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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JANUARY 21, 1994

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Taken before Anna L. Renken, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 21st day of January, A.D. 1994, between the hours of 8:30 o'clock a.m. and 5:45 o'clock p.m., at the Texas Law Center, 1313 Colorado, Austin, Texas 78701.

ORIGINAL

SUPREME COURT ADVISORY COMMITTEE

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JANUARY 21 - 22, 1994

JANUARY 21, 1994 MEETING

MEMBERS PRESENT:

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

MEMBERS ABSENT:

Prof. Elaine Carlson
Michael T. Gallagher
Donald M. Hunt
Franklin Jones Jr.
David E. Keltner
John H. Marks Jr.
David L. Perry
Dan R. Price
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
David B. Jackson
Hon. Doris Lange
Hon. Austin McCloud
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

Hon. Sam Houston Clinton
J. Shelby Sharpe
Thomas C. Riney

OTHERS PRESENT:

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

CHAIRMAN SOULES: We'll be in session now. It's the January 21st and 22nd meeting of the Supreme Court of Texas Rules Advisory Committee. I want to welcome everyone here and thank you for your attendance and especially welcome and thank Justice Hecht for being here today, and invite you, Justic Hecht to make a few remarks, if you care to.

JUSTICE HECHT: I have nothing really to add. We of course have a lot of work ahead of us, and I thank you once again on behalf of the Court. I advised the Court that we'll be meeting this weekend and of the schedule that we're going to be meeting, and they may, members of the Court may drop in. They're very interested in this work. They keep very close tabs on it, and so we very much appreciate your time and energy devoted to this.

CHAIRMAN SOULES: Thank you, Justice Hecht. Just reviewing some of the preliminaries of our last meeting, the Supreme Court of Texas of course is very interested in what this group and members of the Bar and

members of the public have to say and all of our input about Rules changes or Rules review both in the Rules of Civil Procedure, the Rules of Appellate Procedure and the Rules of Civil Evidence.

The interest of the Court over the years as has been expressed to me is not so much in how we vote. The vote or the division of the house is of course of some interest; and if it's heavily favored one way or another, it becomes even of more interest, but it's the dialogue and the debate that the Court is really interested in because that tends to develop more information for the Court about the policy that the Court is setting in place if a particular rule or suggestion is adopted. And particularly where there is a question in the Court's mind about whether that policy is really a direction that the Court wants to go.

The proceedings of this Committee will be reviewed by some of the members or maybe perhaps all of the members of the Court to pick up on what input we have. That's one of the reasons why we have such a

diverse group of members on this Committee from rural and urban areas, from the Plaintiff's Bar the Defense Bar, business litigation, the underprivileged representation, the members from the District Courts and the Courts of Appeals so that the debate can be developed in a way that a broad input, broad-view input comes.

So it is important as we go forward to allow the debate to develop. The last time there were motions made which the Chair thought were preliminary, and so as you noticed I didn't necessarily take them up when made. We took them up later after the Chair felt that the debate had been adequately developed to give some guidance to the Court. That may happen again today. It's not in any way on my part to be rude or disregard what the wishes of a particular member may be, but to try to honor the purpose of the Committee and the wishes of the Court.

I think maybe the best place to start I think Joe's Committee On Sanctions has met or worked more maybe than some of the others because of the holidays. Some of the

others have not met or worked much during the two-month interim from our last meeting and have assured that they will do more in the two-month interim before our next meeting.

Joe, are you ready to give us a report on sanctions?

MR. LATTING: Yes.

CHAIRMAN SOULES: Okay. Let's proceed with that.

MR. LATTING: What we have, Luke, and Justice Hecht and members of the Committee, we have two sets of documents to pass out. One is the red-line version of Chuck's Task Force Committee report that we talked about last time we met in this Committee. This is essentially the Task Force version as modified in our discussions; and by "our" I'm talking about the large Committee here the last time we met.

We have shown the red-line changes, and then on the back page we have a few editorials. Yes, let's start these around in two directions, if we could. On the back page we have some suggested editorial changes that I think are minor.

Then we also have copies of the apocrypha as produced by Tommy Jacks. This is the version that strips the district judges of all meaningful authority and sanctions motions and it deserves some attention, I suppose.

CHAIRMAN SOULES: If you don't, Jacks will mention it.

MR. LATTING: I beg your pardon?

CHAIRMAN SOULES: If you don't mention it, I'm sure Tommy will.

MR LATTING: He's probably going to bring it up. We've met a couple of times, and we talked; and this is -- I think that these changes were self explanatory. I might say that also behind the Rule as produced, I'm going to call it the Committee version, there are several red-line comments, and those are -- Chuck, you'll have to remind me. I'm not sure what the vote of the Committee was or if it was even the sense of the committee. I might say I'm opposed to one or two of these comments. So any way you want to discuss this, that's all right with me,

Luke.

CHAIRMAN SOULES: I'm trying to find the text of 166 of I guess 215(a) and the materials in the Task Force Report.

MR. LATTING: If you'll look at the first think we passed around, you'll see the Task Force version of the Committee. I mean, you'll see the Task Force version.

MR. HERRING: This is just a red-line.

MR LATTING: We changed it. That is what you had before you from the Task Force with the red-line changes that our Committee has made in the last couple of months.

MR. HERRING: And all this basically does, this red line, it has the Committee changes for the Task Force version that are relatively minor, tried to incorporate all of the things that there was a vote on or a consensus on from the last time with the exception the only thing that is not in here, and this is where Tommy's version comes in is a two-step, a more explicit or expressed two-step version; but other than

that it has changing the title just to get away from the violations implication or connotation of the previous title, and then the deletion of that exhibit reference which was considered superfluous because down below in Paragraph 1(b) it talked about that. And then the certificate language the intent was to pick up on Judge McCown's comment and make the certificate of conference requirement a little more substantive than simply referring back to 166b(7).

MR. LATTING: I think we agreed with Tommy Jack's version of the certificate language. We were together on that.

MR. JACKS: We were until I added one more thing.

MR. LATTING: Okay. Well, so much for that.

MR. JACKS: We're pretty much in agreement about that.

MR. HERRING: And then there's a comment that is added for Richard's point about mandamus just to make clear that the paragraph on appeal does not change or address

the availability of mandamus relief in sanctions proceedings; and then a comment that just is a general cautionary comment to try to respond to the sentiment of folks that our young lawyers are growing up in a culture where they think they ought to go file motions for sanctions, so the comment that discourages that is the second red-line comment that is attached here. And then the last comment is just again just goes back to that minor change on the exhibits, the reference to exhibits being attached.

MR. LATTING: If I could call your attention to the second page of this Committee version, you can see in the first paragraph at the top we cut out the term "substantially justified" and substituted "reasonably justified in fact or in law." Here's what we're trying to get to there. The sentence would read "The Court may enter these orders without any finding of bad faith or negligence but shall not award expenses if the unsuccessful motion or opposition was reasonably justified in fact or in law."

What we're trying to get to

there is that you don't get sanctioned because you had a discovery dispute, that is, and I'm thinking right now of a situation where I'm served with interrogatories, and I just don't believe that the other side is entitled to answers to those interrogatories, and I refuse to answer them and file a proper objection. We want to make it clear in this Rule that you don't -- you have to go to court over something like that, but you don't get sanctions just because you're on the losing side. And the language we talked about from a number of different angles was and that we finally came up with was "reasonably justified in fact or law." We wanted to make it clear that there are circumstances where you're going to get -- we can be sanctioned; and one that comes to mind is if you're not reasonable in your refusal to cooperate or in or to make discovery.

That's pretty much at the heart of this rule; and we just below that you'll see the red-line term in writing. That was -- I think that was raised in this Committee where there was some concern that,

or Judge Brister raised it in our subcommittee meetings that the way it had been written was that you couldn't reprimand the offender. And I think he pointed out that he reprimands offenders from the bench.

JUDGE BRISTER: Yes. Just tell them, "Look, don't do that."

MR. LATTING: Yes. The question is is that going to constitute a reprimand; and then this is to make it clear that a reprimand under this rule meant something in writing, because that has effect on attempts to or on your application for certification for specialization and various things we fill out: "Have you ever been reprimanded or sanctioned?" So we wanted to make it clear that a reprimand under this rule is talking about one in writing.

I might just move ahead to the substance or where I think we're headed. The subcommittee, the majority of the subcommittee feels, and I believe I'm speaking for the members of the majority, that we ought not to take away from district judges the right to impose sanctions in cases where there has been

unreasonable or unjustified refusal on the part of the recalcitrant lawyer to engage in discovery or either lawyer or client, and we want to make it so that you don't have to go to court twice. You don't have to get an order from a Court before you can get -- that has to be violated before you can get sanctions.

And I think that Tommy can eloquently state his position, but it's more restrictive than that. It would require more doing before a Court can enter a sanctions order. And I'll just say what I think is at the heart of the disagreement; and that is the majority of the Committee believes that the problem, the basic problem is one of not so much of unnecessary sanctions motions being filed, but the more serious problem if we head in the other direction is that there are lawyers who will not cooperate in discovery, and it's better to have this Rule there available so that if there is discovery abuse, that district judges can deal with it and without making it so cumbersome that it's too expensive and time consuming for our clients.

So that's what the philosophical difference is. This Rule is a codification of TransAmerican. At least in my view it is with some procedural things spelled out that are not exactly addressed in TransAmerican with one -- with it may not be TransAmerican, but it's either TransAmerican or Braden. There is one change, and that is pursuant to the discussion we had last time in this large Committee we cut out the Task Force draft of Subparagraph (h) under Number 3 which would allow a district judge to order a lawyer to do pro bono legal services or things of that kind, the feeling of the majority of the subcommittee being that if a lawyer is that cantankerous or is that far out of line, contempt is available to the Court and that ought not to be dealt with in a sanctions Rule.

So I believe that is a summary of what we felt and what we talked about and what this says. And, Luke, that's about all I have to say at this point.

CHAIRMAN SOULES: Chuck, do you have anything to add?

MR. HERRING: Well, I think one thing we need to address and I think Tommy will get us into it is the two-step. Do we want to have a formal two-step? Judge Brister and I think and some of the others feel that if you look at this Rule, the current Rule, there is in effect a two-step, that the Rule does a lot of things to discourage sanctions motions from being filed now. You've got to have your certificate of conference. If you try to get attorney's fees on a motion to compel, you can only get minimal attorney's fees. That's your $200 award of attorney's fees. You can't get substantial attorney's fees unless you go through the sanctions process with the procedures that are built in and the protections that are built in, so it discourages seeking attorney's fees or getting into attorney's fees arguments on a motion to compel.

The Rule adds all of the procedural protections that the Supreme Court has outlined in Braden and TransAmerican and in Chrysler, and therefore you just don't get large sanctions anymore unless you really have

a good reason and the trial Court makes findings and there is a hearing and the trial Court considers evidence.

So the question is whether you need to go farther here and have an expressed requirement that you go two steps, that first there be an order compelling, and then you come back again to Court to get sanctions. I went back and read the transcript from our last meeting, and the sentiment seemed to be that there ought to be a two-step, but there ought to be exceptions. And when you start writing the exceptions I think is where the difficulty comes in. And we have played with a variety of versions that have exceptions built in; and it gets to I think as you'll see with Tommy, it gets to be very difficult to write an exception that doesn't swallow the two-step process, and as a practical matter we think the Rule has a two-step result now in this version you have in front of you today, and I think really Tommy ought to speak to the other end of the spectrum.

CHAIRMAN SOULES: All right. In order to get the entire Committee's report

on the table do we need to address anything back here on the fourth page, suggested changes to Rule 166d, or is that going to come up in some other order?

MR. LATTING: No. I think we should address those. These are editorial matters. But, for example, we just thought that the first phrase there "without the necessity of Court intervention" was surplusage. And if you'll look on the first page of the Rule, the red-lined portions which appears the dark shaded it just says "The motion shall contain a certificate that the Movant or the Movant's counsel has spoken with the opposing party or opposing party's counsel if represented by counsel in person or by telephone to try to resolve the discovery dispute," and I would suggest making it say "or has made diligent attempts to do so and that such efforts have failed." And I think that "without the necessity of Court intervention" is just surplus. I don't think it adds anything substantive to the rule.

The second one, change subsection 2(i) under 166d(1)(b) which also is

the next paragraph down on the first page it's under (b), middle of the page, to clarify that the word "including" does not modify contents of the case file. What that means is that we ought to flipflop it and say that under where it says "judicial notice shall be taken of the contents of the case file including the usual and customary expenses including attorney's fees," because the way it reads now is "judicial notice taken of the usual and customary expenses including attorney's fees and contents of the case file." It's just awkwardly worded implying the contents of the case file are part of the usual expenses.

Then I think that it's just the next one is purely I think almost typographical in on page two where it's titled -- or three, sanctions under (c) we would suggest to read "assessing a substantial amount of" -- well, let's see now. Now I'm confused. "Assessing a substantial amount in expenses including attorney's fees of discovery or trial." That just doesn't read correctly. It ought to read "assessing a substantial amount in discovery or trial

expenses including attorney's fees." That's a typo.

And the last one is simply on page two if you look at Number 4 of the Committee version of the rule that says "Compliance," I think we should change that to "Time For Compliance," because although it does deal with compliance it's also talking about when these things happen and when the orders should be carried out, so that clarification I think would be helpful.

I don't think any of those are controversial.

CHAIRMAN SOULES: Okay. Tommy, do you want to respond?

MR. JACKS: Yes, I do.

CHIARMAN SOULES: Thank you.

MR. JACKS: I felt that there was at our last meeting quite a groundswell of opinion that we spend as lawyers and judges too much time and energy and resources and emotion revolving around the issue of sanctions; and I mean sanctions in the broad sense to include the awarding of expenses, especially attorney's fees.

And we took a couple of votes. There was one I know on a motion by David Perry that carried overwhelmingly, and that was that we move to a Rule that either in separate Rules or in separate parts of the same Rule treats separately and differently discovery failures as motions to compel of the garden variety on one hand and sanctions for conduct that we all would agree should be punishable conduct during the discovery process on the other hand.

There was another vote that was an up-and-up tie. 18 to 18 was the count; and that was for the proposition that the Court should be stripped of the discretion to award attorney's fees. And I guess I felt simply that the points of view that were aired when we last met weren't fully represented in the subcommittee's suggestions which constitute I think useful but relatively minor tinkering to the Rule that the Task Force had proposed.

The Rule that I drafted is in an effort I don't think to go to an extreme, but certainly to move to a different position

on whatever spectrum we're looking at concerning sanctions; and the thrust of it is an effort by in large except when it matters and is truly justified to get lawyers and judges out of the business of being preoccupied with sanctions.

We all know that I mean when you read one of the advance sheets now you see increasingly discussion about sanctions; and certainly in the trial courts we see increasingly discussions about sanctions. I said to Luke this morning but only half in jest that it wouldn't be long before the Board of Legal Specialization probably opens up board certification and we'll have sanctions lawyers; and I'm being a little bit facetious, but I do worry. And I mentioned going to the Travis County Bench/Bar Conference and hearing the amount of clear focus that particularly lawyers that were a bit younger than I am are giving in their practices to sanctions; and I think that the ramifications to that go beyond any particular case, even go beyond the issue of judicial economy.

I'm not just concerned about

the Court's time being spent on these kind of issues, but I think go to the fiber of the law practice and our relationships with one another.

And the version that I've got is not red lined. The reason for that is twofold. One, I typed it, and I haven't yet learned real well how to use that feature on my word processor. And two, it seems to me that the changes I was making in the Task Force draft, although I worked off that structure were major enough that there be so much underlining and shading it would be hard to read anyway.

But let me outline for you, if I can quickly, what this Rule seeks to do. The first page varies little from the version that Joe has just explained to you, so I won't spend much time on it. In the first paragraph it does get a little more specific. Instead of referring generally to those who abuse the discovery process as being ones who can be sanctioned, it ties it down by saying "in a manner contemplated by this rule."

Secondly, in Paragraph A there

is one addition I've made to the certification requirement that is not included in the draft that Joe handed out, and that is simply that not only must the parties talk, but the certificate must also say that when they talked there was a bona fide effort made to resolve the discovery dispute without the necessity of Court intervention, which I agree with Joe is a superfluous phrase.

And the idea here was prompted by comments, and I think it was Judge Cockran who made them, that the certificate requirement is really being honored only in the most perfunctory way much of the time; and I think there is true value to two lawyers being made to talk to one another. I mean it's become an alien notion in some places that that should happen before you go to the courthouse. I think a loud and clear message from the Supreme Court would be valuable that that is deemed important and in fact essential before you get to the courthouse. And that's about all on the first page that is worth commentary.

On the second page is really

where the major differences lie between my draft and the draft that Joe laid out. And in Paragraph (b) I try to shift the emphasis and the focus, and I haven't drafted the comments, but the comments that I have in mind to accompany this would be pretty strongly worded to signal a clear message from the Court that we want to change behavior with regard to the issue of sanctions.

Paragraph (b) says that "excepting cases involving special circumstances as set forth in 2(c) and 2(d) a party may not seek and the Court shall not award expenses including attorney's fees or a sanction under Paragraph 3 in connection with a motion to compel or quash.

Now 2(c) and 2(d) deal with different matters. 2(c) deals only with the issue of expenses including attorney's fees; and what I've done here is to set forth two requirements that the Court would be required to make as findings in order to grant expenses. The first of them, and I am going to suggest a modification of this in view of the conversation that Judge Scott McCown and I

had on the phone the other day, would be that the amount of expenses involved has to be enough to matter, that is, or to the parties involved in that case. And I made the suggestion, and this is really a bit of a flipside of the approach of the Task Force and of Joe's draft, there the Court even without a hearing can award attorney's fees as long as they're not substantial. And if they're substantial, it's kicked over into the sanctions procedure.

And what I say, and I said this, and I wasn't -- my tongue wasn't entirely in my cheek when I said it is that I don't think that if we're really talking about relatively minor bean counting, that the Court or lawyers should be involved with that. I recognize and one of our brethren from San Antonio who is involved in family law practice made the observation at our last meeting, that well, in a family law case even several hundred dollars in fees may be a lot of money to a party in a divorce case who doesn't have an income and just barely is able to scrape together the money to pay his or her

attorney.

And so I put something about relative to the resources of the party. Well, now, Scott McCown said, "Well, that sounds like that's just slanted toward the Plaintiffs and not the Defendants. GM could never get that kind of a finding." And yet he used the example of Broadus Spivey, so I will too, you know, that Spivey over there has got a wealth of resources, and he's really the one paying the expenses; but Joe Smith, his client may have meager means, and that's not fair. And I grant that, and I was tinkering with some language this morning to add the party's attorney where the attorneys is mentioned in expenses.

Scott was concerned, well, you're going to get into the business of how much money does GM have or how much money does Broadus Spivey have. I say that's not all bad, because for Broadus Spivey he's the one who would be seeking the attorney's fees; and so for him to seek them he's got to be willing to take the position that it's burdensome even to someone of his wealth, the expenses that

he's incurred.

And I'll grant I'm trying to put a hurdle in the path that has to be jumped before you get Courts and lawyers in the business of wrangling over attorney's fees. Now, if you do wrangle over attorney's fees in my draft, you do have to have a hearing, because by definition they're substantial at least in the eyes of the parties involved in that case. And I don't think that people ought to be assessed with attorney's fees or expenses without a hearing if they're enough to matter.

Another thing that would be required --

MR. MEADOWS: Can I interrupt at this point? Robert Meadows. What would happen under your version of this paragraph if I represented Exxon and the Plaintiff objected to my interrogatory requesting the identification of persons with knowledge of relevant facts?

MR. JACKS: When I get to the next paragraph let me come back and answer that, if I may.

MR. MEADOWS: All right.

MR. JACKS: Because in Paragraph (d) I deal with what kinds of -- under what circumstances does the Court get into the sanctions business and now meaning sanctions with the full array of remedies that are available under the Task Force's draft, everything up to and including the striking of pleadings or whatever if that's justified in the case.

The 2(d) provides first that if a party has failed to comply with the prior order of the Court, then you can go straight to sanctions. And that's in sub (i).

But in 2 and 3 I set out other circumstances where even without a two-step approach you could still go directly to sanctions in connection with a motion seeking to compel or quash discovery first where there has been destruction of evidence or some other conduct during the course of discovery that can't be remedied by an order granting or forbidding discovery; and there's a good faith requirement there.

I mean, I could conceive of

situations even where destruction of evidence was done in good faith unwittingly or pursuant to a document retention policy at a time when whoever was in charge of that didn't know that there was litigation afoot.

And then 3, where a party has failed to file on a repeated or continuing basis has failed to file timely discovery responses and has filed clearly inadequate or incomplete discovery responses, failed to comply with specific requirements of the rule or subpoena or an order or propounded requests or raised objections which aren't reasonably justified; and then Bobby, the last of those would catch that conduct, but it might not catch it at the first hearing.

MR. MEADOWS: You would have to have a hearing.

MR. JACKS: To get sanctions under either draft you have to have a hearing.

MR. LATTING: Tommy, a point of clarification.

MR. JACKS: Yes.

MR. LATTING: When you talk

about repeated conduct I believe you told me on the phone the other day, just for the full Committee's understanding, that you contemplated that that meant repeated conduct in that case.

MR. JACKS: That's what I had in mind. Joe raised the question what about the lawyer who just has the reputation locally for always jacking with you on discovery, but in the case you've filed they've only done it once? Now, I guess you could read this either way, and you could present evidence from judges, lawyers "We've been over here. This is the fifth case we've had in this court in the last six months, and every time they have refused to answer," people with knowledge of relevant facts. And I suppose it's open to that interpretation. I didn't have that in mind when I did it.

MR. LATTING: I thought that's how you meant it.

MR. JACKS: The final requirement is in Paragraph (e) which requires that as I think the Task Force required this too -- tell me if I'm wrong, Chuck -- that is

that if you're seeking sanctions, you clearly say in your motion "we're seeking sanctions" and not just to compel discovery so that we don't show up at the hearing and get ambushed.

The other requirement I would add is that the lawyer be required to swear to the special circumstances involved, again just trying to up the ante, make people think more than once before in a knee jerk they haul off with a motion for sanctions.

CHAIRMAN SOULES: Go ahead and finish, Tommy, and then I'll get Bill Dorsaneo.

MR. JACKS: And that is, the last page is I believe the same as the last three paragraphs of the Rule that was laid out by Joe. And so that is the nub of the proposal, and as I say, the main changes.

CHAIRMAN SOULES: Thank you, Tommy Jacks. Bill Dorsaneo, you had your hand up.

PROFESSOR DORSANEO: Yes. I'd like the Committee to indicate what their response would be under the Committee's

proposed Rule to the same hypothetical question proposed to Mr. Jacks by Mr. Meadows.

MR. LATTING: That being a refusal to supply names of persons with knowledge of relevant facts, is that the question you had in mind?

MR. SOULES: The Respondent raised an objection, just won't answer a question.

PROFESSOR DORSANEO: But with an objection being on file.

MR. LATTING: My view would be that that would be sanctionalbe conduct because that is not reasonably justified in fact or in law. Everybody knows you've got to give names of persons. That's exactly the sort of thing I'm wanting to get to so that if I have to file a motion in front of Judge McCown here because somebody will not give us clearly discoverable information, we don't have to come back again in order to have him sanction those people.

PROFESSOR DORSANEO: What would the sanction be at the outer limits of Judge McCown's discretion?

HONORABLE SCOTT A. BRISTER: The point would be it would depend on the circumstances which is the difference in the Committee versus the other proposal. If this is just some dummy that didn't know the rule, then it would be a $250 or $500 sanction for you having to file a motion to go down, or submission or whatever and get that.

If the circumstances suggested that this was done because trial was next week and that way you couldn't get the expert, or the 30 days was about to pass, or some additional ulterior motives where there were additional problems created, then the sanctions order might expand pursuant to the least adequate remedy, hearing, written order requirements set out in TransAmerican.

So the reason I favor the Committee thing is, number one, there is no way to list a sentencing guideline on sanctions. It just depends on the circumstances. The TransAmerican, Braden cases give us significant safeguards to restrict that, and I think we could all say in certain circumstances we can geuss. If you

don't show up at the deposition, we can guess probably all you can get is an order to show up at the deposition, the cost of filing the motion much more than that without a good explanation of why you can't get.

PROFESSOR DORSANEO: So the answer is --

HONORABLE SCOTT A. BRISTER: But I hate to write that into the rule, because there could be times when those circumstances might exist.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: The answer is then that the Rules operate in precisely the same manner. The two drafts work the same way in this hypothetical.

HONORABLE SCOTT A. BRISTER: No. Under Tommy's you don't get $500 just because the guy was stupid.

PROFESSOR DORSANEO: It doesn't say that.

CHAIRMAN SOULES: I've got a question about that, and maybe somebody else is going to raise it. If you get to Tommy

Jack's draft under 2, that's on page 2(d) and then down towards the bottom I guess it's 3 (ii) and (iii) "filed clearly inadequate or incomplete discovery responses or failed to comply with the specific requirements of the discovery rule," why doesn't that launch you right into stage 1? Why does --

PROFESSOR DORSANEO: It's really 4.

CHAIRMAN SOULES: This strips, this becomes not a two-step Rule. It's only a one-step Rule by virtue of that language.

MR. LATTING: Because the answer is, Luke, that you need to read before that. It says that a party under 3, "A party, attorney or law firm has repeatedly" done those things. In other words, if this is the first time in this case that he has filed clearly inadequate or incomplete discovery responses, he hasn't violated that. He has to do that repeatedly.

MR. HERRING: Does that mean twice?

MR. LATTING: Well, I hope so. If we pass anything like this, I hope it

doesn't mean more than twice.

MR. HERRING: If you've done it twice, then you automatically get to go to sanctions in almost every case. Part of the problem I have is that the 2, 3, and 4 you can argue the subparts, the last provisions there in paragraph (d) you can argue in every case.

HONORABLE SCOTT A. BRISTER: Second of all, Paragraph 2(c) says you can't get $500. It's got to be substantial in relation to wealth. Basically I think Tommy's intent was to outlaw the $250 award of attorney's fees. You just can't get $250 attorney's fees unless you're very poor. You have to run up more expenses than that, which I'm not sure we want to tell people they need to do.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: It seems to me that there are two different evils that we're trying to get at. One evil is judges making inappropriate sanction decisions, which I think is the lesser evil of the inappropriate sanction fights is that

we've got a lot of inappropriate sanction fights ultimately the decision from the judge nobody particularly could quarrel with, but it's the fight that's the cost both to the Court, to the parties, to the psyche of the lawyers, to the practice of law; and I think we just have to decide what we would rather live with.

Would we rather live with all of these inappropriate sanction fights and all of that cost in order to give ourselves the freedom to hit the guy the very first time who fails to or who improperly objects to somebody asking about persons with knowledge of relevant facts, or would we rather live in a world where we don't have all these inappropriate sanction fights and we don't have all that cost, but occasionally the fellow who makes the stupid, jerky objection gets a free walk.

I mean, I'd rather live in the world where a guy gets a free walk occasionally, but we don't have all of this sanctions trouble.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: And I think that clearly states the issue; and I'm on the other side of that argument, so I would not. It's to me like saying there is a lot of mugging going on, and I think if we read about it in the paper all the time, a lot of people being indicted if we abolish that crime, we wouldn't have so many indictments for this.

HONORABLE F. SCOTT MCCOWN: Well, it's more like saying " I'd rather have a few muggings than live in a police state" is a better analogy.

CHAIRMAN SOULES: Buddy Lowe.

MR. LOWE: Too often we hear the lawyers talk about "I'll file sanctions against you." They're using that to tell you as a weapon as a threat. And I don't care. We can sit around this room in a vaccuum and consider it. Out there we consider it a serious thing when you file a motion for sanctions; but the lawyers file them to get an advantage, and it's not just a situation, and you've used something I don't see that much where you object to giving names of people with relevant facts. I don't see that.

You're using the extreme. You go to the thing where they object because it's attorney/client privilege or work product and things like that. That's where it comes in and there's an argument; but for a lawyer just to be able to haul off and say, "Man, I'm going to file sanctions, and I'm going to do that" it creates a war right away. I totally agree with the last speaker.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: In my personal experience far and away the biggest discovery dispute I see, and I see five of them a week, is they have not responded at all to an interrogatory or a request for production. It has been sent, and it has disappeared. I see that far more often than attorney/client privilege. I see that far more often by a factor of at least five times. They simply have not responded at all.

Now most of the people in this Committee are not involved in those kind of cases, because you and the people that you sue

or defend or are sued by don't practice that way. But in District Courts we have thousands of cases, all the car wrecks and slip and falls. The biggest discovery dispute is discovery was simply ignored; and if there is no threat to tell the other side "I am going to take you down to court and you are going to suffer some consequence for simply ignoring my interrogatory," in my view that is a far more frequent problem than the other side of the practice.

CHAIRMAN SOULES: May I make an observation here about side discussions at the table. It makes it very difficult for the court reporter to transcribe the speakers that have the floor if there are conversations going on right around her. She just can't concentrate on the speaker that has the floor if that's going on. Alex Albright.

PROFESSOR ALBRIGHT: I have a question. Can you get the order to compel without a hearing? Like in a situation where they just flat didn't answer the interrogatory, ignored them or objected to identifying witnesses, can you get an order

without a hearing? It seems that's a big problem if you have to go down to the courthouse to get an order for that kind of blatant abuse, blatant violation of the Rules. That is where it is costing you time and money. If you automatically get the order and they don't comply with the order, then you go down to the courthouse.

HONORABLE SCOTT A. BRISTER: That's 1(b) of the Committee draft. If it's just to get a motion to compel, no oral hearing is required under Paragraph 2. If a motion to compel and $250, no.

PROFESSOR ALBRIGHT: Tommy, that would be for yours too?

MR. JACKS: Yes.

PROFESSOR ALBRIGHT: If you get the order to compel.

MR. JACKS: That would be true under either draft.

PROFESSOR ALBRIGHT: I remember back before the sanctions Rules a sense that you didn't have to answer interrogatories in 30 days because nothing would happen to you. With the order that

would be better.

CHAIRMAN SOULES: Are you suggesting then that, or is the meaning of these that there be no oral hearing on an ordinary motion to compel, an oral hearing would not be required? Is that true in both drafts?

MR. JACKS: Yes.

CHAIRMAN SOULES: Was that the feeling of the Task Force as well?

MR. HERRING: It could be on the submission point. Nothing to prevent having a hearing; but it's just if you had your routine motion to compel as the judge has posited. I mean, quite frankly I have never seen one where you didn't end up with a hearing. And I think you would have a hearing, but any time you went to sanctions or you went to substantial attorney's fees you would have to have a hearing.

HONORABLE SCOTT A. BRISTER: And I think our concern on that, Luke, was the split in people's opinion about whether things should be by submission or by oral hearing. We didn't want this Rule to try to decide

that, because there are judges with very strong opinions and attorneys, of course, whether everything should be oral, everything should be paper. Rather than getting into that dispute just to say when you absolutely have to have it and leave everything else open otherwise.

MR. HERRING: Well, and some of the local court rules, as you know, vary. That is, some counties provide for submission on paper, and some don't allow it. So it's to accommodate that possibility.

CHAIRMAN SOULES: Steve Yelenosky.

STEPHEN YELENOSKY: Yes. I just had a specific point from a Legal Services perspective on one phrase that Tommy Jacks has already discusses; and that's by "the party seeking such relief is unreasonably burdensome in relation to the resources of that party." In the Legal Services context what would be the test? I mean, the client is not paying me. Do they look at resources of my office? Does that raise a problem? I think overall it's a problem in bringing that

issue.

