Yeah. I'm supposed to be writing one.

MR. ORSINGER: You are?

MR. LATTING: Yes. And I haven't done it yet, so I think I am on an ad hoc committee for that.

MR. ORSINGER: Okay.

PROFESSOR ALBRIGHT: So Joe Latting is working on whether to adopt a motion in limine rule and drafting it.

Back on page 17 there are several letters addressing Rule 174 regarding bifurcation. Since these letters were written we've had Supreme Court opinions addressing bifurcation, and I know our subcommittee, the discovery subcommittee, did not address this. Aren't there other -- it seems like we have talked about it. Are there other rules we have adopted addressing bifurcation?

MR. ORSINGER: We have talked about the nonsuit problem in bifurcated trials. My committee, subcommittee, has done that, but that's the only part of it we have addressed, is the nonsuit part.

PROFESSOR ALBRIGHT: Does anybody remember any other rules that we have talked about concerning bifurcation?

MR. ORSINGER: Of course, the Civil Practice and Remedies Code has now gone into effect that prescribes bifurcation on punitive damage claims, and so in my view the statute has supplanted most of the Moriel case.

PROFESSOR ALBRIGHT: Okay. So now we have disposed of this by saying it's

now statutory. Is that okay? Now governed by statute.

HONORABLE SCOTT BRISTER: Are you talking just about punitive damages or about any bifurcation?

PROFESSOR ALBRIGHT: Well, I guess what I would prefer to do is have somebody look at these bifurcation issues and decide if we do need a rule, if we need to amend Rule 174 or what do we need to do with bifurcation. Is there a volunteer? Bill Dorsaneo will volunteer?

PROFESSOR DORSANEO: Well, I don't think anything needs to be done. Rule 174 allows about anything.

HONORABLE SCOTT BRISTER: Well, it stays separate --

PROFESSOR DORSANEO: Separate trial of any issue.

HONORABLE SCOTT BRISTER: Yeah, but separate trial is two different juries. It doesn't really address bifurcation.

PROFESSOR DORSANEO: The rule is really silent on that.

MR. ORSINGER: Well, this

proposed rule is a lot broader than just punitive damages versus actual damages, and the statute only refers, as I recollect, to the difference between trying punitive damages. So the statute doesn't address the proposed rule completely.

PROFESSOR DORSANEO: The Committee on Court Rules did a lot of work on proposed changes to Rule 174. I don't know what ever became of that.

MR. HAMILTON: When they changed the statute we abandoned it, when they enacted the statute.

PROFESSOR ALBRIGHT: Because the Committee on Court Rules was asking for bifurcation on punitive damages, right?

MR. HAMILTON: Yes.

PROFESSOR ALBRIGHT: So, Judge Brister, would you like to look at this?

HONORABLE SCOTT BRISTER: Sure.

PROFESSOR ALBRIGHT: Okay. So Judge Brister will consider whether we need any changes to Rule 173. Page 584 --

HONORABLE SCOTT BRISTER: What page, again, is that problem with the letter?

PROFESSOR ALBRIGHT: That is page 579 through 583.

HONORABLE SCOTT BRISTER: Thanks.

PROFESSOR ALBRIGHT: I think those letters are primarily about the punitive damage issue, and you might want to go broader than that.

Page 585 is a memo from Professor Jack Ratliff concerning joinder rules in Rule 174. Again, this hasn't been addressed. I know that Richard Orsinger's committee has addressed the joinder rules some. He says there is a conflict between Rule 174 and 41, so maybe, Judge Brister, you can look at the letter on page 585 as well.

HONORABLE SCOTT BRISTER: What does he say the conflict is?

PROFESSOR ALBRIGHT: I think he says it's confusing.

MR. ORSINGER: Let me say that my subcommittee report is going to address this particular letter, but he's got a dual problem. He doesn't feel like the severance and joinder language is sufficiently

identical, but he also has another problem, and that is he doesn't like the Nexus requirement for joinder.

Under the current rule it has to be the same transaction or series of transactions, and he wants to discard that and allow the court to join according to the court's discretion, with no Nexus requirement, and our subcommittee is recommending that we conform the language between joinder and severance but that we reject his proposal to abandon a Nexus requirement as a condition for joinder.

PROFESSOR ALBRIGHT: I think what he's saying is that Rule 174 gives the trial court very broad discretion on joining -- on consolidating cases and separating them, but then when you have parties joining other parties it's more limited, and that should be looked at.

Okay. We are now going to page 586 to 635, also all address bifurcation as well, again on the punitive damage issue. So those will be reviewed by Judge Brister.

Page 636, a letter from Harry Tindall of Houston, June 1993, proposing amending Rule

176 to change the subpoena range from 100 to 150 miles to make it consistent with the statute. This has been done in Rule 22.

Page 642 is a copy of the proposed Federal Rule of Civil Procedure 45 concerning subpoenas. Our new Rule 22 adopted many of the Federal rule's provisions.

Page 645, which is in Volume 2 of the first agenda, is a letter from Judge James Mullin of Weatherford, proposes amending the rule regarding automatic recusal of assigned judges. This is all addressed by statute, and so we cannot do anything with it by rule.

Page 647. This was not addressed. This is a conflict between Rule 188 and 206, sent to us by Jess Young of San Antonio, October 1989. It's concerning foreign court reporters returning foreign depositions to the party who caused the issuance of same without regard to who asked the first question. David Jackson, do you remember how this was --

MR. JACKSON: Well, you know, it's not clear by this whether they are really talking about before Rule 205 and 206 are complied with or after, and it's a little

confusing as to whether they mean for the court reporter to return the deposition, the original of the deposition, to the party who asked the first question before or after it's been submitted to the other side for signature in the first place.

PROFESSOR ALBRIGHT: Okay. David, would you look at this letter and our proposed rule and make any recommendations?

MR. JACKSON: Sure.

PROFESSOR ALBRIGHT: Okay. Thank you. Page 649 from Tindall and -- let's see, from Harry Tindall, proposed amending Rule 200 to add a new subpart wanting to allow people to designate non-smoking areas for deposition. This was addressed in Rules 1 through 15. That subcommittee proposed a non-smoking rule that was rejected by this committee. So the non-smoking issue has been rejected by the advisory committee.

MR. GOLD: That's not very politically correct.

PROFESSOR ALBRIGHT: I voted for it.

Page 650 proposed amending -- let's see.

This is from Hardy Moore from Paris, Texas, February 1992, proposes amending Rule 200 to require a deponent to be identified the same as in a case of a person having knowledge of relevant facts by including his residence and business address and telephone numbers rather than just the name. Our Discovery Rule 14 still only requires the name. I don't remember that we ever addressed this. Does anybody want to propose that we change it according to this letter? I take it by your silence you do not. So we have rejected this proposal.

Page 650, a letter from Hardy Moore. He's the one from Paris, Texas. I had the wrong thing. Oh, wait. Never mind. Page 652, from Wendall Loomis from Houston, May 6, 1991, proposes amending the rule to add language similar to 168 regarding service on the attorney. We now have a general rule adopted to require service on an attorney rather than a party if a party has an attorney. Page 656, again, this is just a repeat of page 636. Page 662 is a repeat.

Page 666. This is a letter from E. J.

Wohlt and Perry Archer, April 1992, from Houston, proposing an amendment to Rule 202 to do away with requirement of a written transcript without a court reporter. See Discovery Rule 18 regarding non-stenographic recordings. You can have a non-stenographic recording without a court reporter present, but if you want to use a transcript -- if you want to use that deposition in a trial, you have to have it transcribed by a court reporter.

Page 672. This doesn't require any action. It's just asking for an opportunity to be heard. 673, from Charles Jordan of Houston, January 1993, proposes removing the provision that requires the custodial attorney to make the original deposition available for photocopying by another party. No change recommended. Our Discovery Rule 16 still has the same language as the prior rule.

675 proposed having statutory amendments. These are not rule proposals, so they are outside our jurisdiction. Page 678 proposed amending the rules requiring the custodial attorney, again, to make a deposition

available. Again, see Rule 16.

Page 680. This is the same letter that was on page 647 that David Jackson is going to look at for us.

That ends the first supplement. I mean, the first agenda. Now we move to the first supplement. First supplement, page 1, 2, and 6 through 10, these are letters from Shelby Sharpe for the Court Rules Committee proposing amendments to Rule 166 regarding scheduling and pretrial conferences. Again, all of the Court Rules Committee's proposals were getting substantial consideration by this committee and the subcommittee and were subject to substantial debate. See the proposed discovery rules.

A new rule -- again, from Shelby Sharpe about health care liability claims. This is another --

HONORABLE SCOTT BRISTER: Can't hear you.

PROFESSOR ALBRIGHT: Another request from Shelby Sharpe regarding health care liability claims and that statute. We have already addressed that. Another request

by Shelby Sharpe for the Court Rules Committee, a new rule on pretrial and motion dockets and to establish uniformity throughout the state to maintain pretrial and motion dockets. Again, we gave this substantial consideration. See our proposed discovery rules.

The next request is from Shelby Sharpe for providing standard definitions for use in written discovery. We considered those standard definitions, and we did not include them in our proposed discovery rules. Supplement page 36, a copy of Dan Downey's article, "Discoverectomy II," suggesting various ways to substantially decrease discovery. See our proposed discovery rules.

Page 72 is an article written by Steve Susman regarding discovery form generally. We addressed all of these issues. This is a speech by Susman, not proposals, and we took -- Susman had an adequate opportunity to present his views to this committee.

MR. GOLD: More than adequate.

MR. ORSINGER: Excessively more than adequate.

PROFESSOR ALBRIGHT: Page 77, it's a letter from Jim Parker from Austin, June 1994, his comments pro and con for the proposed discovery rules. Many of his concerns were addressed in subsequent drafts.

Page 81, Ronald Wren, November 1993, from Dallas. He's again commenting on the proposed discovery rules. He's opposed to any type of mandatory track system. Many of his concerns were addressed in subsequent drafts, and we considered his comments.

Page 785, Shelby Sharpe's report to Lonny Morrison on the ABA Summit on Civil Justice Systems Improvements. Our proposed discovery rules adopt many of these concepts that were addressed at that meeting.

Page 212. This is an article entitled "Mandatory Discovery Reform" from the litigation section of the ABA. No action required. It's just a pro and con on mandatory discovery reform.

Page 214. This is a letter from David Keltner as task force chairman just enclosing drafts of proposed rules they were working on. No action required. Page 229 is a letter from

Anne Gardner about summary judgment. Again, I would like to defer the summary judgment rule issue.

Page 237, a letter from James Guess at the Texas Association of Defense Counsel commenting on proposed changes to the discovery rules. More recent proposals from this letter in 1994 take many of these comments into consideration. He says the discovery period should not be triggered by deposition or document production. This was rejected. Six months is too short, recommends eight months. We adopted nine months.

Case should not be allowed to set for trial for 60 days following completion of discovery period. We did not address trial settings in this committee, although I now understand the Supreme Court may be wanting to address trial settings, but we did not address them.

Let's see. Page 239, an article from the litigation section of the ABA, "District Court Takes Aim at Deposition Obstruction." This is about the opinion in Hall vs. Clifton decision. We looked at that opinion when we

wrote our Rule 15 concerning deposition conduct.

Page 241, it's from Luke Soules, suggesting that we have constraints on discovery by placing the burdens of relevance on the requesting party rather than the responding party. This is not in the proposed discovery rules, although I did note that recent Supreme Court opinions can be read in moving this direction.

Page 242 is a letter from Deborah Hiser from Advocacy, Inc., wanting rules to address the discovery of mental health records of patients who are not parties to the litigation. As I recall, Steve Yelenosky drafted a proposal for this, but I couldn't find it, so I assumed it was ultimately rejected. Was that right, Steve?

MR. YELENOSKY: No. I do remember drafting it. The ultimate disposition, I'd have to -- I can't remember if it was sent back to the subcommittee or what. Let me look at my notes.

PROFESSOR ALBRIGHT: Okay. It is not in the rules -- the package that was

sent to the Supreme Court, so I believe it was rejected, but if you find out something differently, let us know.

MR. YELENOSKY: Yeah. I remember we had several discussions about it, and then I thought some of the concerns might have been incorporated in one of the rules, but let me look.

MR. ORSINGER: Let me comment that several meetings ago we voted to eliminate the exception to these privileges in the parent/child lawsuits, and we're just left with the relevancy exception; and, however, that's all we did, as I recollected.

PROFESSOR ALBRIGHT: We did discuss it at length. I know that. Okay. I'm going to have to leave, and so Steven Yelenosky is going to look at this to make sure of the disposition of this issue. I have got to leave in about two minutes. Should we keep going?

Page 356, a letter from James Guess of the Texas Association of Defense Counsel commenting on proposals. He feels that they shouldn't be allowed -- courts should not be

allowed to shorten the discovery period or trial setting schedule unless the parties agree. Our rules continue to allow the court to modify deadlines. He strongly opposes the provisions for sides. Proposed Discovery Rule 1(3)(b)(2) allows the court to modify hours so there is no unfair advantage, but we did leave it a per side allocation.

Page 358 is a letter -- it's a memo from Lee Parsley discussing a contact from someone at the Attorney General's office that "certified shorthand reporters" is a conflict between the rules and the government code. We did address this, and the way we dealt with it is in Rules 14 and 18 we allowed discovery -- I mean, allowed depositions to be taken by any officer allowed by law to take depositions. So we just punt it to the statute.

MR. YELENOSKY: Alex?

PROFESSOR ALBRIGHT: Yes.

MR. YELENOSKY: I don't have a final answer, but my notes show that we took it up in the summer meeting, June or July, and there was some redrafting, and I had sent something to Judge Brister and John Marks and

then we took it up again. This is the medical rule, discovery of non-parties. We pick it up again in the September meeting of '95. It was the second item on the agenda and then I have a Rule 25 as a result of that meeting in my notes, but I can't speak for the committee as to what happened with that, and I guess we might have to look at the transcript, because my understanding was we had agreed to something.

PROFESSOR ALBRIGHT: Okay. Yeah. I think we have the transcript available, so we can look at that and see where we are.

MR. YELENOSKY: Okay.

PROFESSOR ALBRIGHT: Page 360, again, from Texas Association of Defense Counsel, suggests a provision be added to allow the party to supplement answers to interrogatories regarding designation of persons with knowledge of experts without verification of supplemental answers, also recommends elimination of contention interrogatories. Discovery Rule 12 limits contention interrogatories, and Discovery Rule

5(2) says amended and supplemental responses need not be verified.

Page 362, a letter from James Frost, June '94, lawyers should send request for admissions only on matters which he in good faith believes may be uncontested, so he wants to limit requests for admissions. Proposed Discovery Rule 13 made no substantive changes to the request for admissions rules.

Page 363, more from James Guess, Texas Association of Defense Counsel, wants to extend the time at which defendants have to identify their experts longer than discovery rules at that time allowed. Subsequent drafts extended the time after which the plaintiffs identified experts for the defendants to identify experts, and he also is opposed to the concept of arbitrary number of hours for deposition discovery. This limitation remains, although it is increased from the draft that he was looking at at that time.

Page 365, Stephen Moss and George Petras, February 1994. This is wanting to allow agencies to promulgate rules for notice for appearing at hearings, trials, or depositions.

This seems to propose changes to agency rules and not to the Rules of Civil Procedure. If there is anybody that wants -- this is an administrative law issue, and if anybody wants to look at it and see if I'm wrong, please do so. Does anybody want to look at it, this agency rule? Do we have any administrative law types? I think it's an administrative law issue, not our issue.

