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SUPREME COURT ADVISORY COMMITTEE

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NOVEMBER 19, 1993

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Taken before Anna L. Renken,

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Certified Shorthand Reporter and Notary Public

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in Travis County for the State of Texas, on

22

the 19th day of November, A.D. 1993, between

23

the hours of 8:30 o'clock a.m. and 5:50

24

o'clock p.m., at the Texas Law Center,

25

1414 Colorado, Austin, Texas.

ORIGINAL

ANNA RENKEN & ASSOCIATES
CERTIFIED COURT REPORTING

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SUPREME COURT ADVISORY COMMITTEE
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NOVEMBER 19, 1993

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NOVEMBER 19, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Pat Beard
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
John E. Collins
Tom Davis
Prof. William V. Dorsaneo III
Sarah B. Duncan
J. Hadley Edgar
Kenneth D. Fuller
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Tommy Jacks
Franklin Jones Jr.
Joseph Latting
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Dan R. Price
Anthony J. Sadberry
Luther H. Soules III
Sam D. Sparks
Stephen D. Susman
Paula Sweeney
Harry L. Tindall
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Doak Bishop
Hon Sam Houston Clinton
J. Shelby Sharpe
David B. Jackson
Hon. Doris Lange
Chief Justice Austin McCloud
Thomas C. Riney
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

OTHERS PRESENT:

Chief Justice Thomas Phillips
Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt, Soules & Wallace

MEMBERS ABSENT:

Gilbert T. Adams
Frank Branson
Judge Solomon Casseb
Vester Hughes
Donald Hunt
David Keltner
Thomas Leatherbury
John Marks
Steve McConnico
Charles Morris
John O'Quinn
Tom Ragland
Harry Reasoner
Judge Raul Rivera
Broadus Spivey

EX OFFICIO MEMBERS ABSENT:

Paul Gold
Judge Bob Thomas

P R O C E E D I N G S

Friday, November 19, 1993

8:30 a.m.

MR. SOULES: I guess we'll get started. I'm sorry that we didn't have seating at the table when you got here. There are materials, name tags up here on this table; and then there are some materials that Bill Dorsaneo, his task report and a preliminary report from David Keltner's discovery task force which is also behind us. If you don't have copies of those, you can pick them up when it's convenient. We aren't going to get to those materials probably before the morning break anyway, so you can -- we can wait.

I'm Luke Soules. I'm the Chair of your committee. The Supreme Court has over the years given a lot of deference to what this committee has been able to imbue to the Court in its recommendations. I welcome particularly all the new members that the Court has recently appointed and the old members with whom I've had the privilege to

1 work for several years.

2 To my right here is Holly
3 Duderstadt who is the real brains behind the
4 Chair of this committee, because she is the
5 one who puts the materials together and keeps
6 us organized over the months. I think it's
7 been at least a couple of years since we've
8 had a meeting, because the task forces have
9 been working, and these materials are what
10 have accumulated in addition to those that the
11 task forces have generated.

12 At the other end of the room
13 there is Anna Renken who is a court reporter.
14 She will be recording your comments, the
15 proceedings of this committee for the next day
16 and a half, and she asks that you state your
17 name before you give remarks so that she can
18 identify you on the record; and these name
19 tags are not -- aren't written large enough in
20 a room like this for her to be able to read
21 all the way across, so what will be
22 important. She may also at some point, as
23 court reporters do, stop us in midstream at
24 some because of interference with her ability
25 to transcribe. Feel free to do that if I

1 don't help you do it.

2 Again, welcome. And we'll be
3 in session. We have of course the liason
4 member of the Supreme Court of Texas with us
5 today, Justice Nathan Hecht. Justice Hecht,
6 welcome. If you have any remarks, we would
7 appreciate hearing them.

8 JUSTICE NATHAN HECHT: Let me
9 begin by saying that the Court looks upon this
10 group as one of the most important advisory
11 groups that it has. It has existed since the
12 Rules Enabling Act first gave our Court power
13 to promulgate rules of procedure for the
14 courts in Texas. It functions in the same
15 important capacity that similar groups around
16 the United States do including the Rules
17 Advisory Committees to the United States
18 Supreme Court.

19 Over the years in the 50 some
20 years that our Rules of Civil Procedure have
21 been in effect in their present form there
22 have been a number of changes, but they seem
23 to have increased in the late '70s and mid
24 '80s the number of changes and the frequency
25 of changes to the point that we have heard

1 and that makes your presence here all the more
2 important to us, because we are very aware
3 that you devote your time and energies to
4 this.

5 You can see from the materials
6 in front of you that the work over the next
7 several months will be daunting, but I believe
8 we look forward to making some real changes in
9 the Texas Procedure to bring our courts, make
10 our courts ready for the 21st century.

11 Every member of the Court is
12 aware that we are meeting, and they are all
13 interested, and many of them will drop by from
14 time to time during the course of our
15 meetings, and they have authorized me in a
16 rare display of unanimity to express my
17 gratitude to you on behalf of the Court and
18 our very high hopes for the product.

19 So thank you very much for
20 being here. Also let me mention we also
21 operate at another propitious moment in
22 history, which is that we seem to have the
23 blessing of the legislature on this. It has
24 happened that they have a number of other
25 problems to concern themselves with, and they

1 some complaint expressed by members of the Bar
2 that the rules are changing too quickly and we
3 should settle on a set and let them work for
4 several years.

5 We have not made changes in
6 our Rules of Civil Procedure since 1990, but
7 in the few years since then already there have
8 been some of the most profound changes in the
9 operation of our courts across the country
10 that we have seen in the last 50 years and
11 really in this century.

12 So now we are confronted with
13 a number of very important issues that several
14 task forces have been working on, and the
15 Bench and Bar of Texas is waiting expectantly
16 for your wisdom on these changes. The good
17 news I have for you is that the -- my
18 colleagues have selected you among the lawyers
19 of Texas for your experience and intellect and
20 what you bring to the table, and for the
21 wisdom that we can get out of you on these
22 issues. So I pass that compliment on to you.
23 That is the reason why you are here. The bad
24 news is that your compensation is inversely
25 proportional to that experience and intellect,

1 look at this work now as not interfering with
2 theirs, but in supplementing and really
3 relieving them of some of these problems.

4 So as a demonstration of that
5 the Court has been given an additional legal
6 position to help us assimilate your
7 recommendations and pass on our thoughts to
8 you. We have filled that position with
9 Lee Parsley who is seated here to my left. He
10 is now the staff attorney for the Court
11 assigned to my chambers to assist us in this
12 process. So Lee's presence here is not only a
13 relief to us, but is also a nice signal from
14 the legislature that they look favorably at
15 least for now on what we're about to do.
16 Thank you for being here.

17 MR. SOULES: Thank you,
18 Justice Hecht. In the interim since the last
19 rule changes four task forces have been at
20 work, one on sanctions which was chaired by
21 Chuck Herring, one on discovery which was
22 chaired by David Keltner who can't be here
23 today for a family illness matter, and a task
24 force to review whether or not the rules
25 should be essentially rewritten and

1 reorganized which was chaired by
2 Bill Dorsaneo, and a task force on the jury
3 charge which was chaired by Judge Ann
4 Cockran.

5 I thought we would -- my own
6 approach to organizing this meeting, to the
7 extent I'm capable of doing that, I thought we
8 would start with the task force reports and
9 take them one at a time and see if this
10 committee could conclude its proceedings on
11 those reports, at least two, the sanctions
12 report and the jury charge report today.

13 The discovery task force has
14 not yet completed its work, and it's expected
15 within the next month, so we're not going to
16 be looking at a final report for action from
17 them. And the report from Bill is more a
18 discussion item I think than an action item,
19 if I understand that. Justice Hecht, could
20 you maybe tell us exactly what the Court's
21 thinking is on Bill's report?

22 JUSTICE NATHAN HECHT: Well, we
23 just got it yesterday, so we haven't had time
24 to think about it too much; but one of the
25 reasons for the appointment of Bill's task

1 force was to consider recodifying all of the
2 Rules of Civil Procedure. You'll see from the
3 introductory memo to his report that there are
4 some very strong reasons for regrouping and
5 recodifying the Rules of Civil Procedure much
6 the same way that the recodification process
7 has proceeded in the legislature, the way the
8 TAP Rules have been regrouped; and there are
9 some very good reasons for this.

10 We are -- the Court is
11 sensitive to complaints that if you go through
12 and re-number all the rules and change them
13 all around, it's going to mess up legal
14 research, it's going to cause complications
15 with carry-over citations of authority from
16 the old rules to the new rules; but by the
17 same token if real progress can be made by
18 doing this, then we're very much in favor of
19 that. So as this proceeds we kind of need to
20 keep in mind the possibility of regrouping
21 Rules of Procedure to accomplish that.

22 MR. SOULES: Okay. With the
23 Court's concurrence the Chair appointed
24 subcommittee Chairs and Vice-Chairs. In each
25 case where there was a task force the

1 Vice-Chair is the person who chaired the task
2 force. As far as the sanctions task force is
3 concerned the sanctions report, Steve Susman
4 is the chair for Rule 215, and actually that
5 that should include 13.

6 I'm sorry. Joe Latting is the
7 Chair of 215; and actually I should say 13
8 also, because that's made a part of the
9 report. And Chuck Herring is the Vice-Chair.
10 If you two of you would proceed to give us a
11 report on 215 and 13. So I'll call on you,
12 Joe, to begin.

13 MR. LATTING: Thank you,
14 Luke. I am Joe Latting, and I'm pleased to be
15 here. I don't think I'm officially a member
16 of this committee yet, but Luke said that
17 didn't matter.

18 MR. SOULES: You did a good
19 job.

20 MR. LATTING: In January I
21 will be. But also I didn't know that we were
22 in charge of work on Rule 13. We haven't met
23 yet since we were just appointed. What we'll
24 do is after we hear the remarks of the members
25 of this committee today and hear some of their

1 views we'll schedule a meeting at the
2 convenience of the members of the committee
3 and hear what people feel needs to be done
4 with sanctions.

5 Really the thing to be done
6 today I think is to hear from Chuck Herring
7 who has produced a very high-quality report
8 here on sanctions in the task force work. I
9 guess everyone has that. It certainly is a
10 place to start, and so without further adue
11 I'll recognize Chuck.

12 MR. HERRING: You have the
13 task force report. I doubt that anyone other
14 than those who are here who had to be on the
15 task force have read it. I'm not sure why
16 anyone would want to read all of it, but
17 anyway, you have that.

18 And I don't know how you want
19 to proceed, Luke, but I assume that the
20 subcommittee that have some jurisdiction on
21 this will meet and carve this up and play with
22 it some more, and then we will re-gather at
23 some point with specific rules in front of us
24 proposed that people have had a chance to
25 read.

1 But for now what I can do is
2 give you a little background of what the task
3 force did and point you to some of the rules
4 or at least those two you mentioned, Luke,
5 that I guess Joe and I am charge of in this
6 committee. We have a few other members of the
7 committee. We have the always voluble Rusty
8 McMains is here and the always hard working
9 Judge Scott Brister. I see a number of the
10 people who participated here. "Voluble" is a
11 compliment to you, Rusty.

12 The task force started in and
13 was appointed June 19th of 1991 by the
14 Supreme Court just as the other three task
15 forces were appointed the same day. We had 10
16 members. We had lawyers and judges. We had
17 about 40 other people who showed up at one of
18 the first two or three meetings. Over time
19 attrition kind of wore them down, and we ended
20 up with a smaller and smaller group. We had a
21 lot of people who participated in the
22 process.

23 The background as we
24 understood it was that the 1984 amendments
25 which increased sanction practice in Texas

1 really in an effort to decrease the amount of
2 discovery dispute, the pendulum had swung a
3 little too far the other way, and we ended up
4 spending too much time and effort on
5 sanctions. Tommy Jacks and others have
6 written about that and have raised the issue;
7 and with kind of that background we read
8 everything we could find and started looking
9 at the sanctions including obviously Rule 13,
10 the pleadings sanctions rule; Rule 215, the
11 discovery sanctions rule which was the major
12 focus, but there are several other rules that
13 had minor changes and provisions. We tried to
14 look at those as well.

15 We tracked the pending Federal
16 Rule amendments that are being developed at
17 the same time, Rule 11 in particular. We
18 spent a lot of time with the ABA litigation
19 section standards which are in the back of the
20 report. We sent out a questionnaire. We had
21 250 responses from lawyers and judges about
22 evenly divided between lawyers and judges, and
23 the responses were interesting.

24 I'll mention just a few of
25 them. Basically the lawyers and judges agreed

1 on a lot of the kind of simple conclusions
2 about sanctions practices. They agreed by a
3 very large margin that we're spending too much
4 time and money on sanctions practices in
5 Texas, that the rules have encouraged Rambo
6 techniques and practices, that the rules
7 regarding sanctions ought to be changed, that
8 we should require some form of trial court
9 finding in serious sanctions instances, that
10 sanctions should be discretionary instead of
11 having the mandatory language that appears in
12 some of the sanctions rules, that there ought
13 to be a Safe Harbor Provision in Rule 13,
14 pleadings sanctions rule more or less as it
15 now appears in Rule 11 in the new pending
16 draft, that there should be oral hearings
17 before the serious sanctions were imposed,
18 that the rules ought to include some comments,
19 some commentary that would give a little
20 further explanation of what is going on, and
21 several other items.

22 In the task force report you
23 have all of the questionnaires and all of the
24 results; and it makes interesting reading, I
25 think. Essentially though the changes that

1 were proposed in Rule 215, the discovery
2 sanctions rule attempt to codify the
3 Supreme Court's teachings in Transamerican v.
4 Powell and in Braden v. Downey.

5 Joe Latting told me this
6 morning he looked at the report and went
7 through it and said, "Really all it says is
8 read Transamerican"; and that may be a long
9 way of saying it, but there's a lot of truth
10 in that, kind of the essence.

11 The goals were to try to
12 reduce the amount of time and effort to try to
13 give us some procedure that made sense both
14 when you're dealing with minor sanctions and
15 then when you're getting into death penatly or
16 severe sanctions and to codify those cases.

17 What I'll do, as was proposed,
18 is talk through the Rule 166d proposal in 215
19 and point out some of the changes. Everyone
20 here is going to have to, if you have the time
21 and interest, go read that rule and decide if
22 it works and what is stupid about it, if any.

23 There is no magic to the task
24 force. We had a lot of people that worked on
25 it, but this draft that you will have at the

1 back of this report are the product of
2 compromise, and there is not a huge amount of
3 magic. About halfway into what is called the
4 Report Of The Texas Supreme Court Task Force
5 On Sanctions the appendices start. Appendix A
6 is titled Rule 166d. That's a meaningless
7 number. We stuck that on there simply because
8 we knew that Bill Dorsaneo was going to be
9 revising and reorganizing all of the rules,
10 and that probably the sanctions rule would end
11 up being put someplace closer to the general
12 discovery rules than where it is now. But
13 that Rule 166d was really for practical
14 purposes present Rule 215 as proposed to be
15 modified.

16 Let me get some of the key
17 points. The first sentence there is pretty
18 simple. It is very broad and perhaps somewhat
19 vague; but it's an effort to eliminate a lot
20 of the complicated and confusing itemization
21 that appears in Rule 215 right now of what is
22 sanctionable conduct that's kind of developed
23 and treated over the years; and the idea was
24 that we'd just put a sentence in there that it
25 was not intended to eliminate any of the

1 previous kinds of conduct that were itemized
2 in
3 Rule 215, but simply to have a shorter, more
4 succinct way of pointing to that conduct. And
5 you'll notice if you go into --

6 MR. SOULES: This is at
7 Appendix A? Excuse me.

8 MR. HERRING: Yes.

9 MR. SOULES: Is that correct?

10 MR. HERRING: "Appendix A,
11 Rule 166d" is what it says at the top.

12 And you'll notice there is a
13 long comment to the rule; and it pretty much
14 explains the rule and how it is set up. It
15 says there, for example, in that first
16 sentence it has the itemization, collected all
17 the previous kinds of specifically itemized
18 misconduct, and said that the rule is not
19 attempting as amended or as proposed to
20 eliminate any of that.

21 Section 1(a) deals with the
22 motion, and we tried to clarify what kind of
23 motion you have to file and what ought to be
24 in it and how it is handled. The motion is
25 supposed to be specific. You'll notice in all

1 of these proposals in the sanctions report we
2 have proposed eliminating sua sponte
3 sanctions; and there has been some
4 disagreement in the case law about when you
5 can and when you can't have sua sponte
6 sanctions by the Court.

7 The idea there was we've got
8 too much sanctions practice, too many people
9 filing sanctions motions. If the parties
10 don't care about it, why should the Court get
11 into sanctions practice? You may have intent
12 where they may need to do something there, but
13 it is pretty simple for a judge to invite a
14 motion, and if somebody is upset, they're
15 going to file it, and that that was one way to
16 perhaps reduce a little bit of some of that
17 sua sponte work.

18 There is a basic requirement
19 of an oral hearing, and we set out some
20 procedural sections, or tried to, that would
21 apply in major sanctions cases. And I'll talk
22 about a term on that, what will we talk about
23 as major sanctions in a moment. But the idea
24 is that there ought to be basically an oral
25 hearing unless the parties waive it, which

1 they're free to do, if there are what we call
2 substantial sanctions.

3 And in Paragraph 2 there is a
4 basic distinction that I really hope you will
5 think about and decide if it makes sense or
6 is practical or not. We were trying I think
7 with the leadership of Judge Brister to
8 distinguish between cases where somebody
9 doesn't answer interrogatories, or you just
10 need to go to court to get a response. It's
11 not a major, terrible, egregious sanction
12 situation, but you still have to go to the
13 courthouse and you ought to be able to get
14 attorney's fees. You ought not to have a very
15 detailed procedural exercise to just have the
16 judge say, "Answer the interrogatories, and
17 here is \$250 attorney's fees." It ought to be
18 simple.

19 That is different from a
20 potential death penalty or major sanction.
21 And that's the theme, that distinction, that
22 we tried to build into the rule here. Thus
23 the Paragraph 2 of the rule which is entitled
24 "Relief" really attempts to deal in
25 significant part with that minor sanctions

1 situation.

2 But going back to the
3 beginning here just when you file your motion
4 it is pretty much standard. We require a
5 certificate of conference as we now have under
6 Rule 166b(7) before someone files a sanctions
7 motion. The hearing that would be required
8 unless waived by the parties or unless you're
9 dealing with a minor sanctions situation is
10 set out in Paragraph 1(b).

11 And then we say what the Court
12 should base its decision on, because there is
13 not really anything in the rule right now that
14 says that, and that is itemized in Paragraph
15 1(b). And then we talk about about the order
16 in Paragraph 1(c), and it would be a written
17 order. We make clear that sanctions, this
18 proposal does, may be against the party or a
19 lawyer or a law firm. Obviously that has been
20 up in the air, or there have been a few gaps
21 in the Federal practice in this regard.

22 And then we come to kind of a
23 fun part, and that is under Paragraph 1(c) the
24 order and the findings issue. Should a trial
25 court have to make findings before it imposes

1 sanctions? And the basic approach that this
2 rule adopts is if there again are substantial
3 sanctions, yes, unless the parties waive it.
4 Should the judge have to enter a written
5 finding? We decided, again with the
6 leadership of Judge Brister, I think, that
7 "no," because a lot of our trial judges
8 because we underfund our trial judges in
9 Texas, they don't have secretaries and don't
10 have the time to be able to write up findings,
11 and it gets to be a little bit of a joke
12 sometimes when the other side just submits
13 written proposed findings to be signed. But
14 at least the judge ought to state findings
15 into the record.

16 And the four elements are set
17 out there that need to be stated in those
18 findings in the substantial sanctions
19 situation. Number one, the conduct merit in
20 sanctions. Number two, the reasons for the
21 Court's decision; number three, why a lesser
22 sanction would be ineffective; and number four
23 which really goes to a death penalty
24 situation, if a sanction would preclude a
25 decision on the merits of a claim,

1 counterclaim or defense, the conduct
2 demonstrating that the party or the party's
3 counsel has acted in flagrant bad faith or
4 with callous disregard to the rule. You'll
5 recognize a lot of that language as being
6 pulled directly out of Transamerican and
7 Chrysler v. Blackmon. But anyway, that's the
8 findings provision there.

9 The relief Paragraph 2 that I
10 had earlier alluded to which deals, first of
11 all, we clarify that you can still get an
12 order to compel and an order to quash
13 discovery as provided in 166b, and this rule
14 is not entitled to change that practice. And
15 then it goes on to say in addition so long as
16 the amount involved is not substantial, the
17 Court may award the prevailing party
18 reasonable expenses necessary in connection
19 with the motion including attorney's fees.
20 And then
21 it -- we have a provision that simply says the
22 Court may presume the usual and customary fee
23 in connection with the motion is not
24 substantial unless circumstances or an
25 objection suggests that it may preclude access

1 to the court. So again, this is basically a
2 small motion, a little bit of attorney's fees,
3 a simplified procedure is what the goal of
4 that is.

5 Now, what's substantial?

6 That's a good question. And we wrestled with
7 that that we could either come up with a
8 clear, bright line artificial and arbitrary,
9 or that we could have a flexible standard that
10 is vague; and that's I guess the limit you
11 always have in writing the rules. In the
12 comments someplace we say as long as the
13 amount awarded -- "the additional safeguards
14 are required unless waived by agreement. If
15 the amount involved is substantial either in
16 absolute terms or in relative terms taking
17 into account financial resources of the
18 parties or entity liable," so it's a relative
19 standard.

20 Why have a relative standard
21 on what is substantial? We had Legal Aid
22 lawyers who made the point that a sanction of
23 \$100 for someone who is indigent may be very
24 substantial and have a real impact, whereas a
25 sanction of \$10,000 for IBM may not be

1 substantial. That approach may or may not
2 work and you may or may not like that
3 distinction, but that was the idea: more
4 procedural protection of "substantial," and
5 that would be a relative standard. Does that
6 get us into a Lunsford kind of situation where
7 every time you want to have a hearing you've
8 got to decide, "Well, what is this, what is
9 the financial status, does this outfit really
10 have a bunch of assets or not, what is the
11 trial judge going to do?" As a practical
12 matter in any questionable case he or she will
13 have a hearing, and we'll go from there, the
14 procedure from there.

15 Anyway, that was how that came
16 out. Paragraph 2 continues the ability of the
17 trial court to apportion expense awards and to
18 kind of go back and forth between the parties
19 or award no expenses.

20 Paragraph 3 is entitled
21 "Sanctions," and this lists the Paragraph 3
22 sanctions, "If the Court is going to award one
23 of these, it must go through the hearing
24 procedure." There is not a lot of difference
25 in these sanctions than you would see in the

1 current rule. They are very similar. That
2 list is. There is a little bit of
3 clarification, a couple of changes I want to
4 draw to your attention or at least a couple of
5 items that the cases have been split on.

6 The rule however at the
7 beginning says that -- again, this is language
8 right out of Transamerican and out of
9 Chrysler. "Any sanction imposed must be just
10 and must be directed for remedying the
11 particular violations involved. The sanctions
12 should be no more severe than necessary to
13 satisfy the general purposes." And then it
14 lists the sanctions.

15 Let me mention a few of them.
16 The rule alludes to "reprimand," and in fact
17 we've had just a little recent discussion
18 about the reprimand provision on our task
19 force. Should a judge be able to reprimand
20 someone without going through the procedural
21 rigmarole? Part of the answer to that is,
22 "What is a reprimand?" Is a reprimand when
23 the judge off the record says, "You guys have
24 got to cut out this discovery feuding. This
25 is a waste of all of our time. Let's get down

1 to the meat of the case"? Or is a reprimand
2 where a judge says something on the record
3 that is more formalized, actually a written
4 reprimand?

5 The reason that that was
6 considered important or that we talk about it
7 at some length was the potential effect of a
8 reprimand. We are seeing that more and more
9 in Federal Court. There have been some
10 instances where lawyers have had their careers
11 and their reputations and their clients,
12 reputation of clients affected very negatively
13 by reprimands.

14 "Reprimand doesn't sound bad.
15 Who cares what the judge said." But it can
16 have an effect. When you fill out your
17 certification form if you've been certified in
18 Texas in an area of practice, there is a
19 question on there "Have you ever been
20 reprimanded by a judge?" So it can have some
21 effect.

22 We are seeing it more in the
23 grievance setting. I recently defended a
24 lawyer in the grievance setting where the
25 basis of the grievance was the sanctions order

1 which contained a reprimand and a finding that
2 talked about the lawyer. So there was
3 consideration that reprimand really is and can
4 be very significant and that ought to be
5 considered a substantial sanction and there
6 ought to be protections built in.

7 Nothing is going to prevent
8 the judge from having that warm conversation
9 off the record saying, "Lawyers, you have got
10 to stop this. Party X, You need to stop this
11 kind of conduct in the case." That's one
12 thing we talked a little bit about.

13 The Paragraph 3 or Item 3(c)
14 there talks about assessing a substantial
15 amount in expenses including attorney's fees
16 of discovery or trial. That's the substantial
17 financial award would come under that, except
18 that you will also see that Paragraph or
19 Subpart (g) there refers to granting to
20 movement a monetary award in addition to or in
21 lieu of actual expenses. So even above
22 attorney's fees that would allow a financial
23 award.

24 Should the rule have that?
25 Should it not have that? The cases right now,

1 as you know, are split in terms of whether
2 there must be a sanctions monetary award that
3 is tied to actual expenses, or whether the
4 judge has the authority to go farther in some
5 cases and say, "Well, there may not have been
6 much lawyers fees here or other expense, but
7 darn, this is a time where there ought to be a
8 financial negative deterrent applied in this
9 case."

10 The Justice Gonzalez'
11 concurring opinion in Transamerican and the
12 ABA standards and most the commentators would
13 allow at least the possibility of a financial
14 award over and above attorney's fees in a
15 severe sanction situation. One of the
16 subissues that we talked about a lot, we
17 didn't find solutions for, but it relates to
18 that a little bit, is the problem of legal
19 malpractice. As you know, most legal
20 malpractice insurance policies have an
21 exclusion for amounts awarded as penalties or
22 sanctions, and that creates the ironic
23 situation that in some cases it's better if
24 the judge death penalties you out of
25 existence, because then the client can sue the

1 lawyer and recover under the malpractice
2 policy; whereas the sanctions, the monetary
3 award may not be. There is nothing we can do
4 about that that we can think of, but that is a
5 problem out there.

6 We are also beginning to see
7 in Federal Court, as you've noticed probably,
8 some cases where the judges hold Lawyer X, and
9 there have been a couple of these in
10 government lawyer cases, "You cannot get
11 reimbursed from an insurer, law firm, anybody
12 else. This is personal financial sanction
13 penalty that you pay." We didn't try to get
14 into that or address it.

15 The other sanctions are pretty
16 clear. You'll notice Part (h) there requiring
17 community service, pro bono legal services,
18 Continuing Legal Education or other services.
19 Judges are doing that, those kinds of things
20 all over now. Obviously Braden involved an
21 award or a requirement of the performance of
22 10 hours of community service for the Harris
23 County Protective Services or Child Protective
24 Services Agency to the lawyer, and that's been
25 affirmed now going back. And then judges are

1 awarding or requiring Continuing Legal
2 Education. We tried to clarify that in the
3 broad language of the rule.

4 And then we continue to have
5 the broad last provision there under Paragraph
6 3 which would allow other orders as are just,
7 the theory being the judges need to have the
8 freedom to adapt and creatively adapt
9 sanctions practices involving fact situations
10 experiences.

11 Paragraph 4 is the compliance
12 paragraph, and that is really just a Braden
13 paragraph is what that is. It says, "Monetary
14 awards pursuant" and those subparagraphs above
15 that deal with monetary awards "shall not be
16 payable prior to final judgment unless the
17 court makes written findings or oral findings
18 on the record stating why an earlier
19 assessment of the award will not preclude
20 access to the court." That essentially is
21 exactly what Braden says.

22 One difference there is, that
23 again, we would allow the trial judges to make
24 oral findings on that point stated in the
25 record; and Braden I think talks in terms of

1 written findings.

2 And then the personal service,
3 the next sentence there, the personal service
4 sanctions under Paragraph 3(h) also would have
5 to be after judgment just as the Court ruled
6 in Braden to allow somebody to appeal before
7 they performed the services. And then the
8 Review/Appeal provision.

9 That is a pretty quick
10 introduction as to how that proposal is set
11 up, and there is nothing magic. That can be
12 improved, and some of those concepts the
13 committee may decide that you do not like.
14 Our subcommittee hasn't even addressed the
15 rule yet; and I understand the Chairman here,
16 Latting, is requesting any input and is going
17 to meet at some time to address that. That's
18 Rule 215.

19 MR. SOULES: Okay. We
20 would --

21 MR. HERRING: I can talk about
22 Rule 13, if you want.

23 JUSTICE NATHAN HECHT: Let me
24 say that the Court of Criminal Appeals has a
25 liason to this committee also, and he is a

1 senior judge of that court, Sam Houston, who
2 has come into the room.

3 MR. SOULES: Good morning,
4 Judge. Welcome. Nice to see you.

5 MR. SOULES: By way of
6 clarification, we want to try to get this done
7 today, if we can.

8 MR. HERRING: That's up to the
9 committee, if everyone here has time --

10 MR. SOULES: We're here --

11 MR. HERRING: -- to analyze
12 and digest and make improvements. That's fine
13 with me. It seems a daunting task. Whatever
14 you want to do.

15 MR. SOULES: Well, we have a
16 lot on the agenda. We probably are going to
17 meet at least every other month over the next
18 18 months, and we may not be able to get this
19 buttoned up. Probably we won't, but we can at
20 least get a lot of what we -- we can work
21 through this, see what the committee feels is
22 okay, determine what the committee feels needs
23 additional work in the subcommittee, if there
24 is any such additional work that is needed;
25 and on this and the Court's charge we would

1 like to get as far as we possibly can today
2 towards the final recommendation to the
3 Supreme Court on what the committee
4 recommends, and then go on forward later with
5 other pieces of the agenda.

6 So that the purpose of the
7 debate is clear, we are trying to work through
8 here to say, "This looks fine. This doesn't,"
9 and then debate that out to either resolution
10 or recommendation on how it should be changed
11 and get down to business.

12 MR. HERRING: That's fine.
13 Our subcommittee had talked about going at it
14 a little differently, but we can certainly get
15 all the input or whatever you want to do,
16 Luke. I think our view was in the future at
17 least it would be more helpful to us if we had
18 a subcommittee that proposed a rule in advance
19 of meetings of the subcommittees that were
20 able to meet and let us have some time to read
21 the rules and think about how they work or
22 don't work with the backup materials before we
23 just showed up at the meeting with everybody
24 saying things for the first time. We would be
25 glad to --

1 MR. SOULES: Is this what you
2 have though?

3 MR. HERRING: Well, the task
4 force. The subcommittee hasn't met.

5 MR. SOULES: Right. Okay.

6 MR. HERRING: Would you
7 like -- do you want to talk about that rule
8 now, or do you want me to tell you what the
9 task force proposed for Rule 13?

10 MR. SOULES: What works
11 better for you? Do we need a picture of 13
12 and some of these other rules before us before
13 we go into it?

14 MR. HERRING: I have a
15 judicial ruling to my left from a local judge
16 that we should talk about this first rule
17 first.

18 MR. SOULES: The first rule
19 first. Okay.

20 HONORABLE F. SCOTT MCCOWN:
21 That's only because, Mr. Chairman, that there
22 is something that I wanted to say about this;
23 and I think Chuck's group did a good job on
24 this rule, and what I'm about to say now I
25 went to his group and said, and it was

1 rejected there and may well be rejected here,
2 because I guess I'm just swimming upstream.

3 I think this whole approach is
4 a mistake and there is no tinkering with this
5 rule that is going to solve the problem; and
6 if the Supreme Court would authorize an
7 experiment to pick a dozen or 20 trial courts
8 at random and said, "The rule in those trial
9 courts was motions to compel only, no
10 sanctions," and another 20 trial courts and
11 said, "The rule in these trial courts is
12 Chuck's 166d," and ran that experiment for a
13 year or two years, and then went back and
14 evaluated how fast the cases were resolved and
15 the cost of resolving the cases and the
16 justice that was done, no sanctions is going
17 to be a superior system to sanctions.

18 And sanctions doesn't work.
19 It's satellite litigation. It doesn't produce
20 justice. It's expensive. It's slow, and what
21 we have been trying to do now for years is
22 tinker with our sanctions rule to somehow
23 solve the underlying problems. This rule is
24 no different than the rule we have. It's just
25 fancier, and I think we ought to try something

1 radically different.

2 MR. HERRING: Let me add in
3 addition to Judge McCown there was as least
4 one other that came and said that we really
5 ought to not even rule on attorney's fees, I
6 guess, because we had one discipline. You
7 might even have --

8 HONORABLE F. SCOTT MCCOWN:
9 Well, but this is an area where no rule
10 produces a superior product than a rule.

11 MR. HERRING: And we did not
12 feel as a task force free to go quite that far
13 in terms of, and I would never call Judge
14 McCown radicalizing, but substantial change in
15 current practice. Our effort really
16 was -- he's exactly right -- an incremental
17 effort to try to address some of the problems
18 within the rules under the teachings of the
19 Supreme Court. And he makes a very, very good
20 point, a very good philosophical point the way
21 we do litigation generally. That's something
22 I know Mr. Keltner's task force on discovery
23 and changes in procedure in Federal Court,
24 that all of us are very sensitive to. We felt
25 that Judge McCown, if not ahead of his time,

1 was ahead of our time and our task force and
2 couldn't go that far. We were sympathetic to
3 his perception of the bigger problem here.

4 And do sanctions work? The
5 other place that came up very strongly was on
6 Rule 13; and again the Legal Aid community
7 perceived use of the groundless pleadings
8 sanctions to chill kind of cutting-edge
9 advocacy, and certainly when we get to Rule 13
10 we can talk about that. We didn't find it
11 quite as big a problem in Texas as they did in
12 Federal Court, but a very strong argument was
13 made by a number of people that that rule
14 ought to be abolished completely, that you've
15 got summary judgment. You don't need to have
16 sanctions, because you can file pleadings that
17 ultimately some Court decides to grant.

18 MR. SOULES: Steve Susman.

19 MR. SUSMAN: My question is,
20 if the lawyer's position in the Bar of the
21 State is that sanctions have been over-used
22 and has spurned a lot of unnecessary expenses
23 for litigation, if you're still going to have
24 rules that allow a Court to impose sanctions,
25 why don't you make them real specific? Why

1 don't you provide the laundry list around the
2 state to whoever will use it. Why don't you
3 define what "substantial" means rather than
4 have -- I mean, you are just creating more
5 litigation by making the terms general. I
6 mean, if you're going to have them, they will
7 do less harm I think if they are clear, red
8 flags for the Bar "If you do this, you're
9 going to get punished, and this is how much
10 and how quickly" rather than create this whole
11 body of jurisprudence and court decisions and
12 arguments over these kinds of terms.

13 One thing that occurs to me,
14 for example, on the sanctions which are the
15 monetary sanctions which are not substantial,
16 why even have them? If they aren't
17 substantial, what is it discouraging anyone
18 from doing? Just get rid of them.

19 MR. HERRING: You've got two
20 questions there. We had exactly that same
21 debate at a length of some hours, and there
22 are stated strong positions both ways. This
23 is a, as I said, a product of compromise; and
24 you'll see it kind of does both things. That
25 is we have a general statement in the first

1 sentence of Paragraph 1; and then if you look
2 over at the comments to Paragraph 1, you'll
3 see that it alludes to the same itemization
4 and tries to clarify to some extent the same
5 itemization that you extract from all the
6 different cumbersome provisions in Rule 215
7 now, but you are correct in that it is two
8 ends of the spectrum. One way is specific and
9 clear in a laundry list, or you can have some
10 general language and have some guidance in the
11 laundry list in the way it appears in the
12 comment to the rule.

13 The reason we didn't say,
14 "Here's the laundry list" is because, and I
15 think there is some judicial sentiment to this
16 effect, it's very difficult to have an
17 all encompassing laundry list that imagines
18 every way we lawyers can engage in
19 sanctionable conduct of creative, devilish
20 people. And some of the judges wanted to not
21 try to end up with what purported to be an
22 absolutely exhaustive list; but you can argue
23 both sides of that issue.

24 MR. SUSMAN: You have to weigh
25 the possibility that the bad conduct would go

1 unpunished because it's not specifically
2 prohibited with the weight of judicial
3 research in litigating what is bad conduct
4 every time.

5 MR. SOULES: Ken Fuller.

6 MR. FULLER: My question, does
7 your proposed 166d take over the 215 sanctions
8 regarding experts, or is the 215 provision the
9 exclusion, nondesignated experts don't
10 remain?

11 MR. HERRING: It was moved.
12 There are other rules in here we haven't
13 gotten to that would deal with experts.

14 MR. FULLER: Will deal
15 specifically with experts?

16 MR. HERRING: We have a whole
17 section in here on that, and it's pulled out
18 of that rule. We also thought that Judge
19 Keltner in the discovery context might end up
20 addressing that.

21 MR. FULLER: Okay. It's not
22 what we've gone over so far though?

23 MR. HERRING: No. It's a
24 different proposal in here. And without going
25 through that, let me go back to Steve's point,

1 and we can come back and talk about
2 recommendations and report on that.

3 MR. FULLER: Okay.

4 MR. HERRING: But your second
5 point on the nonsubstantial, why have them at
6 all, why say anything, part of it is are
7 attorney's fees ever a sanction? Are they
8 ever a substantial sanction? And if they are
9 a substantial sanction, we all believe they
10 can be at some level, a million dollars or so
11 of sanctioned attorney's fees, then should you
12 have some procedural protections on those?
13 Yes, if they're large. If they're going to
14 get small, you almost have to have some
15 language to carve them out and say, "No, you
16 don't have to do all this with smaller
17 sanctions." That's why there is the
18 distinction drawn in the rule to try to not
19 have to have a hearing in every case, but to
20 recognize that in some cases expenses can be
21 very much a real and severe sanction.

22 MR. SOULES: Alex Albright.

23 PROFESSOR ALBRIGHT: I'd like
24 to go back to Judge McCown's point about
25 revolutionary changes. I think this whole,

1 all of the task forces are going to be coming
2 out with revolutionary changes; and I know
3 that the Court and this committee has been
4 criticized for making changes without knowing
5 what the results of those changes are; and it
6 seems like now is the time to look at what the
7 effect of what we're going to do is, and maybe
8 we should look at more revolutionary changes
9 since this is going to be the only time. I
10 know Justice Hecht has been revising Rule 95.
11 I really thought we have two years. Maybe we
12 should talk about that. Is that something we
13 can do if we need to do it and it's at all
14 practical?

15 MR. HERRING: That's being
16 done on the Federal level with the 1990
17 Improvements Act Committees. All the plans
18 are being put in effect in different judicial
19 districts and federal districts around the
20 country.

21 MS. ALBRIGHT: We can
22 certainly look at what they're doing. It
23 seems like if we have two proposals on the
24 table for discovery or whatever, it makes
25 sense to do some experimentation over a period

1 of time and see what works. I think we can
2 all imagine what might work the best or make
3 changes based on cases that have come down
4 recently, but maybe we should do some major
5 experimentation.

6 HONORABLE F. SCOTT MCCOWN: Is
7 that a possibility?

8 MR. SOULES: Scott McCown.

9 HONORABLE F. SCOTT MCCOWN:
10 Well, I was going to ask Justice Hecht, I know
11 the Court has authorized experimentation with
12 electronic recording as opposed to
13 court reporters in some local courts. Would
14 the Court be willing or do you think there's a
15 possibility to actually do some big
16 experimenting?

17 JUSTICE NATHAN HECHT: I think
18 the Court would certainly consider it, and it
19 might well be possible. The problem, of
20 course, is measuring which one is better; and
21 we can get apocryphal and those kinds of
22 information that sometimes is not all that
23 helpful, or you can get, try to devise some
24 sort of study. And if you did the latter,
25 you'd have to have the funding, and I don't

1 know what the prospects of funding would be.
2 You might get some grant money some way, but
3 other than that I don't know.

4 MR. LATTING: I was wondering
5 if you were going to publish a list of courts
6 in which you can't be sanctioned. I can go
7 on.

8 MR. SOULES: Judge Brister.

9 HONORABLE SCOTT A. BRISTER:
10 Yes. The idea was, I mean, sanctions is just
11 another name for punishment. I was taught if
12 you've got a rule with no punishment, it's not
13 a rule. It's a suggestion. If we want to
14 just make the discovery rules and discovery
15 suggestions, that's fine; but if they're going
16 to be rules, there's got to be some penalty to
17 doing them. And those penalties are
18 sanctions.

19 Now, the vast majority of the
20 time the sanctions have to do with people that
21 forgot stuff, or were slow with stuff, to busy
22 to do other stuff, and they imposed on
23 somebody else their attorney having to do more
24 than was reasonable, more than was expected,
25 more than would have been required if they

1 would have followed the rules. The question
2 is whether the client, somebody else's client
3 who was innocent of all of that should have to
4 pay their attorney to do that. And the idea
5 is very simply one of justice, no, they
6 shouldn't. Whoever caused that extra expense
7 ought to bear it.

8 Now, that is normally a small
9 amount. That is the vast majority of them, so
10 the idea of the rule was to cover those with
11 the existing practice, because I don't think
12 the cases that have addressed sanctions have
13 been the \$250 or \$500 sanctions assessments,
14 that the perception is that those are being
15 abused. I don't think most attorneys think
16 those are being abused. When they have to pay
17 them, they have to incur them, they want to
18 get them back.

19 Unfortunately the problem was
20 the cases where some judges who may not have
21 wanted to try the case, or just got frustrated
22 or tired or it was a bad day decided to do
23 something significantly more than that; and
24 the idea of the rule in accordance with
25 Transamerican and Downey is to make that very

1 difficult to do, so make it just as hard to do
2 that so that the judges in those cases tries
3 other things first.

4 I don't see really any way to
5 avoid those things if you want to have
6 discovery rules and if you want to avoid
7 situations where judges just do something out
8 of hand that really prejudices a client in a
9 case.

10 HONORABLE F. SCOTT MCCOWN:

11 Luke, could I respond to that, because I think
12 that's a really important point? I think the
13 reason sanctions cannot work as punishment is
14 because most discovery problems are the result
15 of requests that are at a level of abstraction
16 that require the responding lawyer to do work
17 that he's either not smart enough to do or too
18 lazy to do or comes at too great a cost to do;
19 and punishing him will not solve his laziness,
20 will not make him smarter, and will not put
21 money in the client's pocket that is not
22 there.

23 And as far as the
24 reimbursement goes, the idea that, "Well, the
25 other lawyer and his client are out the bucks;

1 they need to be reimbursed," the cost to them
2 of getting that reimbursement exceeds what
3 they get in two different ways. It exceeds it
4 in an absolute way that pursuing the sanctions
5 is ultimately going to turn out to be more
6 expensive than the reimbursement he's going to
7 get. But it exceeds it in another way, which
8 is that as a whole the sanctions burden the
9 system resulting in them not being able to
10 process their case in a speedy, cheap way
11 because everybody else is processing their
12 sanctions cases.

13 I think that the cure is worse
14 than the disease. If you have an order to
15 compel, and if the order to compel is not
16 complied with, then it can be followed with a
17 motion for contempt. I mean there are ways
18 that the Court can punish and enforce its
19 order at the level that it really becomes a
20 specific order telling a guy to do something
21 that he doesn't do.

22 So you can put teeth into an
23 order to compel after the order, but the
24 sanctions process winds up as just not being
25 worth it either in an individual case or when

1 you look at what it does to the total system.

2 MR. FULLER: That sounds to me
3 like you want to roll the clock back about 15
4 years. Some of us remember when we used to
5 have to do that, and it sucks with problems.
6 It is just the worse possible system that you
7 have got to go down there two times to get it
8 done.

9 MR. SOULES: Let's focus for a
10 moment on Judge McCown's idea of having no
11 sanctions and see what the committee's
12 consensus is on that to begin with. Dan
13 Price.

14 MR. PRICE: Yes. Dan Price.
15 It just seems to me that there is about 90
16 percent of the discovery requests I send out
17 they come back just fine; and the reason they
18 come back fine, and I'm not at the courthouse
19 and nobody ever knows that the other side did
20 just fine in their discovery is because there
21 are ultimate sanctions that people are afraid
22 of; and I don't think we want to throw the
23 baby out with the bath water here.

24 MR. SOULES: Richard Orsinger.

25 MR. ORSINGER: I think we

1 ought to distinguish the recovery of fees
2 incident to resolving the discovery dispute
3 from sanctions that go beyond mere
4 reimbursement, and that you can more easily
5 justify the recovery of fees to someone who
6 has had to go to court to get discovery proper
7 from striking the pleadings or finds that go
8 way beyond the cost of going to court. And if
9 we make that distinction, then it might be a
10 little easier for people to focus on whether
11 we ought to go past reimbursement to
12 punishment. Right now I think we are mixing
13 them together.

14 MR. SOULES: Does anyone have
15 a response?

16 MR. BECK: I don't have a
17 response. But Judge McCown, do you anticipate
18 your sanctionless plan to allow
19 reimbursement?

20 HONORABLE F. SCOTT MCCOWN: I
21 could live with that.

22 MR. BECK: I could see a
23 scenario if a guy had to go to court two or
24 three times to get somebody to comply with the
25 rule that was costing your client some money

1 in attempting to help the client. I would,
2 while I've got the floor, I would also note
3 that with the Federal system there were early
4 implementations in the districts that did
5 their plan pass and was able, were able to
6 generate data that the judicial group is
7 looking at. It's not unprecedented.

8 MR. SOULES: Anyone else?

9 MR. PERRY: I had a case a
10 number of years ago in which the ultimate
11 sanction was imposed against a large
12 nationwide company, and in other cases around
13 the country and around the state in which I
14 was not involved that company began to
15 supplement discovery frantically over the next
16 few months, and apparently in 50 or 60 other
17 cases a tremendous number of discovery
18 disputes were quickly resolved. And it
19 occurred to me that Dan Price's comments about
20 not throwing the baby out with the bath water
21 and how the fear of those sanctions sometimes
22 makes the process run smoothly is something
23 that we should bear in mind.

24 MR. SADBERRY: I'd like to ask
25 Judge McCown do you have any data from any

1 other state systems where such an experiment
2 has been used and any type of response,
3 activity, results, any that have come from
4 that?

5 HONORABLE F. SCOTT MCCOWN:

6 Not that I know of. I've only been practicing
7 12 years, so my memory doesn't run back 15,
8 but most people that I have talked to that
9 practices before the time of sanctions had a
10 different reaction than was expressed by
11 Mr. Fuller. Most people I talked to think
12 that the system before we got a great deal of
13 sanctions litigation worked much better. So
14 if we look kind of historically, maybe factors
15 have changed, but...

16 MR. SOULES: Anything else on
17 whether we should attempt to operate either
18 permanently or temporarily with no sanctions?

19 MR. LOW: Somebody is going to
20 be sanctioned. Either he's going to grant
21 that one, or the man that filed is going to be
22 sanctioned. That could cut down in his
23 court.

24 HONORABLE C. A. GUITTARD: On
25 this question of experimentation, I would be

1 very interested in seeing how that kind of
2 experiment would be set up. It seems like to
3 me as indicated by the last comment that how
4 well the system work depends less on the rules
5 than it does on the judge. And how you're
6 going to account for that factor in evaluating
7 the different rules is something that I have
8 real questions about.

9 HONORABLE ANN TYRELL COCKRAN:

10 As a practical matter, and a lot of these
11 problems do bubble down to practicality and
12 how they work, which has a lot to do too with
13 what Judge Guittard said and also to the
14 lawyers; but as a practical matter one of the
15 things that I have seen resulting in a very
16 dramatic decrease in the number of motions for
17 sanctions filed has been rather strict
18 enforcement of the rule that the lawyers
19 actually try to work it out before the motion
20 is filed. And in Harris County we had a local
21 rule that predated the statewide rule
22 requiring conferences, but our local rule
23 required actual human conversation between the
24 lawyers.

25 And I really suggest that in

1 looking at the universe of sanctions that we
2 look at strengthening the language rather than
3 saying "I have attempted to resolve this and
4 the efforts have failed," which to a lot of
5 lawyers that means they use the fax machine,
6 and to strengthen that to require actual
7 one-on-one contact between the two lawyers
8 involved, not their paralegals, not their fax
9 machines, but the lawyer is as a practical
10 matter going to alleviate a lot of the
11 sanctions problems.

12 MR. SOULES: Okay. The
13 question is whether or not we operate
14 permanently or temporarily with no sanctions.

15 MR. MCMAINS: Judge, frankly
16 the problem I have with the notion that you
17 have no sanctions is that you condone the
18 conduct which many people here in the room
19 have seen of intentional concealment of
20 information, of destruction of documents or
21 evidence; and if you don't give the power to
22 the judges to punish that kind of behavior, it
23 will occur to some extent.