MR. JACKS: Having served for a period of years at the beginning of the Reagan years as president of the Central Texas Legal Aid Society I think be definition any legal aid case would qualify. If you wanted to do anything, all you'd have to do is bring over a copy of your budget, and I think they would be well satisfied that your resources would be strained by --

STEPHEN YELENOSKY: By any amount?

MR. JACKS: Yes.

STEPHEN YELENOSKY: Well, even the $250, I mean, to us would be helpful.

MR. JACKS: Absolutely. And that was the intent of this; and as I say, it probably needs some tinkering, but that's the idea.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: I'm generally supportive of Tommy's draft, but I'm very opposed to "that unreasonably burdensome" language, because it's going to result in satellite litigation over what are

the resources of the party. Already any time punitive damages are pled you've got satellite litigation on that issue; and we know how very difficult it is, and this is exactly the same kind of thing, and I think that we need in our Rules to make them very simple and very easy and inexpensive to apply, and you know, I think it would be far more economical for everybody if Tommy is to just pick a number. If you can't have sanctions below $500, pick $500.

MR. JACKS: And I thought about that.

HONORABLE F. SCOTT MCCOWN: Or if it's $250 or whatever.

MR. JACKS: And the problem is that picking a number that works both for Stephen's office and for the silk stocking law firm it can't be the same number. It needs to be $250 really for --

HONORABLE F. SCOTT MCCOWN: Again, I --

CHAIRMAN SOULES: Let Judge McCown finish, and then I'll get to you, Tommy. Go ahead and finish.

HONORABLE F. SCOTT MCCOWN: Again, though it's a question of cost. You're right that picking one number is not going to work, but it's not going to work in a much less costly way than this isn't going to work. This isn't going to work, but it's not going to work at a tremendous cost which is all of that discovery and all of that argument and all of those different decisions from different judges about what is unreasonably burdensome.

MR. JACKS: If I may respond, the problem you get into is that if you pick a number, it has got to be a low number; and therefore you might as well take it out as to have a low number in terms of trying to influence the frequency of requests for attorney's fees. And the reason I favor putting this in is that for Stephen, the people in his office are not going to be hobbled by this, and for those who truly do need to be able to get attorney's fees because it does mean something to them, those are going to be the same people who aren't going to be hindered by the requirement to make a

good showing, on the other hand, the what I'll call the upper crust of the litigatns. And a lot of this heat and friction is fomenting in cases where the amounts really aren't substantial or significant to the parties involved, but it's the "got-ya" element. The truth of the matter is how many times when you award attorney's fees do you think they really collect them. Rarely I'd say. And yet we're creating this environment in which there is this constant outpouring of venom and bile and resentment and anger that is created by virtue of the process, and we're really not compensating people nine times out of ten. And that's the thought process I went through when I thought about this.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: If I could make one follow-up comment on that. I think I agree with you about the thought process. I just don't agree with you about this test. I don't think we need it in there, because I think most judges do an intuitive assessment of the very thing you're asking for

at the time they make their decision about whether they will or won't award sanctions and about how much they are. And if we try to move that from the intuitive discretionary decision by the judge into a fine-tuned factual litigated decision, we're not going to improve the overall decisionmaking any, but we're going to make it a whole lot more costly in terms of discovery and court time.

CHAIRMAN SOULES: Let's see if we can get some more participation on this, those of you that are interested in it. I saw Steve Susman's hand up.

MR. SUSMAN: I generally favor Tommy's. I general like the philosophy. I wonder why something that is designed to simplify sanctions and eliminate satellite litigation is twice as long.

CHAIRMAN SOULES: Speak up, please.

MR. SUSMAN: And I'm concerned about that. It's too wordy. There is too much in here; and I mean, I like the philosophy, but you've got just as many words to litigate, if not more, than the original

version.

MR. JACKS: I'll grant that.

MR. SUSMAN: I don't argue that there ought to be some way to simplify.

MR. JACKS: It's like not having the time to write a short brief. I didn't have time to write a short Rule.

CHAIRMAN SOULES: Rusty McMains. Were you finished, Steve?

MR. SUSMAN: Give an example, I mean, why can't you simply provide that if the position of the party is not reasonably justified, the Court shall award fees, period. Very simple.

If you have go in there and you unreasonably take a position, you get hit with attorney's fees so everone knows what to expect. There's not a lot of weighing and factors and this and that which is to me designed more litigation, and you've got to get a motion filed to get them. Why don't you just made it automatic. If the Court finds you were not justified in taking the position, you get hit.

CHAIRMAN SOULES: Response to

Steve. Okay. Rusty McMains.

MR. MCMAINS: Well, I was just trying to distill the discussion with regards to whether or not what the Committee is concerned about or what the general public is concerned about is judges who are going off the deep end with regards to sanctions, and so we're trying to limit their discretion, or whether we're trying to limit the lawyer's fighting. Most people seem to be wanting to limit the lawyer's fighting.

If you take the essential philosophy of Tommy's draft, that is, that requires an order before you can make a request for sanctions, that there be a violation of the order, but if you take the spirit of the first philosophy and not allow a party to make a request for attorney's fees or anything else for the first bite as it were, but allow the Court to have the authority to impose attorney's fees if in the judgment of the just -- and you can limit that discretion with a number or whatever and doesn't require an oral hearing, but essentially prohibit a request from the parties for the assessment of

attorney's fees in conjunction with the initial obtaining of the discovery, then don't you come down to somewhere in terms of discouraging anybody asking for it, but allowing a judge in Judge Brister's situation to simply say, publish his local rule and say "I'm going to award $250 to any idiot who walks over here who hasn't answered interrogatories and requires a motion to compel and won't return phone calls in order to get them answered."

CHAIRMAN SOULES: Buddy Lowe and then Joe.

MR. LOWE: I don't have any comment. I just have a question and follow-up on Rusty. Would the lawyer be prohibited even though he can't file his motion and put it in there? You know, we argue things over there. Would the lawyer be prohibited from getting into such an argument? Just you have the authority, and then you end up with the same thing without being any motion. I'm wondering what would be the answer to that. I don't know. I'm just asking.

CHAIRMAN SOULES: Response,

Rusty.

MR. MCMAINS: Well, I mean, if you have an oral hearing, I mean, again I think all we're saying is that and what I remember from our debate the last time people were concerned that if you have an opportunity for sanctions at the get-go, some lawyers take the position that they're duty bound to request sanctions or at least they make that argument or justify their conduct.

What I'm saying is that if one of your thrusts is that you want to eliminate what Judge McCown has called the innapropriate request for sanctions and what I think everyone basically feels like is a mere noncompliance, failure to do discovery or do your job or whatever, but not necessarily indicative of what we would consider discovery abuse, then just allow the judge though to be able to say "If you're that stupid, I'm going to award $250, but I'm not going to -- but will not entertain motions."

CHAIRMAN SOULES: Buddy Lowe.

MR. LOWE: But as a practical matter though lawyers say "I can't file the

motion. Son of a gun I tell you what. The judge will do it. I'm filing this motion for hearing. When we get down there I'm going to ask him to exercise." You get into the same thing even though it's not in writing. I mean, is there anything --

MR. MCMAINS: Let me -- excuse me.

CHAIRMAN SOULES: Rusty, go ahead.

MR. MCMAINS: I actually have a second aspect of it that I would like to see with regards to when we do file the motion for sanctions. I would like a party when a party files a motion for sanctions, the loser of that motion ought to be sanctioned. They ought to pay; and I mean in other words, you need to pay. If you're going to move for sanctions irrelevantly, and then you ought to pay. That's one way to discourage motions for sanctions that are totaly inappropriate.

CHAIRMAN SOULES: Judge Till, go ahead.

HONORABLE PAUL HEATH TILL: That will encourage them. That would

give -- if you have a legitimate reason for objecting to the discovery and you feel like it's at least an arguable case, and you know, that will just encourage them. Everybody and his kid brother will be doing it more instead of less.

MR. MCMAINS: Now, you're talking about a motion to compel. I'm not saying that you lose a motion to compel. I'm saying if you are asking for sanctions, what I think most of us consider to be sanctions other than just attorney's fees, then they ought to be -- I mean, if you are asking for that in addition to the discovery or the denial of the discovery, whichever you're requesting for, you could still require that attorney's fees be assessed for the looser if you lose a sanctions motion. In other words, if you press a sanctions motion and lose, you are going to have to pay attorney's fees.

CHAIRMAN SOULES: Joe, and then Judge McCown.

MR. LATTING: Well, Judge, you are in distress.

HONORABLE F. SCOTT MCCOWN: I

am in distress about both of Rusty's suggestions. The notion that a judge sui sponte can impose a fine strikes me as a violation of due process. A person has a right to notice and an opportunity to be heard; and if the fellow doesn't get his interrogatories in there, there may be a half a dozen different reasons that he would need to tell you about before you could make an informed decision. And if he doesn't know that it's on the table to marshal his evidence and to have it there, that strikes me as a pretty serious due process violation.

The problem with Rusty's second suggestion the loser in a sanctions hearing may in fact have been the winner. If the fellow files a sanctions motion and wants me to impose sanctions, I may do a whole lot less than impose sanctions, but he still may be the good guy, and there may be some reason why in my discretion I'm not kicking the fellow who ought to be kicked; but that would be a perverse world where in my discretion I decide to give mercy to one guy, and the outcome of that is I kick the innocent one

automatically.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: This is in response to an earlier question of Buddy's; and Buddy, we're sensitive to the situation you posed which is people just threatening to file motions for sanction against you, using that as a club. And we've addressed that though, and I want to call your attention to two things in the Committee draft.

MR. LOWE: Okay. Well, I will confess I didn't study the details. I just got here.

MR. LATTING: Well, I'm interested in what you say, because I'm sensitive to that because I'm in sanctions situations or in discovery situations, and I'm happy to say I've been in two sanctions hearings in my career, and I hope I'm never in any more. So I don't find myself in them much, but often I get into cases where I'm not sure whether something is discoverable or not, and there are some pretty gray areas in attorney/client privilege and work product, and we have addressed that.

Specifically if you will look at the top of page two where we've red lined it at the next to the last line above Paragraph 3 where we have the "reasonably justified in fact or in law" it says here that "the Court may enter these orders," and we're talking about the minor kinds of orders, "without the finding of bad faith or negligence, but shall not award expenses if the unsuccessful motion or opposition was reasonably justified in fact or law." Okay. So you've got the argument that you can't be sanctioned if you were reasonably justified.

Then we go on to say in Paragraph 3, the second sentence of Paragraph 3 it says "Any sanction imposed must be just and must be directed to remedying the particular violations involved. A sanction should be no more severe than necessary to satisfy its legitimate purposes." Now, that seems to us to be spelling out pretty clearly that there aren't going to be any sanctions if it was reasonably justified conduct.

And so the conduct, first of all, has to be unreasonable, unjustified, and

then the sanction cannot be any more severe than it has to be in order to remedy the wrong; and I'm happy with that myself. I'm very comfortable with that.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: I think there is almost unanimity here in terms of the philosophy both when Tommy makes his introductory remarks and Buddy and Steve talk. Everybody agress there is too much sanctions practice. We dont' want it.

The question is what procedure do you have to reduce it, and do you leave the trial judges any discretion first crack out of the chute to have the possibility of sanctions in a case. The last time we voted and there was a vote in favor of two-step, but two-step with exception. There ought to be some cases like destruction of evidence maybe where you have the possibility of sanctions.

And we have tried to allow that in the subcommittee draft. We've also tried just by changing the name in Paragraph 2 to make clear there are two different things

when you deal with a motion to compel versus sanctions, and you've got a whole procedural rigamarole that applies when you get to sanctions.

The problem I have with Tommy's draft is that it is more complicated than the other draft, but it doesn't for me seem to really eliminate anything, the two things that you have that would reduce the times when you might argue about attorney's fees, but you're still going to file your motion to compel if somebody doesn't answer. You've got to get the answers. You're going to file a motion. You're not eliminating the motion practice. It's only whether you can get attorney's fees that first time.

It does two things. Number one, you can't get the little attorney's fees unless it would substantially burden you, your party. That's Stephen's case. And once you get beyond the indigent litigant I don't know what that means. "Substantially burden" means we're going to have a Lunsford kind of hearing, a "what are your assets" kind of hearing in every situation. That's another

opportunity to have more hearings as Judge McCown points out. So it doesn't seem to me it saves. If you're not going to have a clear rule that says "You've got to have more than $500 attorney's fees or don't come to the courthouse to talk about it," if you sacrifice that clarity which you may have to do for fairness, then it doesn't seem to me it really eliminates many potential arguments over attorney's fees.

The second thing it does on the sanctions side it says you can't get sanctions until there is a repeated violation. Well, as a practical matter under the other draft you're not really going to get sanctions until something real bad has happened, the Court has to impose the least severe sanctions under the circumstance and all. You're not going to get anything but attorney's fees probably your first time, but all you really have to do is have a repeated violation. That means if I send two sets of interrogatories, I can seek sanctions instead of just with the first one, because the three times, the three exceptions that are written

here I think apply or arguably apply in almost every case if you want to just go to the courthouse for sanctions if someone filed clearly inadequate discovery responses.

Well, when I argue that somebody's discovery responses are inadequate I never say they are partially inadequate. I say they're clearly inadequate every time I go to the courthouse. You say the second exception is failed to comply with specific requirements of a discovery rule. Well, almost everything in the discovery rules is pretty specific. You know, failing to put your name on an interrogatory response, or to have the verification, that's a specific violation, but it shouldn't be something that opens up sanctions, but the sanctions door is opened up by that.

And then the last one, propounded discovery requests or raised objection which are not reasonably justified, that's every case. I mean, I'm always going to argue they weren't reasonably justified in the position they took. So it doesn't seem to me it really closes the door any more than the

other draft, but it builds a lot more to argue about into it, and it's more complicated.

CHAIRMAN SOULES: There are two things here that come to my mind. One, have we talked about the philosophy of saying that in connection with the motion to compel, and I did hear Judge Brister's remarks that he's frequently confronted with situations where the interrogatories have been mailed and just gone to a black hole and whenever, and then they come to his court to compel responses where there is no basis really for not responding to discovery. But the philosophy that in connection with the motion to compel there can never be attorney's fees or anything else, zero sanctions.

Picking up then maybe on Tommy's concepts about somehow you're going to have to fix other discovery violations that are not addressed by a motion to compel, and I'm not trying to suggest how that language would be articulated; and then the third thing is I thought that we had talked about at the last meeting having something in the Rule that would address santions for filing frivolous

motions for sanctions. Then the way that would line up, no penalty can be assessed on either side of a motion to compel unless a motion to compel can't fix the discovery problem.

Next in that event you can go to more serious sanctions or sanctions. In that event you can go to sanctions or sanctions can follow the failure to comply with an order, and then to discourage sanctions practice make it some penalty for filing a motion for sanctions which is not seemingly justified. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I think I'm getting to the first part of what you're talking about in terms of whether there should be monetary sanctions, if you want to call them sanctions, awards of expenses when somebody doesn't answer a set of interrogatories and their essential defensive claim if they would be allowed to make it would be that they were preoccupied with other matters. We might refer to that as inadvertence in other contexts where we excuse defalcations made by persons who don't respond

to citations and petitions.

Under the Committee's draft, and I'm still trying to understand how it works and how it's meant to work, if somebody didn't respond at all to interrogatories, presumably they would have to put themselves on the mercy of the Court because they didn't even have -- they don't even have an opposition to be one that is substantially justified. Would it be within the trial judge's power to impose more severe sanctions after a hearing, let's say?

MR. LATTING: No.

HONORABLE SCOTT A. BRISTER: No.

PROFESSOR DORSANEO: Why not?

HONORABLE SCOTT A. BRISTER: Because the difference between expenses and a punishment. A money punishment is 3(g). That's a sanction. Yes, I guess the answer is the judge could do it, but you've got to go through the "I'm doing this not because it costs me $250 in attorney's fees to file the motion and come down here. I'm doing this because I want to teach you a lesson, and

therefore I'm slapping $1,000 or $10,000 on top of it." You could do that, but you've got to go through the list of reasons, Braden vs. Downey, et cetera incorporated in the rule as to why you're doing it.

MR. HERRING: Further as a practical matter you couldn't do it and be sustained, because the Rule says you can only do it if you meet the TransAmerican standard, which is it's got to be the least severe sanction, a sanction no more severe than necessary to satisfy its legitimate purposes. And if you just obliterate sombeody because you're mad at them or because you're doing it, you'll never be sustained on appeal.

CHAIRMAN SOULES: What I'm getting at here on the first part of this is no sanctions for motion to compel is a lot of the concern that we have for the sanctions practice and the discovery practice is generally how burdensome it is and how costly it is in the process. How does that balance? Never charges, never expenses for sanctions versus permitting that and litigating that over and over again in so many cases, which is

better?

There are going to be some abuses either way. There are going to be abuses if there is absolutely no sanctions. There's going to be some lawyers who by their very nature just say "No risk, and I'm on this side, and my client says break them if I can as a part of the process, so I'll see you in court, and we'll have a three-day hearing, and on we go."

Now, If they repeat that, then we get into Tommy's repeated violation concept, but which is better? To just take it out and not litigate it anymore and see what happens in the system, or to leave it in that costs can be assessed on the first motion to compel and continue to litigate it? Steve Susman and then Judge Brister, and I'll go around the table.

MR. SUSMAN: The more I listen I return to the position of my first original reaction which is why are we tinkering with this at all. I think there is some -- I mean, obviously having sanctions at least in your mind that you can get sanctioned if you do

something wrong is some stop, look and listen for lawyers. Even though we don't even know what the Rule provides, we've heard about it. No. Seriously. We have heard that you can be sanctioned; and I think a lot of the lawyers need -- I do it all the time, go to clients and tell them "We can't do that because here are the bad things that can happen to you if you do do it." You use the sanction threat to make your client be reasonable. So, I mean, and they're there; and maybe they have had the effect of making lawyers stop, look and listen and helping lawyers make their clients be reasonable.

At the same time everyone has a feeling that they have been overused. They are abused, the satellite litigation and everything; but there was a notion I thought propounded that the sanction litigation is declining. The number of sanctions motion are on the decline. People are kind of it's not new, so no one is using it that much anymore; and you generally know what the Courts feel about it, or there's hostility to them, and law firms have rules and regulations, and you

aren't going to file them except in special circumstances. So I thought the feeling was generally in the courts the trend is in the right direction on the use of sanctions.

That would lead me to the notion of why propound a new rule at all? Just leave things where they are. Now, there was one argument said, well, you have to make it consistent with this new Supreme Court case. Well, make that the only change so that all you have to tell the Bar is the same old Rule except it's changed to be consistent with the Supreme Court case and don't worry about it otherwise rather than all these changes, either Tommy Jacks' changes or the Committee's changes that will now give rise to a new jurisprudence on sanctions. Everyone is looking at it, reading it, and trying to figure out if it's better for me, worse for me, can I get away with more. That's my point.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A. BRISTER: Two things: Number one, the Task Force Rule

which I took the first shot at drafting, the whole scope of it was to do nothing other than incorporate TransAmerican and Downey and to make it a third as long as it used to be. So that is mostly what it does.

On your question, Luke, I think it's the philosophical problem. If you don't -- if the sanction we're talking about, and I think this attorney's fees is a small attorney's fees and transfer of money, if you have if there is no transfer of money available, then you have no disincentive to the conduct involved, just not answering it at all, frivolous objections.

On the other hand, if you do have a monetary sanction award, the concern is correct you will encourage some people to want to go get it. On those two questions which should we be more concerned about?

My bias, as I said, from what I see I am more concerned about more attorneys who through inadvertence or whatever else don't respond at all to discovery than I am concerned about young lawyers or somebody else out there who is so greedy to have $250 that

they are going to go through this process to try to get $250 or $500. I just maybe I fall down to -- the public would see this as a question whether lawyers are lazy or greedy, and I would have to fall -- I see more in that question, lazy or inadvertent. I just don't think there is going to be that many people that want the $250 so bad that they foam at this thing to get it, and I think therefore I do see a significant number of people who will not act.

Tommy's point is a good one, and there are things you can do about making sure the $250 is not just something you put in an order and nobody hears about again. But the question is as to whether or not to have minor amounts of attorney's fees or not, which side of that conduct do you think is more pervasive, more to be concerned about; and that decides whether you're going to have minor attorney fee awards or not.

CHAIRMAN SOULES: Robert Meadows.

MR. MEADOWS: Just a couple of points. I think we all agree that we want

what Tommy wants, but the biggest problem I have with his proposal is the unfairness of the threshold for relief. I mean, I just don't think -- I agree with Judge McCown's comments about the practical aspects of that and how it becomes another Lunsford issue which I think is a horrendous aspect of our law, but I think it's just basically unfair. It's devisive in the rule; and so I'm very much opposed to that.

I like parts of Tommy's suggestions. I like the idea of affidavit attached to a motion for sanctions. I think that does make it more serious; and I think a lawyer should be required to file an affidavit. I think to draw a distinction between the wealth of the parties is just unfair.

I agree with Steve. I think that basically what we've got in front of us is a rule that has been largely fixed by the Supreme Court and we ought to just keep our work within those boundaries, and I think Judge Brister is correct that it is helpful to do that and make it shorter and more

understandable and less to fight about. So that's why I'm in favor. I'm on the Committee. I'm an ad-on just like Tommy. We invited ourselves.

CHAIRMAN SOULES: Thank you for your help.

MR. MEADOWS: I think the --

MR. LATTING: We've enjoyed having "you" on the Committee.

MR. MEADOWS: I think the Committee's work gets closest to what we're all trying to do, and that's why I'm in favor of it.

CHAIRMAN SOULES: Coming around, Judge Peeples.

HONORABLE DAVID PEEPLES: I think I favor Tommy's proposal over the other one. I do have concerns like those expressed by Judge McCown that the Subsection (c) will lead to a lot of satellite litigation.

Judge Brister said that if you don't have, if you can't get some sanctions, attorney's fees for the first-time offense, there is no disincentive; but isn't it a disincentive if you use up your one bite by

some ridiculous failure to do discovery? Then you're exposed to this "repeatedly and continuously" part of it down here, aren't you?

HONORABLE SCOTT A. BRISTER: Well, I think as Chuck said though, you invite -- whatever you have the Rule as you're going to encourage a certain small, bad element to do. I think you encourage people to bust up interrogatories to try to do something to make you trip once so that then thereafter. If you make a two-step, I think you encourage people to try to get something in their file to use thereafter as a second one. To make them fund it you have to get an order one time before you can get sanctions. I think you engourage people to come down for an order faster so they can get that order on file so the next time they can come down for the second time.

There is no way to write a Rule where you don't encourage some bad people, I'm afraid. That's my point about it. Which is the smallest group of bad people we're going to encourage by the Rule?

MR. JACKS: It's been a while since I spoke, and I've tried to listen, and I have learned from some of the things that you-all have said. Let me try to address a few of them.

I think that Scott McCown framed the issue in its truest form by saying that we really are making a value choice here. And that is do we want to continue in a system that seeks to remedy every discovery wrong no matter what level of friction and cost and so forth, the lawyers fussing over things that Buddy Lowe mentioned about, or are we willing to accept that there will be some wrongs that go unremedied in order to try to make a radical change in that type of behavior among lawyers?

And the concern I have about the Committee's proposal and the Task Force Rule is that it does essentially only codifiy current law and therefore current practice, and those things won't change. I don't agree with the idea as suggested by Steve Susman that things are headed in the right direction. I don't see that in my experience;

and certainly in talking with other lawyers that's not at all what I'm hearing, that there is a whithering or drying up of the sanctions/attorney fees kind of practice; and I don't think it's because as Judge Brister suggested that -- I don't think it has to do with the greed of lawyers who are itching for that $250 of fees in their pocket. They're not getting that in their pocket anyway. These fees generally aren't collected.

What it has to do is with lawyers trying to get got-yas against other lawyers. What it has to do is with a variant, a mutation of Rambo types of law practice that I think are unhealthy for our profession and for our system; and it is in an effort to address that that I make this proposal.

I grant that it's more complicated, and I say that that's not necessarily all bad. We worry about the Lunsford hearings and, well, are we going to have to have all of these hearings where we are talking about the resources of the party or the lawyer who is advancing the expenses of the party; and the answer is, I don't think so

because I think that what truly will happen under this approach is that only those to whom the attorney's fees really do matter once confronted with this Rule are going to engage in it, people like the people that Stephen represents or the woman with three kids who is going through a divorce and who has got $98 in the bank account and has two weeks to go before the end of the month. And those people aren't going to have any problem. It's going to be a short hearing. All they have to do is bring in their checkbook and say, "Judge, Look here. You tell me if that $250 I had to pay because the jerk wouldn't answer any discovery is a problem for me or not."

And but what I think it will do is through a combination of what I concede are hurdles, hurdles made which are intended to make it the exception rather than the rule that judges and lawyers get into the business of wrangling over attorney's fees or wrangling over expenses. Luke suggested and I was tempted by the idea of just saying no, no expenses, no attorney's fees in any case involving a motion to compel unless you have

got some of the kinds of conduct accompanying that that are the kind we all agree we want to punish.

But the problem with that is the people that Stephen represents to whom it truly is a burden to have to engage in discovery arguments where there is no reasonable justification for the other side's position. Now, it's in an effort to accommodate those people that I have the "burdensome" requirement. What I say is they're the only ones who are going to try to get them; and I think this will serve as a kind of filter that I'm looking for that still permits those people who really do need the attorney's fees, gives them the opportunity to get them and filters out the others, because the GMs and the Broadus Spiveys and all the silk stocking lawyers who are sending their young lawyers down there in legions on these motions are going to know they can't do them. And I purposely included in my Rule the language that "the lawyers shall not seek and the Court may not award." And, Scott McCown, that's because I'm not just concerned about

the judge and the judge's discretion and what result finally happens if you get to the hearing. I don't want it to get that far. I don't want it in the motion, period, unless there truly are special circumstances.

CHAIRMAN SOULES: Tom Leatherbury.

MR. LEATHERBURY: Luke, I had real specific comments that applies to both drafts; and that is in Paragraph 3(a) there is an inconsistency between a written Court order which contains a private reprimand in Rule 76a. I don't see how you can square a private reprimand contained in a written order with the requirement in Rule 76(a) that no Court order can be sealed or otherwise private.

And I think that is probably just reflective of the evolution of this Rule moving from some kind of chambers reprimand to a written reprimand.

MR. HERRING: Let me understand that. Would you state that again? What is the inconsitency in 76(a)?

MR. LEATHERBURY: How can you have an order which provides for a private

reprimand and be consistent with Rule 76(a) which provides that no Court order can be sealed.

MR. HERRING: A letter. That's what that goes to.

MR LEATHERBURY: So then there is going to be an order in the file that says this lawyer is going to be privately reprimanded?

MR. HERRING: No. What it was intended to, the "in writing" was put in there because the judge -- some judges wanted to have the freedom to have an oral reprimand without having to go through the rigamarole of the Rule. If it's a written order, it's certainly not private and it's certainly not sealed or sealable.

MR. LEATHERBURY: But it says the written order has to impose the private reprimand. I mean, that's the way I'm reading 3(a), because you have to have an order which contains one or more of the following sanctions, a written, private reprimand.

MR. HERRING: I see what you're saying.

MR. LEATHERBURY: Do you see what I'm saying?

MR. HERRING: Yes. The only other thing, and Tommy, you correct me. The only other thing that came up on that was the letter. Judge McCown sends someone a letter. It's not an order. It's not an order imposing a reprimand.

HONORABLE F. SCOTT MCCOWN: But, Chuck, I was going to comment on this too. I think we ought to just say "reprimanding the offender;" and take out everything else; and I'll tell you why. "Privately" is a very troubling word.

CHAIRMAN SOULES: Where are you, Judge McCown?

MR. MCMAINS: 3(a).

HONORABLE F. SCOTT MCCOWN: On 3(a) following up on Tommy's comment. Courts don't do things privately, and you've got an ex parte problem; and if both sides know about, it's not private. And if you send the letter to both sides, it's not private, and they can put it out there. And if it's in writing, it seems to me under 76a that it's

got to be an order or it's got to go in the file. It's got to be public; and I just have real problems with that. If you say "reprimanding offender;" and the judge wants to take the lawyers back in chambers and bark at them, there is nothing that's going to stop that. And if he wants to bark at them in open court off the record, he can do that. And if he wants to bark at them in open court on the record, he can do that; and nobody is ever going to say to him, "Judge, stop barking at me because you didn't go through the sanctions procedure." That's not going to happen.

HONORABLE SCOTT A. BRISTER: They could.

CHAIRMAN SOULES: We're going to go around the table, and then take a short break. Stephen Yelenosky.

MR. YELENOSKY: I just wanted to raise a process issue. This is only the second meeting I've been to, but as many people here I'm sure I've been a part of a lot of groups that meet continuously. And one thing I've learned from that is you have to have some institutional memory in order to

move forward; and I'm wondering whether we should have an agenda item about that. I don't think we need detailed minutes, but we need to know what we've done before; and that doesn't mean it can't be revisited, but there should be some presumption that we're not going to revisit the big issues that we've discussed if we're going to move forward. And I think we're moving forward today, but there is some refreshment. I know there is a transcript. But is there a way in which we can sort of when we take votes have that before us?

CHAIRMAN SOULES: Well, in responding to that, as the drafts develop, historically in this Committee as the drafts develop there is some revisit to issues that have come up before in the interval. In the two-month interval someone may come up with a really valid idea that goes right to something that got resolved before that needs to be said. We have not --

MR. YELENOSKY: I think that's fine.

CHAIRMAN SOULES: -- taken

votes and said, "Okay. That's it for all time." And it seems in the past at least to have worked, because what we want to do and I think what the Supreme Court wants us to do and what we have done in the past is when we get a draft that is final and is going to the Supreme Court there may be a round or two around the table where people say, "Well, remember what I told you about that, and we've done this, but I still don't like it." But when we do get a consensus of the Committee and it goes to the Court the Court knows it's been fully developed and sometimes again and again fully developed.

I don't know if that is responsive.

MR. YELENOSKY: Well, it is.

CHAIRMAN SOULES: But that's been the way this Committee has functioned.

MR. YELENOSKY: Right. Before we can revisit it we have to remember what the first vote was. And Tommy Jacks repeated some of it and had some of the notes on it, but I didn't recall exactly that split. And it would be helpful to me if we have taken a vote

for whatever it's worth even though we're not bound by it that we're reminded of it when we come back two months later so at least we have a launching point from there for future discussions.

CHAIRMAN SOULES: Going around the table, Judge McCloud.

CHIEF JUSTICE AUSTIN MCCLOUD: I want to certainly agree with Scott McCown on 3(a). I think "reprimanding the offender" it should end right there. I think we can create severe problems if we go on and say "in writing either publicly or privately." I think we should leave that to the trial judge. The trial judges, they have all sorts of ways of reprimanding, and I think that would be much better. Otherwise I think we create some possible problems.

CHAIRMAN SOULES: I don't hear anything counter to that.

MR. HERRING: Just to be clear why that change was made, the Task Force report would say or version said if you reprimand someone, that's a sanction and, you have to go through all of that procedural

rigamarole. If you -- the reason this change was here is because some judges, some Court of Appeals judges -- in fact I think that's where the suggestion came up -- said we'd like to be able to reprimand people privately just talking to them after the case is over or in chambers and say, "Hey, don't do that kind of stuff again." And maybe that's private. Maybe it's not. It's not on the record. "And we'd like not to have to go through that rigamarole."