Page 369, a process service in Houston called Lee Parsley to discuss a conflict between Rule 177 and 201 regarding payment of witness fees. Under proposed Discovery Rule 22 all subpoenas, trial and depositions, are under the same rule.

(Off-the-record.)

PROFESSOR ALBRIGHT: And I guess it's ten minutes to 10:00, so I have to leave, so we will pick up when I come back this afternoon.

MS. DUDERSTADT: These are all on the back table, Richard?

MR. ORSINGER: Yes.

MS. DUDERSTADT: You should have three items for Richard's report.

MR. ORSINGER: Actually, Judge Brister apparently brought -- Scott, you brought your own version of your rule on disqualification, did I see?

HONORABLE SCOTT BRISTER: Well, I think I sent it to either two different people or Luke two different times, but they are the same thing.

MR. ORSINGER: Okay. Well, there is a separate version of that disqualification rule you may want to pick up. It may be the same that I have or not.

What we are going to do now is go through this item that's called -- it's a typical -- it's not a disposition chart. It's just in letter form. It's entitled "Supplemental Disposition Table, January 17th of '97," and it's not integrated into the chart because it represents items that Holly identified as having been omitted in our first pass, and these are in the order of your agenda that were on the agenda for this entire committee meeting. Item 3 was a report on A through J, and J refers to a letter of January 7th that I received from Holly, and that is

the sequence that we are going to follow here.

The first one is the second supplement, page 59 through 62, and that's a letter from Charles Spain in which he suggested that we adopt a rule that whenever the constitutionality of a statute is challenged in a lawsuit that the Attorney General should receive notice, and whenever the legal validity or enforceability or constitutionality of an ordinance or a city franchise is at issue that the city attorney should be notified, et cetera, et cetera.

We discussed this in a prior meeting, and there was question about whether statute may require that notice be given, and since that time Bill Dorsaneo's research assistant has looked into it and concluded that the only statute that gets close to that issue is Civil Practice and Remedies Code 37.006, subdivision (b), which says, "In any proceeding that involves the validity of a municipal ordinance or franchise the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General of

the state must also be served with a copy of the proceeding and is entitled to be heard."

So it appears that the Attorney General is entitled to notice when there is an allegation of unconstitutionality of a municipal ordinance or franchise. Now, that doesn't appear to require notice to the Attorney General when there is an allegation that a state statute is unconstitutional.

PROFESSOR DORSANEO: Yes, it does.

MR. ORSINGER: It does? All right.

PROFESSOR DORSANEO: But it's only for dec. actions, and an action that's not a declaratory judgment action denominated as such, you know, might not be governed by Chapter 37.

MR. ORSINGER: Well, then I amend what I'm saying then. Under Bill's interpretation if there is an attack on a statute that's unrelated to a municipality, there is notices required to the AG, but only if it's a suit to declare it unconstitutional; and if it's ancillary to some other relief, if

the voiding of the statute is ancillary to some other relief besides declaratory relief, then perhaps this provision does not apply at all.

PROFESSOR DORSANEO: I think that's right, although my own interpretation would be that whenever there is a declaration about the validity of a statute, it's a dec. action to that extent, even though it might not be classified as a declaratory judgment action in the minds of the parties of the proceeding.

MR. LATTING: Well, what do you think happens if there is a lawsuit between A and B, and one of the parties says that I'm not required to do this because such-and-such a statute is unconstitutional, but the Attorney General is never involved in the case until, let's say, the case is called for trial, and then it's called to the court's attention that there is an attack being made on the constitutionality of a statute? Does that impact the trial in any way, or can it go forward, or what happens?

PROFESSOR DORSANEO: I did a

tiny bit of research. I looked in my own books about this, and basically the several cases that are cited say that it's not a jurisdictional problem and that under the circumstances do indicate probably there would be discretion on the judge to abate the action for joinder, but perhaps the court could proceed.

MR. LATTING: Okay.

PROFESSOR DORSANEO: It's not a big deal not to notify the Attorney General apparently.

MR. LATTING: Yeah. That's what I thought.

MR. ORSINGER: Well, let me point out that Charles Spain's proposal is that a rule require that notice be given to the AG, city attorney, or other appropriate person, and that a party's failure to give such notice would waive the constitutional challenge; and he also proposes that the Attorney General would be entitled to appear for the sole purpose of defending the statute's constitutionality and should be permitted to appear for the first time on

appeal if the AG did not appear in the trial court; but the AG would then be bound by the record developed by the parties in the absence of the AG.

And then he suggests that before a judgment that declares a statute, rule, or ordinance unconstitutional can be enforced a certified copy of the judgment has to be filed with the Secretary of State. He suggests that the burden be put on the victorious party rather than the clerk of the court. So our subcommittee was kind of lukewarm on what to do with this rule, but my sense of it was, is that we were inclined to require notice, but go no further in terms of stipulating that you waive it or that the AG can intervene on appeal for the first time, and I don't know. I mean -- yeah. Steve.

MR. YELENOSKY: I agree. I think if a court is going to declare something in violation of the Constitution, which is supreme to a statute, we shouldn't be putting all of these obstacles in the way of the reaching that end.

MR. ORSINGER: Well, does

anyone agree or disagree about giving notice to the responsible attorney, whether it's a city attorney or the Attorney General, without prescribing what happens if you fail to give notice?

PROFESSOR DORSANEO: Mr. Chairman?

MR. ORSINGER: Bill.

PROFESSOR DORSANEO: Well, I don't think it's necessary, and I think you get on a slippery slope in the context of someone raising an argument about the constitutionality of a provision maybe when that wasn't made part of the pleadings at all in the case. Maybe it just comes up during the proceeding later. What in the world does the Attorney General add to any of this? It just strikes me as a lot of excessive engineering that's relatively pointless.

MR. ORSINGER: Well, what if a case is settled with an agreement that something is unconstitutional and then the agreed decree is entered to that effect? Does that bind anybody but that defendant and that plaintiff?

HONORABLE DAVID PEEPLES: Not unless there is an injunction, I wouldn't think.

MR. YELENOSKY: Not unless there is a class and then the court would have to have a hearing.

HONORABLE DAVID PEEPLES: Yeah.

MR. ORSINGER: Well, so even if you try the case the only people that are bound by the determination of unconstitutionality are the parties?

PROFESSOR DORSANEO: Well, you have stare decisis, but that has whatever effect it has.

HONORABLE DAVID PEEPLES: If it's just a trial court decision, I would think so. If it gets to be a reported appellate decision, then I presume it has to be followed.

PROFESSOR DORSANEO: What is the problem? Is it like when the worker's compensation statute, the new one was declared unconstitutional way out west somewhere and then it got in the newspapers, and somebody should have been there to defend the new

statutory edifice?

MR. ORSINGER: Well, it seems to me that part of the purpose of giving notice is because the party defending constitutionality may only defend it insofar as it helps them to win the case, and there may be a larger issue in defending constitutionality that the affected institution would invoke or that would add something to the proceeding that goes beyond the interest of the defendant.

Elaine.

PROFESSOR CARLSON: Has the Attorney General's office asked for this, or is this just something that this individual wants?

MR. ORSINGER: I have never heard that they did or didn't, and I have received no indication that they even know that this proposal was made. Maybe we ought to make an inquiry with them, but they are -- I mean, they are entitled in the declaratory judgment action, so they may feel like they are getting notice and they may not be because it's not in the rules. So I don't

know.

So, Bill, is it still your feeling that we should not require notice to be given?

PROFESSOR DORSANEO: Well, I think the declaratory judgment statute does cover the obvious cases where somebody brings an action to have a statute declared unconstitutional or invalid. Now, that particular provision of the Declaratory Judgment Act, I don't know if that's a uniform provision or a non-uniform provision in our statute. It's a little bit difficult to read because it starts out talking about municipalities and joinder of municipalities and then it refers back to statutes; and you need to go up and move into an earlier section or subdivision of the chapter in order to figure it out; and, you know, maybe we could make some sort of recommendation on making it clear or maybe we could make a rule, a parallel rule, for that reason; but beyond that I don't think we need to do anything.

MR. YELENOSKY: Richard?

MR. ORSINGER: Yes.

MR. YELENOSKY: Before we go to

another topic can I just interject something on the record on this prior question that Alex had? I got the answer.

MR. ORSINGER: Go ahead.

MR. YELENOSKY: Okay. Alex had asked about what was the resolution on the proposed rule of discovery on medical records, and she's right. It wasn't in the discovery packet. It was submitted to the Supreme Court on April 4th, 1996, by letter from Luke with an attachment indicating proposed Discovery Rule 25, medical records of non-parties, was being submitted to the Court after the proposed discovery rules had already been submitted.

MR. ORSINGER: Okay. Thank you.

I think what I'm going to do then is make a proposal that we craft a rule that would require a party who is seeking as part of their relief a ruling that a municipal ordinance or franchise or statute is unconstitutional must give notice to the Attorney General or to the city attorney involved, but go no further than to require

that notice and not specify waiver, penalties, when the AG can intervene, or anything of that nature. Is there any opposition to that proposal?

Anne.

MS. GARDNER: I have a question. Are you proposing that the rule be retained in the Declaratory Judgment Act or put somewhere else and made more general?

MR. ORSINGER: I'm talking about a rule of procedure that would not in any way suggest that it's limited to declaratory judgment actions.

MS. GARDNER: Okay. A rule to make it broadly apply. I would oppose that.

MR. ORSINGER: Okay. Why?

MS. GARDNER: For the same reasons stated by Bill Dorsaneo that I think that requiring notice to the Attorney General should be only where the relief sought is the principal purpose of -- or one of the principal purposes of the action, and that would be in a declaratory judgment action and not where it's merely incidental, such as, say, a personal injury suit where a party is

pleading unconstitutionality of Chapter 41 of the Texas Civil Practice and Remedies Code or as to punitive damages or something like that, because constitutionality challenges to statutes, it seems to me, are appearing in most litigation pleadings today, and it would virtually flood the Attorney General's office, and it would delay litigation and cause confusion, and I just think that it's better left the way it is.

I think also that if the state is -- the Attorney General is put on notice and chooses to come in that that somehow -- I think that sort of creates an imbalance against the party alleging the unconstitutionality, and I don't see why there shouldn't be -- you know, let the adversary system take its course and let that issue be determined without one side having the entire power of the state of Texas come in and try to defend the constitutionality.

MR. ORSINGER: Okay. Mike.

MR. GALLAGHER: Richard, was there any question with regard to the timing of the raising of the issue of

constitutionality?

For instance, you're in a case. Substantial discovery has been completed. In an amended pleading sometime prior to trial but well after discovery has been completed a determination is made that the statute as it applies to a situation in which you are involved may or may not be constitutional, but at least it's something on which you want resolution. It appears to me that if we broaden this to the point that any time, any place, in any pleading where a question of constitutionality is raised as to a statute, that we are going to be in a terrible situation because under the rules the Attorney General might would probably have the right to go back and say, "Okay. I want all the discovery that was undertaken in connection with this litigation. We weren't party to it. We now want to redepose," and you start the case all over again.

MR. ORSINGER: Well, are you opposed to a rule altogether, or would you be comfortable with a rule that's limited in scope to what the Civil Practice and Remedies

Code says?

MR. GALLAGHER: I would be comfortable with a rule that says where you file a declaratory judgment action that has as its sole purpose the determination of constitutionality of a statute across the board, that would not bother me, but extending it to this circumstance does.

MR. ORSINGER: Now, if it was just one cause of action out of three, the dec. action was, it would still apply to that situation because it's pled for relief of unconstitutionality?

MR. GALLAGHER: Yeah. The important thing to me is -- I understand that there is some policy involved in wanting to have this state's lawyer involved in litigation in which the constitutionality of state statutes or constitutional provisions are a concern, but I think the timing is what I'm concerned about. If you do it in your initial pleading, dec. action plus other relief, then that would not bother me.

MR. ORSINGER: Well, what proviso do you want to make about raising it

early in the suit as opposed to raising it later in the suit?

MR. GALLAGHER: I'm not sure right now.

MR. ORSINGER: Okay.

MR. GALLAGHER: But I think it's a question that we need to think about.

MR. ORSINGER: Joe.

MR. LATTING: Well, Bill Dorsaneo said that he thought this was not a big deal, and it doesn't strike me as a big deal, and my comment is, do we need to -- or my question is, if it's not a big deal, why are we going to do anything and change anything; and if we are going to write a rule, it seems peculiar to me that we would write a rule but not state any -- give any direction for its implementation or state any kind of sanctions for failure to follow it. It seems to me that's the worst thing to do, and it sounds to me from what I'm hearing, the best thing to do is just not to do anything.

MR. ORSINGER: Tommy.

MR. JACKS: I agree. In the immortal words of Gib Lewis, we are opening a

whole box of Pandoras.

MR. ORSINGER: Judge Brister.

HONORABLE SCOTT BRISTER: It admittedly is not raised very often, but -- and remember what we are thinking about here. We are saying what the people through their elected representatives, however foolish or foolhardy they may have been, cannot decide this thing this way. It is unconstitutional, that the people, the democracy, may not do this at all. Now, I'm, you know --

MR. LATTING: Yes. And?

HONORABLE SCOTT BRISTER: I'm obviously not a judicial activist; and that's a very important thing to say, even if it doesn't affect anybody other than these two parties in their car wreck, not just because of the matter of what impact it will have on them, though I'm -- stare decisis may -- I question whether it can ever be limited just to, oh, this won't have an effect on anybody else; and what is the harm if you are saying the -- if somebody wants to say and win their lawsuit, "The people may not make this law," to send the letter to the Attorney General?

I don't, again, think it's that big a problem. It doesn't come up that much, but on the other hand, it ain't that big of a problem to send a letter if you want to say, "Democracies may not do this."

MR. LATTING: Well, I don't necessarily disagree with that, although that's a little more vehement than I feel about it, but if we are going to -- if it's that important then let's write a rule and say what happens if you don't, and let's not just open the whole box of Pandoras and then have the courts decide what to do in case it's not followed.

And what Mike raises is another issue. What happens when it's not followed but a case has been going on a long time and then the Attorney General gets in late? I mean, it's a messy situation.

HONORABLE SCOTT BRISTER: Rules say what to do with a petition that's amended that's going to cause the trial to be unreasonably delayed. You strike it. It's very simple. I mean, that's always -- you can't add a new cause of action a week or five

weeks before trial if it unreasonably delays the trial and surprises the opposing party.

MR. LATTING: But what if the petition is not amended but there has been no notification of the Attorney General? It just wasn't done for two or three years, and nobody thought about it, and now the case is set, and --

HONORABLE SCOTT BRISTER: If it's going to delay the trial, you've got to decide is this something worth delaying the trial to litigate this issue or not.

MR. ORSINGER: Steve.

MR. YELENOSKY: Well, two things. I mean, I agree with Judge Brister in terms of the importance of a statute being enacted by elected representatives, but if our purpose is really to assure that statutes are defended, we need to start from that purpose and devise a rule. We have to think about all the different Pandoras, I guess now is the metaphor, but you don't have to file a dec. action to enjoin the enforcement of a statute, I don't believe.

So if somebody files and just fervently

enjoins the enforcement of an ordinance on the grounds it's unconstitutional and they haven't filed a dec. action, does that trigger it? You got to think about those kind of questions because certainly that has as much or more of an effect as a dec. action would; and then if that's your purpose and the ultimate goal is to have statutory ordinances defended routinely by the AG's office whenever challenged, even if it's just between two private parties, is not a class, and nobody else is going to read about it, we need a appropriations bill in the legislature to hire some more AG's.