24 We have all seen it happen
25 under the context of the current rule, and so

1 it will damn sure happen if you don't have any
2 rules that sanction the conduct in terms of
3 the merits of the case or the lawyer. The
4 idea that you threaten their law license, you
5 can say that all you want to, but this conduct
6 occurred. I've been practicing law
7 unfortunately a little bit longer than 12
8 years, and I will assure you that that conduct
9 occurred back then when we didn't go to
10 sanctions directly as well; but I don't
11 believe this committee as an arm of the
12 Supreme Court can basically be in the position
13 of telling litigants or their attorneys that
14 they can without impairing the merits of their
15 lawsuit or impairing their own pocketbook be
16 free to destroy evidence, to hide evidence,
17 conceal documents, and to engage in other
18 types of tactics that obviously are
19 condemnatory.

20 HONORABLE F. SCOTT MCCOWN: Of
21 course. And all of that can be sanctionable
22 much more powerfully after an order to compel
23 by way of contempt; and you're talking about a
24 very small amount of behavior at the far end
25 which you say goes on regardless of what the

1 rule is; and what you have to do is
2 effectively catch it and deal with it, and
3 you're talking about a rule that embraces an
4 incredible range of cases at different dollar
5 levels and with different lawyers of different
6 skills; and you've got a rule causing serious
7 mischief in 99 percent of the cases, and you
8 worry about the one percent which can be dealt
9 with in other ways. It seems to me to be
10 unrealistic.

11 MR. MCMAINS: I frankly think
12 that your statistics are backwards.

13 HONORABLE F. SCOTT MCCOWN:
14 Well, what I see as a judge in trial court is
15 a far broader range than what any single
16 lawyer sees; and part of the problem with this
17 committee is it is a high-priced, high-talent
18 committee. And you're going to see cases at a
19 very narrow point on the spectrum, and most of
20 the cases the sanctions rule operates only as
21 a way to screw it up, make it last longer,
22 make it more expensive.

23 MR. SOULES: Anyone else on
24 this subject? Let's take just a show of hands
25 as to how many feel that we should temporarily

1 or permanently try to deal with no sanctions
2 in the practice?

3 HONORABLE F. SCOTT MCCOWN:
4 Could we modify that to say "motions to compel
5 with reimbursement," because I think that's
6 reasonable, is a reasonable approach.

7 MR. SOULES: Let's get the
8 first issue on the table, and then I'll go to
9 that, because that's been a historical subject
10 of debate, the second part, whether we go to a
11 two-step process to reach the ultimate
12 sanctions of whatever; and I know that that
13 was scrutinized by the task force as a
14 separate issue.

15 How many feel that we should
16 attempt to get along temporarily or otherwise
17 with no sanctions?

18 MR. JONES: Are you just
19 talking about an experiment here or there?

20 MR. SOULES: No. We're
21 talking about revising the rules here. I'm
22 not talking about on an experimental basis.
23 If the Court wants to do that, they can do
24 that with the current rules, or they could
25 that with the task force rules.

1 MR. FULLER: Temporarily? You
2 mean until they amend it again?

3 MR. SOULES: Pardon?

4 MR. FULLER: By temporarily
5 then you mean until the rules are amended
6 again?

7 MR. SOULE: Well, by
8 "temporarily" I mean until --

9 MR. FULLER: Okay. Thank you
10 for the clarification.

11 MR. SOULES: -- we get back to
12 another meeting sometime. How many feel
13 that? Did you want to speak?

14 HONORABLE DAVID PEEPLES: I
15 thought his proposal was to run an experiment
16 similar to what was done with electronic
17 recording, which is vastly different than the
18 way you're putting the question.

19 MR. SOULES: I'm not proposing
20 it. That's what I think is one of the topics
21 of discussion. Maybe I don't understand what
22 the topic was.

23 MR. GALLAGHER: Could I have a
24 clarification of what it is exactly that
25 you're seeking, judge, by way of either

1 reformation or modification, temporary,
2 permanent?

3 HONORABLE F. SCOTT MCCOWN:

4 Well, before we got lost in the details of
5 this rule I just wanted to put the fundamental
6 issue on the table, which is I think we're
7 going in the wrong direction, and that what we
8 ought to do, and I'm not wedded to do whether
9 it's no sanctions or whether it's an order to
10 compel first with reimbursement, or whether
11 it's some kind of very stringent modest
12 sanctions. All I'm saying is try to raise the
13 fundamental question before we just skip over
14 it that the way we're going is simply more and
15 more sanctions and tinkering with the rule,
16 and that we ought to moving to some extent,
17 and how much may be a matter of debate, in the
18 opposite direction. And that's all I'm trying
19 to raise right here at the get go, is there
20 any sentiment by anybody to move in the
21 opposite direction and not try to resolve it
22 today. I don't think we could write the rule
23 today, but to look at moving in the opposite
24 direction.

25 MR. SOULES: To what, judge?

1 MR. PRICE: To no sanctions?

2 HONORABLE F. SCOTT MCCOWN:

3 Well, I didn't come with the rule written.
4 But to change the philosophy from moving in
5 the way that Chuck has moved to moving in the
6 opposite direction to look at things like you
7 have to get a motion to compel first, or
8 you're limited to a motion to compel and
9 reimbursement unless intent can be proven, or
10 move some way to make sanctions less a part of
11 the practice instead of more a part of the
12 practice.

13 MR. GALLAGHER: Is there some
14 latitude that this committee can be given to
15 try to, and I understand that the subcommittee
16 may be addressed some of these issues, at this
17 strikes a resonant chord I think with a lot of
18 lawyers who are involved in the trial practice
19 on a regular basis. I know I hear from judges
20 and lawyers generally that sanctions take up
21 too much time; and I know that in
22 circumstances in which there is an omission
23 sometimes to supplement there is motions to
24 strike pleadings, which seems to me to be sort
25 of an overreaction on the part of lawyers that

1 are involved, but nevertheless it's something
2 under the current rules which the judge has
3 latitude to do and can do it perhaps without
4 much notice.

5 And I for one thing am in
6 favor of a system in which we would, or favor
7 an approach to this problem in which we
8 examine some alternatives such as a motion to
9 compel, so that somebody is put on notice of
10 the fact that this is becoming a serious issue
11 in this litigation without, Luke, having to
12 address the problem of sanctions at that
13 hearing initially. And I would favor a system
14 in which something like this is at
15 least examined.

16 MR. PERRY: Luke, as the judge
17 has restated his position, I'm very much in
18 favor of it. I would be very much against a
19 situation in which we go to a system where
20 there are no sanctions available, but I think
21 that it is very important that we change the
22 system to where sanctions and motions for
23 sanctions and motions regarding sanctions are
24 a much reduced part of the practice.

25 I think that the rules need to

1 make a much stronger distinction than they
2 presently do and I think and much stronger
3 than the proposed rule does between the kind
4 of minor infractions that Judge Brister talked
5 about and the kind of major misconduct that
6 Rusty McMains talked about that ought to
7 result in some sort of punishment; and I think
8 that the rules need to try to limit sanctions
9 motions and sanctions hearings to situations
10 in which the kind of major misconduct that
11 Rusty McMains talked about is at issue.

12 MR. SOULES: Okay. What I
13 want to try to do is we can work on this rule
14 or variations of this rule or any other rule
15 if we're going to have rules, and that's what
16 I'm trying to get at now to get down to
17 business working on this rule or some other
18 rule, get down to really scrutinizing what we
19 think the practice should be under the rule,
20 or do we have no rules. How many feel that we
21 need some rules regarding sanctions? Okay.
22 That's a consensus.

23 By way of background, when
24 this committee recommended the -- was it '84
25 changes, Bill?

1 PROFESSOR DORSANEO: It was
2 December of -- I think it went into effect
3 January 1, '84.

4 MR. SOULES: Right.

5 PROFESSOR DORSANEO: I think
6 we talked about it in December of 1992. We
7 worked on it basically from 1989 on.

8 MR. SOULES: Anyway, when this
9 committee recommended in 1983 the changes in
10 the Sanctions Rule 215 this committee
11 recommended to the Supreme Court of Texas a
12 two-tier process by which the first would be a
13 motion to compel, and the only sanction or
14 expense that could be assessed there was
15 reasonable attorney's fees and costs of the
16 motion. And only after an order had been
17 reduced to writing to the extent that it would
18 be punishable by contempt there was a
19 violation that it would be punishable by
20 contempt using those as standards could the
21 other sanctions be imposed.

22 PROFESSOR DORSANEO:
23 Essentially Federal Rule 37.

24 MR. SOULES: The Supreme Court
25 rejected that idea and wrote a rule that took

1 us straight to whatever sanctions the trial
2 court felt was necessary for hearing; and I
3 suppose as I understand the reason for it from
4 the members of the Court at the time it was to
5 permit a judge to address the problem such as
6 Rusty has raised here without having to go
7 through a motion to compel which would be to
8 no avail, destroyed evidence, that sort of
9 thing.

10 There has always been some
11 lingering sentiment here that the Supreme
12 Court shouldn't have done that and Rusty's
13 problem could be addressed some other way.
14 But the task force has also looked at that
15 very carefully. One of its specific charges
16 was to determine whether or not this should be
17 a two-tier process of sanctioning the first of
18 which would be a motion to compel subject only
19 to cost and expenses and legal fees, and then
20 after that a violation of that order would
21 give rise to further sanctions.

22 And, Chuck, what was the
23 debate or the result of that debate? Not that
24 we need to follow it, but so that we have the
25 benefit of it.

1 MR. HERRING: We looked at
2 that very, very, specifically, because the
3 first question or one of the first questions
4 that came up is, "Look. In 1984 the Supreme
5 Court created this new sanctions practice and
6 did not go along with the recommendation of
7 the Supreme Court Advisory Committee that we
8 just established, first a motion to compel and
9 then to go to sanctions."

10 So that was very obvious. Is
11 that a solution to go back to the system that
12 was proposed, the Rule 37 more or less? Not
13 exactly, but more or less the system. And we
14 debated that long and hard, as we will no
15 doubt debate it here. I think Judge Brister
16 was probably one of the most articulate
17 spokespersons for the idea that trial judges
18 ought to have some discretion in some
19 instances that it's just so clear the very
20 first time that people have engaged in abuse,
21 deliberate, callous abuse; and therefore the
22 judge in some instances from the get go ought
23 to have the discretion at least to impose some
24 sanctions rather than make people build up a
25 defense where they have to go through the

1 second step.

2 The whole idea of the rule, if
3 you read through it, it's a lot harder to get
4 sanctions of any significance under this
5 proposal. If you look at the last 50 cases
6 that have been decided by the Court Of
7 Appeals, you'll find out that two thirds of
8 them have overturned severe sanctions, death
9 penalty sanctions. That's the message coming
10 out of the court. The procedure that is in
11 this rule is designed to protect people if
12 there are severe sanctions proposed, but
13 you're not going to want to go through most of
14 this.

15 But anyway, let me turn it
16 over to Judge Brister and let him articulate
17 better than I can the adea of what I guess is
18 the dominant sentiment of the task force that
19 we looked at, is that we should not go back to
20 a two-step system.

21 MR. SOULES: Okay. Judge
22 Brister and then Steve Yelenosky.

23 HONORABLE SCOTT A. BRISTER: In
24 effect the rule does that. In any situation
25 where a motion to compel does any good, it

1 will always be a lesser available sanction
2 that can cover the situation. That's
3 TransAmerican. That's written in the rule.
4 If a motion to compel and attorney's fees
5 filed in the motion will cover the problem,
6 the judge will have to do that. Or if he or
7 she is not going to, they're going to have to
8 explain on the record why that would do no
9 good. If that would do no good, then there is
10 no reason to require that step.

11 This rule as drafted was
12 intended to draw, to have exactly the two
13 different kinds of situations that we're
14 discussing here. One, the 90 percent problem
15 where somebody forgets something, is too lazy
16 to do something, forgotten about something,
17 and get that done; and the 10 percent
18 situation where there are serious, significant
19 criminal acts going on that need to be fixed
20 now, and this rule splits those apart. It
21 makes one easy. It makes the other hard.
22 Maybe it needs to be made harder, but I think
23 for most judges going through, jumping all
24 these loopholes, having to have an oral
25 hearing, other changes like that that are in

1 this rule set up those two very different
2 situations, treat them differently, and that
3 that's what I think the sense of most people
4 on the task force was that that's the way it
5 ought to be.

6 MR. YELENOSKY: Clearly
7 Russell McMains has mentioned the issue of
8 destruction of evidence, and Luke Soule has
9 mentioned that as well. I guess the converse
10 of what you're saying is, and maybe this
11 should be put up to Judge McCown, is if you
12 had a requirement of a motion to compel, how
13 do you deal with things such as destruction of
14 evidence that may be criminal? Is there
15 another way of dealing with those? Would
16 those be dealt with in this rule? And there
17 may be other examples besides destruction of
18 evidence. But that's my question.

19 HONORABLE F. SCOTT MCCOWN:
20 First, to add to my credibility on this
21 argument I want to confess that I'm a few
22 years older than I told you and I've actually
23 been doing this for 14 years, which is getting
24 us closer to the magic 15 year point.

25 All I'm saying is that you

1 could write a rule. This rule makes it not
2 substantively harder, but procedurally harder,
3 which is only going to add to the Court's
4 problem and the party's cost. It's not going
5 to change the outcome of what we're dealing
6 with. If what you want is a way to get an
7 intentional conduct that in fact is criminal,
8 you could write an exception for that.

9 And I guess the question that
10 I'm putting to you is, do we want to try to
11 write a rule that goes in the opposite
12 direction of present law? This is present
13 law. You could write a rule all the way from
14 no sanctions to this, and you've got a
15 thousand miles to play with, and you could get
16 at the limited kind of intentional conduct
17 you're talking about without going this far.

18 MR. SOULES: I think we have
19 to take that in specifics though, Judge. What
20 change would you suggest and where?

21 HONORABLE F. SCOTT MCCOWN:
22 Well, Luke, do we have to resolve this today?
23 If there is sentiment to do it, can we put
24 together a small group and have it at our next
25 meeting?

1 MR. SOULES: We have a task
2 force report on the table. We should address
3 it. If we're going to depart from it, we
4 ought to say I think specifically what it is
5 we dislike about it so that when this
6 committee meets there is some consensus of
7 what its direction should be.

8 MR. JACKS: I respectfully
9 degree. I think that Judge McCown has raised
10 an important issue that this committee, and I
11 appreciate the task force's work, and Chuck
12 Herring and I had many long conversations
13 about it. And but I think that this committee
14 should appropriately address the broad issue
15 of direction.

16 I'm in the 23rd year of my law
17 practice. I cannot remember the last time I
18 was involved in a sanctions hearing. They've
19 never been imposed against me, and I really
20 can't remember the last time I was in a
21 hearing where it was even an issue. But when
22 I go to meetings like the Travis County Bench
23 Bar Conference which we have each spring where
24 many younger lawyers that are coming up half a
25 generation behind me talk about their everyday

1 experiences I hear story after story after
2 story of a generation of younger lawyers that
3 I think are being ruined by the belief that an
4 important part of their law practice is
5 attention to the issue of sanctions.

6 And I think the question of
7 direction is important, and I don't think that
8 it should be incumbent upon Judge McCown to go
9 through and do a red line version of the task
10 force's proposal, but rather to raise in a
11 broad sense as he's done "Do we want to
12 continue down this road, a road that we've had
13 now about a decade's worth of experience on,"
14 or "Do we want to consider another direction?"

15 I do think there needs to be a
16 provision for the kind of sanction that
17 David Perry talked about, for the intentional
18 or criminal violation that Judge Brister has
19 spoken about, but it seems to me that there is
20 a way that we can approach this issue that
21 hopefully will make it less an obsession of
22 the Bar.

23 And I'm particularly concerned
24 about the young members of the Bar. I do
25 think that at the level of the ages of lawyers

1 I see around this table most of us are in a
2 more rarified practice, so I'd say I'd like
3 to see a vote and a record vote on the general
4 proposition that Judge McCown stated.

5 MR. GALLAGHER: Just one last
6 question. Sanctions is not a big part of my
7 practice. I have never filed a motion for
8 sanctions, but I would like for somebody to
9 shed some light on the question of whether or
10 not if you have a circumstance that Rusty was
11 talking about, the contempt powers that the
12 court has previously used in circumstances
13 like this would be capable, would give the
14 Court enough power in a circumstance after due
15 process that the Court was of the opinion that
16 a serious, serious issue of destruction of
17 evidence existed and had a hearing on it,
18 would the contempt powers enable the Court to
19 strike the pleading and impose those kind of
20 sanctions? Do you know the answer to that?

21 PROFESSOR DORSANEO: It's my
22 understanding that the severe sanctions,
23 establishing precluding orders and things of
24 that type that are not in Paragraph 2(b) were
25 developed because the contempt sanction is

1 insufficiently viable a technique to compel
2 compliance or to punish recalcitrants. I
3 think all of us if we spent more than 10
4 minutes thinking about it would realize that
5 giving the trial judge these tools is better
6 than giving the trial judge a ball-peen hammer
7 that is essentially only punitive and pretty
8 much ineffective as a device.

9 Maybe if we have kind of come
10 to agreement on the question of an award of
11 expenses being appropriate when there is some
12 form of non-compliance, perhaps not negligent
13 non-compliance, all we really are talking
14 about is whether we have a one-step or a
15 two-step process. That's what I'm hearing.

16 If the first step is there is
17 non-compliance and we are going to have a
18 motion to compel with the potential award of
19 expenses, that seems to be something that all
20 of us could agree upon; and then even Scott's
21 notion that there can be something more severe
22 later, intent is essentially indicating that
23 the debate is evolving around whether it's a
24 one-step process or a two-step process with
25 the second step perhaps being more

1 sophisticated in some views than in the views
2 of others. And I don't see it as that
3 complicated.

4 I've been practicing for 23
5 years, and this debate sounds pretty similar
6 to debates that I heard 14 years ago. I don't
7 see the issue as being something that requires
8 another group of people to go out and study
9 this for a long period of time.

10 MR. SUSMAN: I'd like to focus
11 on and I'd like to visit the category of bad
12 conduct, the 10 percent category that does
13 require sanctions and requires very special
14 procedures. It should be difficult for judges
15 to impose, and they should be severe. I think
16 those are the kind of sanctions that really
17 motivate lawyers. Lawyers think about the
18 pleading getting stricken, evidence being
19 excluded, kind of bad monetary sanctions.

20 I'd like to talk about the 90
21 percent, the percent of sanctions that this
22 rule makes is easier to impose, okay. That's
23 what is going to cause the volume of work,
24 because you have got to have a motion to get
25 it. Isn't it malpractice for a lawyer not to

1 file a sanction motion to get expense? I
2 mean, I'm seeking reimbursement of legal
3 fees. Someone files a frivolous objection.
4 All right. Actually I don't have to show it
5 was frivolous. He's got to show it was
6 substantially justified to avoid having to
7 imposed upon him my attorney's fees. I mean
8 you really put the English Rule now on every
9 single rule. It has become you make every
10 litigant pay for the price of the ruling of
11 the Court on discovery matters. I think it
12 could have this effect.

13 I think that's what we ought
14 to talk about, the easy, the 90 percent of the
15 cases that will account for the volume where
16 there is going to be a real incentive for
17 lawyers to file the sanctions to reimburse
18 their expenses. There are no oral hearings
19 required. There are no findings required. If
20 the lawyer has got to meet, is that worth it?
21 I mean, have you really accomplished anything
22 with that group of sanctions? Does anyone
23 really -- is that going to affect, tell
24 lawyers how to do business? I don't know.
25 That's a question.

1 MR. SOULES: For
2 clarification, are you suggesting that there
3 not be a vehicle for award of attorney's fees
4 and expenses in connection with a motion to
5 compel?

6 MR. SUSMAN: I guess I am in
7 some ways. That there ought to be serious
8 cases and there ought to be procedural
9 functions in cases, but to have to file
10 motions to get your expenses back.

11 MR. SOULES: Let's see. David
12 Perry, you had your hand up first.

13 MR. PERRY: I would suggest
14 that we approach this on the basis of having
15 two separate rules, one that would deal with a
16 motion to compel, and the other that would
17 deal with serious sanctions, and that we write
18 one rule to deal with the 90 percent of the
19 problems that are relatively minor, and a
20 different rule to deal with the five or ten
21 percent that are very serious, and that we try
22 to draw a bright line distinction between the
23 two to the point of dealing with them in
24 separate rules so that they do not get
25 confused one with the other.

1 HONORABLE PAUL HEATH TIL: I
2 think we've been around the mulberry bush
3 about five or six times here. And is this
4 supposed to be a subcommittee report presented
5 to us to either approve or disapprove?

6 MR. SOULES: No. For debate.

7 HONORABLE PAUL HEATH TIL:
8 All right. Then are we here to debate to
9 instruct the subcommittee as to what we want
10 to do, or what we don't want to do?

11 MR. HERRING: Well, there's
12 not even a subcommittee report, because the
13 subcommittee has never met.

14 HONORABLE PAUL HEATH TIL:
15 That's what I thought.

16 MR. HERRING: All this is is a
17 historical background report from the task
18 force on sanctions.

19 HONORABLE PAUL HEATH TIL: So
20 there really isn't a subcommittee as such.

21 MR. SOULES: Well, I'm
22 regarding the task force report as the
23 subcommittee report for now, and we're going
24 to tee off with that.

25 HONORABLE PAUL HEATH TIL:

1 Okay.

2 MR. SOULES: Or we don't tee
3 off with that depending on how the committee
4 decides to approach this, because the Supreme
5 Court Advisory Committee is a committee, not
6 any one individual. But this has had a couple
7 of years work. It was done under the auspices
8 of the Supreme Court, and it is a very
9 thorough report, gives us something I think to
10 work with or work from. That's what we're
11 trying to do here.

12 Maybe it's not as formal as it
13 should be, but this committee has not always
14 honored all the formalities of committee
15 work. It's really just a working group.

16 HONORABLE PAUL HEATH TIL: I
17 can certainly appreciate that; but my point is
18 that if we're going to debate this, then we
19 really are the subcommittee that is going to
20 decide this issue. Is that what you're
21 saying?

22 MR. SOULES: Well, the way
23 this committee has worked many times before is
24 that we get a consensus of the committee as a
25 whole. And if we don't have a rule before us

1 that we can actually pass on because it needs
2 a lot of rework or it needs new philosophy
3 behind it, then at least the subcommittee gets
4 the benefit of what the philosophy of this
5 committee is, so that when it goes and does
6 its work it is not working in a vacuum. It's
7 responding and bringing things back that are
8 going to be responsive to the consensus of the
9 committee already given.

10 HONORABLE PAUL HEATH TIL:

11 It's in the hope of not working in a vacuum
12 that I'm speaking. What I'd like to know is
13 is there -- I gather there are two
14 philosophical approaches here: One, the
15 sanctions as proposed by the subcommittee; the
16 other, that we shouldn't go that way. Could
17 we just vote one way or the other, because I
18 never have got a consensus here of which way
19 the majority of us want to do one way or the
20 other.

21 MR. SOULES: Another important
22 piece of this committee's work historically
23 and through several Chairs is that the
24 Supreme Court is rarely interested in our
25 vote.

1 HONORABLE PAUL HEATH TIL: I
2 can understand that.

3 MR. SOULES: They are very
4 interested in our comments and our debates,
5 because that gives them the guidance that they
6 feel they need. If we don't develop through
7 listening to everyone who wants to speak to an
8 issue a full basis for the Supreme Court
9 consideration of our rules, then it's not as
10 much help to them as they want.

11 HONORABLE PAUL HEATH TIL:
12 Okay. I understand that.

13 MR. SOULES: So that's why --

14 HONORABLE PAUL HEATH TIL:
15 That being the case, I'll yield to one of the
16 other gentlemen, if you'll come back to me in
17 a minute. I've got a few things to say then.

18 MR. SOULES: Pardon me?

19 HONORABLE PAUL HEATH TIL: I
20 said that being the case, I yield to the
21 gentlemen that have something to say, and then
22 I'll be glad to enter into the debate myself
23 then. I just misunderstood what our purpose
24 was here.

25 MS. DUNCAN: From what I'm

1 hearing there are a lot of different good
2 ideas of how we may can better approach the
3 sanctions problem; and what I for one would
4 like to see I would like to see what happens
5 have it performing if you have an inadvertent
6 violation of the discovery rules rules over
7 here and a serious violation of the discovery
8 rules rule over here.

9 I would also like to see how
10 could a motion to compel, how are you going
11 to -- what is that bright line going to be
12 between the two? How are you going to
13 distinguish those cases where a motion to
14 compel is required.

15 I remember before sanctions as
16 a baby lawyer when nobody paid any attention
17 about anything, and trying to get post
18 judgment discovery even with a motion to
19 compel; and what I would like to see are maybe
20 we can break or maybe we can refer it to the
21 various subcommittee that might form along
22 "Here is what I think the rule ought to be"
23 lines. But let's see what people come up
24 with.

25 I don't want to vote up or

1 down on 166d without seeing what other people
2 think are viable alternatives.

3 MR. SOULES: I think we're
4 talking about a two-tiered process, are we
5 not? Is that what the hands are up to speak
6 to? Judge Cockran.

7 HONORABLE ANN TYRELL COCKRAN:
8 I think that the important focus has to be,
9 and this goes back to what Steve Susman and
10 Tommy Jacks and others have said, has to be on
11 what has been referred to as the 90 percent,
12 although Scott McCown says it's more like the
13 99 percent, and the fact that more and more
14 lawyers, particularly the younger lawyers who
15 are handling that 99 percent many lawyers do
16 not believe that there is any discretion on
17 their part involved on whether or not they
18 should file a motion for sanctions. They feel
19 of the sanctions malpractice, that they have
20 to for every little thing.

21 Oftentimes lawyers will come
22 in and apologize to the trial judge being
23 embarrassed. Since the rule is there they
24 feel that they have to do it even though it is
25 silly. And, you know, it's the 90 percent to

1 99 percent that is the real problem. That's
2 where lawyers are being drained now; and I'm
3 really afraid that if we keep on -- that to me
4 is where the problem is.

5 If we keep on the track we're
6 on now, 20 years from now we're not going to
7 have any more lawyers who can proudly say
8 they've never filed a motion for sanctions.
9 It will just -- we'll be dinosaurs and that
10 will be gone if we don't do something about
11 that.

12 I think that the serious
13 problem where somebody lied to you and is
14 stealing their way through discovery I think
15 it would probably be very easy to get mere
16 unanimity on how to handle those; but the
17 problem is for every little minor infraction
18 or seven-day delay people want to take, you
19 know, children hostage as sanctions.

20 And that's what I think Scott
21 is talking about. That's what trial judges
22 see all the time. That's where the serious
23 problem is.

24 MR. SOULES: Sam Sparks.

25 MR. SPARKS: I think we're

1 getting the cart before the horse. You know,
2 a long time ago when we did trial by
3 ignorance. Nobody knew what anybody else
4 had. We didn't exchange any discovery. We
5 are talking about sanctions for discovery. We
6 made the decision, or the Supreme Court did,
7 that we should have a free exchange of
8 information. We took off on that concept.

9 I say "the cart before the
10 horse" because when we get -- we've gotten to
11 the point now how good a lawyer you are is how
12 well you can hide evidence under the adversary
13 system from the other side. I've never had a
14 sanction, and I just don't do sanctions
15 practice. I filed one under 513c because I
16 wanted the Defendant who was carrying 150
17 pounds of marijuana when he had the accident
18 to tell me that he was claiming the Fifth
19 Amendment to incriminate him. I wanted to
20 tell the jury that. We have a rule that says
21 you can use that. And I've been to
22 San Antonio three times from San Angelo, and
23 that gets expensive, three days of my life.
24 SO I filed one sanction. "You lost. I'm
25 gone. I'm done."

1 But the point is when we
2 change the rules of discovery then the
3 sanctions practice, the bottom is going to
4 drop out of it. It's no longer going to be
5 what it is today in front of the court. We're
6 getting the cart before the horse.

7 And I really like Judge
8 McCown's suggestion for this reason: We're
9 now embarking on the process of teaching young
10 lawyers that to be a good lawyer is how well
11 you can screw the other side. We're
12 destroying the integrity of the Bar because
13 when you hear it every day out on the streets
14 what people think of lawyers.

15 So I'm interested in a concept
16 where we don't train or measure how good we
17 are by how we can keep the other side -- how
18 we can prevent justice from happening, if that
19 makes sense. I'm real interested in the
20 concept of studying what the judge is saying.

21 MR. LATTING: I was just going
22 to say I may be in the minority, but speaking
23 individually I like this rule. I think it's a
24 pretty good rule, and not because I'm a member
25 of the task force. I think it addresses

1 these problems.

2 I don't think that by amending
3 the sanctions rule we're going to address the
4 problem of the fundamental Gestalt of young
5 lawyers. I think that's a much deeper issue,
6 and I'm not belittling it. I think that is
7 important, but I don't think we can do it.

8 Another thing is I think we
9 have got to write a rule here. We can't just
10 say that we're in favor of justice. We're all
11 for that, I guess. The question is, do we
12 need to have a subcommittee meeting, or do we
13 need to -- and get all of these ideas and
14 present them again to the committee, or is
15 this task force a place to start.

16 MR. SOULES: I think the Court
17 wants us to start with this and make some
18 progress as to whether we shuck it and start
19 over again, or whether we --

20 MR. LATTING: I just want to
21 say I'm happy to have numerous and immediate
22 meetings of the subcommittee starting the day
23 after tomorrow literally and have everybody's
24 views, but personally I like this approach.

25 MR. SOULES: We have to

1 develop those views here today.

2 MR. HERRING: Well, let me add
3 to that, a lot of very, very good comments, a
4 lot of good, strong philosophical reflections,
5 almost all of which with a couple of
6 exceptions came before the task force again
7 and again. This is not written in concrete,
8 and it sure isn't art; and the idea was we
9 would give something to this committee for
10 this committee to look at, and if it's
11 adopted, fine; if it's thrown out, fine; if
12 it's changed, fine.

13 One thing that I suggest
14 having spent a good bit of time on this and
15 going through the logistics of writing about
16 40 or 50 drafts, I guess, by the time we got
17 through -- we've got the two-stage drafts.
18 We've got all kinds of drafts in the files --
19 is that if somebody, Joe's subcommittee is
20 going to meet and play with some of these
21 other proposals, what we really need from the
22 committee are more than simply "We like this;
23 we have this philosophical point that we think
24 is very important to be taken into account in
25 the rule."

You need a rule. You need a draft, or you need a revision. And if you're going to do what Joe has suggested, which is say you've got some other ideas and some other proposals, you need to get somebody to either work with the subcommittee to come meet and present it, or give some very, very specific direction, because otherwise you end up recreating the wheel. And it's very, very hard with simply a broad, philosophical direction to sit down and then have a rule that works procedurally.

HONORABLE F. SCOTT MCCOWN: If I could respond to Joe's comment and just take him head on, I think he's wrong that this rule isn't a major part of what is affecting the Gestalt of young lawyers. A young civil lawyer spends his professional day primarily in the pursuit of discovery; and one of the problems with the pursuit of discovery is that unless they are forced to deal with the opposing young lawyer as a human and in a humane fashion, then we are parenting them to deal with them in an unhuman, unhumane fashion; and that's what this rule does.

1 If you know that you can go
2 down to the courthouse with a motion for
3 sanctions and have a shot at getting them,
4 then you don't work as hard to get the
5 discovery and work the problem out. If you
6 know that the Court is going to force you to
7 work the problem out, then you work the
8 problem out; and it's just the direction that
9 we push them in.

10 They know if they come down to
11 court in a great many of our Travis County
12 courts that they are going to have to go to
13 the jury room and work the problem out and
14 that that's going to be the only relief they
15 get. Knowing that they work it out in their
16 law office; and I think that goes back to what
17 Ann was saying. If they know they can come
18 down and have a shot at sanctions, they're not
19 going to work it out; and I think this is a
20 major part of what is driving practice right
21 now.

22 MR. HERRING: Let me respond
23 specifically to that, because the rule
24 contemplates that you do have to try to work
25 it out. It specifically states you have to

1 have a conference before you go down there;
2 and that is I think as Judge Cockran points
3 out, that's how the judges administer it. If
4 the judges would read this and say, "Look.
5 You guys have done this. You didn't have a
6 meeting or conference. Go away. I don't want
7 to hear it from you" --

8 HONORABLE F. SCOTT MCCOWN:

9 Where are the incentives?

10 PROFESSOR ELAINE CARLSON: I
11 was just curious whether or not there is some
12 compromise in clarifying within the proposed
13 draft of Rule 166d the trial court discretion
14 to enter an order compelling discovery in lieu
15 of or as a precondition to a sanction order
16 and perhaps putting a standard in for
17 inadvertent failure to comply with a discovery
18 rule or minor infractions, which is not a
19 bright line test, but it does make clear to
20 the trial court that that is an option, and
21 including within the comment to the rule that
22 counsel is encouraged to seek an order to
23 compel as opposed to sanctions for minor
24 infractions to maybe embrace the notion to
25 younger lawyers and to help clarify

1 malpractice or professional responsibility.

2 HONORABLE F. SCOTT MCCOWN: I
3 think that's a good idea; but to criticize
4 trial judges since I've been criticizing
5 lawyers, a lot of the problem is trial judges
6 won't take the time to be good parents, and
7 they're not going to make it hard to get
8 sanctions. They're going to make it easy to
9 get sanctions, and they're going to be grouchy
10 about it, and they're going to over-sanction.

11 And I think the rule has to
12 restrain the discretion of the trial judge and
13 channel it as much as it does the lawyers.

14 MR. BABCOCK: One of the
15 things that we haven't talked about that is
16 more on the philosophical lines is what
17 sanctions do to the whole process. It seems
18 to me I've seen in my own firm that when
19 sanctions are filed it tends to poison the
20 atmosphere of the litigation, and lawyers get
21 mad at each other not over their client's
22 problems, but over their own problems with
23 each other, personalizing the litigation. It
24 makes it harder to settle. It makes it more
25 expensive; and I'm finding myself persuaded by

1 Judge McCown on his philosophical bent that we
2 ought to cover the problems that Rusty is
3 talking about, but minimize this laundry list
4 of sanctions that a young lawyer can go down
5 and say, "Hum, maybe I can get the pleadings
6 struck if I posture this case in such a way as
7 to make it look like there is a major
8 infraction."

9 The other thing that seems to
10 me worth exploring is a remedy to the abuses
11 that is more result oriented. It gets the
12 focus back on the litigation and away from the
13 lawyers, and as the rule a few pages down,
14 Chuck's 166b(6)(d) talks about, if you fail to
15 make discovery or if you don't reveal a
16 witness or an expert that you want to call at
17 trial, then that evidence doesn't come in to
18 the case; and that it seems to me is a
19 powerful deterrent from destroying evidence,
20 not producing evidence, not listing your
21 witnesses.

22 MR. MCMAINS: Destruction of
23 evidence.

24 MR. BABCOCK: Of course, Rusty,
25 you're going to have to tackle it somehow,

1 destroying evidence.

2 MR. MCMAINS: You're going to
3 get somebody that is going to tell you the
4 truth too, and you're going to have to have
5 somebody that has the power to do something
6 about it.

7 MR. BABCOCK: The power, but
8 you're going to have to capture it anyway
9 somehow somewhere, and when you catch them the
10 remedy is that you don't get to put that
11 witness on. You don't get to get that
12 evidence on that issue in if you catch them
13 doing something like that; and that's to me
14 more a result oriented approach rather than
15 getting the lawyers at each other's throats
16 through sanctions. So I find myself moving
17 into Judge McCown's corner that we have got to
18 try to minimize the sanctions.

19 MR. MCMAINS: Luke, all I'm
20 wanting to do is to defend Chuck in the
21 running of the Committee which I think --

22 MR. HERRING: Defend? Could
23 you choose something better? Defend?

24 MR. MCMAINS: Certainly with
25 more chance of success. But the office of the

1 committee when we were formulated, when the
2 task force was formulated was and rapidly
3 became after TransAmerican the law
4 substantively moved much further than the
5 rule.

6 This rule comes extremely
7 close to what the law in Texas is today. You
8 can't find what the law in Texas is on the
9 discovery sanctions practice today in the rule
10 book. It ain't there. It's in the cases. So
11 our first task was "We've already gotten a
12 pretty damn good hint from the Court what is
13 not acceptable," and so we were forced to
14 formulate.

15 And so the idea of "Do we have
16 a new rule," and all the people have
17 criticized about we don't have a rule, we
18 thought if we are going to have the law and
19 it's going to be the law, we might as well
20 tell people that this is the rule and put it
21 in the rule book where it belongs. That is in
22 large measure what this is and comports with
23 the practice that we got input from around the
24 state with the judges as to how they are in
25 fact applied and applying the rules and the

1 regulations that had been set by the Supreme
2 Court in their decisions already.

3 So one thing that is not
4 acceptable it seems to me to the Court, the
5 Committee, or the Bar is to leave the rule
6 book with a rule that does not apply, because
7 that's not the way it works. The rule as we
8 now have it says you can go to sanctions and
9 strike pleading right now. The rule says
10 without anything. That's not what the law
11 is. That's not what this rule is; and this
12 rule is an attempt to comport in part. And
13 one of our tasks was to at least conform the
14 rule to the way the practice is, and we had to
15 continue to modify it as it kept moving
16 through the task force.

17 So I'm just saying that the
18 idea that we leave things alone, that is not
19 acceptable because our rules are misleading.
20 Our rules actually authorize a whole lot more
21 than what the law does.

22 MR. TINDALL: Luke, I like the
23 draft of the rule a lot, but my struggle is we
24 have a task force on discovery that hasn't yet
25 reported, and so it seems like we are going at

1 it backwards. We're trying to talk about a
2 rule for sanctions on a set of rules of
3 discovery that may be turned upside down.
4 Sanctions on not supplementing document
5 production, you know, may or not be
6 egregious. But do we have any idea when we
7 might see this review of the discovery rules?

8 MR. SOULES: Well, within a
9 month. And there is a summary that you have
10 now that just came yesterday from David
11 Keltner. But if you haven't picked it up,
12 it's up here. Obviously you haven't had a
13 chance to look at it. It looks like this
14 (indicating).

15 MR. TINDALL: But I mean if we
16 could overlay what we say are the rules of the
17 game for discovery before we know if we go
18 directly to sanctions or motions to compel
19 makes, seems attractive to me. And are we
20 going to continue automatic exclusion of
21 witnesses not disclosed? Are we going to have
22 continued duties to supplement? I mean, all
23 the --

24 MR. SOULES: That's in here.
25 That's a part of the sanctions that is before

1 you now, Harry. I agree. It would be great
2 to have the discovery task force report here,
3 but it's not here. It's probably going to be
4 a month away at least, and the Court wanted
5 this meeting even sooner than now, so I'm sure
6 they are expecting information from us.

7 MR. HERRING: That is a good
8 point. We had that problem with the
9 sanctions. If you're going to have mandatory
10 disclosure, you may eliminate a lot of the
11 stuff that comes up in interrogatory
12 practice. Now, you may not -- we didn't know
13 what this is going to be built on or what
14 system is going to be adapted this week.
15 You're right. You are in the dark a little
16 bit.

17 HONORABLE SCOTT A. BRISTER:
18 Just briefly on the two-step issue, I'll
19 repeat again this is basically a two-step
20 process since to get anything serious the
21 judge is going to have to state why a motion
22 to compel would be futile.

23 Second of all, I think if all
24 of us think about it, we can all think of
25 situations we've been in where a motion to

1 compel is a waste of time. In the task force
2 I brought up Alice Travathan, that big case in
3 Houston where 500 depositions taken,
4 documents, et cetera, and 45 days before trial
5 the Defendant discovers 10,000 critical
6 documents and immediately produces them.

7 Now, all of those depositions
8 have to be taken over again, or a lot of them.
9 A motion to compel is -- they've already
10 produced them. It does nothing to do a motion
11 to compel, but it has caused tremendous
12 expense and problems. I think all of us can
13 think of situations where there has been a
14 discovery abuse, but a motion to compel does
15 not address it.

16 I raise that as a situation
17 just because it is very difficult to draw a
18 rule, which is the committee's purpose that
19 covers all of those situations other than
20 something like this where you simply separate
21 out simple things from difficult things and
22 have two different procedures.

23 So the two-step process for a
24 lot of cases works. For a lot of cases it
25 will be nonsense and people will scratch their

1 heads and say, "What are these these people
2 thinking about," because a motion to compel
3 does no good.

4 MR. ORSINGER: I would like to
5 propose a distinction then that the two-step
6 process makes sense when you have a discovery
7 condition that is curable, and that it doesn't
8 make sense when your condition is not
9 curable. If the physical evidence has been
10 destroyed, then a two-step process doesn't
11 make any sense. But if a party has failed to
12 appear for a deposition, a two-step process
13 does make sense.

14 I don't see this committee
15 proposed rule as involving a two-step
16 process. You don't know for sure whether
17 you're pleadings will be struck until the end
18 of the first hearing. That's possible. And
19 what the trial judge is required to do in my
20 opinion is just articulate the reason why the
21 judge did what he or she says so that the
22 appellate court can better decide whether to
23 reverse it or not.

24 I think a two-step process is
25 better because as long as the uncertainty

1 exists as to whether you might walk out of
2 there with a default judgment on liability, as
3 long as that uncertainty exists there is an
4 incentive to go for that sanction on the first
5 motion. Whereas if the rule is written in a
6 curable discovery problem that you must first
7 secure an order, and then if the order is
8 violated, then you can drop some severe
9 sanctions, then there is no great incentive to
10 fight World War III on the first motion that
11 you file.

12 And I think 99 percent of the
13 cases are curable discovery problems where
14 someone probably should be warned before their
15 pleadings are struck, and that probably we
16 will not have to strike their pleadings as
17 long as they're in court first and they have
18 an opportunity to hear from the judge what
19 might happen to them if they don't.

20 MR. FULLER: I think the good
21 news is that I don't know who your judges are
22 and what they're doing, but even though we
23 don't have a two-step process written into the
24 rule now, that in essence has been my
25 experience of what we get anyway. I have not

1 been successful in getting the judge to strike
2 pleadings if something less will do.

3 I know I'll read the cases
4 where this does happen, but I think defacto
5 what is actually happening is that the great
6 majority of the judges are using their wise
7 discretion and not just saying, "I'm going to
8 chop you." You know, "Okay. You show up for
9 the deposition. If you don't, here's what is
10 going to happen."

11 But to write in a mandatory,
12 two-step procedure to me doesn't make sense.
13 Put it in there. I like 166d the way it is
14 suggested here, and I think it's built in in
15 such a way that if there is a need for a
16 second hearing, there can be one; but if there
17 isn't, he can go ahead and chop them off at
18 the knees right then.

19 And the only other comment is
20 I'm really impressed with the care and feeding
21 arguments that are being made about young
22 lawyers, but I don't buy it.

23 MR. DORSANEO: I think that if
24 you believe that there ought to be a motion to
25 compel client's practice codified in the

1 rules, and if you believe that someone ought
2 to be able to get an award of expenses but
3 that the Court has or should have discretion
4 to not order expenses, and I'm reading the
5 word "may" in Paragraph 2 rather than "shall"
6 to suggest that, and if you believe if there
7 is a more serious type of discovery violation
8 such as the violation of an order to compel
9 compliance, but among other things and that
10 that more severe sanction ought to be spelled
11 out beyond saying intent is available when it
12 is available, then I think you end up liking
13 this rule. However, you know, if you don't
14 believe that awards of expenses make any sense
15 or that severe sanctions are appropriate
16 because judges will abuse their authority
17 unless they're restricted to something as
18 severe as putting somebody in jail, you don't
19 like this rule.

20 On balance I think I like it
21 because of what Rusty said. It seems to
22 codify our current law to be better than our
23 current rule; and my expectation is that most
24 people would think a motion to compel
25 compliance needs to be involved. There might

1 be a reasonable disagreement about an award of
2 expenses and about what kinds of severe
3 sanctions, but on balance I think it is a good
4 rule.

5 HONORABLE F. SCOTT MCCOWN:

6 Luke, if I could expound on and build on what
7 Richard said about why a formal two-step
8 process is different than this rule. In a
9 formal two-step process the motion to compel
10 is filed and all that's on the table is an
11 order to compel with the possibility of
12 reimbursement of some modest amount of
13 attorney's fees. That doesn't change the
14 dynamics between the lawyers very much in
15 working it out. And the lawyer doesn't go
16 home at night burdened with the thought that
17 "I got a motion for sanctions today, and
18 whatever the likely result from the wise
19 judge, the judge may not be wise," or "I still
20 have to worry about it, because I may be
21 misunderstanding the likely result."

22 These motions for sanctions
23 cause a great deal of mental stress, to be
24 honest about it, on the lawyer and on the
25 dynamics between the lawyers; and that's why a

1 formal two-step process that eliminates that
2 would make it so much more sane.

3 MR. SOULES: There is one
4 other feature of this rule that as written
5 that may be appealing, and that is that the
6 award of expenses in connection with the
7 motion to compel is not under the category of
8 sanctions. I never have thought that was
9 sanctions anyway, but I never have really
10 known how to tell my young lawyers how to
11 respond to the question have you ever been
12 sanctioned if they've gone to a hearing on a
13 motion to compel and had attorney's fees
14 awarded against them. I don't think that's a
15 sanction.

16 HONORABLE SCOTT A. BRISTER:
17 And that's why we put it in Paragraph 2 rather
18 than Paragraph 3.

19 MR. SOULES: And in
20 Paragraph 2 if the judge decides that somebody
21 ought to pay somebody else's expenses for the
22 motion because they should have made a better
23 decision earlier and gone ahead and made the
24 production or whatever and they're not
25 objecting, the judge gets the attorney's fees

1 paid so that the litigants don't have to pay
2 their own freight to get something they're
3 really entitled to; and it's only when you get
4 to the next stage that we call it sanctions
5 for something more egregious. I don't know
6 whether that has any merit or not.

7 MS. SWEENEY: The question I
8 have, we're entitled in this rule to discovery
9 violations, and we're including in there a
10 motion to compel where there may be egregious
11 behavior perceived, and we are making the
12 assumption here that because we have gone to
13 get a ruling from the Court there has been a
14 violation of the party rule here. And I don't
15 think that is right. I think that litigants
16 are going to have to avail themselves of the
17 courts and get rulings and not necessarily be
18 burdened by politics, certainly not to set a
19 predicate for so and so's first or second or
20 third or fifth motion for sanctions, that
21 there needs to be a process by which disputes
22 that need resolving by the Court can be, even
23 if it's not in a motion to compel where it is
24 not under the rubric of discovery violations
25 and there is not a penalty involved at all

1 other than getting the rulings.

2 MR. HERRING: To be clear on
3 that, that is preserved, and that is why the
4 second sentence of -- the first sentence of
5 the rule of Paragraph 2 says that. You still
6 have a compel to quash motion if you want it,
7 and you don't have to file a motion on
8 anything related to the sanctions as such if
9 you don't want to.

10 You're right in terms of the
11 discovery violations. We can wrestle with the
12 title of the rule. We didn't want to say, as
13 Judge Brister points out, "sanctions" because
14 this isn't sanctions, all of it; but the
15 sentiment we got was to stick all of this in
16 one rule and then have it broken down so that
17 you can deal with all kinds of situations; and
18 "discovery violations" may be a little too
19 strong way to word it, but it is really was
20 Rule 215.

21 PROFESSOR DORSANEO: Why don't
22 we just standard the title back to what it
23 used to be: "Failure to Make or Cooperate in
24 Discovery - Sanctions," and that takes care of
25 that.

1 PROFESSOR ALBRIGHT: What I'm
2 hearing is that this rule, most people like
3 this rule generally except there is concern
4 that it doesn't really address the problem of
5 stopping Defendants from violations of
6 sanctions awarding in a case; and I think like
7 Steve Susman was saying, the fact that you can
8 get attorney's fees in nearly every situation
9 encourages people to file sanctions. Where I
10 remember we could call the other side and say,
11 "Yes. I understand you've gotten busy, but if
12 you would just agree to an order that you need
13 to answer your interrogatories in 130 days,"
14 where now I think a lawyer might say, "Hey,
15 I'm not going to agree to the order, because I
16 can go down to the courthouse and get the
17 attorney's fees, and I can set a precedent
18 before the judge about that."

19 MR. LATTING: Don't you have
20 to verify that you have conferred with the
21 lawyer?

22 PROFESSOR ALBRIGHT: Yes. And
23 I can say, "I'll agree to the order if you'll
24 agree to pay me \$500 worth of attorney's
25 fees." "I'm not going to pay you \$500 worth

1 of attorney's fees." "I'm going to an enter
2 an order on interrogatories."