Scott's answer is, "Well, that's fine. Just say any time you have a sanction that's a reprimand you have to go through all the rigamarole. If they don't do it, they don't do it; but who cares if it's just a private talking to. That's okay with me. But I just want to make sure that this group understands that that is what some of the judges asked is to be able without having to go through the steps of a sanction, be able to have the verbal reprimand, the private talking-to without feeling that they were violating the Rule. That's the only reason that change was made, but it's easy to take

out.

CHAIRMAN SOULES: Buddy Lowe.

MR. LOWE: I think two things. Number one, Judge Brister mentioned people just ignoring. There is a real remedy there. When you ignore you waive your objection to that. When you go down there, and if somebody just ignores you, you know, the time to object has passed and so forth, and you start ordering and you order them to answer. They can't say attorney/client privilege and stuff like that. I don't think that is going to be a real problem.

The other thing they're overlooking is there are other sanctions besides money. And if I go down there and I don't object, and I'm cantankerous and so forth, the objection is that hurts my reputation with that judge. That judge knows I'm not a square dealer with him. And I'd rather pay $250 than go down there with a frivolous claim where I'm arguing with the judge and he knows I'm not in good faith, because when the rulings come up the judge is going to consider the source, and I'm not a

good source anymore. So there are other sanctions besides money that is involved here that is written into our system and not necessarily in the Rules.

And lastly, I think the Committee's report and Tommy's recommendations get to the same thing, to discourage, because the Committee recommendation says, "Okay. You can file," but they dull what they can do. It's like saying you have got a gun, but you're shooting with blanks if you start filing these. You know, you can engage, because they're disarming the motion as I understand it. They're doing a lot of disarming. In Tommy's it just says you just can't file it unless you get an order; and so they reach the same thing. Now, how effective one is as to the other, I don't know. That's it.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: Well, let me make an observation here, because as I listen to the discussion I am very much in sympathy with the spirit of Tommy's proposal, but I

also think it is very important to keep it simple and to express the fundamental principles that are involved more than the particulars. It is ironic to me that the standard for setting aside a default judgment has three elements which can be expressed in a single sentence. We only litigate two of them ever, and usually just one of them. One of them may be unconstitutional in some instances, and there is some litigation over that subject; but it is pretty settled and it works out most of the time.

Here we have sanctions which are not nearly so dispositive of the case in most instances as default judgment is and yet we have rather extensive procedures on what is and what isn't and how to get there. And I worry that even if in trying to discourage sanctions writing a Rule that is more complicated doesn't send a signal to the Bar that this is something more to litigate and to fuss over in more cases.

So I do think we are moving in the wrong direction if we try to make it more complicated. If we tried to put all of this

in TransAmerican, the opinion never would have gotten written, and the reason is because I think as we sit around the table we can each think up myriad circumstances where we think probably sanctions should be imposed or maybe they shouldn't be; and the longer we talk, the more things we can think of, but the basic principles are being obscured it seems to me, and I may be oversimplifying the second part of Tommy's proposal, but it seems to me it is as simple as we mean to discourage both the requesting for and the imposition of sanctions to cases which really need it. And we're going to disagree about that a good bit, but if we try to define it more definitely than that, it seems to me we're just making a Rule that is going to be litigated more.

CHAIRMAN SOULES: Let's take 10.

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

CHAIRMAN SOULES: All right. Let's be convened, please. On the award of expenses that's in Tommy Jacks' draft I had

this concern, and maybe it's addressed and I just don't quite understand it, addressed in the repeated violation part of Step II, but if we're fortunate enough to be in millionaire litigation where one millionaire is in litigation with another or multimillionaire or a multimillion dollar company in litigation with another and the test for awarding fees in the first instance if we're to that point in our thinking is "unreasonably burdensome" in relation to the resources of that party, you know, a $10,000 or a $15,000 or a $25,000 award may not be unreasonably burdensome to those parties.

And if you have a situation where one of those parties and that party's counsel are playing by the Rules, staying within the Rules and conducting themselves accordingly, and the other party is not in the Rules but trying to stay close enough to the Rules not to get sanctioned, then the party that is behaving itself along the way may not be able to get attorney's fees for the other parties far reaching conduct, reaching way beyond the Rules. And I wonder if that's

really fair. I realize that this works for Steve Yelenosky's docket, but does it work in big litigation?

MR. YELENOSKY: Let me respond to that.

CHAIRMAN SOULES: Or is the idea we just in big litigation everybody can afford whatever they have to do and so be it.

MR. YELENOSKY: Before you answer that, there may be a misimpression there. I asked the question about how this would operate with Legal Services, because my concern was if you're looking at the party's resources obviously we would be awarded something, because the party's resources by definition if we represent them are nil; but then you would say, "Well, but that client is not paying Legal Aid, so there is no burden on them." And then you would shift to an analysis I guess as Tommy Jacks says of Legal Aid's resources.

But what I didn't get to say was we don't live or die by these discovery awards. I don't know that we really make much money off of an award of attorney's fees in a

discovery dispute, so I don't want that to be considered something that is essential to Legal Services. Obviously we want to be treated fairly, but there are perhaps other ways of dealing with this; and I'm sensitive to the criticisms this is hard to interpret.

MR. JACKS: Another thing that occurred to me that might be a way of accommodating some of the concerns that have been expressed is simply saying that if the amount of expenses including attorney's fees incurred in connection with the motion or opposition to parties seeking such relief exceeds $1,000 I picked that number, or is unreasonably burdensome, so you accommodate Stephen's clients, but you've got a bright-line watershed for everybody else. And then in the big litigation if it's less than $1,000 bucks, whatever figure you pick, they don't jack with it. But those to whom something under $1,000 truly is an important matter are still free to seek the attorney's fees. That would be another way of skinning the cat. And I'm not wed to any single approach. The goal simply is to lessen the

occasion, the frequency of the occasions for courts getting involved in the inquiry at all.

CHAIRMAN SOULES: Okay. Do the proponents of each of these drafts feel like we've fairly compaired them and contrasted them? Is there anything else to discuss as to how these differ and the thinking behind the differences? Sarah Duncan.

MS. DUNCAN: I'm in favor of Tommy's draft because of what I perceive to be the general rule in (b) that you don't get expenses or sanctions unless you make a special showing.

I would make a couple of suggestions though. It seems to me that a straight-up motion to compel should not take any of the trial Court's time; and I would propose that it be on written submission unless the Court decides the hearing is necessary. And as far as the satellite litigation I do not understand there to be a Constitutional right to discovery on every issue involved in a lawsuit, and I don't

understand why the Supreme Court of Texas is powerless to say, "No, we're not going to do that. If the Movant makes a prima facie showing that this is over $1,000 or unreasonably burdensome, then that's it. That's all we're going to have on that subject."

The other thing I want to point out, I mean, I've represented Exxon. I'm not unsympathetic to anybody who doesn't get what they're entitled to under the Rules, but there is a system cost and a cost to other litigants to letting everyone go into the court every time they've been done wrong no matter how small the wrong is; and I frankly am appalled that someone as bright as Scott Brister is spending as much time as he's apparently spending having oral hearings on things that are just too simple to warrant his time and to take time time away from other litigants who have serious problems that need a judge to decide.

HONORABLE SCOTT A. BRISTER: It doesn't take me long.

MS. DUNCAN: How long is "not

too long" if you've got five a week? I mean, I'm asking the question, Scott.

HONORABLE SCOTT A. BRISTER: For no response, less than 60 seconds. "Respond $250 unless you've got some reason you didn't do it." Usually they don't show up.

CHAIRMAN SOULES: Okay. Now, the first thing I want to ask is do we now have these fairly contrasted so that people feel comfortable with that? If so, then I think we ought to go to debating which or how to put the two together as they differ and try to get something concrete here to put into a final draft which will then be the subject of some scrutiny at the next meeting. Does everybody feel that we've contrasted the two well enough now that wanted to debate and talk about? And I'll get to Judge Peeples in just a moment.

What I want to move to is how does this Committee feel that the differences should be resolved so that the Committee has the guidance of this Committee's feeling about that, and we can get a next draft of the Rule

on the table that meets the Committee's directive for our next meeting. Does anyone have anything else to say about how these differ?

HONORABLE DAVID PEEPLES: That's what I wanted to talk about.

CHAIRMAN SOULES: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: I think that while the language is different I think in the real world these will operate in large part similarly because in Tommy's draft Sub (c) is going to create a lot of litigation about these little sanctions disputes; and I'm wondering if there is any -- I'm for radical change, and I'm wondering if there is any sympathy for going with Tommy's draft without Subsection (c). I thought Scott McCown and you, Luke, were sort of leaning in that direction in some of your remarks, but you didn't come out and say it. But as long as (c) is in Tommy's draft I think these will work very similarly, not the same, but in large part similarly.

CHAIRMAN SOULES: My concern

is over (c)(1). (c)(2) doesn't bother me. (c)(1) to me is -- I think (c)(2) takes care of the cases where (c)(1) really is going to operate anyway, and that (c)(1) is not that helpful.

HONORABLE DAVID PEEPLES: (c)(2) is an exception that goes a long way towards swallowing up the Rule.

CHAIRMAN SOULES: Discussion on Judge Peeples' comments? Judge McCown.

HONORABLE F. SCOTT MCCOWN: I think everybody that has expressed support for Tommy's draft has done so with the exception of (c)(1). So if he'd take out (c)(1), he might win; and if he leaves (c)(1) in, he's going to go down in flames. I'm wondering if he's interested in modifying (c)(1) or taking it out.

HONORABLE SCOTT A. BRISTER: You're back to really our Rule.

MR. JACKS: Did I win any friends by putting in the $1,000 so you've got the bright line? Did that help?

HONORABLE F. SCOTT MCCOWN: Yes. That helps a lot.

HONORABLE SCOTT A. BRISTER: We did discuss that last time.

CHAIRMAN SOULES: We did.

HONORABLE SCOTT A. BRISTER: That's where the first sanctions Task Force meeting we talked about that, and we talked about that subsequently that the price ceiling, price floor problem. If you tell people you've got to have a $10,000 claim to get into Federal Court, guess what amount everybody always has? $10,000. If you tell them you've got to have $1,000, guess what it's always going to cost to file a motion?

MR. JACKS: I agree. I agree. I think you're right. I think that suddenly the price of drafting goes up.

HONORABLE SCOTT A. BRISTER: Instantly.

CHAIRMAN SOULES: Okay. I think we're ready for a motion of some kind. Does anyone have anything formed in their mind where they could proceed to make a motion? Joe, do you want to make a motion to put on the table?

MR. LATTING: I move that we

adopt the Committee's version of this rule.

CHAIRMAN SOULES: A second?

CHIEF JUSTICE AUSTIN MCCLOUD: How about the reprimand?

MR. LATTING: With the reprimand language taken out of it, that is to say striking in 3(a) everything after the word "offender."

MR. HERRING: We had a discussion before we got back, just so Justice McCloud's position will be clear, that to solve the problem that the other judges were worried about this still would allow the warm, friendly discussion by the judge with counsel. It simply wouldn't be a reprimand and therefore wouldn't initiate the sanctions requirements procedures.

HONORABLE SCOTT A. BRISTER: Can we see that in a comment or something?

MR. HERRING: Yes. We can put that in the comment.

CHAIRMAN SOULES: So your motion is to accept the red line 116d that you delivered here today except to take out the language you just addressed under 3(a)?

MR. LATTING: And with those editorial changes that were reflected on the back page which are not substantive.

MR. MEADOWS: Joe, may I raise something on the order of an editorial change? And that is on page two where it is stated "reasonably justified in fact or laws" does that say anything more than "reasonably justified"?

HONORABLE F. SCOTT MCCOWN: Since the whole world is divided into fact and law.

MR. MCMAINS: That leaves out politics.

CHAIRMAN SOULES: Let me get a second, if there is one, to the motion, and then we'll take discussion. Is there any second to Joe's motion?

MR. HERRING: Second.

CHAIRMAN SOULES: Second by Chuck Herring. Now, discussion. Robert, you had started with one question.

MR. LATTING: May I respond to that?

CHAIRMAN SOULES: Yes. Please

respond, Joe.

MR. LATTING: I'm not sure that there is any difference, but what we wanted to do in this motion, and this goes to what Steve Susman said earlier, we are trying to discourage the filing of sanctions motions, and we're trying to make it clear in the way we wrote this that nobody is going to get sanctioned if they've got any kind of a reasonable basis for taking the position that they are, so we made it a little broader. We wanted to make it if you're justified either factually or legally, if you have a reasonable basis for that, you're not going to get sanctioned. It was an effort to do that. If you want to just say "reasonably justified," I wouldn't lose any sleep over that.

But the point here is that we feel like sometimes sanctions are necessary, that we're trying to discourage them except in cases where there has been unreasonable, unjustified behavior on the part of one side or the other. That's why we chose that language. It's not magical.

MR. SOULES: All right. Tommy,

I'm assuming. I'm assuming that Tommy Jacks would move to amend the motion by substituting his, what, Section (2) for the Committee's.

MR. JACKS: Yes. I think that's really where the heart of it lies. And Judge McCown has asked me if I'd be willing to amend my (c)(1), which seems to cause some controversy simply to say "is unreasonably burdensome" period for (c)(1) and leave out the business about the resources of the party to try to add some additional hurdle, but perhaps not as difficult a hurdle; and I told him that's something I'd be happy to do. It still is in the direction that I'm trying to go.

Really to try to bring this thing to a head, it is -- and then Joe's motion is on the floor, and we can take an up-and-down vote on that. But there are -- if the sense of the group is that they feel more comfortable but not entirely comfortable with the Committee's approach, but they think mine is too complicated and it's got this business in it about the resources of the party and that bothers them too, it does seem to me that

there is a way to work towards something that is a better blend of both than either one of these is; and that is if there were a restructuring of the Committee's rule to state as mine does in some clear way at the beginning that the awarding of either attorney's fees or expenses is to be the exception and not the Rule, and that whatever motion it is that you're filing and what you ask for has to state specifically what grounds it is you think entitles you to either attorney's fees or sanctions, and to swear to that part of it, and that build in some assurance that it's not de minimis amounts over which we're going to be quibbling particularly considering they're usually not collected anyway, then I think that can be done. I don't think that's a drafting challenge beyond our scope.

And I'm not trying to divert us from the task at hand of Joe's motion, but it does seem to me that the concern is legitimate that if all we do as a group, if all the Supreme Court does is to enact the Committee version, that we essentially are

institutionalizing current practice as well as current law.

HONORABLE PAUL HEATH TILL: Did he agree to take that out or not?

CHAIRMAN SOULES: I'm not sure. I wanted to see if you had any motion to amend, and if so --

MR. JACKS: To try to bring things to a head I move to amend Joe's motion by substituting for the Committee's Paragraph 2 my Paragraph 2 with one change, and that one change is to make (c)(1) in my Paragraph 2 read "the amount of expenses including attorney's fees incurred in connection with the motion or opposition by the parties seeking such relief is unreasonably burdensome."

HONORABLE F. SCOTT MCCOWN: Second.

CHAIRMAN SOULES: We've got a motion and a second. And I'm assuming that the amendment is not acceptable to the original Movant, so --

MR. LATTING: That amendment is not acceptable.

CHAIRMAN SOULES: Okay. So now then that's open for discussion. Let's discuss both motions at the same time and try to blend the two drafts in such a way so Joe's subcommittee will have guidance from us as to what we think we would approve at our next meeting. Buddy Lowe.

MR. LOWE: I just have a question and not a comment on that. Is this 164d to take the place of 215 totally? Okay. Because 215 even goes to talk about taking a deposition, and if they refuse to answer, what you may do and so forth. I think that this doesn't cover everything that is covered in 215.

PROFESSOR DORSANEO: They got other proposals for that.

MR. LOWE: Pardon?

PROFESSOR DORSANEO: It doesn't cover everything that 215 covers. There are other proposals in the report.

MR. HERRING: That one is covered in the comment.

MR. LOWE: Okay.

MR. HERRING: Here's what

you're dealing with, which is Rule 215 has a long laundry list, and we tried to simplify.

MR. LOWE: No. This is not in the laundry list. It says when taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. That just tells you -- I mean, I'm not verbatim on 215. I'm not an expert on the Rule, but it would appear to me that we would certainly need to make some -- we've made such an effort on determining sanctions and we've made sanctions the master until we need to be sure that whatever Rule we adopt does not omit certain things in 215 that are going to be taken as well. They've taken that out of 215. It's no longer the law, or some construction. We need to consider a little bit more dovetailing whatever we do with 215 so that it accomplishes everything that 215 did; and that's my only question.

MR. HERRING: And the way we have handled that specific point you raise, all of the violations in 215 are covered in this Rule and in the first paragraph or in the comment.

The procedure of the discovery of what you do during a deposition, the idea was that's not really sanctions. That comes out and goes into the Discovery Rules, into the deposition Rules and the like. And that is not yet before us.

MR. LOWE: That was my point though, if we go that and we just say. That's the reason I asked the question does this wipe out 215. I'm not disagreeing with that. We don't need to keep something alive that we intend to keep alive but kill it by ignoring it. And that was my only point. If we're going to put some of these things, there needs to be some attention to putting some of these things maybe where they belong. I don't disagree with what you're saying; but if we ignore them and they are omitted and we don't do them there and don't put them someplace else, people are going to say, "Well, that's no longer. You can't do that."

MR. HERRING: That's right.

MR. LOWE: So I would just raise that point.

CHAIRMAN SOULES: Chuck, in

your Task Force Report do you address that somehow saying where these other provisions of Rule 215 will be placed?

MR. HERRING: Yes.

MR. SOULES: Where is that covered?

MR. HERRING: You really don't want to cover all that today, Luke. But trust me on that. There are a whole series of other provisions that have been pulled out and proposed as different subparts of other Rules, and those are in the back of the Task Force report. They're discussed at length, but most of those that are pulled out, for example, the Rule 169 request for admission procedure that formerly was in Rule 215, most of those our view was that the Discovery Task Force and Discovery Committee of this group were going to have more jurisdiction over this.

So it's back there, but I really think that's Discovery and not Sanctions at this point.

MR. LOWE: I understand. But I think we need to make clear what we intend to come out of Rule 215. I mean the laundry list

will come out. We need to make clear what we intend to come out of 215 and what we intend to keep in 215 in some other rule.

MR. HERRING: I absolutely agree. But you can't do it all in this one Rule. And we can trace all of those for you, Luke, if you'd like to, but that's I suggest a different subject.

CHAIRMAN SOULES: Right. I'm just trying to determine where it is in the report so that I can direct the members of the Committee to that point in the report, if you can help us.

MR. HERRING: Well, Luke, look at appendices in terms of what makes it into Task Force Rules as opposed to sanctions rules as opposed to going into the other discovery Rules. Look at Appendices D, E, F for other provisions that were pulled out of 215 and suggested those ought to be someplace else. And then the Task Force report will have recommendations on those provisions.

CHAIRMAN SOULES: D, E and F. Appendix D it's about halfway through the book. The page says Appendix D, and I guess

followed by E and F, that's where this is.

I don't think we have to do this now; but I do think we need to do it before we leave, 166d we need to decide whether we're going to change a policy that was adopted in 1984 to put all sanctions in one order, for example, the sanction of automatic exclusion of the witness for failure to supplement.

MR. ORSINGER: In one Rule you mean?

CHAIRMAN SOULES: In one Rule the sanction of deemed admissions if they're not responded to. That's the reason that 215 is comprehensive.

MR. HERRING: Those sanctions are in here, Luke. Look at provision 3, the sanctions provision of Rule 166d, the draft that you have in front of you today.

CHAIRMAN SOULES: All right. Does this include the automatic sanctions of deeming?

MR. HERRING: No. Not Rule 169, the Request For Admissions Rule, which the Task Force concluded it should be in that

Rule. It should not be in Rule 215.

CHAIRMAN SOULES: That is a policy change from ten years ago, and we probably need to talk about that when we get through blending this first part. Richard Orsinger.

MR. ORSINGER: I'd like to ask for a clarification from Chuck. Did you-all intend to make it discretionary with the trial Court whether or not to exclude an undisclosed witness? Because the way I see the Rules that's mandatory now subject to good cause findings. But if your proposed Rule replaces Rule 215, then it goes back to being discretionary with the individual trial judge.

MR. HERRING: No. What you then need to look at if you want to talk about exclusion of witnesses is --

CHAIRMAN SOULES: Appendix D.

MR. HERRING: What is it, Luke?

CHAIRMAN SOULES: Appendix D.

MR. HERRING: D.

MR. ORSINGER: Well, then we get back to your point, Luke, which is that

all of the sanctions are not mentioned in the same Rule, which I'm not sure that I have a problem with that, but that's in fact the case.

CHAIRMAN SOULES: Yes. We do need to discuss that. So the automatic sanctions are not in 166d.

MR. HERRING: The experts and the disclosure of witnesses was going to be put the way the Task Force had organized it; and again we're organizeing in a vaccuum, because we haven't received anything from the Discovery Task Force to know where they wanted to put that stuff. But our idea was we would have the Sanctions Rules here, the experts, the automatic exclusion that results from the failure to timely supplement or timely designate, those would go in whatever the Rule was that that was the requirements on designation or supplementation. And as you point out, you'll see Appendix D has the language on the experts.

And there is another change we can talk about later or whenever we get to it. Even our Committee has not gotten to

that; or the Committee of this, Joe's Committee has not gotten to that either, but that's not in Rule 215. That was considered to be more properly in the Discovery Rule which we don't have, but wherever that Rule would be dealing with how you handle witnesses and disclosure of witnesses in response to discovery. What happens if you don't do it we thought ought to be there.

Now, that's not to say that some conduct in connection with that couldn't result in sanctions, because obviously it could if you get into a failure to answer interrogatories as we've talked about.

CHAIRMAN SOULES: Well, let's go forward with an effort to blend the two to the extent the Committee wants to blend the two drafts, I guess, by taking it a step at a time.

MR. LATTING: Luke, I have an area of agreement with Tommy that I would be amenable to.

CHAIRMAN SOULES: All right.

MR. LATTING: And see how the other members of the group feel. I wouldn't

object to a requirement in the motion for sanctions that it be sworn to, and I would not object to a requirement that it state specifically those things that are sought to be sanctioned. I don't object to making this a more serious matter to file such a motion, so I personally -- that's just speaking for myself -- would not object to that.

MR. HERRING: I'd certainly agree with that.

PROFESSOR ALBRIGHT: We were just talking here about -- I was just going to make another amendment. I didn't know whether it would be procedurally proper to do so. But if you take Tommy's 2(e) which is at the bottom of page two, and you insert it as new Paragraph 4 on page 2 of the Subcommittee's version so it would read Number 4, "A motion to compel or quash discovery, or a written opposition to such a motion, that also seeks either recovery of expenses, including attornyey's fees, or imposition of sanctions shall so state and shall be supported by affidavit evidence describing specifically the acts or omissions constituting circumstances

justifying such award."

MR. LATTING: This is Joe Latting. And I don't believe I'm quite ready to go that far; however I would agree that we have to assume that there have to be special circumstances.

PROFESSOR ALBRIGHT: I took "special" out.

MR. LATTING: I want to think about the grammar in connection with that.

HONORABLE SCOTT A. BRISTER: Couldn't you just add "sworn" on the first sentence of Paragraph 1(a) before "motion"?

MR. MEADOWS: Sworn Motion specifically.

PROFESSOR ALBRIGHT: That means your motion to compel has to be sworn also.

HONORABLE SCOTT A. BRISTER: I thought that's what you were saying.

MR. LATTING: That would meet the Susman requirement. The Susman, that's one word instead of a paragraph.

PROFESSOR ALBRIGHT: So you'd have either a sworn -- you'd have to have a

sworn motion for either a motion to compel or a motion for sanctions.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I don't mind having something stated specifically in terms of a particular misconduct that is supposedly sanctionable; but just requiring something to be sworn or supported by affidavit in the sense of a general verification practice is a step backwards, not a step forward. We ought to get rid of that all together rather than to require it more often.

JUSTICE HECHT: You can hold them in contempt. Why do you want the DA to indict them?

MR. LOWE: You're already signing a certification anyway.

MR. LATTING: I'm not enthusiastic about it, but I'm trying to accommodate making it more difficult so that we'll quit taking filing these motions so lightly so that these silk stocking law firms will have to think even three times before

they send their minions down to file sanctions motions.

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT MCCOWN: I'm not sure I believe that lawyers think before they sign affidavits; and I agree with Bill Dorsaneo that when you swear to something it ought to be a very serious event. So I understand what Tommy is saying, "Well, let's make them swear to it and that will be a serious event." But when you ask people to sear so often as we do in our Rules, instead of making it serious, it makes it trivial so that the oath become less and less and less of something that carries any weight. So I think I'm against asking them to swear to it.

CHAIRMAN SOULES: Maybe we can get that done by a consensus. How many feel that a motion for sanctions should require to be sworn? How many feel it should not? That's about 10 to 4 against having the motion sworn. Unless somebody has any strong feelings about that, I think we'll go on to some other issues. Sarah Duncan.

MS. DUNCAN: I'd just like to ask if you really mean in the Committee's Paragraph 2, the top of page 2, that if a motion for sanctions that is reasonably justified in law but not in fact is all right. I mean, it says "Shall not award expenses if the unsuccessful motion or opposition was reasonably justified in fact or law." Don't you really want it "reasonably justified if fact and law"?

MR. LATTING: Okay.

CHAIRMAN SOULES: Either that or leave it as suggested earlier to put a period after "justified" and drop the other three words.

MR. LATTING: I'm for that.

CHAIRMAN SOULES: How many? Let's get a consensus. On page two of the Committee draft how many favor dropping the words "in fact or law"? Those opposed? That's unanimous to drop the words "in fact or law." Bill Dorsaneo.

PROFESSOR DORSANEO: Mr. Chairman on the exact same language, I would like guidance as to why the Committee decided

to abandon the standard language that is in our current Rule 15 that was copied from Federal Rule 37 that talks about substantial justification or substantially justified; and I would like to know whether the Committee believes that "reasonably justified" is a lower standard than "substantially justified."

MR. LATTING: The answer is, yes, we felt it was a lower standard. And the reason we did it was to meet the objection that -- actually it's Buddy Lowe's issue, and that is we don't want somebody getting sanctioned because he didn't have a substantial justification for doing it. We want it clear to the trial Courts that they're not to sanction people if there is any reasonable justification for a lawyer's action. It seems like, it sounded like a lower standard to us, and we believe it is lower.

MR. HERRING: Someone said at the Committee that it sounded as though you had to win to avoid sanctions, that if you were substantially justified you should have

won. And the choice was simply that, to try to respond to that objection. I don't think it's particularly important. I think it's about 12 or 11 angels on the head of the pin there myself.

PROFESSOR DORSANEO: I'm not impressed with any of that justification for abandoning relatively standard language that is understood across the country to mean the equivalent of not just logically justified, but reasonably justified under the circumstances.

MR. LATTING: Well, we drafted this for East Texas as well.

PROFESSOR DORSANEO: I think we could learn the meaning of the same language that other people use.

CHAIRMAN SOULES: Okay. Let's stay on this subject until we get it resolved. Richard Orsinger.

MR. ORSINGER: I was just comparing the "reasonably justified" to the language in Rule 13; and the standard as I understand Rule 13 is "groundless," and I think Rule 13 applies to these motions whether

we have an internal provision in this Rule or not.

MR. MCMAINS: Correct.

MR. ORSINGER: And to me "groundless" is probably even I guess it would be a higher threshold. In other words, you would have to show even more extreme impropriety for something to be groundless than for it to be reasonably justified. So it's like "substantially justified" would be the highest burden to avoid punishment, "reasonably justified" a little lower and "groundless" even lower.

MR. LATTING: I agree with that.

MR. ORSINGER: But maybe we ought to make a conscious decision here about why the Rule 13 standard which applies to everything we do is not the standard we ought to be using here, and maybe it shouldn't be. Maybe we ought to discuss that. And "groundless" is defined as having no basis in law or fact, which I think will eliminate Sarah's grammatical problem. And "not warranted by good faith argument for

extension, modification or reversal," well, in Lunsford when they did their discovery for the net worth of the Defendant that means they would get sanctioned because before that case there was no basis on which you could do the discovery of the net worth of the Defendant before you had the judgment. So the Plaintiff's lawyers in Lunsford are going to get sanctioned under this Rule because it's not substantially justified unless you include arguing an extension of the law; and so I don't know that there aren't some features of Rule 13 that we shouldn't be either adopting verbatim or at least considering.

HONORABLE F. SCOTT MCCOWN: Well, I think you've miss -- there is two steps in 13. It has to be groundless and brought in bath faith.

MR. ORSINGER: We could use the term groundless is what I'm saying, the definition of "groundless" instead of the definition of "reasonably justified"; and maybe that doesn't include enough activity.

HONORABLE F. SCOTT MCCOWN: No. "Groundless" is a de novo right or wrong

test. It is either right or wrong; and "reasonably justified" is close to the mark, but not on the money. It's you hit the target but not the bull's-eye.

CHAIRMAN SOULES: I think Richard is right. Rule 13 does apply to filed discovery, but the threshold for sanctions for discovery offenses is lower than the threshold for sanctions under Rule 13.

HONORABLE F. SCOTT MCCOWN: Right.

CHAIRMAN SOULES: You can cross both thresholds and you can get into a Rule 13 problem; but even if you don't cross the second one, under the present practice you're still subject to sanctions in discovery for crossing the first threshold.

HONORABLE F. SCOTT MCCOWN: Right.

CHAIRMAN SOULES: Do we want to leave it that way, or change it?

HONORABLE F. SCOTT MCCOWN: Leave it that way.

HONORABLE PAUL HEATH TILL: Leave it that way.

HONORABLE F. SCOTT MCCOWN: And I think "reasonably justified" captures it real well. The fact that there is case law about what "substantial justification" means I don't think fits with the words. The words "substantial justification" has a particular connotation when you read it that's very different from the words "reasonably justified."

MR. LOWE: I was just going to say before you brought it up that, and it's a housekeeping matter, that when Rule 13 refers to 215(2)(b), I mean, when we need to make a note that we change to go to the new Rule and to -- if there is some portion of 215 still applicable, we need to.

MR. HERRING: That change has been made in the draft of Rule 13 which we'll some day get to.

MR. LOWE: Oh, okay.

MR. HERRING: No. You're right though. That's another correlation.

MR. LOWE: I just didn't want to overlook it. That's all.

CHAIRMAN SOULES: Anything

else on whether the words in proposed 166d(2) on page two of the proposed draft where the red line shows the words "reasonably justified" being substituted for "substantially justified"? I think the standard then we've got three different concepts on what the standard would be. One is "groundless," the next "substantially justified," and then the third one is "reasonably justified." Is there any further discussion from anyone on that? I'm sorry. I didn't see you. Rusty, go ahead.

MR. MCMAINS: I just have the one question about what, and maybe the Committee hasn't focused on this issue. But does -- if you use terms like "reasonable," those mean something mostly to lawyers in terms of negligence. So the question I have is can you negligently fail to file discovery and still be reasonably justified -- I mean, fail to respond to discovery and still be reasonably justified? That seems to me to be very contradictory, which I guess is part of what I think Bill may be getting at, maybe not.