MR. GALLAGHER: And, if I may, Richard...

MR. ORSINGER: Mike.

MR. GALLAGHER: I don't believe it's a problem. I don't believe we need to do anything; but if, as Judge Brister says, this is the laws of the state of Texas are being challenged, then where do we stop? Do we go to Texas Natural Resource Regulatory Commission rules and regulations, which may in their application to a given lawsuit be

considered unconstitutional? Railroad Commission promulgations?

I see no end to it because these rules have the same force and effect as law, and they may also be considered unconstitutional, and I think if Judge Brister's concern is that you are challenging the constitutionality of a statute then it is not unreasonable to say if you are going to do it, this is the vehicle by which it's going to be done or this is the time frame within which it's going to be done, because to give the latitude to a judge to continue a case -- what's an unreasonable continuance? An unreasonable continuance can be one week. 14 days can destroy your ability to provide the proof that's necessary to establishing your cause of action.

And I, for one -- and Judge Brister is not a judicial activist, but I do not want to invest in the judiciary any more power to say, "Okay, now I have gotten a letter." I mean, the defendant or the plaintiff has written a letter in this case to the Attorney General's office contesting the constitutionality of one of the myriad of tort reform provisions that

are being passed and propounded every year, and the mere writing of that letter then put my case on hold, where the expert that I had who was committed for a certain time in order to be available for trial, or maybe three or four of them, can't be there, and I think it interposes too many problems, and -- keep it like it is.

MR. YELENOSKY: I have got another one, and I don't know if it speaks to this, but what if you're challenging an ordinance or a state statute on the grounds that it's in violation of the Federal statute? Does that provision require notice to the AG's office?

MR. GALLAGHER: No. U.S. attorney.

MR. YELENOSKY: And given the principle that's to be met here, I guess, one would think that you would want to notify the AG in those situations, too. I mean, we are about to challenge a city ordinance on grounds of violation of the Fair Housing Act. I mean, should we be notifying the AG's office?

MR. ORSINGER: I think under

the statute that it doesn't matter whether you are invoking the state or the Federal Constitution.

MR. YELENOSKY: It's not Federal Constitution.

MR. ORSINGER: It's a Federal statute?

MR. YELENOSKY: Federal statute.

MR. ORSINGER: Well, then your preemption has the same effect as the finding of state unconstitutionality, doesn't it?

MR. YELENOSKY: Well, I don't know. I don't have it in front of me, but I'm guessing that --

HONORABLE SCOTT BRISTER: Preemption is the Constitution. That's not unconstitutional.

MR. YELENOSKY: Right. I'm not saying that the ordinance is unconstitutional. I'm saying it's in violation of a Federal statute which takes precedence by constitutional preemption, so I wouldn't give notice to the AG's office.

MR. ORSINGER: But remember

it's the supremacy clause of the United States Constitution that gives you the power to preempt the state law.

MR. YELENOSKY: Well, sure, but I don't know that people would read it that way.

MR. ORSINGER: Well -- yeah. Tommy.

MR. JACKS: I move we do nothing on this issue.

MR. LATTING: Second.

MR. GALLAGHER: Second.

MR. ORSINGER: Okay.

MR. LATTING: No, I seconded it.

MR. ORSINGER: By the way, I want to follow that vote up with a vote on let's do something but let's put specific timetables in there so that alternative will exist, but on Tommy's proposal that we do nothing on this issue, everyone who wants to do nothing on this issue would you raise your hand?

MR. GALLAGHER: A resounding vote for nothing.

MR. ORSINGER: 11. Okay.

CHAIRMAN SOULES: When I walk in, do nothing.

MR. ORSINGER: Now then if the proposal were to do something on this issue, but do it with timetables so that the individual litigants are not prejudiced, how many people would support that? Okay. Then that's only two, so it's 11 to do nothing, two to do something with protective timetables, so we will move on. Do nothing and do it well.

Okay. The next item is Rule 41, page 168 of the agenda, regular agenda now, the original Volume 1; and this is the memo from Professor Ratliff that we discussed previously; and as I said before, our subcommittee recommends that we look at the language about the party's right to join in pleadings under Rule 41 and the standards of joinder and severance under Rule 174 and conform that language.

There is another part to Professor Ratliff's suggestion, though, and that is that he thinks the language is too confusing in Rule 40a that permits joinder arising out of

the same transaction, occurrence, or series of transactions or occurrences; and he wants joinder to be within the discretion of the trial court, subject to abuse of discretion review, and says that the trial court should be able to join parties as long as there is not an inordinate amount of expense and no prejudice to the parties, which seems to me like it is no standard.

And our subcommittee is recommending that we match the language between what used to be Rule 41 and what used to be Rule 174, but that we reject Professor Ratliff's suggestion that we eliminate this Nexus requirement that in order to join it must arise out of the same transaction, occurrence, or series of transactions or occurrences.

Any discussion on that? Any opposition to that proposal? There is none.

The next item relates to Rule 67 on page 187 of your agenda, and that is a request that pleadings be amended 30 days prior to trial, and as we have done -- have mentioned before, our subcommittee wants to count backwards from the close of the discovery window; but we

don't know if we are going to have a discovery window and, therefore, when this has been discussed we have tabled it, pending the Supreme Court's determination of what to do with the discovery rules; and we have done that with amended pleadings, special exceptions, you know, anything relating to the pleadings; and that's our proposal then, that we table it. Is there any opposition to that?

Next item is Rule 74. I should say there is no opposition to that. Next item is Rule 74, which is page 188 of your agenda, and that is a letter from the district clerk of Collin County enclosing their fax filing plan, which she is proud of and wanted to share with us, and we considered that together with the fax filing rules of other counties and came up with a set of uniform fax filing rules, which this committee has previously adopted.

The next issue is Rule 76a on sealing court records, page 204 of the agenda, a letter from Jack Garland upset about a decision by the First Court of Appeals in Houston, Chandler vs. Hyundai, in which the trial judge refused a 76a hearing on the

grounds that at issue was just a confidentiality order and not a sealing order, dismissed the appeal, and the Supreme Court reversed the court of appeals and remanded it to the trial court, saying there was a Rule 76a interlocutory appeal from the decision, and they sent it back down to the trial court.

Now, this issue about is there a distinction between a confidentiality order and a sealing order and if so, what is that distinction, was the precise issue presented to the Supreme Court Tuesday of this week in the case General Tire vs. Kepple; and General Tire was conducting an interlocutory appeal from a case that had been settled that was brought against them on a products claim; and after the case was settled the plaintiff's lawyer -- well, the trial judge, Carolyn Clause Garcia, who is a former trial judge at this time --

MR. BABCOCK: Right.

MR. ORSINGER: -- said that she had granted a protective order under which the plaintiff's lawyer, who specializes in these products cases, and the defendant exchanged

information that was proprietary to the manufacturer, and it was under a confidentiality requirement, and Judge Garcia specified when the case was settled that she wanted to conduct a 76a hearing, which they did, and she ruled that -- well, let me back up.

Under the confidentiality order, the proprietary information could be shared with this plaintiff's lawyer, this plaintiff's lawyer's experts, and any other plaintiff's lawyer currently representing litigants against General Tire and any future plaintiff's lawyers that had claims against General Tire.

So the confidentiality order was broad enough to include all current plaintiffs as well as future plaintiffs, but then this plaintiff's lawyer won the 76a hearing, and they were ordered to disclose it, and General Tire appealed, claiming that there was a trade secret information in there like the formulas for their tires that would be of no particular interest because the issue was tread separation and not formulas and also marketing

information that would be helpful to competitors but not to plaintiffs lawyers.

And I sat through the oral argument, and it was apparent to me that the Court as presently constituted is uncomfortable with the proposition that every confidentiality order requires a 76a notice and hearing and is evaluated on 76a standards; but it also seemed to me from listening to the justices' questions that there was no agreement on the Court as to what the distinction would be; and the plaintiff's lawyer or the appellate lawyer representing the plaintiff's position was that there is no distinction and that every confidentiality order is a 76a order and every confidentiality motion is a 76a motion and has to go through the 76a procedure.

And so Judge Enoch and Judge Hecht and others suggested possible dividing lines between a confidentiality order that doesn't have all the notice requirements and a sealing order that does, but it wasn't evident to me what they would come up with or whether they would accept the contingent that all confidentiality orders are sealing orders.

So our subcommittee's proposal is that we take no action on what to do with 76a until the Supreme Court rules in Kepple, unless they drag it out. Now, that implicates a motion that Judge Brister made either last meeting or two meetings ago to eliminate subdivision (2)(c), I believe is what it is, on unfiled discovery and making it a potential court record, and that was tabled, and it's our recommendation, Judge Brister, to continue to table that until Kepple is ruled on, and I would be curious to know if you are happy with that or whether you want to proceed anyway.

HONORABLE SCOTT BRISTER: No. I think we would waste a lot of time if they are going to write on it.

MR. ORSINGER: Is there anybody that opposes tabling this until we get a decision in the Kepple case, General Tire vs. Kepple? Okay. Then it's tabled.

Now, I want to point out that if you look in your agenda on page 494 there is another letter that implicates this issue, which I feel is -- it was called to my attention by our discussion this morning, and I believe it

was decided it was assigned to our committee; but I think we should talk about it now because on page 494 of the agenda there is a proposal regarding protective orders; and there is a proposed addition that says, "A trial court shall have continuing jurisdiction beyond its plenary power over the merits of a case to rule on motions by any party or non-party to a case seeking to rescind an order sealing discovery."

Now, it seems to me that if it's a 76a ruling, you can do it anyway under 76a; but if there is a distinction between a 76a ruling and a confidentiality order, this would give you an out of time opportunity to come into the court after they have lost plenary power and to re-litigate the question of disclosure; and I would propose that that specific procedure, which is tendered as a discovery rule, would be considered part of this same debate and tabled at the same time.

Is there any opposition to that idea, even though perhaps, technically this isn't in my subcommittee, or maybe it is?

Okay. Well, then let's make that

correlation in our minds and remember that we are going to debate those together when we debate them.

The next item on the list, I'm sorry to do this, but we have to flip over to the second supplemental agenda, page 84; however, it's nothing but a long article on Court TV, and this has been referred to before. Our subcommittee has the following recommendation. The Supreme Court has adopted rules of appellate -- pardon me. The Supreme Court has finalized -- finalized or almost finalized?

MR. PARSLEY: Almost.

MR. ORSINGER: Almost finalized its version of the new Rules of Appellate Procedure, which will then be routed to the Court of Criminal Appeals for response, and those appellate rules include a proviso for electronic media in the appellate courtroom. Right, Lee?

MR. PARSLEY: Yes. That's right. Permissive with the trial judge and allowing the trial judge -- not trial judge. I'm sorry. Appellate court to set standards for recording and broadcasting, which include

standards for what the equipment might be and whether there can be lighting and pooling of cameras, and all that fairly well follows what the Court has approved as local rules in a number of instances, but it does allow it, allow each appellate court to make its own decision in each individual circumstance.

MR. ORSINGER: Okay. Now, that is reflective, I believe, of some attitude on the Supreme Court about the involvement of electronic media in the litigation process, and the possibility exists that our previous full committee vote, which essentially leaves us with the existing rule and no proviso about pooling or anything else, may result in the Supreme Court writing its own rule without guidance from this committee, which I suppose is fine; but our subcommittee is going to propose that we recognize the previous majority vote.

Although it was a skeleton crew, it was a majority vote of this committee not to change the rule, but to also forward to the Supreme Court the -- as a minority report the subcommittee recommendation of what a trial

rule would look like where one going to have a uniform trial rule about electronic media in the courtroom, and that would send the signal that this committee as a whole on the vote does not want a uniform rule on electronic media, but that if there were to be one, the subcommittee had proposed one that was rejected by the full committee.

Now, as a practical matter, even if we don't vote to do that I suspect that a copy of the subcommittee report may make its way to the Supreme Court anyway and that they may anyway have it as a guide to go by, but that would all be unofficial, and so what I'm doing is laying on the table the prospect that the subcommittee proposal that was rejected by majority vote be forwarded as a minority report and that it would be informational only.

Is there any comment on that? Is there any opposition to that? Luke, is there any precedent for that?

CHAIRMAN SOULES: Yes.

MR. ORSINGER: Okay. So, well, there being no opposition and since it doesn't

alter our previous majority vote then I think we will just go ahead and do that. Our recommendation is to send the minority report.

CHAIRMAN SOULES: Let's take a break.

MR. ORSINGER: Take a break.

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

CHAIRMAN SOULES: Okay. We will be in session, and thanks to Alex and Richard for assisting the Chair this morning. Richard has been very accommodating to yield from his agenda to the issue of summary judgment, and I think we will follow that with the issues of disqualification and recusal and then get back to the other agenda.

Judge Peeples, you've got -- you have been working on the summary judgment rule. Why don't I turn it over to you for a report from you?

HONORABLE DAVID PEEPLES: Okay. Thanks. For this discussion I think all you will need is three pages. The cover page is a memorandum from me that Luke sent out about a

week ago, and under that is the redrafted rule and a proposed comment, and just to review last meeting, we discussed this at length, had several votes and pretty much came up with the provision that is attached here; but a subcommittee of about ten people faxed back and forth and rewrote it and fine-tuned it, hopefully making it better and not really changing anything that was voted upon, and that process is described in the memo.

And, frankly, I think I will just move its adoption, Luke, and we will probably have to have some discussion. We do need to decide on lines one and two which heading we want. The other paragraphs in the existing rules have headings, and I think headings are helpful. That needs to be decided. I guess I would call your attention on lines six and seven, there are some brackets, which that language either stays in or goes out depending upon whether the Supreme Court promulgates the discovery rules that we sent a good while ago.

I think all of us strongly believe that a comment would be helpful in explaining exactly what is happening and is not happening here,

and that's the reason for the comment, and I guess I would just move its adoption and open it up for questions.

MR. LATTING: I would second it.

CHAIRMAN SOULES: Been moved and seconded. Discussion? Anyone want to speak to this? Any opposition to (i) without regard to whether we have -- to what its title may be? Everybody concurs?

MR. ORSINGER: Well, I think it needs to be understood that there were a lot of people that participated in this process that didn't think anything should be written. So when you say everyone concurs I think that that's a contingent concurrence.

CHAIRMAN SOULES: Right. But we did get a vote of this committee to adopt this concept, (i), already.

MR. ORSINGER: Right.

CHAIRMAN SOULES: And so having the majority of the committee committed to something like this, now we have this to vote on. This is a new subparagraph (i) to Rule 166a. Let's just vote now on the rule and

then we will decide what its title is. (I) and (j).

Just (i) to start with. Anyone opposed to (i)? Carl Hamilton.

MR. HAMILTON: I just have a question about why is it necessary that there be a period of discovery before it can be filed? I mean, part of the problem is going through long and expensive discovery when there is really no basis for the plaintiff's claims. It looks to me like one ought to have the opportunity to make that motion for summary judgment like is here and force the plaintiff to come forward with some evidence at that time, prima facie or affidavits or something to support the claim, just like they do in the medical malpractice cases.

CHAIRMAN SOULES: Let me see if I have this right in my recollection of where we were. There was a vote that was taken, and I think where that language was absent, that was to do nothing. In other words, (i) failed, but with that language in there and some other additions that Judge Peeples proposed -- I think one other. I can't

remember what it was. The committee reversed and decided to do this. So that became a critical part or essential element of the paragraph in order to do anything. Isn't that where the vote was last time?