3 MR. LATTING: Scott doesn't
4 like to do that anyway.

5 PROFESSOR ALBRIGHT: But I can
6 foresee that dynamic going on between young
7 lawyers who are trying to establish who is
8 most macho. And if there is an incentive to
9 say to try to work it out and not pay
10 attorney's fees except in unusual situations,
11 if there is some way, I don't know how to
12 write the rule on that. I haven't thought
13 about it; but if there is some way, maybe it
14 is to split the rule out to say if you
15 need -- if someone doesn't comply with the
16 discovery, you then need to go to this rule;
17 if the next rule in situations where there is
18 conduct for rules something else, then you can
19 award attorney's fees; and in even worse
20 situation there's can be more severe
21 sanctions.

22 MR. HERRING: Those kinds of
23 sentences and guidelines are very hard to
24 write.

25 PROFESSOR ALBRIGHT: I know.

1 MR. HERRING: And that's --

2 MR. SOULES: Something like
3 this.

4 MR. HERRING: This rule, as
5 you'll notice, has a discretionary award of
6 expenses which our current rules does not.

7 PROFESSOR ALBRIGHT: Right. I
8 think what I'm hearing here is to have
9 something maybe more in the comments that
10 judges should award expenses only in more
11 egregious situations.

12 MR. SOULES: Why not just put
13 it in the rule, and if the Court finds that
14 there is not a bona fide dispute, he can
15 order attorney's fees.

16 HONORABLE SCOTT A. BRISTER:
17 "Substantially justified" covers that, doesn't
18 it, Chuck?

19 MR. HERRING: Yes.

20 MR. SOULES: Some words like
21 that; and that may respond to Steve's concern
22 earlier that do you have to file for
23 attorney's fees in a case. And right now
24 there is no limit on that, and I think that
25 was a very --

1 MR. HERRING: The rule though
2 as it's written, let me just point out that
3 provision, because it says, "The Court may
4 enter these orders for expenses without a
5 finding of bad faith or negligence, but shall
6 not award expenses if the unsuccessful party
7 or opposition was substantially justified, or
8 other circumstances make an award" --

9 PROFESSOR ALBRIGHT: Are you
10 talking about the current rule or?

11 MR. HERRING: This is the
12 proposed rule.

13 MR. SOULES: The proposed rule.

14 MR. HERRING: -- "or other
15 circumstances make an award of expenses
16 unjust."

17 MR. SOULES: I think Judge
18 Brister's point is that what we're speaking
19 about right now is already in this draft.

20 MR. HERRING: And we tried to
21 put that in there. That's the language. It
22 obviously can be changed.

23 MR. SOULES: Buddy Low, you
24 had your hand up.

25 MR. LOW: I'd like to see

1 something that encourages how the motion says
2 you can do it, but I think these rules as
3 proposed do not discourage the filing of
4 motions of sanctions as much as they should.

5 MR. SOULES: Is it possible to
6 put some balance in this by writing in for the
7 first time a sanction for filing a groundless
8 motion for sanctions?

9 MR. HERRING: You have that.
10 Rule 13 already covers that, and certainly the
11 amended rule here does.

12 MR. SOULES: Rule 13 --

13 MR. HERRING: Yes. It applies
14 to a case that is filed in bad faith,
15 groundless bad faith and for groundless
16 harrassment. You have that sanction for that
17 unusual, very unusual situation already built
18 in.

19 There are really three
20 anti-incentive things. The task force
21 absolutely agreed. There is too much
22 sanctions practice. We don't like it. We
23 want less of it. Everybody unanimously agreed
24 on that.

25 The question was how do you

1 deal with the sanctions steam that we have
2 now, and how do you build in some
3 disincentives. You make it nonmandatory,
4 which it is mandatory now if you read the
5 rules in terms of expenses, substantial
6 justification of opposition. So it is a
7 discretionary standard. Whenever you come to
8 court the court need not impose any
9 sanctions.

10 You have a conference
11 requirement. You can't even go to the
12 courthouse on a motion for sanctions unless
13 you confer with the other side. And if judges
14 will enforce that, get the message out,
15 "Folks, we don't want to hear any of these
16 motions." Nobody ever has to grant a motion
17 for sanctions ever again. That's built into
18 this rule.

19 And third, if you want to
20 really hit somebody with a severe sanction,
21 it's going to be darn tough to do under this
22 rule and you're going to get reversed if you
23 don't go through the procedures.

24 Those are the I think three
25 areas of disincentive we tried to build in.

1 They're not perfect, but we could do more.

2 MR. SOULES: Should the filing
3 of a groundless motion for sanctions be
4 governed as severely as Rule 13? You've got
5 to overstep your bounds big-time to get
6 Rule 13.

7 MR. LATTING: Well, if you'd
8 put a seniority provision, you couldn't file a
9 motion for sanctions. That's the way to get
10 away from the young blood.

11 MR. SOULES: We pretty much
12 have that rule in our firm. They can't file a
13 motion for sanctions without getting my okay,
14 and I don't give it.

15 MR. ORSINGER: The problem I
16 have with this whole thing is that as long as
17 there is discretion to award sanctions there
18 is an indication to lawyers to take it; and
19 that's why I like the two-step process, except
20 for the problem that Rusty McMains addressed
21 which is when you have been caught lying,
22 falsifying evidence, destroying evidence two
23 steps probably is not necessary, probably not
24 appropriate, but I think 99 percent of the
25 discovery disputes are resolvable by one visit

1 down to the courthouse.

2 Now, I understand that you
3 have all of these criteria that must be met as
4 you move up the scale of severity, but in
5 terms of inviting sanction litigation since
6 they're all available on the first motion
7 you're inviting people to seek the maximum
8 relief on the first motion.

9 If you really want to reduce
10 sanction practice, I think what you should do
11 is force people for the curable issues to seek
12 an order together with compensation for the
13 attorney's fees and expenses necessary to get
14 that order. Then no one will be asking to
15 strike your pleadings in the first trip to the
16 courthouse.

17 To mesh that is the real
18 disincentive to have sanctions spots, because
19 it will only occur -- the sanctions award will
20 then occur only after someone has been told
21 "This is what the ruling is. Abide by it, or
22 you will suffer." And having one rule with
23 gradations in it where everything is on the
24 table for the first hearing I think doesn't
25 change the sanction environment we live in.

1 MR. HERRING: What do you do
2 about the problem that Judge Brister talked
3 about, Judge Travathan and other judges he
4 said who get people who just won't do it until
5 you come to the courthouse? "We'll just award
6 expenses. We can't sanction." Or we get the
7 case where a week before trial somebody is
8 curable, but somebody doesn't produce the
9 1,000 documents or the 10,000 documents and
10 the whole thing is put off.

11 MR. ORSINGER: I think having the
12 second or possibly even the third hearing in
13 those instances of those recalcitrant parties
14 is a small price to pay to destroy the
15 sanction litigation that we have, because I
16 think a two-step deal like that is going to
17 take the sanction awards out and limit them
18 just to those people who really seriously are
19 abusing the system even though they've been
20 told by a judge that if you continue to do
21 this, we'll have your pleadings struck.

22 MR. SOULES: How does that
23 respond to Judge Brister's example of what
24 happened with Judge Travathan?

25 HONORABLE SCOTT A. BRISTER:

1 What do you do at the first hearing?

2 MR. HERRING: There were a lot
3 of district judges who said, "We see people
4 who come into our court. We can't ever get to
5 them except to award expenses the first time.
6 We're going to have more problems. The abuse
7 we'll never be able to address." And if you
8 have the occasional big case where the whole
9 trial gets put off because somebody doesn't do
10 it and it's curable, you'll never be able to
11 get any sanctions against them other than
12 "Okay, judge. I'll pay \$250 because we came
13 over here today."

14 MR. ORSINGER: To me it should
15 not affect the trial setting, because this
16 ought to be done well in advance of trial. If
17 the problem comes up, it's the time to file
18 your motion.

19 MR. SOULES: David Perry.

20 MR. PERRY: I'm David Perry.
21 I agree with Richard. I think that we have to
22 make a distinction between motions to compel
23 and motions for sanctions. I think that
24 motions for sanctions ordinarily ought to be a
25 two-step process. Now, there may be an

1 exception to that if the person has
2 irrevocably destroyed evidence or something of
3 that nature; but the basic principle ought to
4 be that we make a distinction between
5 compelling discovery on the one hand and
6 sanctioning someone on the other hand.

7 And I would move that we adopt
8 as a principle that we have two separate rules
9 that deal with compelling discovery, one of
10 which deals with compelling discovery, and the
11 other of which deals with sanctions, and that
12 we consider the two issues as separate and
13 distinct issues.

14 COMMITTEE MEMBERS: Seconded.

15 HONORABLE SCOTT A. BRISTER: I
16 would suggest as opposed to setting up two
17 different rules, if you look at the third page
18 of the comment, the first full paragraph that
19 starts Rule 166d addresses the least severe
20 sanction principle, goes on to quote the
21 language from the rule that the judge has to
22 find why a lesser sanction would be
23 ineffective, and that the sanction itself as
24 reviewed on appeal that it's no more severe
25 than necessary.

1 One could add a sentence in
2 the comment that says "Unless there is some
3 evidence that a motion to compel appearance at
4 a deposition, production of documents, answers
5 to interrogatories would be utterly futile,
6 such would always constitute a lesser severe
7 sanction" making it clear in the comment that
8 that is what we mean when we use that
9 language.

10 I think that would take care
11 of the problem; but again, it will be futile
12 in a number of cases to have that first step
13 of the two-step hearing. So in my opinion a
14 rule cannot be drawn that covers both. Either
15 you have to double the rules -- and let me
16 reiterate, one of our goals in this, this rule
17 we drafted is one-third of the length of
18 current Rule 215.

19 Current Rule 215 sets out
20 provisions where you can recover attorney's
21 fees five different places. Part of the idea
22 was Rule 215 is so unwieldy it would take 10
23 minutes to read it, and therefore it's hard to
24 apply, was to keep it as few rules, as
25 succinct in one place as possible.

1 I would suggest that we add a
2 sentence like that to the comment saying,
3 making explicit what I think everybody is
4 saying. If unless it's futile to order them
5 to show up at the deposition, to produce the
6 documents, then that is the lesser severe
7 sanction that is readily available.

8 MR. GALLAGHER: I don't know
9 if David's suggestion was in the form of a
10 motion.

11 MR. PERRY: I intended for it
12 to be in the form of a motion, if that is
13 appropriate.

14 MR. GALLAGHER: If it rises to
15 the dignity of a motion in the mind and the
16 eyes of the Chair, then I second it.

17 MR. SOULES: I heard it
18 seconded several places, and we are debating.

19 MR. GALLAGHER: And I would
20 like to -- I think that if we deal with the
21 circumstance that Judge Brister addresses that
22 occurred in Judge Travathan's court where
23 everything had been done and there was really
24 nothing that a motion to compel would benefit
25 either side, there was no benefit to be

1 derived from the violation, then that's one
2 set of circumstances, Luke, that I think the
3 committee needs to address and deal with. And
4 then a motion to compel would appear to me to
5 be the kind of thing that Judge McCown is
6 suggesting from the standpoint of curable
7 discovery, and I think that's is what Richard
8 was talking about a minute ago, curable
9 discovery versus incurable problems in
10 discovery.

11 And I think that that kind of
12 system would be beneficial from the standpoint
13 of eliminating some of the rancor that has now
14 developed within the trial practice which our
15 objective should be to try to eliminate that
16 if at all possible because the sanctions
17 carry such severe potential effects to the
18 litigants that are involved, that anything
19 that can be done to make it more difficult for
20 those to be granted should be done.

21 And I think two rules such as
22 David suggested is a good way to deal with it.

23 PROFESSOR DORSANEO: So I
24 understand it, what you're talking about is
25 these so-called sanction or severe sanctions

1 rule unlike the paragraph labeled sanctions in
2 the task force draft would require two steps,
3 and I heard you say "two different rules." But
4 the real important thing is that the sanctions
5 rule requires two steps, right?

6 MR. PERRY: That's going a
7 step beyond the motion that I made.

8 PROFESSOR DORSANEO: I'm just
9 trying to understand it.

10 MR. PERRY: Because the
11 motion, the concept that I have is that
12 compelling discovery is a different issue than
13 sanctioning somebody.

14 PROFESSOR DORSANEO: Tell me
15 about the sanctions.

16 MR. PERRY: I happen to believe
17 that if we are on the sanctions issue, that
18 sanctions should ordinarily be a two-step
19 process.

20 PROFESSOR DORSANEO: Okay.

21 MR. PERRY: Now, I think there
22 may be exceptions for irrevocable destruction
23 or something like that. But it seems to me
24 that we need to start off by separating in our
25 minds whether we're dealing with compelling or

1 sanctioning, and I also think that when
2 lawyers get down to the courthouse it needs to
3 be clear in the mind of the lawyers and in the
4 mind of the judge "Are we here to compel
5 discovery," or "Are we here to find about
6 sanctioning."

7 MR. SOULES: Yes. Stephen
8 Yelenosky.

9 MR. YELENOSKY: I agree with
10 the motion after listening to the debate. And
11 I went back and read the rule again after
12 listening, and I agree with Paula Sweeney's
13 comment of I don't like the title. First of
14 all in the first sentence it says the same
15 thing. It commingles a failure to respond to
16 a discovery request in good faith with
17 destruction of evidence. The very first
18 sentence of this rule essentially puts those
19 in the same sentence. For that reason I think
20 they should be bifurcated.

21 And I don't think that if
22 truly 90 percent of the practice is one in
23 which we are talking about compelling
24 discovery and we're not talking about
25 malfeasance, but nonfeasance whether it's

1 negligence or good faith, that we want to
2 separate the two merely with a comment. I
3 think that should be dealt with in the rule.

4 PROFESSOR DORSANEO: Part of
5 what happens or what happened effective April
6 1, 1984, the rule up until that time modeled
7 the old companion Federal rule, basically
8 thought of itself as a failure to make
9 discovery, and then if there is an order,
10 sanctions; or in certain circumstances
11 otherwise severe sanctions.

12 So in my view whether it's two
13 numbers, two rules, really doesn't make any
14 particular difference as long as the concept
15 is changed back to the way that it was
16 before.

17 MR. YELENOSKY: Essentially
18 that's the year that I was licensed, so I
19 don't have any...

20 PROFESSOR DORSANEO: The
21 Federal Rule right now is the same thing as
22 what we had.

23 MR. LATTING: Wait a minute.
24 The message if you want --

25 MR. SOULES: Just a minute.

1 Judge Brister had his hand up. He jumped in,
2 and I'll get to you next, Joe.

3 HONORABLE SCOTT A. BRISTER:

4 Well, I yield to the Chair.

5 MR. LATTING: That's my
6 concern.

7 MR. SOULES: Okay. Joe
8 Latting..

9 MR. LATTING: That's my
10 concern, that we are inviting litigants who
11 have deep pockets to file at least one
12 motion. Why give them the material to make
13 them take you down and get a hearing set and
14 go through all that. That will run them out
15 of a month of time, and how many thousands of
16 dollars not in every case, but we're
17 requiring. Keeping the trial judge in an
18 appropriate situation from doing what seems
19 appropriate under the circumstances, it seems
20 to me we can address that.

21 I agree with your comments
22 earlier that I think we ought to state in the
23 rule that moving for sanctions is a severe
24 step that ought to be discouraged, and maybe
25 even beefing up the requirement to be a

1 face-to-face communication between the lawyers
2 to secure a bona fide effort to resolve
3 discovery.

4 But sometimes that just
5 doesn't work. You have some lawyers who just
6 don't work that way. And I think trial judges
7 need to be able to take those situations into
8 account and not say, "Well, we have to give
9 this guy one trip down here to the courthouse
10 irrespective of the facts."

11 So I think we're headed in the
12 wrong direction and making it more expensive
13 and cumbersome to litigate cases if we require
14 a two-step process.

15 MR. SOULES: Judge Brister.

16 HONORABLE SCOTT A. BRISTER: I
17 would oppose making two rules. And I think if
18 we think about it more, for instance, my
19 situation where 10,000 documents are
20 discovered 45 days before trial, but you don't
21 produce them, then you think, "Uh-huh. Then
22 I'm going to fit under the rule that says it
23 is curable. So now all you can do with my new
24 10,000 documents is make me go down to the
25 courthouse, and the judge will order me to

1 produce them, and the attorney's fees for
2 going down for the motion," and you have just
3 avoided the severe sanctions that you would
4 have gotten if as soon as you got them, you
5 had turned them over.

6 In other words, I think when
7 you start -- it is hard to set up a situation
8 curable, noncurable and separate sanctions,
9 separate treatments, et cetera, where one can
10 never cross over into the other or you're
11 going to end up with situations, and that's
12 just the one that comes immediately to mind,
13 where you're going to be stuck in one rule
14 with injustice. "I've just discovered these
15 10,000 documents. I'll hold on to them
16 because that now makes this a situation that
17 is curable by a motion to compel, and that's
18 all you can do with me under this new separate
19 rule."

20 MR. YELENOSKY: I mean my
21 response to that is how you are defining
22 curable? And also doesn't that raise the
23 question of their intent to delay release
24 which could be addressed in this separate
25 rule?

1 In other words, if you're
2 saying curable means that you just want
3 something from them and then that cures the
4 problem, then you do have that problem. But
5 if curable means that presenting it in a
6 manner which is useful given the trial setting
7 or otherwise that you have a definition in
8 your sanctions provision that talks about
9 intentional concealment, then you can proceed
10 under both rules.

11 HONORABLE SCOTT S. BRISTER:

12 My point is just everything else in the rule
13 is going to be identical. We're going to have
14 two rules with the same provisions for the
15 motion, the same provisions for things you can
16 do. The only difference is going to be "If
17 the circumstances in this particular case
18 which in the close cases is going to be the
19 judge's discretion, say, fall under this rule,
20 then go to this rule. If the circumstances
21 suggest in the close cases fall under this
22 rule, go to this rule."

23 I don't think it's necessary
24 to have two rules. When you're going to have
25 close cases the judge like it or not no rule

1 we can draw is going to avoid the judge having
2 to make some calls. Otherwise we would be out
3 of a job. We're going to have to make some of
4 those calls someplace.

5 If that's the case, economy
6 says put it all in one rule; and if we need
7 further clarification, we can play with the
8 rule. Appeals cases can clarify it, that kind
9 of thing.

10 MR. SOULES: I think the idea
11 is we want a separation of the two concepts of
12 compel and sanctions whether in one rule or
13 two; but if it's in one, it's going to have to
14 be subparts to set them out separately. Is
15 that okay with you David?

16 MR. PERRY: Yes. I prefer two
17 separate rules. But however we do it, I think
18 they are very, very different concepts, and I
19 think they should be handled differently.

20 I do not agree with Judge
21 Brister's comment that the procedures would be
22 the same. I think one of the basic teachings
23 of Transamerican is that the procedures for
24 sanctioning somebody was going to be different
25 than the procedures from compelling

1 discovery.

2 HONORABLE SCOTT A. BRISTER: I
3 agree. If I said "procedure," I meant to say
4 the motion is going to be the same. You're
5 going to have to ask which court to file the
6 motion, and that's going to be the same. The
7 possible sanctions is going to have to be the
8 same. The certificate of conference is going
9 to have to be the same in both rules, that
10 kind of thing. Not procedure. I agree with
11 you. I agree with you as far as the
12 procedures will be different.

13 MS. DUNCAN: I think the two
14 are very different. I suppose to me as a
15 practicing lawyer, the real difference is the
16 motion. When I get hit with a motion for
17 sanctions or for liable procedures a month
18 old, I don't think I am unusual. I get
19 upset. It is upsetting to me.

20 We're all making different
21 assumptions about what is the cost that is
22 incurred as a result of a failure to provide
23 discovery. With Judge Brister's 10,000
24 document example in my view the cost of that
25 failure to make discovery is the cost of

1 retaking those depositions, of putting off
2 your trial, of changing those people's
3 schedules.

4 I would say there might be the
5 discretion of the trial judges to determine if
6 that failure to make discovery was intentional
7 or "We just found a warehouse." It happens.
8 I mean, sometimes you just find a new
9 warehouse of documents. It happens
10 particularly when your documents date back to
11 the 1930s. It just happens.

12 But to me they're very
13 different, and I think that the trial judge
14 can make a determination of intentional versus
15 inadvertent, because nine times out of ten
16 that's going to be fairly apparent.

17 MR. BABCOCK: I keep focusing
18 on the consent rule that gives the judge tools
19 for excluding evidence from the trial. I
20 agree. It would certainly prevent them from
21 using, the other side, if they claimed a
22 surprise.

23 PROFESSOR DORSANEO: How is
24 that different from an establishment order or
25 a preclusion order or striking the

1 pleadings? How is that different?

2 MR. BABCOCK: How is it
3 different? The pleadings are different.

4 PROFESSOR DORSANEO: Well, if
5 you're not allowed to put on your evidence,
6 what good are your pleadings? I mean, it's
7 the same thing. The people who created it
8 thought about the same things that you're
9 thinking about.

10 MR. BABCOCK: Yes. But it
11 doesn't -- it is different. It is different.
12 But it doesn't necessarily go to the heart of
13 it all. (Inaudible.) It may be an important
14 witness that they need and the jury is likely
15 to go with. It's not the same thing.

16 MR. BEARD: Luke, I know you
17 don't like to close debate, but I think it's
18 time to vote.

19 MR. SOULES: David, do you
20 want to state, or does anyone else have
21 anything to comment about separating the
22 concepts of motions to compel from the concept
23 of sanctions?

24 MR. FULLER: I'd just make one
25 comment, and that is the present system works.

1 MR. HERRING: The concepts of
2 this rule are supposed to be separate, and
3 there are very different procedures and very
4 different effects depending on where you put
5 the expenses for attorney'S fees or motion to
6 compel or something else. That is the
7 separation. They are very, very different and
8 they are supposed to be treated differently.

9 The question then is how do
10 you want to separate them in some other way?
11 Conceptually if it's not done clearly enough
12 or completey enough, you can have two rules in
13 which Judge Brister suggests in which case you
14 re-write a lot of the same stuff in both
15 rules, or you can try to clarify the division
16 in the rule.

17 HONORABLE SCOTT A. BRISTER:
18 Yes. I would propose an amendment or whatever
19 way you want to do it. I think I would have
20 to do it as an amendment to that motion just
21 to put it up or an alternate vote that my
22 proposal to put it in the comment saying that
23 if it's curable by a motion to compel,
24 et cetera, you have to do that, to put that in
25 the comment as opposed to making two new

1 rules. I would propose that as an amendment.

2 MR. SOULES: Let me ask,
3 Judge Brister, what is your impression of the
4 force of the comment as being influential on
5 trial judges?

6 HONORABLE SCOTT A. BRISTER:
7 Because the rule says the judge has to say why
8 a lesser sanction is inappropriate. In my
9 opinion the appellate courts are going to say
10 the judge -- every time you do anything other
11 than your first step motion to compel the
12 judge is going to have to say why the motion
13 to compel was futile. So it's in the rule.

14 Obviously from the comments,
15 people are concerned that some judges or
16 lawyers might not think it's in there, so you
17 put it in the comment to make it explicit that
18 that is required, if it would do any good.

19 HONORABLE F. SCOTT MCCOWN:
20 Luke, could I ask again what exactly it is you
21 envision us doing today? Because after
22 hearing everybody's comments I can tell you
23 what I want. I want either one rule that has
24 very clear subdivisions, or two rules that say
25 we're going to require face-to-face efforts by

1 the lawyers to resolve discovery before they
2 file anything. We want a motion to compel
3 when that's possible. We'll provide
4 reimbursement for expenses on compelling
5 discovery if it was not a good faith dispute.
6 If it's an incurable discovery problem, and by
7 incurable we mean that a order to compel would
8 not address the problem created such as the
9 delay in the Judge Travathan example, you can
10 go directly to the motion for sanctions. If
11 there is a failure to comply with the order to
12 compel, you can go directly to a motion for
13 sanctions, that we have the procedural
14 safeguards that this rule has for resolving
15 sanctions, and that we have the least
16 sanctions that will do the job.

17 Now, I'm sure we could write a
18 rule to capture those comments. The devil is
19 going to some extent be in the details, and we
20 can't do that this morning. So I'm not sure
21 where you want to go with this, but that's
22 what I would like to see.

23 MR. SOULES: That pretty much
24 summarizes what I've got written down as to
25 what has been the focus of the debate. I

1 think two things were not included in your
2 summary. One is the change in the title of
3 it, so it's not necessarily a violation.

4 HONORABLE F. SCOTT MCCOWN: A
5 neutral title.

6 MR. SOULES: A neutral title.
7 And the other --

8 MR. TINDALL: What about
9 something like "Enforcement of Discovery"?

10 MR. SOULES: We are not down
11 to drafting it yet, but we can do that. But
12 the other concept was whether or not there
13 should be a sanction other than Rule 13 maybe
14 with lesser of the prior requisites for filing
15 a frivolous motion for sanctions. Those are
16 two things that were not covered in your
17 comments as I've written them down of what
18 seemed to be the issues.

19 MR. SUSMAN: Something that is
20 confusing, the relief in Paragraph 2 has
21 nothing to do with the procedure in
22 Paragraph 1. Any of the Paragraph 1
23 procedures you get the relief in Paragraph 2.
24 That's why it is written. And Paragraph 2
25 ought to go somewhere else, because

1 Paragraph 3 relates to Paragraph 1
2 procedures. Am I right?

3 MR. HERRING: No.

4 HONORABLE SCOTT A. BRISTER:
5 No.

6 MR. HERRING: Paragraph 2
7 deals with the relief there is for limited
8 relief we're talking about. You file your
9 motion to compel. And again just to restate
10 the obvious, the rule in that first sentence
11 recognizes the motion to compel.

12 If you're going to go beyond
13 the nonsubstantial expenses as an award, then
14 you're going to have to follow the hearing and
15 the order procedures.

16 MR. SUSMAN: The relief, I
17 don't have to go through any of the
18 Procedure 1 to get it.

19 HONORABLE SCOTT A. BRISTER:
20 No. You have to file a motion. You would
21 have to attach affidavits if you're going to
22 use it. You have to serve them. You have to
23 do 167. You don't have to have an oral
24 hearing.

25 MR. HERRING: The oral hearing

1 under (1)(b) and the order requirements under
2 1(c) are not applicable to the simple relief,
3 the little expenses. Everything else
4 procedurally applies.

5 MR. SOULES: Okay. What is
6 the sense of the committee? Do we want to
7 take up the issue separately either with the
8 same rules separated by subparts, or discrete
9 rules numerically? David Perry recommends to
10 address all the issues.

11 MR. ORSINGER: I think we
12 ought to vote on the proposals individually.

13 MR. SOULES: All right.

14 MR. FULLER: That's
15 presupposing you're going to have a two-step
16 process; and there are some people in here, me
17 being on of them, that opposes the two-step
18 process.

19 MR. PEEPLES: Luke, could I
20 have a clarification?

21 MR. SOULES: Yes, sir.

22 MR. PEEPLES: Judge McCown
23 stated his preferences, which sounded to me
24 like something David Perry would agree with.
25 Do you agree with how he restated his

1 preference, David Perry?

2 MR. PERRY: Judge, I agree
3 with most of what Judge McCown said, but I
4 don't think it would be fair to the committee
5 to try to take all of that and lump it all
6 together at one time and vote on it all at one
7 time. I think we ought to do it on an
8 issue-by-issue basis, and I think the first
9 issue is to separate out --

10 MR. SOULES: That's what we're
11 going to do.

12 MR. PERRY: -- motions to
13 compel versus sanctions.

14 MR. SOULES: That's what we're
15 going to do.

16 MR. GALLAGHER: Just the
17 general principle? Is that what we are going
18 to talk about or we're going to vote on,
19 separating sanctions from motions to compel?

20 MR. SOULES: That's right. And
21 this includes -- remember this includes the
22 acceptance, as Ken Fuller talked about, of a
23 two-step process. Otherwise you don't need to
24 bring it out.

25 MR. TINDALL: I thought Rusty

1 was saying the concern is --

2 MR. PERRY: Luke, my motion
3 was simply that we consider the issue of
4 compelling as a separate and distinct issue
5 from the issue of sanctions; and I do not
6 include in the motion itself any of the
7 details beyond that.

8 MR. GALLAGHER: You're not
9 contemplating necessarily the two-step process
10 in all circumstances?

11 MR. PERRY: Not as part of the
12 motion. Now, I personally think that's where
13 we'll probably end up. But the motion is just
14 to have two parallel tracks of consideration,
15 one on compelling and one on sanctions.

16 MR. SOULES: We've got to
17 separate the debate along those lines?

18 MR. HERRING: Not talking
19 about the rule. You're just talking about --

20 MR. SOULES: I don't know how
21 we can separate the debate along those lines.

22 MR. PERRY: I think we ought
23 to separate the debate along those lines, and
24 I think it makes sense to end up writing two
25 separate rules along those lines.

1 MR. SOULES: But don't we have
2 to talk about them in the context of each
3 other?

4 HONORABLE SCOTT A. BRISTER:
5 Because I would vote for that, also for this
6 rule, because I think this rule separates it
7 along two lines.

8 MR. SOULES: All right. State
9 your motion, and we'll vote on it. We've had
10 some debate already.

11 MR. PERRY: My notion is that
12 we adopt the concept of writing separate and
13 distinct rules either as separately numbered
14 rules or as separate sections of the same
15 rule. I would leave that to the discretion of
16 the drafting people, but that we adopt the
17 concept of writing separate and distinct rules
18 on compelling discovery on the one hand versus
19 sanctioning on the other hand.

20 PROFESSOR DORSANEO: Seconded.

21 MR. SOULES: That's been
22 seconded. All in favor raise your hand.
23 Okay. Opposed? The motion carries heavily.

24 MR. HERRING: We need to go to
25 the next step though, because obviously

1 Judge Brister and I believe that's what the
2 rule reflects now. It divides out the motion
3 to compel procedure with the relief area in
4 section two, and sanctions in section three.

5 And then the question is, as
6 the judge said, "The devil is in the
7 details." Where do you go from there? We all
8 agree on those concepts. They ought to be
9 different than the motion to compel.

10 MR. SOULES: I think it's
11 important to note here that what we've
12 developed here this morning in the past couple
13 of hours is the very thing that the
14 Supreme Court failed to see in 1984, and that
15 is compelling response to discovery is not
16 equivalent to sanctions; and I'm not sure that
17 the committee exactly saw it that way that
18 well defined, but that was the reason for the
19 two-step process then.

20 And now I think with this
21 background there is a good chance the Supreme
22 Court will give that a closer look if that's
23 what we suggest.

24 PROFESSOR DORSANEO: I move
25 that with respect to the compelling compliance

1 part of this analysis that the trial judge
2 have discretion to award expenses --

3 MR. SOULES: Always?

4 PROFESSOR DORSANEO: -- frankly
5 in the language with the limitations that are
6 contained in Paragraph 2 of the task force
7 draft which itself is built on our current
8 rule which it is mandatory, the substantially
9 justified language as in our current rule
10 taken from the Federal Rule. That's my
11 motion.

12 MR. SOULES: Is there a
13 second?

14 COMMITTEE MEMBERS: Seconded.

15 MR. HERRING: For
16 clarification, are you saying what this is?

17 PROFESSOR DORSANEO: That we
18 have two steps. One is compulsion of
19 compliance with the effect of that forget
20 sanctions, that an award of expenses be part
21 of the compelling compliance process as a
22 matter of trial court discretion when the
23 failure to comply is not substantially
24 justified or when the motion to compel is not
25 substantially justified.

1 MR. HERRING: That is the same
2 that is in here except you're focusing on the
3 two steps.

4 PROFESSOR DORSANEO: Yes.

5 MR. HERRING: Are you then
6 precluding any other award?

7 PROFESSOR DORSANEO: No. No.
8 I'm not talking about sanctions at all.

9 HONORABLE ANN TYRELL COCKRAN:
10 Are you limiting it to the extent it is
11 necessary --

12 MR. SOULES: We've got a
13 motion and a second. The motion is to permit
14 the court in some circumstances in language
15 that is here and use other language to award
16 the expenses including attorney's fees in
17 connection with a motion to compel. Okay.
18 That's what we're debating. And Sarah had a
19 question. That's not a sanction.

20 MS. DUNCAN: My question is
21 are expenses as he is using the word only
22 those expenses necessary in connection with
23 the motion including attorney's fees just for
24 bringing that motion and getting an order on
25 that motion? I need to know before I can

1 vote.

2 MR. SOULES: Now we're
3 debating. Now the question that is suggested
4 for debate is should the fees, the expenses
5 including attorney's fees be limited to those
6 incurred in connection with the motion that
7 the judge hears to compel, the motion to
8 compel that the judge hears, or can it be
9 broadened? Who wants to start? Buddy Low.

10 MR. LOW: I wonder does that
11 have -- and I'm not clear. Does that have the
12 reverse weight, the motion to compel and have
13 to go down here? "I'm not granting you fees.
14 I'm granting attorney's fees for the other
15 side." Is it a two-way street?

16 MR. ORSINGER: It is. You can
17 get it for defending it if it's not
18 substantially justified.

19 MR. LOW: Okay. I'm not
20 arguing the merits either way.

21 MR. SOULES: I think the
22 understanding is th at whatever the expenses
23 and fees are awardable, they can be given for
24 either the prosecuting function or defending
25 against it.

1 MR. TINDALL: And they're
2 payable at --

3 MR. HERRING: Not the delay in
4 trial.

5 MR. SOULES: That's what we're
6 debating right now. Who wants to speak to
7 that? Tommy Jacks.

8 MR. JACKS: I really have just
9 a question of Judge McCown, and that is could
10 you tell us if there is a difference, and I
11 think there is, between the standard that is
12 encompassed in the proposed rule that I
13 understand Bill Dorsaneo incorporated in his
14 motion versus the standard you would suggest
15 for the recovery of expenses?

16 HONORABLE F. SCOTT MCCOWN:
17 Yes. I think the issue is one of whether you
18 want an objective test or a subjective test of
19 good faith. Is the question calling it up or
20 down was this a good motion or a bad motion, a
21 good objection or a bad objection. Assuming
22 that it was bad, is it mandatory that the
23 trial judge award reimbursement, or does the
24 trial judge have discretion not to? And if
25 the trial judge has discretion not to, then

1 the test really isn't up or down, good or
2 bad. Instead it's a test of good faith which
3 is what I would propose.

4 PROFESSOR DORSANEO: Well, if
5 you want to think of your discretion and how
6 you would exercise it in terms of your
7 evaluation of bona fide, I think that that
8 would be fine. I would make it discretionary
9 and would not evaluate. You couldn't -- I
10 wouldn't test the ruling on that.

11 HONORABLE F. SCOTT MCCOWN:
12 Well, but it's not discretion unless you have
13 a standard.

14 PROFESSOR DORSANEO: And
15 objective facts.

16 HONORABLE F. SCOTT MCCOWN:
17 It's arbitrariness. You are saying the trial
18 judge could arbitrarily decide what he or she
19 wants to do about awarding attorney's fees
20 unless you have a standard. Once you have a
21 standard then it becomes discretion within a
22 range of whether the trial judge is
23 reasonable.

24 I think the standard ought to
25 be good faith. If you've got a young lawyer

1 who comes down on an objection because they
2 just flat don't understand the law and it's
3 the first time they're down there and you
4 don't want to award attorney's fees, that's
5 fine.

6 On the other hand, I
7 understand the argument that, "Well, it costs
8 the other side for them not to understand the
9 law, and the other side needs to be
10 reimbursed." The reason I prefer good faith
11 is because when you require reimbursement you
12 move real dollars. You take \$500 out of their
13 pocket and move real dollars over.

14 When you don't require
15 reimbursement it's not a real \$500 cost,
16 because the lawyer inflated what he's asking
17 for to begin with. He's not going to charge
18 it all back to his client to begin with, and
19 the client is not going to pay it all to begin
20 with particularly in these small cases that we
21 see.

22 PROFESSOR DORSANEO: You said
23 a lot of things. But if you make it bad
24 faith, then you're just talking about the same
25 sanctions game we're talking about. I think

1 an objective test substantially justified, not
2 substantially justified is not something that
3 maybe would make somebody feel upset or like
4 he's been accused of being a thief or a
5 cheat. And when I say unreviewable discretion
6 amounts to arbitrariness I don't necessarily
7 disagree with that; but I like objective
8 tests, unreviewable discretion on this
9 particular question that should expenses be
10 awarded or not.

11 MR. SOULES: Steve Susman.

12 MR. SUSMAN: What would be the
13 measure of just saying you've got to pay the
14 other side's expenses if you lose, discovery
15 expenses? You bring on the discovery
16 dispute. You initiate it, and it is opposed;
17 and if you lose, you pay the other side the
18 expenses in connection with that. What is the
19 mischief? There's no motion. There's no
20 procedure.

21 HONORABLE F. SCOTT MCCOWN:

22 The mischief concern is --

23 MR. SOULES: I thought your
24 concern earlier was that that would grow
25 lawyers every time to file, request attorney's

1 fees because it might be malpractice not to.

2 MR. SUSMAN: No. This is
3 automatic. You don't file. This is no
4 motion. This is no hearing. It is
5 automatic. It's just, I mean --

6 MR. SOULES: If you lose, you
7 pay.

8 MR. SUSMAN: If you lose. If
9 you guess wrong, or whether you're ignorant or
10 negligent or bad faith, the other side wins
11 the motion to compel because you have posed a
12 bad objection, or you succeeded in getting a
13 discovery request quashed because he asked for
14 too much. They pay you the expenses of the
15 outing.

16 MR. TINDALL: Steve, I think
17 in many discovery fights there are no winners
18 or losers. You go down and you have a 45
19 minute hearing over a bunch of documents and
20 relevance and burdens, and the judge grants
21 some and denies some. I think that's the 90
22 percent result. Usually there are very few of
23 these fights where it's just a single fight
24 over one point. So I mean you would have a
25 situation where how do you decide. If it's a

1 mandatory award of fees, which I find
2 attractive, how would you do it if he grants
3 half of your motion and denies half of it?

4 MR. SOULES: 50/50. My hourly
5 rate is higher than yours though.

6 MR. TINDALL: Yes. That's
7 right.

8 MR. PERRY: It looks to me
9 like that -- I derived from the expressions
10 earlier that the general sentiment on the
11 Committee was that in the 90 or 95 or 99
12 percent of the cases where the disputes are
13 relatively minor that we should avoid trying
14 to become (avesh) in satellite litigation, and
15 that on the other hand in those relatively
16 rare cases where the infractions are severe
17 and the satellite litigation is necessary,
18 that we ought to be prepared to drop the
19 hammer on them; and it seems to me if that is
20 our philosophy, that a motion to compel
21 discovery ought to be like any other motion in
22 a lawsuit.

23 Now, I think there should be
24 an exception about requiring consultation, but
25 other than that where the consultation is

1 required ahead of time it seems to me that if
2 all you're trying to do is have a motion and
3 compel some discovery, that each party ought
4 to have to pay their own attorney's fees just
5 like they do for every other thing that
6 lawyers do for them.

7 MR. SOULES: Just like special
8 exceptions?

9 MR. PERRY: Whatever the hell
10 it might be.

11 MR. SOULES: Summary
12 judgment. There's an idea. Ken Fuller.

13 MR. FULLER: Luke, I've got
14 something that is really bothering me. I hear
15 everybody wandering around worrying and
16 wringing their hands about attorney's fees and
17 court costs, but I haven't heard addressed the
18 main problem that bothers me about the
19 two-step process. How about the delay that
20 results in getting a case to trial and your
21 client loses \$150,000 because of this delay
22 when the stock market is jumping all over the
23 place, when the dry hole is being drilled?

24 I don't hear this addressed;
25 and that is my main objection to this two-step

1 process. You can pay attorney's fees until
2 the world looks level, but this guy
3 may -- your client may have still lost half a
4 million dollars because the trial was put off
5 for two months, five months, a year.

6 And I don't hear that
7 addressed; and it really disturbs me, because
8 we get involved in this. I'm a divorce
9 lawyer, and I'm telling you the market is
10 going crazy. And if you miss a trial date,
11 boy, you may -- you're forced into a position
12 you have almost got to settle to salvage your
13 client's financial situation.

14 MR. PRICE: Just to echo what
15 Ken is saying, you know, one out of every two
16 cases filed in this state is a divorce case or
17 a family law case, and in every divorce case
18 one side wants to delay; and it's going to
19 really cause some havoc in 50 percent of the
20 litigation in this state if you really go to
21 some type of two-part process.

22 I'm worried that we keep
23 forgetting about the fact that the vast
24 majority of cases aren't going down to the
25 courthouse for sanctions hearings. We're

1 overlooking that there is a tremendous amount
2 of litigation going on out there that is
3 running smoothly because of the fear of
4 sanctions.

5 We're saying we ought to get
6 rid of the criminal laws because we don't like
7 criminal trials. I think you have got to
8 think about the fact that there is a
9 prophylactic effect that these sanctions have
10 on the everyday practice, and we're forgetting
11 that average case, that is, that the average
12 case doesn't go down and have anything to do
13 with district judges.

14 MR. JACKS: This is the second
15 time that Dan has raised this, and lest my
16 silence be taken for agreement, I disagree
17 wholeheartedly with the idea that that is why
18 lawyers comply with discovery requests. I
19 think by and large the lawyers with whom I
20 deal comply with it because they simply,
21 that's how they practice law, and they know
22 that what goes around comes around, and they
23 have some respect for one another; and I don't
24 think that it is essential to the practice of
25 law in that manner that you have this bugaboo

1 of sanctions hanging out there.

2 I'm sorry. I don't buy that.

3 I don't see it in the world I practice in.

4 MR. PRICE: I think that's
5 where we got where we are. We used to
6 practice under the great system we're going on
7 now, and it got so bogged down because you
8 couldn't get any documents, that we went to a
9 sanctions rule. And maybe -- I mean I think
10 Tommy is right in a lot of respects. Most
11 lawyers are just going to do it because it's
12 the right thing to do. But I think those
13 lawyers that aren't going to do it because
14 it's the right thing to do do it because there
15 is the threat of sanctions.

16 MR. SOULES: Is there a
17 perception that there has been any change at
18 all in the responsiveness to discovery requests
19 since 1984?

20 MR. TINDALL: Absolutely.

21 MR. PRICE: There's a lot more
22 compliance.

23 MR. SOULES: That's what I
24 hear generally is that there is more
25 responsiveness to discovery requests after the

1 1984 sanctions.

2 MR. GALLAGHER: Is there more
3 judicial time being expended on discovery now
4 than there was in 1983?

5 MR. SOULES: A lot more.

6 MR. LATTING: I was just going
7 to say to Tommy that I agree with Tommy
8 Jacks. I think, and I mean this sincerely, I
9 think if you and I were on opposite sides of
10 the lawsuit, we wouldn't really need the rules
11 much at all. We'd do it the right way. But
12 we are writing these rules for people who
13 don't feel that way all the time. These are
14 the situations where people are on the edge
15 either inadvertently or trying to be. So I
16 think we have to address the bad guys as well
17 as those of us who are trying to do the right
18 thing.

19 MR. JACKS: And I think we can
20 do that. And it seems to me that where we are
21 on this particular motion that Bill proposed
22 is the difference between the words
23 "substantially justified" in the proposed rule
24 and "good faith" under Scott McCown's proposal
25 and get back to the specifics of this. And

1 I'm not saying we don't have any sanctions.

2 MR. SOULES: Well, that is
3 whether expenses can be awarded at all.

4 MR. LATTING: I wanted to ask
5 Sarah a question, and the question is this:
6 In connection with Bill's motion is
7 it -- maybe I'm asking Bill the question.
8 Either one of you. Is the suggestion that we
9 only have the judge be able to award the
10 attorney's fees for that outing if there's a
11 failure to make discovery, and if that is the
12 rule that we're suggesting, doesn't that mean
13 if you want to delay the case like what you're
14 talking about, you just say, "Well, that's
15 fine. Go give it to them. We'll pay their
16 fees." Is that the direction you want to be
17 taking here? And if not, aren't we back to
18 the sanctions that we've got in this draft
19 anyway?

20 MR. SOULES: Let me interrupt
21 just a moment. Justice Hecht wants to
22 recognize Chief Justice Phillips.

23 JUSTICE NATHAN HECHT: A
24 Chief Justice has come in; and I said several
25 members of the Court might be stopping by

1 today, and Chief Justice Phillips is here.

2 MR. SOULES: Chief Justice
3 Phillips, welcome.

4 CHIEF JUSTICE PHILIPS: Thank
5 you.

6 MR. SOULES: We're glad to
7 have you here today. Okay. Sarah.

8 MS. DUNCAN: That's my
9 objection. Bill says that the way he means
10 expenses is that you get your attorney's fees
11 for preparing that motion, going down to
12 court, getting your order compelling
13 discovery.

14 In my view there is a big
15 difference between negligently or
16 inadvertently or intentionally and good faith,
17 not providing requests for discovery and
18 paying the cost of doing that; and to me if
19 you can make a good showing that your failure
20 is intentional and not in good faith to
21 provide me with your assets in a divorce case,
22 to delay this trial, if you can show that that
23 was done intentionally and in bad faith, I
24 have no problems with your having to pay the
25 actual cost of that delay, not the attorney's

1 fees incurred in the motion to compel, but the
2 actual cost of what does it cost the husband
3 or the wife in terms or spouse to have this
4 trial delayed for 30 days. And that's my
5 objection to Bill's, and I assume I guess to
6 this rule, because I'm assuming that's what
7 you intended.

8 MR. TINDALL: All related
9 damages?

10 MR. HERRING: Now, you can go
11 back to the two-step and do it as Bill talked
12 about. What is the measure of attorney's fees
13 or expenses really is what you're talking
14 about on a two-step. This is what he's
15 dealing with.

16 MR. SOULES: Chief Justice
17 Phillips, would you like to give us any words
18 of direction here while? We do appreciate
19 you're being here.

20 CHIEF JUSTICE PHILLIPS: On a
21 specific subject or?

22 MR. SOULES: Since you're the
23 chief, on any subject.

24 CHIEF JUSTICE PHILLIPS: Well,
25 no. The Supreme Court does recognize the

1 sacrifice that you're making. We very much
2 appreciate your help. The Rules Committee has
3 been an integral part of this Court's work for
4 over 50 years, and I think I'll try to get
5 Judge Hightower to bring you a picture that we
6 found while we were moving of the first Rules
7 Committee in 1941 with all the signatures
8 under it.

9 We could not function without
10 your serious work, all of you reading these
11 books, thinking about this, talking to your
12 friends in various types of practice and
13 bringing the collective wisdom of your
14 experience together to give us the best advice
15 on these rules.

16 I think we're all coming more
17 and more to recognize how true
18 Judith Reznick's dictum was that all
19 procedural reform is an attempt to correct the
20 reforms of the previous generation, but I
21 really think that we have tried so many
22 different tacks that we're on the verge of a
23 new day when we really could make some changes
24 that produce some profound benefits to the
25 people of Texas.

1 There has been enough
2 scientific study of what works and what
3 doesn't, and we're seeing what other states
4 are trying; and but by a group of this caliber
5 and talent and diversity coming together I
6 think all of us on the Court are really
7 excited. And our next rules amendments are
8 going to be something that are a positive move
9 for the people of Texas, and we'll be watching
10 what you do with great excitement.

11 MR. SOULES: Thank you.

12 CHIEF JUSTICE PHILLIPS: As to
13 your specific problem.

14 MR. SOULES: All right.
15 Steve Susman.

16 MR. SUSMAN: I think the
17 ultimate sanction is the sanction that trial
18 judges exercise an order at trial, excluding a
19 witness testifying on a subject, excluding a
20 piece of evidence, and that is -- I mean, you
21 don't have any hearing. You don't have any
22 oral findings. It's generally nonreviewable,
23 and it's the trial Court's willingness to say
24 it's unfair and keep out evidence or to keep
25 out testimony or strike an expert or not put

1 on a witness on certain subjects, and I think
2 that causes everyone today to be more
3 forthcoming in discovery. But I think that's
4 the ultimate sanction. What the trial judge
5 can do to you at trial is basically never
6 reviewable. So I think that is really the
7 ultimate sanction.

8 I have heard that the number
9 of sanctions motion is declining today, that
10 people generally are fed up with it. The
11 senses of the judges and the Bar is that it's
12 a waste of time; and apparently that's what
13 this group has concluded.

14 Now, if the current rule is
15 causing, has something to do with the number
16 of motions declining, why change it? I don't
17 care if it mean what it says. Leave it like
18 it is if the trend is in the right direction.
19 Why pass a new rule that is going to cause new
20 seminars, new institutes, new law review
21 articles, new court proceedings to determine
22 what is substantial, what is nonsubstantial.
23 Leave the mess like it is and just hope the
24 trend continues.

25 MR. LATTING: If it ain't

1 broke, don't fix it.

2 MR. SUSMAN: Is it your sense
3 that the number of these motions is declining,
4 that about five years ago that there were a
5 lot of them all the time, but now people have
6 heard the judges speak, and they say, "Yes.
7 We aren't going to file this"? They're
8 getting the message not to do it. So they
9 don't read the current rule. They don't care
10 what it means. It's not a real issue.