But are we trying to say that

negligence and inadvertence is okay? We're back to the default stuff, I guess, in terms of that comparison of that standard too. Or if you're negligent in the position you take or negligent in acquiring the information or not acquiring the information necessary to take the position that you are taking, is there a basis? Is that a reasonable justification or not a reasonable justification assuming that it is negligent?

CHAIRMAN SOULES: How can something be unreasonably justified?

HONORABLE F. SCOTT MCCOWN: Well, could I answer Rusty's question?

CHAIRMAN SOULES: Anne, go ahead. Anne Gardner.

MS. GARDNER: I was just going to comment on that reasonably in comparison with the default standard for extending time to file a statement of facts on appeal, for example, you can have a reasonable explanation according to the standard and still be negligent as an attorney, so...

MR. MCMAINS: Well, that's right. But it says -- but we have

specific -- we add a bunch of language saying inadvertent, and at least the case law.

MS. GARDNER: The case law defines.

MR. MCMAINS: But we don't know -- but that's not a definition of "reasonable." That's a definition explanation. And the question is whether or not "reasonable justification" is the same thing as a "reasonable explanation." And if in fact it is, why don't we say the same thing if you want to import the case law and say the same thing.

HONORABLE F. SCOTT MCCOWN: Rusty, the answer is that "reasonably justified" is an affirmative defense that's pled by the lawyer that when he proves it you can't award sanctions against him. So if he's negligent, he may plead negligence as a defense, but that's going to be a throw yourself on the mercy of the court. The Court is going to consider whether that negligence is or isn't going to be excused. If he's reasonably justified and he pleads and proves that, then it's not a mercy of the Court.

It's an affirmative defense. Sanctions cannot be awarded. That's the difference. And the Rule makes that distinction by saying "shall not award expenses if it was reasonably justified." So if you've got reasonable justification you're home free. If you've got mere "I forgot" or "I was sick," then you're into the mercy of the Court.

CHAIRMAN SOULES: Anything else? All right. How many feel that the standard here should be "groundless"? No votes. How many feel that the standard should be "reasonably justified"? I believe that's 17. How many feel that the standard should be "substantially justified"? All the votes that voted favored "reasonably justified" then. Okay.

MR. ORSINGER: Luke, can I follow up on Scott's observation?

CHAIRMAN SOULES: Yes, sir.

MR. ORSINGER: I don't see anything about this Rule that indicates that is has to be pled or proved by anybody; and I think that in my view it's something that the Court should determine based on whoever

decided to offer evidence. If we do want to put a burden to plead and prove, then we ought to include some more words.

HONORABLE F. SCOTT MCCOWN: That was metaphorical language.

MR. MCMAINS: That was a lie actually.

CHAIRMAN SOULES: So that we have a record on that, is it the consensus of the Committee that there is no burden to plead or prove reasonable justification just as it may develop in the course of a hearing or a written submission? Is that the consensus? Anyone opposed to that? Okay. That record is made. It is the consensus that no pleading or proof is necessarily required.

MR. MCMAINS: Do you want to make the comment? I mean, do you want to put a comment or amend the comments in order to make clear that the burden on the motion for sanctions is on the Movant?

MR. HERRING: We can certainly do that.

MR. MCMAINS: I'm just wondering if that --

MR. HERRING: Obviously the motion has to be filed and it must specifically describe the violation; and obviously the Court cannot impose the sanction unless it is just, so the Movant as a practical matter is going to have to meet that standard, but we can certainly add something to the comment if you want to.

PROFESSOR DORSANEO: (Nods negatively.)

MR. HERRING: Dorsaneo is shaking his head "no."

MR. MCMAINS: Well, all I was trying to figure out is if that -- if Tommy or anybody felt that maybe by making a comment that makes it clear that the burden throughout is on the Movant for sanctions, if that would in any way discourage.

MR. HERRING: We can certainly add it. You can't get sanctions unless you met these findings.

MR. MCMAINS: I understand.

MR. HERRING: And then the Court made the findings, so it's implied; but we could make it expressed if someone wants

to.

MR. MCMAINS: But there are lots of places in this Rule that go back and forth that have exceptions. And if Judge McCown wants to take the position that there is a shifting burden here based on the mere fact that there are exceptions --

MR. HERRING: He's a metaphorical guy.

MR. MCMAINS: -- here and there, then you have a different -- then you have a legal question as to whether or not an exception comes into play at all if unless you have a continuous burden having been articulated.

CHAIRMAN SOULES: Any other discussion on that? All right. Let's go to --

MR. ORSINGER: I do have another comment.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: The phraseology there on motion unless -- "if the uncussessful motion or opposition"; and I'm wondering if we

have any trouble when someone just fails to make discovery but doesn't file a formal objection. And the example was given if someone who doesn't file answers and then you file a motion to compel, and as one judge suggested sometimes they don't even show up to defend that. Is that included in the phrase "motion or opposition," or do we need to add?

MR. HERRING: If they don't show up, that's what is known as unsuccessful opposition.

MR. ORSINGER: Well, the failure to file answers to interrogatories that means opposition and therefore you can award fees?

MR. HERRING: A motion to compel is what this deals with; and so if they don't oppose and they don't show up to oppose it, they have not successfully opposed it.

MR. ORSINGER: Okay. Okay. That means doing nothing constitutes opposition. As long as we all understand that, that's okay, because that's not what that word normally means.

MR. LATTING: Well, it refers

here to the opposition to the attempt to impose sanctions and --

MR. ORSINGER: No. I don't agree, because sanctions come under Section 3 and I'm really focusing on attorney's fees on a motion to compel --

MR. LATTING: All right.

MR. ORSINGER: -- when someone fails to do anything; and we either need to agree that failing to do anything is opposition and you can recover your fees, or we need to put some words in there that even if they fail to do anything, you can still get your fees on a motion to compel.

MR. HERRING: Well, I think logically, I mean, if they don't show up at all in the opposition, they're not going to win on the opposition if they have any; and that's a situation where the fees ought to be appropriate. It doesn't seem to me like we need to add language to say that.

MS. DUNCAN: I think the problem though is that you have used "motion," a noun, and right next to it is "opposition"; and I think that's why Richard and some other

people are reading opposition as a noun rather than opposition as the verb that we're implying it to be, so maybe if you changed it --

MR. HERRING: I mean it as a noun too.

MS. DUNCAN: No. You're using --

MR. HERRING: The question is if you don't show up, is that opposition? And I would just propose the legislative record be sufficient here that we indicate, yes, if you don't show up, that's within the scope of opposition. We can add a comment to say that that's what it means, if anyone thinks that's a significant ambiguity.

CHAIRMAN SOULES: What's the concern here?

MR. ORSINGER: If somebody fails to answer interrogatories and a motion is filed and then the guy goes down there and says "He's right, you know, I should have answered these interrogatories, I really have no opposition to that," the punishment is really for not filing the answers to

interrogatories and necessitating the filing and setting of a motion. It's not so much the fact that you've showed up and argued against the motion; and to me it's the failure to make discovery or it's the decision that you consciously made is what the sanctions are for and not the position you take in the hearing; and maybe this is irrelevant, but the wording to me is a little difficult because it assumes that you have a moving party and an opposing party at a hearing each of whom are advocating some view that the judge is going to rule who is right and who is wrong, and that doesn't cover every situation.

MR. LATTING: I think it's moot, isn't it, because what is going to happen is the guy shows up who doesn't answer the interrogatories, and Judge Brister imposes -- he ignores it. He imposes $250, and there is no opposition to that. Nobody is ever going to hear that. It will never be heard from again; but he does oppose the imposition of that fine. In Case 2 if he opposes it and loses that, it's unsuccessful opposition. So there's got to be some

opposition for this ever to be heard from.

MR. ORSINGER: Well, am I reasonably justified in opposing the amount of fees that they're requesting even though I may not have been reasonably justified in failing to file my answers? It seems to me that we are confusing what we're sanctioning. We're sanctioning the improper discovery behavior, not the position you take in the courtroom.

CHAIRMAN SOULES: All right. Let me in addressing that if you look at the structure of this Paragraph 2, it says in its beginning what the Court may do, and this last clause says what it cannot do. In other words, the Court can award sanctions against a party who does not answer, but this last clause says where the Court cannot award sanctions or award fees.

I don't know if I'm making myself clear, but this doesn't say the Court shall not ward expenses if there is no answer. This last clause assumes that there has been a motion and an opposition, a motion or an opposition and then speaks to that situation only and not to the situation where

there has been no response or perhaps even a nonappearance at the hearing.

MR. ORSINGER: Okay. I see what you're saying.

CHAIRMAN SOULES: It could be that it would be better to split this sentence to say "The Court may enter these orders without any finding of bad faith or negligence. The Court shall not award expenses" so that they're not joined grammatically as they are now. I don't know if that -- I don't know whether I'm reading this right or not, but that's the way it seems to me on this same thing.

PROFESSOR DORSANEO: I think you're reading it right, except it's curious to me that the very last part is where it is, "or other circumstances make an award of expenses unjust." That would seem to be so without regard to whether there was an opposition, and that kind of almost seems to go up or to talk about the same thing that is talked about in the third sentence. "Unless circumstances suggest such award may preclude access to the Courts" is kind of a specific

example of something being unjust under the circumstances. Am I off base there, or is that last thing in the last sentence a separate thought?

MR. HERRING: We certainly could move it. I think the reason it's there is because we wanted to emphasize. I think I like Lukes idea of breaking the sentence up. I think it makes it a little clearer.

MR. LATTING: To read how?

MR. HERRING: So you'd have a period after "negligence" and then say "the Court shall not award expenses if the unsuccessful motion or opposition was reasonably justified or other circumstances make an award of expenses unjust." Any opposition to that?

CHAIRMAN SOULES: Any discussion now about the --

MR. LATTING: I kind of hate to go back to this, but I think Richard may have raised a point that got me thinking. Are we really needing to talk about the unsuccessful party or attorney rather than the unsuccessful motion or opposition?

MS. DUNCAN: Movant or non-Movant.

MR. LATTING: Is that why we're all kind of being quiet about this? Maybe you're right.

PROFESSOR DORSANEO: He's not right.

MR. LATTING: He's not?

MR. HATCHELL: And seldom is.

MR. ORSINGER: It won't be the first time I've not been right.

PROFESSOR DORSANEO: It's in the first sentence.

MR. HERRING: Look at the second sentence --

PROFESSOR DORSANEO: Second sentence.

MR. HERRING: -- of the paragraph.

MR. LATTING: That being where? On the first page?

MR. HERRING: Yes. "In addition so long as the amount involved is not substantial the Court may award the prevailing person or entity reasonable expenses necessary

in connection with the motion including attorney's fees."

MR. LATTING: Okay. I stand corrected.

MR. ORSINGER: Are we assuming the award is necessarily against the opposing party and not against the opposing party's lawyer, right?

MR. HERRING: Are we assuming that?

MR. ORSINGER: Or does it say?

CHAIRMAN SOULES: That's taken care of somewhere in here that sanctions can be awarded against either, isn't it?

MR. HERRING: Yes.

MR. ORSINGER: Okay.

MR. HERRING: Paragraph 1(c), "An order under this rule shall be in writing. And order granting relief or imposing sanctions shall be against the party, attorney, law firm or other person or entity whose actions necessitated the motion."

MR. ORSINGER: Okay. I'm with you.

CHAIRMAN SOULES: All right.

What's next on this Rule?

PROFESSOR DORSANEO: I almost hate to say it, but I don't like this "substantial" out in the air. The comment talks about -- I'm talking about the second sentence of that same paragraph, "so long as the amount involved is not substantial." I say to myself, "I wonder what that means?" The answer is "go read the comment." The comment says that substantial can be substantial absolutely, which I would guess means different things absolutely to different people, so it's a relative absolute, and --

MR. MCMAINS: Metaphorically speaking.

PROFESSOR DORSANEO: And then it talks about something in relation to the resources of the party or person to be charged with the expenses.

MR. LATTING: Where are you looking?

MR. HERRING: Let me show you the comment he's talking about. The comment says this if you'll read it completely, that provision. "As long as the amount of the

award is not substantial, then those requirements, the oral hearing and the findings and the like do not apply. These additional safeguards are required however unless waived by agreement if the amount involved is substantial either in absolute terms or in relative terms taking into account the financial resources of the person or entity liable."

Now, he is correct that I think there is a logical problem with the notion of absolute terms. What does that mean? Well --

MR. LATTING: $1,000.

MR. HERRING: And here's the reason it ended up that way. I'll tell you the origins of that. Part of the problem was to try to get away from the Lunsford problem that we talked about with Tommy's draft and the other part of the Rule. Either you could have a bright-line, $1,000, $250, $500 which wouldn't be fair again with the indigent litigant kind of situation compared to the IBM perhaps, so you needed to have a flexible standard. There was some sentiment though

that at some point the number just gets large enough that even if in relation to the party's financial resources it was not a large number, $10,000 maybe, whatever it is, it's big enough that that stuff ought to come into play. I think that's logically inconsistent in my own view, that the consistent approach is to say if the amount involved is substantial in relative terms taking into account the financial resources of the person or the entity liable, but that opens the can of worms of are we dealing with IBM, or are we dealing with an indigent? So that's the background of it.

MR. ORSINGER: What page did you read from?

MR. HERRING: The comment under Paragraph 2.

MR. ORSINGER: No. On your Task Force Report weren't you reading?

MR. HERRING: No. From the comment to the Rule which is in the appendix.

MR. MCMAINS: Yes. It's not on the thing they handed out.

CHAIRMAN SOULES: That's got

to be in the Task Force Report.

MR. MCMAINS: It's in the Task Force Report.

CHAIRMAN SOULES: It's not in this four-page handout.

MR. HERRING: We had a version the last time at the last meeting that had the comment as well, but it's in the Task Force Report if you'll look at the version of the Rule there and the comment Paragraph 2.

CHAIRMAN SOULES: Okay.

HONORABLE F. SCOTT MCCOWN: Luke, this is an issue that we did talk about last time; and I'm really convinced this is a serious mistake, because all it does is take what ought to be simple, easy to apply Rules and make them complicated and expensive to apply. When you couple that with the fact that when it's not substantial you still now you're not only making a procedural ruling, you're making a Constitutional ruling, because you have to decide whether that might preclude access to the courts. I mean, it would be easier to say it applies in every single case, or it would be easier to pick a number of

$500, but to have this is simply to invite litigation at the trial court and appeals in the appellate court. It's crazy.

PROFESSOR DORSANEO: I vote for $500.

MR. JACKS: I turn it down.

CHAIRMAN SOULES: Judge Brister.

PROFESSOR DORSANEO: Too much.

MR. ORSINGER: I see that, and raise you $200.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT A BRISTER: You'll go around the table. It will be different in small towns than it will be in the city. If you suggest a number, and everybody bids a dollar lower or a dollar higher, because that will put them onto this track or that track. You create all kinds -- I don't think it's a problem. Everybody knows $10,000 is a lot of money, even if it is Exxon; and all we're talking about is should there be a record of it.

Everybody knows $250 in the vast majority of cases there is no reason to have a record of it. The rule though has to be vague for some in the middle.

As a trial judge the obvious message is if there is any question, just make a record. If somebody comes in and claims it's substantial, I'm not going to do some Lunsford hearing on that. I'm just going to have a record, but that's all I have to do is have a written order. I'm not going to have any collateral litigation about whether it's substantial or not. If somebody says it is, and we put that in the rule by saying "or an objection suggests that it may preclude action," if somebody says it's substantial, I'm going to go through the Part 3 section; but unless anybody says something and unless it's something on the face that looks like it, we're going to do it the easy way until somebody says different.

I don't think it will create any collateral litigation because of the fact that it's vague. I think it has to be vague, because otherwise a Rule that works in the

county won't work in the city, works for this party, won't work for that party. You just can't write a Rule for everybody any other way.

CHAIRMAN SOULES: Are you suggesting that preclusion of access to the court is what "substantial" means?

HONORABLE SCOTT A. BRISTER: No. That's one thing that is could mean.

CHAIRMAN SOULES: What does it mean, "substantial," in this context?

HONORABLE SCOTT A. BRISTER: Well, if somebody comes in and says "I went to hit Owens/Corning, for example, for a million dollars, that's substantial, and that judge needs to put on the record why he's doing it; and that's exactly what the Supreme Court has said even if without -- I don't know how much Owens/Corning is worth, and I'm not going to get into it. But if it's a million dollars, it ought to be on the record so we can take it up and people can look at it. That's all I'm saying, and I think that's what the Rule does.

CHAIRMAN SOULES: All right.

Those people that are concerned about the word "substantial" what suggestions do you have? Bill Dorsaneo.

PROFESSOR DORSANEO: Well, I suggest -- I have two opposite suggestions. One would be to pick a number, and the other would be to say substantial in relation to the resources of the party or person charged with the expenses. I just don't like it to be so vague that I don't know how to deal with it unless I go find the comment, which I guess will be able to find in the rule book maybe than it is to find here in the report.

HONORABLE F. SCOTT MCCOWN: Clarify again. What is the difference in if it is substantial, what happens? And if it's not substantial, what happens?

HONORABLE SCOTT A. BRISTER: You have to have it on the record, the hearing you have to have the order stating the reason why less restrictive, et cetera on the record or in writing.

HONORABLE F. SCOTT MCCOWN: Why don't we just do all of them that way?

MR. LATTING: Because it's too

burdensome for the judge.

HONORABLE F. SCOTT MCCOWN: It's not hard.

CHAIRMAN SOULES: In our county the judges don't read the motions or the responses. They think that it takes more time to do that. I believe that is the justification for it, than to just get the lawyers up, "give me five minutes, what is your position and what is your position on this" and run through it, they make a ruling and it's over.

I don't know whether hearings are really more burdensome than written submissions, because they --

HONORABLE SCOTT A. BRISTER: I couldn't agree more, but there are some of my fellow judges in Harris County that don't want an oral hearing for nothing. You know, I mean, I'm sure you do as well, some people like the Federal deal where you just see paper and no people.

PROFESSOR DORSANEO: People talk back.

CHAIRMAN SOULES: Anything

else on this?

HONORABLE F. SCOTT MCCOWN: Well, to the extent that what we are trying to do is to discourage this practice, requiring an oral hearing I suppose might do that to some extent.

HONORABLE PAUL HEATH TILL: Can't the Court go ahead and require an oral hearing if you want it?

CHAIRMAN SOULES: Well, in San Antonio they do, but you don't ever get a motion. Nothing gets heard until unless there's a summary judgement or something like that where the Court is focused on the fact that it's got a decision that it has to make, and it's going to take time, and that may get submitted in writing; but in San Antonio that motion is not going to come to the surface until you're before the Bench and address the Court. It just won't happen.

MR. ORSINGER: That's true in Austin too.

CHAIRMAN SOULES: That's the way it works.

MR. ORSINGER: That's the way

it works in Austin too.

CHAIRMAN SOULES: He says Austin the same way.

MR. LOWE: In Beaumont if you don't file a motion for the hearing, the judge isn't going to pay any attention. The paper will be there.

CHAIRMAN SOULES: Now whether we want to require the Court to go through all the hoops --

MR. ORSINGER: Can I comment on that?

CHAIRMAN SOULES: -- of a TransAmerican hearing in order to give ordinary sanctions that is built in, once you pass the threshold of, quote, "substantial", whatever that is, then you have got to meet the TransAmerican standards, and TransAmerican and the United State Supreme Court cases behind it they're really talking about sanctions that are at least to some extent dispositive of the litigation, preclusive of access, striking the pleadings and that sort of thing. So that's not Constitutionally required to go through those hoops in order to

cover a $250 award of fees.

So we are really talking about significantly changing how this Rule works from the way it's drafted right now.

HONORABLE SCOTT A. BRISTER: I was just reading back what TransAmerican suggested or in Street or in one other case about $250 or $950 attorney's fees. Those specifically said we're not saying you have to do it or we weren't addressing that situation in those cases whether small attorney's fees, so again just reflecting back the language of what the Supreme Court has already decided.

MR. ORSINGER: I think the whole purpose of having Paragraph 2 is to permit the Court with relative ease to reimburse someone the cost of a valid discovery hearing or motion without having all of the extraordinary safeguards from when you're going to be suppressing evidence, striking pleading, entering default judgments or assessing large sums that are out of proportion to reimbursement. And I think it would be going in the wrong direction to require a lot of rigamarole just to award

reimbursement for attorney's fees on a motion to compel. I'm not that worried about having the word "substantial" dangling there, especially if we protect it in the comment, because I think that over a period of time the Courts are going to articulate when some judge went so far that he went beyond reimbursement and became substantial without offering the procedural safeguards that "substantial" should require.

On the other hand, I don't oppose defining "substantial" so that we can eliminate all of that litigation, but I really think we can trust the trial judges to know the difference between a Constitutional dimension sanction and the reimbursement of fees even if we don't define it.

PROFESSOR DORSANEO: Mr. Chairman, just trying to work through this, and I've tried to listen to Scott Brister's statement as to what would happen if somebody said or had the temerity to say "this is substantial" at some point. You would have some sort of an after-the-fact hearing where you would justify the award of $5,000 and that

would take care of it?

HONORABLE SCOTT A. BRISTER: The order setting out the items in 1(c) on the record or in writing would have to be that way. And so the whole point of this TransAmerican stuff so they'll have something to review on appeal.

HONORABLE F. SCOTT MCCOWN: But is this an area though where we would have to worry about the variance in local practice like in some other areas? If we said $1,000, if it's going to be more than $1,000 you've got to do the formal procedure, because it's our judgment that in most cases if it's more than $1,000, you ought to look at it pretty carefully. That doesn't in any way prevent the local practice that says if it's going to be more than $200, you've got to do the procedure or whatever series of safeguards you want to have short of the full procedure. It just says $1,000, the full procedure. Less than $1,000, it's up to you. You can have whatever procedure you want. If you think a particular party at $200 needs protection of extra scrutiny, you can do that. So you've

got the local option. You've just got a rule of thumb statewide. $1,000 would seem to capture it for me.

PROFESSOR DORSANEO: It's almost like a traffic ticket kind of a notion. Kind of the burdens are reversed, and maybe you send in your money or you have a hearing. It's not worth the trouble except for your insurance. But, you know, I don't mind it if it's a relatively small number as a protective device. If it's a larger number or if it could be a larger number, then I agree with you. We should have more procedure.

CHAIRMAN SOULES: Let's deal with this problem. At some point in time, Justice McCloud, if it comes up between now and December 31st, 1994, or Justice Hecht or somebody is going to have to say, "Well, you've crossed the line. This was substantial, and you didn't hold a hearing, didn't comply with TransAmerican, and here's why." Why? What would they write?

PROFESSOR DORSANEO: Access to the Court is precluded.

CHAIRMAN SOULES: That's one

thing.

HONORABLE PAUL HEATH TILL: I thought your comment that it was dispositive of the case in essence. I mean, if whatever they did was such a nature and extent that it pretty well took care of the litigation, you know, whatever if might be, that would certainly be substantial.

HONORABLE SCOTT A. BRISTER: How is it going to come up, Luke? On mandamus?

CHAIRMAN SOULES: Probably.

HONORABLE SCOTT A. BRISTER: With $5,000, are they going to grant leave?

JUSTICE HECHT: You're getting back to a more fundamental idea. Unless it is only an incidental amount, there is something wrong with taking away somebody's money in the course of litigation without having an opportunity for them to say it ought not to have been taken away. And if it's an incident amount, attributable expenses, that's one thing; but if it gets any more than that, then it seems to me you have some due process right to say I shouldn't have to pay this.

PROFESSOR DORSANEO: In fact, the Supreme Court has said that, I think, in the criminal contempt context, and our statutes say the $500 number is the number, isn't it?

HONORABLE F. SCOTT MCCOWN: There aren't too many daily awards that are over $500, even rarer to be over $1,000. I think if we picked $500, we'd be pretty safe.

CHAIRMAN SOULES: What would be wrong with saying "award reasonable expenses necessary in connection with a motion including attorney's fees so long as it doesn't preclude access to the court?

HONORABLE F. SCOTT MCCOWN: Because that sets a Constitutional standard in every case; and how is the judge going to decide whether it precludes access unless he knows who the parties are, what their net worth are, what is the real amount in controversy as opposed to the pled amount in controversy, what is all the expenses that are already in the file, is this going to be the straw that broke the camel's back. He couldn't make an in-chambers decision on a

submission at that level.

MR. HERRING: Well, except you have the Judge Brister solution. If there is any question, you're going to get the hearing, you're going to go through the procedures and enter a written order. You always have to call it as a trial judge "On the safe side, give them the hearing."

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: As a practical matter isn't this a money judgment that would be collectable either when the order is signed or at the end of the case when the judgment is entered? Is that not what this award is? And if so, then how is it ever going to preclude access to the court?

MR. HERRING: Well, the compliance provision of the Rule, Section 4 which tracks the Supreme Court's holding in Braden v. Downey allows a judge to award sanctions unless they would -- monetary amounts unless they would preclude access to the Court. And if a party objects and says, "Hey, that will preclude access to the court,

then the judge cannot make the award effective before final judgment unless the judge makes written findings why it would not.

MR. ORSINGER: Well, let's say that the sanction is imposed on an indigent Plaintiff who is going to be compensated if the suit is successful. The sanctions are imposed, payable immediately. The Plaintiff doesn't have the money to pay, so he doesn't pay. He doesn't get precluded from the courtroom until the judge says, "Because you didn't pay I'm going to strike your pleadings." Isn't that right? I mean, why does the granting of a money judgment for $500 or $1,000 or $2,500 preclude somebody from going to court? It doesn't. It might mean that they can't put money in a bank account because it may be garnished. It might mean that their real estate might be put up for foreclosure on a writ of execution. But is it ever going to preclude someone from going to court? No. Not until the Court strikes their pleadings because they don't pay it, right? What am I missing?

MS. DUNCAN: I think what

you're missing is that if someone puts your house up for foreclosure, they're not going to use your house, but some non-exempt piece of property, and you can't pay the sanctions, fine. You sure can't pay the appeal costs, so you're effectively -- you're not being precluded. You just can't choose to go to court, because you can't afford it.

MR. ORSINGER: I disagree. You can still go to court. What you can't do is you can't put money in a bank and you can't hold on to your real estate. The punishment or the force of this sanction is being felt on the litigant assets outside the courtroom and not on their ability to walk in the court and pick a jury; and I think the standard about precluding their access to the court I don't see as a practical matter that an award of attorney's fees is ever going to preclude someone from the courthouse unless the Court backs that up by denying them access to the court.

MR. HERRING: But what happens though is the next step. You get an order requiring Mr. indigent to pay $500. He does

not. He then is put in the position of being subject at least to a motion for contempt for violating a Court order, a motion to dismiss, a motion for ultimate sanctions for violating the previous Court order. Should you not be able to head that off as the Supreme Court has held you must by saying that if there is an objection raised, that that order will preclude that award of expenses, those dollars will preclude access to court, then you cannot make them effective until final judgment, so there is an opportunity to appeal unless the judge, the trial judge finds that it wouldn't preclude access to court.

If IBM comes in and says, "It will preclude access to court if we're assessed $500," surely the judge should have the discretion to say, "No, that doesn't preclude access to the court." That's why that exception has to be in there.

CHAIRMAN SOULES: Let's follow through this whole thing. What we're talking about on page one is the reasonable expenses necessary in connection with the motion that's being heard. That's all. Not any prior

conduct. No prior conduct is being considered because it talks about "the motion." At the end of that motion if the judge -- of the hearing if the judge decides to award fees, wants to have them paid now, he's got to find that it doesn't preclude access to the court. That's over on page two, item four. Otherwise they are going to be paid at the end of the case. That's the fees on "the motion."

Now, if you go to a full-blown hearing later or maybe in connection with that motion under sanctions under Paragraph 3, then by going through the hoops the judge could award expenses and fees not only in connection with the motion, but something that would tend to compensate the party for all the problems that they had in the past with discovery or with whatever conduct has been going on. And if the limit is reasonable expenses necessary in connection with "the motion" and the only way to get that paid prior to judgment is a special finding that it doesn't preclude access to the court, why isn't that okay as a standard --

MS. DUNCAN: I don't think

Paragraph --

CHAIRMAN SOULES: -- without the word "substantial."

MS. DUNCAN: I don't think Paragraph 2 is subject to the compliance provision in the first sentence of Paragraph 4. Paragraph 4 speaks only of monetary awards pursuant to Paragraphs 3(c) or 3(g).

CHAIRMAN SOULES: Put 2 in there. I agree with you.

MR. ORSINGER: May I respond?

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: The problem I have with that is that a significant number can have a lot of negative effect on someone that doesn't result in their being precluded from court; and I'm attracted to Bill Dorsaneo's suggestion that it be relative to the financial strength of the party being sanctioned, because $5,000 to a millionaire is nothing, and $5,000 to a teacher that makes $2500 a month is a hell of a lot. And it seems to me that the question of whether it's substantial or not has to do with the kind of

havoc it's reeking on the party you're sanctioning and not what I think is basically a bridge you'll never cross which is being able to come to court.

MR. LOWE: I can imagine a traffic ticket, "Exxon executive if you get 50 miles we're going to fine you $1,000," somebody else. You can't get into something like that. You have got to have discretion with the trial judge, and he's going to consider all that. We have got to give some credit that these trial judges some of them have good sense and common sense and they know how to do things, and that's all going to come into play. You can't just write them a handbook on how to go to the bathroom, how to do this, how to mount the bench. You've got to have some discretion with these trial judges --

MR. LATTING: At least a few of them know what they're doing.

MR. LOWE: -- and give them credit for having good sense and then leave it vague, and they're going to handle those things; and we can't get in a position of

saying, "If you're rich, we're going to fine you this. If you're poor, we're going to fine you that." No.

CHAIRMAN SOULES: All right. Let's have lunch.

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

CHAIRMAN SOULES: We've had our customary 30 minutes for lunch, so I guess we can be convened if you-all are ready. If anybody hasn't had lunch or is still having lunch, just go ahead and bring it to the table with you, and we'll be convened.

We've probably beat this thing to death, this word "substantial" or whatever we're going to use there. I've tried to articulate in my mind what I'm trying to say, although I don't know if I've got it right yet or not. It seems to me if we leave "substantial" in, there are two places to litigate. One is on precluding access, and the other is whether or not fees awarded on the motion were substantial. If we take it out, then the fees awarded for the motion

that's not something that you litigate whether that's substantial or not substantial, because it is what it is. There's not a standard or a measure. I don't think that hearing to get the reasonable fees and expenses for that motion ever reaches TransAmerican proportions until you get the precluding access which is something that may have to be litigated anyway. So rather than -- what I'm articulating without necessarily suggesting it is drop "substantial" and only get to the TransAmerican hearing when it's necessary which is precluding access.

Is the gain worth the gamble to put the word "substantial" in there and litigate that to whatever extent it is, litigate it in the future, or just leave it out and let the judges make their awards?

MR. LATTING: Where would you take it out?

CHAIRMAN SOULES: Right in 2 beginning at the third line.

MR. LATTING: What would you say in place of it?

CHAIRMAN SOULES: Nothing.

HONORABLE SCOTT A. BRISTER: Drop that phrase?

CHAIRMAN SOULES: Well, that's right. The whole in addition just drop out that phrase, "so long as the amount involved is not substantial," take that out. Again --

MR. LATTING: Consult with my lawyer.