MR. LATTING: Yes.

CHAIRMAN SOULES: Anybody remember that differently?

MR. LATTING: Yes. No, I mean.

HONORABLE DAVID PEEPLES: Can I speak to the concerns that Carl raised?

This is a big enough step beyond where we are right now, Carl, that I think the step you're urging would be a giant step, and in the opinion of many people it would be going too far.

MR. GALLAGHER: I'm sorry. I can't hear you, Judge.

HONORABLE DAVID PEEPLES: This is a pretty major step that we are taking right here. What Carl proposes would be an even bigger step, and I think some people thought that might be a little too much. You can always -- in a case that is filed that is totally ridiculous you can file the regular

kind of summary judgment motion now. This doesn't prevent the motion in which the defendant has to refute an element as a matter of law.

You can still do that from the start; and in addition, I think the judge would have the discretion on motion to say, "Here is a modified discovery schedule. What do you need? I'm going to let you have some discovery, and if you can't come up with something in that time, Mr. Hamilton can move for summary judgment." In other words, it doesn't have to go right up to the brink of trial.

CHAIRMAN SOULES: Paul Gold.

MR. GOLD: Yes. I want to respond to Carl's comment as well. The impetus for this rule change in part was the Celotex Corp. vs. Cattrick, a case out of the United States Supreme Court, and even the United States Supreme Court in its majority opinion noted that a plaintiff shouldn't be railroaded at the beginning of the case by having to marshal evidence without having the opportunity to conduct reasonable discovery,

and that's an interpretation of Rule 56, which is the parent rule to our 166a, and I just wanted to respond to that.

I think we debated that fully last time, and I don't think we need to rehash it, but I think that needs to be put on the record that even the United States Supreme Court recognizes that there should be sufficient due process afforded the plaintiff to develop their case before they have to respond to a summary judgment motion.

CHAIRMAN SOULES: Okay. Anything else on this?

Richard Orsinger.

MR. ORSINGER: On lines eight and nine I'd like to see what the opinion is where it says that the motion shall state that there is no evidence, and yet when you get down here later on, the certificate that the lawyer must give appears to restrict the representation to the discovery in the case, no evidence in the discovery in the case.

The certificate appears to be limited to what's in the discovery, but the statement that you have to allege that there is no

evidence would appear to me to be broader, and so the question I want to raise is that if I know of evidence but it has not surfaced in the discovery, is it proper for me to file this motion alleging no evidence and certify that I have searched the discovery and I see no evidence, while all the time knowing that if they just depose a certain witness they will find the evidence?

CHAIRMAN SOULES: All right. We talked about that.

MR. ORSINGER: Okay. And I've forgotten. The answer to that is what?

CHAIRMAN SOULES: And the answer was, the response of the committee to that problem was that the lawyer's certificate would be limited to the discovery.

MR. ORSINGER: Okay. But the assertion in the motion that there is no evidence is not so limited.

CHAIRMAN SOULES: That's correct.

MR. ORSINGER: And, therefore, I presume you might be subject to sanctions or a grievance if you know that there is evidence

and you assert there is not, even if it hasn't been discovered yet.

CHAIRMAN SOULES: The other rules would apply to that as in any other pleading, I think is the way our debate was developed. Am I right, Chip?

MR. BABCOCK: That's right.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I'm sure you debated this the second day of the last meeting even more than it was debated the first day, but I would at least like to go on record as saying that at lines 12 and 13 I oppose the idea that the evidence raising a genuine issue of material fact needs to be in admissible form. I don't think any jurisdiction has that requirement in this kind of a Celotex context, and I just continue to be opposed to it.

Beyond that I would suggest that this subdivision be changed or modified just ever so slightly to replace the word "paragraph" with the word "subdivision," because in the iteration that's what these things are called,

and to change the word "shall" -- the words "shall" to "must" where they appear. I think that will happen editorially if it doesn't happen otherwise, but I might just raise it for everybody's information.

MR. LATTING: Could I ask a question?

CHAIRMAN SOULES: Any opposition to using "subdivision" in the place of "paragraph" and "must" in the place of "shall"?

HONORABLE DAVID PEEPLES: Does the rest of the rules say "subparagraph" or "subdivisions"?

PROFESSOR DORSANEO: "Subdivisions."

HONORABLE DAVID PEEPLES: We need to be consistent with what the rest of the rules say. I won't argue with that.

MR. LATTING: I don't have any opposition to either one of those.

CHAIRMAN SOULES: All right.

MR. LATTING: Could I ask a question, though?

HONORABLE DAVID PEEPLES: I'm

not sure about "must" and "shall." Why is "shall" improper here, Bill?

PROFESSOR DORSANEO: Well, it's --

HONORABLE SCOTT BRISTER: Because we are continuing to ask, What does "shall" mean? Does it mean "must" or "may"?

HONORABLE SARAH DUNCAN: It's going to be changed to "must" by Brian Garner anyway. You might as well change it to "must."

PROFESSOR DORSANEO: Just as a matter of modern -- modern convention is that "shall" is not a popular word because it sometimes means "must" and it sometimes means "will," and when you mean "shall," that is to say something "must" be done, it should say "must" rather than "shall."

CHAIRMAN SOULES: Okay. Any opposition to "must" instead of "shall"? "Subdivision" instead of "paragraph"?

No opposition to that, so the draftsmen will have that guidance, and we won't need to bring it back to the committee for that. That will just come to me with those changes to be

forwarded to the Court.

Joe Latting.

MR. LATTING: I have a question for Bill Dorsaneo. You said that we would be the only -- or one of the only jurisdictions that would require the evidence to be in admissible form, and I must admit I hadn't focused on this. It says that the court must grant the motion unless the respondent produces evidence raising a genuine issue of material fact.

What situations would there be where you think that the spirit of this rule would be followed where the evidence wouldn't be in an admissible form, not be in admissible form? I mean, how else would you create a fact issue besides coming forward with some evidence?

PROFESSOR DORSANEO: Well, I think as Paul mentioned at the last meeting, there might be a situation where the -- or you could think of this problem area as being one of the defendant's burden. The defendant has to show that there is no genuine issue for, you know, trial; and as part of doing that the defendant would have to, you know, show that

there is no basis for concluding that the policeman was, you know, not in the store in the Addickes vs. Kress kind of context.

If there was an inadmissible witness statement that indicated that the policeman was -- you know, was in the store, and the plaintiff came up with that by way of showing the defendant hasn't met its burden under this rule, you know, the court must grant summary judgment because the evidence isn't in the right form.

Now, that is probably okay with me because people ought to get their evidence in the right form, but it just seems against the spirit of the idea here. I don't know if I'm being very clear, but you could have evidence or information that would reflect that if you put it in the right form you would have a fact issue, but in the form that it's in now it's not technically, you know, evidence because it's not admissible; and under this rule if you didn't get your evidence in admissible form, the plaintiff is going to, you know, have summary judgment granted against you.

MR. LATTING: Well, wouldn't

that be taken care of by the part of the rule that says that if there is an objection as to the form of an affidavit that you have an opportunity to cure?

PROFESSOR DORSANEO: Maybe it would.

HONORABLE SARAH DUNCAN: No.

PROFESSOR DORSANEO: Maybe it would, but I have some trouble with that correlation, that connection.

CHAIRMAN SOULES: Okay. Paul Gold.

MR. GOLD: Yes. I'm still concerned that this issue may not be totally clear, even though we voted on it last time. Let me just read to you from the synopsis from the Supreme Court decision in Celotex, because it frames this issue. It says, "The questions whether an adequate showing of exposure to petitioner's product was, in fact, made by respondent in opposition to the motion and whether such a showing if reduced to admissible evidence would be sufficient to carry respondent's burden of proof at trial should be determined by the court of appeals

in the first instance."

Because what was offered in -- offered in response to the motion for summary judgment in Celotex were letters, just letters. They were not authenticated. They weren't proven up as business records. They were just letters, and the Supreme Court of the United States held that that was sufficient.

That was sufficient because they found that that gave a clear inference or a clear indication that the plaintiff, the responding party, could reduce that type of information to admissible evidence at trial if necessary; and they go on in the first -- the four justices that wrote the majority opinion, "We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment."

They are making that clear that all that a responding party has to do is produce materials, data, that could -- that would raise the clear indication that evidence could be forthcoming at trial on that point. You don't have to have a mini-trial with

admissible evidence on this motion for summary judgment; and in that regard, not to rehash the debate, both Alex Albright and I in this exchange of communication articulated this point pretty strongly throughout the discussion; and I would request, just to aid the Court in consideration of this, that that correspondence go up to the Supreme Court with whatever we offer as well because I still don't know that this has been fully hashed out here by virtue of the fact of the questions still being raised.

CHAIRMAN SOULES: Justice Duncan.

HONORABLE SARAH DUNCAN: My memory is -- maybe it's faulty. I thought we had voted on this and decided it didn't have to be in admissible format. The easiest -- and I, frankly, didn't read this to require that it be in that format, and I apologize to David for not raising this earlier if I should have, but I think the easiest example, at least for me to understand, one of the primary methods of proof in summary judgment is an affidavit. An affidavit if objected to as

inadmissible hearsay is inadmissible. It's not in admissible form except at something like a motion for new trial proceeding, and I don't understand why we would require it in admissible format.

We have to presume the nonmovant's proof is true. Well, how do you presume it's only true if it's in admissible form? The comment that Bill made about thinking that maybe the objection to form of an affidavit would resolve this, an objection to the form of an affidavit can be cured, but the fact that it's an affidavit isn't an objection to the form of the affidavit. It's an objection to the fact of the use of an affidavit.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Maybe I've gotten confused. What's the point of objecting to the other side's summary judgment if it can be in inadmissible anything? I mean, we have always had objections that you can raise to the other side's stuff, and if I'm just supposed to consider anything, why are we -- why do people file objections to it?

It's just wasting time. Just outlaw any objections.

I thought I was supposed to -- I understand if the objection is they didn't swear to it or sign it. Then we give them time to do that, but I thought I was actually supposed to consider the objection, and if it was going to be a problem then grant a continuance for them to get whatever it was in properly admissible form; and, you know, if it can just be anything, let's just outlaw objections because the first three pages of every response to summary judgment and every reply to the response I get is a long list of objections. If we are wasting our time, let's save the trees.

CHAIRMAN SOULES: Chip Babcock.

MR. BABCOCK: We voted on this last time, and our vote, it's my recollection, was to keep the current summary judgment practice with respect to evidence, and the comment that Judge Peeples drafted makes that completely clear. The existing rules continue to govern the general requirements of summary judgment practice such as time limits and what

constitutes appropriate summary judgment evidence.

MR. LATTING: Yeah.

MR. BABCOCK: So this subdivision, unless I am misreading it, does not attempt to vary what has been our summary judgment practice; and as Judge Brister says, every summary judgment I've ever dealt with, it starts out with objections to your evidence.

MR. ORSINGER: Well, I think it's noteworthy that we have seemingly gone a lot further than the United States Supreme Court did in Celotex, and I am not even sure that the mandate was to go further than Celotex, if the mandate was to go that far; but we have gone further, and I think we all ought to recognize the fact that we have gone further, and this is really not the Celotex rule. This is the Celotex concept applied to the Texas summary judgment practice.

CHAIRMAN SOULES: Rusty McMains.

MR. McMAINS: Well, I, too, actually read the rule to also say basically

that it's got to be summary judgment evidence, and we can talk about what summary judgment is; but summary judgment evidence in terms of an affidavit authenticating a deposition doesn't mean that what's in the deposition is necessarily probative in terms of raising a fact question, as this rule is directed to require it.

So the problem that is created just generally, if, for instance, there is a problem in the deposition in terms of how the question is asked, if it's objectionable in some fashion and somebody wants to not raise that until it comes down to the summary judgment where they are trying to present it, and they say, "See, it's not in an admissible form" or "An insufficient predicate has been laid for that particular evidence."

Now, in our discovery rules we have been trying to streamline discovery in terms of streamlining the objections and allowing people to do these things later and trying to limit what types of objections can be made and so on, but this rule is going to encourage people to basically go ahead and prove up your

case and basically says to people that you had better when you conduct your discovery make sure that these are admissible type of data, that it is in admissible form, that you don't by mistake ask an opinion question when you should be asking a question about the facts, because otherwise, even though you may have this stuff in discovery in some fashion, it's not such that would raise a fact question if that evidence were produced at trial in the face of some objection as to it.

And I think that's part of, I think, what Bill is complaining about, is that it's not that you can't put evidence in by way of an affidavit. It's that once that evidence is in, the standard that you are directed to is must raise a fact question, which isn't clear that that doesn't mean if it were admitted at trial in that form or in that fashion -- and I think this runs completely counter to the attempts to streamline the discovery rules, and I can guarantee you that Judge Brister is now going to get in response to a summary judgment motion like this an entire ceiling full of documents because you don't have to

marshal the evidence. None of the -- according to the comment.

Nobody has to tell you where it is in there that there is a fact question. They have to just give you the material. They just have to produce the evidence for you, and it's the whole damn file that's going to be on your desk for you to rule on, and if that's what you want then that's what you will get, and that's what this rule encourages, and I think it's a stupid procedure and a very poor substitute for what we have now.

CHAIRMAN SOULES: Well, picking up on what Paul read, I guess from the decision in Celotex, at line nine -- and this is just a question that may focus our discussion. If we say -- or eight and nine -- "A motion filed under this paragraph must state that there is no evidence or information that can be reduced to a form that would be admissible evidence at a trial to support one or more specified elements."

PROFESSOR DORSANEO: So moved.

CHAIRMAN SOULES: Is that of any assistance?

PROFESSOR DORSANEO: So moved.

MR. McMAINS: Well, the problem there is -- as I see your phrasing of it, is that supposedly we are at a stage where the discovery has been closed.

MR. BABCOCK: Yeah.

CHAIRMAN SOULES: No. That's not right. The discovery has not been closed. There has been a long enough discovery period for there to be a summary judgment practice.

PROFESSOR DORSANEO: Mr. Chairman?

MR. McMAINS: Well, it doesn't say it has --

CHAIRMAN SOULES: Maybe it hadn't been closed.

MR. McMAINS: -- to be in the discovery period.

CHAIRMAN SOULES: Yeah. I hadn't read this to say that -- I see what you're saying. We actually have to be at the end of all discovery before this practice can be used. That's what it says.

MR. ORSINGER: True.

CHAIRMAN SOULES: I agree.

That's what it says.

MR. McMAINS: So, you know, if, in fact, it's not a witness under your control, it's almost kind of irrelevant in some respects to say that you might be able to reduce it to form if you could ever reopen discovery.

MR. BABCOCK: Well, and -- excuse me.

CHAIRMAN SOULES: Well, one way to reduce it to form that would be admissible evidence at a trial is to subpoena the witness to trial.

MR. McMAINS: Yeah. Easy, if he's in subpoena range, which 90 percent of my witnesses never are.

CHAIRMAN SOULES: Well, I understand we've got -- okay. Joe and then I will go around the table.

MR. LATTING: I wonder -- I'd like to ask Judge Peeples what he would think about an addition to this which would cover one of the things that Rusty mentioned that I got to thinking about it. If we added the phrase "and points out" -- irrespective of

what we have been talking about here, said that the court must grant the motion unless the respondent produces and points out evidence. It seems to me that it would be a good requirement on the person who is saying, "Here is a stack of evidence," to tell the court where it is.