11 MR. SOULES: When this task
12 force was formed we didn't have Transamerican,
13 and things were in a big mess. So there have
14 been major changes and decisions of task force
15 reform.

16 MR. LATTING: That's what this
17 rule in the task force report does. It really
18 just says what TransAmerican says I believe
19 and is the current law and really articulates
20 what you said like it is now. This rule would
21 announce TransAmerican and cover the problem
22 Rusty mentioned which is you have got to go to
23 the cases to find out what the law is.

24 MR. ORSINGER: I'd like to
25 comment on the delay question. I think that

1 most of us are going to get our written
2 discovery out in the very first stages of the
3 lawsuit and we're going to get back objections
4 and production, and it may take some time to
5 go through the production. But I would think
6 that if we're going to have motions to compel
7 on written discovery, we will know that in the
8 very early stages of our case.

9 In Bexar County where I
10 practice primarily I will get a hearing on a
11 motion to compel in three days; and in the
12 rural counties around Bexar County I can get a
13 hearing usually within a month, although it
14 may not be in the county where the case is
15 pending. It will be in the county where the
16 judge is riding the circuit. I don't practice
17 in Houston much, but my practicing friends in
18 Houston say you can get a hearing on a
19 discovery motion within a month. And I really
20 don't see why a two-step processes imperils
21 the trial setting and is likely to cost a
22 client tens or hundreds of thousands of
23 dollars unless you as the party seeking
24 discovery wait until the last minute to file a
25 motion to have your motion to compel ruled

1 on.

2 So to me the issue of delay
3 and the cost of delay is not a very likely
4 issue if people are diligent about pursuing
5 their discovery.

6 MR. FULLER: Have you ever
7 tried to get a trial setting in Tarrant County
8 where you've got to request it three months
9 ahead of time?

10 MR. ORSINGER: Trial setting,
11 or a hearing on the discovery motions?

12 MR. FULLER: Trial setting.
13 Trial setting. So if your trial setting gets
14 put off, you have got an automatic three-month
15 delay.

16 MR. ORSINGER: All I'm talking
17 about is getting a hearing on a motion to
18 compel and how long does that delay your
19 case. In my opinion it shouldn't delay your
20 case one day.

21 HONORABLE SCOTT A. BRISTER:
22 Again, I just wanted to respond briefly to
23 Sarah Duncan's question. The way the proposed
24 rule deals with the extracurricular I'll call
25 them costs of motions, Paragraph 2, and Chuck

1 may -- my recollection is maybe, Rusty, you
2 can check me on this. Paragraph 2 covers,
3 limits the reasonable expenses in connection
4 with the motion, so the proposal does limit it
5 to costs or expenses on the motion. But if
6 there are the extracurricular expenses in
7 addition, likely it's because those are
8 substantial, 10,000 or 100,000, or if the
9 market moves or whatever, and then you would
10 go under Paragraph 3 to the awards of expenses
11 that are not substantial or amounts of money
12 in excess of expenses incurred. So both,
13 either way you could recover it, but again it
14 would depend on what amounts involved would
15 dictate what procedure you go through, which
16 again is a problem if you separate both rules,
17 you are going to have to define curable in
18 such a sense to tell us which rule, which set
19 of procedures you're going under, et cetera;
20 but the Committee proposal presumes the
21 informal procedure is just the attorney's fees
22 on the motion. If you want something more
23 than that, you need to go to a sanctions
24 motion.

25 MR. TINDALL: Luke, do you

1 still invasion that there would be bright line
2 rules when we can grow directly to sanctions?
3 If we suspect fraud, criminal behavior, are we
4 going to have to -- I mean, I didn't
5 understand David's motion to be that we could
6 not go directly to sanctions. And so --

7 MR. GALLAGHER: David and I
8 were speaking on that very point a moment
9 ago. And he has in his motion two separate
10 rules or maybe one rule, as Judge Brister
11 suggested, two separate subdivisions.

12 MR. TINDALL: Sure.

13 MR. GALLAGHER: But I don't
14 think that he contemplated within the
15 egregious circumstance that was referred to a
16 while ago that there would have to be a
17 two-step process.

18 MR. TINDALL: I agree.

19 MR. SOULES: We're not there
20 yet. Right now we're talking about what kind
21 of expenses or fees, if any, should be
22 awardable by the trial court on the simple
23 motion to compel not aggravated by the kind of
24 conduct that contemplates sanctions.

25 MR. TINDALL: I move that we

1 certainly add attorney's fees including
2 expenses to the motion to compel because
3 Sam Sparks gave us an example of driving into
4 San Antonio three times, and I'm not sure
5 unless we hammer down what expenses are that
6 we're going to get those recovered in a simple
7 motion to compel.

8 MR. SOULES: How many agree
9 with that?

10 PROFESSOR DORSANEO: I'll
11 accept that.

12 MR. SOULES: This is not
13 limited to that, but at least that. How many
14 agree that at least attorney's fees and
15 reasonable expenses? It would be
16 discretionary with the judges.

17 MR. TINDALL: And then I think
18 at that the next question is what is the
19 standard by which you get attorney's fees on a
20 motion to compel?

21 MR. SOULES: Let's just take
22 it first. How many agree that the -- how many
23 are for permitting the trial judge on some
24 standard to be yet articulated trial judges to
25 award attorney's fees for reasonable expenses

1 on a motion to compel, discretionary? How
2 many oppose it?

3 All votes are for it. Now,
4 we've got to talk about the standard, right?

5 MR. TINDALL: Right.

6 MR. SOULES: What should the
7 standard be?

8 MR. TINDALL: I like what
9 Bill Dorsaneo proposed, because without
10 substantial -- wasn't it a substantial
11 justification standard?

12 PROFESSOR DORSANEO: Judge
13 Brister said it should be a subjective test.

14 HONORABLE C. A. GUITTARD:
15 Is this the same test, or should there be any
16 difference?

17 PROFESSOR DORSANEO: If it is
18 a true/false, I'd say true.

19 MR. HERRING: The standard
20 you're using is the one that's in the
21 proposal, which is that the "court may enter
22 an order without a finding of bad faith to pay
23 the attorney's fees, but shall not award
24 expenses if the unsuccessful motion or
25 opposition is substantially justified," and

1 then it goes on to say "or other circumstances
2 make an award of expenses unjust." I don't
3 know if that is yours or not.

4 MR. SOULES: Stephen Yelenosky.

5 MR. YELENOSKY: I think
6 earlier Steve Susman raised the possibility of
7 paying whoever loses; and as a legal aid
8 attorney, one hour of you-all's attorney's
9 fees could kill us. If I have to
10 substantially justify a motion to compel and I
11 lose it, and I still end up paying your
12 attorney's fees, even if it came out of the
13 award, it would kill us.

14 MR. SOULES: Discretionary and
15 not compel. We passed that issue.

16 MR. YELENOSKY: That's what I
17 wanted to make sure.

18 MR. SOULES: Does anyone have
19 anything to offer other than the standard that
20 has been articulated in the rules? Does
21 anyone want to see a different standard other
22 than Judge McCown has talked about?

23 HONORABLE F. SCOTT MCCOWN: I
24 don't think it matters much. Whatever the
25 standard is, I can articulate the necessary

1 findings.

2 MR. SOULES: He talks like a
3 true veteran.

4 MR. SOULES: Is there anyone
5 who oppose that standard, the one that is
6 essentially articulated already in the draft?

7 PROFESSOR ALBRIGHT: That
8 standard relates only to to attorney's fees?

9 MR. SOULES: And only on the
10 motion. Okay. We really haven't talked about
11 whether it's only on the motion. That
12 standard then is acceptable.

13 Now, will the fees and
14 expenses be limited to those related to the
15 motion or beyond?

16 MS. SWEENEY: (Inaudible due
17 to sidebar comments at rear of conference
18 room.)

19 HONORABLE SCOT A. BRISTER:
20 Again, as per the rule, I would suggest it
21 depends on if it's substantial. If you mean
22 \$150 attorney's fees and \$20 for having to
23 drive down from Conroe, that's one thing.

24 If you're talking about \$150
25 attorney's fees and \$10,000 for resheduling

1 the experts because we had to put the trial
2 off two weeks, that needs to go under
3 different kinds of protection, safeguards,
4 higher hurdles to jump over.

5 MR. BEARD: When you're
6 talking about assessment, one day out of the
7 office, is that substantial?

8 MR. SOULES: I think the
9 response to Paula is that what we're talking
10 about here being an ordinary motion is not
11 something aggravated by other circumstances.

12 MR. HERRING: I think what
13 he's saying is he would limit it to the -- he
14 would use the substantial standard. If you're
15 going to have a more substantial awarding,
16 then you would get into the procedure of
17 sanctions, the idea being we have a number of
18 cases now where people are awarding hundreds
19 of thousands of dollars on motions, and if
20 you're going to get into that and your
21 proposing it, you may want to have the
22 opportunity to have a hearing between
23 yourselves to talk more about it.

24 MR. SOULES: But this is not
25 the same substantial we were talking about a

1 moment ago about substantially justified.
2 This is a substantial violation.

3 HONORABLE SCOTT A. BRISTER: A
4 substantial amount of money.

5 MR. HERRING: No. A
6 substantial amount of money.

7 MR. ORSINGER: So long as the
8 amount involved is not substantial, that's
9 what he's talking about. Regardless of
10 whether you are right or wrong, if the amount
11 is big, you would have to proceed. If the
12 amount is small, legal fees relating to the
13 motion.

14 MS. SWEENEY: But, you know,
15 define big for us. It's not the same for me
16 as it is for him. And I think it's important
17 to qualify it. (Inaudible due to sidebar
18 comments at rear of conference room.)

19 MR. HERRING: That's what the
20 comment says.

21 MS. SWEENEY: I understand
22 that. But the difference -- in the situations
23 that you're talking about \$100,000 and making
24 it limited, those have tended to be punitive
25 cases, not expense related cases.

1 MR. HERRING: No. There are
2 expense cases now that are in excess of
3 \$100,000 just as attorney's fees in connection
4 with a motion.

5 MS. SWEENEY: And let's talk
6 about cases where the underlying suit is of a
7 different magnitude. (Inaudible due to
8 sidebar comments at rear of conference room.)

9 I think the cost provision has
10 to take into account the context. (Inaudible
11 due to sidebar comments at rear of conference
12 room.)

13 MR. HERRING: You would allow
14 then an unlimited award of expenses just on a
15 motion to compel without having to go through
16 the procedural activities?

17 MR. SOULES: Judge Cockran.

18 HONORABLE ANN T. COCKRAN:
19 (Inaudible due to sidebar comments at rear of
20 conference room.)

21 HONORABLE SCOTT A. BRISTER:
22 We discussed -- can I respond to that?
23 Because that was where we started, and as a
24 matter of fact the first speaker at our first
25 meeting was Justice Hecht who said, "You need

1 to address whether we need to set like a
2 thousand dollar cutoff for different ways to
3 apply Transamerican or not.

4 We didn't do it my
5 recollection is, Chuck, for two reasons. One,
6 \$1,000 in the indigence cases substantial may
7 preclude access to the court. They're out of
8 court. Two, if you put \$1,000, then it's like
9 a price fixing measure. Everybody asks for
10 \$1,000 or \$999. If you do \$750, they'll ask
11 for \$749. To state a number is to suggest how
12 much you're going to give roughshod without
13 looking at it twice. So we thought we would
14 just do substantial.

15 Three, tens years from now
16 depending on who is on the Federal Reserve
17 Board and that kind of thing, \$1,000 may have
18 to be amended up or down, that kind of thing.
19 So we thought substantial was more lasting for
20 a rule.

21 MR. HERRING: Take the
22 standard as it appears in the comment it says
23 dealing with the other safeguards they are
24 required if the amount is substantial either
25 in absolute terms or in relative terms taking

1 into account the financial resources of the
2 person or the entity liable. Typical
3 standard, flexible standard and tries to
4 address the level aid, indigent was the idea.

5 MR. JACKS: It seems to me
6 that some thought ought to be given to the
7 idea if it's not substantial, life is too
8 short. Don't jack with it. I mean the 99
9 percent percent as Judge Cockran mentioned and
10 so much of the friction costs, and I don't
11 mean just the money costs, but also the
12 emotional costs between lawyers and litigants
13 it seems to me is frittered away over expenses
14 that, yes, maybe it's not entirely fair that
15 the other client had to pay, but it does come
16 with the territory in a sense.

17 And we're putting so much of
18 our judicial resources and resources of our
19 lawyers into bean counting. I'd seriously
20 propose that if it's not substantial, the hell
21 with it. Only substantial sanctions for
22 serious conduct deserve attention.

23 MR. SPARKS: We're not talking
24 about sanctions here at all.

25 MR. JACKS: Well, I know we're

1 not calling it sanctions anymore. We're now
2 being politically correct and calling it
3 something else. But we're still talking about
4 lawyer taking up the judge's time; and I'd
5 suggest that we cut all that out and just in
6 terms
7 of --

8 MR. HERRING: You would not
9 allow an award of attorney's fee unless it got
10 to be a substantial amount?

11 MR. JACKS: Unless it was a
12 serious situation.

13 MR. SOULES: Does anyone want
14 to reconsider the vote in any case award
15 attorney's fees and expenses in a motion to
16 compel? We're there. That issue is resolved,
17 I mean, unless we want to revisit it, which is
18 fine. Nothing is set in concrete until. We
19 write down the words and approve them, and
20 assign them to the Supreme court.

21 MR. SPARKS: My question, it
22 seems like to me in the first comment that the
23 motion to compel stuff we're talking about
24 compensatory. The substantial stuff we are
25 talking punitive. But if you're going -- I

1 don't know what Susman makes, but you know,
2 \$250 for three days out of my office, that's
3 not worth the effort, but yet I feel like I
4 need to compensated for what is going on. So
5 I think that is something you start saying
6 substantial, to a legal aid person that's a
7 different question. If you're going to go
8 compensatory, then there has to be some
9 evidence of what is a fair fee for this
10 lawyer.

11 Punitive that's over in the
12 sanctions deal the way I heard it.

13 MR. PERRY: Well, I was out of
14 the room, I guess, when you took the vote that
15 you mentioned, and I was really moved to
16 reconsider, because the fact of the matter is
17 one of the things we really need to do,
18 discovery has become the tail that wags the
19 dog. The purpose of the discovery rule is not
20 to be an end in itself. It is to get the case
21 ready for trial so that you can go down to the
22 courtroom and try the lawsuit.

23 One of the philosophies that
24 the Discovery Rules Task Force has been
25 following is to try to write the rules in ways

1 that reduce the number of potential conflicts
2 and don't try to achieve perfect justice in
3 every situation. It seems to me that awarding
4 attorney's fees on ordinary motions to compel
5 is just more trouble than it is worth. It
6 would be my suggestion and my philosophy that
7 if somebody commits a serious violation, that
8 we go through a sanctions procedure and drop
9 the hammer on them. And if they have not
10 committed a serious violation, that each party
11 bear their own attorney's fees on this motion
12 just like on anything else and go on.

13 MR. SOULES: Then why do we
14 need two rules?

15 MR. PERRY: Well, because for
16 the very reason to make the distinction. One
17 is a simple motion to compel where you can't
18 get attorney's fees, and the other is a motion
19 for sanctions where you're not trying to
20 compel something. You're trying to prove that
21 somebody has been very, very bad.

22 HONORABLE ANN TYRELL COCKRAN:
23 I would like to make a suggestion about not so
24 much whether parties are entitled to
25 compensatory award, but the timing of it. One

1 of the problems is that I think a lot of our
2 problems would be alleviated if the rule said
3 that the order actually awarding the fees and
4 expenses was not entered during the pendency
5 of the litigation, because that's when people
6 start using it as tools, but to say that the,
7 you know, entitlement the amount of
8 compensatory award will be, that will be
9 signed when the judgment is signed, because
10 the cases that are going to settle anyway
11 settlement is taking into consideration all of
12 these, you know, dickering back and forth.
13 You're trying to solve the problem of getting
14 the discovery done and doing the sanctions
15 that would affect the trial, but postpone the
16 question of actually trying to order an
17 awarding of attorney's fees until a later
18 point in the case.

19 MR. SOULES: How many feel that
20 the trial judge should have discretion to
21 award expenses including attorney's fees in
22 connection with an ordinary motion to compel?
23 Show by hands.

24 MR. GALLAGHER: Is there a
25 standard?

1 MR. SOULES: We're going to
2 draw the standard. David Perry wanted another
3 vote. We're going to take another vote.

4 MS. DUNCAN: The standard is
5 what is at issue.

6 MR. GALLAGHER: The standard is
7 the issue, Luke.

8 MR. TINDALL: He didn't want
9 any.

10 MS. DUNCAN: The issue then is
11 you can have a motion to compel and then in
12 the egregious circumstance you can also file a
13 motion for sanctions. I need my discovery,
14 but there is also the deplorable situation
15 going on.

16 MR. SOULES: Okay. Well, I'm
17 going to take a vote on it the way I stated
18 it. How many feel that attorney's fees should
19 be awarded?

20 HONORABLE SCOTT A. BRISTER:
21 Discretion to award.

22 MR. SOULES: The court has the
23 power to award expenses including attorney's
24 fees on ordinary motions to compel. How many
25 feel no? Okay. I'm going to need a count.

1 How many feel yes? 18. How many feel no?
2 18. A divided house. Well, I think we need
3 to talk about this some more.

4 MR. PERRY: Give Judge Hecht
5 the vote.

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

P R O C E E D I N G S

Friday, November 19, 1993

1:00 p.m.

(On November 19, 1993,
previous discussions were had, and continued
after lunch recess as follows:)

MR. SOULES: Okay. Orsinger,
do you have a way to state the last
proposition that you recommended to me? Let's
let Richard so we can get -- so I get this
thing on the record right, Richard is going to
state a proposition that we are going to vote
on up or down just to get things moving just
to get an understanding of what, where the
people stand on this question of some or no
expenses and fees on sanctions motions.

MR. ORSINGER: Okay. I'm
going to make a motion that I don't actually
support, but I think it will clarify the
debate. And the motion is that we should
adopt a rule that prohibits the trial court
from awarding fees or expenses on a motion to
compel under any circumstances. No

1 discretion, complete prohibition, never
2 recover fees or expenses on a motion to
3 compel.

4 MR. SOULES: Those in favor?

5 PROFESSOR ALBRIGHT: Can I
6 have some discussion, hear the reason why?
7 Can you simultaneously file a motion for
8 sanctions if you feel like that the motion to
9 compel is required because of bath faith
10 conduct?

11 MR. SOULES: No. I mean, not
12 "no," but I don't want to put that appendage
13 on. We just want to find out how many people
14 here feel that a trial judge should never be
15 able to impose sanctions.

16 MR. ORSINGER: Shouldn't be
17 able to award attorney's fees and costs.

18 MR. SOULES: Award attorney's
19 fees and costs in connection with the motion
20 to compel.

21 MR. LOW: That is different
22 than he stated. He said, "A rule stating
23 that." Not what the rule claims.

24 PROFESSOR EDGAR: Could you
25 speak up? I can't hear you.

1 MR. LOW: There is a
2 difference in that, because there is a
3 difference in having a rule stating you can't
4 do it and just don't put it in the rule. The
5 judge follow the rules. I mean, you know,
6 there's a difference in that. I think the
7 other --

8 HONORABLE DAVID PEEPLES: Is
9 the motion to amend the rules and adopt a
10 rule?

11 MR. ORSINGER: Well, no. My
12 effort is for us to focus our debate. I think
13 that there is a smaller nucleus that doesn't
14 want fees under any circumstances than the 18
15 to 18 vote indicates, so I'm talking now about
16 the policy. The policy is that we don't want
17 district judges to have the power to award
18 fees and costs on motion to compel. Do we
19 believe that, or do we not believe that?

20 MR. GALLAGHER: On a discovery
21 dispute?

22 MR. ORSINGER: On just a
23 motion to compel. Not the sanctions, not the
24 striking of pleadings.

25 MR. SOULES: State it one more

1 time so everybody has it.

2 MR. ORSINGER: That the policy
3 is that district judges should not have the
4 power under any circumstances to award fees or
5 expenses in connection with a simple motion to
6 compel.

7 MR. SOULES: Those in favor of
8 that policy hold up your hand.

9 MR. SPARKS: Second.

10 CHIEF JUSTICE AUSTIN MCCLOUD:
11 Does he mean district judges or county judges?

12 MR. SOULES: No. We're trying
13 to focus the debate. This is not an up or
14 down deal. Okay. How many feel that way?
15 Fourteen.

16 And those opposed show your
17 hands. Nineteen. Okay. Well, that's not a
18 clear enough division to stop debate. I think
19 let's go ahead and put the appendages with it
20 that we were talking about. Sarah, you had
21 some concerns. What were your concerns in
22 connection with that vote or the policy?

23 MS. DUNCAN: Well, what
24 concerns me, what several of us were talking
25 about during the break is viewing this in a

1 piece-by-piece, isolated pieces fashion versus
2 whole concepts that are different. And I feel
3 fairly comfortable about what I think should
4 be the whole concept, but I have trouble
5 fitting things into it on a piece-by-piece
6 basis, because they may not make much sense in
7 my concept.

8 MR. SOULES: Okay. Alex
9 Albright, you had a question then before we
10 took the vote on does that mean that you could
11 couple, or can you couple a motion to compel
12 with a motion for sanctions all at the same
13 hearing.

14 PROFESSOR ALBRIGHT: Well, I
15 think my certain is like Sarah's is I have a
16 hard time voting on these in individual
17 parts. I like the idea that attorney's fees
18 are thought of as some sort of sanction or
19 sanctionable conduct in motions to compel.
20 What I would like to see is Tommy Jacks and
21 Scott McCown and David Perry going and
22 drafting an alternative rule that they bring
23 back to us and we can vote "Do I like this
24 rule better than the task force rule," and
25 then looking at them as a whole rather than

1 voting on them in individual increments. I
2 have real trouble like Sarah in voting on each
3 of these particular parts individually without
4 knowing what the next step is.

5 MR. HERRING: Well, let me add
6 to that. We found on the task force it real
7 easy to agree on a lot of general concepts
8 that we then tried to write down, and it was
9 very, very difficult to put in a rule and have
10 a procedure that would work. We have got 30
11 or 40 other drafts sitting in our files of
12 things.

13 If we could get everybody who
14 has a different approach or a different idea
15 today, I don't know what you're going to do,
16 Luke, but either before the next meeting or
17 whatever to do that, give it all to Joe's
18 committee and then lay out some different
19 proposals and maybe different ways of going on
20 this.

21 I think it's easier -- it's
22 useful to have this kind of philosophical
23 discussion --

24 PROFESSOR ALBRIGHT: Right.
25 To a point.

1 MR. HERRING: -- to a point.

2 It's a useful educational effort for us all,
3 but ultimately the devils really are in the
4 details.

5 PROFESSOR ALBRIGHT: Right.

6 Because some of these things may be nice
7 concepts, but they're virtually impossible to
8 put into a rule. And so maybe the people that
9 feel strongly about that there is something
10 that I want to change about the task force
11 rule, well, let's develop an alternative, and
12 then we all have something to look at, and we
13 can vote on it that way.

14 MR. SOULES: What are the
15 concerns that you want addressed in order to
16 make a decision as to whether or not a trial
17 judge should be authorized to impose fees and
18 expenses in connection with a motion to
19 compel? Let's at least get them on the table
20 so that if there is an interim committee,
21 they're addressing those concerns. Steve
22 Susman.

23 MR. SUSMAN: Well, one thing I
24 want to know is how this rule will affect how
25 expensive it is to get a motion to compel

1 resolved. Is it going to encourage lawyers to
2 file 25-page briefs with 10 inches of
3 appendices which include letters that they've
4 written back and forth to each other; and I
5 mean, or is it going to -- I mean it seems
6 to me the expense of getting a motion to
7 compel ruled on is what we ought to really be
8 addressing. Not who is going to pay it.

9 I mean, I'd like to see a
10 system where you just have to call up a judge
11 and say, "Judge, the guys won't answer the
12 interrogatories" on the phone. The judge
13 says, "Answer them." There it is. That's not
14 expensive. Who cares.

15 So I mean I think you have to
16 look at before you determine who bears the
17 expense is how expensive is the process, how
18 expensive should the process be, how quick is
19 it; and then you could decide, well, who
20 should bear the expense and should it be an
21 expense which shifts from the winner to the
22 loser and under what circumstances.

23 And I would just add one
24 further thing. I mean, what's wrong with the
25 way the Federal Rules operate on these

1 subjects? And shouldn't this group, I mean,
2 before we impose yet another set of rules for
3 lawyers of this state to learn which is
4 different from the Federal Rules shouldn't we
5 figure out what is wrong with the Federal
6 Rules, why aren't they good. Are we curing
7 anything? If not, why don't we go to be just
8 like them so we only have to learn one set of
9 rules.

10 MR. SOULES: Buddy Low.

11 MR. LOW: That's true. The
12 most expensive thing in the lawsuit is the
13 whole litigation. So then if we're going to
14 do that, then why single out just discovery
15 and say, "Okay. You filed this lawsuit, and
16 you shouldn't have. You lost. You pay all my
17 expenses and everything." No, I'm not for
18 that. So why make such a privileged character
19 out of the motion to compel when you wouldn't
20 do it for the whole lawsuit? I mean, I don't
21 see the reason.

22 MR. SOULES: Ken Fuller.

23 MR. FULLER: In the ideal
24 world that I hear proposed where you would not
25 have any sanctions for motions to produce and

1 also you can't have any attorney's fees, if I
2 have a client and it's to his advantage to
3 delay the litigation, do I have a duty, number
4 one, particularly since there are no sanctions
5 involved and no bad things can happen to me,
6 why shouldn't I delay it by delaying it until
7 the very last minute producing all my
8 discovery. And I'm sorry, but that's the
9 world I live in; and that doesn't make it
10 right, but that's where I live.

11 I mean, we only get what we
12 take away from them. I don't know what we'll
13 do if we end up with a rule like that.

14 MR. BABCOCK: A concern I have
15 about the no fees and expenses is that I agree
16 with that on the first go-round. However, if
17 you file a motion to compel and you get an
18 order and then you have to go back with
19 multiple motions, it seems to me that probably
20 there ought to be a provision for awarding
21 attorney's fees in that situation. Free first
22 shot, but the second time around your client
23 ought to be compensated for the expense.

24 MR. SOULES: Anyone else?
25 Judge Guittard.

HONORABLE CLARENCE GUITTARD:

I think there is a great deal of merit to what has been said here about how we ought to have some concrete alternative to consider. I think most of us can agree that the task force proposal would be a big improvement on the rules that we have if for no other reason as Rusty suggested it puts it down in the rule. You don't have to go through a lot of cases.

But there is also the problem that if we consider an alternative here, I think the main thing that the task force report doesn't completely deal with to the satisfaction of most members of the committee is those of us that are concerned about disincentives to such motions. I don't know whether we can provide any effective disincentives that would not also chill the discovery process to a reasonable degree. We have to strike a balance between the one and the other. And in order to do that it seems like to me that we ought to have some concrete proposal that would go further in the direction of disincentives that we could compare with what the task force has put

1 before us.

2 MR. JONES: I can cite you
3 some disincentives, Mr. Chairman, and I
4 remember.

5 MR. SOULES: Franklin Jones.

6 MR. JONES: I was a member of
7 the committee that did those disincentives, so
8 I guess I can talk about them. What they have
9 done to the discovery process over there is
10 Draconian; and you can disincentive the hell
11 out of people and kill the baby with the bath,
12 and think about that.

13 MR. SOULES: Can you give us
14 an example, Franklin?

15 MR. JONES: Well, you can only
16 take three depositions unless you have an
17 extremely complicated case. You're limited on
18 interrogatories, limited on requests for
19 admissions. It's just like it was when I
20 started practicing law. You'd look up and the
21 witness would walk in and turn to one of these
22 partners and say, "Are you going to examine
23 this S.O.B. or me, and who is he?" It's back
24 to the rudimentary Dark Ages. And that's not
25 all bad, but this is what we're talking about

1 when we speak of disincentives being
2 recovered, and I want you-all to think about
3 that, because I'm a victim of it, and I don't
4 see too many more around who have practiced in
5 that district. Low does.

6 MR. LOW: I quit going there.

7 MR. SOULES: Why is that? No
8 need to go?

9 MR. LOW: It got so
10 complicated and so many rules that if it's not
11 state court, I just get somebody else to take
12 it.

13 MR. SOULES: Joe, the
14 discussion seems to be focusing on giving it
15 back to your committee to rewrite.

16 MR. LATTING: Yes, it does.

17 MR. SOULES: Now, do you feel
18 like you have direction to --

19 MR. LATTING: Yes.

20 MR. SOULES: -- undertake the
21 rule?

22 MR. LATTING: I'm going to
23 have Scott and Tommy Jacks write the --

24 (Committee laughter.)

25 MR. LATTING: I am, seriously,

1 and David, and invite everybody to get in
2 touch with us and help us come up with some
3 modifications or alternative plans or --

4 HONORABLE CLARANCE GUITTARD:
5 A minority report.

6 MR. LATTING: -- a minority
7 report, whatever.

8 MR. SOULES: There is no need
9 just going down a blind trail. And I think
10 that we need to give Joe as much information
11 as we can give him about in which direction
12 we're inclined. What about the current
13 proposal do we want to see different so that
14 he can write it differently?

15 MR. ORSINGER: Didn't you
16 announce a checklist earlier on?

17 MR. LATTING: I was thinking
18 of getting Luke's checklist.

19 MR. ORSINGER: Maybe we ought
20 to discuss the rest of the checklist.

21 MR. TINDALL: Are you asking
22 about the entire proposal, or just this one
23 issue of attorney's fees and expenses, Luke?

24 MR. SOULES: The entire
25 proposal.

1 MR. TINDALL: I think we need
2 to give some direction to Joe about when you
3 can go directly to a sanctions motion and pass
4 the motion to compel. The illustration of
5 late discovered documents or the willful
6 destruction of documents, fraud, delay, I mean
7 there will be a number of ones where it seems
8 like to me it is not just a routine quarrel
9 that two good lawyers have about or
10 inadvertence. You should be able to go
11 straight to the hammer on something you view
12 as serious; and I think the committee can give
13 input on that.

14 MR. SOULES: All right. Then
15 we had Judge Cockran's suggestion about the
16 timing of the discovery award. I don't know
17 whether that means the timing of ruling from
18 the bench and the signing of an interlocutory
19 order, and then when do you pay, or do you
20 come in and argue for sanctions and the judge
21 says "I'll let you know when you receive a
22 final judgment." What will that accomplish?
23 What about that?

24 MR. LATTING: I would like to
25 speak in opposition to that, because I can see

1 situations in which a deep-pocketed client
2 could make it very difficult for a litigant to
3 get information and where he would need those
4 sanctions; and in plain English I think there
5 are situations where a trial court ought to be
6 able to make them pay on the spot if the
7 circumstance is merited, and I don't see a
8 good reason for saying you could never do that
9 in the statement.

10 MR. SOULES: Judge McCown.

11 HONORABLE F. SCOTT MCCOWN: It
12 seems to me, and I may well be wrong, but I
13 think we've reached the point of limiting
14 diminished returns in talking about this
15 particular rule, because I think we've covered
16 this issue. And we certainly haven't
17 resolved it, but I'm not hearing new things,
18 and I'm wondering if it's not just best at
19 this point because I know you have lots of
20 other things you want us to look at in the,
21 I guess, two half days we've got left as to
22 whether or not we ought not move on and just
23 have Joe's subcommittee come to us with the
24 alternatives.

25 We all may have some thoughts

1 about minor details that we can share through
2 correspondence with Joe separately; but I
3 don't know if the majority of the group feels
4 the same as I do or not, but I think we've
5 chewed this one up pretty fine.

6 MR. LOW: If you want to get
7 to the rule where you have the unusual
8 situation, you need to go straight to the
9 judge and file sanctions. Then lawyers might
10 construe that as meaning "Well, this is
11 unusual and I've got to do it." But if you
12 have that, why not then you either have to
13 file a motion to compel or a motion for leave
14 to file sanctions and then you can attach your
15 documents. I know it's more paper; and I'm
16 not suggesting that's what I would even do,
17 but that's a thought. You could do that so
18 that the lawyers can't just automatically file
19 a motion for sanctions saying "This is
20 unusual," because every situation is going to
21 be unusual. So that's just an alternative.

22 MR. PERRY: One of the things
23 that I believe needs to be addressed in the
24 rule and Transamerican deals with the concept
25 that the punishment should fit the crime.

1 Now, there are various types of circumstances
2 that occur with some degree of repetitiveness.
3 It seems to me that it would be very
4 beneficial if we spent a little bit of time
5 talking about different kinds of circumstances
6 that arise and seeing to what extent there is
7 a consensus among the committee. Maybe not
8 take a vote on it, but at least talk about it
9 to give the committee some guidance, the
10 subcommittee some guidance as to what ought to
11 happen in various circumstances.

12 We've done a little bit of
13 that. But for example, in the 10,000
14 documents situation where somebody finds a new
15 warehouse 32 days before trial and they dump
16 it on somebody, what ought to happen? Should
17 they have to pay a million dollars in the
18 expense of rediscovering the case? Should
19 they get defaulted, or what else ought to
20 happen? There are a number of cases like that
21 that I think that if we were to discuss the
22 nature of the situation, we might find a
23 surprising amount of agreement as to what
24 ought to happen, and that would be of guidance
25 to the subcommittee in writing the rule.

1 The other issue that I would
2 like to raise, and I think this is a very
3 different issue but I think it ought to be
4 discussed, Transamerican presently calls on
5 the trial court to have a factual inquiry to
6 determine as between the lawyer and the client
7 who it was that did wrong. I have a grave
8 question as to whether that is good policy
9 with all respect to the Court; but the policy
10 of the law has always been in the past that
11 the lawyer is the agent of the client, and if
12 the lawyer doesn't prosecute the case properly
13 and it gets dismissed for want of prosecution,
14 too bad. If the lawyer doesn't make -- if you
15 have ineffective counsel in a civil case, your
16 remedy is not a new trial. And if we're going
17 to depart from that, I think we need to give
18 some real serious thought procedurally how do
19 we handle that, or do we really want to go
20 down that trail?

21 JUSTICE NATHAN HECHT: Keep in
22 mind though that that is one thing Judge Mauzy
23 and I agreed about, so that may make it right
24 or wrong. I'm not sure.

25 MR. PERRY: I started to tell

1 Tommy Jacks a minute ago that I wanted to go
2 on the record as disagreeing with him; and I
3 think if I could disagree with Tommy, you
4 could agree with Oscar and maybe both of us
5 are wrong.

6 MR. SOULES: Okay. Richard
7 Orsinger.

8 MR. ORSINGER: I'm not
9 comfortable closing debate at this point,
10 although we will do whatever you decide; but I
11 think this is one of the most contentious
12 issues that trial lawyers deal with; and even
13 if we spend the whole rest of the afternoon
14 trying to formulate a consensus here, it will
15 certainly save us time the next time a rule
16 comes back because we'll have already, if you
17 will, argued up some kind of consensus or
18 maybe even taken a vote so that the rule
19 that's drafted is closer to what we might
20 ultimately adopt.

21 Secondly, there are some
22 things that have never been talked about. Just
23 for example Paragraph 5 of the proposed rule
24 which has not be mentioned I think can be
25 interpreted to eliminate mandamus review. It

1 says that "It shall be deemed to be part of
2 the final judgment and subject to review on
3 appeal." And I know that there is a dispute
4 even as recently as just a couple of weeks ago
5 as to whether appeal is an adequate remedy
6 when the Court of Appeals won't let you file a
7 statements of fact; and that's a very unclear
8 area, but this suggests to me that even if you
9 have a death penalty sanction that eliminates
10 any semblance of a real fact finding at a
11 trial, that you still have to go through that
12 charade in order to raise your death penalty
13 complaint on a direct appeal. And I don't
14 know if the committee intended to do that with
15 Paragraph 5 or whether it's just the words
16 that were chosen, but if in fact that's what
17 those words mean, I think we ought to discuss
18 it real seriously before we just let it
19 happen.

20 MR. HERRING: You have two
21 questions on the floor. One is the
22 culpability determination, and the other is
23 the appeal point. The appeal point I'll let
24 Rusty talk to us since he was the designated
25 appeal expert. On the culpability

1 determination point here's the language that
2 the Supreme Court had in Transamerican, and
3 it's in the comment to the rule. It says,
4 "The trial court must at least attempt to
5 determine whether the offensive conduct is
6 attributable to counsel only, or to the party
7 only, or to both, and then the Court must
8 punish the guilty party." You don't
9 punish, the theory of that is, the client if
10 it's the lawyer's fault.

11 We spent a lot of time talking
12 about that, a lot of time talking about the
13 conflict of interest issue. There is a long
14 line of cases now in federal jurisprudence
15 under Federal Rule 11 that says that there is
16 a -- there well may be a conflict that's
17 almost unsolvable in that situation; and
18 they've reversed a number of sanctions awards
19 where the same lawyer in a major sanctions
20 situation represented himself or herself and
21 the client.

22 How do you deal with that
23 conflict, potential conflict situation? We
24 now have the Beyers Product case which also
25 addresses that and says in effect "Must judges

1 now give a Moranda warning to the client or
2 the lawyer or advise the client that maybe
3 another lawyer is necessary for the sanctions
4 hearing?" So that's a problem. The comment
5 goes on to say, "The court should exercise
6 care in making the culpability determination
7 required by Transamerican. The determination
8 of relative culpability may be complex and
9 fact specific, and a conflict of interest may
10 arise between attorney and client who may have
11 directly opposing financial and other
12 interests depending upon the outcome of the
13 culpability determination. The trial court
14 should take appropriate steps to minimize as
15 much as possible any intrusion into the
16 attorney/client relationship. In some cases
17 postponing the decisions of a sanctions
18 motion, or at least the culpability
19 determination may be helpful. The Court also
20 should control discovery and evidenciary
21 inquiries concerning sanctions issues to
22 insure that such inquiries do not unnecessarily
23 invade the attorney/client relationship or
24 risk disclosure of privileged information.
25 Protective orders and in camera inspection of

1 privileged information may be helpful to
2 minimize such disruption."

3 That comment is pretty close
4 to a statement that appears in the comment in
5 Federal Rule 11, but we debated long and hard
6 whether the trial judge should just be
7 required to award monetary sanctions; and
8 that's really what you're talking about is the
9 monetary sanctions situation against the
10 client. If it would be a severe sanction
11 where there would be dismissal, that's going
12 to affect the client anyway obviously. But
13 whether there should be some procedure that
14 you don't have to make that determination,
15 because it can be very disruptive; and
16 unfortunately right now it's kind of a
17 cutting-edge, Rambo tactic that some people
18 are using.

19 If you're trying to get
20 sanctions against somebody, severe sanctions,
21 and you know that that lawyer and the client
22 are together and there is no separate counsel,
23 are you going to be able to sustain that on
24 appeal now?

25 It's a difficult issue. The

1 underlying theory behind that culpability
2 determination is one of equity and fairness.
3 If it's the lawyer's fault, you shouldn't
4 punish the client.

5 We did not -- we were unable
6 to come up with a creative, brilliant way to
7 reconcile those two different sides of that,
8 and it is as we talked about earlier further
9 complicated by the exclusion in most legal
10 malpractice insurance policies that says and
11 in almost all of our policies that they do not
12 cover monetary amounts awarded as sanctions.
13 That's the issue and that's what we
14 discussed.

15 MR. LATTING: What about the
16 appeal question?

17 MR. SOULES: I'm curious as to
18 how does a trial judge actually inquire into
19 whether the discovery abuse is the fault of
20 the client or the fault of the attorney.

21 Judge Brister.

22 HONORABLE SCOTT A. BRISTER:
23 Usually it's not that hard. You know, I've
24 seen it where somebody didn't show up for a
25 deposition. We bring them in and say,

1 "All right. How come you-all didn't show up?
2 Whose fault is it? Yours or the attorney's?"
3 They both shake their head like this
4 (indicating). In a lot of circumstances "How
5 come did we not get the paper?" Usually
6 you're not going to have to go into the
7 evidenciary area. There is an explanation
8 "How come we didn't get the document or didn't
9 show up at the deposition." Here is what that
10 explanation is," and it's not very -- it's not
11 anything that they can do but place people
12 under oath, but not to say you're not going to
13 in some circumstances. Again, 90 percent of
14 the time it's not something that causes any
15 problem.

16 MR. BEARD: What do you do
17 with the 10 percent where the lawyer says one
18 thing and the client says the other?

19 HONORABLE SCOTT A. BRISTER:
20 Well, I've never had it. You probably have to
21 do what the comment says and maybe have to put
22 it off until the end of trial, and then after
23 the trial have some kind of hearing or
24 something like that. I mean, it's similar to
25 the question about whether you can look at an

1 insurance company's claims file. I think you
2 have to have some kind of abatement of part of
3 the deal.

4 MR. SOULES: Rusty McMain.

5 MR. MCMAIN: One of things
6 that David has talked about was fairly
7 contentious in the beginning on the committee,
8 because Transamerican came out shortly after
9 we started our work and the committee shifted
10 in basically attempting to draft a rule that
11 comported at least in part with Transamerica
12 or deciding if that's what we were going to
13 do. And I, and I don't even know if there
14 were any other supporters on the committee,
15 was on David's side in this in terms of
16 thinking that it's an invasion and intrusion
17 into the attorney/client process anyway to be
18 making such inquiries; but more importantly it
19 is almost always and certainly was under the
20 case law as it existed prior to Transamerican
21 in the attorney's interest to take the heat,
22 because if the indications and readings of
23 Transamerican and it's progeny are that you
24 should not if the attorney is at fault default
25 them, dismiss them, delare issues deemed,

1 those sorts of things on the merits of the
2 lawsuit, and therefore even if the client did
3 it, there is every motivation and incentive
4 for the attorney to take the heat and
5 basically then preclude the ability to apply
6 sanctions directly against the client in terms
7 of dismissal or default or issues deemed.

8 That to me creates an
9 incredible amount of mischief as well as an
10 intrinsic perversion of the truthful inquiries
11 that ought to be going on anyway. If you are
12 going to be having such inquiries, then you
13 would have to have discovery on it. And there
14 isn't anything worse than having a parallel
15 discovery proceeding on a sanctions proceeding
16 to see if they're lying about who did it, and
17 especially if the issue that you're talking
18 about what they did is something that was
19 dishonest to begin with.

20 So the idea that somehow a
21 client should be immunized from the effects of
22 its agent seems to be so foreign to our law
23 otherwise in which doctrines of respondeat
24 superior and course and scope are fairly
25 standard, they delegate -- if the client

1 delegates something performed in the court to
2 the lawyer, the client needs to be the one
3 that will bear the brunt of what will happen;
4 and if there is a dispute arises, then the
5 lawyer ought to pay back the client, ought to
6 make good on the default, whatever, if that's
7 what happened.

8 That was frankly my judgment,
9 and I think Transamerican is dead wrong in
10 going the other way, and I always did from the
11 beginning. I think it's also contrary to the
12 law of the restatement with regards to the
13 responsibility of agents in the performance of
14 their liability. In fact, a year before
15 Transamerican I had a case that I took to the
16 Supreme Court that they wouldn't take in which
17 my client was basically infected with
18 liability for the assault committed by an
19 attorney on a peace officer during an
20 execution, and it was imputed to the client;
21 and that's just straight-up case law out of
22 the restatement and didn't even make an
23 exception on intentional torts.

24 Now, if they have tort
25 liability, why don't they have liability

1 responsibility for conducting discovery which
2 is what the lawyers ought to be able to do
3 without intruding into this process? If
4 you're going to have an administrative
5 determination, it should be disciplinary and
6 not otherwise.

7 That was my view from the
8 beginning, but the problem is we either had to
9 go one way or the other. This is not an issue
10 in large measure upon which you can
11 compromise. This is one of those things where
12 you have to make a call are you going to -- do
13 you buy the argument that the client should
14 not suffer at the hands of the lawyer and
15 thereby create potential for mischief as well,
16 but also obviously due equity in those cases
17 where it really is the lawyer and not the
18 client. Or do you say, "That's not the
19 issue. The issue is what is the essential
20 impact of the particular abuse on the
21 litigation, and if there is a relationship to
22 it, to the litigation, then the litigant that
23 caused it either himself or through his
24 lawyers should be forced to bear that
25 punishment.

1 And those are not things
2 frankly in our discussions that seem to have
3 any kind of middle ground. There isn't any
4 place to go on that, because once you start
5 making an exception for the attorneys, then
6 you do exactly the vice -- as you open the
7 door wide; and it's one of those things, it
8 either stays shut or it stays closed.

9 MR. SUSMAN: You know, I mean,
10 what three -- the one that allows you to
11 impose a monetary award in addition to in lieu
12 of actual expenses, that is punitive damages
13 obviously. That is not compensatory. That is
14 to punish. And even when you submit punitive
15 charges in the case you have got to identify
16 the person who is responsible for the
17 malicious, the bad faith. I mean, as I recall
18 the standard charge now if it's a corporation,
19 you have got to identify an officer or some
20 responsible person in that corporation.

21 Now, it seems to me you can't
22 impose that kind of punitive -- I'm against
23 judges having the ability to impose punitive
24 damages on lawyers in the first place. I
25 don't believe they ought to have the power

1 under any circumstances, because I mean a two
2 million dollar punitive damage award against
3 an attorney with no jury trial? Everyone else
4 gets a jury trial. Why doesn't the attorney
5 get a jury trial? Why doesn't he get due
6 process before a judge can impose something
7 that's obviously going to force him into
8 bankruptcy. If he's not insured, he's
9 history, I mean, plain and simple.

10 So, I mean, I'm not sure I'm
11 in favor of it at all, but if you're going to
12 do it, you have got to identify who is
13 responsible, and then you get into this whole
14 problem of creating another lawsuit between
15 the lawyer. I mean Scott Brister is right.
16 In the simple case you can tell who was
17 responsible for the guy not showing up at the
18 deposition, but we're talking about here now
19 the 150,000 documents that show up before a
20 trial. And I guarantee you in that case,
21 because I've seen it happen before, there is
22 going to be a huge dispute between the
23 in-house counsel and the lawyer, counsel of
24 record as to who gave appropriate instructions
25 on where the documents should have been

1 produced, how they should have been looked
2 for, "It was your fault you didn't tell me."
3 "Oh, I told you. Look at my letter." "But it
4 didn't say that."

5 It's a huge dispute in those
6 cases where a lot is at stake. So, I mean,
7 I'm in favor. I mean, basically my view is
8 that you ought to eliminate the ability to
9 impose punitive damages, and it all ought to
10 go on the client. The client ought to be
11 responsible, take that out of the system. The
12 client is responsible for the lawyer's
13 conduct.

14 MR. SOULES: No fines.

15 MR. SUSMAN: And no fines. No
16 punitive. I mean, no fines.

17 MR. HERRING: How do you
18 decide, though, if the imposed severe sanction
19 is not monetary, you want to do something
20 bad? We want to prevent you from putting on
21 your witness, or we want to strike your
22 pleadings, or we want to default. That's one
23 that is definitely going to go against the
24 client.

25 MR. SUSMAN: I think they all

1 ought to go against the client.

2 MR. HERRING: You want
3 everything to go against the client?

4 MR. SUSMAN: Yeah. I don't
5 want punitive damages mainly because you're
6 going to have to figure out on that one
7 whether it's the client or a lawyer who gets
8 hit, because it's their state of mind that
9 should be determinative. And I don't want a
10 judge to have the power to assess punitive
11 damages on a lawyer.

12 MR. LOW: In keeping with what
13 Steve said, he's absolutely right, is that in
14 punitive damages it has got to be a
15 vice principal; and if a lawyer is not a
16 vice principal in a lawsuit, then I don't know
17 what he is. So that would be between the
18 lawyer and the client. If a lawyer makes a
19 client lose his case because of this, why make
20 an exception? Why get into who did it or
21 what? You know it came from that side.
22 They're only one party. That party should
23 suffer. And if he's not responsible, let him
24 and his lawyer work that out, and just go from
25 there.

1 MR. MCMAIN: Addressing
2 Steve's point with regards to the reason that
3 the damage number, that the number still
4 exists basically our reading of Transamerican
5 which relies on the U.S. Supreme Court cases
6 that had discussed the issue is basically that
7 we -- really and truly we thought that
8 Transamerican as well as this rule is designed
9 not to go to the merits of the lawsuit unless
10 the abuse goes to the merits. The problem is
11 that everyone that considered it has seen
12 abuses that do not necessarily deprive you or
13 maybe even per se adversely even affect the
14 merits, but it's egregious conduct, and it may
15 have cost a lot of money or expenses to have
16 to get around it, but it may be absolutely
17 immaterial like the 10,000 documents in the
18 warehouse that you're talking about or that
19 David is talking about. It may well be there
20 is nothing there. But can you take that
21 chance? You go do that. It doesn't affect
22 the merits under the Supreme Court case
23 basically and under Transamerican the way the
24 committee read it. We couldn't go to the
25 merits. We couldn't default. We couldn't

1 determine the issue. If it didn't have a
2 bearing on the issue, we didn't have the
3 ability to do that.