CHAIRMAN SOULES: -- is it worth litigating that? Is the times that we're going to litigate that, is it worth having it in there? Can we just take it out? I don't think it's a Constitutional issue at all. We would have to put 2 in where Sarah suggested in Paragraph 4, and that would take care of the TransAmerican and Constitutional questions.

HONORABLE PAUL HEATH TILL: How is it going to read?

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: The problem, Luke, that I have with that is that I have been, as I'm sure a lot of other people in this room have, to hearings in which people

have in fact spent $10,000 and $25,000 in preparation for the sanctions hearing, and so and it would not preclude access to the court. You're dealing with in terms of you're dealing with people with ample resources. And you're suggesting I think that if you take that out, then that means that that's not something that requires the hearing.

CHAIRMAN SOULES: Yes, I am.

MR. MCMAINS: And I just don't see how. I mean, it seems to me that if you were talking about somebody -- because whether or not that was necessary is highly arguable in a lot of those cases, whether or not somebody should have in fact put 25 lawyers working overnight or whatever putting together things in order to do that.

CHAIRMAN SOULES: But "reasonable and necessary" is a standard that is there anyway.

MR. MCMAINS: I understand. But I'm just saying that the notion that you can do that without even an oral hearing, because this Rule does authorize not even having an oral hearing; and I mean, you could

have a substantial enough written submission that I suppose you could take a look and see and see that there is a lot of work involved.

I tend to subscribe to what the judge said earlier, and that is that anything over $10,000 it doesn't matter whether it denies you access or not. Virtually all the courts that I can think of would think that's a lot of money to award for not complying with discovery for expenses incurred in connection with the production of that discovery; and it just seems to me you'd need to be -- there needs to be a point where you go to those safeguards and it's not the issue of whether you're prevented from being accessed, from having access to the court in terms of it.

CHAIRMAN SOULES: Does anyone have a motion to amend the second sentence of numbered Paragraph 2 on the first page? All right. There being no motion, then we'll just leave it as it is, "so long as the amount involved is not substantial." Okay. What's next?

MR. ORSINGER: Luke, the very

next sentence seems to me to impact on what you were talking about, because there is a presumption that it's not substantial unless someone shows that it precludes access to the court; and that suggests to me that the test for "substantial" is precluding access, and I don't think that that should be the test for "substantial" if I'm reading it correctly.

HONORABLE SCOTT A. BRISTER: Again, the comment makes clear that those are not equal. Substantial in absolute terms, or monetary as well. Plus just, I mean, when you read it most people think, you know, the amount involved is not substantial. Most people don't think of that indigent litigant. They know what an amount that is not substantial is and what isn't, I think.

CHAIRMAN SOULES: Is there any motion to amend that sentence? Okay. Let me go over page one then. Looking at the Committee's draft and what we've passed on so far is all of page one. In the highlighted I guess last sentence of 1(a) as I understand it we would, the draft of the Committee wants to delete the words "without the necessity of

court intervention."

MR. LATTING: That's right.

CHAIRMAN SOULES: So the lead-in paragraph stays the same. (a) stays the same with that change.

HONORABLE F. SCOTT MCCOWN: Before you leave (a) could I ask something?

CHAIRMAN SOULES: Yes, sir.

HONORABLE F. SCOTT MCCOWN: This is a very minor point, but it illustrates I guess the problem I've got, and I don't know what the cure is, and cumulatively it's a big problem. But if you look in 1(a) and you see "Motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a."

Our Rules are full of provisions like this; and it's completely unnecessary totally, because when you look at Rule 21 and 21a they both say "every motion." And, you know, when you sit down to write a Rule there's a natural tendency to kind of want that Rule to be totally all inclusive, but --

MR. HERRING: That is in the

current Rule. I agree with you. We don't need that. Just take it out.

MR. LATTING: Take it out.

MR. ORSINGER: Now, wait a minute. It's not in the current Rule. And I was talking about this before lunch. The current Rule says that if you use affidavits, they must be delivered seven days in advance of the hearing. This language converts it from seven days to three days. So intentionally or unintentionally the Task Force Committee proposal eliminates the requirement that the other side get seven days advance notice of your affidavits; and I'm in favor of leaving seven days rather than three days, because the affidavits are going to be probably from people that you have never deposed, don't know what they're going to say, may have to get some affidavits to respond to that; and you're down to 72 hours under Rule 21, whereas you have seven days under Rule 166b(4).

MR. HERRING: That's a different problem. I mean, I don't disagree with what you're saying about the seven days notice for

affidavits. We don't need though to have the standard notice provision on the motion itself with reference to Rule 21 and 21a in this Rule. If you have affidavits, we could do it as we did for I guess it's Rule 120a where we have a seven-day service requirement on affidavits in that Rule, if that's what you want to do about affidavits.

MR. ORSINGER: Well, it's already in Rule 166b, Subdivision 4. I'm just in favor of leaving it in some form or fashion saying 21 overrules it or overrides it.

CHAIRMAN SOULES: Are you saying that this sentence needs to be here?

MR. ORSINGER: No. I'm saying that this sentence made a change that may not have been intended, but if it --

CHAIRMAN SOULES: Is there any opposition to deleting the sentence in 1(a) that says "motions or responses made under this rule shall be filed and served in accordance with Rules 21 and 21a"?

MR. LOWE: Neither one of those Rules refer to three days or seven days.

CHAIRMAN SOULES: 21 does.

MR. MCMAINS: 21 does.

CHAIRMAN SOULES: Okay. Not opposition.

MR. LATTING: I have a question about it. I'd like to hear from Judge Brister or Judge McCown, some of the judges about what are we doing there? Are we saying that sanctions motions then require seven days notice?

MR. ORSINGER: No. Rule 21 still applies, but Rule 166d doesn't say that Rule 21 applies. Rule 21 says it applies if you take the sentence out.

MR. LATTING: Where are we left if we want to file a sanctions motion that has an affidavits attached to it?

MR. ORSINGER: Rule 21 says three days notice.

PROFESSOR ALBRIGHT: Seven days. You'd have to have a separate provision probably under 1(d) that said "any affidavits like 21 and 21a, "any affidavits have to be filed seven days before."

MR. LATTING: Thank you. I understand.

CHAIRMAN SOULES: All right. There being no opposition, that sentence will be deleted, so we'll have then two deletions from 1(a), that and the one previously identified. And (b) it would be as written except (b)(ii) would read "judicial notice taken of the contents of the case file and the usual and customary expenses including attorney's fees."

HONORABLE F. SCOTT MCCOWN: Can I make -- are you taking that out, did you say?

CHAIRMAN SOULES: No. No. I'm just --

HONORABLE F. SCOTT MCCOWN: Okay.

CHAIRMAN SOULES: -- changing the order of the words. "The contents of the case file" would be moved up in front to follow the words "taken of -- judical notice taken of the contents of the case file."

HONORABLE F. SCOTT MCCOWN: Can I make a comment about that substantively? And I don't feel strongly about this. But it does seem to me that the easier this Rule

makes it, the more it's going to be used. So to the extent you're going to make it hard to discourage using it it just strikes me as kind of wrong that out of the air a trial judge can just say, "Well, I've looked at the file, and using my knowledge about what attorney's fees are and how much work went into this I pick the figure of $750," which is what happens, and there's not any proof at all.

HONORABLE SCOTT A. BRISTER: I think the thing we had in mind was, and there are cases on attorney's fees saying, "Well, the only testimony was $400 an hour attorney's fees, therefore the judge must award. It was abuse of discretion not to award." There really are cases out there like that where if an attorney says it's $500 an hour, the judge or the jury has to award that amount.

So the idea was to bring in line with other set of cases saying more along the breach of contract, non-jury cases where the judge can award what is reasonably necessary for abuse of discretion, because there are also sanctions cases saying you have to have evidence which means you have to have

an oral evidenciary hearing every time you're going to award $150, because otherwise there is no evidence in the record. That's the provision.

But you're right. It would make it easier in the $250 case, I think. It could still be made harder by the oral hearing requirement on the other cases.

HONORABLE F. SCOTT MCCOWN: Well, it's not me. It's the other trial judges I'm worried about. I don't know. I don't care.

CHAIRMAN SOULES: With that reordering of the language in (b)(2) that would be the only change in (b). No change in (c) and no change in the -- no change in Paragraph 2 on the first page; and then on the second page in (2) there would be in the fifth line a period after the word "negligence," and then again "the court shall not award expenses if the unsuccessful motion or opposition was reasonably justified or other circumstances make an award of expenses unjust."

PROFESSOR DORSANEO: Mr. Chairman.

CHAIRMAN SOULES: Yes, sir.

PROFESSOR DORSANEO: Could we say "the Court may make these orders"?

CHAIRMAN SOULES: "The court" -- let's see.

PROFESSOR DORSANEO: Instead of "enter" them.

CHAIRMAN SOULES: "May make," yes, that's right.

PROFESSOR DORSANEO: And then down in (3)(h) say "making such other orders as are just." And the other thing I wanted --

MR. LATTING: Where, Bill?

PROFESSOR DORSANEO: In (3)(h).

MR. HERRING: (3)(h).

PROFESSOR DORSANEO: And the other thing I wanted to say is we probably ought to take a vote on, even though I was silent about it, we probably ought to take a vote on whether we ought to say "substantial" or $500. Justice Hecht mentioned as he was here earlier that he thought $500 might be a reasonable number, give the Court guidance as to whether we think it ought to be

"substantial" or a number. I don't want to belabor the point, but just to do that.

CHAIRMAN SOULES: This is not to change the wording of the Rule, but just to find out what the consensus of the Committee is as to what is substantial?

MR. ORSINGER: No. He wants to substitute $500 in lieu.

PROFESSOR DORSANEO: No. I want to say as long as the amount is not more than $500.

CHAIRMAN SOULES: Where?

PROFESSOR DORSANEO: In the second sentence. And I realize that I was quiet a little while back.

CHAIRMAN SOULES: In Paragraph 2?

PROFESSOR DORSANEO: Paragraph 2. In addition "so long or as long as the amount involved is not more than $500, the Court may award."

MR. MCMAINS: "Does not exceed $500."

CHAIRMAN SOULES: Okay. Bill's suggestion is that we take a consensus

back on page one, Paragraph 2, the first word in the third line, to change that from "substantial" to "$500."

PROFESSOR DORSANEO: And then make --

CHAIRMAN SOULES: To "$500 or less," something like that. Those in favor show by the hands. Those opposed. That fails ten to four.

MR. MCMAINS: Luke, in order to get at what he's trying to get at I think is let's suppose the Court decides they want to put a number in regardless of what they've heard from us, then one thing that Justice Hecht really wants to know I think is what number would you put in if you were going to put in a number and you had no choice. If the Court says "We're going to put in a number," what number is that going to be?

HONORABLE PAUL HEATH TILL: Let them figure it out for themselves.

CHAIRMAN SOULES: That's right. And that's why I asked Bill the question I did, was he trying to get some consensus of the Committee as to what dollar

figure if we're going to put it. If we're going to put an arbitrary number there, what is the number that this Committee would recommend?

HONORABLE C. A. GUITTARD: Let's put in $800.

CHAIRMAN SOULES: All right. There's $800. I'm not an auctioneer.

MR. MCMAINS: $1,000.

CHAIRMAN SOULES: There's $1,000. I'll just write the numbers down and we'll take a vote.

MR. ORSINGER: We'll do a quotient verdict.

CHAIRMAN SOULES: We've got $800 and $1,000.

MR. LATTING: Tommy wants $10, $15.

CHAIRMAN SOULES: Any other numbers besides $800 and $1,000?

HONORABLE PAUL HEATH TILL: How about let's let the Court make up their own mind?

CHAIRMAN SOULES: Because we're going to take a consensus, Judge.

HONORABLE PAUL HEATH TILL: Then make it $1500.

CHAIRMAN SOULES: And $1500. Any other numbers? I heard $500. But is no one suggesting that now?

PROFESSOR DORSANEO: I like $500. The reason I like it is because it has some Constitutional basis for it in what the United States Supreme Court has said about what is the dividing line between petty and not petty.

CHAIRMAN SOULES: Any other numbers? Steve, do you have a number?

HONORABLE C. A. GUITTARD: Inflation caught that.

PROFESSOR DORSANEO: Probably.

MR. YELENOSKY: I think $500 as well.

CHAIRMAN SOULES: Okay. $500, $800, $1,000 and $1500. How many in favor of $500? Hold your hands up. 11. How many in favor of $800? One. How many in favor of $1,000?

HONORABLE F. SCOTT MCCOWN: Notice that's all the rich people.

MR. ORSINGER: How many was that, Luke?

CHAIRMAN SOULES: Five or six. How many in favor of $1500? One.

All right. Now we're going to go back and go between $500 and $1,000, just a vote between those two figures, because the others only got one vote each. Those in favor of $500. 13. 13 in favor of $500. And those in favor of $1,000. 7. All right. By a vote of 13 votes for $500 and seven votes for $1,000.

MR. JACKS: By $7,000 to $6,500 we beat them on money.

PROFESSOR DORSANEO: That proves to me that most the people think that more than $500 is substantial.

MR. ORSINGER: This was just a clever way to get to it.

PROFESSOR DORSANEO: To get to it.

CHAIRMAN SOULES: All right. We're now over to Number 3, which is --

MR. ORSINGER: Well, before we go to Number 3 can I --

CHAIRMAN SOULES: We can do anything. What are you suggesting.

MR. ORSINGER: I think there may be some support for this, and I would like to move that at the end of paragraph 1(a) that we put language about notice of affidavits identical to what is in our Rule 120a special apperance, and that says --

MR. HERRING: It says, "The affidavits, if any, shall be served at least seven days before the hearing." That's the language you are talking about?

MR. ORSINGER: Yes. 120a also requires personal knowledge and specific facts, but maybe that is not warranted in this situation.

MR. MCMAINS: That would be required to be sworn to now, isn't it? That's an affidavit supporting --

MR. ORSINGER: Yes. That's right.

MR. MCMAINS: -- special appearance.

MR. ORSINGER: So I'm going to move that we have a seven-day notice

requirement if you're going to support your motions or responses with affidavits.

CHAIRMAN SOULES: The idea here for those of us that weren't in the -- may not have been here before talking about affidavits. There was this -- the problem is that if a party shows up with a live witness, puts them on the witness stand, then you have an opportunity to cross examine. So as long as you're not using affidavits, you can show up on the day of the hearing, put on your live witnesses and slug it out.

On the other hand, if you show up on the day of hearing with an affidavit, there is no way to cross examine them. You may not have a counter affidavit. There needs to be some notice if you're going to do that, because you have no way to recover. That's been the reason for giving seven days for affidavits for hearings. Whether it's a good idea or a bad idea, I don't know, but that's the historic reason for it. Judge Brister.

HONORABLE SCOTT A. BRISTER: Number one, that's another trick to trap the

unwary if you do it six days. It's another place you can mess up and have an objection because it wasn't on time. But suppose we do have seven days and it's filed six days before? What's going to be the response? Strike the whole affidavit so we don't have the facts before us, that doesn't make sense. We just put it off. Well, that's the same. If we don't have any requirement at all that you get it two hours before the hearing, isn't that the thing you ask the judge for? "Judge, I just got it two hours ago. We would like to respond. Can we put off the hearing for a week?"

It seems to me just clutters up with an additional time table you have to try to remember when the effect is not going to be anything different than not talking about it at all. If it's a problem, ask the judge for some more time. If it's not a problem, then don't worry about it.

CHAIRMAN SOULES: Where is that seven-day rule in 166b?

MR. ORSINGER: 166b, Subdivision 4. If you have a paperback, it's

at the top of page 57. It's been the fourth or fifth line of page 57 of the paperback, the top left corner.

CHAIRMAN SOULES: Okay. Those of you that have a rulebook, just about dead in the center of Paragraph 166b(4).

MR. ORSINGER: In other words, that's the current rule. The question is, should we change it?

CHAIRMAN SOULES: Well, that's for --

MR. ORSINGER: That's for discovery motions and responses.

CHAIRMAN SOULES: That's for any -- this is really if you make an objection to exclude any matter from discovery on the basis of an exemption or immunity, then you have to plead and produce any evidence by affidavit seven days ahead of the hearing or by oral testimony, so it's really a restrictive.

MR. ORSINGER: Just the response and not the --

CHAIRMAN SOULES: Why it's so limited, I don't know know or recall. But if

you read the sentence, it only applies to parties objecting on the basis of privilege or exemption or immunity to respond.

HONORABLE SCOTT A. BRISTER: This is in 215?

CHAIRMAN SOULES: I don't think so.

HONORABLE F. SCOTT MCCOWN: Part of our confusion here I think turns on whether we think the Rules of Evidence apply to these sanction hearings or not. And if we're talking about a not substantial where we don't have to have a hearing --

HONORABLE SCOTT A. BRISTER: Judicial notice plus everything, I wouldn't think it does.

HONORABLE F. SCOTT MCCOWN: -- the Rules of Evidence don't apply to these sanctions hearing?

HONORABLE SCOTT A. BRISTER: Because there's no record. That's the whole idea of TransAmerican. We want a record to review in big cases.

HONORABLE F. SCOTT MCCOWN: No. I'm talking about the sanctions, because

this provision on the hearing applies to both nonsubstantial attorney's fees on motions to compel as well as sanctions, right?

HONORABLE SCOTT A. BRISTER: No. No oral hearing required.

CHAIRMAN SOULES: There is no time for affidavit under 215. 215(6) says "motions or responses made under this Rule may have exhibits attached including affidavits, discovery pleadings and other documents."

HONORABLE SCOTT A. BRISTER: Treated just like 21a, don't mention it. The other Rules apply to the extent the other Rules apply.

CHAIRMAN SOULES: Do we want to impose a seven-day Rule on motions under 215, because it's not there now?

MR. LATTING: I would suggest not under the Susman theory that we don't need to make more jurisprudence where it's not called for. Let's try not to make this more detailed than we need to.

MR. LOWE: In the Civil Practices & Remedies Code when you're talking about attorney's fees, affidavits in

connection therewith they require 14 days, so we don't want to pass anything that's contrary to the legislature.

CHAIRMAN SOULES: Is that in connection with any motion file, the 14-day Rule?

MR. LOWE: No. An affidavit, if you file an affidavit concerning attorney's fees, I guess this is that. Then it has to be on file more than 14 days. We can't pass anything that is inconsistent with the Civil Practice & Remedies Code, can we?

CHAIRMAN SOULES: Yes. We may not want to for a lot of reasons.

MR. MCMAINS: At appropriation time.

MR. LOWE: Well, in amended Rule 18a I think we learned a lesson there. I doubt we want to do that. I don't think I'd invite the Court to do that.

CHAIRMAN SOULES: Well, they passed Rule 13 that contradicts the Texas Civil Practice & Remedies Code, the Texas Wait Grace Period.

MR. LOWE: Just vote me

against it. That's all I have to say.

CHAIRMAN SOULES: And I --

MR. ORSINGER: Well, is Rule 13 valid?

CHAIRMAN SOULES: -- don't know of any repercussions of that yet.

Okay. Anyone think there ought to be a seven-day Rule for affidavits in motions for sanctions?

HONORABLE F. SCOTT MCCOWN: May I ask a question first? Does this sentence, "the Court shall base its decision upon" apply only when there is no oral hearing?

MR. MCMAINS: No.

HONORABLE F. SCOTT MCCOWN: It applies whether there is an oral hearing or not. If there is an oral hearing, then the Rules Of Evidence apply?

MS. DUNCAN: Civil Procedure. It's a civil proceeding.

HONORABLE F. SCOTT MCCOWN: You say that, but so is a motion to transfer venue, which is done on affidavits, not the Rules Of Evidence. If you're having an oral

hearing and the Rules Of Evidence apply, then how are these affidavits going to be used? They're hearsay.

MR. ORSINGER: Well, 1(b) says that you can rely on affidavits.

HONORABLE F. SCOTT MCCOWN: That's what I'm asking. Then the Rules Of Evidence don't apply.

MR. ORSINGER: No. They do. But the hearsay objection to an affidavit doesn't apply; but if the affidavit doesn't constitute evidence or there is no showing of personal knowledge, then it may not accomplish anything, but you can't object that the affidavit is hearsay, because this Rule says you can rely on an affidavit.

MS. DUNCAN: Well, 101b says "except as otherwise provided by statute." And if a contrary Rule has the same force and effect as a statute, then it seems to me the Rules Of Evidence do apply unless another Rule says they don't.

HONORABLE F. SCOTT MCCOWN: Well, then you're simply saying you're making an exception and you're going to allow

affidavits at sanctions hearings. I have real problems with that. If you're going to impose sanctions, you ought to have the witnesses there to be confronted with cross examination, particularly these serious sanctions.

CHAIRMAN SOULES: Under 166a summary judgment the Court considers affidavits. There is nothing in that Rule that says the Rules Of Evidence don't apply.

MR. HERRING: Rule 120a, special appearance you can do both testimony and affidavits. You can do it that way, but you raise the policy question do you want to allow just affidavits?

HONORABLE F. SCOTT MCCOWN: Well, a summary judgment doesn't adjudicate anything if you find there is no fact issue. If you've got affidavits that are opposed to each other, you don't pick. It's not an evidenciary decision.

MR. HERRING: It can happen on only one side.

MR. GOLD: I think the issue is whether it's controverted or not; and that brings up the whole issue of the seven-day

notice provision. From a practical matter seven days is inadequate to do anything. Even if you get the seven days, having experienced this quite a bit, if you get an an affidavit, in seven days you can't notice anyone for deposition. All it does is intensify the acrimony that already exists. You wind up noticing somebody in a very short period of time. You can't get them to get to the deposition, can't resolve the matter, and it winds up being passed. But I think that an affidavit would be sufficient. Just like in a summary judgment motion it's presumed that it's sufficient unless it's controverted. So the whole issue is whether the other side had the opportunity to controvert it which would come back to whether seven days is adequate notice or not. I'm Paul Gold.

CHAIRMAN SOULES: Okay. Anything else on either 1 or 2?

PROFESSOR ALBRIGHT: I was just going the make the point about the seven days for affidavits. If you look through the Rule, every hearing that allows affidavit proof has a seven-day deadline when you can

last file affidavits without the -- motion to transfer venue, special appearances and summary judgments all have the same Rule. If we do impose the seven-day Rule, I don't think it's unusual to require it.

CHAIRMAN SOULES: Except 215 which does not -- permits affidavits today, but does not have a seven-day Rule. I don't know of any other. Anyplace there is an exception to 21 regarding affidavits it's always seven days --

PROFESSOR ALBRIGHT: Right.

CHAIRMAN SOULES: -- as far as I know.

MS. BARAON: I'd just say briefly the kind of affidavits you're going to get are going to be from a very limited scope of people. Unlike special appearance hearings and others where we're going to have a wide range of people who may have facts relevant to the hearing this is limited conduct in connection with a discovery motion, and it's very likely to come from a party or party's attorneys as much as anything else.

HONORABLE F. SCOTT MCCOWN:

Why don't we just say to make is easy, just say "pleadings, affidavit filed seven days before the hearing, stipulations," and just put it right there with the word "affidavits"?

CHAIRMAN SOULES: Okay. I think we need to get a consensus on how many feel that there should be a seven-day rule for affidavits in sanctions hearings or motions to compel, the subject of this 166d, these hearings. How many feel there should be, show by hands. 11. How many feel otherwise? 8. 11 to 8 the Committee feels there should be a seven-day rule for affidavits here.

MR. MCMAINS: Luke, may I ask something of the subcommittee?

CHAIRMAN SOULES: Yes. What?

MR. MCMAINS: In this precise place that we're dealing with we say "the Court shall base its decision," and this is under both the one that requires an oral hearing and the one that doesn't. The first one is "pleadings, affidavits, stipulations and discovery results submitted with the motion." Now, does that mean that you cannot

produce any of this material unless you served it with the motion? That is, you can't come up on the day of the hearing and provide any of this type of material including the discovery results or pleadings or anything else. As I read that that's a time frame where if you make a motion it's got to all be there at the time you make the motion, and you're not entitled to come up with anything new other than a witness. Apparently you can produce live testimony, but everything else has to be at the time the motion is filed. Is that right?

CHAIRMAN SOULES: It says "submitted with the motion," not "filed with the motion."

MR. MCMAINS: It says "submitted with the motion." And what I'm trying to find out is does this mean at the time of submission, or does it mean at the time the motion is filed?

MR. HERRING: What would prevent you from amending your motion?

MR. MCMAINS: Nothing would prevent you as far as I gather, but I don't

know under the Rule. But the point is, if you didn't amend your motion, then does that mean that any material that was produced at the hearing that falls into this category will not support an award of sanctions, because it appears to be fairly arbitrary about that.

MR. SUSMAN: Could you take out the word "submitted with the motion"? I mean, can't the Court base its decision on when to submit it in opposition to the motion? I mean, just take out those words.

MR. MCMAINS: Yes. What I was trying to get at is I was trying to figure out if that was intended to be a time limitation by the Committee or if it was merely intended to talk about anything that was submitted from the standpoint of that was argued.

MR. LATTING: It's okay with me to do what Steve suggests, just take it out. I don't think we consciously thought about that.

CHAIRMAN SOULES: Any opposition to taking out the words "submitted with the motion"? Okay. So after the words "affidavits" in that sentence that we're

looking at, "the Court shall base its decision upon pleadings, affidavits filed at least seven days before the hearing," I guess.

MR. HERRING: Could we say "served," Luke, instead of "filed"? That's the language of Rule 166b(4), and that gets what you want is to get them served.

CHAIRMAN SOULES: I think that works backwards.

MR. SUSMAN: Why do we have that sentence in there at all? What else is the Court going to base its decision on? It's stupid. It's just words.

HONORABLE SCOTT A. BRISTER: Because there are come cases that have reversed the Courts because they didn't specifically have an evidenciary hearing.

MR. LATTING: That's the Rule.

HONORABLE SCOTT A. BRISTER: The idea was to say we don't have to have a full-blown evidenciary hearing. Call your first witness, opening statements, closing arguments, just a discovery motion.

MR. HERRING: Further if

you're going to have affidavits, you need to say that, because otherwise you wouldn't.

CHAIRMAN SOULES: The reason you use "filed" instead of "served" is in Rule 21 where it says everything is to be filed and at the same time a true copy shall be served on all parties. And if we say "served," it doesn't say whatever you serve has to be filed.

MR. LATTING: You have to serve it anyway if you file it.

CHAIRMAN SOULES: If you file it, you have to serve it at the same time.

MR. HERRING: You're supposed to.

CHAIRMAN SOULES: Okay. And then --

MR. LATTING: Filed at least seven days before the hearing.

CHAIRMAN SOULES: Before the hearing. The stipulations and discovery results strike the word "submitted with the motion," and those are the changes that we've just discussed.

Rusty, did you have something

else?

MR. MCMAINS: Yes. The problem with that is that when you put that seven days in there it assumes there is going to be a hearing; and remember the way this is constructed this applies to cases that don't require a hearing as well.

CHAIRMAN SOULES: It says "hearing." That is what this is about is a hearing.

MR. MCMAINS: No. But it says "oral hearing is required unless waived." And then it says no oral hearing is required under 2, and then it says "the Court shall." And the point is that "the Court shall" does not require. Those are things that are required whether there is a hearing or not a hearing.

MR. LATTING: Why don't we say "filed for at least seven days."

MR. ORSINGER: "On file for at least seven days."

MR. LATTING: Instead of "before the hearing" and cut it out, just cut out. Everybody all right about that? Cut out "before the hearing"?

PROFESSOR DORSANEO: Say "before the oral hearing" if you're going to talk about a hearing. Filed at least seven days what?

MR. MCMAINS: The point is if you want notice of the affidavits on the attorney's fees in one that is, quote, "not substantial," plus they're only wanting $250, they want to submit an affidavit with it; and the question is when does that need to be filed. It's one you don't have to have a hearing or an oral hearing for.

HONORABLE F. SCOTT MCCOWN: Well, there is a policy question here that we're completely skipping over, and that's when we want a litigant to have a right to an evidenciary hearing. The way the Rule reads right now let's say it's a motion for sanctions for destruction of evidence and the Movant has an affidavit that Sam knowingly and intentionally right in front of me telling me his state of mind destroyed the evidence, and Sam's affidavit says not a word of that is true, and Sam's lawyer is there saying I've subpoenaed both the affiant and I've got Sam

here, and I want to put on my evidenciary record, and the judge says "According to this rule I can base it -- in fact I have to base it on the affidavits, and I'm going to believe this affidavit and not Sam's affidavit. This is a discovery matter. I'm not taking evidence."

MR. LATTING: Read the first sentence of the Rule. (b) doesn't say you have to have a hearing.

HONORABLE F. SCOTT MCCOWN: An oral hearing. There's a difference between an oral hearing and an evidenciary hearing. An oral hearing just means you get in in front of a judge.

CHAIRMAN SOULES: Justice Hecht, did you have something on this?

JUSTICE HECHT: What troubles me again on this is one of the complaints about this entire body of law is that this is satellite litigation; and what we are doing is establishing it as satellite litigation. We're setting up a whole separate procedure. And I suppose someone will ask at some point maybe there should be a jury trial if the

sanctions are severe enough, and we ought to be going back the other way.

You have the same issue involved with a motion for new trial which is sometimes there are grounds for motions for new trial which you need evidence on, and sometimes there aren't. Sometimes you can just move on the motion itself. Sometimes you file affidavits. There is a varied procedure with them, but it troubles me that to institutionalize this makes it into a bigger procedure than it ought to be; and the basic Rule is you ought not to get sanctions unless you put on enough evidence to justify it at a time when the other side has enough time to respond. And sometimes that will be as simple as an affidavit, and sometimes it won't be.

HONORABLE F. SCOTT MCCOWN: Wouldn't that argue for leaving the whole sentence out?

MR. LATTING: No, because that doesn't touch what Scott Brister says. I don't mean to be stating your position.

HONORABLE SCOTT A. BRISTER: Some judges out there think you have to have a

full-blown evidenciary hearing, and unless somebody tells them otherwise they will. I mean, there are attorney's fees discovery cases that are reversed because somebody didn't raise, put themselves on the stand, take an oath, subject to cross examination, testify how many hours.

CHAIRMAN SOULES: There is a Supreme Court case. It's an old one written by Judge Calvert, Millwrights Local something or other where a party tried to use an affidavit at a temporary injunction hearing, and the Supreme Court held it was hearsay and could not support the order on temporary injunction; and that's been as far as I know the leading case for holding an affidavit as hearing. You can't use them unless the Rules say specifically that you can. So if we take this out, then there is going to have to be an oral evidenciary hearing with the Rules Of Evidence applying unless there is something done about that old Millwrights Local case. Steve Susman.

MR. SUSMAN: You know, there are all kinds of decisions that the Courts

make under the Rules, and it's not expressly stated what kind of evidence. Class action determination, that Rule doesn't say exactly what kind of evidence you can rely on.

I mean, I would suggest that if we're concerned about that, there should be a special Rule saying "when the Courts make the following kind of decision it's got to be according to the Rules Of Evidence and a hearing on the record and list the decision." "On the other hand when the courts make the following kind of decisions," and you could list them, "then they can use affidavits, stipulations," wiegie boards, whatever it is you want them to use. I mean, why couldn't you do that all in one Rule where it's easy to find? I mean, doesn't that make sense to just put it in one spot?

CHAIRMAN SOULES: That's Bill's job when he does the rewrite.

MR. SUSMAN: I mean, I agree with Judge Hecht. I mean, I think you are creating a whole procedure here for sanctions motions.