CHAIRMAN SOULES: Let's stay on this point. I mean, we get too many things out here and -- unless you feel that's germane to what we are --

MR. LATTING: Well, I think it's germane to something he raised, and I got to thinking about that, because one of the --

CHAIRMAN SOULES: Well, let's stay on the question of what kind of proof is going to be permitted at this hearing.

MR. LATTING: Okay.

CHAIRMAN SOULES: For now. And hold that thought.

MR. LATTING: Okay.

CHAIRMAN SOULES: I will not close debate on this without giving an opportunity to anybody to raise their hand for any other question.

Chip Babcock.

MR. BABCOCK: Yeah. I don't think I like your proposed addition of language because you just get in one more fight about something that is fake. For example, could you have a counsel's statement saying, "I got a witness that lives in Montana, and here's what he would say, and he will be here at trial, by God. I promise you." And so he defeats summary judgment on that basis. You know, you can't allow that, it would seem to me. Shouldn't allow that.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: It seems to me that -- I'm in favor of taking this measured step in this direction, and if we start changing the rules that we have right now about what's admissible, what's proper summary judgment proof, we are taking on a pretty big task, and once we start down that road I just think it's no telling where it's going to end.

I mean, we know pretty well what you do and don't do in a summary judgment proceeding

as far as your evidence. I mean, we have been doing that for decades, and to start changing that simply for this rule I think would be an unwise thing to do.

CHAIRMAN SOULES: As I perceive the dynamics here of the no evidence term, we are -- the concept of the no evidence term, as used here, means like no evidence in an appellate review. There is no evidence, but -- and so we have got it -- we are using it in that way, but a fallout of that is that we really are talking now about evidence, not an affidavit, not a strong suggestion of evidence.

And we have got a lot of words in the current rule; and I don't know whether they mean evidence or not, "set forth facts as would be admissible in evidence"; but it doesn't say they have to be evidence at the moment of the summary judgment, just facts as would be admissible; and the person that makes the affidavit has to demonstrate that the person is competent to testify on the matters in the affidavit. So is that short of being evidence?

So this, the words in (i) are different than the words in (f). Do they mean something different? And in the rule we talk -- in several places we talk -- or at least in one place it talks about summary judgment evidence. That's in (d).

HONORABLE DAVID PEEPLES: Could I raise this question? On line 13 of the rule, if instead of saying "the respondent produces evidence," if we said "unless the respondent produces summary judgment proof raising a fact issue," would that help?

CHAIRMAN SOULES: Well, the rule uses the words "summary judgment evidence." That term is in the rule now in (d).

HONORABLE DAVID PEEPLES: That's what we mean here, and if we said that, wouldn't that solve a lot of the problems that we are discussing?

MR. BABCOCK: "Summary judgment evidence"?

HONORABLE SARAH DUNCAN: That's what I thought it --

MR. ORSINGER: It would permit

affidavits, for sure.

HONORABLE DAVID PEEPLES: Well, that is certainly the intention. Why not say that?

MR. BABCOCK: And the comment says that.

HONORABLE DAVID PEEPLES: The comment does say it.

MR. BABCOCK: The comment says exactly that.

CHAIRMAN SOULES: Well, if we use "summary judgment evidence" there in 13 that ought to pick up --

HONORABLE DAVID PEEPLES: It ought to do in the rule.

CHAIRMAN SOULES: -- the policy of the rest of the rule.

HONORABLE DAVID PEEPLES: What we are saying in the comment.

Tommy, what do you think?

MR. JACKS: I think that's an improvement. Yeah, I do.

I don't know that that gets to Paul's issue, which is that there is evidence which the Supreme Court he believes under Celotex

would say is sufficient for these -- for purposes of this kind of motion but would not be sufficient under our rule of summary judgment, such as the letter that's not authenticated.

HONORABLE DAVID PEEPLES: The Supreme Court in Celotex remanded to the court of appeals to take another look at it. I don't think the Supreme Court said one way or the other.

MR. GOLD: Well, they -- may I address that?

CHAIRMAN SOULES: Okay. Paul.

MR. GOLD: I want to address several things. First, one of the critical issues in Celotex was not the responding party's burden, but the initial burden by the movant; and in response, Chip, to what you're saying is, think about what we are doing here, and that is that all the movant has to do is basically make a statement that there is no evidence.

Celotex said, wait, they have to demonstrate -- it is the defendant's task to negate, if he can, the claim basis for the

suit, and it talks about on page 2555 the fact that a plaintiff need not initiate any discovery, reveal his witnesses or evidence unless required to do so under the discovery rules or by order of the court. He must respond, but he doesn't have to do -- this is what Paula was talking about last time.

You don't have to go out and depose all your witnesses and everything merely to have to respond to a motion for summary judgment. You may not want to depose all those people, and this is what Rusty is saying. We're creating more work than we're solving.

The -- and Celotex was remanded, but it was remanded because the movant didn't produce sufficient evidence to warrant getting to the summary judgment in the first place. All the discussion about what the respondent had to do was secondary. The movant never put on the evidence that the Supreme Court thought was necessary to get the motion.

So I think in response to what Judge Peeples was saying, is, I think that we're -- in this attempt to create a hybrid that by taking what the Supreme Court was

trying to do in Celotex but keep the Texas rules on evidence, we're creating a potential monster here.

We are going to have the law of unintended consequences because if you really go by evidence, that means any time that expert testimony then is going to be used in response to a motion for summary judgment, before you have a summary judgment you are going to have to have a Daubert hearing. So now not only do we have Judge Brister with pounds and pounds of paper on the summary judgment we're going to have Daubert hearings preceding the motion for summary judgment in every case.

All that to say, I think that the Supreme Court of the United States was on the right track when it was saying that it doesn't have to be admissible. It merely has to -- it raised the point that "if reduced to admissible evidence at trial," and I think in our attempt to merge these things we're creating a problem here that's going to cause a lot more problems than it's solving. I keep hitting that drum, but I really feel very

strongly about it.

CHAIRMAN SOULES: Okay. Lee is going to go get the opinion of the Supreme Court on this. In Centeq Realty vs. Seagram the Supreme Court has already set up a procedure. It says that if a defendant brings a motion for summary judgment and that summary judgment -- the dynamics of that summary judgment is to negate an essential element of the plaintiff's case, not on affirmative defense, negating an essential element of the plaintiff's case, and the defendant's summary judgment proof facially does that, the plaintiff must come forward with something, and I don't know what that something is. That's why Lee has gone to get the decision. Something that raises a genuine issue of material fact on that element.

We have got this at play already in recent decision. That's a '95 decision. That's the first time that I have seen that in a case where the dynamic of the motion was to negate an essential element of the plaintiff's case. Before that it was used where the defendant established conclusively by their

proof of affirmative defense and then the plaintiff had to come forward with something that would raise a genuine issue of material fact about the defense, but now we already have this at play against the defendant's cause of action by decision.

I don't know whether that's germane, but I want you to know that.

Chip Babcock.

MR. BABCOCK: Predating Centeq is Caso V. Brand, and in that case the Supreme Court said the same thing, that on the actual malice issue in a public figure/public official libel case if the defendant negates actual malice, the plaintiff must come forward with evidence to raise a genuine issue of material fact; and there are a number of cases following Caso that talk about the inadequacy of the plaintiff's proof in that regard in sustaining summary judgment. So Centeq is not the first time the Court has done that.

CHAIRMAN SOULES: Okay. Well, given the impetus that we have received from the Supreme Court to make a change, we have already resolved that we are going to make a

change. Now I think we need to focus on the details of this (i). Can it be improved? Has it got a genuine problem? If so, let's address it and fix it. The debate that we should do -- directed to doing nothing, I don't think is going to be productive.

Richard Orsinger.

MR. ORSINGER: Well, I think in light of this discussion I'm just envisioning how I'm going to have to change the way I practice my cases, and I can see that the focus of my deposition testimony is going to change from finding out what the witness says to finding out what the witness says and then nailing it down in admissible form, particularly if it's an adverse witness. Otherwise, I might find myself in the trap that I know what a witness has to say, but I don't have it in admissible form when I get one of these motions filed against me.

CHAIRMAN SOULES: But if we -- a question to you. If we put in the words "summary judgment evidence" so as to pick up the practice, with the intent to pick up the summary judgment practice that exists, would

it in your judgment still be necessary to do that? Because we haven't done it in the past, and we have used those same materials to defeat summary judgments effectively.

MR. ORSINGER: Well, to me there will be instances where you would -- it's not cured. Because under the current practice before I can get thrown out of court they have to come forward with some concrete evidence on that point, and if I took a deposition of their expert and I figured out what he was saying but I didn't put it in testimonial form usable in the courtroom, but I did find out what he was saying, I read his report, and we skipped around, and I had a good picture, well, they could always come back and get whatever affidavit they want from their expert to try to knock me out under current practice.

But under this all they have to do is allege no evidence and then they control whether their guy puts an affidavit on the table or not, and I can't control whether he puts an affidavit on the table. All I can rely on is my deposition; and, of course, the

discovery period has occurred, so it's too late for me to redepose him.

So I'm stuck with what I took, and so I can see that right now my depositions are going to stop being just to find out what the other person is saying until I figure it out and then I quit, now, to sticking with it long enough that I have it in such ironclad admissible form that I am secure that a motion like this can't throw me out of court.

And so the goal of my deposition ceases to be to find out what their expert or what their witness is going to say and starts being be sure that the deposition testimony is as complete as the trial testimony is going to be, and that's going to make all of those depositions in my cases longer.

CHAIRMAN SOULES: All right. Let me draw a distinction, if I may, between adding the words "summary judgment" in 13 or adding the words that I earlier stated, "or information that can be reduced to the form that would be admissible in evidence" in 9.

An expert report is not summary judgment proof now; and if we draw from the med mal

summary judgments that have come down because the controverting affidavit, if you want to call it that, was whatever, not from the right type of doctor, didn't say the right things, just about anything in the world, we know that there has to be a play of affidavit and competing affidavit. Particularly the competing affidavit gets looked at under a microscope, and that then becomes the summary judgment proof, not a report.

We could carry that into this rule simply by saying "summary judgment" in 13. We can broaden this, however, to say the report becomes something that can be used in defeating an (i) section summary judgment by putting in the words "or information that can be reduced to a form that would be admissible in evidence."

So it actually broadens what might be used to defeat a section (i) summary judgment to use all of those words instead of two words, for whatever that's worth, if you want to give that any consideration.

Carl Hamilton.

MR. HAMILTON: I thought that

the concept here was to give a provision similar to the Federal rules. We have provisions now where we fight with affidavits and everybody makes an affidavit that raises a fact issue, and I thought the concept here was to try to design a rule that would allow cases to be disposed of based upon the evidence adduced from discovery, if there is evidence there to support a claim or a defense.

MR. GALLAGHER: Could you speak up, please?

MR. HAMILTON: And if there isn't any evidence to support the claim or defense, we shouldn't waste our time with it. So to say "summary judgment evidence" which brings back into play affidavits, you're going to have a hard time ever getting a summary judgment under that rule because somebody can always come up with an affidavit that raises a fact issue.

So I thought the idea behind the section (i) was to go another step and require -- if you are going to give time for discovery and the discovery is done, then the parties ought to be able to come up with the proof and not

just affidavits.

CHAIRMAN SOULES: But we have got the tension between limited discovery and this summary judgment rule now that is a major concern here in the room, and that is, we are trying to save costs and time in discovery by streamlining and just getting to expert -- tell me what your theory of damages is and how much it adds up to and I'm ready to go home, because I don't have many hours with you or other witnesses.

Now, if we have to convert that into evidence, it takes more time because it has to be made admissible. Maybe it already is, but if it's not, more time has to be spent to make it admissible, and that's what Rusty and others I think are saying here. If we haven't -- if we are going to compress discovery and a summary judgment is going to come before trial whenever your evidence may be vastly bigger than just the discovery product, that somebody shouldn't be unfairly prejudiced at the summary judgment stage for not having taken a deposition, for having taken a short deposition, and the like. For

whatever that's worth.

Mike.

MR. GALLAGHER: Rule 166(f) permits the use of supporting and opposing affidavits, and as I understand that rule, I don't know that we have amended that portion of the rule.

MR. BABCOCK: We haven't.

MR. GALLAGHER: So if we have not then you're still permitted to use opposing affidavits at the summary judgment hearing, and the point that you've just made is one that is very well taken. With the limitations on discovery the plaintiffs have to have the ability to use affidavits in order to oppose this new brand of motion.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I think we are arguing about something that's a problem under the current rule, though. You might take your discovery in a way you can't use it and then the other side files a summary judgment, not based on no evidence, but based on their own affidavits. If you are going to

counter that, you are going to have to go back and get your -- if there is an objection that is hearsay, what do we do now?

We extend the time, if necessary, to go back and get it in whatever admissible form, and I have always assumed these objections were something I was supposed to rule on and that you were supposed to go get it in, you know, some kind of discoverable form; but this is not a new problem created by a no evidence rule, the fact that you may have to take your discovery -- that there is a difference between discovery of facts and discovery -- there is a difference between the discovery deposition and a trial deposition. That already exists.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: It is a new problem, however, when it's a procedure that's employed after the expiration of any applicable discovery period, to read from the rule. That makes it a whole lot harder to go back out and reopen your deposition and get it in admissible form. In fact, it makes it

impossible. So that leeway is gone.

HONORABLE SCOTT BRISTER: Not under the discovery period we had with the Susman subcommittee. I mean, that was expressly addressed in the discovery period. It was understood, motion filed at the last minute, you know, if it was something that happened at the last minute, you would have to open it back up again.

MS. SWEENEY: That was before this invention was before us. When we discussed that aspect of the discovery rules -- and correct me if I'm remembering it wrong, but my memory was when we discussed all the windows and the Susman plan and all of that, this committee had never been presented with a directive from the Court to change the summary judgment practice in this fashion or to create this new vehicle.

This came after, after the discovery rules had been sent up, after the discovery window had been created, after the limitations on discovery had been imposed; and this rule specifically says after the expiration of the discovery period, when it is too late to go

get discovery, when you are frozen by whatever exists in the record, then the other side can file this motion and say, "A-ha, you never asked anybody about this issue, and we are now going to contest it for the first time ever, and, by the way, you can't use an affidavit."

That is absolutely an untenable position.

HONORABLE SCOTT BRISTER: Nobody is saying you can't use an affidavit.

CHAIRMAN SOULES: Just a minute. Rusty had his hand up. Rusty, did you want to talk? Do you want to speak now?

MR. McMAINS: All I'm saying is that the difference is that this is not a question of contest of affidavits. It's a question of just shifting the burden of proof. I mean, this is an absolute shift in the burden. So it's a big difference, because people don't go around saying there is no evidence of negligence in filing a no evidence of negligence motion for summary judgment when there has been a bunch of discovery and evidence about the accident is there, you know, or a routine car accident or whatever.

They don't do it, but now they have

encouragement to do it, if they manage to finagle people into not doing much discovery or not doing it the right way or people send associates down who don't ask the questions to get them in the right form and people are objecting "objection to form" and nobody wants to have that explained so they can fix it, and then you go down there, you say, "Ahh, gotcha." And that's what this is. It's a gotcha rule. That's all it is. That's all it's for.

MR. LATTTING: No, no, no, no.

MR. McMAINS: And I thought we were getting away from something like that, but the response to it is going to be there is going to be affidavits and everything galore, and everybody is going to put everything on your desk.

MR. LATTING: Question.

MR. McMAINS: And none of that streamlines any of the procedure. That's what's going on.