4 So the question is, should
5 there be something else there? And that's
6 kind of the only reason that there is a
7 punitive part there at all. I don't disagree
8 with the generic notion.

9 MR. SUSMAN: You cover that
10 with expenses though.

11 MR. MCMAIN: Well, you can
12 cover the 10,000 documents. The point is
13 there are egregious things that can happen
14 that you can never show would affect the
15 merits; and that's the Catch 22 that you get
16 into especially when you're talking about the
17 nonproduction of things ever or the
18 destruction of things in which the best you
19 could do is to get into some kind of a
20 presumption argument there which the cases
21 might let you do, but and then we get back to
22 the question of do you do it against the
23 lawyer or the client.

24 HONORABLE F. SCOTT MCCOWN: I
25 agree with Rusty on this, and would like to

1 just point out a small technical related
2 issue. In Subdivision 1(c) it uses the term
3 "law firm or other person or entity whose
4 actions necessitated the motion"; and that
5 suggests to me vicarious liability of the firm
6 for the actions of a single lawyer, because it
7 says "attorney"; and to then say "law firm"
8 would be redundant unless it was trying to
9 capture some notion of vicarious liability
10 which seems to me to go against the Limited
11 Liability Partnership Act and the Corporations
12 Act if they are in fact constituted that way
13 and would be a change of substantive law. And
14 I certainly think that there ought not be
15 vicarious liability, though I would agree with
16 the larger point that it ought to be visited
17 on the client anyway. But those are two
18 separate issues; and the rule seems to suggest
19 vicarious liability.

20 MR. SOULES: Isn't it true
21 that the firm has vicarious liability for the
22 attorney's errors? It's just the other
23 lawyers don't.

24 MR. MCCOWN: Well, it wouldn't
25 if it was a limited liability partnership or

1 if it was a corporation.

2 MR. HERRING: And the
3 contemplation of the rule is still, the sense
4 of it is, you're going to punish the guilty
5 party. If a law firm has done something
6 either by nonsupervision of a lawyer or
7 affirming what the lawyer did, I think the
8 intent of that is, or I know that's what we
9 were talking about, is that you're not going
10 to deal with the law firm just as a matter of
11 course.

12 Now, the reasons it has
13 changed is because the same change just came
14 up in Federal Court where the issue arose and
15 the Supreme Court said under the existing
16 Rule 11 you can't sanction the law firm. It's
17 not contemplated, and the rule has been to
18 have been proposed to change that. We thought
19 we would be consistent with that. But there
20 might be some circumstances where the law firm
21 indeed did have not pure vicarious
22 culpability, but actually was not doing what
23 it should have done which led to the bad
24 conduct.

25 HONORABLE F. SCOTT MCCOWN:

1 Well, but then it would be an attorney. There
2 is going to be some individual. When you say
3 "law firm" that suggests some kind of entity
4 liability as opposed to liability of a
5 specific individual.

6 MR. BECK: Scott, there are
7 some law firms, and actually there are bar
8 associations outside the State of Texas that
9 are making conscious policy choices in their
10 rules to make law firms liable for sanctions
11 imposed upon their lawyers. The theory is
12 that it will require those firms to police the
13 lawyers and to supervise the lawyers as
14 opposed to having the courts do it.

15 HONORABLE F. SCOTT MCCOWN:
16 Well, if you want to go that way, I suppose
17 you can. But I think that that policy
18 decision is one that is not -- I'm just trying
19 to point it out, that those words give a
20 policy decision to do what David just
21 suggested or not.

22 MR. BECK: I'm not suggesting
23 you do that. I'm just simply saying that
24 there is at least one policy argument in favor
25 of making the law that way.

HONORABLE F. SCOTT MCCOWN:

Right.

MR. JACKS: I have a question of Chuck Herring regarding the intent of the task force in this regard: The phrase that follows "law firm or other person or entity" is "whose actions necessitated the motion." In order to hold the firm responsible for the sanctions would it be necessary that there be a finding that it was the firm qua firm whose actions necessitated the motion as opposed to a lawyer in the firm?

MR. HERRING: Well, I'm not sure my firm even has a qua firm in it, but I think the answer is "Yes." I mean, if the firm -- and I think it's David Beck's point. The idea there is that the firm as firm did something. Or suppose the firm had a policy: You know, "We will file," as someone has said, "a sanctions motion in every case just for the heck of it because we like them, and we are that kind of image out there." A judge could be offended by that.

We didn't talk about that example, but that comes to mind. I think

1 that's the intent.

2 MR. MCMAIN: Tommy, the other
3 thing frankly that we did talk about was if
4 you don't talk about it as a collective
5 entity, if you were to try and read too
6 literally as the Feds have actually their
7 Rule 11 and you get two lawyers from the same
8 firm maybe one of which is no longer there
9 saying "He did it," then basically one of the
10 purposes of this was that the judge doesn't
11 have to figure out who did it --

12 MR. JACKS: Right.

13 MR. MCMAIN: -- from that
14 standpoint. And again that is to me one of
15 the vices of Transamerican. You not
16 only -- of the Transamerican notions anyway,
17 because you not only go into the
18 attorney/client relationship, you go into the
19 internal core relationship.

20 MR. PERRY: Then it's a
21 responsibility issue.

22 MR. HERRING: Going back to
23 the point on do you allow a Court to do
24 something against the lawyer, or do you try to
25 say, "No. Let's do it all against the

1 client," the three arguments, and I guess
2 we've already covered them really, but there
3 was concern that if a lawyer engages in
4 misconduct, the judge ought to have more
5 ability to do something than simply contempt
6 which is very limited and wouldn't reach a lot
7 of discovery abuse kinds of situations, that
8 judges don't like to and as a practical matter
9 often don't refer to grievance committees, and
10 we shouldn't make that the first step, and the
11 problem of financial penalties. If it's a
12 sanction and it's excluded from legal
13 malpractice insurance policy, the client sues
14 the lawyer and can't get it back from a lot of
15 lawyers. I don't say those are carried
16 today. Those are simply some of the
17 considerations that we discussed.

18 Really the reason it's in
19 there is because again this was an effort to
20 incorporate and make sure people were aware of
21 existing law under Transamerican, and that is
22 Transamerican. It's just how you deal with
23 it. In most cases it doesn't come up. In
24 many cases the lawyer and client have worked
25 it out before the hearing, but there are some

1 cases where it will come up and can be very
2 painful; and we -- I just want everybody to be
3 aware of that, and we didn't solve it. It's
4 just these are procedures that we mentioned
5 and people should be aware of it.

6 MR. SOULES: Do we want to
7 give direction to Joe's committee as to how we
8 think that should be resolved? Lawyers only;
9 client only; lawyers and clients; lawyers and
10 clients and law firms and other people who may
11 be responsible? We've got I think about every
12 category that you can think of in the rule
13 right now. Should any of them be deleted in
14 the work Joe is going to be doing in the
15 interim?

16 MR. BEARD: Should we -- I'll
17 ask Justice Hecht this. Should we be trying
18 to overrule the Transamerican case?

19 JUSTICE NATHAN HECHT: You
20 can't, of course; and a record is being kept.

21 MR. SPARKS: Oral motion to
22 reconsider.

23 JUSTICE NATHAN HECHT: But the
24 Court can, and rules are treated at the same
25 level of a statute or a Supreme Court

1 opinion. So if there is significant feeling
2 that this rule should be different, I think
3 the Court wants to hear it.

4 MR. SOULES: I've never sensed
5 any restraint on this committee, Pat. If the
6 committee felt procedurally there was a case
7 out there that needed to be addressed and some
8 recommendation made to the Supreme Court that
9 the rule ought to be changed so that the
10 procedure were different, I've never sensed
11 any restraint at all in this committee for
12 making those kinds of recommendations.

13 JUSTICE NATHAN HECHT: No. I
14 think that's true.

15 MR. SOULES: Whether they take
16 them or not, again, the Court takes the
17 action.

18 MR. BABCOCK: In line with
19 what Rusty said, which I fully agree with I
20 make a motion that we limit it to clients
21 only.

22 MR. SUSMAN: Seconded.

23 MR. SOULES: The motion is
24 made and seconded that the sanctions be
25 visited only upon the clients. Then I guess

1 they sort it out later with the lawyer.

2 MR. BABCOCK: Right.

3 MR. SOULES: Does anyone have
4 any further discussion?

5 PROFESSOR EDGAR: What are you
6 going to do where you have professional
7 misconduct by the lawyer, subordination of
8 perjury, for example? Now, are you going to
9 penalize the client for that which was a
10 conscious decision made by the lawyer of which
11 the client was completely unaware? I mean, is
12 that what you're saying?

13 MR. SOULES: Who wants to
14 respond?

15 MR. SUSMAN: No. I mean, I
16 think that penalties that can be visited on
17 the client should be. Like monetary penalties
18 should be visited on a client. There are
19 other things that obviously could only be
20 visited on the lawyer. In my view it would be
21 okay to send a lawyer and make him take CLE
22 every Saturday which would be a terrible
23 punishment, maybe worse than money, or at
24 least something else. Like, I mean, I think
25 you could make, report them to a grievance

1 committee. There are things that could I
2 think be done to a lawyer for misbehaving, but
3 I would not -- money would not be one of
4 them. A reprimand.

5 PROFESSOR EDGAR: Well, but
6 this is cast in visiting the sanction on the
7 client and never on the lawyer. That's the
8 way I understood you.

9 MR. SUSMAN: That's what I
10 wanted.

11 MR. SOULES: Did you have
12 something to add?

13 MR. SUSMAN: Or maybe we could
14 clarify the motion.

15 MR. BABCOCK: Yeah. I mean
16 there are statutes that prohibit anyone
17 including an attorney from supporting a
18 perjury. And what we are dealing with is
19 discovery abuses. This is what this rule
20 deals with; and I think along with what Rusty
21 said I mean I couldn't say it better. You
22 create a terrible conflict and terrible
23 problems that are totally unnecessary when you
24 try to sort it out at that level as between
25 the client and the attorney.

1 MR. PERRY: I agree entirely.
2 And the thing we have to remember it has
3 always been the policy of the law in every
4 area relating to the trial of a case that the
5 party is bound by the conduct of their
6 attorney. If the lawyer does not file a
7 lawsuit on time and the statute of limitations
8 has run, it doesn't make any difference
9 whether that was negligent, whether it was
10 intentional, what the problem was. It's the
11 client that is out of court. If the lawyer
12 fails to make an objection to the charge that
13 he ought to make, it doesn't make any
14 difference why he didn't make that objection
15 to the charge. It wasn't made. It can't be
16 raised on appeal, and the client is bound by
17 that. And all this motion does is continue
18 the same policy in this area of the trial of
19 the lawsuit as in every other area that the
20 client is bound by the conduct of their
21 lawyer.

22 The only exception to that
23 that is generally recognized that I'm aware of
24 is in criminal cases with respect to criminal
25 Defendants who have appointed counsel. That

1 is a tremendous can of worms in that
2 situation, and we don't and should not be in
3 that opening that can of worms. In civil
4 cases when we're dealing with lawyers that
5 have been retained by their clients if there
6 is a problem, it's between the two of them.
7 That should be resolved later between
8 themselves.

9 HONORABLE SCOTT A. BRISTER: I
10 want to just raise two concerns to think about
11 on the motion. Number one, if the sanctions
12 can only be assessed against a client, some of
13 these sanctions which have been recognized
14 under existing law will be removed. Attending
15 CLE, that obviously only applies to the
16 lawyer. Reprimand or a warm discussion as
17 discussed in the Federal cases, that only
18 applies to the lawyer. Several of
19 these -- you will remove several tools as
20 possible punishment, possible sanctions to
21 use.

22 Second of all, I think we
23 should think real hard about changing the law
24 if the group of attorneys passes a rule that
25 attorneys can not be punished, we're going to

1 stick it all on the client. As someone who
2 has to stand for election I want to distance
3 myself from saying I'm going to be the one
4 that wants to put it all on the clients.
5 Attorneys once again are a group who are
6 immune to any punishment for things which
7 admittedly many times they themselves did. I
8 would think very carefully about the political
9 correctness of that kind of rule.

10 HONORABLE F. SCOT MCCOWN: I
11 don't know what the answer to this is either.
12 But following up on what Judge Brister said
13 and thinking about what David said it's not
14 true in the law that the sins of the lawyer
15 are always held against the client. For
16 example, deemed admissions are undeemed
17 quicker if it was the lawyer's negligence than
18 if it was the client. Default judgment is
19 going to be undone quicker if it was the
20 lawyer's negligence than if it was the
21 client. And there are many, many times when a
22 trial court is going to rescue the client from
23 the lawyer.

24 The other problem it seems to
25 me to follow up with what Judge Brister just

1 said, if you say that only the client can be
2 sanctioned, you still don't solve the problem
3 that Rusty identified, because what is the
4 client going to do. The client is going to
5 come in and say, "I'm the only person that can
6 be sanctioned, and you should not strike my
7 pleadings because it was all my lawyer's
8 fault." It doesn't moot or make irrelevant
9 the inquiry of whose fault it was. The client
10 will still plead that as a factual
11 circumstance for why the sanction should be
12 something other than striking pleadings or
13 excluding evidence or something that would
14 affect the merits of the case, and the judge
15 is going to want to hear that.

16 MR. MCMAIN: Understand this,
17 Scott. Frankly, it's much preferable to me if
18 in fact that dispute deserves to be there, you
19 probably are going to make further progress in
20 the case in my judgment if you get the
21 recalcitrant lawyer out of the picture. And
22 one way to do that is if the client
23 understands that he's going to be held
24 responsible for the conduct of his lawyer and
25 if he goes and gets him a good lawyer that

1 will follow the rules and work with the Court,
2 so much the better, and let the bad lawyers go
3 without business.

4 I don't have any problem at
5 all with that. We're not talking about trying
6 to solve legal problems. We're talking about
7 trying to close inquiries by Courts and
8 adversaries into the attorney/client
9 relationship or allow them to drive a truck
10 through the bond that should be there between
11 the attorney and the client with regards to
12 performance in the course of litigation, and
13 that's what Transamerican does.

14 MR. LOW: There are other
15 procedures that accomplish what Rusty wants;
16 and when they say, "Well, we're coming out
17 saying lawyers are immune," we are not. If a
18 lawyer doesn't do something on time, you go to
19 grievance committee. There is a procedure for
20 that. The judge doesn't have to get involved
21 in that. If a lawyer is negligent, there is a
22 procedure for that. He can be sued. So this
23 is in no means saying a lawyer is immune.
24 There is nobody here feels immune from
25 anything, and I think we all get the sense of

1 that. So they are not immune, and there are
2 other procedures where you can best resolve a
3 conflict between the lawyer and the client
4 better than trying to solve it in the very
5 lawsuit where the lawyer is representing the
6 client; and I would second Steve's motion.

7 MR. ORSINGER: I have a
8 problem with the sense of fairness with the
9 client who typically at least, not the
10 commercial clients, typically don't really
11 understand the litigation process in good
12 faith taking the advice of their lawyer who is
13 giving them bad advice. Then they suffer from
14 that, and it doesn't look fair. When I read
15 Transamerican I thought for example of the
16 lawyers who constantly interrupt in a
17 deposition, making objections to tip the
18 witness off, constantly asking for conferences
19 with the witness telling them how to answer
20 questions and things like that; and they do
21 that from case to case to case, client to
22 client to client.

23 You can directly stop that by
24 the same district judges that have seen this
25 lawyer do it in five different cases, start

1 fining him \$1,000 and then \$3,000 and then
2 \$5,000 and then \$10,000. But if the only way
3 to punish the lawyer is to punish the clients
4 so that the word gets out among lay people
5 "Don't hire this lawyer or you may get fined
6 for his misbehavior," we can't focus the
7 punishment on the person whose behavior we're
8 trying to correct. If you can only punish the
9 client when really what we ought to be doing
10 is giving the lawyer an incentive to act
11 right, then we are dealing indirectly through
12 harming the people who really aren't
13 responsible in order to get at what we really
14 want which is to change the behavior of the
15 lawyer, and that doesn't seem fair to me.

16 MR. YELENOSKY: Yeah. I think
17 on a theoretical level the arguments that this
18 is an agency principal matter and it ought to
19 be treated just like every other agency
20 principal matter are compelling. My concerns
21 were Judge Brister's concerns and with
22 something added, and that is sure, you can say
23 that the lawyer is still accountable because
24 the client can turn around and sue them for
25 negligence. Right. Go get another lawyer.

1 Or they can go file a grievance. Right. File
2 it with the State Bar, more lawyers.

3 I don't think there is going
4 to be much perception and probably much
5 reality that those things make it all the way
6 back around again. So I don't know if -- I
7 tend to think that maybe the reality of the
8 situation is such that it prevails over the
9 compelling logical argument about agency and
10 principal.

11 MR. HATCHELL: I think Scott's
12 discussion highlights for me what is ambiguous
13 to me in the motion, and that is whether or
14 not we are doing away with the trial court's
15 ability to properly inquire into the place of
16 the fault to determine the severity of the
17 sanction, not who bears it. I would be very
18 much against that, because I thought that's
19 what the purpose of Transamerican was. I know
20 everybody is very influenced by the latest
21 case they have. But let me tell you about my
22 latest default sanction.

23 A lawyer misses three
24 discovery hearings in a row probably because
25 he has a substance abuse problem. The client

1 is in jail. He knows nothing about any of
2 these discovery -- even discovery even being
3 served, any hearings being held. Rusty's
4 answer is, "Well, sue the lawyer."

5 The lawyer is disbarred
6 because of his substance abuse problem and
7 doesn't have malpractice insurance. I don't
8 understand why the client bears a default
9 judgment sanction as a result of that conduct
10 when the purpose of the sanction is to secure
11 compliance with discovery, not to fix
12 liability.

13 PROFESSOR CARLSON: As I read
14 Transamerican the Court was suggesting some
15 due process implications when disposing a case
16 based on serious sanctions that necessitated
17 the inquiry into the wrong doer before those
18 serious sanctions would be imposed. I'm not
19 sure that is something you can undo by a rule
20 change.

21 MR. PERRY: There are certain
22 obligations that are obviously the obligation
23 of the attorney as opposed to the client.
24 Richard talked about the conduct of an
25 attorney in a deposition or the appearance or

1 nonappearance at a hearing. Judge McCown
2 talked about failing to timely deny something
3 on the request for admissions. The practical
4 approach that judges almost always have is
5 that if something is obviously the lawyer's
6 fault in an area that is obviously the
7 lawyer's responsibility, judges do not
8 generally visit that, visit the harm on the
9 client; and I think we all recognize that that
10 is fair.

11 The problem is that there are
12 a lot of areas such as locating and producing
13 documents and answering discovery in which the
14 obligation is one that is a mutual obligation
15 that the attorney and the client have to work
16 together in order to accomplish, and
17 Transamerican appears to require that there
18 has to be an inquiry as to which of those two
19 it was that made whatever mistake was made.
20 Now, I don't understand it to be the sense of
21 the motion on the floor that the rules would
22 prohibit a party from coming in and letting
23 the lawyer throw himself on his sword and take
24 the wrap, which is very common, if that's what
25 the party and the lawyer decide they want to

1 do and try to avoid the sanction; but it's one
2 thing to say we are going to require an
3 inquiry as between those two, and it's another
4 thing as to say we're going to let the lawyer
5 throw himself on the sword if he wants to.

6 Before Transamerican it was
7 common for the lawyer to come in and try to
8 take the wrap, but there was no mandated
9 inquiry into the attorney/client
10 responsibility. It seems to me the sense of
11 the motion is that we should not mandate that
12 type of an inquiry, but if in defense of the
13 sanctions motion they want to come in and say,
14 "Well, hell, it's really all the lawyer's
15 fault," well you know, the Court is going to
16 listen to them, and maybe he'll believe them
17 and maybe he won't.

18 MR. BABCOCK: That is
19 correct. That is the sense of the motion,
20 because it is the client's privilege.

21 MR. SOULES: I thought the
22 motion was that the sanctions could be imposed
23 only upon the client and not the lawyer.

24 MR. BABCOCK: That's correct.

25 MR. SOULES: Even then I guess

1 if the lawyer says, "It's all my fault" and
2 falls on the sword and the judge believes him,
3 then no sanctions can be imposed on anybody.

4 MR. BABCOCK: Or he may impose
5 it on the client anyway.

6 MR. SOULES: Okay.

7 MR. SUSMAN: How would we
8 reword the motion? "Sanctions can be imposed
9 only on the client unless the lawyer -- unless
10 it's clear the lawyer is solely responsible"
11 or something like that.

12 MR. HERRING: That's the rule
13 now. That's the same thing.

14 HONORABLE ANN TYRELL COCKRAN:
15 It's not a rewording of the motion.

16 MR. BABCOCK: It's not a
17 matter of rewording the motion at all. It's
18 just a matter --

19 MR. HERRING: You just don't
20 want sanctions against the lawyers.

21 MR. BABCOCK: Right. And
22 because the way it is now this is a tactic
23 that opponents are using to try to get between
24 the lawyer and the client. And if the client
25 is properly advised just as you say, that it

1 may well be that the defense to the motion
2 will be it was the lawyer's fault. And if the
3 client gets sanctioned, he may be irritated at
4 the lawyer and he may get himself a new
5 lawyer, or he may wait and file a subsequent
6 lawsuit to get back the money he's been
7 sanctioned.

8 MR. HERRING: He can't do that
9 under the malpractice insurance policies.

10 MR. BABCOCK: It depends on
11 how much he's been sanctioned. I mean, some
12 of us have got some assets.

13 MR. HERRING: Speak for
14 yourself.

15 MR. MCMAIN: You don't work
16 for Jones, Day.

17 MR. BEARD: The motion for
18 sanctions is going to have to be personally
19 served on the client now or just one of the
20 lawyers? He may never know about it.

21 MR. HERRING: We actually
22 talked about that where there ought to be a
23 notice in a severe sanction situation, and if
24 the client is on the hook potentially for a
25 severe sanction, you're committing malpractice

1 and violating the disciplinary rules if you
2 don't inform the client of that fact. So we
3 figured that you really don't need to put that
4 in here because that's --

5 MR. BEARD: What if the lawyer
6 doesn't tell him?

7 MR. HERRING: Then the lawyer
8 is going to have real problems after that when
9 it comes out. The client is going to be --

10 MR. SOULES: The lawyer is the
11 agent for service, but not the agent for
12 sanctions.

13 HONORABLE F. SCOTT MCCOWN:
14 This illustrates the wisdom of getting rid of
15 sanctions almost all together.

16 MR. SOULES: Anything else on
17 this? Harry Tindall.

18 MR. TINDALL: Isn't there a
19 middle ground where we don't sanction if it's
20 going to be intrusive of a privilege, but if
21 at the hearing the lawyer throws himself on
22 the sword and it's apparent at the sanctions
23 hearing that it's the lawyer's fault, that the
24 Court can then impose sanctions?

25 MR. HERRING: That's how it is

1 in the rule now. Unless the lawyer is at
2 fault, you can't sanction the lawyer the way
3 it is in this proposal.

4 MR. TINDALL: Well, the
5 concern is that the way it's written I think,
6 Chuck, is that if the Court has to make an
7 inquiry; and I think there is concern that
8 that's intrusive of privilege and agency and
9 things like that. But if the lawyer goes down
10 there and is about to have his client
11 sanctioned and says, "Judge, hold up. I went
12 on a vacation. I didn't have my file
13 supervised. It's my fault." Why couldn't in
14 that situation where there's been a disclosure
15 of a problem voluntarily at the hearing, that
16 the lawyer should be sanctioned?

17 HONORABLE SCOTT A. BRISTER:
18 It doesn't require an inquiry. It says "On
19 the party whose act necessitated the motion."
20 As indicated many situations that will be
21 clear what the violation is. Maybe it will
22 show up in the discovery.

23 MR. BEARD: What if the other
24 side says, "I don't believe that lawyer.
25 Bring that client in, and let's prove he did

1 it."

2 MR. TINDALL: Well, you have a
3 privilege unless it's voluntarily disclosed is
4 what I'm trying to get at. It seems to me it
5 sort of solves 95 percent of these problems.

6 MR. BEARD: I thought we were
7 knocking out the privilege when we got into
8 these issues.

9 MR. TINDALL: Well, I'm trying
10 to see if there's not a middle ground here.

11 HONORABLE F. SCOTT MCCOWN:
12 What Mr. Beard is saying is that what is
13 voluntarily disclosed may not be true, and the
14 other side might insist upon the right to
15 discovery.

16 MR. LATTING: Well, if they do
17 that, they rely on privilege and put the
18 evidence on.

19 MR. MCCOWN: Well, but you're
20 right back where you started.

21 MR. SOULES: Let's see where
22 we are, at least just get a consensus, unless
23 somebody else has got something they think
24 will influence the votes. David Perry.

25 MR. PERRY: If the inquiry is

1 not mandated but in effect is optional on the
2 part of the party that is being, potentially
3 going to be sanctioned, if that party wants to
4 come in and say, "I blame it on my lawyer,"
5 they have the right to do that. They might
6 waive some attorney/client privileges and so
7 forth, but if they choose to do that, then
8 that's up to them, but it seems to me that I
9 think there is a consensus that the rules
10 should not mandate that there be an inquiry as
11 between the attorney and the client as to who
12 was responsible, and that as a general rule
13 the rule should not abrogate the general rule
14 that the party is bound by the actions of the
15 attorney.

16 MR. SOULES: Okay. Chip, this
17 is your motion, isn't it?

18 MR. BABCOCK: Yes, sir.

19 MR. SOULES: Why don't you
20 restate the motion, and we'll take a show of
21 hands.

22 MR. BABCOCK: Can the court
23 reporter read it back, please? No. I'm just
24 kidding. I think the motion is that the
25 discovery sanctions that we have been

1 discussing would only be visited upon the
2 client and not the attorney or law firm.

3 MR. SOULES: Is that the
4 motion you seconded, Steve?

5 MR. SUSMAN: It is the one I
6 seconded.

7 MR. SOULES: All in favor of
8 the motion show by holding up your hands.

9 PROFESSOR EDGAR: We can't
10 hear. We can't hear down here.

11 MR. MCMAIN: Are you talking
12 about modifying it?

13 MR. SOULES: You couldn't
14 hear?

15 MR. SUSMAN: I'll take
16 amendments.

17 MR. SOULES: State it again.

18 MR. BABCOCK: Sorry. The
19 motion as made was that the discovery
20 sanctions would only be visited upon the
21 client and not the attorney or law firm. That
22 was the motion that I made.

23 MR. SOULES: Okay. All in
24 favor of the motion show by hands.

25 MR. HERRING: Just a

1 clarification here. Any sanction? That is
2 couldn't do CLE, couldn't do money, couldn't
3 do anything?

4 MR. BABCOCK: That's correct.

5 MR. SOULES: All in favor show
6 by hands. Eight. Opposed? Okay. The house
7 is very definitely against the motion. So
8 that will give you some guidance on that,
9 Joe. Judge Cockran, I had --

10 MR. PERRY: Wait a minute.
11 Does that leave us back with the -- I don't
12 think people intended to vote that they were
13 in favor of mandating an inquiry between the
14 two.

15 MR. LATTING: Could we get a
16 show of hands on that, because we didn't vote
17 on that.

18 MR. SOULES: Well, one of the
19 things you're going to have to look at Elaine
20 has raised a serious issue here, and it's not
21 just in Transamerican. It's in the Supreme
22 Court of United States cases and federal
23 cases. If the sanction is going to go against
24 the client, default judgment, striking
25 pleadings and that sort of thing, it may be

1 essential that the Court first determine
2 whether the lawyer or the client did it.

3 MR. PERRY: Well, not really.
4 It would always be up to the client to decide
5 whether they want to raise as a defense "We
6 did not do it. Our lawyer did it."

7 MR. SOULES: You can waive
8 your Constitutional rights.

9 MR. PERRY: You see, there's
10 no reason that the initial burden of making
11 that inquiry should be on the Court or on the
12 Movant. The initial burden of raising that as
13 a defense should be on the client, on the
14 party defending the motion.

15 MR. FULLER: You don't have to
16 say that though, do you? You don't have to
17 say that, move for sanctions weighed against.
18 You don't have to say that. And if they want
19 to raise the privilege or waive privilege,
20 fine.

21 MR. SOULES: Judge Cockran, I
22 had a question. You were indicating that you
23 thought maybe the order on a motion for
24 sanctions may be delayed until the time of
25 judgment or after verdict or at some point

1 later in the trial. Did I understand that
2 correctly?

3 HONORABLE ANN TYRELL COCKRAN:

4 I wasn't -- just to clarify, I wasn't
5 suggesting that that be mandatory, but that if
6 you could, to take care of those times
7 somebody over there brought up before lunch
8 when the sanctions hearings are not really
9 over the sanctions conduct as much as they are
10 trying to paint the picture of who is the good
11 guy and who is the bad guy for the judge, sort
12 of setting the stage where the judge is going
13 to make a real decision in the case, and
14 you know, when it becomes this one-upsmanship
15 and, you know, who can deliver the more
16 devastating blow during discovery; and I have
17 found that it's like a lot of things. If you
18 don't get caught violating the rule, it
19 doesn't matter, you know, that sometimes just
20 saying, you know, "Let's work on the problems;
21 let's work on getting the discovery done and
22 getting the case prepared," so I will make
23 those orders now about, you know, who is going
24 to do what in discovery; but as far as arguing
25 about who should be slapped with what monetary

1 sanctions for being a bad guy, "Let's not
2 worry about that until we get the case itself
3 ready. And then if you-all still want to
4 argue that, we'll hear the motion. We'll hear
5 the evidence on that and hear the argument on
6 that while we're waiting on the jury verdict"
7 just to diffuse this situation of litigants
8 trying to use it as a way to resolve the case
9 on something other than the merits which is
10 becoming a real problem, but at least having
11 the option there in the rule that awarding of
12 these monetary sanctions doesn't have to take
13 place at the same time that you actually rule
14 on getting the discovery or not having to
15 produce the discovery.

16 MR. SOULES: The reason I was
17 curious there is if the purpose of sanctions
18 is to deter further abusive conduct, one of
19 the things you're doing even by delaying the
20 decision is the threat at least of sanctions
21 later is I guess a deterrent without
22 actually --

23 HONORABLE ANN TYRELL COCKRAN:
24 And a lot of times if you say, you know,
25 "Instead of deciding the question of

1 attorney's fees now, let's wait and see how
2 everybody behaves for the rest of the
3 depositions." You know, it's amazing how it
4 cleans up people's acts.

5 MR. SOULES: You don't feel
6 that you have to come down right now in a
7 hearing in order to get the deterrent effect
8 of possible later sanctions.

9 HONORABLE ANN TYRELL COCKRAN:
10 I would I least like that flexibility.

11 MR. SOULES: Doke Bishop.

12 MR. BISHOP: Luke, I think
13 that David had a good point a minute ago, and
14 perhaps the rule ought to be stated in terms
15 of being a rebuttable presumption that it's
16 the client who is responsible for the
17 sanctions, and that way it makes it clear that
18 it's a defense that the client can bring up
19 and then waive the privilege if they want to,
20 but the moving party doesn't have to. The
21 judge doesn't have to require that. It's
22 strictly a defense.

23 MR. SOULES: Can that issue be
24 raised after the sanction has been visited?
25 That's the problem we pose to you. Somebody

1 is threatening you with death penalty
2 sanctions; and if they come down, the client
3 is out of court. And is it too late then for
4 the client to say, "Wait a minute; I didn't do
5 that; my lawyer did," or whether they have to
6 fight prior to really knowing whether there is
7 going to be a serious sanction. Do they have
8 to get into a quarrel between themselves for
9 fear that there may be a death penalty
10 sanction and it would be too late to raise the
11 question after the sanction has already come
12 down.

13 MR. BISHOP: I would think
14 that you would want to make them fight that
15 upfront. I mean, it's a good point.
16 Otherwise you're going to wind up with two
17 different hearings, and this could go on for a
18 long time. I don't know that that is a
19 practical approach.

20 MR. SOULES: I don't know
21 either, but it does put the issue prior to
22 trial, some of the things that Rusty was
23 talking about was if there is going to be a
24 sanctions visit in one place or another and
25 it's a serious hearing, then you almost have

1 to broach that issue or the client bites the
2 bullet as somebody said they might do. David
3 I think. Mike Hatchell.

4 MR. HATCHELL: One other
5 point about Doke's and David's comments which
6 I take seriously it sounds as if there is
7 always a deliberative process between the
8 client and the lawyer to lead the lawyer to
9 the sword.

10 It can work the other way.
11 The other death penalty sanction, a case I'm
12 working on the week, the sanctions hearing is
13 held without any notice whatsoever to the
14 client in the judge's chambers, and the lawyer
15 who is responsible for getting the situation
16 where it is to begin with puts on evidence at
17 that hearing exonerating himself and secures
18 an order from the judge that it isn't his
19 fault.

20 And the only point I'm trying
21 to make is that in the mandated inquiry in
22 Transamerican the Court looked into this
23 consciously. It may be the only time that the
24 client has to determine that its his lawyer
25 that is at fault. He can then take

1 corrections to secure compliance with
2 discovery by getting rid of his lawyer.

3 MR. LATTING: It says in a
4 comment, by the way, that's after the rule, it
5 says that "The trial court should take
6 appropriate steps to minimize as much as
7 possible any intrusion into the
8 attorney/client relationship," for whatever
9 that is worth. It does say that.

10 MR. SOULES: As far as these
11 comments are concerned if you look at your
12 rule book and see the length and the
13 subject matter of the comments that get
14 published when the rules get published, it's
15 not this kind of comment that comes out. And
16 what we are trying to communicate, if that's
17 what we're trying to do, if we are attempting
18 to communicate through comment how the rule is
19 supposed to be interpreted, that may never get
20 published in the rule book. The comments may
21 or may not get adopted by the Supreme Court of
22 Texas. What the rules mean needs to be stated
23 as much as possible in the rule and not in the
24 comment.

25 MR. LATTING: Maybe we need

1 to -- I was just pointing out that it is in
2 the task force report, that it's been
3 addressed; and maybe it's a good idea. I
4 don't know if it does any good, Rusty, or what
5 you think about whether that helps to put that
6 in the rule after you've mandated an intrusion
7 into the attorney/client relationship and say
8 "Do it as unobtrusively as possible." I don't
9 know if that helps, but it might make him feel
10 a little better.

11 HONORABLE F. SCOTT MCCOWN:

12 One of the problems is that these motions for
13 sanctions that plead pretty severe sanctions
14 against the client such as striking the
15 pleadings or excluding evidence are common.
16 Now, the fact that that is the way it comes
17 packaged when it's filed doesn't mean that
18 that is the way it's going to look at the
19 hearing. But what you've got is a very common
20 motion; and on motions to withdraw now you are
21 required to serve that. If you file a motion
22 to withdraw, you have got to serve it on your
23 own client and advise them of their right to
24 come to the hearing and protest. So if you
25 get one of these motions for sanctions, what

1 are you supposed to do?

2 As pled it's a serious
3 problem. Nine times out of ten in reality
4 it's not, but you have to bring your client in
5 who has no way to assess whether you're
6 telling him the truth or it's serious or not
7 and say, "This has been served. You need to
8 now retain another lawyer to look over my
9 shoulder and make sure that I'm handling it
10 appropriately. And we've got to come to a
11 strategy about this."

12 That's pretty unrealistic; and
13 if it's what you did, it would really drive up
14 the cost of litigation. Yet at the same time
15 if it's not what you do and you fail to
16 assess, you fail to guess how it's going to be
17 handled, and the client actually does get a
18 sanction visited against him, then you're in
19 serious problems both from malpractice and
20 grievance for not providing your client
21 appropriate notice. And so it seems to me to
22 be a terrible can of worms. I don't know what
23 you do about it, but...

24 HONORABLE SCOTT A. BRISTER:

25 And I think that Judge McCown directly points

1 out the difference between a rule and a
2 comment. To try to put all those
3 circumstances in a rule you end up with
4 something more specific, and a rule says
5 something more specific than "Sometimes you
6 want to notify the client. Of course
7 sometimes you don't." That's not a rule.
8 Sometimes, you know, you don't want to go into
9 this until the end of the trial, and then have
10 the hearing, because sometimes you can't even
11 announce that. That is appropriate for a
12 comment to give. The rule would be, as I
13 think it does, give discretion, say "The Court
14 should do this, may do that, and assess it on
15 the party appropriate," and point out in the
16 comment, "Think about this" and "Think about
17 that," but it's hard to write the rule that
18 covers all of those circumstances to say when
19 specifically you need to do it, when not and
20 when if it's just looking at the face of the
21 motion. "That's right, but that's again
22 usually not the deal." At some point you have
23 to leave some discretion to us judges.

24 MR. SOULES: Are we ready to
25 go to Paragraph 5 now?

1 MR. HERRING: Let me just
2 comment.

3 MR. SOULES: Okay.

4 MR. HERRING: A comment on
5 comments because you raised it. It was the
6 overwhelming sentiment of the lawyers and the
7 judges who responded to the questionnaire,
8 250, that we ought to have comments to the
9 rules. The reason is there are a lot of
10 things to say like that. Federal Rules have
11 lengthy comments; and we do have comments in
12 some of our rules, the Rules of Civil
13 Evidence. Rule 801 has lengthy comments. We
14 do have some of that, but we're building up so
15 much of this decisional gloss that you really
16 can't simply put in the rules and shouldn't be
17 in the rules, but it would be nice for people
18 to have access to it. And we've had 3,000
19 reported Federal decisions on Rule 11, over
20 3,000 now since 1983. We'd like to have that
21 information that the lawyers and judges want,
22 some of it at least available.

23 MR. SOULES: Okay. Are we
24 ready to go to the question of mandamus
25 review, whether or not to leave 5 as it is,

1 what is the meaning of it? Rusty, what is
2 your input on that?

3 MR. MCMAIN: Well, the reason
4 for the wording of the rule, it was not
5 intended to detract from mandamus. Nobody
6 intended to overrule Transamerican. It simply
7 provides that, and it was primarily designed
8 to deal with the greater sanctions saying if
9 you are going to go to severe monetary
10 sanctions, they're going to be in the final
11 judgment. You're never going to put them
12 anywhere else, and I mean basically to follow
13 some case law that had followed the
14 Transamerica case with regards to monetary
15 sanctions, Downey and the other cases.

16 We weren't really saying that
17 you couldn't go to a mandamus, but by and
18 large if you follow the procedure the way the
19 rule is designed, it doesn't get done until
20 the end, because that's what essentially the
21 law had developed by the time we wrote the
22 rule.

23 The question we had was
24 whether or not to have an interlocutory appeal
25 procodure was the real issue that we tried to

1 focus on as opposed to whether you resort to
2 mandamus; and kind of everybody said, "No."
3 Nobody likes -- well, I shouldn't say
4 "nobody." Justice Scoggin probably likes the
5 ceiling rule provision with regards to
6 immediate appeal, but those were the
7 extremes. You can provide an appellate remedy
8 whenever there's a decision on sanctions which
9 will not only clog up the trial courts but the
10 appellate courts, or you basically not provide
11 any appellate remedy except in the context of
12 the appellate final judgment; and if there is
13 something else that happens, you're left with
14 the principles theoretically of Transamerican
15 as to whether or not mandamus review is
16 applicable. And nothing we did was intended
17 to do away with it if the sanctions went that
18 heavy.

19 MR. HERRING: You might even
20 want to add a statement, Richard, in a comment
21 to clarify that --

22 MR. MCMAIN: Right.

23 MR. HERRING: -- it wasn't any
24 attempt to abolish or to change the applicable
25 principles of mandamus law.

MR. MCMAIN: We weren't trying to change Transamerican. What we were trying to say is -- the problem is once again because we could not develop or nobody could develop a consensus bright line between what is a substantial. In other words, when you're using Procedure 3 versus Procedure 5 or Procedure 4 almost everybody agrees that if you're -- if the sanction is not overwhelmingly significant, and in most contexts you can say \$1,000 or less, that it was going to be a non-issue.

When you're using the other sanctions it's really each case has got to be decided on its own. We did not want to provide any separate procedure even though virtually all the mandamus cases are going to be in the second procedure. \$1,000 might be fatal to an indigent Defendant if he's got to pay it right now. So it may be that his position is one of mandamus because under his circumstances wrong procedure was followed. It should have been under 4, didn't have an evidenciary hearing, whatever. Even if it cost \$1,000 to defend, even if that is a

1 reasonable number, basically it's going to
2 wipe out the lawsuit and you can't afford to
3 do that.

4 But we didn't have -- there is
5 no bright line way that we could arrive at
6 that; and that's kind of our consensus, and
7 that's kind of where we came out was just kind
8 of keep the law the way it is and mold it into
9 a rule. But I agree with what the comment
10 basically says. We're not changing the
11 availability of mandamus relief where you
12 essentially are killing the lawsuit.

13 JUSTICE NATHAN HECHT: But I
14 do think it sounds like you are. I agree with
15 you as a strict matter of logic and English it
16 doesn't do it, but it kind of suggests that if
17 they are deemed to be part of the final
18 judgment and subject to appeal, then that
19 remedy is adequate and ought not to be made.
20 I agree with you it doesn't have to be that
21 way, but it sort of sounds like that.

22 MR. SOULES: Let me ask you
23 this: If we just took out -- if we stopped
24 the first sentence after "part of the final
25 judgment," period, "An order under this rule

1 shall be deemed to be part of the final
2 judgment," and don't say "and shall be subject
3 to review on appeal therefrom."

4 MR. ORSINGER: That doesn't
5 help you. I think it's risky.

6 MR. SOULES: Why? I mean if
7 it's part of the final judgment.

8 MR. ORSINGER: I think if you
9 want to fix this, fix it by saying, "Nothing
10 herein shall be construed to deny the remedy
11 of mandamus when appropriate." Hang that on
12 the end.

13 MR. LATTING: That is what I
14 would strongly favor.

15 MR. ORSINGER: And let the
16 Supreme Court tell us --

17 MR. SOULES: Okay. Whatever
18 the draft, whatever else.

19 MR. MCMAIN: I might point
20 out, Luke, that Bill has raised a point. We
21 actually have this language or something very
22 close to it in Rule 215 now, and it didn't
23 preclude the Court from going to mandamus.

24 PROFESSOR DORSANEO: I think
25 it was put in in 1988.

1 MR. MCMAIN: In 1988 it was
2 put in "Such an order shall be subject to
3 review on appeal and final judgment." We put
4 that in several different places.

5 PROFESSOR DORSANEO: Awards of
6 expenses.

7 MR. MCMAIN: Awards of
8 expenses.

9 JUSTICE HECHT: This is for
10 everything?

11 PROFESSOR DORSANEO: Yes.
12 This goes beyond that.

13 MR. ORSINGER: And as the new
14 rule, then it might be interpreted as being
15 something different.

16 MR. MCMAIN: I understand. I
17 just want you to understand that nobody
18 thought that was a limitation on mandamus,
19 because the Court didn't.

20 MR. SOULES: The last big
21 issue that I heard was Steve Susman's
22 suggestion that we not have a Texas Rule or
23 that we think about not having a Texas Rule
24 and we just adopt the Federal Rules. And,
25 Steve, why don't you explain that?

1 (At this time there was a
2 discussion off the record, after which time
3 the deposition continued as follows:)

4 MR. SOULES: Again the last
5 big issue that I had down here, and I man not
6 not have written them all down as they came
7 up, was the question of considering utilizing
8 the Federal Rule in our State Rule and not
9 have variations from that to others. And,
10 Steve, your thought?

11 MR. SUSMAN: I just heard
12 there are 3,000 decisions interpreting
13 Rule 11. I withdraw my suggestion.

14 MR. HERRING: That was one of
15 the points against it.

16 MR. SOULES: Okay. That fixed
17 that one. Does anyone have any other thoughts
18 that you want to express to give guidance to
19 Joe as they, he and his subcommittee go
20 forward? Joe, do you have a question?

21 MR. LATTING: I have a
22 question about Section 3(h) on sanctions, and
23 I'd like to know what the committee thinks
24 about giving trial courts the ability to
25 require community service or pro bono legal

1 services from lawyers for violating discovery
2 orders or for failure to make discovery.

3 MR. HERRING: Well, the
4 discussion was that, number one, judges are
5 doing it. If you look at Braden v. Downey,
6 that was a specific award that the
7 Supreme Court commented on at least in terms
8 of discussing the creativity. Since that time
9 Braden has gone back down and been appealed,
10 and that's been affirmed, the community
11 service award.

12 Federal courts have done
13 pro bono service. The idea -- and Justice
14 Gonzales in his concurring opinion mentioned
15 the community service. The idea is to lay the
16 full panoply of possible things that a judge
17 might want to do. In some cases if you go
18 back and look at the Federal discussions of
19 Rule 11 like Judge Johnson's article, he says
20 that too often judges immediately go to
21 monetary awards of attorney's fees, and that
22 doesn't solve the problem. You have lawyers
23 who don't know how to behave, or lawyers who
24 maybe we bring them up in a bad culture. In
25 any event, you think you ought to do some

1 things that you shouldn't do; and hence if you
2 tell them that they've got to go watch the
3 videotape put out by the Center On Legal
4 Professionalism or if you tell them to go
5 listen to David Beck lecture on ethics, or if
6 you come up with some creative solutions, you
7 may be able to deal with them individually;
8 and that's the reason it's in there. Of
9 course, they're doing it State and Federal,
10 and maybe it shouldn't often be done, but
11 there are some times when it might make some
12 sense. That's why it's in there.

13 Some people object to that
14 obviously for the same reason some people
15 object to any kind of pro bono or any kind of
16 personal service. No. We got those
17 objections, but it's being done in State and
18 Federal Court, and it's a judicial option, and
19 our judges need more options instead of less
20 options in terms of trying to get lawyers to
21 behave reasonably.

22 MR. SUSMAN: I mean where is
23 the empirical evidence that judges need more
24 power? I mean where is this? First punitive
25 damages, now slavery. I mean you are

1 converting civil judges to criminal judges in
2 allowing them to sentence lawyers.

3 HONORABLE F. SCOTT MCCOWN:

4 It's even worse than that, because in criminal
5 court conditions of probation are optional.
6 You could always go incarceration. I mean
7 seriously. You don't even give the lawyer the
8 chance to just pay the monetary fine. You
9 force him to go do something demeaning. I
10 think it's demeaning.

11 MR. SUSMAN: To me it's so

12 Micky Mouse. I think it is so Micky Mouse.
13 It demeans our profession. It is just the
14 product of some judge who wants to be able to
15 do something bizarre to some lawyer and then
16 write about it in Texas Lawyer, and I think we
17 should not allow them to do it, period.

18 MR. HERRING: A lot of judges

19 are doing it. I don't necessarily agree they
20 need more power encouragement. The question
21 is whether they should ever have that option;
22 and maybe you could if you think they
23 sometimes perhaps should, you add a comment to
24 say that should be used only in rare
25 instances.

1 A separate issue from the
2 personal service is the CLE, and you can
3 distinguish those at least logically and say
4 maybe they should have that option and maybe
5 not the other option, or you could say they
6 shouldn't have any of those options.

7 MR. LATTING: I have a
8 motion. I move that we -- as you can tell by
9 my comments, I'm for broad powers for trial
10 judges, but this is too far in my judgment. I
11 move we take away all ability of trial judges
12 to require community service, pro bono legal
13 services. I move we strike that from the
14 draft.

15 MR. SUSMAN: Second.

16 HONORABLE SCOTT A. BRISTER:
17 Can I make a suggestion? We're probably going
18 to have to bar it, because the rule says
19 "including the following." So if you want to
20 bar it, you're probably going to have to add a
21 provision specifically barring it.

22 MR. HERRING: What you need to
23 do is delete it and add a comment that says
24 judges shall not do it.

25 HONORABLE SCOTT A. BRISTER:

1 "May not do it."

2 MR. HERRING: Because (i), the
3 last provision, is a catch-all that says
4 "other orders as are just." And that's the
5 provision in the current rule that judges are
6 using and have used to order CLE and other
7 kinds of things.

8 MR. LATTING: Well, whatever
9 it takes is the spirit of my motion, because I
10 don't think it's appropriate for judges. It
11 seems to me that in terms of conduct that is
12 this egregious, then it's a matter for
13 contempt or for a grievance procedure. It
14 doesn't seem to me to be connected with not
15 producing documents, "Well, you have got to go
16 to CLE," or "You've got to work for the Travis
17 County Republicans."

18 MR. TINDALL: We have a
19 district judge in Houston who banned a lawyer
20 from practicing in his court. Do you envision
21 that?