CHAIRMAN SOULES: What is

written here except for the seven-day issue is the way the Federal practice works. It doesn't change the current practice on motions to compel or motions for sanctions.

PROFESSOR DORSANEO: I have a suggestion that might work. That would be to take the last sentence, at least something for you to consider, take the last sentence, "the court shall" and move it down to Paragraph 2 as the third sentence and leave out (iii), "testimony if the hearing is oral."

My idea there would be to make it clear when you don't have a required oral hearing that you have to have some basis for the award of expenses in the Court's file; but since there wouldn't be an oral hearing, you wouldn't have testimony at the oral hearing. By the same token that would suggest that you couldn't use affidavits if the hearing was oral, that it would be an oral hearing conducted in the normal manner like other oral hearings, which I frankly like if they're going to be considerations of substantial monetary sanctions or something that is essentially dispositive of the litigation all

together.

MS. DUNCAN: It seems to me that the case you were talking about, the opinion Justice Calvert wrote and the problem with affidavits has been resolved by giving hearsay probative force if it's entered without objection. The fact of an objection to the hearsay affidavit causes it to be inadmissible and the objection should be sustained, and then go on to have an oral hearing and you cross examine everybody. But if no one has an objection to having that evidence come in in affidavit form, unobjected to hearsay does have probative force and it should support the trial Court's order.

MR. LATTING: I think I was listening to you, Bill, and I don't think I agree with that, because I think that we ought to be able to have judges consider some affidavit testimony and some live testimony and not get all tangled up on appeal about whether it was all affidavit or live; and I don't think I agree that someone ought to keep out an affidavit by objecting that it's hearsay, which will always be the objection.

Once again we're creating kind of a jurisprudence and causing more work away from -- where is Tommy Jacks to argue for his position? Making this a bigger deal rather than a smaller. So the way things work in Travis County and in Harris County from what I've seen is you have these hybrid hearings anyway. The lawyers come in. They stand up. Most of the evidence is given from counsel table. They say, "Here is what we did," judge, and they start talking about what they did, and you hate that.

PROFESSOR DORSANEO: It looks like law students.

MS. DUNCAN: It's what happens.

MR. LATTING: I understand the logical requirement of due process; but when you start making everybody take the stand and have admissible evidence in order to have sanctions awarded, then we're getting into a subtrial. It's like the old venue trial days; and it seems to me we're trying to move away from that.

HONORABLE SCOTT A. BRISTER:

It's much worse than that, because you're putting opposing counsel on the stand.

MR. LATTING: Oh, yes. I forgot about that.

HONORABLE SCOTT A. BRISTER: So every question gets into an argument about whose fault. I don't want to swear anybody in unless somebody is going to be excommunicated or executed, one of those.

MS. DUNCAN: But aren't we already doing this if there is a substantial amount involved? I mean, it seems to me if there is a substantial enough amount involved that you get a hearing, it ought to be substantial enough that you get the benefit of the Rules Of Evidence.

MR. ORSINGER: I'm curious to know what we're going to do about proving up privileges in discovery hearings, because under the existing Rule I think as refined by our discussion after lunch anybody who is opposing discovery based on an exemption or immunity can do that with affidavits.

One of the things the judge is going to be deciding on a motion to compel is

whether you properly raised a privilege or an immunity. And if our Discovery Rules permit you to prove a privilege or immunity with affidavits, then how can we say in a motion to compel hearing that they can't consider affidavits? We're going to have to coordinate those two Rules so that if you're attempting to prove up a privilege by an affidavit of a lawyer or a corporate lawyer in another town, that we don't find that proof being admitted under 166b while it's not admitted under 166d in the same hearing on the same issue. I would be curious if that has been written yet by the Discovery Task Force.

PROFESSOR DORSANEO: They're working on it right now.

MR. MCMAINS: High on their agenda.

MR. LATTING: Discussing it daily.

CHAIRMAN SOULES: Bill, your suggestion then is to move some of the third sentence of 1(b) somewhere else.

PROFESSOR DORSANEO: I would move almost all of the third sentence of 1(b)

except for the very last part that talks about oral hearings which I would delete down to Paragraph 2 right before the sentence that begins "the Court may presume the usual and customary fee." And frankly notwithstanding my dislike for severe sanctions hearings conducted semiformally that wouldn't require Travis County to do anything differently if they chose to have these hearings, oral hearings done differently than other proceedings.

MR. HERRING: Well, are you going to, just for clarification, have affidavits admissible at a formal oral hearing or not?

PROFESSOR DORSANEO: I'm not addressing that.

MR. HERRING: Well, you wouldn't say that they are. So by implication they would not be unless they came in unobjected to.

PROFESSOR DORSANEO: They wouldn't be in Dallas.

MR. ORSINGER: But they are going to be under Rule 166b. They're going to be in the hearing there. So they're in the

hearing and they're not in the hearing.

The consequence of Bill's suggestion of moving the affidavit language down to Subdivision 2 is that by inference you can't use affidavits in a sanction hearing, but you can use them in a motion to compel hearing, and yet in both hearings they may be using affidavits under a different Rule.

PROFESSOR DORSANEO: You could use the affidavits if they comply with the Civil Practice & Remedies Code provision for expenses.

MR. ORSINGER: No. We've got under Rule 166b, subdivision 4 if you're trying to prove up an exemption from discovery, you're permitted to do that through affidavits. And frankly that's where it's going to happen. I've never seen any affidavits other than people that were trying to prove up privileges.

So when you move this affidavit language from 1(b) to to 2 you make it look like a sanction hearing has to be based on sworn testimony. Whereas I really think that it's going to be a combination of

sworn testimony and affidavits, because to defend against the santions hearing you've got to prove that your exemption is valid, and you may need an affidavit from corporate counsel in Cincinnati to do that.

CHAIRMAN SOULES: Let me see if I can -- I'm sorry. Anne Gardner, go ahead.

MS. GARDNER. You might also have to produce your records for in camera inspection by the Court under what Richard Orsinger is saying. I don't know how that would fit in.

MR. ORSINGER: It used to fit in where we said "discovery results submitted with the motion." To me that meant in camera inspection of allegedly privileged materials. We've now taken "submitted with the motion" out, and now it just says "discovery results"; and you're going to have to be aware that you better submit your stuff in camera at the hearing if you're relying on the discovery results as proof of your privilege.

CHAIRMAN SOULES: You can submit the discovery results with affidavits before or at the hearing under this Rule right

now as we have changed to seven days, which the real usefulness of it, I think, the affidavits. Get a bunch of documents and somebody makes an affidavit that these are attorney/client and says why, and it may be pretty obvious that they are, and you don't need to bring a witness to do that. Or work product, some things an affidavit.

But you have to put on something. You can't just submit the documents in an envelope. That seems to me to shorten the open court hearing when some of it's done by affidavit.

What is wrong with the way it's working right now? Why are we trying to change it? I know it was 11 to 7 vote to put a seven-day rule in here. But other than that or the sentiment to reconsider that why make a change?

HONORABLE SCOTT A. BRISTER: Change in?

CHAIRMAN SOULES: In the way that the hearings are now conducted.

HONORABLE SCOTT A. BRISTER: 215, or the Committee proposal?

CHAIRMAN SOULES: I think that in the Committee proposal other than where we've looked and changed some things the way 215 works now.

HONORABLE SCOTT A. BRISTER: And the reason for that is because of concern that 215 and the argument that it would be construed to require more extensive, even up to jury trial proceedings. Stated in the rule all of that stuff is not required. This is a pretrial discovery hearing. This is not a fact determination. It's not subject to all of the full panoply of evidenciary rules and so forth, which is probably the understanding of most judges, but definitely not all.

CHAIRMAN SOULES: It says "the Court shall base its decision upon pleadings, affidavits, stipulations and discovery results." Isn't that what we do now? Judicial notice of some things and then testimony, some testimony if the hearing is oral and somebody, they offer testimony.

HONORABLE SCOTT A. BRISTER: I think that's probably what most judges do, but not all.

CHAIRMAN SOULES: Is putting it here like this codifying what most people think the current practice is, and should we do it?

MR. LATTING: Yes.

CHAIRMAN SOULES: What do you think, Judge?

HONORABLE SCOTT A. BRISTER: I think so, yes.

JUSTICE HECHT: Why do you do it here, but not in Rule 13? 13 just says "after notice and a hearing."

MR. HERRING: Well, we haven't gotten to Rule 13 yet.

JUSTICE HECHT: You haven't gotten to it. I'm sorry I asked.

MR. HERRING: I wanted to hold that back for a while.

MR. LOWE: Why do we want to allow testimony? I mean, we went through on pleas of privilege you can go through all that, affidavit and documents on file. What in the world is so holy and sanctimonious about sanctions that when your whole case depends on whether you're going to have it

tried at Jasper or Beaumont, that was quite important; and yet sanctions you're talking about $250 I can put on testimony and everything. Why allow testimony on something like this? Why not do it by the documents and the affidavits and give time for counteraffidavits? Why make such a minitrial which may be a major trial out of one of these? I mean, I just raise the question.

HONORABLE F. SCOTT MCCOWN: Well, but it seems to me that the answer to that is it completely depends on what they are requesting. It's like a motion -- it's exactly like a motion for continuance. Some motions for continuance are decided just by what the lawyers say. Some are decided by the affidavits; and there is that rare motion for continuance where the witnesses need to take the stand and be crossexamined. And if they are asking for extremely serious sanctions and credibility is at stake, you may have to have some people on the stand; but I don't think we ought to -- I understand the problem that Judge Brister is pointing out. It seems to me that that's a perfect place to put in the

comment though that the extent of the hearing and the nature of the hearing is going to depend upon the nature of the allegations and the relief that is requested, and put that into the comment and not say here anything. We don't say it on motions for continuance, and the judge has an appropriate hearing based upon what we have got to figure out and what people are asking for.

PROFESSOR DORSANEO: I think I agree with that. The only thing that I would say extra is that if affidavit practice is going to be permitted when there is no oral hearing, maybe that's something that everybody would understand, but I don't think so. And I think you could say how these no oral hearing determinations are to be made or what's to be considered without implying. Maybe you would need a comment to negate the implication without implying how a more full-blown proceeding would be conducted. That frankly after notice and hearing would probably be good enough although not very informative.

JUSTICE HECHT: Well, if we don't need any more information for

continuances or for new trials, why do we need it here?

PROFESSOR DORSANEO: We have a lot of information on continuances, probably too much.

JUSTICE HECHT: Not in the Rules.

PROFESSOR DORSANEO: A lot of stuff.

JUSTICE HECHT: The way to hear it?

MR. ORSGINER: No. Just proving it up. It's just says "affidavit."

MR. HERRING: Some Rules have it, and some don't. Rule 120a obviously what you shall rely upon and how it should be conducted. That's a special kind of proceeding. Summary judgment we have it. As recently as six months the Supreme Court was telling in Otis Elevator v. Parmelee telling the trial judge you don't decide a motion for sanctions at least in a death penalty situation purely on just the oral statements of counsel in effect.

JUSTICE HECHT: Right. It

seems to me that you don't, but you might decide whether to award $250 attorney's fees because of a spurious objection.

MR. LATTING: Judge, our concern, and I agree about not saying more than you need to. But my concern is what do you do about the situation where the attorney and there is testimony and affidavits and there is objection to the affidavits on the grounds that they're hearsay? And it seems to me we need some kind of a pronouncement in the Rules or from the Court that says judges may consider affidavits in the sanctions process. Otherwise they are hearsay and not admissible.

HONORABLE SCOTT A. BRISTER: Maybe what we were meaning to say was that. The Court may base its decision on X, Y and Z. The idea was it was meant to be that the Court can do things more informally than perhaps some people think, and then rather than the Court has to do all of these things. It may be better to amend and say "the Court may base its decision." The idea is permissive, not mandatory.

CHAIRMAN SOULES: Any

opposition to that change? All right. That change will be made and changed from "the court shall base its decision" to "the Court may base its decision upon" and so forth.

Okay. If we stay with the seven-day filing, then it seems to me we have to have two -- we have to deal with two situations, one submission without a hearing and the other submission at an oral hearing. And if we're dealing with the first submission without an oral hearing, how do we know when the matter is going to be submitted? I know in Houston they give a notice of submission. I guess that's when the judge is planning to read the papers.

MR. ORSINGER: Well, Luke, the suggestion was made that we say "affidavits on file for at least seven days."

CHAIRMAN SOULES: Well, I know, but what if the judge acts in three days?

MR. ORSINGER: Well, he shouldn't.

CHAIRMAN SOULES: What if he does? Sarah Duncan.

MS. DUNCAN: We don't have provisions like the Federal Courts have in their Rules really for written submissions. I mean, even with a motion for summary judgment. We just we don't have it. And I personally think it's a real nice thing to know that if someone, if a motion or something else had been submitted, I know that I have 15 days until the judge will even consider it.

CHAIRMAN SOULES: You know that the Rule says that you have that. The judge may consider it today before you even have a chance to begin drafting your response.

MS. DUNCAN: That's right. But if he decides that motion two days after my opponent submits it before I have had time to get a response in, I've got a pretty good case for that order being invalid, because I was not given notice of the submission date, the true submission date of that motion.

CHAIRMAN SOULES: Do we still want to stick with the seven-day rule?

MR. LATTING: I wish we'd just take it out.

CHAIRMAN SOULES: Do we need to rewrite this part of it so that we've got I think one dealing with submissions and one without? We're saying to the judge that he can't. I don't know how you write that.

MR. LOWE: If you do that, you'd have an affidavit saying most times, saying how long before the hearing you have to file a counter affidavit and things like that. You get into how long affidavits have to be on file.

CHIEF JUSTICE AUSTIN MCCLOUD: How many affidavits can be filed? Who is going to file them? One goes six days, and another waits another seven days; and I think we've created a big problem with the time factor.

HONORABLE ANN TYRELL COCKRAN: If this really is just limited to the little bitty stuff, you know, the $300 in attorney's fees, isn't that what we're talkinbg about on no oral hearing, the minimal?

MS. DUNCAN: Substantial.

CHAIRMAN SOULES: Judge, that's correct, except that this Rule saying

what a judge may rely on is also applicable to the oral hearing.

HONORABLE ANN TYRELL COCKRAN: I know. I know.

CHAIRMAN SOULES: Okay.

HONORABLE ANN TYRELL COCKRAN: But at least an oral hearing with a firm date if it -- but I'm questioning why it needs to be applicable to the little bitty thing. If the ones that are going to be -- if all people want is $250, why are we telling them that they should each bother fooling with affidavits and things if it's a question of, you know -- I mean, why can't we sanction in the positive sense of the word the use of, you know, Court's reliance just on what the lawyers say in their motion if all we're going to do is order them to do it and, you know, give them $200 in attorney's fees. Why are we even encouraging?

Because what we do when we authorize it is most lawyers do it. It is the one area that above all others has raised the price of litigation to a point where the nonlawyers of this country are getting ready

to rebel. All we're doing is giving people a way to run up. You know, if you say you can have an affidavit, then they're going to have three affidavits and three lawyers in their firm about how many work and include in there another eight hours for preparing the motion and supporting affidavits. That's ridiculous. And if we're going to have a limited thing for just, you kow, "you're late answering your interrogatories or let's" -- the motion to compel is really the vehicle for determining the claimed privileges or the objections to the request for production. Then why should we even be telling them it's okay to file things like affidavits?

If it's really that serious where it's going to have to have some testimony to back it up, then let's have a hearing, if it's that important and if the relief that is requested is serious enough; but for the mundane "Uh-huh, Day 31 and I'm going to file my motion to compel to answer interrogatory, the answers are late," I don't think we should even be authorizing use of

things like affidavits. I think it's silly, and all it's going to do is increase the number of people who file affidavits.

CHAIRMAN SOULES: If somebody that voted in the majority on the seven-day Rule wants to reconsider, we can.

CHIEF JUSTICE AUSTIN MCCLOUD: I'm one. I voted in the majority. I move to reconsider.

MR. LOWE: I second.

CHAIRMAN SOULES: You move to reconsider. All right. Those who favor a seven-day filing Rule on affidavits under 166d show by hands.

MS. DUNCAN: In favor of the seven-day rule?

CHAIRMAN SOULES: In favor of the seven-day Rule. Four. Those opposed? Ten. It fails ten to four.

MR. LATTING: Should we go back to the language that says "the Court may base its decision on pleadings, affidavits, stipulations" and so on as written?

CHAIRMAN SOULES: Yes. The sentence as I now have it would read as

follows: "The court may" instead of "shall."

MR. LATTING: All right.

CHAIRMAN SOULES: "The Court may base its decision upon (i) pleading, affidavits, stipulations and discovery results," drop the words "submitted with the motion." (ii) --

PROFESSOR DORSANEO: Why do that?

CHAIRMAN SOULES: There was no opposition to doing that a while ago when we called for it.

HONORABLE ANN TYRELL COCKRAN: Then it doesn't let the Respondent file it.

CHAIRMAN SOULES: To be submitted either -- it can be either filed with the motion or submitted with the oral at the oral time. Discovery results at any time. Not fix a time for it.

Okay. Backing up, "pleadings, affidavits, stipulations and discovery results," strike "submitted with the motion," and pick up (ii), "judicial notice taken of the contents of the case file and the usual and customary expenses including attorney's

fees," and (iii), "testimony if the hearing is oral."

HONORABLE SCOTT A. BRISTER: And if I understand Judge Cockran's proposal, would that be to move affidavits out of (i) and put it down in (iii) so testimony and affidavits if the hearing is oral?

CHAIRMAN SOULES: But aren't there fairly simple things that can be submitted not in an oral hearing but they do require some proof, for example, the claim of privilege?

MR. LATTING: Yes.

CHAIRMAN SOULES: The judge just can't look at it. He's got to know whether it was exchanged in confidence, things that don't appear right on the document. That could be submitted without oral hearing by affidavit, and actually shorten maybe the burden.

HONORABLE SCOTT A. BRISTER: I think that's -- you know, the question, you know, they failed to show up at the deposition. Our current practice is you just file a motion to say they failed to show up at

the deposition and attach to it the Certificate Of Non-Appearance. Are we saying you need to get across the message "and you don't have to file an affidavit saying as I said in my motion and as the court reporter has said in her certificate I also say under oath he didn't show up at the deposition"?

HONORABLE ANN TYRELL COCKRAN: Or if the response is, because this happens a lot, if the response to the motion for sanctions for failure to appear at the deposition is "but I called him the day I got the notice and said that the deponent's wife was going to be having a baby that day, and could we please reschedule, and he refused," do we need an affidavit for that, or isn't it okay in that situation for the Court to base its decision just on the unsworn statement of the responding lawyer in the response, or are we going to require another expensive step that, you know, the people of this State are paying for?

MR. LATTING: But this doesn't require it. It just says the Court may look at it. And your point was if we allow it,

they are going to use it; but I would think that we ought to leave that open for the individual cases. You don't have to use it.

HONORABLE ANN TYRELL COCKRAN: To me part of what we need to be looking at here is not just what seems to work on a case for the lawyers and the judges in the current practice, but also to look, you know, is it also working for the people paying for litigation. If we don't start taking that responsibility seriously, then the whole system, you know, is threatened. And, you know, just because -- I'm just saying that it needs to be looked at, whether or not we are encouraging, you know, additional work in instances where it is unnecessary to do so and unjustified by any kind of cost benefit analysis.

PROFESSOR DORSANEO: I just want to go on the record as being opposed to the idea that what a lawyer says in argument to a judge is treated as the same as testimony.

HONORABLE ANN TYRELL COCKRAN: I didn't say that that was testimony. I said

there are some situations. I mean, are we going to have to get, and you know, are we going to have to have testimony on everything now that we are called upon to resolve when lawyers can't communicate well or can't get along or have a dispute? I mean, are you saying that I can't ever unless a lawyer takes the stand or signs a detailed factual affidavit, that I can't ever hear what a lawyer is telling me about, you know, what the problem is in the deposition, you know, that they call and need guidance from the Court on whether or not a witness needs to answer a certain question? Can I not have telephone conferences and assume that what the lawyers are telling me are correct in most situations?

I mean, I agree that there are some. If you're getting ready to take somebody's firstborn child hostage or something, you should require some serious evidence. Yes, I may not take everything a lawyer says as the equivalent of sworn testimony. There are lots of times I should be able to base a decision in an interim step in the lawsuit based just upon what the

lawyers tell me, and that our Rules should not require that we actually have sworn testimony on that.

CHAIRMAN SOULES: Okay. Are there any other specific suggestions or any other suggestions for specific changes in 1(b)?

MR. ORSINGER: I'm concerned about where despositions fit in, because --

CHAIRMAN SOULES: Discovery Rules.

MR. ORSINGER: That is. And it wouldn't fit in under Number 3 as testimony if the hearing is oral?

CHAIRMAN SOULES: Fit either place.

MR. ORSINGER: Because we should be able to attach photocopies of sworn deposition testimony in support of a position, but technically you could argue that that is really testimony, which apparently testimony is only to be considered if the hearing is oral, but if you have a photocopy of a deposition, then no oral hearing.

MR. LATTING: Also it's under

discovery results.

MR. ORSINGER: It does?

MR. LATTING: Yes. It says "the Court may base its decision on pleadings, affidavits, stipulations and discovery results."

MR. ORSINGER: Okay. That includes deposition testimony even if it's not what is being sought? I thought discovery results mean the stuff you produce in camera and show to the judge.

MR. LATTING: I think it would be either.

MR. ORSINGER: Okay. I can live with that.

CHAIRMAN SOULES: Anything else specifically? Anyone that has a specific change to 1(b) so we can get on with this? Do you have a specific change, Judge?

HONORABLE F. SCOTT MCCOWN: I would like --

CHAIRMAN SOULES: What is that change?

HONORABLE F. SCOTT MCCOWN: I would like a vote on taking this whole

sentence out as being unnecessary. I think there is a fair amount of feeling. I don't know exactly how much, but apparently --

CHAIRMAN SOULES: We're going to take that vote right now.

HONORABLE F. SCOTT MCCOWN: All right.

CHAIRMAN SOULES: All in favor of 1 now as written. If you want to take the sentence out, vote against this motion. All in favor of 1(a), (b) and (c) as now in the record show by hands. 10. Those opposed? 10. Let's go on and debate that.

Those 10 what do you want changed? Judge McCown wants this sentence completely out.

HONORABLE F. SCOTT MCCOWN: Can I say a word about that? It seems to me that this sentence has exposed a very complicated issue that would be very hard to capture in a Rule, and that is that many times the case file itself, merely taking judicial notice of that gives you all you need, because you know that the interrogatories were served and you know that no answers were filed. You

can take judicial notice of that. That's a fact.

Many times the lawyers are going to informally agree or fall in an informal agreement. One of them is going to tell you his side. The other is going to tell you his side. They don't want to spend any more money than that and they want you to decide based upon what each of them told you. And there are going to be other times when you're going to have lawyers saying that they need a contested evidenciary hearing.

I don't think we can capture all of the complexities of the different kinds of hearings that are required in the Rule, and I think anything that we'd likely suggest is going to have the danger of misleading people or resulting in unintended results when read by trial judges and counsel.

HONORABLE SCOTT A. BRISTER: But I think if there is nothing in here, then the question will arise "what do I have to have, what kind of evidence do I have to have, can I present," and that will have to be answered by appeals to the Supreme Court

before we get any answers to those if it's not in the Rule. And that's just not hypothetical. Those cases are already in the Courts Of Appeal.

HONORABLE F. SCOTT MCCOWN: But I don't see that that's a problem, because it's not going to come up very often. When it does come up, it's going to be critically important, and probably then we can get appellate clarification; but I don't think we can write a Rule to take into account all of those complexities. We can put a comment in.

CHAIRMAN SOULES: Could we just go around the table? Those who voted against please express yourself. And I don't recall where the hands were up, but down the table here.

MR. ORSINGER: I did not vote because I was concerned if we take it out, that that might mean we cannot use affidavits. I would like to know if this sentence is out of here, can the Court consider affidavits?

CHAIRMAN SOULES: Not under Millwrights.

MR. LATTING: No.

HONORABLE F. SCOTT MCCOWN: It depends on what you're using the affidavit for.

MR. ORSINGER: Well, then I think it would be disasterous to take this sentence out, because then we would force everybody to fly people in from all over America to testify for three minutes on some little point that they could have done a one-page affidavit on.

CHAIRMAN SOULES: Sarah, did you vote against?

MS. DUNCAN: Yes.

CHAIRMAN SOULES: Okay. Could you express yourself, so we could follow you?

MS. DUNCAN: I think the discussion we've had now for the last hour and a half, however long it's been demonstrates to me that we shouldn't be even talking about expenses if it's not a substantial amount of money. To me if it's not substantial, we shouldn't be having to worry about all this stuff; and I guess I have to vote against every section of this in order to make it

clear that I am not in favor of this rule, and I still think we ought to go back to a rule where if it's not a substantial amount of money and a big problem and somebody has really been hurt, we just shouldn't even be discussing this.

And then second, I also agree with Judge McCown that we've got volumes and volumes and volumes of statutes and cases and everything else saying what you can and can't do in a particular type of hearing, at a particular type of time depending upon whether there is waiver or agreement or whatever. And I don't think we can codify that in this Rule, and I don't think we should try.

CHAIRMAN SOULES: Bill, you voted against.

PROFESSOR DORSANEO: Yes. I agree with Judge McCown and what I thought I heard Judge Cockran say about individual hearings. They're just different on the affidavit from one another, and you can't really write a Rule that's going to work well. And on the affidavit problem it seemed to me after I thought about it that affidavits

are going to involve things in terms of the expense that are pretty much covered by what the case file is going to show aside from perhaps all of the hours and time that somebody put in in participating in the discovery controversy; and frankly once that crossed the threshhold which I think will be relatively minimal into substantial I would like to have a witness at least sponsor an exhibit to say that "We spent so many hours on this work." I don't think it's that onerous, and I don't think it will require people from all over the country.

MR. ORSINGER: What about the privilege? What about proving the privilege through an affidavit?

HONORABLE ANN TYRELL COCKRAN: Isn't that included in another section?

MR. ORSINGER: We don't know yet, because they haven't written that section yet.

PROFESSOR DORSANEO: I don't think of that as being part of a super-sanction part of the proceeding myself.

CHAIRMAN SOULES: Who else was

opposed as we go down the table?

PROFESSOR DORSANEO: Granted it may happen at the same hearing.

MR. GOLD: I was opposed. And for the same reason that Sarah was talking about. I think this is just a lot of to do about nothing. I mean, to the extent that it's de minimis I think the judge should be able to decide based upon the court file and cut out the affidavits which are going to lead to depositions and just going to lead to more acrimony. I think the judge should just decide on the record and leave it. I don't think we need it.

CHAIRMAN SOULES: Who was next?

PROFESSOR ALBRIGHT: The same reasons.

MS. GARDNER: I have a basic problem with the concept. This goes back to the two-step process we talked about earlier; and I think that motions to compel should be treated parallel to motions for protective order under 166b and that affidavits should be allowed, but I think on sanctions where

serious offenses that serious violations including violations of protective order or motions to compel that there ought to be actual testimony and a full hearing. And I also have a problem with the word "oral hearing." I'm not sure what the meaning is. That's additional.

MR. MEADOWS: Luke, don't you meet the concerns expressed by Judge Brister and Judge Cockran if you just take out the word "affidavit"?

CHAIRMAN SOULES: I don't know.

MR. MEADOWS: Because that meets Judge Brister's concern about permitting a judge to consider the record, and it meets Judge Cockran's concern about generating a bunch of unnecessary expensive activity.

CHAIRMAN SOULES: Who else was opposed? Tommy Jacks.

MR. JACKS: I was persuaded by both Judge Cockran and Judge McCown. I think in an effort to provide flexibilty by spelling things out we in fact are denying flexibilty in creating opportunities for more

litigation. For example, discovery results into this have to be submitted with a motion. Well, what if at that hearing you point to the interrogatories? That's a discovery result. If it wasn't attached to the motion, the judge under this Rule can't consider it. I think I agree with Judge Cockran that it is appropriate, Bill Dorsaneo's concerns notwithstanding, that Courts take into account the reputations of lawyers as a part of their basis for a decision.

So I'd either take it out as Scott McCown suggested, or I think it needs to be rewritten.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Ditto.

CHIEF JUSTICE AUSTIN MCCLOUD: Let me ask you something from what Judge Cockran said. I don't know the wording. But what if you added something which would permit a judge to ask informal questions? In other words, you've got affidavits, whatever else we've got here, and include in that if the judge so desired that the judge could ask

informal questions of parties, witnesses, attorneys. If we're using the word "may," then that particular judge might well want to use that procedure and say "this is all I want to do. This doesn't amount to anything. I just want to use this." Another judge might want to use -- I don't know if you've got an answer for that.

HONORABLE ANN TYRELL COCKRAN: One thing that makes me nervous is realizing that these are Rules is if there are going to be a lot of lawyers who say if we do that; and I think the concept is great. If we have that in this Rule, I can just see now some lawyers telling the judge when the judge is informally questioning the lawyers on something else, "Well, Judge, the Rules don't authorize you to informally question me here. It's only in this kind of motion." I mean, I guess there is a danger in rule writing of by implication saying in another area what is expressly permitted over here is not precluded --

CHIEF JUSTICE AUSTIN MCCLOUD: You think this would become exclusvie and it would hurt you in the other areas?

HONORABLE ANN TYRELL COCKRAN: Yes. I think surely a judge without getting into the question of the judge propounding directly questions for that witness in a variety of circumstances, but surely a judge always has a right to ask lawyers questions --

CHIEF JUSTICE AUSTIN MCCLOUD: Yes.

HONORABLE ANN TYRELL COCKRAN: -- about their motions and their positions.

MR. LOWE: I voted against it simply because I'm probably confused. But as I read this oral hearing and all that they're addressing only the Paragraph 3 thing, not talking about the insignificant things that we talked about that have small fines, it's the significant things that we address in these hearings, and I agree that you probably should have a hearing on that. But I'm confused whether this language applies to the whole thing. We've got it confined to 3, the serious, the sanctions part, and yet we are then talking about what we can consider in connection with the lesser things. And I'm just plain confused. I'm just telling you.

CHAIRMAN SOULES: All right. Let me see what would the hands be if we delete the entire last sentence of 2(b) -- or 1(b)? I'm sorry.

HONORABLE ANN TYRELL COCKRAN: Can I raise one question?

CHAIRMAN SOULES: Judge Cockran.

HONORABLE ANN TYRELL COCKRAN: And I've talked with a couple of people, and I understand that it was raised before I was able to get here today. But a whole other area of, you know, my inability to vote in toto for what we're talking about here is the question Buddy just brought up, that until you get clear in these Rules what a hearing is that is not an oral hearing and how much notice people have of it and is it on a definite date, or you know, does anybody know when the judge might rule on that, until that is clarified along with the question of does "hearing" mean oral hearing, or does it mean the nonhearing submissions, then you know, if we want to talk about creating litigation for appellate courts, I mean that procedure for

the non-oral hearing hearing needs to be much more, made much more clear before we can talk about voting on this proposal in toto.

CHAIRMAN SOULES: Okay. If we delete the entire last sentence starting with "the Court" and ending with "the hearing is oral" that's the last, most of the last six lines of 1(b) on page one, then how many are then in favor of 1?

HONORABLE DAVID PEEPLES: Can we have some other discussion? We have heard from everybody who voted to delete the language. And I have a question of them what would the hearing be like if that language is out of there? Total discretion for the Court? You can do what you want to? If somebody has got live witnesses there, you can say I don't want to hear them absolutely.