CHAIRMAN SOULES: All right. Kind of reviewing the bidding here, this does shift the burden. No question about it, and

that dramatically changes the summary judgment practice. The movant just has to say something. The respondent now has to do the work, and before, the respondent had to do a lot of work before the movant had to do anything. Before the respondent had to do anything. That's a big change.

Another big change is the discovery dynamics if we don't do something about this, and obviously this needs to be fair or it's going to be -- a lot of people are going to be taken advantage of if it's not a fair rule and a balanced rule.

MR. GALLAGHER: Could you repeat what your suggestion was awhile ago?

CHAIRMAN SOULES: Well, it was to -- and I don't know whether I got all the words of the Supreme Court of the United States as they reviewed letters that were not in admissible form and got concerned about a summary judgment that they felt might be unfair, because it did get remanded, but the words that I got out of what Paul read was "information that can be reduced to a form that would be admissible at a trial." Is that

what it says, Paul?

MR. GOLD: Essentially. Here. If we could get -- you know, it really might help us if we could get copies.

CHAIRMAN SOULES: Well, just read those words. You read them one time.

HONORABLE DAVID PEEPLES: Are you reading from the opinion or the headnote?

MR. GOLD: I'm reading from the headnote. I can read from the case, too. The synopsis said, "The questions whether an adequate showing of exposure to petitioner's products was, in fact, made by respondent in opposition to the motion and whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial should be determined by the court of appeals."

CHAIRMAN SOULES: "If reduced to admissible evidence." So it's information if reduced to admissible evidence. They had some letters. They weren't reduced to admissible evidence, but they remanded it anyway on that basis.

Chip, you had your hand up for some time,

and I hadn't called on you.

MR. BABCOCK: Well, I was trying to respond to Paula's point about the discovery window. I was opposed to leaving it until the end of discovery, but the reason this was put in was because the sentiment of our collective group, the people who were most concerned about a gotcha rule or people sneaking up on you, wanted to have the maximum amount of time possible in order to do their discovery and to prevent this type of motion being filed until that time had passed. That leads to the consequence that Paula is talking about, but it was the people who were concerned about it that wanted the rule in the first place.

I think the better rule is Rule 56, which says that there has to be a reasonable time for discovery, whether it's at the end of a relevant discovery period or in the middle of the discovery period; and what happens in Federal Court is if you go in with a, quote, no evidence point and the other side says, "Judge, I've taken this guy's deposition, but it's not in the form I want," or "I need to

take the deposition of A, B, and C in order to respond to this summary judgment," No. 1, you almost never get to the judge because it's always agreed upon; but if you do get to the judge then the judge almost always allows you the discovery you need to respond to the summary judgment.

So in response to Paula I would say, Paula, I agree with you. I think that this could lead to some problems, and to remedy that, you should have the Rule 56 "after a reasonable discovery period."

MS. SWEENEY: Didn't we also vote, Mr. Chairman --

MR. BABCOCK: We voted on that, by the way.

MS. SWEENEY: But didn't we also vote at one point that we could reopen the discovery window? I remember that discussion. I remember a vote that we were going to insert language that "the court shall" -- it was going to be mandatory -- "allow the discovery to be reopened for proof to be obtained," and I don't know what happened to that, but it existed at one point

a long time ago.

CHAIRMAN SOULES: It must have gotten voted down because otherwise I think they would have picked it up. I can't remember either how the vote went.

Richard, and then I will go around the table.

MR. ORSINGER: Well, I think there might be an imbalance here, too, because the certificate of the moving attorney is that they have inspected the discovery, but the true pool of information that you are looking at is summary judgment evidence, and I can think of three instances in which the discovery wouldn't be summary judgment evidence.

One would be documents that are produced, even by the opponent, but that haven't been authenticated in a deposition. So I have gotten a stack of documents on a request for production. That's part of my discovery. There is a memo in there that helps me on my case, but because I haven't authenticated that as a business record, it's not summary judgment evidence at the time of this motion.

The other one is a witness statement that's unsworn. If through discovery somehow I obtain a witness statement that's unsworn from the other side, that's discovery. That's "witness certificate," presumably would apply to, and yet it's not summary judgment evidence, so it isn't going to help me in opposing one of these motions; and the third one is an expert report.

The expert report is in discovery. The lawyer's certificate should apply to having examined all expert reports, but if I haven't taken that expert's deposition, the expert report is not summary judgment evidence.

It seems to me like we have an imbalance here and that in reality we think that we are permitting a broader range of proof to defeat one of these motions than we actually are, and I would support Chip's idea that maybe let's move this up a little bit so that we have the ability to go authenticate that memo or to take that expert's deposition and prove in admissible form that the expert's opinions are -- I mean, that his testimony would be what his report says it is, because if we

were -- you will force us to take the deposition of every expert that does a report, if we do this, out of fear that when we get down to this motion we have a report and no admissible evidence.

CHAIRMAN SOULES: So that's getting somewhat at what Paula was saying, that if the respondent has information that would raise a genuine issue of material fact, discovery must be reopened in order to get that information reduced to admissible form, at least summary judgment evidence. Something along those lines?

MR. ORSINGER: To me that's the most unworkable solution. If I have an expert report that's signed by their expert, how come that's not sufficient to defeat a motion? If I have secured their unsworn witness statement, how come that's not sufficient to defeat their motion? If they have produced documents that would defeat their motion but they didn't authenticate them because they were in response to a request for production, why aren't those documents sufficient to defeat their motion?

The way this is written, those documents are not sufficient to defeat their motion.

CHAIRMAN SOULES: Okay. Going around the table, Paul Gold and Tommy and Sarah.

MR. GOLD: I think the most important thing that we have tried to accomplish over the last several years is to try to reduce the expense of litigation. That was what the focus of the subcommittee on discovery was. That was our mantra throughout all of our discussions, was is this going to make it more efficient, less costly for the participants in the litigation?

This rule, after we spent two years doing that, skewers all of that effort needlessly; and to pick up on what Carl was saying, I don't understand why it is that we just can't follow the Supreme Court. We are not satisfied with that. We want to do more than the Supreme Court. What we want to do is we want to conduct the trial before the jury is put in the box. That's what the bottom line is here. That's what's being said here, is we don't want to have a trial with a jury. We

want to try the case beforehand, and that's not what the Supreme Court is saying with this summary judgment rule.

What they are saying is if you can produce materials, produced in discovery or through investigation, that if reduced to admissible form would be evidence at trial then go on, go try your case. And that would make this all very simple. It would. If you stop and think about it, why must we, if we are so concerned about expense, produce an expert report at an ungodly amount of money that that takes to make it a full report now; and under Robinson it has to be virtually a 50 page report now, and then you have to produce an affidavit. The report isn't enough. A signed report is no longer enough. You have to get an affidavit and then you got to go get the deposition. How is this efficient? It's just not.

And if you ask yourself, what is the magic of an affidavit? An affidavit wouldn't be admissible at trial. It's hearsay at trial, yet we've carved that out; but we are not willing to just say, you know, this

affidavit stuff has really just created a lot of expense anyway. If we have got a signed expert report, why, why in God's name, shouldn't that be enough to indicate that we can reduce something to admissible form so we can go to a jury?

I agree with Carl. I think that we should be guided by the United States Supreme Court, and the United States Supreme Court in Celotex reiterated over and over again that it was not the nonmovant's responsibility to marshal all the evidence in the case, to go out and take the deposition of every single witness that they would need to prove their case, but merely give an indication to the court that there was information that if reduced to admissible form would be admissible at trial; and if we did that, if we did that, we could combine this rule with what we did in the discovery rules and we could save our clients a lot of money.

If we adopt what we're adopting, we're going to increase the expense of the litigation, and we are going to take and all that work we did on the discovery rules is

going to have to go back because this rule is counterproductive to what we brought forth from that subcommittee's efforts.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: Let me take a stab at suggesting some language, Luke, and I'm picking up on both what Paul read and what you had stated earlier. First, I just think it's helpful, as David had suggested previously, on line 13 to insert the words "summary judgment evidence," and I would do that, for one thing; but for another thing, at the end of that sentence, that is, after the words "raising a genuine issue of material fact," I would insert -- change the period to a comma, "or produces other information which raises a genuine issue of material fact, even though not in proper summary judgment form," and what I'm saying that -- "even though in not proper form for summary judgment evidence."

I'm trying to get at the problems that Bill and Richard and Paul and Justice Duncan and others have raised. This would -- for one, gets this issue of admissible out of the way because I don't think we ever intended

that for these summary judgment purposes the evidence need be evidence that would be admissible at trial, and that is to say affidavits can be used.

But Richard raises the interesting point of, for example, documents you obtain in discovery from another party who naturally was not obliging enough to put them in summary judgment evidence form for you when they produced them and which you cannot get in summary judgment evidence form without going out and finding a bunch of custodians and deposing them and doing things that cost money, take time, and generally don't add any additional light of a substantive nature on what those documents reflect.

This change in wording would as to this no evidence motion permit the use of that information to show that there is evidence which raises a material issue, a genuine issue of material fact, even though it's not in one of those forms.

HONORABLE DAVID PEEPLES: Luke, could I please respond to some of this?

CHAIRMAN SOULES: Let me get

around the table, Judge. There are other hands up. Anyone want to speak before -- okay. Anne. Back there.

MS. McNAMARA: I'm not sure of the process of all of this, but it seems like what we are trying to do is balance a couple of very good objectives. One is to save money through shortening discovery process and making it more efficient, and the other is to address the Supreme Court -- or the summary judgment practice.

From my perspective one of the objectives in doing that is to in certain cases not force a defendant to face a jury and explain stuff that a jury will never be able to deal with intellectually. As between saving money and having to face a jury in some very complex back patterns where there may not be evidence but the jury may not understand that, the saving money in the discovery process is a very small -- it comes in a distant second.

I don't see the magic in forcing the discovery cutoff at that point. If the evidence isn't in proper form, why not reopen discovery for a sufficient time? You know, at

the end of the day all of these rules have to work together, and the ones that came out of the pipeline first, you know, to the extent they are governing everything we do afterward, I'm not sure that makes a good deal of sense.

I would hope that at the end of the day somebody looks at them and makes sure that it all works, and locking this into the discovery rules that we voted on -- and I think Paula is right, that we hadn't focused -- I sure hadn't -- on this, this piece of it, it's sort of the tail wagging the dog.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: I would remind everybody this was a compromise. The discovery -- you know, that the burden shifts at the end of the discovery period was a compromise. The alternatives are do nothing or go to Celotex, which means this motion can be filed a week after the case is filed, very early, and it is entirely in the judge's discretion whether reasonable opportunity for discovery has been done, and that means I can look at the case and I say, "Well, you're

never -- tell me what -- you're never going to be able to prove this case, so any discovery is going to be unreasonable, so let's do it now."

And my recollection was while there was pluralities that favored each of the two extremes, nobody on the extreme wanted the other extreme, and as a result we met in the middle, which was a discovery period, which was a firm date to say, "Okay, we don't want anything, but at least let's wait 'til the end of the discovery." By then at least you ought to have your case together.

Now, the reason the Federal deal about just, you know, nonadmissible but maybe I will be able to find something makes sense in the Federal rule because with Celotex if that's a floating date then it makes sense to respond, "I've heard something from somebody," because that comes in on my decision about whether there has been a reasonable time of discovery.

That's -- if you want to go to Celotex, we have had this discussion over a year and voted twice. I, for one, am about ready to say, okay, forget it. I'm not for the

compromise anymore. Let's just -- you want Celotex, we will do Celotex, but it was my understanding that that was not what you wanted. That is where you are going to end up. That's where all the discussion today is suggesting we go, and I just want to remind everybody I thought the deal was that was the last thing we wanted.

CHAIRMAN SOULES: Judge Peeples.

HONORABLE DAVID PEEPLES: Okay. I would like for everybody to focus on the rule, lines 8 through 12. This is what the movant has to do to trigger this. You've got to file a motion and then going on down, you specify the elements that you are attacking, not a shotgun motion. You've got to specify the motions and then say, certify under oath, "I have reviewed the discovery, and there is no evidence to support the specified elements."

Now, I will just tell you, if a lawyer comes into my court and says, "Judge, I've done all of this. There is no evidence," and the respondent says, "Judge, their own

documents raise a fact issue. Their own expert witness' report raises a fact issue. I have got a witness statement, and I got it from them, and it raises a fact issue." I'm going to move to the next sentence there. Let's see. It's 14. I'll find that the motion didn't have an objectively reasonable basis, and I will award attorneys' fees.

I mean, that's a frivolous motion, if the discovery raises a fact -- shows documents or a report. We have been just chasing, you know, wisps here, you know, saying you've got to -- you know, that the nonmovant or the respondent is just hammered here because he didn't get something in admissible form if the expert witness report or the documents raise a fact issue.

Now, just to pick up on what Judge Brister said, Richard Orsinger, when Luke a couple of months ago sent out, you know, here's our rule and here's Celotex, let's do this. That scared the dickens out of everybody that Richard sent that to on the appellate practice. They said, "Please don't do this. Don't do this."

He sent this proposal out to the same people and didn't get a single response, yea or nay. So the idea that we ought to adopt Celotex, I thought we buried that last meeting, but surely, Paul, you're not asking to adopt Celotex. That's what scared everybody, and we tried conscientiously to come up with something that's better than Celotex.

Now, Richard just told me a minute ago that in his opinion if a defendant, let's say, or a movant, makes this certificate and there is a document or an expert witness report, still the respondent has the burden to come up with admissible evidence. I, frankly, hadn't thought about that. I would hope no judge would grant the motion if the defendant makes just a ridiculous motion like that.

MR. ORSINGER: But you must. On line 13 you must grant the motion.

HONORABLE DAVID PEEPLES: Well, and it's not reviewable if you don't. What judge is going to do that and not grant a continuance on it?

MR. ORSINGER: Well, we ought

to write the rule so that the certificate is working with the same pool of information as the merits of the motion. At the very least it ought to be internally consistent, but I can see dangers.

HONORABLE DAVID PEEPLES: If there is some language that doesn't open up further problems that would say, you know, if the defendant's certificate is wrong and the discovery does show a fact issue, you don't grant the motion, certainly that's our intention; and if there is a clean, crisp sentence that will say it, I'm for it, but I just think that's inconceivable.

CHAIRMAN SOULES: All right. Let me see if we have got -- Anne Gardner, you haven't spoken yet. Let's hear from you.

MS. GARDNER: Thanks. I'm in favor of changing the language to "summary judgment evidence" to make clear that it doesn't have to be admissible evidence, that it's the same type of evidence that is used for other motions, and I wanted to just point out again the language in I guess it will be (h), when affidavits are unavailable, the

language that's in the rule now as (g), I believe, that "Should it appear from affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justifying his opposition, the court may refuse the application for judgment" -- "the motion for summary judgment or may order a continuance."

And so, in effect, doesn't that say what it is that the nonmovants want to be able to go -- Paul Gold and others want to be able to do, and that's introduce -- or that Celotex allows, if you can -- if the attorney, for example, had an affidavit, you know, setting out that they have -- and they attached a letter to it or the expert's report and say he has these facts as shown by this report, but is unable to obtain summary judgment proof or summary judgment evidence because it's the other side's expert and he hasn't deposed that expert for whatever reason, the trial court can deny the motion for summary judgment based on that under (g).

He doesn't have to come forward -- the nonmovant doesn't have to come forward with

admissible evidence under (g). In other words, the court can grant a continuance, or it can just deny the motion for summary judgment, which is what the plaintiffs want anyway. Doesn't that accomplish the same purpose?