22 MR. GALLAGHER: Can we select
23 which judge?

24 MR. PERRY: Can I take my case
25 with me?

1 (Discussions simultaneously
2 among committee members.)

3 MR. SOULES: Who wants the
4 floor? Hold up your hand, and I'll recognize
5 you. Does anyone want to speak in favor of
6 judges having the right to give community
7 service, pro bono legal services? Richard
8 Orsinger. And Steve, I'll get to you next.

9 MR. ORSINGER: I don't have
10 any problem at all with community service, but
11 I do have a problem with pro bono legal
12 services. And I don't have a problem with CLE
13 because they're definable and they'll probably
14 teach humility and knowledge in a few things;
15 but the problem that I have with pro bono
16 legal services is if you have to do 25 hours
17 of pro bono work and you take a case, you
18 don't know for sure that at the end of 25
19 hours you can walk away from it.

20 If you're foolish enough to
21 take a divorce case, you may find out that
22 there is a sexual abuse allegation that
23 surfaces, and you may be involved in a
24 termination case, and you may be involved with
25 the Department of Human Resources, blah, blah,

1 blah, blah; and you can't sentence somebody to
2 X number of hours of pro bono, because once
3 they take a client I think the duty to the
4 client is until the end of case.

5 But on community service you
6 can go work with a charity or work with a
7 church for 200 hours and then leave. And so
8 to me I don't have a problem with service, but
9 I do have a problem with the indeterminate
10 nature of pro bono services.

11 MR. YELENOSKY: I don't know
12 how common this is, but I know Judge McCown
13 has compared it to some penal penalties where
14 you have the option of doing something other
15 than the service, but I don't think it should
16 be compared to that. This is a profession,
17 and we have made a choice to join the
18 profession, and that carries some
19 responsibilities; and sometimes it requires
20 policing, and sometimes I think a judge may be
21 required to police a particular member of the
22 profession by requiring something of them in
23 kind, and that we should not proscribe that.
24 And I think it's going to look awfully funny
25 if we are going to specifically proscribe that

1 in this rule.

2 MR. SOULES: We're certainly
3 going to be running counter to the State Bar's
4 pushing to get pro bono services.

5 MS. SWEENEY: That's totally
6 different.

7 MR. SOULES: Anyone else? I
8 think the motion was to delete both community
9 service and pro bono legal services. Is this
10 against the motion?

11 HONORABLE F. SCOTT MCCOWN: I'd
12 just like to amend the motion slightly just to
13 suggest that what we ought to do is just
14 delete (h). I mean I don't think you have to
15 go so far as prohibiting judges from doing
16 that or, you know. It just seems to me that
17 (h) encourages it and legitimizes it and will
18 foster it, and we ought to just delete (h),
19 and then, you know, leave it up to community
20 pressure to produce the appropriate amount of
21 it.

22 MS. MIERS: Well, I just
23 wanted to comment that I know a lot of lawyers
24 that would like judges to rather than a
25 monetary dismissal or some other sanction

1 enter some sort of less destructive form of
2 sanction, so I just point out to you that
3 maybe it is this room's consensus that they'd
4 rather pay a fine or have a case dismissed,
5 but I know a lot of them that would like to be
6 able to do community service or pro bono work
7 instead of be sanctioned, some other way.

8 MR. SOULES: Anyone else?

9 MR. LATTING: The idea of
10 sanctions is something they don't like, so I'm
11 not -- it just seems to me -- well, I've said
12 what I have to say. And if taking it out will
13 do it, then I'm agreeable to that amendment,
14 but I would prefer to have it deleted.

15 MR. SOULES: That is what I
16 was going to ask you. Do you agree to the
17 amendment so that the motion would be to
18 delete (h)?

19 MR. LATTING: No, I don't,
20 because I want to see if the committee
21 feels -- I feel that we should, that judges
22 should not be allowed to do this, and I don't
23 think just taking this out gets me there.

24 MR. SOULES: Okay. So the
25 motion is that we should have a rule or a

1 comment that prohibits it.

2 MR. LATTING: I don't care
3 whether it's a comment or a flat prohibition.
4 I just don't think that this has anything to
5 do with failure to make discovery.

6 MR. GALLAGHER: Can I ask a
7 question? How do you distinguish between from
8 the standpoint of the merit of the sanction,
9 community service on the one hand or
10 incarceration or whatever it may be, striking
11 the pleadings versus the monetary sanctions?
12 I'm in agreement with the motion. I'd like to
13 see it go forward. What's the distinction
14 between the two?

15 MR. LATTING: Maybe I suppose
16 one distinction is that this is just farther
17 removed from the discovery process. That is,
18 doing community service, as we'll all agree I
19 guess, is a good thing to do, but it has
20 nothing to do with what is going on in the
21 lawsuit. Whereas the lawsuit is literally I
22 guess about money or about something
23 identifiable, and the sanctions have
24 historically been applied to those things that
25 are within the controversy.

1 Say we just don't like the way
2 you've been behaving, so we're going to make
3 you go do something else outside the
4 courtroom or sweep up the park or something.
5 It just seems demeaning to me; and I guess
6 it's an emotional response as much as
7 anything.

8 MR. GALLAGHER: But a million
9 dollar sanction versus community service,
10 Chapter 11 is demeaning also.

11 MR. LATTING: I'd rather sweep
12 up the park. I agree.

13 MR. LOW: I was just thinking
14 I would hate to be the client. "How come
15 you're representing me?" "Well, I messed up,
16 and they gave you to me." I don't know that
17 pro bono would be too good, a good springboard
18 for pro bono work.

19 MR. SUSMAN: Yes. I think one
20 way, Mike Gallagher, one way that could be
21 distinguished, they talked about on the
22 monetary, the fines, the punitive damages
23 instead of going under the court system, go to
24 the injured party, the other side, because the
25 rule is we want to avoid the impression that

1 judges are imposing these sanctions, punitive
2 damages to finance the judicial system. It
3 looks a little fishy.

4 I think you have the same
5 fishiness when a judge orders a lawyer to go
6 work on some community project that is their
7 favorite project or favorite charity. I mean,
8 how the hell do you select the charity? I
9 mean, we will get in all kinds of scandals by
10 this. I just don't think it's necessary. I
11 mean, you've got the same bad-looking
12 appearance. That is my thought.

13 MR. GALLAGHER: Hence Judge
14 McCown's suggestion, elimination of sanctions
15 all together.

16 MR. YELENOSKY: Sorry to speak
17 again, but I know I'm one of the few taking
18 this position. But as I understand it these
19 are the possible sanctions for the whole range
20 of conduct, and that may include destruction
21 of evidence. Destroying evidence isn't part
22 of the lawsuit either. It's an offense
23 against not just other lawyers. It's an
24 offense against the judge. It's an offense
25 against the community, and it's an offense

1 against the profession. And to order somebody
2 to do community service for destroying
3 evidence is probably a punishment that very
4 well fits the crime. So I'm not saying that
5 this is appropriate for every violation, but
6 there are some things for which it is
7 appropriate, and it isn't a defense to say
8 "Well, it's not part of the lawsuit."

9 HONORABLE F. SCOTT MCCOWN:

10 Could I suggest a compromise? I think, and I
11 don't want to speak for him, but I think what
12 troubles Steve Susman and what troubles myself
13 is that this allows a trial judge to put a
14 lawyer into a very demeaning situation that he
15 can't control, and I just see it's potentially
16 ripe for abuse.

17 On the other hand, I
18 understand Ms. Miers' point that sometimes
19 requiring a lawyer to attend reasonably
20 related CLE might well be an appropriate and
21 tailored sanction. What about making it
22 exactly like probation and writing the rule to
23 say "A judge may suspend a monetary award
24 against an attorney conditioned upon
25 performance of reasonable community service or

1 completion of reasonably related continuing
2 legal education." And that way the judge can
3 set an appropriate monetary award against
4 sanctioned behavior and say "I'll suspend it
5 if you go to this CLE program and send me the
6 certificate of completion," or "I'll suspend
7 it if you'll do this community service."

8 MR. SOULES: Do you want that
9 as an amendment?

10 HONORABLE F. SCOTT MCCOWN:
11 Yes.

12 MR. LATTING: I don't want
13 them to be able to do that. I'll take it
14 better than the next.

15 MR. PERRY: I think part of
16 the problem also is that these particular
17 items do not seem to me to be reasonably
18 related in severity to the type of conduct for
19 which sanctions ought to be imposed. I
20 thought there was a consensus among the
21 committee earlier today that sanctions would
22 be reserved for very severe and egregious
23 conduct, destruction of evidence, violations
24 of court orders, flagrant bad faith, things of
25 that nature.

1 Now, I think the rules need to
2 make a relationship between the badness of the
3 conduct and the nature of the punishment. If
4 the sanctions rules in fact are going to be
5 predicated on flagrant and/or intentional
6 misconduct, which I believe they should be, a
7 slap on the wrist like sending somebody to 10
8 hours of CLE is not appropriate.

9 MR. LATTING: I agree.

10 MR. PRICE: I was going to
11 just simply echo Harriett's comments. And I
12 don't know. This has its own problems. But
13 isn't there a way somewhat similar to what
14 Judge McCown was suggesting that lawyers be
15 able to opt for community service in lieu of
16 monetary fines. I think there is a -- you
17 know, I'm shocked every time you read the
18 average salary of practicing lawyers. It's
19 incredibly low, and there are a lot of lawyers
20 that can't afford a \$500 sanctions order. So
21 if you can somehow allow the lawyers to agree
22 somehow, I know that has it's own problems,
23 but I think we need to be sensitive to what
24 Harriett has brought up.

25 MR. YELENOSKY: That is

1 sensitive to the problem that Ms. Miers has
2 brought up which is sensitivity to lawyers who
3 would rather do the community service than pay
4 the fine. It is not sensitive to the
5 situations where you may want to require a
6 lawyer to do something that he could very well
7 afford to buy his way out of, and that it
8 isn't appropriate that attorneys who can
9 afford to buy their way out of things
10 essentially would be able to do that.

11 I think the question is
12 whether this is an appropriate sanction to
13 impose in some circumstances, or whether
14 you're going to proscribe it entirely. When
15 it is appropriate it shouldn't be one that you
16 can buy your way out of.

17 MR. SOULES: Does anybody have
18 anything new on this, because I'd like to get
19 to the charge part today.

20 HONORABLE SCOTT A. BRISTER:
21 Very briefly, I would like to point out that
22 under Paragraph 4 community service is
23 specifically an area that cannot be imposed
24 until after the appeals are all final. I
25 think it does make sense, as Judge McCown

1 points out, to make it some kind of reasonably
2 related matter.

3 It is demeaning. I've never
4 applied it, but as I understand it the judges
5 that have ordered it done in Harris County was
6 because the attorneys did something
7 demeaning. They got in a fist fight at a
8 deposition. They did something childish, and
9 they got a childish punishment.

10 So I think that that is the
11 concept of it. I think it does make sense to
12 put some reasonable relationship. It does
13 offend me that because I did something wrong
14 in discovery I could be ordered to go do
15 community service at something that was, for
16 instance, politically related, or was
17 something that I'm absolutely opposed to. I
18 think we get into serious kinds of personal
19 privacy, et cetera concerns if it is unrelated
20 to the specific conduct involved.

21 MR. SOULES: Okay. Those in
22 favor of the motion? That may be pretty
23 lopsided. It may be right down the middle. I
24 have no idea. Those in favor of the motion?

25 MR. LOW: What's the motion?

1 MR. LATTING: The motion is
2 that we prohibit trial courts from requiring
3 community -- that we prohibit the conduct that
4 is set forth in 3(h) requiring community
5 service, pro bono legal services, continuing
6 legal education or other services.

7 MR. SUSMAN: Seconded.

8 MR. LATTING: That it be
9 prohibited.

10 MR. ORSINGER: That's against
11 lawyers. You're not prohibiting it against
12 clients. Just against lawyers?

13 MR. LATTING: Everybody.

14 MR. HERRING: Take it out.

15 MS. ALBRIGHT: So you're
16 saying take it out and put someplace else in
17 there that says you can't do it?

18 MR. LATTING: Yes. That's the
19 motion.

20 MR. SOULES: Cast a vote.
21 Everybody got the motion in mind? Those in
22 favor show by hands. Okay. Those opposed?
23 Okay. 22 against. 10 for.

24 MR. ORSINGER: What about
25 proposing a deletion without prohibition?

1 MR. SOULES: Okay. This vote
2 is to delete (h) and not say anything about
3 the prohibition. Those in favor show by
4 hands. Delete (h). Those opposed? Okay. We
5 delete (h). The house is against it.

6 MR. TINDALL: I move that we
7 delete (i). I think (i) is a freight train
8 exception, that we don't cure the problem that
9 Joe brought up if we leave (i).

10 MR. SUSMAN: Seconded.

11 MR. SOULES: Harry, I think
12 there is going to be some discussion about
13 that. I'd like to get to the charge. This is
14 going to come back in another draft.

15 MR. TINDALL: Can we vote on
16 it real quickly --

17 MR. SOULES: No.

18 MR. TINDALL: -- while we're
19 on the subject?

20 MR. SOULES: I don't think we
21 can vote on that without discussion. We can't
22 vote on that without discussion.

23 MR. TINDALL: I thought
24 I --

25 MR. SOULES: I'd like to get

1 to the charge some day, if possible.
2 Obviously we're not precluded from looking at
3 this when it comes back again.

4 MR. SPARKS: Luke, to keep (h)
5 just from falling under I'd like to suggest
6 that the comment say that a person sanctioned
7 could elect in lieu of to accept community
8 service. I think that satisfies Steve's
9 comments; but it's under the comments and not
10 under the rules, because as I understand what
11 we're saying now you can do (h) under (i).
12 You are not prohibited (h).

13 MR. LATTING: I hate to give
14 them the idea though.

15 MR. SPARKS: I said "at the
16 election of the person being punished." If
17 the person being punished would rather do
18 community service rather than Chapter 11, I
19 mean, that's a lot of community service.

20 MR. SOULES: Okay. Paula --

21 MS. SWEENEY: Yes.

22 MR. SOULES: -- would you and
23 Judge Cockran give us a report on the charge
24 rules and the task force report?

25 MS. SWEENEY: I will.

1 As the sanctions task force, we have not yet
2 met having been appointed in the past 10 days
3 or whatever. Judge Cockran chaired the task
4 force, and I'll ask her to report to us on
5 those rule changes.

6 HONORABLE ANN TYRELL COCKRAN:

7 I'm a little nervous about doing this today
8 after coming after the last six hours or so
9 worth of discussion. Particularly I mean I
10 feel like we all need to cross our fingers and
11 do something superstitious, because so far the
12 work and product of this task force have been
13 free from any known controversy, but I don't
14 know if it's possible to sustain that momentum
15 in this group.

16 You will also note that our
17 report is much, much shorter. I mean it's as
18 big as it is only because it's done twice in
19 the attachments, and that's with changes shown
20 and once with a clean copy. This task force,
21 and since many of you have been on this
22 committee before are well aware, has a history
23 to it in that there were some attempts earlier
24 in the '90s to look at the question
25 particularly the rules relating to the jury

1 charge as they relate to the preservation of
2 appellate complaint about the charge itself.

3 There were a couple of years
4 worth of work in this committee and a couple
5 of others, I believe. Luke when I first got
6 started on this sent me the transcripts from a
7 lot of those hearings, so I sort of knew from
8 reading those exactly where the debate had
9 centered; and I think because this, the
10 disputes in this area are not traditional ones
11 in that they are not one segment of the Bar
12 against another segment of the Bar, but turned
13 out to be lawyers and appellate judges versus
14 trial judges in that it was lawyers and
15 appellate judges who worked on the earlier
16 work product found a lot of agreement among
17 themselves, but then when it was published in
18 the Bar Journal there were a certain number of
19 trial judges who became very vocal in their
20 opposition to it, and many others of us who
21 although not vocal did see a lot of problems
22 coming in trying cases if the proposed rules
23 were to go into effect.

24 So the Supreme Court decided
25 to revisit this issue by appointing this task

1 force along with the others that were
2 parrallel to it, and once we met, and I guess
3 once I read all of the history that went into
4 it I realized that we were at a disadvantage
5 because I was the only trial judge who had
6 been appointed to be on the task force, so at
7 our first meeting the task force authorized me
8 to ask Justice Linda Thomas who was then the
9 Chair of the Judicial Section of the State Bar
10 to give us sort of an informal working
11 advisory group of good trial judges from
12 across the state, urban as well as rural
13 judges and really representative
14 geographically to meet with us so that I was
15 not the sole representative of the viewpoints
16 of the trial bench of the State of Texas.

17 We had I guess about a total
18 of three meetings with those judges. The
19 first meeting was here in Austin. It was
20 really a help to everybody who was there. I
21 see several of the task force members here
22 today, really a remarkable, intense day
23 spent. It was a wonderful -- both the judges
24 that Justice Thomas suggested we contact and
25 the task force members were all wonderful

1 listeners. We all really became educated at
2 the concerns and problems that our colleagues
3 on the other side of the bench were having in
4 this area, and after we really understood each
5 other's problems it became a fairly easy
6 task.

7 I think we were all surprised
8 once we had really listened and absorbed each
9 other's points of view that it was relatively
10 simple to come to what we believe is a very
11 workable proposal on the question of how to
12 preserve appellate complaint in the court's
13 charge that addresses responsibly the primary
14 concerns of those involved, and each side gave
15 up a few of its concerns in accommodation of
16 the other.

17 Essentially what we found was
18 that first of all everybody agreed the system
19 was broken as is, that it is now impossible to
20 preserve complaints about errors in the
21 court's charge under the current system, and
22 everybody agreed that it needed to be fixed.
23 Trial judges were very vocal in trying to get
24 the lawyers and appellate judges involved to
25 realize that although lawyers and appellate

1 judges too often look at this purely as an
2 appellate question, that for the trial judges
3 and the lawyers and the litigants actually at
4 the trial court level it is a question of how
5 much help to give the trial court to get it
6 done right the first time.

7 Very few people get to the
8 point of asking an appellate court to address
9 errors in the trial, and it is very important
10 that as much be done as possible to get it
11 done correctly the first time and to get all
12 of us away from focusing on this question just
13 as one of appellate review and instead look at
14 it dually, both how it should work at the
15 trial court level and how it should work on
16 appeal.

17 The trial judges involved in
18 this process became very sensitive to the
19 concerns of the Bar both in the impossible
20 standards of perfection now required by the
21 appellate review process and for the serious
22 threats to the advocacy system that lawyers
23 see the requirement that they now completely
24 write the other side's charge for them in
25 order to be able to complain about it on

1 appeal.

2 The trial judges -- the
3 lawyers were very good at listening to the
4 trial judge's concerns about not being given
5 anything in writing particularly realizing
6 that, you know, trial judges often leap from,
7 you know, it might be a second degree murder
8 case one day, and three days later a domestic
9 case, and the next Monday a very complex
10 commercial litigaion trial with very few
11 resources, oftentimes not even a typewriter
12 and someone who knows how to type around, much
13 less any briefing attorneys.

14 A lot of the trial judges have
15 very inadequate law libraries, and the
16 pressures on the judge that come from the jury
17 sitting out in the hall, a lot of lawyers and
18 it gets back to what we were talking about
19 earlier on the sanctions practice and in some
20 ways the handicap of the caliber of lawyers
21 who are appointed to serve on the task forces
22 and on this committee in that you don't see a
23 lot of the problems that the trial judges
24 see.

25 A lot of trial judges, and I

1 count myself firmly among them, are convinced
2 that without some sort of consequence to, you
3 know, failing to at least give some bare bones
4 of the charge, that there are an awful lot of
5 lawyers who would try cases without even
6 thinking about what should be in the charge
7 until after they got the verdict and that the
8 judges needed some help.

9 So essentially what we did was
10 say first of all that tender is only going to
11 be required in limited circumstances, and that
12 is if the question, instruction or definition
13 is omitted entirely from the court's charge
14 and it's on something that is raised by your
15 pleadings. In other words, so it's going to
16 get away from one side having to tender
17 something that is really the other side's
18 case. That will give the trial judges just
19 the bare bones of the charge.

20 Everything else is an
21 object-only system. So that the, you know, if
22 you know, the compliant is, you know, the
23 definition of conspiracy and there is an
24 attempt to define conspiracy in the charge,
25 then everybody can object, even the person who

1 is alleging in their pleading that conspiracy
2 is part of the cause of action.

3 The most important thing I
4 think we did was to totally delete the
5 reference to tenders having to be
6 substantially correct because of all of the
7 appellate baggage that that phrase carries
8 with it now, and instead go to, and this is on
9 page two of the report, language that says
10 "Defects in a requested question, definition
11 or instruction shall not constitute a waiver
12 of error if the request provides the trial
13 court reasonable guidance in fashioning a
14 correct question, definition or instruction"
15 to get away from the problem of appellate
16 courts finding waiver of a complaint because
17 of a semicolon instead of a comma and things
18 like that.

19 PROFESSOR DORSANEO: Is that
20 meant to adopt the Federal Fifth Circuit
21 requirement that the trial judge is a person
22 having responsibility to have the charge
23 correct even if the request is affirmatively
24 incorrect? In other words, if somebody
25 requests an instruction or a definition that

1 is just affirmatively wrong, that the judge
2 could look at it and say "That is a term that
3 should be defined."

4 HONORABLE ANN TYRELL COCKRAN:
5 Yes.

6 PROFESSOR DORSANEO: Is that
7 the judge's job then rather than nobody's
8 job?

9 HONORABLE ANN TYRELL COCKRAN:
10 Well, it's still going to be the lawyer's
11 job. Essentially what the judge could do then
12 would be to put that in the charge even if it
13 was affirmatively wrong, and then it's the
14 burden of the lawyers to make specific
15 objections that point out what is wrong with
16 it, but they would not have to tender it
17 perfectly.

18 PROFESSOR DORSANEO: Get there
19 eventually.

20 MR. ORSINGER: If the tender
21 is incorrect, the burden falls on the other
22 side to object, or no error is preserved.

23 HONORABLE ANN TYRELL COCKRAN:
24 Yes.

25 MR. ORSINGER: If you make a

1 faulty tender and the other side doesn't --

2 PROFESSOR DORSANEO: Federal
3 practice.

4 HONORABLE ANN TYRELL COCKRAN:
5 In other words, if the instruction, if the
6 definition of the term is dead wrong, but it
7 is clear from that being tendered that the
8 judge will, anybody should realize that that
9 term needs to be defined in the charge, then
10 yes, it is then the judge's burden; and if the
11 judge doesn't get it right, then in objecting
12 to the charges the lawyer has preserved
13 complaint.

14 That's the main. The rest of
15 it really is we finally rewrote all the
16 instructions to the juries that are required
17 under 226a to be given. They're rewritten
18 hopefully in plain, clear English. We moved a
19 lot of instructions around, because if you
20 look at them which most lawyers don't, because
21 you're busy getting ready for either voir dire
22 or your first witness when the judge is
23 reading these instructions to the jury, but a
24 lot of the instructions are in the wrong
25 place. We tell them what they can't do during

1 deliberations when they first get sworn in
2 instead of right before they go to
3 deliberate. A lot of them were just moved
4 around.

5 We tried to do the same things
6 with the two or three oaths that are scattered
7 through the rules about where to go. The rest
8 of it is pretty much cleanup, consolidation.
9 The last portion of the report that you have
10 got has the strike-through and underline, but
11 also has annotations on the right that shows
12 where it's been moved from or to try to just
13 consolidate, simplify a lot of the work that I
14 know that Dorsaneo's committee is going to go,
15 you know, back behind us.

16 I have already sent a copy of
17 this to Judge Lynn Hughes who is on that task
18 force who is trying to make our plain English
19 even plainer, and you know, making sure that
20 we are very consistent with word usage and
21 things like that, but that's essentially it.

22 MR. SOULE: Okay. Doris
23 Lange.

24 MS. LANGE: I'd like to
25 compliment you on all of this since I'm the

1 one giving the oaths and everything in our
2 court. The next to the last page, 22, I would
3 suggest adding in "in writing, to inform the
4 bailiff in writing," because they invariably
5 come to the door and say, "We're finished" or
6 whatever, and our judge wants that in writing
7 all the time; and so --

8 HONORABLE ANN TYRELL COCKRAN:
9 Some of us don't require it in writing. They
10 just tell the bailiff that they have a
11 verdict.

12 MS. LANGE: Oh, then I stand
13 corrected. All the courts I work with did.

14 MR. SOULES: Let's see. What
15 draft should we -- where should we be
16 looking?

17 HONORABLE ANN TYRELL COCKRAN:
18 Well, really it just depends upon if you want
19 to look to see what we did. The clean copy is
20 the first one, you know, just the clean copy
21 if this were to be adopted and printed, how it
22 would look. And then about six pages or so
23 behind that it's the one with the columns with
24 the strike-through showing which rules have
25 been repealed, which have been moved where.

1 That's harder to read, but it is a lot more
2 informative about what we did.

3 MR. SOULES: And we're going to
4 start now looking at the rule commencing with
5 271.

6 HONORABLE ANN TYRELL COCKRAN:
7 Yes. If you want to skip over 226 and the
8 stuff about the oath and the reliefs and all
9 of that stuff.

10 MR. ORSINGER: Let me just
11 comment before you skip it.

12 HONORABLE ANN TYRELL COCKRAN:
13 Stuff that just the judges do.

14 MR. SOULES: I wanted to kind
15 of get a consensus of the committee where do
16 we want to start?

17 HONORABLE F. SCOTT MCCOWN:
18 274.

19 MR. SOULES: 274.

20 PROFESSOR ALBRIGHT: I have
21 272.

22 MR. BABCOCK: I've got 272.

23 MR. SOULES: What do we want
24 to do with Ms. Lange's suggestion that the
25 requirement to summon the bailiff after the

1 verdict be in writing? Do we want to leave
2 that up to the individual judges?

3 HONORABLE C. A. GUITTARD: Why?

4 MR. SOULES: Will that work?

5 HONORABLE ANN TYRELL COCKRAN
6 She just said that some judges were requiring
7 it to be in writing when they had reached the
8 verdict.

9 HONORABLE C. A. GUITTARD:
10 Well, why shouldn't that be in the judge's
11 discretion?

12 MR. SOULES: Well, that's what
13 we just said. Just should we leave it up to
14 the individual judge?

15 MS. LANGE: That's fine. Yes.

16 MR. SOULES: I believe
17 Ms. Lange has indicated that that would work.

18 MR. ORSINGER: On 226?

19 MR. SOULES: Okay. 226, do you
20 want to turn through the earlier rules and see
21 if there is anything there? Go for it. What
22 about 226, Richard?

23 MR. ORSINGER: I don't
24 remember that we made a conscious decision to
25 do this, but Rule 226 as it's presently

1 written says that the court will give
2 appropriate instructions, and then the
3 Supreme Court by --

4 HONORABLE ANN TYRELL COCKRAN:
5 You're talking about 226a?

6 MR. ORSINGER: 226a. The
7 Supreme Court by order on its miscellaneous
8 docket has provided what the instructions are
9 which gives them more flexibility to adjust
10 them. What used to be a three and a half line
11 rule has now turned into a multipage rule, and
12 so the instructions to the jury will probably
13 be fixed in concrete more than they are today,
14 and I think we should be aware of the fact
15 that we are promoting what used to be a freely
16 substitutable miscellaneous order or
17 miscellaneous docket order from the Supreme
18 Court.

19 HONORABLE ANN TYRELL COCKRAN:
20 Though in practice that was not what
21 occurred. It has not been amended I think
22 since --

23 MR. ORSINGER: Thirty years or
24 something like that?

25 HONORABLE ANN TYRELL COCKRAN:

1 Yes.

2 MR. ORSINGER: But, you know,
3 all the stuff that is going on about jurors
4 asking question and I don't know what all, but
5 let's just be aware. I think it's important
6 that we be aware that this proposal elevates
7 what used to be an order that could be changed
8 just by the Supreme Court issuing a new
9 miscellaneous order is now part of our rules
10 of procedure and will be much more difficult
11 to modify. Be aware of that in case you don't
12 want to give up that flexibility.

13 MR. SOULES: Okay. Any
14 comment on 271?

15 PROFESSOR EDGAR: What about
16 226a?

17 MR. SOULES: 226a, okay.

18 PROFESSOR EDGAR: I thought
19 that is what Richard was talking about.

20 MR. SOULE: Yes. And I think
21 since we don't have a member of the court here
22 that I see, I think they've got to really
23 decide whether they want to put this in a rule
24 or whether they want to put it in a
25 miscellaneous docket, and we need to just

1 submit that to them for their decision.

2 HONORABLE ANN TYRELL COCKRAN:

3 And I think you asked if it was, and my
4 recollection on the task force is that very
5 few of us realized it until we really started
6 scrutinizing. Everybody assumed that 226a
7 instructions are in the rule because they are
8 printed in all of the rule books as if they
9 were, and because it had been 30 years or so
10 since anybody had changed them, but it is
11 certainly not one that the task force had any
12 strong feelings on.

13 You know, if the Supreme Court
14 feels that, you know, more flexibility is
15 appropriate, we wouldn't have any problem with
16 making it a miscellaneous order as well.

17 MR. SOULES: Hadley Edgar.

18 MR. EDGARD: Whether it's been
19 on the miscellaneous docket or whether it's a
20 Rule of Civil Procedure, I would suggest that
21 the court note Paragraph 16 and 18, because
22 our county courts and county courts at law
23 require only five of six people to reach a
24 verdict.

25 HONORABLE ANN TYRELL COCKRAN:

1 There is a note at the beginning. In fact
2 it's the first paragraph of Rule 226a. It
3 says if the case is tried to a six-person
4 jury, the references to 10 or 11 should be
5 changed to 5.

6 PROFESSOR EDGAR: I stand
7 corrected. I was looking at the wrong
8 portion.

9 MR. TINDALL: Luke, are we on
10 Rule 271?

11 MR. SOULES: Well, right now
12 we're on 226a, but I think we're getting past
13 that. Is there anything else on 226a? Okay.
14 Richard.

15 MR. ORSINGER: There was also
16 some discussion on our task force about the
17 practice in some courts of allowing jurors to
18 take notes, and there were some judges that
19 have actually drafted instructions on
20 controlling juror note-taking. There are
21 other judges that don't think juror
22 note-taking is good. I think we finally
23 elected not to do any proposed instructions on
24 juror note-taking.

25 HONORABLE ANN TYRELL COCKRAN:

1 And I will say parallel to that that there is
2 a State Bar Committee that's working on a
3 juror's handbook and that met Wednesday of
4 this week, and they were looking at the same
5 thing and did some pretty exhaustive research
6 that I think I did when we were -- you know,
7 when I first started letting jurors take
8 notes. The case law is almost entirely in
9 criminal cases and almost entirely when just
10 one juror was taking notes, and that there was
11 just so little guidance, that they weren't
12 going to put anything in the handbook.

13 And we certainly decided that
14 we didn't want to actually put it in the
15 instructions, that right now it is in one of
16 those experimental phases that Alex was
17 talking about. And I think everybody felt a
18 lot more comfortable just letting it bubble to
19 see if it was going to be a practice that
20 everybody accepted and worked well before we
21 started writing a rule about it.

22 MR. SOULES: 271, this doesn't
23 say when the trial court is to provide
24 counsel. Getting back to 271 does anyone have
25 any comments about proposed 271?

1 MR. SUSMAN: I don't know if
2 there is anything in here, but it seems to me
3 that there should be some provision in these
4 rules to allow trial courts to experiment with
5 giving preliminary jury instructions,
6 instructions that they give at the beginning
7 of the case rather than at the end of the
8 case. I know it's done and has been done for
9 some time, can be done in Federal courts
10 giving instructions, not final instructions,
11 but some instructions at the beginning of the
12 case on what the issues are and what the law
13 is. And I'd just like to see the rules have
14 enough flexibility so that judges can do that,
15 because I know a lot of judges are thinking
16 about shortening the length of trials, making
17 them go quicker, which I personally think is a
18 great solution to our problems; but I think if
19 they're going to do that, the judges are going
20 to have to have the discipline to figure out
21 what the law is a little earlier in the case
22 and to tell the jury what to look out for.

23 HONORABLE ANN TYRELL COCKRAN:
24 Even if the lawyers don't know?

25 MR. SUSMAN: Well I think the

1 lawyer is going to have to get disciplined. I
2 mean, that's one of the problems. You're
3 going to have to discipline yourself to figure
4 out what the charge is before you go over to
5 the courthouse; and so that because, you know,
6 you call these jurors together and you ask
7 them to listen to evidence with no indication
8 to them as to what is important, what they're
9 going to be asked to spot.

10 I think lawyers and judges
11 don't do it now because they're lazy on both
12 sides, and that we ought to at least have that
13 possibility, should not be required, but the
14 rules should make that possible at least.

15 HONORABLE ANN TYRELL COCKRAN: Do
16 you think that the rules prohibit it now?

17 MR. SUSMAN: I'm not sure
18 whether they do now. I have not read these
19 that carefully, but this is just where you're
20 talking about when the charge is read. I just
21 want to make sure that that is possible in
22 these rules.

23 PROFESSOR CARLSON: Was there
24 any committee discussion on whether the
25 provisions of Rule 166k which gives the trial

1 judge as a pretrial matter the ability to
2 require either side or all parties to submit
3 the proposed charge? Would that practice
4 continue or that authority continue for the
5 trial court under your proposed amended
6 rules?

7 HONORABLE ANN TYRELL COCKRAN: I
8 don't see any conflict with it just as I -- we
9 certainly we talked about it. We really
10 talked about it in terms of the proposal from
11 the last time around that the judges could
12 order lawyers to give them proposed questions
13 and instructions to go in the charge, but that
14 there would be no appellate consequences to
15 it. And going back to what Judge Brister said
16 earlier, be it on another topic, if there are
17 not any consequences, it's not a rule and it's
18 not an order.

19 And there was a lot of
20 discussion about what the effect particularly
21 in a lot of the language here about not
22 requiring the lawyers to make even that
23 limited tender that we're proposing until
24 after the conclusion of the evidence, but the
25 tension between that and the pretrial order

1 rule exists now, because now it says that it's
2 not until, you know, that your total tender
3 doesn't have to be done until the completion
4 of the evidence. And as far as we know there
5 are no recorded cases about what the effect of
6 a 166 pretrial order would be requiring an
7 earlier tender would be. The question of
8 preserving appellate complaint, there is just
9 no answer there.

10 The tension is still there. I
11 don't think our rule has really changed what
12 the answer to that unanswered question right
13 now will be.

14 MR. BEARD: I would oppose
15 what Steve is saying. The Federal Court has
16 got the power to comment on the weight of the
17 evidence. I think the state district courts
18 ought to be confined to granting, overruling,
19 sustaining and not comment on the weight of
20 the evidence. To attempt to make statements I
21 think we just have a lot of questions raised
22 in the process.

23 MR. SPARKS: Are you going to
24 help do the voir dire, Steve?

25 MR. SUSMAN: I don't really

1 understand. I don't understand about your
2 comment. It is the same charge made at the
3 end of the case being given at the beginning
4 of the case. It just requires that you
5 understand what the law is, what the issues in
6 your case are early on.

7 HONORABLE ANN TYRELL COCKRAN:

8 It also depends in large part -- a lot of
9 times I could see problems where it would not
10 be possible to make an accurate forecast of
11 what you are going to end up putting in the
12 charge because of evidenciary disputes and
13 whether or not there be any evidence raised by
14 the particular point.

15 I will say that there are an
16 awful lot of instructions other than the 226a
17 instruction that have been given traditionally
18 and that are being given now. Even things
19 about, you know, the great role in the
20 American system of government of juries and
21 things that are not in here, but that are
22 rather common additional instructions about
23 the trial itself.

24 Some judges tell them about
25 what the stages of the trial will be, and I

1 don't think that there has ever -- I don't
2 know of any hints that if it's not 226a, it is
3 prohibited. I think maybe that what you are
4 talking about unless some question does arise
5 about these being, you know, the only
6 instructions that can ever be given jurors, I
7 don't think has ever been suggested before,
8 that you know, I would at least propose that
9 what you're talking about probably falls into
10 the same category as juror note-taking where
11 it's probably better to let it bubble up a
12 little bit since, as I said, I don't know of
13 any hint that this is an exclusive outline of
14 what can be included in instructions to
15 jurors.

16 MR. SOULES: Anything about
17 271?

18 MR. TINDALL: Would you
19 consider a provision allowing the parties to
20 waive the reading of the jury charge? I hear
21 of these three-hour charges being read to the
22 jury which are mind numbing.

23 HONORABLE ANN TYRELL COCKRAN:
24 I don't think it came up.

25 MR. TINDALL: And then the

1 lawyers arguing for --

2 MR. HATCHELL: I think we
3 considered that that is optional by agreement.

4 HONORABLE ANN TYRELL COCKRAN:
5 I think we considered that just about anything
6 is waivable, you know, by agreement.

7 MR. TINDALL: I don't see any
8 rules written that says that, you know, the
9 parties shall agree on reading to the jury but
10 whether or not lawyers argue, so --

11 HONORABLE ANN TYRELL COCKRAN:
12 I don't remember this exact point, but I do
13 know there were several things about it that
14 we kept saying should we put in "unless
15 waived," and we realized that you'd have to
16 put "unless waived" in almost every rule in
17 the book.

18 MR. TINDALL: Yes.

19 HONORABLE ANN TYRELL COCKRAN:
20 You know, that once you started this, "unless
21 waived" is missing from one of them that you
22 can't waive that, and we just didn't want to.
23 We felt that was too dangerous a project to
24 embark on.

25 MR. SOULE: Anything else on

1 271?

2 HONORABLE PAUL HEATH TIL: At
3 the present time in the Justice Court it is
4 forbidden for the judge to give a charge to
5 the jury; and this produces a lot of not of
6 confusion, but a great deal of open animosity
7 among the jurors and the Court, because they
8 want, they expect it. Was there any thought
9 given on perhaps preparing a written charge
10 that would be appropriate to be given at the
11 justice court level?

12 HONORABLE ANN TYRELL COCKRAN:
13 The subject did not come up.

14 HONORABLE PAUL HEATH TIL: It
15 would appear to me that it would be
16 important. My court alone does about 1,000
17 civil trials a year. I deal with a lot of
18 people that get a lot of impressions as to
19 what the court system is in justice court.
20 And it doesn't have to be nearly as precise as
21 you might suggest, but primarily follow what
22 you have laid out here, but the present rule
23 forbids it. It doesn't say it's permissive.
24 It says "you shall not."

25 MR. SOULES: Judge, then we

1 need a submission from you. If you will give
2 me a letter with whatever recommendation you
3 think that should be under what rule, I'll put
4 it in the agenda and we'll bring it up.

5 HONORABLE PAUL HEATH TIL:

6 All right.

7 MR. YELENOSKY: I just have a
8 question about that. How many of those jury
9 trials are pro se litigants?

10 HONORABLE PAUL HEATH TIL: Say
11 again?

12 MR. YELENOSKY: Are you having
13 pro se litigants with jury trials?

14 HONORABLE PAUL HEATH TIL:
15 Yes.

16 MR. YELENOSKY: And would you
17 be asking them to tender a written charge?

18 HONORABLE PAUL HEATH TIL:
19 Since about 85 to 90 percent of the court
20 trials are pro se litigants on either one side
21 or both, yes, that that would be the case.
22 But as you said, they can always waive it if
23 they wish. You would not command them or
24 demand that they do it. But if they want to
25 do it, they ought to be given the

1 opportunity.

2 But in any event, I'll get you
3 your letter right away.

4 MR. SOULES: Okay. Thank
5 you.

6 MS. SWEENEY: Can I clarify
7 something here?

8 MR. SOULES: Yes. Paula
9 Sweeney.

10 MS. SWEENEY: Judge, are you
11 asking for the court in the Justice Court to
12 be able to submit one perhaps sua sponte or
13 for the Court in that circumstance to have
14 leave to ask the parties to create one, or
15 both?

16 HONORABLE PAUL HEATH TIL:
17 Primarily it would be the first, for the Court
18 to just do it on its own.

19 MS. SWEENEY: Okay.

20 HONORABLE PAUL HEATH TIL: And
21 again, it would just be nothing more, and
22 which most of us would like to be able to do,
23 of a general statement of what you have here
24 of "You will follow the law. You will follow
25 the instructions." It's given twice. We had

1 to take the instructions to the jury, and we
2 presently have to delete them and modify them
3 so we can use them because they're
4 inappropriate in several areas of our court;
5 but we still want to give instructions to the
6 jury as to what their conduct is and who can
7 talk up and whatnot. We've made it up, but
8 we've done it on our own. We've taken the
9 rules and put it to them now and tried to make
10 them fit, because they're clearly not drafted
11 with our court in mind.

12 MR. SOULES: If you could help
13 us by giving us the modified versions that
14 you've used and your colleagues have used
15 Judge, we'll certainly give that attention.

16 HONORABLE PAUL HEATH TIL:
17 You'll have it in your office Tuesday.

18 MR. SOULES: Thank you.
19 Anything on 272?

20 PROFESSOR DORSANEO: I have
21 something.

22 MR. SOULES: Okay. Bill
23 Dorsaneo.

24 PROFESSOR DORSANEO: I'm all
25 the way down to the Paragraph (2)(d) in 272.

1 If somebody has something before that, I'm
2 certainly willing to defer.

3 PROFESSOR EDGAR: I'm on
4 (2)(e), so you go ahead.

5 MR. BABCOCK: I'm on (1)(a).
6 I assume this is not meant to affect trial by
7 consent. I think you're just going to have to
8 tie it into Rule 67. Or was it meant to
9 affect when you try the issue by consent?

10 HONORABLE ANN TYRELL COCKRAN:
11 This is not a change. This part is
12 essentially just a rewording of what is now
13 currently in 270a, so this is not a change in
14 substance at all.

15 MR. ORSINGER: In (1)(a) we've
16 assigned the responsibility to the party that
17 has the burden to plead though rather than the
18 party that has the burden of persuasion at the
19 end of the jury trial, because the burden of
20 persuasion shifts sometimes depending on
21 whether a fiduciary relationship was found and
22 whether or not it's a --

23 HONORABLE ANN TYRELL COCKRAN:
24 But what we were talking about, this is just
25 that you're not entitled to a submission of

1 it. This is the current law. Then we tie it
2 into that since that's already part of the
3 rule and say that in, what is it, 274, that
4 yes, in 274 that to preserve appellate error
5 if you have this burden to plead that is
6 already in the rules and it's omitted, then
7 you have to.

8 And then Richard is right. We
9 stayed with the burden to plead rather than
10 the burden of persuasion, because that does
11 tend to shift in a good number of situations.

12 MR. ORSINGER: But if you try
13 it by consent, it may still be your burden to
14 plead.

15 MR. BABCOCK: Right. Rule 67
16 ties into 277 and 279 which has now been
17 deleted as I understand.

18 HONORABLE ANN TYRELL COCKRAN:
19 Yes.

20 MR. BABCOCK: You're just
21 going to have to amend 67 to tie into 272.

22 HONORABLE ANN TYRELL COCKRAN:
23 To get the right rule.

24 PROFESSOR DORSANEO: And that
25 raises the question as to whether you want to

1 retain the proviso in Rule 67 which does
2 require --

3 MR. BABCOCK: A pleading --

4 PROFESSOR DORSANEO: -- a
5 pleading.

6 MR. BABCOCK: -- before
7 submission, right?

8 CHIEF JUSTICE AUSTIN MCCLOUD:
9 You'd still have to get an amended pleading
10 under 67.

11 MR. BABCOCK: Right. You have
12 to get a trial; and then the --

13 CHIEF JUSTICE AUSTIN MCCLOUD:
14 You still have to make the objection and then
15 do what you needed to do depending what the
16 court did on the objection.

17 MR. BABCOCK: Right.

18 CHIEF JUSTICE AUSTIN MCCLOUD:
19 I don't see that it would affect it.

20 MR. BABCOCK: No. It doesn't
21 look to me like it would other than having to
22 change 67 just to tie it into 272 now. Ready
23 for (b)?

24 MR. SOULES: Okay. 272(1)(a)
25 and (b). Anything else under (1)? (2)(a) and

1 (b)?

2 MR. ORSINGER: Nobody is
3 objecting to broad form submissions?

4 MR. TINDALL: I do on (a).

5 MR. SOULES: Harry Tindall on
6 (2) (a).

7 MR. TINDALL: It seems to me
8 that (2) (a) the phrase "factual" could be
9 deleted. I think in broad form submissions we
10 are not really asking keep, break, lookout
11 type questions anymore. We are asking really
12 disputed material issues, and we need to where
13 we can delete references like "factual."

14 MR. SUSMAN: I agree.

15 MR. SOULE: We're going to
16 find out, aren't we?

17 MR. HATCHELL: I'm not sure I
18 agree with that.

19 HONORABLE F. SCOTT MCCOWN: I
20 had a question on (b). I don't know if there
21 was still something on (a). But the term
22 "whenever feasible" it seems to me either
23 ought to be deleted to simply say "The court
24 shall submit the case," or "feasible" ought to
25 be changed to what we really mean if we mean

1 if there is any discretion, if we're talking
2 about desirable or practical, because it's
3 always feasible.

4 There is not any case in the
5 world that can't be submitted on broad form.
6 So we either ought to say it's always going to
7 be broad form and take "whenever feasible"
8 out, or we ought to say what we really mean
9 about when there is some discretion not to be
10 broad form.

11 PROFESSOR EDGAR: May I
12 respond?

13 MR. SOULES: Before we go to
14 that, let's address Harry's whether or not we
15 should delete "factual." Any discussion about
16 that?

17 MR. TINDALL: I so move that
18 we delete "factual."

19 MR. SUSMAN: Seconded.

20 HONORABLE C. A. GUITTARD: If
21 it's not factual, why submit it to a jury?

22 MR. TINDALL: Your question is
23 what?

24 MR. FULLER: If it's not
25 factual, it won't go to the jury.

1 MR. TINDALL: Well, because
2 the issues typically submitted to the jury are
3 conclusory issues that really don't get into
4 specific fact issues any longer; and so I
5 think that we need as a matter of writing
6 these rules to get away from these fact
7 specific type rules.

8 PROFESSOR DORSANEO: It doesn't
9 say "specific factual." It says "factual."

10 MR. TINDALL: I know. But
11 really it's issues like "Did the Defendant
12 breach the contract? Who should get custody
13 of the children? What are the reasonable" --
14 I guess reasonable attorney's fees could be a
15 fact issue, but there are really...

16 HONORABLE ANN TYRELL COCKRAN:
17 I think it's important too. I mean, it
18 doesn't say that "The court shall submit
19 issues." It says "The court shall submit
20 questions on the disputed material factual
21 issues." I mean, the juries -- you have to
22 have a factual dispute before there is any
23 point in submitting it to the jury anyway; and
24 I think that that was sort of the --

25 MR. FULLER: What do you do

1 about the mixed questions of law and fact?

2 HONORABLE ANN TYRELL COCKRAN:

3 It's okay for that to be in the question, but
4 we're just saying that I guess the reason for
5 the language is because you submit questions
6 on disputed fact issues, and sometimes they do
7 involve mixed questions --

8 MR. FULLER: And that really
9 gets --

10 MR. SOULES: The court reporter
11 is not getting either you, Ken, or Judge
12 Cockran. Ken Fuller, ask your question or
13 make your comment and then let the judge
14 respond.

15 MR. FULLER: My reply to that
16 is there are mixed questions of law and fact,
17 many of them that go to the jury, and
18 therefore I don't think that you're being
19 precise when you say "factual issues." Issues
20 are what are submitted to the jury, not just
21 factual issues.

22 MR. TINDALL: Questions are
23 submitted to the jury, but they're not factual
24 questions.

25 HONORABLE C. A. GUITTARD: I

1 would suggest to you that there must be a
2 factual element in anything submitted to the
3 jury, and that just because that it's a mixed
4 question of law and fact as in the inquiry
5 concerning negligence under proper
6 instructions, that doesn't keep it from being
7 a factual issue. And if we take out
8 "factual," that would imply that you can
9 submit pure questions of law to the jury, and
10 I don't think any of us want to do that.

11 MR. SOULES: That seems to be
12 the purpose of it, Ken, as distinguished from
13 questions of law or issues of law.

14 MR. FULLER: Okay. I don't
15 think either way does violence to it. I think
16 we've wasted enough time on it. We could
17 probably take some words out and it would be a
18 bit more descriptive without it, but I have no
19 problem.

20 MR. SOULES: Does anyone else
21 have any comment on that? Judge Brister.

22 HONORABLE SCOTT A. BRISTER:
23 Judge Cockran is the expert in Harris County
24 on "that" and "which," and it seems to me that
25 one time in her career she has erred here,

1 because it should be "that" and not "which."
2 Am I correct?