JUSTICE HECHT: In my view it's got to be discretionary with the district judge in the sense that if this is the kind of issue that takes live testimony, you're not going to be able to resolve it on the argument of counsel; and by the same token if somebody -- if the complaint is apparent in

the record and somebody says, "Well, judge, I've got six witnesses here that I'd like to have testify on this," and the judge says, "Well, I can see what the problem is from the record and I can now make a decision based on the record and I'm not going to hear your six witnesses," it seems to me that you've got to have that flexibility; and I don't see any way to spell that out, because sometimes it will take evidence,and sometimes it won't. Sometimes the sanction will be so severe somebody was talking earlier about a million dollars imposed against the other side. If you're talking about that kind of sum of money or anything like that, then you're going to be on shaky ground entering a judgment against somebody for a million dollars without ever having given them the opportunity to present evidence.

By the same token, if it's $150 because, "Judge, we had to come down here," or "we had to file this motion to get this discovery request answered" when everybody knows it should have been answered, I doubt very seriously that an appellate court

would say the district judge erred because he didn't conduct an evidenciary hearing to ascertain that $150 was reasonable; but I don't see any way to codifiy that except just to say on notice of hearing. But if there were a way to do it, we ought to use it with continuances and new trials and Rule 13 sanctions and everything else which it seems to me work fine without that kind of specificity, so I don't know why we need it here.

HONORABLE DAVID PEEPLES: I want to say something that's been bothering me and I haven't expressed it. Our Court has jurisdiction over South Texas, and in South Texas and in one or two other counties that I read about around the state there are judges who with regularity impose sanctions in five and six digits. Now and as a former trial judge I am in favor of a heck of a lot of judicial discretion at the trial court level. But how can the appellate courts fairly review drastic sanctions like that if the trial Court has virtually unlimited discretion to say I'm not going to hear your witness, for example?

That's a problem. And Justice Hecht, it's easy for you on the Supreme Court to say "We'll take care of those," but I served with some people who say, "Well, it says the word reasonable here and the trial court has discretion," and that means that anything goes as a practical matter. It's a problem I think in some cases of frankly trial court appeals. How do we deal with that?

CHIEF JUSTICE AUSTIN MCCLOUD: Luke, I think there is another problem here. If you don't have anything there, true enough you're probably not going to say "I'm going to have affidavits" and the trial judge says "Well, you have got six witnesses here. I'm not going to hear any of them." Then rather than hear that evidence, and on the appellate level what we're going to hear is the formal bill of exception, because that guy who brought six witnesses is not going to turn around and just leave. He's going to spend all of his time producing all of that evidence, and we're going to have to listen to it. And if you as a trial judge don't let him make that bill of exception, then somebody

else has got to probably. So I think we'd better be real careful in this area if we just say, "Well, no guidance, do what you want to, and it will be okay," because a lot of these folks will not accept that. They'll say, "Thank you, judge. Now I'd like to make my bill."

MR. SUSMAN: I'm in favor of giving guidance. I just think the guidance should be in a Rule that talks about what kind of hearing when you don't have a regular evidenciary hearing. I mean, there are other things that need to be decided. Justice Hecht mentioned all the things. Why should that be part of a separate rule rather than get different kinds of hearings for every kind of decision that a Court has got to make?

MR. LATTING: Maybe it should be. And I don't mean to be facetious. Maybe I'd like to ask Justice Hecht, if we were going to provide some guidance, how does this strike -- the kind we're providing here as drafted, how does that strike you? It seems to us to be fairly loose to provide for all of the cases that would come before different

judges in different parts of the world, but it gives at least some guidance.

And what we could do it seems to me, Steve, is if we passed it here, we could take up the question whether we should in fact put this in a separate Rule applicable to continuance and whatever other kinds of hearings it might be applicable to, because it is a hard question. That is, I don't know what the Rule is in Travis County. It's just kind of loose, how they feel that day.

JUSTICE HECHT: I think it provides guidance. But if you bought a copy of the transcript of this, you'd have some pretty good arguments about what the holes were, because as we sit around and talk about whether it provides guidance or not we come up with about 50 arguments about why it doesn't.

So on the one hand you solve some of the problems, but it seems you create a lot more. At the very least you ought not to treat sanctions any differently from everything else. I agree with Steve. If we're going to deal with this subject, we ought to put it over in a Rule by itself. I'm

a little uneasy about why we did the special appearances the way we did, but they kind of came up by themselves; but there are other kinds of motions which sometimes require evidence, and it seems to me we ought not to single out sanctions motions. Otherwise the signal go for it.

MR. LATTING: I'm not disagreeing with that. I'm just raising the question of what kind of guidance should be provided, if any? And if we don't provide any, what do we do when we're in a hearing before Judge Brister? Or Judge Brister, what do you do when Sarah and I are in a hearing and she offers an affidavit from somebody in Pennsylvania proving her privilege, and I say "We object to that, Your Honor; it's hearsay to this Defendant"? Don't you have to sustain my objection?

HONORABLE SCOTT A. BRISTER: It depends on what Circuit Court Of Appeals is likely to hear it. It depends on what's in the Rule. Yes, if there is nothing in the Rule, and then I have to wait several years for it to go to the appeal courts and I get a

definitive answer, I don't know.

MR. LATTING: Isn't that just exactly what Tommy Jacks says we ought not to be doing, which is encouraging litigation on something that ought to be peripheral to the trial in the first place?

PROFESSOR DORSANEO: In our Recodification Task Force one of the things we did discuss and make note of is that there are a variety of standard pretrial pleas and motions that are each handled in a slightly different manner from other ones that are essentially similar. Pleas in abatement are handled one way. Motions to transfer venue another way, special appearance motions another way; and I believe that although we haven't drafted anything to solve this problem for pretrial motions that our Task Force membership generally recognized that there should be some uniformity rather than a separate and distinct practice for every type of motion that is handled at the pretrial level.

I think we may be approaching the point where we could write something up

that would be more multipurpose to supersede what is said in the various areas or what is not said at all in the Rules with respect to pleas in abatement. I think that would be a good idea to do that as a separate undertaking and to let this Rule simply talk about notice and hearing.

MR. HERRING: Every time you have a proceeding you don't have to go see what the hearing is going to be and what kind of evidence or documents come in; and I would be in favor of having a general procedure apply to a lot of kind of proceedings including sanctions.

Just for information purposes, not for argument purposes, but at the Task Force level one of things we looked at was the ABA's section litigation guidelines for sanctions which was written by Gregory Joseph wrote the leading treatise on sanctions. I think he did most of the work. On the hearing subject they adopt kind of a flexible approach, which is not the way we went on the Task Force.

Our theory was people don't

know what you do at a sanctions hearing. We ought to try to put something in to give some guidance. Obviously there is another side to that; but what the ABA rules or standards and guideline for sanctions under Rule 11 say is very general. It says "Due process requires that before sanctions are imposed the alleged offender be afforded fair notice and an opportunity to be heard. The procedure employed may vary with the circumstances provided that due process requirements are satisfied."

Under hearing it says "The Court in its discretion shall determine whether to hold a hearing on sanctions under consideration. A hearing is ordinarily required prior to the issuance of any sanction that is based upon a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the Court in its consideration of a sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense" is the way it is worded.

CHAIRMAN SOULES: All right.

If we take this sentence out, the last sentence in 1(b), then how many favor 1 as its now presented? Nine. How many oppose it?

MR. BABCOCK: Excuse me, Luke? What are we doing?

CHAIRMAN SOULES: Okay. Where we are, we've talked about and we've been having a lot of discussion I think focused primarily on the last sentence in 1(b) on the first page which begins "the Court shall base" and ends "the hearing is oral." That's about six lines. We took a vote a moment ago on approving 1 as written with that in or as presented now with its changes with that sentence in, and the vote was 10 to 10.

Now we're taking a vote to see how many approve 1 as now presented with the changes that are on the record but deleting the last sentence in paragraph 1(b).

MR. LATTING: I'm not understanding that to be a vote about whether we're in favor of taking it out. You're just asking if we do take it out, are we still in favor of this Rule?

CHAIRMAN SOULES: Yes.

HONORABLE SCOTT A. BRISTER: Say that again.

MR. LATTING: In other words, I'm going to vote yes, but it's my second choice. I'd rather leave it in, but I'm still voting for it even if we take it out.

CHAIRMAN SOULES: Well, my perception was that some people would be for 1 either way, that they would vote for it with or without the sentence. Maybe they prefer it in. But to get a consensus if this is out, how many then favor Rule 1 as now presented, please show by hands without, no last sentence in Paragraph 1(b)? Fifteen. How many opposed? Four. Fifteen to four. So the Committee favors the Rule very heavily with this sentence out and is split evenly with it in. Okay. So we're going to report it to the Supreme Court with the sentence out.

Now let's go to Number 2.

HONORABLE DAVID PEEPLES: I thought the 10 to 10 vote was whether you wanted the language out or not. Maybe I misunderstood.

CHAIRMAN SOULES: No. The 10

to 10 vote was to pass the Rule with that paragraph in there.

HONORABLE ANN TYRELL COCKRAN: Pass the Rule as written with no other changes to be discussed?

HONORABLE SCOTT A. BRISTER: What was the second vote?

HONORABLE ANN TYRELL COCKRAN: To pass the Rule with what that one sentence deleted.

CHAIRMAN SOULES: Let me be clear. We have got a typewritten Rule here. We've been through several changes on the record which have carried. All right. Excepting all those changes that have carried then picture the Rule. We had a 10 to 10 vote that the Rule with the last sentence of 1(b) be included. It was a tie. Now we've had a 15 to whatever it was 4 or 5 vote to pass the Rule as changed on the record without the last sentence in there. Now, is there any confusion about that so that vote, anyone that would want to change their vote? Everybody understand what the vote was?

HONORABLE SCOTT A. BRISTER:

That's not what I was voting on.

CHAIRMAN SOULES: What we are voting on now is again picture the Rule as typewritten on the Committee's report. We are talking about 166d(1), but with the changes that we've already discussed and passed, and in addition to that deleting the last entire sentence of 1(b).

HONORABLE SCOTT A. BRISTER: Why don't we just vote on that issue. That's the question. We've had further discussion since the 10 to 10. That's just an idea. If that's the issue --

CHAIRMAN SOULES: What we're going to get to eventually is passing 1 in it's entirety.

HONORABLE SCOTT A. BRISTER: If the only issue is whether that sentence should be in or out, then that seems what we ought to vote on.

CHAIRMAN SOULES: How many feel the sentence should be out? 14, 15. How many think it should be in? 14 to 8. Now, that deletes that sentence.

With that sentence deleted how

many now favor Paragraph 166d(1) with all the changes that have been voted on accepted? 18. And those opposed?

MR. LATTING: I move Jacks votes not be counted.

CHAIRMAN SOULES: Three. Okay. That was 18 to 3 now to accept Paragraph 1 as it's been amended by Committee action. Now we'll go to --

JUSTICE HECHT: Let me make one point.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE HECHT: I mentioned this to Chuck earlier, but I didn't have a chance to mention it to Joe; but we have talked about in the past some review once we decide on the concepts and the basic language some editorial review of the language to put it in plain English and stylistically like the rest of the Rules and that sort of thing, and I assume we're going to still pursue that when it's appropriate, Brian Garner or somebody to put it in English to the extent that it's not.

MR. LATTING: I was going to

say.

MR. HERRING: We use substantial English, but a few other languages at times. But I understand we're going to do that to all of the Rules that are coming out of all of this. They're all going to go through that process.

CHAIRMAN SOULES: Correct. Okay. Now on Number 2, we've discussed Number 2 and made some changes. The changes I read earlier are all in the last sentence.

MR. ORSINGER: Luke, I think Tommy had a motion to insert his language in here that never got voted on.

PROFESSOR DORSANEO: They didn't accept the amendment.

MR. ORSINGER: They don't have to. If he wants to make an amendment to a motion, then we vote on the amendment.

CHAIRMAN SOULES: All right. Okay. So let's go to work on Number 2. You're right. The floor is open to discussion about substituting Tommy Jacks' Paragraph 2 for the Paragraph 2 in the Committee report, subcommittee report. Tommy Jacks.

MR. JACKS: Well, there are a few people who have come in since we have had this discussion this morning. I don't think Paul and Anne were in the room then; and I won't repeat all my discussion, but let me capsulize it, if I may. The purpose of my Paragraph 2, and by the way, there are a couple of changes in it as written that I've conceded I will make, is to try get Courts and lawyers out of the business of arguing about and deciding the issue of expenses including attorney's fees in connection with motions to compel, and yet to allow a process that permits where conduct warrants it the imposition of more severe sanctions in connection with such motions, but only where there has been conduct which deserves punishment.

The thrust of my Paragraph 2 is that first in its opening part, particularly it's Paragraph B it tries to make clear that it's the exception rather than the rule, that when we get into the business of sanctions including the business of awarding expenses. In Paragraph C which deals with expenses there was a lot of controversy about

the fact that I had included a requirement that the Court has to find before you get into the attorney's fees issue that the expenses that have been incurred are unreasonably burdensome, and I've stricken the language in relation to the resources of that party because it was thought that that creates secondary lines of inquiry about people's assets and so forth that are inappropriate and impractical, and so I've taken that language out.

(b) relates to the occasions when you kick over into sanctions and include not only the violation of an order entered previously which is a two-step process, but also in 2 and 3 addresses other matters that would warrant sanctions, the destruction of evidence, for example, or a little laundry list, and I'll grant that it could probably be with some editing shortened and made at least to look less complicated.

And then finally in (e), and we've had a vote that disapproved of the idea of having these motions sworn, which I had put in as hopefully an additional stop sign

lawyers would look at before they file motions for sanctions or seeking expenses; but I still would urge leaving in the requirement that if you're going to seek attorney's fees or sanctions in a motion, your motion ought to specifically state why you're entitled to them, and so that's still in my proposal, but I'm deleting the requirement that the motion be supported by an affidavit because affidavits seem to be a controversial issue today.

The thrust of it is this, and the choice is a value choice more than it is anything else in my opinion, and that is, yes, under my proposal maybe there will be somebody that doesn't get zapped as soon as they would get zapped under the Committee proposal, although I think they will get zapped eventually. And but I say I'm willing to let that happen in return for a Rule which does indeed in its body and not in its comments express clearly the message that we want to get Courts and lawyers out of this business and get on about the business of getting our discovery together and getting ready to try

our lawsuit; and that's what my Paragraph 2 does, and I have moved that we substitute that for Paragraph 2 of the Committee Rule.

CHAIRMAN SOULES: Okay. For housekeeping purposes, you've deleted in the Paragraph (c) and the 1, 2, 3?

MR. JACKS: Paragraph (c)(1) I've deleted everything after the word "burdensome."

CHAIRMAN SOULES: All right.

MR. JACKS: Specifically I've deleted the words "in relation to the resources of that party."

CHAIRMAN SOULES: And where do you delete the necessity for a sworn motion?

MR. JACKS: In paragraph (e), the third line from the bottom I have deleted the words "be supported by affidavit evidence" and I've changed the word "describing" to be the word "described," so that the last clause reads "shall so state and shall describe specifically the acts or omissions constituting special circumstances under subparagraph 2(c) or (d)."

CHAIRMAN SOULE: Okay. Any

further discussion on this? Joe Latting?

MR. LATTING: No. I just stated to Ann Cockran that the difference between Tommy Jacks' motion and the Committee motion would come in a situation like this, that under the Committee version if there were interrogatories that were served and a party refused to answer them and did not answer them, and there was a motion before you to sanction the party, and you found after a full hearing if you wanted to have one or on whatever basis you wanted to you believed that that party was not reasonably justified in doing what it did, and that that unreasonable and unjustified action had cost money to the party having so moved, you would still be unable under Tommy's version of this to impose monetary sanctions. He just thinks you ought not be able to do that. The Committee doesn't feel that that is a power that ought to be taken away from the trial judge if she feels that there is no justification and it costs money.

That's kind of a shorthand version of it, but that's --

MR. JACKS: Well, in fairness, if that happened one and only one time, what you've said is just true.

MR. LATTING: Well, that's right. If they keep on doing it, then you can do it.

MR. JACKS: But if there is more than one violation, then it's "Katy bar the door."

HONORABLE ANN TYRELL COCKRAN: But like for the first time they get a free get out of jail card the first time.

HONORABLE PAUL HEATH TILL: Free first bite.

MR. LATTING: And Tommy believes that that is going to cut down on the number of times that people come to court, and I think it's going to do just the opposite.

HONORABLE ANN TYRELL COCKRAN: I really think that I agree with Tommy. It's going to cut down a lot. Most of the sanctions motions that we get, at least that I see, are in small cases, and people are just leaping. Even the requirement that we have in 1 about, you know, that you have to have

actually have talked, we are seeing now situations where the sanctions motion gets filed because somebody calls up. Somebody is late with their interrogatories. They say, "I'm going to have to file this motion for sanctions against you. Get your answers." And the other lawyer says, "I'm sorry," you know, some excuse, you know, "the dog ate the papers or whatever, but "I'll get right on them. I'll get them to you within a week. I agree to that." But he won't agree to $350 in attorney's fees, so the lawyer goes ahead and files the motion because, you know, everybody is out for money now on even the simplest of things.

And I think that we can see people doing -- people are going to do things they shouldn't do no matter what the Rule is. So I think we just need to make that sort of evaluative decision about which is the worst harm to the most people; and I come down on the side of the amendment because the simple "I was late in answering my interrogatories or getting the documents that maybe we need a Court order to get their attention" to me we

are causing many more problems than we are solving by incorporating an award of attorney's fees with those motions alone the first time around.

HONORALBE F. SCOTT MCCOWN: Call the question.

CHAIRMAN SOULES: Any other discussion on this? All right. Then we'll take a vote. How many favor substituting Paragraph 2 in the Tommy Jacks draft for Paragraph 2 in the subcommittee's draft, show by hands? 13. How many opposed? 11. Pretty close.

MR. LOWE: Which one are we going to work on amending now?

CHAIRMAN SOULES: Tommy, just by way of housekeeping, can I ask you a couple of questions here? Are you saying in (a) "The Court may compel or quash discovery as provided in Rule 166b"? Well, 166b doesn't really deal with compelling discovery.

MR. JACKS: That's true. I just copied that from Joe's draft.

CHAIRMAN SOULES: I should have raised it before, I guess.

MR. JACKS: I was urged to make as few changes as I could in the Task Force's caption, and so I tried to keep it to limited issues.

CHAIRMAN SOULES: I guess this goes to both. Should the opening sentence read "The Court may compel, limit or deny discovery."?

MR. JACKS: Sure.

MR. HERRING: The reason it refers to 166b is there was an objection that if we did not, it might be interpreted to have eliminated the protective order procedure that 166b prescribed; and you could say in a comment that it doesn't and make the change you suggested.

HONORABLE F. SCOTT MCCOWN: I don't think you'd want to say "The Court may compel, limit or deny discovery," because if you say that, I'm just going to enter a blanket order denying all discovery filed in my court and cite that rule.

HONORABLE SCOTT A. BRISTER: It would save a lot of time.

MR. HERRING: But you do that

anyway without it.

HONORABLE F. SCOTT MCCOWN: I wish I could.

CHAIRMAN SOULES: Okay.

MR. JACKS: Mr. Chairman, if I could make a suggestion.

CHAIRMAN SOULES: 166b does more than quash discovery.

MR. JACKS: Yes.

CHAIRMAN SOULES: Maybe the Committee can just work on that, subcommittee can work on fixing that first sentence.

MR. LATTING: I'm not sure what the problem is.

CHAIRMAN SOULES: 166b does more than compel or quash discovery. 166b(5) permits you to limit discovery or deny discovery.

PROFESSOR DORSANEO: I'd like to see the word "quash" eliminated so my students wouldn't write "squash" all the time.

CHAIRMAN SOULES: I have seen "quash" elsewhere in the rules, so I don't think --

MR. JACKS: It's more descriptive.

CHAIRMAN SOULES: All right. I guess that last vote probably covered this, but let me be clear now. Other than perhaps some editorial work that may be done on the Rule on Paragraph 2 those in favor of Paragraph 2 then as submitted by Tommy Jacks, show by hands. I just want to be sure we've got it on the record, a show by hands. Let's just get another vote. 13 to -- those opposed? It's 13 to 10.

MR. YELENOSKY: Luke, I was confused. I should have had my hand up. It's 14 to 10, I think. Some of them changed their vote.

HONORABLE SCOTT A. BRISTER: No. It's 13 to 11, because Steve voted with the second group.

CHAIRMAN SOULES: All right. Now, go to Paragraph 3.

PROFESSOR DORSANEO: If we voted on it again tomorrow, it's a different group.

MR. HERRING: We'll re-do it.

MR. ORSINGER: Yes. Send it back to the subcommittee which won't change it at all.

CHAIRMAN SOULES: I don't know whether we've really been through this laundry list under 3.

MR. HERRING: The laundry list is basically the same as in the current Rule 215 with a little combination and shortening, and then of course we've eliminated that Provision (h).

CHAIRMAN SOULES: So we've taken out (h), and we've taken out in the fourth line we've changed "enter" to "make."

HONORABLE SCOTT A. BRISTER: Also probably make that change in the second line, "The Court may enter an order imposing one or more."

CHAIRMAN SOULES: "May make," okay. So in the second line of Paragraph 3 we change "enter" to "make." In the (a) we put a semicolon after "offender" and took out the balance of that with (a). And (c) is this "Assessing a substantial amount in expenses including attorney's fees of"?

MR. HERRING: I think that has changed in the editorial attachment.

MR. LATTING: We changed it in the editorial.

CHAIRMAN SOULES: How was that changed?

MR. HERRING: Your last page, Luke, of our packet.

CHAIRMAN SOULES: Okay.

MR. LATTING: It says "Assessing a substantial amount in discovery or trial expenses including attorney's fees."

CHAIRMAN SOULES: All right.

MR. LATTING: We took out everything after the word "offender" in (a).

CHAIRMAN SOULES: That's right.

MR. LATTING: "in writing either publicly or privately."

CHAIRMAN SOULES: In (h) we changed "entering" to "making," and in 4 we changed that to "Time For Compliance." Those are all the changes that I have.

MR. LATTING: That's right.

CHAIRMAN SOULES: Is there any

other further discussion on Paragraph 3? Those in favor of Paragraph 3 as now presented on the record show by hands. 18. Those opposed. Okay. That's unanimous. Those in favor of Paragraph 4?

MR. HERRING: Luke, just a second there. Rusty, who I guess had to leave, asked to make a minor change in Paragraph 4 to insert the word "ordered" before the word "payable" in the second line.

CHAIRMAN SOULES: Okay. Any opposition to that? It will be done. With that change and the words "time for compliance" put in the title, then those in favor show by hands. Those opposed.

MR. ORSINGER: Did we have some discussion about whether 2 was going to be added to 4 on that -- added to 3(c) and 3(g)? Have we changed that, or is 2 included in that? You see what I'm saying about the interim award of attorney's fees? I thought at one point we had put Paragraph 2 in there.

CHAIRMAN SOULES: We discussed that. We don't have a resolution. How many feel that minor sanctions under Paragraph 2

should be eligible for the considerationss set forth in Paragraph 4? I imagine Steve Yelenosky is going to find that important.

MR. ORSINGER: If we say nothing, can they order immediate payment?

CHAIRMAN SOULES: I think so.

MR. ORSINGER: I think so.

HONORABLE SCOTT A. BRISTER: You can order immediate payment, but under the Committee draft the indigent party, $250 preclude access to court is not under 2, because that goes to 3(c). 3(c) covers indigent party, $250.

CHAIRMAN SOULES: 3(c) does that.

HONORBLE SCOTT A. BRISTER: Because "substantial" takes into account the relative wealth of the party.

PROFESSOR DORSANEO: I would be in favor of that, putting 2 in Paragraph 4 subject to hearing what other people would say to make me change my mind the other way, if only because we could get rid of that -- I think we could get rid of that "the Court may presume the usual and customary fee is not

substantial unless circumstances or an objection suggests the award may preclude access to the courts." Am I right? Could we simplify Paragraph 2 if we put Paragraph 2 in Paragraph 4 protectivewise?

HONORABLE SCOTT A. BRISTER: Say that one more time.

PROFESSOR DORSANEO: Could we simplify Paragraph 2 by deferring the payment of the $500 until after the case is over?

HONORABLE SCOTT A. BRISTER: Sure. That's correct, if that's what we want to do though. I'm with Tommy Jacks. There is no point in having small attorney's fees awarded. The only reason I used $250 is because I say "You have to pay it by next Friday," because if you say $250 and it will be paid if you go to trial and can't settle, then it would wipe it out, and et cetera, et cetera. They know the $250, it is disregarded.

The only purpose for a $250 award in my opinion is if you have to pay it within 30 days or else, that otherwise it is no sanction at all. It is ignored. It

disappears and is never heard from again.

PROFESSOR DORSANEO: But if I'm on the other side and I'm willing to excuse it but can settle the whole case, why is that so bad? If I have to pay it, maybe I'm so irritated by this that we're just going to the Court of The Hague. And I would be very irritated by it. I am sure it would be a grave injustice if it was ever done to me.

MR. LOWE: It wouldn't be a help to settlement.

HONORABLE SCOTT A. BRISTER: I think that that's a rehash of the argument of whether you should have $250 sanctions or not. There are circumstances where people in such bad faith just to cause you trouble will require you to come down to the court to get something they know you are entitled to; and if the only sanction is $250 to be assessed at the final judgement after a jury trial, there may as well be no sanction.

CHAIRMAN SOULES: Paragraph 2 has changed. We now have unlimited sanctions under Paragraph 2, because the Court can sanction a party for activity that cannot be

remedied by an oral compelling or quashing discovery now under Paragraph 2 since we've substituted Tommy's Paragraph 2.

PROFESSOR DORSANEO: That's right.

CHAIRMAN SOULES: I think when we previously were looking at 2 we were looking at the Committee's draft of 2 which was minor sanctions; but now 2 includes some major sanctions; and with that I think 2 has to go in.

PROFESSOR DORSANEO: Has to go. Yes. I'm sorry.

MR. LATTING: It's late in the afternoon.

CHAIRMAN SOULES: But I'm not sure. Why doesn't everybody take a look at that and see if that's right.

HONORABLE F. SCOTT MCCOWN: The point that Bill was asking, well, why should we care if the party who gets the $250 award is willing to wash it out in a settlement? What's the harm in just letting it ride the case? And I think that the real use of the $250 award that has to be paid by

Friday is that then the lawyer has to deal with his client; and it forces them to assess their behavior right then, and he has to answer to his client if it's the lawyers screwup; and if it's the client's screwup, then the client realizes he has got to get with it. So it's an effective sanction to changing behavior whether it's the lawyer's behavior or the client's behavior. If you simply let it abide the case, then they never have to review their conduct.

HONORABLE PAUL HEATH TILL: So in effect it's a $250 fine for bad conduct.

HONORABLE F. SCOTT MCCOWN: It works like a fine. It is proportional to the cost to the other party, but it does work in that same sense of they've got to figure out whose fault this is and how to put a stop to it so it doesn't happen again.

HONORABLE PAUL HEATH TILL: I don't see anything wrong with that.

HONORABLE ANN TYRELL COCKRAN: I think my experience has been the reverse. Even the small fines if they're ordered payable immediately, and I have a real

philosophical objection to doing that, because it's my experience what happens when you do that is that lawyer stays up all night for the next 30 days figuring out a way to get the money back on another sanctions hearing, and it becomes a matter of pride to do it; and all you're doing and by deferring it until the end you're just putting something else in the pot that is going to need to be evaluated for settlement purposes, and what you're doing is diffusing the practical use of sanctions that I think is encouraged if you pay it immediately, because if you order it done by next Friday and then they don't, guess what? You've got another motion. By this time if these lawyers see each other, they might kill each other. I mean, all you've done is create this satellite litigation that is now much bigger than the main fight; and I think by just saying that, you know, let's do like everything else and have it be a part of the final judgment and you know go from there. I think even small amounts need to be deferred to the end unless you can make this finding, you know, the finding on the record about the

earlier stuff.

PROFESSOR ALBRIGHT: Since we've just passed Tommy's version of 2, isn't it true that we won't have the small amounts except when there is a finding that it's unreasonably burdensome, so we'll have an indigent type situation?

HONORABLE ANN TYRELL COCKRAN: I don't think necessarily, because I think sometimes even on the second motion that really you're still going to be -- you know, really still there is going to be where it's just attorney's fees, but the lawyers really haven't tried to overwork the motion, but it's up to $500 now, but it's still no big deal.

PROFESSOR ALBRIGHT: Okay.

HONORABLE ANN TYRELL COCKRAN: I think you're still going to have that even under the current Section 2.

MR. YELENOSKY: Luke, you suggested I would have some comment on this. I'm not quite sure how it plays out, but I guess when you would have to, whatever you do generally in the situation where you did have an indigent client and you had an award of

attorney's fees that is in absolute terms or whatever a small amount, that it still might preclude access if they were ordered to pay it right then. It would still have to be considered in that case, wouldn't it?

HONORABLE SCOTT A. BRISTER: Or the flip side is that can't you be beat in court if the case is two hours away flying time, you have to go up to the hearing, your client is indigent and cannot or you're pro se and cannot afford to fly up there. You lose automatically because you cannot recover a minor amount of expenses under the new Rule 2 in the first place; and in the second place you can't recover it until the final judgment. So the indigent Plaintiff who is out expenses in responding to this frivolous discovery motion loses.

MR. YELENOSKY: Well, under what we have passed in 2 I guess the indigent client could demonstrate that it's an unreasonable burden.

HONORABLE SCOTT F. BRISTER: But you couldn't recover it until the judgment.

MR. YELENOSKY: If that were

the Rule, right. I guess on the flip side what I'm concerned about is where there is an award against an indigent client and that whatever the amount is some amount may preclude access if it's ordered to be paid at that very time, and that there Constitutionally I guess would have to be some consideration for that.

CHAIRMAN SOULES: Is 3 backwards? By that I mean shouldn't it be that the Court must order the award delayed to the end of trial if it finds that earlier assessment of the award will preclude access to the court?

HONORABLE SCOTT A. BRISTER: Say that again.

CHAIRMAN SOULES: That the Court must delay payment if it finds that earlier assessment or earlier payment will preclude access to the Court. This forces the Court in order to assess it today to find that it will not; and I think the case law is the opposite of this, that the Court may assess the fees and order them payable immediately unless the Court finds --

MR. YELENOSKY: That it would preclude.

CHAIRMAN SOULES: Or unless it would preclude access to the court. Isn't this inverse to the case law? And where I'm headed is if Judge Brister wants to make a $250 fine, why should he have to jump through the hoops and find that's not going to preclude access to the court. Why shouldn't you be able to make that, and somebody say, "Hey, wait a minute. I'm indigent, and I can't pay." And then you would find if it does preclude access to the court, you would have to delay it.

HONORABLE SCOTT A. BRISTER: Well, in the original Committee report the reason was because you decided that back when you decided whether it was substantial or not, but that's not applicable any more under the new 2.

CHAIRMAN SOULES: Does it make any difference?

MR. LOWE: They are not to be payable. But if he wants to make them payable, he can make a finding that it won't

deny you access.

CHAIRMAN SOULES: Right. But the trial judge has got to go forward and make a finding if he makes a $5 award.

MR. LOWE: Right. And then if he makes that finding, then he says they're payable now.