CHAIRMAN SOULES: Okay. Bill Dorsaneo.

PROFESSOR DORSANEO: I think on the "summary judgment evidence" point, that should be in there, and I think everybody agrees with that. It should be clearly "summary judgment evidence," and I think Anne as usual makes a good point that assuming that a court would apply (g), that's the right subdivision I believe, then there would be really less concern, and I think David said basically what judge would not apply (g) in a circumstance where it's appropriate to apply (g)?

I personally would feel much more comfortable in this troublesome area if there was at least a cross-reference, given the fact that this is added in at the end, or whatever, and I might be able, you know, might be able,

to live with that; but the last thing I would have to say, is my recollection is that there are a number of relatively recent (g) cases that are pretty tough, saying why weren't you a better lawyer before now; and, you know, I can understand why a judge might say that, but I can also understand why a judge who is irritated with a particular lawyer might wish that he or she hadn't said it some years later.

There almost is too much discretion loaded into (g) in this context where somebody, you know, does not have a day in court because they didn't have their evidence in admissible form, even though there was potentially admissible evidence available. I mean, think about what summary judgment is. I mean, it is no day in court. You know, case over, receive information in the mail, you're finished, and it's a very radical procedure and needs to be kept constrained. Granted if there is no case then it's appropriate, but let's not make it some sort of a technical game in this context, which is really very different from the other types of motions for

summary judgment.

CHAIRMAN SOULES: Rusty.

MR. McMAINS: One of the concerns I have, too, especially since this is a brand new effort, the insertion of this rule, Judge Peeples suggests that the motion has to be specific. It's not a shotgun motion. Now, it's just like when we required that objections be specific. What happens is a party will file a motion saying that there is no evidence in just an ordinary case.

There is no evidence of negligence. There is no evidence of proximate cause or there is no anything -- to be more specific, there is no evidence causing fact or foreseen in the future. Okay. That doesn't tell you anything. It doesn't describe anything, and it doesn't help anything, or you can say there is no evidence of recoverable damages in some kind of a property damage, economic lawsuit, or fraud case. None of those things tell you anything.

They don't give you any sufficient information, and to suggest that that somehow remedies everything in terms of the burdens

that are put by this rule I think is silly. It's a shift in the burden of the rule. Now, in terms of the expert witness report or any of those other things, if you do, in fact -- right now under our current summary judgment practice they file a summary judgment, and you file the expert witness report. Let's say you even do an affidavit that says, "I got this from them." What does that get you under our rule?

Is that a legitimate response to the summary judgment under our current rules? Maybe not. Because it has nothing to do with what's accurate in the report. It has no verification for its accuracy, and the only authentication is that I got it from them. Well, he might have gotten the flu, too, but that doesn't make it admissible.

So, I mean, you do not eliminate this problem when you have shifted this burden and are suggesting that you terminate the litigation as a consequence of failing to meet, and yet we have no description whatsoever of what our burden is in that regard other than now we want to say "produce

summary judgment evidence."

Summary judgment evidence is an affidavit to the truth and correctness of something that you are competent to testify to. Now, how am I going to be competent to testify what another expert said about something when he didn't even say it there? We have not fixed it here, and the reason that it is significant is because of the shift in the burden of proof, and that's the reason I'm bitching.

CHAIRMAN SOULES: All right. Most of what I'm hearing now seems to be repetitive, and what I'd like to do is try to write down alternatives, maybe take a straw poll, see if that gets us down the road.

We are talking about the party with the burden of proof, and in this case it's going to be the party responding to summary judgment. Big change. Because before if the party failed to carry his burden, that was the movant, and there was no summary judgment.

Now under (i) if the party with the burden fails to carry his burden, there is a summary judgment. The absence of a summary judgment means litigation goes on, and it

costs money, and it takes time, but it doesn't terminate the party's rights. Granting the summary judgment does. So it's a major change. So, now, what will be the burden of a party trying to stay in court?

MR. ORSINGER: I would like to make a proposal.

CHAIRMAN SOULES: And I see those that we have brought about so far, to leave (i) as it is written by Judge Peeples, one. Two, to change that to say "summary judgment evidence," and we have talked about that. Three, to open discovery, have a mandatory requirement that discovery must open if there is information that could be reduced or might be reduced to summary judgment evidence that has not yet been and is tendered to the court not in summary judgment evidence form but in some other form not admissible even on summary judgment, open discovery.

Four would be to allow the use of information that can be reduced to admissible form and just let that be used without opening discovery and making it putting it into admissible form. Are there any other

alternatives?

MR. BABCOCK: Yes.

CHAIRMAN SOULES: If so, articulate what that is without arguing it.

Chip Babcock.

MR. BABCOCK: One alternative to the mandatory discovery, opening of discovery, is to go back to Rule 56, which allows the motion to be filed any time but permits reasonable -- a reasonable opportunity for discovery. That's one.

One that hasn't been suggested yet but that I would like to advance is the elimination of the attorneys' fees provision, because we already have not only a rule but a statute that deals with frivolous pleadings.

CHAIRMAN SOULES: Okay. That's not on point.

MR. BABCOCK: Huh?

CHAIRMAN SOULES: That's not on point. Let's save it. I just want to articulate in words the burden of the nonmovant to defeat the summary judgment. What is it? What can be used? What information can be used?

Richard.

MR. ORSINGER: I have a proposal that's not as broad as Celotex, but it's broader than this, and it would occur on line 12 and 13 where it says, "The court must grant the motion unless the respondent" -- and then I would insert "points to discovery or" -- and then continue, "produces summary judgment evidence."

So that would permit you to point to the pool of discovery or it would permit you to add to the pool of discovery with summary judgment evidence, but it would not permit you to bring a letter in from somebody that's not in affidavit form, that wasn't produced in discovery. So to me it's not as broad as Celotex.

CHAIRMAN SOULES: Okay. So I'm going to call that the pool of discovery plus summary judgment evidence.

MR. ORSINGER: That's a good description.

CHAIRMAN SOULES: Paul.

MR. GOLD: This indirectly hits it and --

CHAIRMAN SOULES: Articulate another standard.

MR. GOLD: On line 11, instead of "discovery" I would impose on the rule that there be mandatory disclosure, because if there is mandatory disclosure then the party moving for the discovery, moving for the motion, is not only saying that what they have produced won't lead to evidence but what they are hiding and what they haven't produced similarly would not lead to the evidence either, and I think that's --

CHAIRMAN SOULES: Okay. I will write that down as mandatory disclosure of everything the movant knows germane to the summary judgment.

Okay. Anything else? All right. Let me just go through these one at a time and see -- let me just start this way. Do you favor or not favor one of these, and I don't know how to make this fair, so anybody can come back and say, "Oh, you screwed up." That's okay with me, but I want to try to get started anyway, if it doesn't get into issue.

Those in favor of and those who

believe -- who favor leaving (i) as-is.

MS. McNAMARA: Can we vote for more than one?

CHAIRMAN SOULES: Yeah. We are going to vote on every one of them, do you like or not like this. Do you like or not like --

MS. McNAMARA: Can we vote for as many as we want?

MR. McMAINS: They will probably all pass.

CHAIRMAN SOULES: You can like every one of them. If we can get down to three that the majority like then we will start picking through those three. That's the exercise that I'm trying to get to, and I don't know whether that's fair or not.

MR. ORSINGER: I think it will work.

CHAIRMAN SOULES: But I'm trying to come to some process that may work. So just do you like or not like, and we will go down through them one at a time.

Do you like or not like (i) as-is? Those who like it? Six like it.

Those who don't show by hands. 12. So by 12 to 6 it's no -- and I'm just using shorthand here -- to one.

Only changing the word "evidence" to "summary judgment evidence," without anything more.

MS. SWEENEY: Throughout? Like, in each place?

CHAIRMAN SOULES: Well, wherever it's appropriate.

HONORABLE DAVID PEEPLES: No, no. Just on 13.

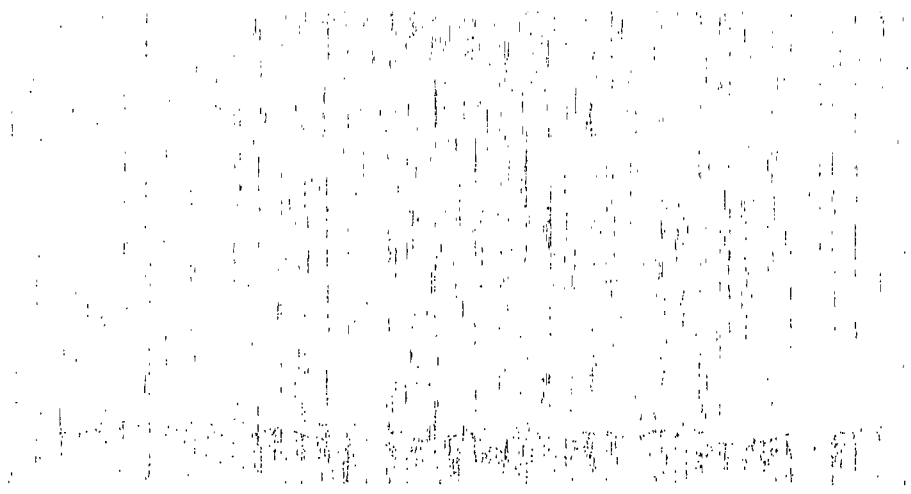
CHAIRMAN SOULES: Well, it would not be in the party -- the motion would say there is no evidence, but you would -- this is the burden on the party with the burden of proof.

MR. ORSINGER: It's line 13, is the only place that goes.

MR. BABCOCK: Right.

MR. ORSINGER: Everything else doesn't have summary --

CHAIRMAN SOULES: Well, it goes in two places. It goes in 13, and it goes in 9. Well, no, it doesn't go in nine.



MR. ORSINGER: No. It shouldn't go in nine.

HONORABLE SCOTT BRISTER: Only goes in 13.

CHAIRMAN SOULES: Only goes in 13. Okay. 13. Just changing 13 to say "summary judgment evidence" as opposed to "evidence." Nothing more. Those who like that show their hands. 12. Okay. That's 12. Now those that don't like it.

PROFESSOR DORSANEO: This is only that?

MR. ORSINGER: This is an exclusive change. No other change.

CHAIRMAN SOULES: Only change. No mandatory opening of discovery. Nothing more than just --

MR. ORSINGER: I think you better recount.

PROFESSOR DORSANEO: I don't think people understood that.

MS. SWEENEY: Well, you said we could vote for --

MS. McNAMARA: We can vote for all of them.

CHAIRMAN SOULES: This is making only the change from "evidence" to "summary judgment evidence."

MR. JACKS: I want to take back my vote then because I'm for doing that, but I'm also for doing some other things.

CHAIRMAN SOULES: I asked you to vote on making that change only, and nothing else at this time. That's the vote now.

MR. JACKS: Would you take it again then?

MS. SWEENEY: Call for a revote.

HONORABLE DAVID PEEPLES: Yeah. Vote again.

CHAIRMAN SOULES: Okay. Now, is it clear what we are voting on? We are only going to insert the words "summary judgment" in 13 and not do anything else to (i). Those who like that? Seven like it.

Those who don't? 11. Okay. 11 to 7. No on that.

Okay. Now, those who would change those words in 13, but if the only problem is that

something that the party with the burden of proof has is not summary judgment evidence in the right form.

HONORABLE SCOTT BRISTER: What?

CHAIRMAN SOULES: This is the hypothetical. The party with the burden of proof has some information, but it is not in summary judgment evidence form. Are you with me? That's the circumstance.

Okay. In that circumstance those -- and what we are going to vote on is inserting "summary judgment" at line 13 and making it mandatory that the party be given an opportunity to do discovery or whatever else may be necessary to get it in admissible form. So that's a combination.

MR. GALLAGHER: Summary judgment admissible form?

CHAIRMAN SOULES: Summary judgment evidence form.

MR. GALLAGHER: Okay.

CHAIRMAN SOULES: Okay?

HONORABLE DAVID PEEPLES: It's a mandatory continuance, in effect?

CHAIRMAN SOULES: Well, I don't

know whether it's a continuance. It's mandatory discovery. There may not be a setting yet.

Okay. Those who like that combination show by hands. And no other changes. Ten. Ten like that.

Those who don't like it? Six.

MR. GOLD: Luke, may I have a question on that because I heard two things? Is it that mandatory discovery would be allowed to allow the nonmovant to get the summary judgment evidence in admissible form or just in summary judgment evidence form?

CHAIRMAN SOULES: It is to get the information that the nonmovant has in summary judgment evidence form.

MR. ORSINGER: Not trial evidence. Summary judgment evidence, like affidavits.

MR. GOLD: Okay.

CHAIRMAN SOULES: I've got some information I should be able to use, but I don't have it in summary judgment evidence form. Here it is. It will defeat the summary judgment, but I have got to have some time to

get it in summary judgment evidence form.

PROFESSOR DORSANEO: And that may require taking somebody's deposition.

CHAIRMAN SOULES: Discovery or something else.

MR. ORSINGER: But on that limited point, not just a long ranging.

PROFESSOR DORSANEO: Right.

CHAIRMAN SOULES: I don't -- I'm not getting into that. I won't go into that.

All right. Next is to permit the party with the burden to defeat the summary judgment now, to use information that if reduced to admissible form that would be admissible in evidence at a trial, use that information without it being in summary judgment evidence form.

MR. McMAINS: Is this Richard's proposal?

MR. ORSINGER: No.

CHAIRMAN SOULES: This is really -- that's my proposal.

HONORABLE DAVID PEEPLES: Could you state it again, please?

MR. GALLAGHER: What did you say, would raise a genuine issue of material fact?

CHAIRMAN SOULES: To use information -- whether it does or doesn't is not our problem. It's what can he use to try to do that. Okay. Use information that can be reduced to a form, that can be reduced to the form that would be admissible at trial.

HONORABLE SCOTT BRISTER: So let me ask, if the -- medical malpractice case, defendant says, "No malpractice." The plaintiff files an affidavit saying, "Somebody in the emergency room that looked like a doctor said somebody had done something wrong." Now, do I have to grant a mandatory continuance because that may potentially become admissible?

I mean, there is a clear difference in my mind -- I was talking with Mike. If one side objects, "Oh, the contract they attached to the motion for summary judgment is not authenticated," I'm not going to fool around with that and grant a continuance after a second. I'm just going to deny the objection,

because it's a contract, you know, I mean, really, do you want a continuance?

CHAIRMAN SOULES: What's the question, Judge? What's the question?

HONORABLE SCOTT BRISTER: The question is, what do you mean with your proposal when you say "may be admissible" or "may be made admissible"?

MR. GOLD: May I respond?

HONORABLE SCOTT BRISTER: Does that mean just an authentication problem, or does that mean maybe someday we will find somebody who substantiates this gross hearsay?

CHAIRMAN SOULES: The second is what I'm talking about. Now, remember, this is only (i). This is only germane to an (i) motion. It does not go to 166a as is presently articulated in the rules. That can be used --

HONORABLE SCOTT BRISTER: Sure.

CHAIRMAN SOULES: -- without an (i) motion.

HONORABLE SCOTT BRISTER: Sure.

CHAIRMAN SOULES: So a party comes to you. They file an (a) motion and an

(i) motion. You grant the (a) motion. Anyway. Yeah. That's what I'm talking about. They come in, and they say, "Here is information."