3 HONORABLE ANN TYRELL COCKRAN:
4 You're correct.

5 HONORABLE SCOTT A. BRISTER:
6 You're right. Let the record reflect that.

7 HONORABLE ANN TYRELL COCKRAN:
8 But I knew he and Lynn Hughes were coming
9 behind me and cleaning up after us.

10 MR. SOULES: Okay. Anything
11 else on (2)(a)? Okay. Now (2)(b)?

12 PROFESSOR EDGAR: I'd like to
13 respond to question or the comment that
14 Judge McCown has raised. We deliberated this
15 for probably as long as we deliberated the
16 sanctions this morning when we inserted the
17 term "whenever feasible" several years ago.
18 And you will recall that the reason we did
19 that is because there really are some things
20 that cannot be submitted broad form, Judge
21 McCown.

22 For example, workers
23 compensation cases.

24 MR. SPARKS: There aren't any
25 more.

1 PROFESSOR EDGAR: Whenever
2 feasible to submit a workers compensation case
3 you can't submit it in broad form. And then
4 also under recent case law, for example, we
5 have some owner/occupier cases that cannot be
6 submitted in the traditional broad form "Did
7 the negligence of the parties proximately
8 cause so and so." So we had to leave a
9 loophole there, because it may not be feasible
10 in some kinds of cases to submit in the broad
11 form that we envisioned broad form to be, and
12 that's why we left it there. That's why we
13 inserted it.

14 MS. DUNCAN: Bill and I have
15 been arguing about this. I don't like these
16 words. I haven't liked them since I first
17 read them. I have read every word of your
18 deliberations that came up with this
19 formulation more than one time because I keep
20 seeming to get involved in cases where it is
21 feasible, it is clearly feasible to submit it
22 broadly. Now, whether that means one question
23 or lots of questions nobody knows. And it's
24 real hard to tell from reading the
25 deliberatons of the committee.

1 Additionally, even if it's
2 feasible, it doesn't mean it's fair, and it
3 doesn't mean that you're not denying somebody
4 their right to appellate review; and I think
5 the formulation means different things to
6 different lawyers and different judges in
7 every different cause, and to me that is not a
8 rule that works. A rule ought to convey
9 pretty much the same thing to most people who
10 read it.

11 HONORABLE ANN TYRELL COCKRAN:

12 I would like to say that we spent a couple of
13 hours at one of our early sessions with some
14 preliminary sort of warm-up talks about
15 complaints about broad form submissions. We
16 decided that it was not in our, within the
17 scope of our employment to even, you know,
18 that we even those who were complaining about
19 it be decided, that you know, enough energy
20 and time and you know had been spent, and that
21 we really for purposes of this task force I'm
22 not saying that it's not the job of this
23 advisory committee to revisit it if they so
24 choose, but that we assumed that the battle
25 had been fought. The bodies had been buried.

1 You know, the dead had been mourned, and that
2 we were going to assume that it was a given
3 and move on.

4 MS. DUNCAN: And I don't mean
5 to criticize either the task force or the
6 concept of broad form submissions. All I'm
7 saying is that I think whatever our rule it
8 needs to say what broad form submission is,
9 because I don't think either the rule says it,
10 and I know the committee's deliberations don't
11 say it.

12 MR. SOULE: Let's see if we
13 can get this done. Not rush through it
14 because it's very important.

15 MR. PERRY: Luke, could I ask
16 a question?

17 MR. SOULES: Yes, sir.

18 MR. PERRY: I wonder if the
19 judge -- I read most of this as being a
20 nonsubstantive revision of the rules. And I
21 wonder if I could maybe cut through this a
22 little bit by asking the judge to point out to
23 us the specific places where the committee
24 intends to make a substantive change and tell
25 us what the substantive change is that they

1 intend to make.

2 HONORABLE ANN TYRELL COCKRAN:

3 In 50 words or less. Most of that really can
4 be found from the great draft that Mike Young
5 did that shows the sources and dispositions,
6 that shows what we -- you know, I mean it
7 really is about as good an effort at
8 describing, you know, what we've done,
9 you know, and with this unnecessary, you know,
10 moved around. And you know, where it says
11 "Source: New" is where we really -- and some
12 of it we tried to like the "omitted as
13 unnecessary" we are not thinking that we are
14 making any substantive change, you know. It's
15 the last part of the packet here
16 (indicating).

17 MR. SOULES: It starts with it
18 looks like this on the first page about
19 halfway through the materials.

20 HONORABLE ANN TYRELL COCKRAN:

21 Two columns.

22 MR. PERRY: I'm looking at
23 this.

24 HONORABLE ANN TYRELL COCKRAN:

25 There are some things. Most things except for

1 the preservation of error and some things in
2 the 226a a lot of which have been instructions
3 that trial judges have added over the years
4 and have gained enough popularity and are used
5 often enough that we decided to go ahead and
6 include them now. Except for the preservation
7 of error system there are very few substantive
8 changes, at least that we thought we were
9 making.

10 For example, you know, the
11 deemed findings portion in here we tossed
12 around a bit some of the problems, but I think
13 finally concluded we would probably make it
14 worse if we changed it. So there are some
15 rewrites of it, but really no dramatic
16 substantive changes, but I really think
17 everything is fairly outlined here.

18 MR. HATCHELL: David, I can
19 give you two places to look. The two things
20 that stand out in my mind are the burden of
21 pleading duty to tender, otherwise to object
22 is a major change which we think hopefully
23 fixes the rules. And second, the reasonable
24 guidance concept in terms of the duty of the
25 trial court.

1 MR. PERRY: By the reasonable
2 guidance concept you're talking about the
3 provision that instead of saying that if you
4 make a request, you have to tender it in the
5 substantially correct form --

6 MR. HATCHELL: Right.

7 MR. PERRY: -- it is now
8 saying that it's okay for it to be wrong if it
9 provides reasonable guidance?

10 HONORABLE ANN TYRELL COCKRAN:
11 That is correct.

12 MR. PERRY: Could I inquire
13 why that change is being recommended?

14 HONORABLE ANN TYRELL COCKRAN:
15 Primarily because it was the conclusion of
16 almost I think everybody involved directly and
17 most people that we talked with outside the
18 task force that the "substantially correct"
19 language was really at the heart of most of
20 the problems now, that it was the appellate
21 court's interpretation of "substantially
22 correct" to essentially mean "perfect" that
23 was the basis of so many repeated findings of
24 waiver of appellate complaint, and that we
25 made a conscious decision to try to get away

1 from that.

2 MR. PERRY: What is the thought
3 process as to why if somebody tenders a
4 request to the court and it's wrong, why
5 should they get a reversal based on that?

6 HONORABLE DAVID PEEPLES: Good
7 question.

8 MR. SUSMAN: Good question.

9 HONORABLE ANN TYRELL COCKRAN:
10 They can't.

11 MR. PERRY: Under the rule as
12 proposed they could.

13 HONORABLE ANN TYRELL COCKRAN:
14 No. If they tender something that is wrong in
15 substance but that clearly is on a topic that
16 needs to be included in the charge, and the
17 trial judge says, "It was not perfect enough.
18 I will not include it," then yes, he can
19 complain about the total omission of that from
20 the charge.

21 If it is submitted in that
22 wrong form, then unless that party
23 specifically objects to its own tender, which
24 I can't figure that out, and that objection is
25 then overruled, it's not going to be the basis

1 of appellate complaint.

2 MR. SUSMAN: Well, since David
3 has jumped ahead to 273 or 274, I did think I
4 do have these two questions. It seems to me
5 there are two premises underlying the
6 changes. First is that it should be easier to
7 reverse a judgment on the basis of an
8 incorrect charge, that is premise one. Okay?

9 HONORABLE ANNY TYREEL COCKRAN:
10 No. The premise is that it should be easier
11 to get appellate review of complaints about
12 the charge on the merits. Not that it should
13 be easier to reverse, but that you should at
14 least have a review of it.

15 MR. SUSMAN: Well, isn't that
16 about the same?

17 HONORABLE ANN TYRELL COCKRAN:
18 No. I think it's very different.

19 MR. SUSMAN: I mean, the
20 second thing it seems to me that may be an
21 underlying premise there is that the charge
22 makes a damn bit of difference on whether
23 justice is -- on the result or the outcome of
24 the case, which I don't think it ever does. I
25 think there is plenty of empirical proof. I

1 think you can prove that it doesn't make much
2 difference. So I question, well, why should
3 at a time when we ought to be concerned about
4 the loss to society and judicial resources in
5 terms of retrying cases, about appellate time
6 spent reviewing the charges, about bills being
7 generated to clients for writing appellate
8 briefs and hiring people like Rusty to go
9 argue the improper nature of the charge when
10 it doesn't make a God damn bit of difference
11 anyway? I just question whether that is what
12 this committee ought to be up to.

13 The second premise that
14 underlies these changes as I read it is that
15 trial courts are smart enough to write a
16 proper and correct charge without all the help
17 that they can get from the lawyer. I think
18 that's an incorrect premise too. So I think
19 that both of the premises which I see in this
20 are bad; and I think it's going -- I don't
21 think the charges make that much of a
22 difference, and all we're going to do here is
23 encourage more appellate work, more appeals.

24 Obviously if the courts can
25 look at them, they're going to reverse them

1 periodically, and I just don't think that -- I
2 don't think anyone can persuade, make any kind
3 of persuasive case that the charge, mistakes
4 in the charge are producing an unjust result.

5 There are people that have
6 experimented with all of these jury
7 simulations, and you can mock try the same
8 case 10 times and get 25 different charges and
9 it doesn't affect the result, because the
10 jurors who are deliberating ain't reading
11 them, period. Why are we spending so much
12 resources worrying about charges? Why don't
13 we get down to deciding cases?

14 HONORABLE F. SCOTT MCCOWN: If
15 I could kind of respond to that and make a
16 couple of different points. The problem that
17 comes up here is that in a charge you're
18 trying to capture and resolve tension in the
19 law. A good example is the agent principle
20 discussion we had earlier and the notion of
21 when do you visit the sins of the lawyer on
22 the client.

23 There are tensions in the law
24 where the law when applied to these facts has
25 an ambiguity or has a tension that you're

1 trying to capture in the charge. It is very
2 easy to talk about it in abstract and very
3 difficult to write it in English, and that's
4 the problem we're having today when we talk
5 about principles we agree on, but we can't put
6 it in words that capture the concept.

7 And so when you go to the
8 charge stage I think it's unfair to say that
9 trial judges aren't smart enough. The problem
10 is it's extremely difficult to do. The
11 lawyers have a disagreement about it; and if
12 all they have to do to preserve error is
13 articulate into the record eloquently what
14 their disagreement is and the appellate court
15 then reviews that on the merits and picks
16 between those eloquent disagreements and
17 reverses for a new trial, you still have to
18 stop and say "What did the trial judge do
19 wrong."

20 And to illustrate how
21 difficult this is, appellate opinions that
22 reverse for errors in the charge almost never
23 say how to do it correctly. They will pick
24 abstract concepts, but they will not say how
25 to do it correctly, because they don't know

1 because it's too hard.

2 And so to reverse for a new
3 trial because the trial judge didn't get it
4 right merely because the parties were able to
5 articulate their disagreements and provide
6 reasonable guidance by an incorrect tender
7 seems to me to be a mistake.

8 And I don't think it's correct
9 to say that the charge doesn't make any
10 difference. That's the same as saying the
11 trial doesn't make any difference because
12 after voir dire everybody has made up their
13 minds and that's what studies show. Well,
14 that's true only if the trial actively unfolds
15 what happened in the voir dire.

16 A charge that captures
17 properly the law in the hands of a skillful
18 advocate is going to make a lot of difference,
19 and the question is how to get that charge and
20 at the same time not be reversing trials
21 because the trial judge couldn't do something
22 that the appellate court can't do, which is
23 capture that tension correctly.

24 That's why I prefer like most
25 trial judges the present rule of substantially

1 correct.

2 MR. LOW: One item we delt
3 with way back over the years and Hadley worked
4 on this, the trial judges came to us and they
5 said, you know, we have -- "I'll be trying a
6 different case today, something else tomorrow
7 and something else. I can't research the law
8 and prepare a charge for all of these
9 lawyers. I cannot do it. I physically
10 can't. I'm ruling on their sanctions
11 motions." And so therefore they said, you
12 know, "We don't care how you do it, but we do
13 have a body of law how where the jurors go
14 astray or not. We lawyers shouldn't -- we
15 should have the law because the legislature
16 passes it. The Supreme Court writes it. And
17 therefore how do we get the charge?"

18 So the idea was that we would
19 get something up so that the judge wouldn't
20 have to prepare the charge. Now, how are we
21 going to do it? There wasn't only just that.
22 There were questions when was something
23 omitted and when was it defective? If you
24 omit one word, is that defective or is it
25 omitting? So we needed to kind of put these

1 together to put them in focus so that the
2 rules would be clear. Whatever the rules
3 were, it would be clear. There would be a
4 charge prepared by the lawyers that would
5 substantially state what the law is.

6 Now, that's why we did it that
7 way. I question changing the language now,
8 because if you don't submit it in
9 substantially correct form, then they've given
10 the judge something he can't submit. He
11 really shouldn't submit it if it's not in
12 substantially correct form. So therefore who
13 is going to submit it? The other side? Not
14 them. They are not going to put it in.

15 So it should be on the person
16 who has the burden on that issue to submit it
17 in substantially correct form, not just so he
18 knows what to do, but so the judge can turn
19 around and give it without the judge having to
20 revise it and spend time. And that was why we
21 did it that way.

22 So I question the change of
23 the word.

24 MR. GALLAGHER: If judicial
25 economy is our objective, I tend to concur

1 with David's suggestion that anything that
2 makes the trial less meaningful and reversal a
3 greater probability is probably not serving
4 that goal. And I'm sure that this committee
5 thought about those kinds of things, but I
6 have yet to hear enunciated a satisfactory
7 response to David's question with regard to
8 why this was deemed advisable.

9 HONORABLE ANN TYRELL COCKRAN:

10 Well, I would like to say that first of all I
11 don't think that anybody wanted more reversals
12 because of the change of the rule. I think
13 that a lot of us thought that it was probably
14 going to be either a bit too presumptuous of
15 us to write a rule that said that the problem
16 was that appellate courts were reversing too
17 many cases and to say "You need to take a more
18 relaxed review standard," you know, "that the
19 charge was also substantially correct or gave
20 reasonable guidance to the jury," you know,
21 and use that standard for your review
22 purposes. But again, I mean it really was, we
23 didn't really see that the Rules of Civil
24 Procedure could be used as a vehicle to tell
25 the Appellate Courts what their review

1 standards were.

2 MR. BEARD: It appears to me
3 that you submit a charge that may not be
4 substantially correct, but if the court
5 submits it without objection from the other
6 side, then who can complain? It's when he
7 doesn't submit anything at all and you get
8 upstairs and they say, "You left out two words
9 or something, so it's not substantially
10 correct." It looks to me like the adversary
11 system takes care of the problem.

12 MR. MCMAINS: Well, one of the
13 things I appear to be hearing is this
14 revisiting of why are we revisiting the
15 charges. But everybody so far is ignoring the
16 fact that one of the problems that is
17 addressed in this rule is it reduces your
18 burden or the burden of a party to submit.
19 The current rule requires a submission as to a
20 question, definition or instruction that ain't
21 there, whoever's burden it is to plead or
22 prove. Even the other side's lawsuit you have
23 got to submit their definitions, instructions
24 and questions, or not questions, but
25 instructions, definitions, anything other than

1 a question. If it's missing, you have got to
2 do it in substantially correct form, or you're
3 not entitled to it. And so that in the
4 classic example --

5 MR. PERRY: What is wrong with
6 that?

7 MR. MCMAINS: Well, because I
8 was just getting ready to talk about it. Thus
9 far the consensus of the committee and in the
10 past has been that is not fair that I have to
11 do something for the other side and take the
12 position as to the proving up a cause of
13 action, for instance, that I don't think
14 exists.

15 And the classic example of
16 that is a good faith and fair dealing claim in
17 which you are at an advantage right now under
18 our current rules if you submit good faith and
19 fair dealing as a question. This of course
20 assumes the judge will do it, but some judges
21 will, with no definitions or instructions.
22 You as a Defendant take the position there is
23 no such cause of action, but you are then
24 forced if you wish to confine in any way
25 whatsoever the jury's explanation of what good

1 faith and fair dealing means, a definition for
2 it. Otherwise you cannot complain about it.
3 An instruction for it, you cannot complain
4 about it if you don't. If it's totally
5 missing, your burden. And you not only have
6 to do it, but you have to do it right. And if
7 what you do doesn't happen to be right, then
8 it's not error not having defined it at all.

9 MR. SUSMAN: In that example that
10 you just gave where you don't think I have a
11 cause of action with good faith and fair
12 dealing I say yes, you should be able to say
13 there is no cause of action. That's point
14 one.

15 But then you should -- if you
16 have ever complained about my failure to give
17 an instruction, you should give that
18 instruction as an alternative, because I might
19 say, "Rusty, I like your charge. Put it in."
20 And now we have got if the court finds there
21 is a cause of action, if the appellate court
22 does, we have a bullet proof instruction
23 because it has come from you. What's wrong
24 with that?

25 MR. MCMAINS: The way it is

1 and what the courts have held otherwise in
2 reality is that because you put the
3 instruction in and the other side took it,
4 that you're stuck with what the elements of it
5 are. That is you have invited errors, so you
6 can't complain now about how good faith and
7 fair dealing is defined because you put it in
8 even though your position is it doesn't even
9 exist.

10 CHIEF JUSTICE AUSTIN MCCLOUD:
11 Why should that be a problem? You wanted it.
12 That's the reason you put it in.

13 MS. MCMAINS: No. But you
14 didn't want it. You don't want it at all.
15 Why do I have to do anybody else's work?

16 MR. SUSMAN: You don't. But
17 then you take the change, okay, that -- I mean
18 you can say "I'm smart enough that I believe
19 that there's no such" --

20 MR. MCMAINS: But --

21 MR. SOULES: Don't talk at the
22 same time now. Judge McCloud wants to say a
23 few words and hadn't had the floor today, so
24 Judge McCloud.

25 CHIEF JUSTICE AUSTIN MCCLOUD:

1 Well, I was just questioning Rusty there about
2 being concerned about the fact that he is
3 going to tender a definition which he
4 otherwise would not tender because it was not
5 his burden, but if he does tender that
6 definition, then he's stuck with it. Well, it
7 looks to me like if you want the definition,
8 if you feel like it's going to help your case,
9 you would tender it. If you don't want it,
10 well, don't tender it.

11 MR. MCMAINS: That's not the
12 point as to whether or not you want it. The
13 point is your position is that you don't want
14 the defense or the question asked at all, be
15 it a defense or whatever. But you are now
16 left in the rules when there is an omission
17 with no option in order to complain about what
18 the jury can consider in answering that
19 question. You cannot limit their constraint
20 without attempting to do the other side's
21 work. And you can argue whether that's a good
22 thing or a bad thing. I'm just telling you
23 the committee in the past has voted
24 overwhelmingly. Most in fact people didn't
25 even know that was their obligation.

1 CHIEF JUSTICE AUSTIN MCCLOUD:
2 I like this better than the one we have. But
3 I have a real concern about the word
4 "reasonable guidance." I have no idea what
5 that would mean. Why not if you want the
6 judge to submit a question, definition or
7 instruction, why not give it to the judge in
8 substantially correct form?

9 MR. HATCHELL: The problem,
10 Judge McCloud, has been in the appellate court
11 interpretation of "substantially correct form"
12 for the denial of request it means "absolutely
13 perfect," so that the cases are to the point
14 that if you submit a definition or instruction
15 that is legally correct but that it duplicates
16 two words that are in the charge, it's
17 substantially incorrect.

18 That's where we are. The
19 sense of the committee was that because the
20 construction of "substantially correct" has
21 gone so far to preventing review on the merits
22 that it was really bringing the profession
23 into disrepute. Clients were seeing these
24 flood of waiver mania holdings. Lawyers are
25 getting sued for malpractice because they

1 cannot preserve objections to the charge.

2 The purpose of the shift that
3 we have made is to be able to get cases
4 decided on the merits. Not to get more
5 reversals. The reversal rate may in fact go
6 down on charges if cases ever get decided on
7 the merit, but the system is going to be
8 considerably cleaner.

9 The "reasonable guidance"
10 comes right out of Judge Hecht's opinion in
11 State Department of Highways vs. Payne; and
12 in the footnote to Exxon vs Perez it's already
13 the rule in Texas that you can preserve error
14 by tendering a question or an instruction that
15 is not affirmatively incorrect. So the
16 reasonable guidance concept which also has
17 some analog in Federal practice we think means
18 that you at least give the trial court enough
19 substance in your request to be able to allow
20 him to give the jury a charge that is
21 meaningful and is accurate in terms of the
22 law, but that is not 100 percent ideally
23 correct in terms of commas, periods and
24 everything else.

25 HONORABLE DAVID PEEPLES: I

1 want to support the idea that we need to
2 retreat a bit from the rigid appellate
3 practice we've had. But when I heard
4 Ann Cockran say that you can submit something
5 that is absolutely incorrect, and if the judge
6 therefore knows that you want that theory in
7 the charge, that that's good enough, that just
8 goes way too far, Rusty.

9 MR. HATCHELL: That doesn't
10 give reasonable guidance.

11 MR. MCMAINS: That's not the
12 problem.

13 HONORABLE DAVID PEEPLES:
14 Well, but that was the answer to the
15 question.

16 MR. SOULES: Rusty McMains.

17 MR. MCMAINS: The way this is
18 set up, and I think you were actually on the
19 committe the last time, you may recall we went
20 to an entirely objection practice is what we
21 had recommended. Then the Supreme Court
22 called a meeting among other things on that
23 and other issues that we had, a public meeting
24 which was attended by a number of academics,
25 and it became very clear that not everybody

1 agreed what the charge rules even in existence
2 were at the time. But one thing we did get
3 from the trial judges was the trial judges
4 said, "Wait a minute. We didn't want to go to
5 a straight objection practice, because I need
6 to be able to have something in any hands and
7 be able to tell them to give to me. It
8 doesn't matter whether it's perfect. I just
9 need to have something that I can work with,"
10 which is I think what the reasonable guidance
11 principle is. They've got something to work
12 with.

13 Now, that's step one. It
14 actually does nothing to preserve error. Even
15 if it's perfect, it does nothing to preserve
16 error in the context of these rules. The
17 objection still is what preserves error. Your
18 objection is the only thing reviewed by the
19 appellate court, but you never get to the
20 review of the objections unless you have given
21 them something if you have the burden of
22 pleading it. That's the way the rule is
23 designed.

24 The law now is just the
25 opposite. It doesn't matter who has the

1 burden of pleading, and it doesn't even matter
2 who has the burden of proving it. It may all
3 be on the other side if it isn't a question
4 and if it's omitted, which is one of the
5 places we get into a lot of trouble, because
6 whether or not something is defective or
7 omitted. And the question frequently is,
8 "Well, if you add a few words, does that mean
9 therefore it's omitted?" "Well, if it's
10 omitted, it's your burden to submit it."

11 So like, for instance, in a
12 fraud case, if you you leave out reliance in
13 your definition of fraud, if the Plaintiff
14 does, then is it defective? Can you object to
15 the omission of reliance, or is it omitted so
16 that you have the burden to submit a reliance
17 issue? Not very clear as to which that is.

18 So what is happening is people
19 are trying to do both and frequently are
20 leaving out a word, not doing it right, or not
21 realizing that they need to define reliance,
22 and the courts are saying, "Uh, reliance
23 omitted. No tender. Don't have to deal with
24 the weight." And the question is, will
25 therefore the jury answer the fraud issue

1 without regard to reliance?

2 Now, maybe you think that that
3 doesn't have any impact on the jury, that they
4 don't have to find reliance. And maybe you're
5 right. Maybe they don't pay attention to the
6 charge, but most lawyers who look at the
7 question and see that there isn't a
8 requirement that they even find reliance, that
9 that makes a difference to them.

10 MR. LATTING: I have a
11 question, Luke.

12 MR. SOULES: Okay. Joe
13 Latting.

14 MR. LATTING: Rusty, or to
15 anyone, Ms. Cockran. What is the idea of
16 making the reference to the burden of pleading
17 as opposed to the burden of proof?

18 MR. MCMAINS: The reason for
19 that is because there is a shifting burden of
20 proof in a lot of areas, some areas, and
21 particularly in the domestic relations area.

22 MR. ORSINGER: Also in
23 fiduciary litigation.

24 MR. MCMAINS: Fiduciary
25 litigation.

1 CHIEF JUSTICE AUSTIN MCCLOUD:
2 Fiduciary relations is the big one.

3 MR. MCMAINS: Is the big one.
4 Some of it grows out of it.

5 MR. SOULES: Let Judge Cockran
6 answer your question.

7 HONORABLE ANN TYRELL COCKRAN:
8 And I think another reason too, I mean, that
9 is, you know, the big problem with doing it by
10 the burden of persuasion. But we already had,
11 if you'll look at 271(1)(a) which is now the
12 second sentence of Rule 278, we already had in
13 place a rule that says that you are not
14 entitled to submit something if you have the
15 burden of pleading it unless it's in your
16 pleadings. So we already have some rules
17 about submission that are triggered by the
18 burden to plead, so this was like this.

19 MR. LATTING: That's what
20 caused my question. I didn't understand. I
21 know that that's when you want it submitted,
22 but as I understand now you can't even
23 complain about it unless you have submitted it
24 in what is your language?

25 HONORABLE ANN TYRELL COCKRAN:

1 No. Now who can't complain about it? You can
2 complain about anything in the charge no
3 matter who you are, what side you're on,
4 whether it's in your pleadings or not by
5 objection.

6 MR. LATTING: But you can't
7 preveil via an objection unless you've
8 submitted --

9 HONORABLE ANN TYRELL COCKRAN:
10 That's not true. The only time you have to
11 submit it is if your objection is "Judge, you
12 totally left this out of the charge."

13 MR. LATTING: Okay. All
14 right.

15 HONORABLE ANN TYRELL COCKRAN:
16 That's the only time you have to tender.

17 MR. HATCHELL: Joe, the
18 problem that we have is when, and I'm sure
19 you're familiar with Payne, the rules are
20 broken. We used to have this old your-issue
21 theory rule, but with the advent of broad form
22 submission when you have a question that says
23 "Was Plaintiff, Defendant or some third party
24 negligent? Whose issue is that," we don't
25 know. So in addition to that, so that

1 standard is gone, but so there has to be a new
2 standard for tender.

3 The trial judges prevailed
4 upon the committee and I think very eloquently
5 and convinced us that an object-only world
6 doesn't work for us. There are some of us who
7 don't, as they told us, have secretaries. We
8 need some help. So the subcommittee and the
9 task force was faced with the proposition of
10 finding a new analog for the duty to tender;
11 and that's the one we used, and that is as I
12 told David is the big change, and you're right
13 to focus on it. But that's the reason why we
14 are where we are.

15 HONORABLE F. SCOTT MCCOWN:
16 But this analog is completely a matter of
17 fortuity. In other words, the trial judge's
18 big problem is not whether he or she has or
19 doesn't have a secretary. The trial judge's
20 big problem is correctly capturing a complex
21 area of law when he's got a jury waiting, and
22 he's got to move this trial on. And if he
23 addresses it in the charge at all with a
24 single word, now you have relieved the parties
25 of the responsibility when they object of

1 providing a written tender of how to do it.

2 It's only if he leaves it out
3 that he gets any help under the reasonable
4 guidance tender.

5 MR. MCMAINS: That is current
6 law.

7 HONORABLE ANN TYRELL COCKRAN:
8 Scott, I want to say that I wholeheartedly
9 agree with all of the concerns that you and
10 lots of other trial judges have expressed. It
11 is the hardest part of the case. It is the
12 part that we need the most help on that our
13 inadequate resources hurts the most, but I am
14 also thoroughly convinced that this situation
15 is one of those tensions that either the
16 lawyers or the judge are going to have
17 terrible problems if you go to a system that
18 addresses all of the problems of one side.
19 Then it's going to leave the other side in a
20 terrible situation; and this is not the best
21 system for trial judges. It's not the best
22 system for people who focus only on, you know,
23 preserving appellate complaint, but I think
24 you've got to take both those positions into
25 consideration; and each side has had to give,

1 and I have agree with you. My life would be a
2 lot easier if perfect tender were the rule.

3 HONORABLE F. SCOTT MCCOWN: It
4 only works if appellate courts relax their
5 scrutiny of the trial court's charge and say
6 that if it reasonably captured the law and
7 provided reasonable guidance to the jury, it's
8 affirmed. In other words, that's the -- if we
9 adopt the Federal Rule on one half, we have to
10 adopt the Federal attitudes on the other
11 half. And if we adopt the Federal Rule only
12 on preserving without adopting the Federal
13 attitudes about the charge, then we've just
14 flipped the world. It's still a terrible
15 world, but now it's terrible for me.

16 HONORABLE ANN TYRELL COCKRAN:
17 I agree with you. And maybe we need to talk
18 to Justice Hecht about how if the Supreme
19 Court would look terribly askance at our
20 trying to dictate to them what appellate
21 review standards are, at least say "Don't
22 adopt this unless you also make this change.

23 MR. GALLAGHER: I have a
24 question. The objection, Rusty, the point
25 you're making in the objection process even

1 where it's a matter that has not be submitted
2 on which you have the burden of pleading, the
3 failure to get, the objection you have to
4 state distinctly the error of the court in
5 failing to give that instruction, which seems
6 to me to go a little bit farther down the road
7 to trying to give the court guidance, and then
8 in your written request you have to give
9 reasonable guidance, but in the oral objection
10 you have to state distinctly the grounds of the
11 objection so that you bring it to the court's
12 attention.

13 MR. MCMAINS: And how to fix
14 it.

15 MR. HATCHELL: And how to fix
16 it.

17 MR. GALLAGHER: And how to fix
18 it.

19 MR. SOULES: Where does it say
20 "and how to fix it"?

21 MR. GALLAGHER: If you have to
22 state distinctly the grounds of your objection
23 in the failure to submit, then you're having
24 to point out specifically the nature of the
25 omission. I mean, am I incorrect in my

1 understanding?

2 MR. SUSMAN: And Rusty, I take
3 it that I could say "I object because reliance
4 is an element of common law fraud and there is
5 no definition here of reliance."

6 MR. MCMAINS: Correct.

7 MR. SUSMAN: I say no more. I
8 have preserved error, okay, and I have allowed
9 the Court of Appeals to look at that even
10 though I have got in my form book the perfect
11 pattern reliance charge. I could have handed
12 that to the judge, but I didn't, but I have
13 preserved it, done all I need to do by
14 just -- I haven't showed the judge how to fix
15 it.

16 MR. MCMAINS: Yes. If that's
17 not your burden.

18 MR. SUSMAN: It's his burden.

19 MR. MCMAINS: I understand.

20 If it's not your burden to plea, yes.

21 HONORABLE ANN TYRELL COCKRAN:
22 But, see, what is going to happen though is
23 that then the trial judge says, "Yes, you're
24 right. I'm going to put reliance in here. Do
25 you want to volunteer how I should define it?"

1 No, judge, I don't have to do that." So I
2 say, "Fine. Reliance means, you know, the
3 price of eggs at the grocery store" and put
4 that in the charge, and then it's your burden
5 to point distinctly what is wrong with that
6 definition which is going to give me the
7 information I need.

8 MR. SUSMAN: So the judge has
9 got to go get the definition in the first
10 instance.

11 HONORABLE ANN TYRELL COCKRAN:
12 Or make one up.

13 PROFESSOR DORSANEO: Or ask the
14 other lawyer if he wants to define it.

15 HONORABLE ANN TYRELL COCKRAN:
16 Yes.

17 PROFESSOR DORSANEO: I have
18 one technical question. There is a sentence
19 that means various things in various places.
20 At the end of current Rule 273, "a request by
21 either party for any questions, definitions,
22 or instruction shall be made separate and
23 apart from such party's objections," is
24 that -- I didn't see that in there anywhere,
25 and it made perfect sense to me the way you

1 described it. You could say your objection
2 and make your written request simultaneously.

3 HONORABLE ANN TYRELL COCKRAN: I
4 guess the reason that we found that you didn't
5 have to, because you do as Rusty pointed out,
6 you have to object to the omission and then,
7 you know, as well as tender; and there have
8 been some problems with some appellate courts
9 saying that you did not do it separately
10 enough.

11 PROFESSOR DORSANEO: Do that
12 separately. Yes. I hate those opinions. I
13 hope they're gone.

14 HONORABLE ANN TYRELL COCKRAN:
15 And so since you're going to have to object,
16 even if you're going to say, "I object because
17 you are not including this in the charge,"
18 then there is no point in having them
19 separate. So we did and we have tried.

20 PROFESSOR DORSANEO: Let the
21 record reflect it was omitted on purpose.

22 HONORABLE ANN TYRELL COCKRAN:
23 Right.

24 MR. ORSINGER: I wanted to
25 repeat for Justice Hecht's benefit, because

1 I'm not sure he was in the room when this
2 happened, but the reason at least my
3 conception of why the task force threw out or
4 dropped "substantially correct" was not
5 because the words are poorly chosen. They are
6 good words, but they've developed a meaning in
7 the courts of appeals that is hypertechnical
8 and result in too much waiver on the merits.

9 It was our desire to find
10 other words that could serve the same vehicle
11 that didn't carry that old baggage. If these
12 new words are adopted and the courts of
13 appeals carry over their very restrictive
14 interpretation to these new words, then these
15 new words have accomplished no amelioration of
16 the condition, and we really need for the
17 Supreme Court to tell us that these new words
18 don't carry the same baggage that
19 "substantially correct" carries, and that
20 "reasonable guidance" is going to permit the
21 courts of appeals to look at the merits more
22 often than they have been in the past.

23 If that doesn't happen and the
24 courts of appeals do the same thing over
25 again, we haven't improved anything.

1 MR. LOW: It takes me a while
2 to understand what you've done. I think
3 you've done a great job, because even under
4 our old system just tendering issues it might
5 state the law so incorrectly, the other side
6 still has to object. So you have got to point
7 them out, so every error is there to be
8 corrected, and I agree that "reasonable
9 guidance" should be, because there's no need
10 in doing it twice. It has to be perfect here,
11 and the other lawyer has to point it out, so
12 it shouldn't be done but once; and this
13 committee is just smarter than I am. They saw
14 through. I commend them for what they did.

15 PROFESSOR EDGAR: Buddy
16 pointed out too a minute ago during the break
17 that the requirement under Rule -- let's see
18 where it is. The pleading requirement under
19 272(1) there is a recent Supreme Court case
20 that says mitigation --

21 MR. LOW: It was before Tort
22 Reform. Rusty tells me Tort Reform changed
23 that. I don't know. Mitigation. You know,
24 the Supreme Court case was before Tort
25 Reform. It was an older. I'm sorry if I

1 misstated it. And Rusty tells me the law has
2 changed on that where like mitigation was
3 not -- you didn't have to plead it in order to
4 get mitigation.

5 PROFESSOR EDGAR: Okay.

6 MR. MCMAINS: Isn't mitigation
7 now -- I mean, mitigation at least in the
8 classic, in the personal injury mitigation
9 area are things controlled by Tort Reform.
10 Clearly that is now a part of the affirmative
11 defense of what in essence is comparative
12 negligence.

13 PROFESSOR DORSANEO:
14 Contributory negligence.

15 MR. MCMAINS: Contributory
16 negligence, contributory responsibility, or
17 whatever you want to call it.

18 MR. PERRY: Comparative
19 responsibility.

20 PROFESSOR DORSANEO: It's
21 contributory negligence.

22 MR. MCMAINS: So I think you
23 have the burden of pleading it there. Now,
24 the question is in general lit cases as to
25 whether or not the doctrine of mitigation or

1 avoidable consequences or whatever may be
2 something that has to be pleaded, I haven't
3 frankly researched that; but if it's not
4 controlled by Tort Reform, I don't know that
5 it has changed.

6 CHIEF JUSTICE AUSTIN MCCLOUD:

7 I don't know of any way that you can correct
8 this, but it is something that's always
9 bothered me, and there was some discussion
10 about it a moment ago when you're talking
11 about simultaneously objecting and handing the
12 trial judge the tendered instruction. The
13 last sentence, which is believe me I prefer
14 this rule much more than what we've had. I
15 commend this group for doing this. But the
16 last sentence this is still better, but it
17 says, "If a request has been filed and bears
18 the judge's signature, it shall be presumed
19 unless otherwise noted in the record that the
20 request was tendered at the proper time."

21 And up there in the first part
22 of that you talk about the proper time for
23 tendering being after the evidence and before
24 the objections are starting. And that's just
25 a little bit of a time problem there. I've

1 always taken the position that this business
2 of the judge signing it some sort of
3 presumption. It doesn't mean it couldn't be
4 shown by other ways such as now they talk
5 about a Bill of Exception in the rule. No
6 formal bill. Maybe have an informal bill, and
7 maybe you have the court reporter showing what
8 is taking place.

9 But do you see what I'm
10 saying? In other words, it says that it shall
11 be presumed unless otherwise noted in the
12 record that the request was tendered at the
13 proper time, which would indicate your tender
14 had to take place before your objections. I
15 wish we could correct that.

16 MR. SOULES: "Before or at."

17 HONORABLE ANN TYRELL COCKRAN:

18 "Before or at."

19 CHIEF JUSTICE AUSTIN MCCLOUD:

20 Does it say?

21 HONORABLE ANN TYRELL COCKRAN:

22 "Before or at the time of objection."

23 CHIEF JUSTICE AUSTIN MCCLOUD:

24 That's great. That's wonderful.

25 MR. SOULES: Does that fix

1 it?

2 CHIEF JUSTICE AUSTIN MCCLOUD:

3 You bet. That's wonderful. I'm sorry I
4 missed that, because that is a good thing,
5 "before or at time of objection."

6 MR. ORSINGER: One of our
7 concerns was that some people either because
8 of a pretrial order or trial strategy will
9 submit their charge before they even impanel
10 the jury, and we didn't want to get into an
11 argument because actually you're required to
12 tender after the close of the evidence, and
13 people are looking around in files and
14 everything; and we just said if the judge had
15 it in his hands during the charge conference
16 and signed it, let's not worry about whether
17 it was submitted before the jury was impaneled
18 or after the evidence was closed.

19 HONORABLE ANN TYRELL COCKRAN: The
20 main thing was the problem that trial judges
21 often have of not knowing what the district
22 clerk has file marked in that file and making
23 sure that not just the clerk had it to avoid
24 sandbagging to the extent possible.

25 CHIEF JUSTICE AUSTIN MCCLOUD:

1 That's great.

2 HONORABLE DAVID PEEPLES: Can
3 one of you-all walk me through a common
4 situation? Several theories have been
5 pleaded. I decide to submit three, but the
6 fourth one, and let's say it's fraud, I decide
7 is not raised by the evidence. Now, if the
8 party who wants it submitted tenders an issue
9 with an instruction that has four of the six
10 elements, can I safely refuse that and is it
11 over?

12 HONORABLE ANN TYRELL COCKRAN:
13 Sure, if you're right that there wasn't any
14 evidence to support.

15 HONORABLE DAVID PEEPLES:
16 Yes. It bothers me. What else does the
17 tendering person have to do in order to
18 preserve it for appeal?

19 MR. MCMAINS: They must object
20 to the omission.

21 PROFESSOR ALBRIGHT: But they
22 don't have to have submitted it correctly to
23 preserve the error that they're entitled to a
24 fraud claim.

25 HONORABLE DAVID PEEPLES: Okay.

1 HONORABLE ANN TYRELL COCKRAN:

2 The theory is that it is not a game of got
3 you, and that the trial judge just like the
4 other side should not be able to say, "Well, I
5 thought that no evidence thing was a close
6 point, but boy, this makes it easy, I don't
7 even have -- because he left out an element."
8 You know, if it's enough to tell you that
9 fraud should be in there, because the two
10 omitted elements are ones that you could cure
11 by putting it in the charge and then hearing
12 objections.

13 HONORABLE DAVID PEEPLES: When
14 do they have to tell me there are six elements
15 and you need to submit all six? Fraud is easy
16 because we can all look that one up. There
17 are a lot of theories that are not that easy.
18 I choose fraud because I know there are six
19 elements. But at what point do they have to
20 tell the trial court, "Look, it ought to be
21 submitted this way," which really gives me
22 some guidance?

23 HONORABLE ANN TYRELL COCKRAN:
24 At the point that you decide to include it in
25 the charge.

1 HONORABLE DAVID PEEPLES: No.
2 I'm deciding not to include it. And they've
3 submitted it in what would right now be
4 substantially incorrect.

5 MR. MCMAINS: Again the point,
6 and I think what we are trying to do here is,
7 then all they have to do is object to the
8 failure to submit our cause of action for
9 fraud.

10 MR. SOULES: As I understand
11 they have given you pursuant to number one up
12 here, the first sentence, they have given you
13 a defective question, instruction or
14 definition, however it's tailormade by them.
15 And you've refused it. Or have you refused it
16 or included it?

17 HONORABLE DAVID PEEPLES:
18 Refused it.

19 MR. SOULES: You refused it.
20 At that point unless that gave you reasonable
21 guidance in fashioning a correct question or
22 definition or instruction, well, really
23 nothing has happened probably either way.
24 Then they have to object to your failure to
25 give a fraud question, instruction, definition

1 cluster and tell you expressly what should be
2 in it as I understand it.

3 HONORABLE DAVID PEEPLES:

4 Okay. Is that right? Do they ever have to
5 tell me --

6 MR. LATTING: No.

7 HONORABLE DAVID PEEPLES: -- it
8 ought to include elements one through six?

9 HONORABLE ANN TYRELL COCKRAN:
10 Not if they're not going to submit it.

11 MR. SOULES: I don't think
12 that's right.

13 MR. MCMAINS: But the point is
14 that if you say at that point, "Okay. I have
15 this one here; it looks to me like that there
16 is another half a dozen of them also," and you
17 make an extra half a dozen of them also that
18 you want to make them overcome, and you write
19 that in, or you give the one that they've got,
20 if somebody wants to complain about that, then
21 they complain about the omission of the other
22 two elements or object to them.

23 MR. SOULES: It says, "No
24 party may assign as error" and so forth
25 "unless the party objects thereto before the

1 charge is read to the jury stating distinctly
2 the matter objected to and the grounds of the
3 objection."

4 PROFESSOR ALBRIGHT: Well,
5 then the objection is you failed to submit the
6 issue. The objection is not there is
7 something wrong with this issue, because there
8 is nothing in the charge.

9 HONORABLE ANN TYRELL COCKRAN:
10 The objection is you failed to submit this
11 issue. Then you go to number one; and before
12 you are legally permitted to make that
13 complaint, to make that objection, if it's
14 something you needed to plead, you had to have
15 tendered it before you can legally make that
16 objection about omitting.

17 PROFESSOR ALBRIGHT: Right.
18 And you have to tender it in a form that gives
19 reasonable guidance. I guess we could get
20 into a big brouhaha about if reasonable
21 guidance --

22 MR. YELENOSKY: If four of six
23 elements.

24 PROFESSOR ALBRIGHT: -- if a
25 four element gives reasonable guidance than

1 six, but we're hoping not to.

2 HONORABLE ANN TYRELL COCKRAN:
3 Well, but you also have to realize the lawyer
4 doing, you know, it's not -- that is not the
5 standard for grading what was in the charge.

6 PROFESSOR ALBRIGHT: Exactly.

7 HONORABLE ANN TYRELL COCKRAN:
8 It is only, you know, "I have fraud pled. I
9 have evidence of fraud. You refused to give
10 me any submission of fraud, and I gave you
11 know, a fraud. It wasn't perfect. I left out
12 a couple of elements. Maybe those are the two
13 elements I didn't have any evidence on." But
14 it's a wholly different problem than if you're
15 complaining about what the judge did put in
16 the charge where having all six elements
17 really becomes important.

18 MR. SOULES: See if this
19 works. Just like Judge Peeples said, I had
20 the burden to plead fraud, and I gave them a
21 defective question, instruction, definition
22 cluster and omitted two elements. Later I say
23 "You erred in failing to submit fraud and you
24 should submit fraud." Okay. I've got maybe a
25 valid objection, but that doesn't preserve the

1 error, because I have to both object and
2 request if it's my burden to plead. I have to
3 do both, and my request has to give reasonable
4 guidance in fashioning the correct cluster
5 that you did not submit. So if my request
6 gave reasonable guidance in fashioning this
7 correct charge even though it omitted two
8 elements, and that's what the appellate courts
9 hold, then I have preserved error. Otherwise
10 not.

11 HONORABLE DAVID PEEPLES: Let
12 me ask it this way: Suppose it's a cause of
13 action that's on the cutting edge of the law
14 and we just can't go look it up in a dozen
15 Supreme Court cases and nobody knows what the
16 elements ought to be. Can I get reversed for
17 saying, "I'm sorry. The jury is out there.
18 You want this to go to the jury. You should
19 have had me some help. Tender something to
20 me." Well, I can't do it, Judge." "Then I'm
21 not going to submit it." How do they reverse
22 me on that? It sounds like you just make
23 an -- you tender something that is not even
24 close, make an objection --

25 MR. LATTING: That doesn't

1 give you reasonable guidance if it's not even
2 close.

3 MR. SOULES: You have to do
4 two things to preserve error if it's your
5 burden to plea. You have to object, and you
6 have to tender something that gives reasonable
7 guidance in fashioning a correct cluster.

8 HONORABLE DAVID PEEPLES:
9 Okay. There will be litigation over what
10 reasonable guidance means.

11 MR. MCMAINS: There is no
12 question about it.

13 MS. DUNCAN: And it will
14 become "substantially correct." We will just
15 change the words.

16 MR. ORSINGER: Judge Peeples,
17 that was the point of my earlier comment.
18 We're trying to find words that mean something
19 different from substantially correct as
20 interpreted, and it may require litigation or
21 maybe we ought to put a comment in there
22 warning all the Justices on the Courts of
23 Appeals "We changed these words because we
24 didn't like your interpretation of
25 substantially correct, and we would like a

1 little bit loser and yet well defined idea of
2 reasonable guidance."

3 MR. SPARKS: I thought you said
4 a while ago Judge Hecht has already written
5 about it. "Reasonable guidance" is
6 substantially correct.

7 MR. SOULES: Reasonable
8 guidance in fashioning a correct question,
9 definition or instruction will be litigated if
10 we change to that. Are we going to change to
11 that and litigate, or are we going to stay
12 with substantially correct and live with the
13 very technical way that that has been
14 interpreted? That's really the policy
15 question that's before the committee; and
16 there are I guess reasons for doing both. Do
17 we want to litigate a new term, or do we want
18 to stay with one that is very technical, very
19 strictly construed and is causing the
20 appellate lawyers difficulty?

21 MR. BEARD: I move we adopt the
22 reasonable guidance standard.

23 MR. SUSMAN: Seconded.

24 MR. SPARKS: I believe we
25 already have. Judge Hecht, he defined

1 "substantially correct" as "reasonable
2 guidance." He's already done it.

3 MR. SOULES: That does move us
4 along. Any discussion about going to this new
5 standard now?

6 MR. BECK: Can I just say one
7 thing about this new standard? You know,
8 under the substantially correct form standard
9 the appellate court looks at the tendered
10 definition or the tendered instruction and
11 then looks at the law and determines whether
12 or not that is substantially correct. As I
13 interpret what has been said with respect to
14 the reasonable guidance standard there may
15 well be a factual dispute involved, and I'm
16 talking about a complex piece of business
17 litigation where you have multiple parties
18 where you don't just have one document and the
19 appellate court then has to apply the law to
20 that. You've got lawyers arguing about
21 whether or not this language ought to be in
22 the instruction or definition, whether some
23 other language ought to be, and the debate can
24 go on for hours.

25 Now, how is the appellate

1 court going to sift through all that and make
2 a determination of what is reasonable and what
3 is not when there may well be a factual
4 dispute?

5 HONORABLE ANN TYRELL COCKRAN:
6 It sounds to me like what you were talking
7 about is a situation where the lawyers are
8 arguing about the language of something that
9 they both know is going to be in the charge.
10 The reasonable guidance standard doesn't come
11 into play where that is the situation. It's
12 only when something is totally omitted from
13 the charge that you even look to this
14 reasonable guidance language.

15 MR. BECK: Yes. But there is a
16 debate though, judge, about whether something
17 ought to be included or excluded from the
18 charge.

19 HONORABLE ANN TYRELL COCKRAN:
20 Okay.

21 MR. BECK: And I guess what I'm
22 concerned about is I don't want to get into a
23 situation where the appellate court is somehow
24 deciding facts that were before the trial
25 judge with respect to what is and what is not

1 reasonable guidance. That's what bothers me.

2 HONORABLE ANN TYRELL COCKRAN:

3 Well, we don't have any discretion.

4 Everything is mandamusable anyway. It's
5 unrealistic to think trial judges are to be
6 given any new discretion.

7 MR. SOULES: David, I'm sorry.
8 I don't really understand the problem. Could
9 you run it by me again? I'd like to try to
10 understand it, if I can.