HONORABLE SCOTT BRISTER: Yeah. Change my hypothetical. They just say, "They haven't designated a medical expert. They have no proof of medical negligence." Doesn't submit their own affidavit, so that would come under (i). So now the response is plaintiff says, "Somebody in the emergency room, I don't remember their name, said the doctor had done something wrong."

CHAIRMAN SOULES: Say, "Well, you may be entitled to a continuance under (i), but you're not under (a). You're out of here."

HONORABLE SCOTT BRISTER: I'm not under (a). The defendant did not file their own proof that what he did or she did was not negligent. They just filed an (i) motion saying, "They have got no expert. 4598, they got to have an expert. I don't have to have an affidavit by an expert. They have got to have something."

CHAIRMAN SOULES: You do under -- okay. I think they lose. The hypothetical here is they lose. You don't have to go under (a) to get that, or they have to worry about information which is brought.

HONORABLE SCOTT BRISTER: Well, then we don't need an (i) then because everybody can say, "I think someday I may be able to find something to support my case."

CHAIRMAN SOULES: There may be a way to fix that, too. There may be a way to fix that down in the attorneys' fees. If the response is frivolous, we may get to that, too; but anyway, we are going to vote on information, should the party be permitted to use information that can be reduced to a form that would be admissible at trial.

MR. HAMILTON: Can I ask a question? Is the only difference between this and the last one we voted on is that --

CHAIRMAN SOULES: Yes.

MR. HAMILTON: -- under the last one you have to get the time to go reduce it, but under this one you don't have to reduce it?

CHAIRMAN SOULES: That's right. That's right.

Okay. Those who like this one show by hands. Four. This is basically the Celotex test. Four.

Those who don't like it? 12. Okay. 12 to 4, no.

All right. Then the other proposal was to allow the motion to be filed at any time and then require discovery. Was that what was suggested?

MR. BABCOCK: Reasonable discovery, as under Rule 56.

CHAIRMAN SOULES: And then have mandatory reasonable discovery after the motion is filed if there is a problem.

MR. JACKS: This is basically the Babcock --

CHAIRMAN SOULES: Right. Those who like that show by hands.

MR. ORSINGER: Wait a minute. I thought Chip was suggesting that there was a minimum period of time for discovery before the motion but we weren't defining what that was.

MR. BABCOCK: As in Rule 56, you can file your motion at any time, but the judge can't grant the motion until there has been a reasonable period for discovery.

MR. GOLD: So you are just saying adopt -- this would just be adopt Celotex straight out?

MR. BABCOCK: Celotex didn't address that. That's a rule -- I say adopt Rule 56 on timing. Rule 56 says you can file it any time you want.

MR. GOLD: Right.

MR. BABCOCK: But there has to be a reasonable period of discovery.

MR. GOLD: Well, Celotex addresses that as well.

MR. BABCOCK: Okay.

MR. ORSINGER: Chip, if it's filed after the discovery window closes, would your proposal permit the judge or require the judge to permit you to do enough discovery to get it in summary judgment form?

MR. BABCOCK: It didn't, but I will accept that friendly amendment.

CHAIRMAN SOULES: Okay. So

this proposal is that the party with the burden to defeat the summary judgment must do so with summary judgment evidence, but it would allow the motion to be filed at any time, and if the party says, "I need time to get my summary judgment evidence together," the court would be required to give that party reasonable time.

MR. BABCOCK: Right.

CHAIRMAN SOULES: Okay. Those who like that show by hands. Four.

Okay. Those who don't like it show by hands. Ten.

HONORABLE SCOTT BRISTER: Once again, just like the two previous times, nobody is for anything. Everybody is -- there is a majority against anything.

MR. ORSINGER: We are not finished yet.

HONORABLE SCOTT BRISTER: That was the last one, I thought.

MR. ORSINGER: No, it wasn't the last one.

MR. GALLAGHER: No. Richard has got one.

MR. ORSINGER: It may only have one vote, but --

CHAIRMAN SOULES: The next one is Richard's, which is to permit the party with the burden to defeat the summary judgment to use all discovery product, whether or not in summary judgment evidence form, and any other summary judgment evidence.

In other words, it's summary judgment evidence plus all the discovery, whether or not in summary judgment evidence form.

HONORABLE SCOTT BRISTER: How is that different from yours that said, "I may be able to get it into summary judgment form"?

CHAIRMAN SOULES: It restricts what you can use in addition to summary judgment evidence to discovery product.

MR. ORSINGER: I would further point out that it makes the rule internally consistent, which I think is a virtue, at least aesthetically.

MR. GOLD: Richard is rising to a higher level.

PROFESSOR DORSANEO: Thank you, Plato.

CHAIRMAN SOULES: Summary judgment evidence plus any and all discovery, whether or not it's summary judgment evidence form. Those who like it show by hands. 12.

Those who don't? Five.

The seventh was this: The movant be required to make mandatory disclosure of everything the movant knows that's germane to summary judgment. Okay. Those who like that show by hands. Two.

Those who don't like it? 13.

Okay. There are -- we had a majority on two alternatives.

MR. JACKS: Why don't you try combining them? They are not mutually --

CHAIRMAN SOULES: And they are as follows: The first is that the summary judgment -- summary judgment evidence is required, but if the party demonstrates that they have something that may be put into summary judgment evidence form, it would be mandatory discovery or time to get it into summary judgment form. Discovery would be one. Affidavit would be another one. That's one that we had a majority on.

The other one was to use summary judgment evidence and the pool of discovery.

MR. HAMILTON: Whether or not it's in summary judgment evidence form?

CHAIRMAN SOULES: Whether or not it's in summary judgment evidence form.

Those could be combined. I see ways they could be combined.

MR. McMAINS: Luke, may I have a point of clarification?

CHAIRMAN SOULES: Yes, sir.

MR. McMAINS: I think that when Richard was talking about the discovery, pool of discovery, what he was talking -- he was not saying that you just attack something that you claimed you got. He's saying that you can do it by way of traditional summary judgment evidence, saying, "This is what I got," and that's all the authentication you need, that that's part of the discovery, but he's not just saying attach the document.

CHAIRMAN SOULES: Well, you have to demonstrate that it is discovery.

MR. McMAINS: That's what I mean, but the way you framed it one time it

sounded like you didn't.

CHAIRMAN SOULES: I'm sorry.

MR. McMAINS: It doesn't have to be summary judgment -- nobody is saying that it isn't summary judgment evidence. You are just saying that the summary judgment evidence is that it is part of the discovery.

HONORABLE SARAH DUNCAN: But that's subsection (d) right there.

CHAIRMAN SOULES: Well, no, that's not right. Let me see if I can articulate this. There is summary judgment evidence. I think I sort of know what that is. I guess most of us do, and then there is a body of discovery, some of which will be summary judgment evidence, depositions, for example; but some other aspects of it may not, an expert report, a document produced in response to a request for documents, otherwise unauthenticated. So it's the whole pool of discovery, whether or not it's in summary judgment evidence form. That entire pool.

HONORABLE SCOTT BRISTER: Can we talk about that? I mean, what about a denial of a request -- your own denial of a

request for admissions? Point to that?

CHAIRMAN SOULES: That's not summary judgment evidence now.

HONORABLE SCOTT BRISTER: But you just said it's different from summary judgment evidence. It's a discovery product.

MR. ORSINGER: No. A denial of a requested admission doesn't prove anything.

MR. LATTING: Yeah.

HONORABLE SCOTT BRISTER: A lot of discovery things don't prove anything. You're saying you can point to discovery product.

MR. GOLD: A request for admission isn't a discovery product anyway.

HONORABLE SCOTT BRISTER: You better say that. We are fixing to say -- endorse a rule that says you can point to a discovery product, and that includes a denial of a request for admissions, and that includes your own interrogatory answer.

MR. BABCOCK: "Admit you have no evidence to support your claim. Denied."

MR. ORSINGER: Pointing to your own interrogatory answer is okay with me

because it's under oath and it's the equivalent of an affidavit. A denial of a requested admission is not helpful because it doesn't raise a genuine issue of material fact, that you merely denied some assertion that they made.

HONORABLE SCOTT BRISTER: Not if you don't say that in the rule.

CHAIRMAN SOULES: Okay. Say this --

HONORABLE SCOTT BRISTER: Assuming it's a discovery product.

CHAIRMAN SOULES: Let's leave those issues to be resolved. If we have to get down to the details of this, this may not even fly. I don't know, but anyway, we have got a majority on those two alternatives.

Does anyone want to include any of the others now that we are down to two?

MR. BABCOCK: Yeah.

CHAIRMAN SOULES: Chip.

MR. BABCOCK: You maybe properly ruled me out of order when I said I wanted to vote on deleting the attorneys' fees things, but since we voted on the whole

subparagraph it seems to me it is in order to --

CHAIRMAN SOULES: No. We are only voting on respondent's burden to defeat.

MR. BABCOCK: Okay.

CHAIRMAN SOULES: We are talking about the respondent's burden to defeat.

MR. BABCOCK: Can I gripe about the attorneys' fees later?

CHAIRMAN SOULES: We haven't gotten --

MR. BABCOCK: We voted on all of this.

CHAIRMAN SOULES: Paul has got some other burrs on this that he wants to file off.

MR. ORSINGER: Gripe over lunch.

MR. BABCOCK: Okay.

PROFESSOR DORSANEO: Let's finish this and go have lunch.

MR. GOLD: Money is the last of my concerns here.

MR. BABCOCK: Oh, I don't agree

with that.

CHAIRMAN SOULES: Okay. Apparently we are down to two, and people are comfortable with either-or or some combination of these two. So we are going to restrict our attention to these two.

Summary judgment evidence with a mandatory right to the respondent for the respondent to reduce any information they have to summary judgment evidence form; or summary judgment evidence plus the entire pool of discovery, which has some burrs that are going to have to be filed off, Judge Brister has raised, or may have to be filed off; or the third, let me see if I can figure out some way to combine these.

Summary judgment evidence plus discovery plus information and time. Okay. So one is it has to be summary judgment evidence but you get time. The other is it has to be summary judgment evidence or a discovery product, and you don't get any time, and the third one is summary judgment evidence plus discovery product plus information and time.

MS. SWEENEY: What's

information? I lost that.

CHAIRMAN SOULES: Information and time. In other words, it's a combination of the two.

MS. SWEENEY: Okay.

CHAIRMAN SOULES: You can use summary judgment evidence, you can use discovery product, and you can use information that you have that can be converted, but you are given time to do that. It's a combination of the three.

Okay. First is summary judgment evidence, but you must be given time to get information into summary judgment evidence form if it's not. Those who favor that.

PROFESSOR CARLSON: Is this an only?

MS. SWEENEY: This is only one vote, right?

MR. GOLD: This is a one voter, right?

CHAIRMAN SOULES: Yeah.

HONORABLE SCOTT BRISTER: Can I ask a clarification? I heard some people say "just get it in the form," and that's to be

distinguished from getting it? I mean, it's one thing to get a document authenticated. That's getting it into the form. It's another thing to say, "I think I can find an expert." That's getting it, and I just want to mention I'm comfortable with "get it into form," mandatory; but if there is a mandatory continuance for "I think I'm going to be able to get it," we are terribly wasting our time.

CHAIRMAN SOULES: I'm talking about information that you have but it's not in summary judgment evidence form. "I think I can find an expert" is not information. "I know Joe Smith. He is an expert. I need time to get an affidavit" is information as I'm perceiving this.

Okay. All right. Those who want just the -- it's got to be in summary judgment evidence form, but if there is other information available, the party must be given time to get it in summary judgment evidence form. If that is your choice of the three, show by hands.

MR. McMAINS: Now, which one is this?

HONORABLE DAVID PEEPLES: Can you only vote for one, Luke?

CHAIRMAN SOULES: You can only vote for one.

MR. GOLD: There is three? I thought there were only two proposals.

MR. McMAINS: Well, he merged them.

CHAIRMAN SOULES: Now, listen.

HONORABLE SARAH DUNCAN: Three is the combination.

MR. ORSINGER: Everybody needs to listen.

CHAIRMAN SOULES: No. 1? Five.

MR. HUNT: Is this the combination we are voting on?

MR. ORSINGER: No. This is summary judgment evidence plus time to reduce to summary judgment.

CHAIRMAN SOULES: Okay. There is too much confusion. If everybody will stop talking and pay attention for a minute, we will get this done.

Three alternatives. Summary judgment evidence is the only thing that can be used,

but if a party has information that can be reduced to summary judgment evidence form, they must be given time to do that. That's No. 1.

No. 2 is you can use summary judgment evidence or anything in the discovery pool, with the burrs that may have to be filed off it that Judge Brister raised, but you don't get any time.

No. 3 is you can use summary judgment evidence, you can use the discovery pool with the burrs filed off, and you can use information, and you have to be given time. It's a combination.

Okay. No. 1, summary judgment evidence with required time to get information in the summary judgment evidence form. Those that favor that show by hands. Seven. Okay. I will call that summary judgment evidence plus time. The next one is --

MR. ORSINGER: No. Vote against. Oh, I'm sorry. There is no vote against.

CHAIRMAN SOULES: Yeah. Only vote once on the three.

Summary judgment evidence plus the discovery pool and no time.

HONORABLE DAVID PEEPLES: No mandatory time.

CHAIRMAN SOULES: No mandatory time. Those who favor that show by hands, and don't vote if you have already voted.

HONORABLE SCOTT BRISTER: How did Rusty and I end up on the same side?

CHAIRMAN SOULES: Six.

MR. GOLD: Is there going to be a coalition government here on this one?

CHAIRMAN SOULES: And, finally, the combination, summary judgment evidence plus the discovery pool plus information and mandatory time, all three. Those who favor that? Six. Well, we are seven, six, and six.

MR. ORSINGER: I'm not sure that somebody didn't double vote.

PROFESSOR DORSANEO: The first 7 and the last 6 add up to 13, and it's really 13 to 6.

MR. McMAINS: It's a genuine issue of material fact.

MR. ORSINGER: Two and three

are close together. One is different from two and three.

PROFESSOR DORSANEO: No. One and three.

MR. ORSINGER: No. Because -- well...

MR. GOLD: Can we do some lobbying?

MR. YELENOSKY: I move we give the Supreme Court alternate language.

MR. ORSINGER: If I've got an expert's report, why should I have to depose the expert? Why can't I just offer the report?

MR. GOLD: Yeah. Why do you need an affidavit if you've got the report?

PROFESSOR DORSANEO: Well, everybody is thinking about a different hypothetical. I'm thinking about the case where somebody actually comes in to Judge Brister and they say, "I can get this in summary judgment form," and he's skeptical about it and say, "Okay. You have three weeks to get it in" and then -- because if they can't do it, then they can't do it.

MR. ORSINGER: But you are making them spend the money to do it on something that's not even contested. If I have their expert report, why do I have to take their expert's deposition just to get it into summary judgment form? I am burning money.

MR. GOLD: I'm not totally radical on this. I think that Judge Brister has got a point. I think that you should have to show something that there is somebody out there other than just coming in and saying --

CHAIRMAN SOULES: Well, we have said that. That's information. You've got to have some information. You've got to be able to show something.

HONORABLE SARAH DUNCAN: Let's lobby over lunch.

CHAIRMAN SOULES: Fine. 30 minutes.

(At this time there was a recess, after which time the proceedings continued as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 17, 1997, and the same were therafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1075.00 .

CHARGED TO: Luther H. Soules, III .

Given under my hand and seal of office on this the 24th day of January, 1997.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas Highway, Suite 110
Austin, Texas 78746
(512) 306-1003

D'Lois L. Jones
D'LOIS L. JONES, CSR
Certification No. 4546
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