11 MR. BECK: Well, I guess what
12 I'm concerned about is in a complex case where
13 you've got multiple parties and there is a
14 debate about whether or not to include a
15 particular instruction in the charge or not,
16 okay, under this proposal when does the
17 reasonable guidance standard come into play?

18 MR. MCMAINS: When there is no
19 instruction given.

20 MR. BECK: All right.

21 MR. MCMAINS: And you have the
22 burden to plead.

23 MR. BECK: All right. Now,
24 when the appellate court is trying to
25 determine whether the trial court has been

1 provided with reasonable guidance or not, what
2 is the appellate court going to look at?

3 HONORABLE F. SCOTT MCCOWN:

4 The tendered reasonable guidance.

5 MR. BECK: The tendered
6 written reasonable guidance.

7 HONORABLE F. SCOTT MCCOWN:

8 Yes. That is the reasonable guidance is the
9 written request.

10 MR. SOULES: Written request.

11 MR. MCMAINS: They'll look at
12 the request.

13 MR. YELENOSKY: Is that what
14 the language says?

15 MR. SOULES: Yes. That's it
16 the way this rule is structured right now.

17 MR. SOULES: My question is,
18 am I reading it right?

19 MR. HATCHELL: Yes.

20 MR. MCMAINS: Yes.

21 MR. SOULES: Okay. Hatchell
22 and Rusty say, "yes."

23 MR. MCMAINS: You need to
24 understand that's just a threshold. I mean,
25 like for instance, and we do have a dispute

1 I think between what David's interpretation of
2 reasonable guidance in light of Luke's
3 comments versus mine. And that is if there is
4 a fraud cause of action pled and the judge has
5 determined he's not going to give fraud and
6 you've submitted fraud as a pleading, all you
7 have to do in my judgment is object to the
8 omission of your fraud claim. Now you're
9 obviously confined to the pleaded claims and
10 what's in the evidence in order to make that,
11 but your position is you had evidence raising
12 it and so on.

13 What David would like to do
14 and what the other side would like to do is to
15 be able to sandbag me because my submitted
16 instruction wasn't 100 percent correct, even
17 though he knows full well what all six
18 elements of the fraud are and doesn't need any
19 help to go write them down.

20 And essentially all the
21 committee was saying is, you ought not to have
22 that kind of advantage. If your position is
23 "I'm going out on a limb this is not a fraud
24 case in my judgment, and I'm not going to give
25 you fraud," then that -- you object to the

1 omission of fraud; you have given, crossed the
2 threshold, given them a fraud definition that
3 has got four of the six elements.

4 Now, if we forget the fraud
5 definition or fraud instruction or if you ask
6 a question that has no elements, probably
7 we're in the same line. It just asks "Are
8 they bad fellows?" And your position is
9 "That's a fraud case; that's a fraud
10 submission." I probably don't think we are
11 going to have a problem resolving that there
12 is no reasonable guidance. "Are they nasty
13 guys? Should they be penalized," that sort of
14 stuff.

15 If you asked however the
16 question of fraud given the modernday
17 patterned jury charge, et cetera, it's highly
18 likely in my judgment that the Court will look
19 to your objection if you have requested a
20 question on fraud, whether you have any
21 definitions or instructions or not, if there
22 is a reasonable basis, if you give the judge
23 the PJC pact for that matter, or four, I don't
24 personally think that that appellate court
25 would necessarily have any problems saying "He

1 should hae given fruad" if there is evidence.
2 And you go back to the merits of the
3 objection, which is all we're trying to get
4 to.

5 CHIEF JUSTICE AUSTIN MCCLOUD:
6 I do want to take just a minute to defend some
7 of the courts of appeals, because --

8 MR. YELENOSKY: Which one?

9 CHIEF JUSTICE AUSTIN MCCLOUD:
10 Some of them. I know it's been quite, quite
11 accurate, because there's been a large
12 discussion about the hypertechnical courts of
13 appeals; and I think that if you go back and
14 check most of the cases and the things that
15 most of the lawyers are concerned about, and
16 as a judge I've been very concerned about for
17 years, involves things like whether or not the
18 definitions are on separate pieces of paper,
19 whether or not they're tendered properly,
20 whether or not they are endorsed, denied,
21 granted. Those are extremely hypertechnical
22 matters; and the reason the courts of appeals
23 have been extremely hypertechnical about those
24 is because that's what the rules have said,
25 and they've been following Supreme Court

1 opinions for the last 50 years on that.

2 Now, and again in defense I
3 don't recall, and you may have a multitude of
4 them, but I don't recall the courts of appeals
5 getting all bogged down in this business about
6 substantially correct. I know all about the
7 courts of appeals getting all bogged down on
8 all of this other business about when you
9 tendered it, where you tendered it, who signed
10 it, who was in that room, and when you did
11 it. But and I suppose that what you're
12 telling me is that there is just a multitude
13 of cases out there or I assume you wouldn't
14 have done it, wouldn't have changed the
15 language where the courts of appeals have
16 said, what, an "and" is missing, or somebody
17 said "a comma." I've never seen a case like
18 that.

19 MR. MCMAINS: But as a for
20 instance suppose the --

21 CHIEF JUSTICE AUSTIN MCCLOUD:
22 Again this is I'm just defending them for a
23 few minutes.

24 MR. SOULES: Who wants to
25 respond?

1 CHIEF JUSTICE AUSTIN MCCLOUD:

2 Go ahead, please.

3 MR. SOULES: Okay. Sarah

4 Duncan.

5 CHIEF JUSTICE AUSTIN MCCLOUD:

6 I'm talking about the discussion about how
7 hypertechnical they were, and I've been
8 looking at all these cases for 20 some odd
9 years; and you know, I don't see -- I have not
10 seen that tremendous technicality when you
11 start talking about the definition.

12 MS. DUNCAN: There is at least
13 one Court, perhaps more, where if it can be
14 either a question or an instruction, and this
15 is pretty much what happened in Payne, the
16 Court will say, "Well, it has to be an
17 instruction. Yours looks like a question.
18 It's not substantially correct. And even
19 though we all knew that what you were trying
20 to get to, you haven't preserved error." Or
21 there will be a phrase that may or may not
22 turn out to be the law by the time you get to
23 the Supreme Court. That can defeat all review
24 for the complete omission of that affirmative
25 defense, element of a claim, whatever it is.

1 CHIEF JUSTICE AUSTIN MCCLOUD:
2 Well, I don't think the judges on the court of
3 appeals are going to be the least bit
4 concerned about the fact that you've changed
5 this language. They're just going to try to
6 comply with it.

7 MS. DUNCAN: In my opinion,
8 Judge, a judge like you it won't change your
9 life at all.

10 CHIEF JUSTICE AUSTIN MCCLOUD:
11 I sure hope it won't.

12 MS. DUNCAN: You've been
13 living by reasonable guidance all along. The
14 problem is substantially correct has taken on
15 a life of it's own and can be manipulated if
16 that's the choice.

17 CHIEF JUSTICE AUSTIN MCCLOUD:
18 Thank you very much. Otherwise they'd want to
19 know what I said.

20 PROFESSOR EDGAR: Rule 274
21 generally. One is a matter of form and the
22 other is a matter of some substance, I think.
23 And I'd like to ask the committee and
24 subcommittee in Rule 272 we talk about
25 submitting questions, and now suddenly in all

1 of Rule 274 we talk about giving questions or
2 the failure to give. Is there any
3 significance, because some lawyer is going to
4 attach some significance to it if there is an
5 intention? We always used submission and now
6 we're talk about giving.

7 HONORABLE ANN TYRELL COCKRAN:
8 I think that was unintentionally,
9 unconsciously in.

10 PROFESSOR EDGAR: I would
11 suggest then that the word "giving" or "give"
12 in Rule 274 be changed to "submit" or
13 "submission" wherever indicated.

14 MR. SOULES: Are there any
15 objections to that. No objections.

16 PROFESSOR EDGAR: The second
17 point goes to the second sentence in new Rule
18 274(2), "An objection is required even if the
19 objecting party is required to tender a
20 request." I know that that is basically the
21 rule we have now. However as I read
22 State vs. Payne the court stated there that
23 anything that calls to the appellate -- to the
24 trial court's attention will preserve error
25 whether it is an objection, or whether or not

1 it is a tender or an objection.

2 Now, we are kind of caught in
3 a paradox here it seems to me. If it is the
4 desire of the subcommittee to suggest to the
5 court that it modify State vs. Payne in that
6 regard, even though the current rule carries
7 out the essence of the proposed rule, that the
8 comment, that there really needs to be a
9 comment here that this is intended to modify
10 State vs. Payne in that record, because this
11 is going to cause a lot of confusion if you
12 don't.

13 MR. HATCHELL: I think Hadley
14 is absolutely correct, because the intention
15 is to modify Payne in that respect and a
16 comment should say so.

17 JUSTICE NATHAN HECHT: And
18 given the change in the rest of the rule, it
19 almost has to. It seems to me it almost has
20 to be this way.

21 PROFESSOR EDGAR: Yes. I'm
22 not concerned about the merits. We don't want
23 to confuse the Bar and Bench. That's what we
24 want to try and avoid.

25 MR. SOULES: Any other

1 comments on 274?

2 MR. LOW: Number (1) says "A
3 party may not assign as error the failure,"
4 and the second one says "no party may assign,"
5 and it's just two different ways of stating
6 it. I don't know if we want to state them the
7 same way both times. It makes no difference,
8 but why state it? You know, somebody is going
9 to wonder why did they state it this way "a
10 party," and then the other says "no party."
11 Somebody will just say, "Well, they mean then
12 no multiparty lawsuit" or something.

13 MR. SOULES: Which way do you
14 suggest?

15 MR. LOW: I don't know.

16 MR. SOULES: Make a
17 suggestion.

18 MR. LOW: "The party may not
19 assign" --

20 MR. ORSINGER: Let me respond
21 to that. In the first instance there it's
22 referring to the one party who had the burden
23 to plead --

24 MR. MCMAINS: Right.

25 MR. ORSINGER: -- has that

1 burden to tender; but in the second question
2 everyone has the burden to object, and so it's
3 multiple, so you've got plural in one and
4 single in the other, and the phraseology
5 supports that distinction.

6 MR. LOW: Okay. But you
7 say -- how would it be different if you went
8 down to the second, "A party"? I mean,
9 somebody, one of the parties is going to be
10 assigning error. It doesn't mean more than
11 one.

12 MR. ORSINGER: The problem
13 with "a party" is --

14 MR. LOW: Okay. If you're
15 satisfised with it, I can live with it.

16 MR. ORSINGER: "A party" means
17 one. "No party" means everyone.

18 MR. LOW: I'll yield.

19 HONORABLE DAVID PEEPLES: As
20 long as we're talking about wording, in number
21 (1) we talk about the judge in a couple of
22 places and the trial court in another place,
23 and it ought to be consistent.

24 MR. SOULES: Where does it say
25 "trial court"?

1 HONORABLE DAVID PEEPLES: Well,
2 in number (1) about five lines down, and at
3 the bottom we say "judge." A couple of times
4 we say the "trial court." We should say the
5 same.

6 MR. SOULES: It's the judge.
7 It's not the court. Where does it say "the
8 court"?

9 HONORABLE DAVID PEEPLES: Four
10 lines up. I was going to suggest that we make
11 these wording suggestions to the subcommittee
12 and not deal with them on the floor.

13 MS. SWEENEY: I'm writing them
14 down.

15 HONORABLE DAVID PEEPLES: In
16 number (4) in paragraph (4), "Rulings," do we
17 mean objections? "The rulings shall be made
18 in open court or on the record." Can you make
19 it on the record in chambers? Don't we really
20 mean "on the record"?

21 MS. SWEENEY: Yes.

22 MR. EDGAR: Changing "in open
23 court" to "on the record"?

24 MS. SWEENEY: Yes.

25 HONORABLE DAVID PEEPLES:

1 Well, I was wondering what we mean. And,
2 Luke, I want to say I detect from some of the
3 discussion and from Rusty's use of the word
4 "sandbag" that there is some sentiment here
5 that judges play games.

6 Let me just say: If it's so
7 easy for the judge to know what the law is on
8 everything someone has pleaded, why can't the
9 lawyer who has nursed this case along for
10 years know what the elements of every cause of
11 action are that he's pleading? That's the
12 judicial point of view, and I just wanted to
13 state it.

14 MR. SUSMAN: See, I'm not sure
15 I understand. I understand there is a problem
16 with the "substantially correct" and that the
17 appellate courts have written, construed it
18 too strictly, and that now all you want to do
19 is make it "reasonable guidance." If the
20 requested instruction gives the judge
21 reasonable guidance, then that's enough.
22 That's one point.

23 Isn't it an entirely different
24 point though to say that the party who doesn't
25 have the burden of pleading has no duty to do

1 anything? You were talking about the person
2 who --

3 MR. MCMAINS: He has the duty
4 to object.

5 MR. SOULES: The party that
6 does not have the burden to plead must object
7 by according to the standard that's
8 articulated here.

9 MR. SUSMAN: But he has no
10 duty to submit a request that gives the trial
11 judge reasonable guidance.

12 MR. SOULES: That's correct,
13 according to this rule.

14 MR. MCMAINS: That is if he
15 didn't have -- if it's on an issue he didn't
16 have the burden to plea.

17 MR. SUSMAN: Now, what is the
18 justification not requiring him to give the
19 trial judge reasonable guidance of a proper
20 instruction? I mean I understand you don't
21 want to do work for the other party. But is
22 that all that we're talking about? We aren't
23 now in word games. We are not substantially
24 correct.

25 MR. MCMAINS: What we're

1 raising right now is we've got two things.
2 Number one is the fairness of whether or not
3 you are required to do the other party's job.

4 MR. SUSMAN: Right.

5 MR. MCMAINS: That
6 historically the committee consistently has
7 taken the position in the last few years that
8 that is not a fair allocation of the burden
9 and this committee I think only continued, so
10 that is nothing new really, but that is what
11 has been the consensus of the committee in the
12 past.

13 Secondly is that the courts
14 have seized upon the providing of that
15 information as being an invitation, invited
16 error if you will, like for instance, you
17 don't know. Take the example I gave of good
18 faith and fair dealing. You don't know a good
19 faith and fair dealing issue for some reason
20 or another is coming exactly. I mean you're
21 dealing in a real estate land sale
22 transaction, and somebody wants to bring in an
23 issue of real estate. You haven't prepared
24 anything. You had no idea that was coming,
25 and yet you now have the burden if it's

1 undefined in order to attempt to circumscribe
2 the jury in any fashion whatsoever and get into
3 the other side's head as to what it is they
4 have in mind, and they may not tell you. You
5 have to try and fashion an instruction.

6 Well, if you fashion that
7 instruction, and it happens to help out the
8 other side rather significantly, there are no
9 complaints you can make about it for the mere
10 fact that you did it under our current
11 practice the way that things are going. And
12 so we haven't had a way, and that's basically
13 on the notion that you can't lead a Court into
14 error. You can't encourage them to do
15 something and then complain about it.

16 And the problem, that's fine
17 if you're talking about your case and what
18 you've got a burden to plead and prove. It's
19 something else again when you're talking about
20 somebody else's case, something they left
21 out. And why do you have to do their work and
22 then get penalized for having done it?

23 MR. SUSMAN: But there are two
24 distinct issues, are there not, Rusty? I mean
25 one is the substantially correct versus

1 reasonable guidance.

2 MR. MCMAINS: Yes.

3 MR. SUSMAN: And the other is
4 do you have to do work for the other side.

5 MR. MCMAINS: Yes.

6 MR. SUSMAN: You could agree
7 with one and not with the other.

8 MR. MCMAINS: Yes, but they
9 are related issues in the sense that the
10 substantially correct stuff filters in to your
11 doing the other side's work as well.

12 MR. SOULE: This objected to,
13 the requirements for the objection to be good
14 are lax in this rule, and there is a
15 Supreme Court case which I can't recall the
16 name of -- it's an older case -- that gives a
17 more complete, requires the objection to be
18 more complete. We had that in our draft
19 before this came out, and it pretty much
20 requires that the objection tell the judge
21 what is wrong with the omission, in other
22 words, what specifically is being omitted.
23 "You're omitting fraud, and you're omitting
24 the six elements of fraud, and here's what
25 they are." What's that case? Do you

1 remember?

2 MS. DUNCAN: I don't remember
3 the case.

4 PROFESSOR DORSANEO: Brown vs.
5 American Transfer and Storage.

6 MS. DUNCAN: No.

7 MR. SOULES: No. It's not
8 that either. We can find it; but this is
9 pretty lax, this objection that we've got
10 right here, the parameters of this objection.

11 MR. SUSMAN: That's what I
12 would like to see --

13 MR. SOULES: And it was in our
14 draft that was here before; and I didn't bring
15 it, but I can get it.

16 MR. MCMAINS: That's because
17 we did not -- because with that in that draft
18 we had no request practice, so what we
19 actually put in was the statement that the
20 objection must state specifically the matter
21 objected to, the grounds, and how to fix it.

22 MR. SOULES: That's right.

23 MR. MCMAINS: The
24 how-to-fix-it language was in the earlier
25 draft that we had, but then we had no request

1 practice, and that's what everybody complained
2 at; and so the how-to-fix-it sort of theme got
3 shuffled into the request practice.

4 MR. SOULES: This seems to me
5 to be deficient. I think the objection should
6 have to give the judge the instruction orally
7 that you're saying is omitted even though it's
8 not my burden. At least you ought to tell the
9 judge that; and this doesn't require that.
10 Sarah Duncan.

11 MS. DUNCAN: Two points.

12 MR. EDGAR: Are you talking
13 about giving the Court substantial guidance
14 rather than reasonable guidance? I'm just
15 trying to find a term.

16 MR. SOULES: I'm not arguing
17 about the standard for what you tender. I'm
18 talking about the standard for the objection.
19 This objection is you state the matter
20 objected to and the grounds of the objection,
21 but it does not require you to give the judge
22 guidance to any kind of information about how
23 to cure the problems that you are objecting
24 to. You just state the grounds, the matter
25 objected to and the grounds; and the existing

1 law governing what an objection has to include
2 has more requirements than this language has.
3 Okay. Richard and then Sarah.

4 MR. ORSINGER: There were
5 several district judges that met with us that
6 had exactly that concern; and one of the
7 examples we discussed is the Plaintiff who
8 submits a charge or anyone whether seeking it
9 by counterclaim would apply as well, with a
10 damage question and no instructions on what
11 compensible damages are. Now, then the
12 Defendant or the party defending the
13 counterclaim would say, "I object because you
14 are not instructing the jury on the proper
15 measure of damages," and you have just alerted
16 the judge that the charge is deficient because
17 it doesn't give the measure, but you haven't
18 taken the risk or taken it upon yourself to
19 tell him what that measure is, because that's
20 really the party seeking affirmative reliefs,
21 that's their burden to come in with that case
22 law and to come in with that proposed
23 language.

24 MR. SOULES: We're to a policy
25 issue here right now. Should we have to tell

1 the judge what the correct measure of damage
2 is at least orally if we are going to be able
3 to preserve that ground?

4 MR. ORSINGER: But you see if you
5 make them state the correct submission in an
6 objection, then we still have tender, tender.
7 It's just that your tender is oral instead of
8 being written. And what have we
9 accomplished? All you've done is put us right
10 back to where we are now which is that the
11 good lawyer has got to put together the case
12 for the bad lawyer so that it doesn't get
13 reversed on appeal. And you've got to ask
14 yourself in an adversary system like this
15 should we be making the good lawyers put
16 together the case for the bad lawyers so the
17 case doesn't get reversed on appeal?

18 MR. SOULES: He stated a
19 policy question. We can just go through
20 here. I didn't want that to be missed.

21 MS. GARDNER: Can I ask a
22 question?

23 MR. SOULES: Yes. Anne
24 Gardner.

25 MS. GARDNER: It has always

1 been the law that the lawyer even, say,
2 representing the Defendant objecting to the
3 Plaintiff's damage issue would have to on the
4 ground that did not present the proper measure
5 of damages would have to point out verbally in
6 his objection what the proper measure of
7 damages was in order to preserve his
8 complaint.

9 PROFESSOR DORSANEO: No.
10 There's a split.

11 MS. GARDNER: Is there?

12 PROFESSOR DORSANEO: Yes.

13 MR. HATCHELL: This is a case
14 where there is no measure of damage given.

15 MS. GARDNER: No measure is
16 submitted.

17 MR. HATCHELL: Not a defective
18 measure, but no measure.

19 MS. GARDNER: Right. An issue
20 on damages is submitted where it's --

21 MR. ORSINGER: A question.

22 MS. GARDNER: -- just a
23 general damage question on damages and no
24 instruction is submitted on the question of
25 what measure of damages is. Well, there's a

1 substantial body of authority that says that
2 the objection must specifically point out what
3 the proper measure of damages is. And I'm
4 wondering if that since the language on what
5 the objection in the amended rule, the new
6 rule would include is almost identical to the
7 old language, isn't it? It must point out
8 distinctly objection. "Must state distinctly
9 the matter objected to and the grounds of the
10 objection" is the same language as the old
11 case law. So could the Courts still hold that
12 the Defendant has the burden to point out what
13 the measure of damages is under the new rule?
14 Does that make any sense?

15 MR. SOULES: Well, I think the
16 policy issue --

17 MS. GARDNER: It doesn't
18 change the law, in other words --

19 MS. SOULES: I think this
20 does.

21 MS. GARDNER: -- on what the
22 objection has to include.

23 MR. SOULES: And I can get
24 the case. I just can't bring it to mind, but
25 we had that standard in what was drafted

1 before. It did require at least orally
2 telling the trial judge how to fix your
3 objection. It had to be sufficiently specific
4 that it informed the judge what step he could
5 do to fix it.

6 MR. BEARD: Luke, why don't we
7 vote on the reasonable guidance standard and
8 get that out of the way.

9 MR. SOULES: How many -- have
10 we done enough debate on that?

11 MR. PERRY: I have some
12 questions about that before we vote.

13 MR. SOULES: Okay. David
14 Perry.

15 MR. PERRY: If the reasonable
16 guidance standard is adopted in terms of what
17 the lawyer has to tell the trial court, would
18 that standard also be adopted over in
19 Paragraph 3 to the effect that "A judgment
20 shall not be reversed so long as the charge"
21 seen on Paragraph 3 on the next page "provides
22 the judgment shall not be reversed because of
23 failure to submit shades and phases"?

24 Now, wouldn't it make sense if
25 you adopt the reasonable guidance standard to

1 add into that sentence that "The judgment
2 would not be reversed so long as the charge
3 submitted provided reasonable guidance to the
4 jury" so that you don't put a heavier burden
5 on the trial court than you do on the
6 lawyers?

7 MR. SOULES: That's a
8 different question I think than we're talking,
9 than somebody wants to vote on.

10 JUSTICE NATHAN HECHT: Judge
11 McCown made that point earlier, that same
12 point earlier.

13 MR. BEARD: Let's vote on
14 reasonable guidance.

15 MR. SOULES: Let's vote on
16 whether or not the words, the standard
17 "reasonable guidance" in fashioning a correct
18 question, definition or instruction should be
19 used for future practice rather than
20 "substantially correct form." Those in favor
21 of the language in the proposed 274 hold your
22 hands up, please. Those opposed? That
23 carries heavily.

24 MR. SOULES: I want to get to
25 your issue.

1 MR. PERRY: Is it agreed to
2 add "reasonable guidance" to the last page of
3 Paragraph 3 on the next page?

4 MR. SOULES: Not yet I don't
5 think. It may be. And that does come up
6 before Judge Peeple's point about "on the
7 record" or "in open court." So if we want to
8 go to that, that is fine.

9 MR. SUSMAN: Luke, isn't the
10 next issue what the party without the burden
11 must do to preserve the error in terms of
12 providing an instruction, in terms of
13 objecting and how specific the objection has
14 got to be? I mean, isn't that kind of
15 the -- I mean, the next issue is we now know
16 what you have to do if you've got the burden,
17 if you have had the burden to plead
18 something.

19 MR. SOULES: If you'll permit
20 me to do this, I'll get that case before our
21 next meeting and we can look at that and see
22 what the Supreme Court has said the language
23 in the old rule meant. I just don't have it
24 here.

25 MR. SUSMAN: My only

1 feeling --

2 MR. MCMAINS: He's still
3 asking about the fundamental change that we
4 were talking about.

5 MR. SUSMAN: My only feeling
6 is that it's not sufficient for us in this day
7 and age to say, "Well, the guy, you shouldn't
8 have to do it because it's not -- you
9 shouldn't have to make the other guy's case."
10 That's inefficient. I mean that's just going
11 back to the old gamesmanship that, you know,
12 "You shouldn't have to do anything to help the
13 other guy out or the Court out. It's his
14 burden. If he can't do it right, tough,
15 because I'm an adversary and that's what the
16 adversary system is about."

17 Well, it's changed, and the
18 public is going to make us change it.

19 MR. SOULES: And we've had the
20 trial and spent the money for the trial.

21 MR. SUSMAN: And we have got to
22 do something so we don't have to do it again.
23 Now, whether it's in terms of requesting an
24 instruction that gives reasonable guidance
25 whether I've got the burden or not, or making

1 an objection that makes it pretty damn clear
2 to the trial judge what is wrong and what he
3 has to do to fix it, I think you have got to
4 do something other than just remain, just say
5 "I object" as to those things on which you do
6 not have the burden.

7 MR. SOULES: Going back four
8 or five years, and of course we've got a newly
9 constituted committee, but the feeling of the
10 committee has been that an objection should
11 fix something that's not your burden to do
12 something, to plea, is what we finally came
13 down to. If it's not your burden to plea, the
14 objection plea should be sufficient to
15 preserve error, and that's really been worked
16 through very thoroughly.

17 MR. SUSMAN: Okay. Well, not
18 vote.

19 MR. SOULES: But I think we do
20 need to look at what must the objection
21 include, and at least the judge should as some
22 of us sitting here think, should be told what
23 are you to do to fix this, at least told
24 orally. Richard thinks that that is
25 doing -- maybe he thinks that that may be

1 doing the other side's work; and your view on
2 that is let's have a trial and get it over
3 with. And I think that is a policy decision
4 that we need to make; and there is language in
5 a case that requires more than what this rule
6 does in terms of advising the trial court in
7 your objection how to fix the problem.

8 Are you suggesting that the
9 objection should include telling the trial
10 judge what it is that you need to do to cure
11 the objection that I'm making?

12 MR. SUSMAN: Yes. You said it
13 perfectly a while ago, because you said
14 orally, you have got to do it orally. You
15 don't have to put it in writing, but orally
16 you have got to tell him "Here's the right way
17 to ask the question, judge."

18 MR. ORSINGER: What if you're
19 wrong? What if you're wrong? What if you do
20 it orally and you're wrong? Did you waive
21 error?

22 MR. SOULES: May be. Sarah
23 Duncan.

24 MS. DUNCAN: It seems to me
25 that we are confusing the fix with the

1 problem. The problem has been in my view not
2 that we didn't require a litigant to help the
3 trial court put together a correct charge.
4 The problem has been, one, does it have to be
5 in writing, or does it have to be oral; and
6 two, what happens if you miss a little bit?
7 And the previous proposal of the Supreme Court
8 Advisory Committee I think was premised upon a
9 feeling that it is the trial judge's
10 responsibility to fix a problem in the charge,
11 but it is the lawyer's responsibility as an
12 officer of the court to assist when called
13 upon or when he's complaining about something,
14 to assist the trial court in putting together
15 a correct charge.

16 And if the rule is going
17 to be you have to tender no matter how bad it
18 is really, if we can just define the court
19 that will say "reasonable guidance," we're
20 going to have the same kind of games we've got
21 now. And we're going to have the same kind of
22 games with appellate lawyers, and we're going
23 to have the same kind of games with appellate
24 courts, which is why I would prefer a rule
25 initially that says everybody files the charge

1 that they think the case should have, all
2 issues, all questions, whatever. "We'll sit
3 down and we'll work with that charge. We'll
4 object with it; but if you're going to object
5 to something in that charge, you tell me,
6 lawyer, as a trial judge how to fix it,"
7 because I personally don't see the charge.
8 It's the court's charge that we're working on,
9 not a particular side's charge, and that the
10 objection, Luke, in that case was you've got
11 to object enough in whatever words are
12 necessary that any reasonable person would say
13 that trial court understood what the problem
14 was. You've got to tell them what the problem
15 is, and then you've got to tell them how to
16 fix it.

17 HONORABLE DAVID PEEPLES: Is
18 the language, you know, "knew what the
19 objection was and consciously chose not to do
20 it"?

21 MS. DUNCAN: Yes.

22 HONORABLE DAVID PEEPLES: Is
23 that what you're looking for?

24 MR. SOULES: No.

25 MS. DUNCAN: That was part of

1 it.

2 MR. SOULES: That's a
3 different case, but that's a piece of it.

4 HONORABLE DAVID PEEPLES: Yes.

5 MR. SOULES: If the Plaintiff
6 is submitting the wrong measure of damages
7 because he wants to or whatever reason and the
8 objection made is the wrong measure of
9 damages, and the Defendant knows what the
10 measure of damages is, why shouldn't the
11 Defendant have to say "This is the correct
12 measure of damages"?

13 MR. YELENOSKY: But how do you
14 sort that out from the Defendant who doesn't
15 know but is then required to submit something
16 at his own peril?

17 MR. SOULES: The consequence I
18 guess of what we're saying here is the concern
19 that Richard had.

20 MR. YELENOSKY: Right.
21 Exactly.

22 MR. SOULES: If I'm the
23 Defendant and I say, "And this is the correct
24 measure of damage," and I'm wrong too, then
25 I'll waive it. The Plaintiff doesn't have a

1 good verdict, and the case is over, but it all
2 goes to what? Objection to his incorrect
3 measure of damage, or do you waive it all
4 together?

5 MS. DUNCAN: If you truly
6 don't know, he could just say "I really don't
7 know what it is, but judge, if you want me to,
8 I'll try to figure it out." I mean, we are
9 there to help the judge in this instance.

10 MR. YELENOSKY: What's the
11 appropriate response? It's an inappropriate
12 response to say, "I know, but I'm not telling
13 you," of course. I guess it would be
14 appropriate to say, "I don't know." But what
15 do you do? Write a rule that says you can say
16 "I just don't know, but you can't really know
17 and not tell us." I mean, how do you write
18 that rule?

19 MR. PERRY: Isn't the issue
20 that the objection where it refers to stating
21 the grounds of the objection, isn't the issue
22 that that statement needs to go far enough to
23 distinctly inform the trial court of the
24 nature of the defect that is being claimed to
25 be in the charge, not that the person who is

1 making the objection really has to tell him in
2 detail how to fix it, but he has to go far
3 enough that it's clear what it is the objector
4 is claiming is wrong? Isn't that where we
5 ought to be?

6 MS. DUNCAN: And if that
7 happens, if we have no measure of damages with
8 the damage questions and I'm the Defendant and
9 I say, "Judge, they have to have a measure of
10 damages; there has to be some guidance given
11 to the jury," then isn't the judge's response
12 "Mr. Plaintiff, Ms. Plaintiff, go get me a
13 measure of damages"?

14 MR. PERRY: Sure.

15 MS. DUNCAN: And you're going
16 to live with it whatever you bring back.

17 MR. PERRY: If the Plaintiff
18 tries to submit the damage question with no
19 instructions on the elements of damages, it
20 ought to be plenty good to say, "There has to
21 be an instruction on the elements of damage,
22 and there's not."

23 MS. DUNCAN: And it's their
24 burden.

25 MR. SOULES: Right. But he

1 said "There is a measure of damages. Now go
2 to the next step."

3 MR. PERRY: But if there is a
4 measure of damages there and the objector sees
5 that he thinks it's wrong in some respect, it
6 shouldn't be enough to say, "The instructions
7 submitted do not correctly state the measure
8 of damages." "Well, in what way do they
9 not?" "Well, I think I made my objection.
10 Thank you." That shouldn't get you there.

11 MR. HATCHELL: I think David
12 has put his finger on sort of a two-tier level
13 of objections. In the instance where there is
14 a complete omission from the charge, for
15 example, the measure of damages, the purpose
16 of the objection ought to be to identify the
17 error. The error is the failure to give any
18 measure of damages whatsoever. Why should I
19 have to in order to preserve that objection
20 tell the judge what the measure of damages
21 is? It's his charge anyway, and it's my
22 opponent's. But if he overrules my objection,
23 that's fine. We just go on up and decide if
24 you can submit a charge without a measure of
25 damages. If he decides, yes, your objection

1 is good and if he gives one, then Luke, I
2 think it's at that point that the specific
3 type of objection is the only objection you
4 could probably make. Although I would argue
5 that that is probably already -- I think the
6 language that we used is probably sufficient
7 to take care of that, but I don't think we
8 ought not confuse the type of objection
9 necessary to preserve the error complained of.

10 MR. PERRY: Shouldn't it be a
11 requirement that the objection must point out
12 distinctly the error which is being objected
13 to?

14 MR. SOULES: That's what they
15 took out.

16 MR. ORSINGER: No. It's still
17 in the rule.

18 CHIEF JUSTICE AUSTIN MCCLLOUD:
19 It's in number (2) right down there.

20 MR. ORSINGER: What is not in
21 here is an oral tender, and that's what we're
22 really debating.

23 MR. SOULES: My mistake. It's
24 here.

25 MR. YELENOSKY: Just no oral

1 tender.

2 CHIEF JUSTICE AUSTIN MCCLOUD:

3 It seems to me like we've got several years of
4 interpreting the old rule 274 and its
5 predecessors using language stating distinctly
6 the matter objected to and the grounds of the
7 objection. That's probably as specific as we
8 need to be. I mean, we've been that specific
9 for all of these years; and the courts have
10 looked at it and they've looked at your
11 objection, the one you just used in your
12 hypothetical and said, "Well, I don't think
13 that was distinguished specific enough," or
14 they say, " Well, I think you did a good job.
15 You informed the court of what the problem
16 was, and you complied with the old Rule 274."
17 It looks to me like that's clear and
18 distinct. It says distinct and the grounds of
19 the objection. If you go any further, I think
20 we get in trouble.

21 MS. DUNCAN: Can I make a
22 picky point --

23 MR. SOULES: Sarah Duncan.

24 MS. DUNCAN: -- about what
25 Buddy was saying earlier? The way I read (2)

1 or that can read (2) is that no party may
2 bring forward the error unless all the parties
3 object, "that party." "No party may assign as
4 error unless that party." What party? The
5 party bringing it forth? To me it just makes
6 more sense to say "A party can't do this
7 unless that party has also done this." And
8 it's just a picky little error.

9 MR. ORSINGER: I'm going to
10 withdraw my objection to that change, because
11 if that's a reasonable interpretation, it's
12 certainly not what we want.

13 MR. SOULES: It should be "A
14 party may not."

15 MS. SWEENEY: How do you-all
16 want that? "A party"?

17 MR. SOULES: "A party may
18 not." Hadley Edgar.

19 PROFESSOR EDGAR: Does this
20 cover it here in 274(2) where we start with a
21 deletion, and it says "stating distinctly" and
22 then include here "the nature of the
23 objection, the matter objected to and the
24 grounds thereof."

25 MR. SOULES: It may.

1 MR. EDGAR: Just include in
2 the third, "the nature of the objection, the
3 matter" -- or you could say "the matter
4 objected to, the nature of the objection and
5 the grounds thereof" or something like that.
6 But I think we need to include the "nature of
7 the objection."

8 HONORABLE DAVID PEEPLES:
9 "Error objected to."

10 PROFESSOR EDGAR: Well, I'm
11 just -- what's what is here in the rule now.

12 MR. ORSINGER: Could I ask
13 what do you mean by "the nature of" that adds
14 to what is here already?

15 PROFESSOR EDGAR: There is no
16 measure of damages. That is the nature of the
17 objection.

18 MR. ORSINGER: Why isn't that
19 the objection itself?

20 MS. SWEENEY: Or the grounds
21 of the objection.

22 PROFESSOR EDGAR: Let's look
23 at it this way. The matter objected to is the
24 charge on the damage -- the damage question,
25 that's the matter. And then the nature of the

1 objection is that there are no -- there is no
2 measure of damages.

3 MR. ORSINGER: What's the
4 guidance?

5 PROFESSOR EDGAR: And then the
6 grounds objected to would cover the situation
7 at least in my mind where you've left out two
8 elements out of four or out of six. I can
9 draw a distinction in my mind between the
10 nature of the objection and the grounds of the
11 objection, and I'm just trying to figure out a
12 way to cover that second tier that Mike was
13 talking about a moment ago.

14 MR. SOULES: That may get it,
15 Hadley. I'm sorry.

16 PROFESSOR EDGAR: It's getting
17 late.

18 MR. SOULES: Okay. Anything
19 else on this?

20 MR. ORSINGER: What is
21 "this"?

22 MR. SOULES: Are people
23 satisfied with the language, "this" being the
24 language describing the requirements for an
25 objection to be good? Hadley, you're

1 suggesting adding what now? Stating
2 distinctly?

3 MR. EDGAR: I was just trying
4 to insert the term "nature of the objection"
5 wherever it might be deemed appropriate and
6 trying to distinguish between that and the
7 grounds of an objection. And it's something
8 we might just think about overnight.

9 MR. SOULES: All right.

10 HONORABLE C. A. GUITTARD:
11 Have we passed over 272, or are we going back
12 to that?

13 PROFESSOR EDGAR: We haven't
14 covered it yet.

15 MR. SOULES: We can certainly
16 look at that. I think we might be able to fix
17 this in the next couple of minutes, this
18 number (4) on 274 maybe we can go back and
19 pick up there in the morning. Judge Peeples
20 had a question about "in open court" or "on
21 the record."

22 PROFESSOR DORSANEO: "On the
23 record."

24 MS. SWEENEY: "On the record."

25 MR. ORSINGER: "On the

1 record."

2 MR. SOULES: "On the record,"
3 okay.

4 MR. SPARKS: Shouldn't it say
5 "the judge" instead of "the court"? Another
6 one of those matters.

7 MS. SWEENEY: Yes.

8 MR. SOULES: One of the
9 problems with using "judge" is you don't know
10 whether it's a he, she or it, and the court is
11 an it, and that's how you get into these
12 drafting problems.

13 MR. SPARKS: Isn't the judge a
14 he or she?

15 MS. SWEENEY: Not always.

16 MR. SOULES: Then which do you
17 use for the pronoun? It's really a pronoun
18 selection.

19 HONORABLE C. A. GUITTARD:
20 Just use the noun, repeat the noun.

21 MR. ORSINGER: Right. Go
22 ahead and use the pronoun.

23 MR. SOULES: We'll have to do
24 that where we fixed this before. Judge
25 Guittard, what did you want to look at on

1 Rule 272?

2 HONORABLE C. A. GUITTARD:

3 Well, I was concerned about (d) and (e) and
4 the possible conflict between the two as
5 interpreted by the Supreme Court and whether
6 we could resolve that some way.

7 PROFESSOR ALBRIGHT: I have
8 the same problem. I would say let's get rid
9 of (e) inferential rebuttals. I think it's
10 time to bury and without mourning inferential
11 rebuttals. Inferential rebuttals can be
12 objected to because they misplace the burden
13 of proof or because there are various
14 objections you can make to inferential
15 rebuttals, and all we do by leaving them in
16 the rule is making them seem more important
17 than they really are.

18 PROFESSOR DORSANEO: They're
19 certainly not broad form submissions.

20 PROFESSOR ALBRIGHT: Right.

21 MR. SOULES: The discussion of
22 the committee that I have heard about this is
23 that the worry about taking this out may
24 resurrect submitting inferential rebuttal
25 questions.

1 PROFESSOR ALBRIGHT: How can
2 it? Then it would be phrase or shade of the
3 same question, or it would not be broad form.

4 MR. SOULES: Not under the old
5 practice.

6 PROFESSOR ALBRIGHT: Well,
7 right. Under the old practice it was always a
8 very narrow question that was an inferential
9 rebuttal question, and it cannot be a broad
10 form question.

11 MR. SOULES: That's the words
12 I heard discussed.

13 HONORABLE C. A. GUITTARD: Are
14 you ready to hear the discussion about (d) and
15 (e)?

16 MR. SOULES: Yes.

17 HONORABLE C. A. GUITTARD: It
18 seems to me that (e) as interpreted by the
19 Supreme Court is in conflict with (d), because
20 as I recall the Supreme Court decision if the
21 alternative submitted, if the disjunctive
22 language submitted inferentially rebuts the
23 primary language submitted, then that's an
24 objectionable and inferential rebuttal
25 submission.

1 Now, my concern with that is
2 this: First of all, I think it's a very
3 convenient and clear way to submit questions
4 where the Plaintiff relies on one fact, the
5 Defendant relies on a rebutting fact that
6 rebutts the Plaintiff's fact. You ask them
7 whether it's this or that and then give a
8 proper instruction on the burden of proof.
9 That's a very clear way to do it.

10 The reason that inferential
11 rebuttal issues were outlawed is, number one,
12 they were confusing. Number two, they led to
13 negative conflicts. Neither of those
14 objections applies when you submit them
15 disjunctively. For instance, suppose the
16 Plaintiff it's a contract case. It has to do
17 with what was the oral contract. The
18 Plaintiff says it's one thing. The Defendant
19 says it's a different thing. Why can't you
20 submit an issue saying "Did the parties agree
21 to X," or "Did they agree to Y?" Even though
22 Y rebuts X inferentially, that ought to be a
23 permissible way to do it. It ought not to be
24 subject to an objection that it's an
25 inferential rebuttal submission.

1 So I would propose that either
2 in (d) or (e) this language should be added:
3 "Disjunctive submissions shall not be
4 considered inferential rebuttal."

5 PROFESSOR DORSANEO: I don't
6 know if I end up agreeing with the remedy
7 exactly, but I agree with Professor Albright
8 that there is no need given the fact that we
9 have a requirement of broad form, the
10 submission of broad form questions whenever
11 feasible to have a sentence, a subparagraph in
12 the rule that inferential rebuttal questions
13 shall not be submitted.

14 I agree with Judge Guittard
15 that if that sentence is interpreted the way
16 it probably has been in Limos vs Montez as not
17 authorizing the disjunctive submission of
18 inferential rebuttal theories, that that's not
19 a good idea, because there is nothing unclear
20 about disjunctive submission of inferential
21 rebuttal matters. Limos vs Montez the
22 Muckleroy Stovall submission in negligence
23 cases is very good from the standpoint of I've
24 always thought from the question; but from the
25 standpoint of Limos vs. Montez saying that

1 both and neither as alternatives is a bad way
2 to do it. Frankly I think the suggested
3 answer blanks in Limos vs. Montez now are more
4 confusing to the person from having to select
5 among alternatives.

6 In terms of the disjunctive
7 submission paragraph itself it's up above
8 (d). It's a related point, but it's perhaps
9 not as closely related. When the original
10 rules committee grappled with this question of
11 separate and distinct submission in its draft
12 that was promulgated as a rule that never went
13 into effect because it was changed before it
14 went into effect by the Supreme Court there
15 wasn't authorization to proceed as a general
16 proposition by disjunctive questions. You
17 could ask in a question a broad form question
18 if you like according to the specific language
19 of the rule as adopted and then repealed
20 before it went into effect whether there was
21 negligence in speed, brakes or lookout, a
22 disjunctive submission in broad form of those
23 three theories.

24 That was changed, and the
25 disjunctive authorization which is really an

1 exception to separate and distinct submission
2 that we have retained now was added. In other
3 words, the disjunctive authorization in the
4 current rule came into existence as an
5 exception to a required separate and distinct
6 submission. That's what it was in there for.
7 If became a very limited exception, because
8 it's an either/or kind of a deal. And now we
9 have it, and you could either read it as being
10 possibly a limitation on broad form submission
11 requiring either/or. You say, "No. We
12 wouldn't read it that way." Or as just kind
13 of an extra, unnecessary statement. I read it
14 as an extra, unnecessary statement, because
15 that is not the only kind of disjunctive
16 submission that is appropriate of broad form
17 submission.

18 So in my view the proper fix
19 would be to just delete (d) and (e) and that
20 that would take care of it maybe not as
21 clearly with respect to my own criticism of
22 Judge Pope's opinion in Limos vs. Montez, but
23 as far as textual rule language it would.

24 MR. SHARPE: In response to
25 what Judge Guittard said and in meeting what

1 Bill Dorsaneo just said, I think the easier
2 way to cure the problem without creating
3 confusion would be to add one sentence to
4 (e). And that sentence would be that "A
5 disjunctive submission shall not be considered
6 an inferential rebuttal question." If you add
7 the one sentence there, you've cured the
8 situation in my opinion and you don't create
9 any confusion or clarity problem.

10 HONORABLE C. A. GUITTARD:

11 That's my proposal.

12 MR. SPARKE: He was going to
13 put it up above, and I just say put it in (d)
14 instead of -- put it in (e) instead of (d)
15 where he was wanting to put it.

16 HONORABLE C. A. GUITTARD:

17 Well, I have got it penciled in here to put it
18 in (e). I don't care where it goes. I think
19 (d) is all right.

20 MR. SPARKE: That's what I
21 suggest.

22 PROFESSOR ALBRIGHT: But why
23 do we need inferential rebuttals mentioned at
24 all? I think all they do is create problems
25 of who has to plead and, you know, do you

1 really have to plead an inferential rebuttal.
2 In business cases nobody knows what an
3 inferential rebuttal is. The example that
4 Judge Guittard used is a perfect example where
5 people don't recognize inferential rebuttals
6 where in negligence cases you can look in the
7 pattern jury charges and you have this list,
8 and you create traps because something may be
9 called an inferential rebuttal because it's a
10 theory raised by the defense, and then it
11 can't be put in a question.

12 And I just think it's just a
13 strange creature that the Texas Rules created
14 many years ago. And why do we have to keep it
15 in the rules just because we always have it?
16 I think it's just time to get rid of it.

17 HONORABLE C. A. GUITTARD: We
18 haven't always had it.

19 MR. HATCHELL: I think we
20 talked during the break, and I think Ann would
21 want me to tell all of you-all that the task
22 force considered that this area and any aspect
23 of broad form submission to be off limits and
24 out of its parameters, so nothing that anybody
25 is talking about is treading on anything that

1 we have done; and I just wanted you to know
2 this is not an essential aspect of our report.

3 HONORABLE C. A. GUITTARD: This
4 is an additional change in existing law.

5 MR. HATCHELL: I also know
6 that Hadley has some concerns about the same
7 thing and he has some positive fixes too.

8 PROFESSOR EDGAR: Well, my
9 concern was not whether or not we should
10 submit inferential rebuttals in any form or
11 not. That's another question. My concern was
12 paragraph (e) reads in the negative. That's
13 the only rule I know that says that you don't
14 do something. It seems to me like the rules
15 ought to say what you can do rather than what
16 you can't do. And I was just going to suggest
17 that if we retain even inferential rebuttal,
18 that what we say is that inferential rebuttal
19 matters shall be submitted only as
20 instructions or definitions.

21 That's what we mean, and
22 that's what the rule means, and it doesn't say
23 that though. It's been confusing. It's
24 confusing to lawyers, law students and
25 everybody else; and if we're going to retain

1 inferential rebuttal, then I would suggest
2 that we say what we mean here rather than what
3 we don't mean. That doesn't speak to the
4 issue of whether we have inferential rebuttals
5 or not. I'm just saying that if we do have
6 it, it ought to read "Inferential rebuttal
7 matters shall be submitted only as
8 instructions or definitions."

9 MR. SOULES: Apparently we've
10 got two ways to fix this problem. One is to
11 add a sentence (e) that was suggested by Judge
12 Guittard, and the other would be to delete (e)
13 and possibly also (d). How do you want to
14 approach this?

15 HONORABLE C. A. GUITTARD: I
16 would suggest that inferential rebuttal
17 questions are determined to be inappropriate.
18 Now, it's a fatal objection that it be
19 inferential rebuttal. It seems to me that we
20 should clearly say that that objection does
21 not apply to otherwise proper disjunctive
22 submissions.

23 Now, if we simply take (e)
24 out, well, I think that would be a step
25 forward, and I would agree with Professor

1 Albright, but then we've got all
2 these -- we've got Limos vs. Montez and other
3 decisions which say that inferential rebuttal
4 questions are improper and even disjunctive
5 submissions are improper if it would be
6 considered inferential rebuttal.

7 Now, on the point of the
8 alternative theories of recovery, that would
9 be ruled out I suppose by the language of
10 present (d) which says " when the evidence
11 shows as a matter of law that one or the other
12 of the conditions or facts about necessarily
13 exist." And I suppose that is why that was
14 put in there.

15 Now, there are other types of
16 disjunctive submission that may be proper
17 including the Muckleroy submission. If (d)
18 would as written here would outlaw that sort
19 of thing, if we want to keep it, we ought to
20 make that clear. We ought to amend (d) to
21 make sure that it's not so construed.

22 MR. SOULES: Let's think about
23 it overnight. Thank you for all of your good
24 work today. I appreciate it.
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