CHAIRMAN SOULES: My suggestion if he makes a $5 award, he doesn't have to go forward and do anything else on the record unless somebody says "Wait a minute. That denies me access to the court."

MR. LOWE: I understand what you're getting at. I mean, it just...

CHAIRMAN SOULES: Does anyone have any sentiment towards changing --

HONORABLE DAVID PEEPLES: I think you're right. I haven't heard an argument against it yet.

MR. SUSMAN: You're right.

MR. HERRING: Here is the quote from Braden v. Downey which adopts the Fifth Circuit language, quotes the Fifth Circuit language and adopts it as the Texas Rule: "If a litigant contends that a monetary

sanction award precludes access to the court, the district judge must either, number one, provide that the sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation, or two, make express written findings after a prompt hearing why the award does not have a preclusive effect."

CHAIRMAN SOULES: Shouldn't we just use that language in 4 to the trial court standard? Okay. Anybody opposed to making that change?

MR. YELENOSKY: Are we also making the change with the references to Paragraphs 3(c) to include 2, or just knocking out references to Paragraphs and just saying "monetary awards"?

CHAIRMAN SOULES: That seems to me to be the better way.

MR. YELENOSKY: Just say "monetary awards," because like I said, any amount potentially could be preclusive.

MR. LATTING: Just amend pursuant to Paragraphs 3(c) and 3(g).

CHAIRMAN SOULES: Just say

"monetary awards," and then pick up the Braden vs. Downey language.

MR. LATTING: What's that language, Luke?

MR. HERRING: If a litigant contends that a monetary sanction award precludes access to the court, the district judge must either, number one, provide that the sanction is payable only at a date that coincides with or follows entry of a final order terminating the litigation, or number two, make express written findings after a prompt hearing why the award does not have such preclusive effect?

CHAIRMAN SOULES: Will you move to substitute that language for paragraph, the first sentence of Paragraph 4?

MR. LATTING: Or some substantially equal language.

MR. ORSINGER: Can I speak against that?

MR. HERRING: Well, essentially the same. We need to eliminate the sanction word there.

MR. ORSINGER: Can I speak

against that?

CHAIRMAN SOULES: Okay. Is that a motion, Chuck?

MR. HERRING: If you're asking for a notion, sure, I'll make a motion.

CHAIRMAN SOULES: Second?

MR. JACKS: Second.

CHAIRMAN SOULES: Tommy Jacks. Okay. Discussion, Richard Orsinger.

MR. ORSINGER: That language right there in my view requires a second hearing on whether someone is precluded from court; and that makes sense when you have a severe sanction, but if you have a $350 award, to say that upon a complaint that it's preclusive you have to have a prompt hearing on whether or not it's preclusive to me is just foolishness.

I think that if somebody -- I think that we ought to have a hearing on what the attorney's fees are and that if somebody hears that they want $400 and they think that that's preclusive, they ought to say it right then and there so that when the judge rules it's all over and we don't have to have a

second hearing.

MR. LATTING: It would be the third hearing under 2.

MR. ORSINGER: Or a third hearing. Yes. Right. It would be the third hearing.

CHAIRMAN SOULES: So we would put in this Braden vs. Downey language if someone contends at the hearing that precludes access to the court, then the judge could proceed to make those findings, I suppose.

HONORABLE PAUL HEATH TILL: It would appear to be the meaning that was conveyed with what he just read.

MR. ORSINGER: The language suggested to me that you can raise the complaint after the sanction is announced, and that makes sense under that case because a sanction could be anything from striking your only expert to suppressing the deposition of your main witness. You don't know what the sanction is until the judge gives it to you, and that's when you complain. In this case you know what fees they're seeking when they pass the witness, and there is no reason to

have a second hearing, because you know before the end of the first hearing what they are after and whether or not it would be preclusive.

CHAIRMAN SOULES: Doesn't that depend on when the end of the first hearing is? Is the end of the first hearing when the judge says $2,000? Now, you've had the sanctions hearing and you did not say $2,000 precludes from access to the court because you thought it might be $50 and you could pay it. I don't know whether we can really fix that.

MR. ORSINGER: So then you have a bifurcated hearing then. The judge rules on what the fee is and how it's going to be assessed, and then you proceed to have the second phase of the hearing where they complain that they can't support that?

CHAIRMAN SOULES: The trap I'm concerned about is now every time that you go in where a party is seeking a monetary award that means that we've got to have something in our pleading that says the monetary award is going to preclude me access to the court, because if I don't have that in my pleading, I

haven't raised it before the judge rules, so now then we are going to have another piece of boiler plate in our responses to motions to compel.

HONORABLE F. SCOTT MCCOWN: But is this a practical problem? Because if the judge assesses it, chances are he's not going to make it payable immediately; and the case where the judge thinks it ought to be payable immediately and makes it that way, chances are you're not going to have any kind of claim that it precludes access, so you're not going to raise the objection. In the rare case where you raise the objection you have a hearing. Whether you have it immediately or whether you have it at a subsequent time it is just not going to come up enough to worry about, is it?

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

CHAIRMAN SOULES: Let's be convened. I think, Judge McCown, why don't you repeat or summarize what you were saying, Judge McCown, so we can get back on track here

about what difference, if any, it may make in having one or two hearings where this issue arises about monetary award possibly being preclusive of access to the court.

HONORABLE F. SCOTT MCCOWN: I just think there are so few times when anybody is going to have even an arguable claim that it is, that they're just not to have the temerity to raise the objection, and I don't think we need to worry about it. On those few cases where they do raise the objection you can either have a second hearing right then and there, or if they claim they're not ready, you can say you'll put it off; but it's just not going to come up enough to worry.

CHAIRMAN SOULES: So are your comments consistent with saying that the Court may award payment at any time unless there is a contention and then a contention that payment of the award now would preclude access to the Court?

HONORABLE F. SCOTT MCCOWN: Yes. I don't have any problem with the way the original draft was written.

CHAIRMAN SOULES: This would

mean that on every monetary award, the way it's written now, every monetary award would have to be delayed unless there is findings. What I'm suggesting is that every monetary award be subject to payment now unless there is a finding contrary.

HONORABLE F. SCOTT MCCOWN: I think the presumption is it probably ought to be delayed. If the judge wants to -- if in a particular case the judge wants to make them payable now, and I think there are those cases where that is helpful for the reasons I've said, then he ought to say "I'm going to make these payable now unless you've got some good explanation and can back it up with evidence why that would preclude access to the court."

MR. LATTING: Do we need to say anything? Could we take the whole thing out of the Rule?

HONORABLE F. SCOTT MCCOWN: No, because it's a big problem. We need to address it, because it's a big issue. Whether they are payable now or whether they're put off until the final judgment is a key question at every one of these hearings.

MR. LATTING: Well, to be consistent with the law shouldn't we say unless we want to take this away from the trial judge, that the monetary awards may be made payable at the discretion of the trial Court at the end of the case or now provided however that if they're made payable immediately, that those against whom they are awarded shall have the right to make their case and will use the language. But that's really what we have to say, isn't it?

MR. ORSINGER: That's really implicit in the language.

CHAIRMAN SOULES: That's really implicit in the very quote that Chuck was reading.

MR. HERRING: Let me read the language that we got out of the case at least with one change I've made. "If a litigant contends that a monetary award precludes access to court, the district judge must either, number one, provide that the award is payable only at a date that coincides with or follows entry of a final order terminating the litigation, or two, makes written findings or

oral findings on the record after a prompt hearing that the award does not preclude access to court."

That's the quote. The one change I made was the insertion of the oral findings on the record, because we had allowed that before up above, and that's just the same procedure. The point is we want to have findings whether the judge states them on the record or writes them out.

HONORABLE F. SCOTT MCCOWN: We need to take out the word "prompt" too.

MR. HERRING: Okay.

CHAIRMAN SOULES: Change "litigant" to "party."

MR. LOWE: That presupposes that he's made them due now. I mean, that case doesn't say he has to impose them payable now. It doesn't say that. It says if he does that, then that's what he has to do; but we have the prerogative of saying that "We don't want that done; we don't want it payable now; we want it payable at final judgment." But if the judge wants to make them payable now, then he must make these findings, so it's a

question of philosophy whether you want to do it now. That case doesn't require it either way.

MR. HERRING: All the case does --

MR. LOWE: The case we're quoting it says what you have to do only when they're payable now, but the Fifth Circuit hasn't said that they must be payable now.

MR. HERRING: Correct.

CHAIRMAN SOULES: If we could maybe precede that sentence with a sentence that says "The Court may set a time for the payment of monetary sanctions"? That is certainly implicit anyway.

MR. SUSMAN: Again, I raise the philosophical question simply because a case has held something doesn't mean we have to take the language and put it in the Rule anymore than you do on a jury instruction have to take it out of a case and put it in a jury charge; and that's what we're doing. I mean, this is micromanaging of the worst kind that makes the Rules long, and it presumes that Courts have no good judgment, and I just don't

see why you need to say anything about this. I mean, clearly there are limits, and there is going to be a jurisprudence whether you put anything in a Rule or not. Why do it?

CHAIRMAN SOULES: Well, it is a procedural right of a party to raise that, and there may be more lawyers reading the Rules than reading the cases.

MR. LATTING: Luke, I'll make a motion that in substance that we allow the Court discretion when to award the monetary award and that we adopt language consistent with Braden without trying to write it out here today.

CHAIRMAN SOULES: Any more discussion? Those in favor show by hands.

HONORABLE C. A. GUITTARD: Does "monetary award" include expenses?

CHAIRMAN SOULES: Yes.

MR. LATTING: Yes.

CHAIRMAN SOULES: Those in favor show by hands. 11. Those opposed. 1. The vote is 11 to 1. All right.

So the Committee will work on redrafting Paragraph 4 as indicated; and that

gets us to the last Paragraph 5. Take a minute to read that.

MR. SUSMAN: Luke, what does the last sentence mean, "Sanctions pursuant to Paragraph 3(h) shall be deferred"?

CHAIRMAN SOULES: That's been stricken in the --

MR. SUSMAN: Gone already.

MR. HERRING: Yes. That just doesn't apply anymore.

CHAIRMAN SOULES: But the last sentence, "Otherwise orders under this Rule shall be operative at such time as directed by the Court," that stays in 4. Now, we are going to 5.

MR. LATTING: Well, to raise a point, I don't know that we need that last sentence anymore. "Otherwise orders under this Rule shall be operative at such as directed by the Court," if we say what we just voted on about Braden and we've taken out the sentence that Steve asked about, do we need that?

HONORABLE SCOTT A. BRISTER: I think we ought to look at the language and put

it all together in one sentence.

CHAIRMAN SOULES: Not necessarily leave it in.

MR. LATTING: So we have the leeway to take that out or incorporate it in the Braden language?

CHAIRMAN SOULES: Right.

MR. LATTING: Wavy line through that.

PROFESSOR DORSANEO: Usually it makes better sense to talk about the main Rule before talking about exceptions.

CHAIRMAN SOULES: Actually the lead-in sentence could just simply be what's there. Strike "otherwise" and say "Orders under this rule shall be operative at such time as directed by the Court." And then put the Braden language in behind that.

HONORABLE SCOTT A. BRISTER: Yes.

CHAIRMAN SOULES: That gets everything.

MR. LATTING: Okay. I'm for that. Let's do that.

CHAIRMAN SOULES: So you pick

up that, strike "otherwise," lead into Rule 4 with the balance of the last sentence now under Rule 4, and you pick up the Braden language and draft it that way. Does everybody agree? Anybody opposed to that? Okay. That's the way it will be done.

Now, Number 5. Any comment on Number 5, Paragraph 5. Sarah Duncan.

MS. DUNCAN: It bothers me to say that an order shall be deemed to be part of the final judgment, because then you create at least in my mind some confusion about what your transcript on appeal needs to contain. And I'd suggest you can get to the same place if you just say "An order under this rule shall be subject to review on appeal." It's not part of the statute saying that an interlocutory order is appealable, so it can't be appealed other than after final judgment.

It also to me is a conflict to say "on appeal therefrom," which I think references the final judgment, but also say that a person or entity affected by the order may appeal just as a party to the rest of the judgment may appeal, because there may not be

an appeal from the substance of the final judgment, but there might very well be an appeal from a sanctions order.

MR. LATTING: Would you have it read this way: "An order under this rule shall be subject to review on appeal."?

MS. DUNCAN: Period.

CHAIRMAN SOULES: Period.

MR. LATTING: Period.

MR. LOWE: Does that mean, are we giving authority that now you can appeal the Rule subject to appeal? I mean that alone can you appeal?

MR. LATTING: I don't know. That's a good question.

HONORABLE SCOTT A. BRISTER: Our concern was the Mother Hubbard Clause invokes final judgments, "all other relief not set out in this order is hereby denied." Did that expunge the previous sanctions orders? The concern was that the Mother Hubbard Clause expunged the sanctions orders or at least is unclear.

CHAIRMAN SOULES: Good point.

MR. GARDNER: It might be a

different question than the question of whether it's an interlocutory judgment which I think the language if you just stop "shall be reviewable upon appeal," period, if you stop there, I think that would imply to the average lawyer that it's now available for interlocutory appeal. I think if you say "An order under this rule shall be subject to review on appeal from the final judgment," I think -- you don't think you could say it that way?

MS. DUNCAN: No. Because then if you don't have an appeal from the final judgment, you can't have an appeal of the sanctions order.

MR. LATTING: Why don't we just add "after final judgment."

CHIEF JUSTICE AUSTIN MCCLOUD: You can't have it both ways anyway, can you? I mean, you can't have an appeal of the sanctions order if you don't have an appeal of the final judgement. That may be the only thing you urge, but you can't have two judgments, two final judgments. What I'm saying is I think you're right. If you have a

sanction order which becomes a part of the final judgment, then you must appeal the final judgment, but this could be the only point of error that you would urge. In other words, I don't think you can divide it out.

MS. DUNCAN: Right. But this isn't even in the judgment. We're deeming it to be apart; and you may go up on a transcript. If you go up on a standard transcript, this isn't even going to be in the record, but you're nonetheless appealing it as a part of final judgment.

PROFESSOR DORSANEO: Well, in my understanding of our practice all orders that precede the last order or a part of the judgment.

MR. LOWE: Supposed to be.

PROFESSOR DORSANEO: And we don't have a requirement of reducing everything to one formal final order. It seems to me that both of these sentences in this review paragraph are not very good sentences with the exception of making it plain because it perhaps wouldn't be clear to everyone that someone who is not otherwise a

party to the final judgment who has been, you know, aggrieved by a sanction order can appeal when all other claims, issues and parties' controversies have been resolved, but not before that, and we could word that.

HONORABLE F. SCOTT MCCOWN: Why don't we take this whole Paragraph 5 out. It seems to me that we ought not make a special Rule here, that you've got an order just like all the other orders in the case, and it's interlocutory. It's not going to be appealable. At the final judgment stage you can take your appeal and you can assign that order as error just like you can assign an order excluding evidence or denying discovery as error.

And if you're a non-party, I don't know what the law is. We have our appellate experts here. But let me ask you this: Let's say you're a non-party who is ordered to give discovery in a case. Well, isn't that appealable right then? The non-party doesn't have to wait to appeal until the parties dispose of the case by final judgment.

MS. DUNCAN: I don't think that's appealable.

MR. MCMAINS: So if you're a non-party, i.e. a lawyer who has been sanctioned, I think you could take your appeal then.

PROFESSOR DORSANEO: That's controversial.

MR. HERRING: That was one of the reasons to have something in here is to try to address primarily the issue of what happens to the non-parties who are stuck with an order when they appeal to try to answer the question further. The language in the current Rule, and there is nothing magic about that, but simply says "An order shall be subject to review on appeal from the final judgment," so that's what is in the Rule now.

HONORABLE F. SCOTT MCCOWN: I don't think a non-party ought to have to wait for the final judgment particularly if it's a lawyer for the party who is suffering collateral consequences from a sanctions order, and his interest in appealing that shouldn't be tied up with his client's

interest in how fast the litigation goes or doesn't go.

MR. BABCOCK: Suppose you have got a non-party who is ordered to testify and reveal privileged and confidential information and/or produce proprietary information and trade secrets and financial information? What is there to appeal there at the end of the case?

HONORABLE C. A. GUITTARD: Mandamus.

MR. HERRING: That's mandamus review there.

MS. DUNCAN: That's mandamus.

CHAIRMAN SOULES: In Rule 87, the last provision is "There shall be no interlocutory appeals from such determination." It's of course a venue Rule, and maybe it is more instructive there, because before that Rule and the change in 1995 there had been interlocutory appeals from venue determinations, but that's what the Committee wrote in and the Supreme Court adopted. I don't know whether that helps.

HONORABLE C. A. GUITTARD: Mr.

Chairman, I would envision the situation where there is a very serious appeal from the temporary injunction order; and some sort of discovery order might be -- a sanctions order connected with discovery might be crucial to the appeal of the temporary injunction. Unless you have a jurisdiction of the interlocutory appeal, you can't add something else on. But if there is some incident to a temporary injunction hearing that would affect the temporary injunction appeal, then you ought to be able to raise that in the temporary injunction interlocutory appeal.

So if you say "appeal from the final judgment," the question then is would that rule out arranging these matters on appeal from an interrogatory appeal?

CHAIRMAN SOULES: Is that permitted now?

HONORABLE C. A. GUITTARD: As I understand it if there is some crucial error that the trial Court makes in the course of the temporary injunction hearing that might -- for instance, if you deny a party a right to proceed with its evidence or

something like that, that would be very crucial in a temporary injuction appeal. And if you appeal from a denial of a temporary injunction, well, you ought to have the right to raise that.

CHAIRMAN SOULES: In other words, you were denied discovery crucial to the temporary injunction hearing, and you want to complain on appeal from the denial that you should have had the discovery?

HONORABLE C. A. GUITTARD: Or the other way around.

CHAIRMAN SOULES: Or the granting of a temporary injunction, but you should have had discovery and it was wrongfully denied, and you can raise that in your temporary injuction appeal?

HONORABLE C. A. GUITTARD: Yes.

MR. LOWE: That's denying the discovery. This is the sanctions or fine that we're talking about here. But I have a question I'd like to ask Rusty. I mean, if you can never appeal this, that's fine. But what if you had a judgment, you try the case,

nowhere, nothing else but just this you want to complain of. Okay. Would Rule 434 mean whatever error on this had no effect? It's not in the final judgment. And would they be able to say, "Well, any error there did not affect the final judgment in this case, and therefore Rule 343 is harmless error and we can't reverse." What about that, Rusty?

MR. MCMAINS: Well, I think that's why we were not contemplating that the actual order be a part of the final judgment. We did not want the order to be subject to Rule -- what used to be Rule 434 in terms of the harmless error rule, because obviously for one thing it may well be an order. The sanctions order may well be against the lawyers. And as has already been pointed out I think this rule was only intended as a timing rule. That was at least the Committee's intent as to when you could take the sanctions appeal as to the sanctions when the appellate relief was available as opposed to that you did it in conjunction with the appeal or on the appeal only, because I can see a situation where the party that loses the

sanctions hearing or the lawyer might win the case. They may not want to appeal, and so it may be the other side; but they may not have lost enough, the other side is not going to pay it, and so you then have -- you still have this order out there. The lawyer has to be able to perfect his rights; and so it's just a question of when.

HONORABLE F. SCOTT MCCOWN: Well, what about just saying an interlocutory appeal may be taken from a monetary award ordered paid before final judgment or an order against a non-party?

MR. SUSMAN: Well, it seems to me there is a policy issue here that we have got to decide before we get into the language. One issue is that since the sanctions are going to be imposed against a lawyer, could be imposed against a lawyer who doesn't have a stake in the final judgment, there is no reason to require the lawyer to wait until the very end to appeal. You should allow. That's Scott's point.

HONORABLE F. SCOTT MCCOWN: Not only no reason, but it could be bad.

MR. SUSMAN: I mean, the Committee's point it seems to be that that just encouraged proliferation of litigation, more appeals, more appeals for these satellite orders. Make the lawyer or whoever is aggrieved wait until the very end and appeal at the very end.

And then there seems to be a third position, Judge Guittard, which is that if the sanction relates to an interlocutory appeal anyway like in our temporary injunction where perhaps discovery or a defense was limited as a sanction the sanction is directly related to the merits of the interlocutory appeal. You wouldn't want to leave that until the end. So I mean, these three extremes it seems to me, these three positions that you could have. And I would not be in favor of interlocutory appeals just because the lawyer wants to clear his good name. It seems to me that's just going be a lot of appeals. I would think you ought to wait until the very end.

MR. MCMAINS: The problem right now is statutorily you cannot -- we

cannot do by Rule. We cannot create an interlocutory appeal. It has to be done by a statute.

HONORABLE F. SCOTT MCCOWN: I'm not sure I agree with that.

CHAIRMAN SOULES: We did in 76a. The Supreme Court has already done that, and it happens.

MR. MCMAINS: Well, no. What we did was we did it artifically. We said that's a final judgment. What I'm saying is we did not do it as a interlocutory appeal. We said it shall be treated as a final judgment. That's what made it appealable. I realize that may just be a terminology question, but you cannot say that there is just going to be an interlocutory appeal. We have a jurisdictional statute that limits the ability to take any appeals except from final judgments except as provided by statute, and so that's the reason we don't have any interlocutory. I mean, we don't have an interlocutory appeal for anything, you know, that we can just kind of imagine or write an interlocutory appeal Rule. That is a function

of the legislature.

Now, we could say and we have said -- I mean, we haven't said it. The Courts have said it. The Courts have treated, for instance, orders on turnovers to be final judgments, because there isn't anything left to be done, and it's separate and apart from the final judgment. But just a turnover order post judgment that's the end of that controversy, and therefore that is a final judgment, and therefore that is by judicial interpretation a final judgment; and that is really what we I think did in the 76a stuff is say we treat it as a final judgment, because that's kind of the judicial gray line that we've been able to do.

CHAIRMAN SOULES: Chief Justice Phillips has just joined us. Good day, Chief Justice. How are you today? Would you like to have some words with the Committee?

CHIEF JUSTICE PHILLIPS: As long as this Committee is working it will reduce the cost of litigation by 80 percent.

CHAIRMAN SOULES: Judge,

don't starve us to death.

MR. MCMAINS: Can we enhance attorney's fees by a like amount?

CHAIRMAN SOULES: Chief Justice Phillips, if you'd like to talk to us at any time, please let me know and we'll be happy to hear from you.

CHIEF JUSTICE PHILLIPS: Thank you, no.

CHAIRMAN SOULES: Welcome. We're glad you're here. Steve Susman, and then I'll get to Judge McCloud.

MR. SUSMAN: It seems to me in my experience with sanctions when sanctions awards are entered they are frequently resolved as part of settlement of the overall lawsuit. I mean even big monetary sanctions against a law firm get wiped out when we settle the overall case when the overall case is resolved. So we would not want to encourage I would not think. We want to discourage any kind of appeals from sanctions awards until the very end of the case I would think. So I think you need to put something in the Rule that has that effect, because

otherwise I think an argument could be made that "There's $100,000 fine against me. It's really final as to me. It's not interlocutory. It's for me. It's the only relief ever sought against me. You know, maybe I have some right to appeal." I don't know, so make it clear that it says to the end.

CHIEF JUSTICE AUSTIN MCCLOUD: I think he makes a very good point, and it seems to me I see no problem with the final judgment. Of course, it doesn't have to be one piece of paper. The final judgment is when the litigation is finally terminated and ended. And so you can have -- you would have a final judgment even though this interlocutory order has been entered, the judgment would become final when the final judgment on the merits then is signed by the judge. At that point any part of that judgment would be appeal. I think that would be right, so it would take care of your problem about you would not be involved in the settlement situations. And I don't see any reason why it would not become final, do you,

once the judge signed the final judgment on the merits? And no matter how many pieces of paper might be out there they all become a final judgment. I think that's right.

CHAIRMAN SOULES: Just Brister though raises a curious issue that I haven't addressed before, and that is if you draw a final judgment at the end of a case and say at the bottom "all relief not granted in this judgement is denied," and you've got maybe back early in the case you've got a summary judgment that was granted, and that's interlocutory right up to the day of final judgment. We always think that that summary judgment is still -- that that interlocutory summary judgment that got granted is still granted, but it's not in the piece of paper called the final judgment; and I guess that would be somewhat analogous to a discovery order. But what really is the effect of that? And I think it's interesting. I never even thought about it.

MR. ORSINGER: I would like to suggest that an order should be subject to review when it becomes enforceable. In other

words, when it's collectable and if it's payable immediately, you should be able to supersede it and appeal it immediately rather than waiting until the end of the case. And is there -- would there be any support for the idea that we're going to link enforceablity with appealability and supersedability?

CHAIRMAN SOULES: Well, you're raising something that I wanted to also bring up. I don't know if we need it in this discussion. There is no provision right now in the rules for superseding a monetary award that's ordered payable now. Maybe some people think 47 fits, but it really doesn't fit, because it's talking about a monetary award and a final judgment, and that may need to be worked into this as a side issue.

MR. ORSINGER: One possible way to link them would be to say that if it's going to be enforceable immediately, and we can borrow Rule 76a language, then it's deemed severed from the case in a final judgment which may be appealed. That way if you can execute on it, or if you can put them in jail for not paying it or whatever, it's subject to

immediate appeal and it's subject to a supersedeas bond.

That doesn't solve Justice Guittard's problem about interlocutory appeals, but its does solve a problem for anyone else that what difference does it make if you have to wait two years to appeal it if they can't collect if from you for two years? But if they can collect it from you right away, then by God, you ought to be able to appeal it now and not two years from now.

CHAIRMAN SOULES: Or at least supersede the appeal.

MR. ORSINGER: Or at least supersede it until you can appeal it.

PROFESSOR DORSANEO: Are these awards of expenses thought of as money judgments? Or they're really thought of as in personam awards, aren't they? Right? I mean, you're supposed to pay them, right, not just a judgment liable for that amount.

MS. DUNCAN: It seems to me it's like any other money judgment, and I don't see that the supersedeas Rules we now have wouldn't cover it.

PROFESSOR DORSANEO: But should is be? That's the question that I have. Should we treat it like any other money judgment, or should we treat it as something that you're obligated to pay such that when final judgment is rendered you pay it as opposed to failure to protect your exempt property?

HONORABLE F. SCOTT MCCOWN: Well, that's a critical question, because if it's a money judgment, then you can't get a writ of execution on an interlocutory order which is what it is if it's a money judgment. There is no way until the final judgment in which it should be incorporated can you get your writs. If you can enforce it by contempt, then it's not a money judgment. It's something else. It's a fine or something.

PROFESSOR DORSANEO: You could craft it. If we made it a final judgment by definition under one of a couple of different approaches, then you could think of it as an order that becomes a separate final judgment dealing with a separate claim almost like a

Federal Rule 54 judgment that says it's final. Then you could have execution.

HONORABLE F. SCOTT MCCOWN: The point I was going to make is why treat this different than anything else? If the judge wants it enforced immediately, then he can sever it out and make it a final judgment and give the writs of execution. If a lawyer has a sanction against him which he's not willing to have abide the final judgment, he can move for severance, and there can be a case-by-case decision about whether that should be severed out so that the lawyer can appeal it separately.

You ought to just treat this like everything else. The problem is whether it's a money judgment or whether it's something that can be enforced by contempt or by striking pleadings or whatever.

PROFESSOR DORSANEO: I think that is the important question. We have to decide what methodology we're going to use to enforce it and then decide when.

CHAIRMAN SOULES: And it doesn't fit the severance Rule. It's not a

cause of action, is it, or is it?

MR. ORSINGER: You would override the severance Rule by adopting a provision that says it's deemed severed and appealable just like 76a does.

MR. MCMAINS: The problem I had, and one of those things I guess that we discussed at the sanctions hearing early on in the Sanctions Task Force Committee is that if you treat these as severable items and final judgements and therefore accomplish the appeal, they are also subject to a motion for new trial. I mean, unless you also try and say, "Well, this is a species of final judgment that isn't subject to a motion for a new trial." So what you've done is built in another hearing and a new procedure to go through with regards to that practice; and it just, it's endless.

And I think that's why we were -- we were trying to decide that basically there were two different types. There were those that were substantial and those that were insubstantial, and the substantial ones you have to wait, and the

insubstantial ones you don't, and you get them back by restitution if you were to do it later on.

MR. HERRING: There's been a little disagreement as to whether you can supersede them if there is any way to make sure that they can be superseded. I think that's significant. In the Task Force the most plaintive cry we had about sanctions in an individual case was the Metzger decision down in Houston where the two lawyers were sanctioned one million dollars in sanctions, and it was not -- the other side apparently took steps or threatened to take steps to obtain execution, and the lawyers were going to go bankrupt before they could have the appeal. In a megasanctions, monetary sanctions case there really needs to be some mechanism to allow it to be superseded. Otherwise you have a real problem.

MR. ORSINGER: Where are they going to get a million dollars?

PROFESSOR ALBRIGHT: If you're talking about severing, it sounds to me like what you're talking about is severing as final

judgments sanctions that are payable immediately. If they're not payable immediately, then you can pay them effectively in the final judgment, and the only ones that are going to be paid immediately are under Braden and TransAmerican ones that do not affect your access. The million dollar one is going to be able to get mandamus. So doesn't the mandamus law take care of the problems that we're trying to deal with? Why not?

MR. MCMAINS: The problem in the Metzger case specifically was it happened at trial. The judge had previously overruled a motion for summary judgment. They went to trial. At the end of the trial he granted a directed verdict against the Plaintiff and then entered sanctions against the Plaintiffs for filing the lawsuit for a million dollars. So I mean actually it contemporaneously occurred with the final judgment in the other case; and it didn't help them at all. I mean mandamus would not make any difference.

PROFESSOR ALBRIGHT: They can appeal. I agree there is a problem as to how do you supersede it, and is it part of the

judgment, and how should you enforce it, that sort of thing; but it seems like the problems as to when you appeal is under TransAmerican and Braden if it's a severe sanction and you have to pay it immediately or effective immediately, then you can mandamus it, but I don't think we want to get into the situation where we're saying any money judgment that is payable immediately is immediately appealable, because then every time Judge Brister gives a $250 sanction for failure to answer interrogatories, then that is a separate judgment that is immediately appealable. And I guarantee you then all the appellate judges are going to say to the district judges "Don't you ever have a $250, any kind of monetary sanction that is payable immediately, because we don't want to hear them."

HONORABLE F. SCOTT MCCOWN: Nobody could afford it.

MR. BABCOCK: I'm still worried about -- this follows up on what Alex was saying. I'm still worried about third-party discovery. I used a bad example a second ago. But suppose you've got a case pending in

Harris County and the parties want to do discovery on the chief executive officer of a non-party in Dallas County, and they depose him for a couple of days, and then he says "I'm a busy man. I'm not going to sit for this anymore," and they go for an order in Dallas County under this Rule and say "make him go back," and the district judge in Dallas County says, "Yes, go back and do it," and he says "Sir, I aint going to do it." The Dallas County judge says "Okay. You're going to get fined $1200 or $1500 for disobeying my order and for discovery abuse."

Number one, how is that person who is a non-party even going to know when there is final judgment? I assume that that kind of discovery order, you know, spend another day or two in a deposition would not be reachable by mandamus. And what is left for appeal even if he does appeal?

HONORABLE C. A. GUITTARD: I'm real reluctant to get into an area of describing what is appealable and what is not. We have quite a body of law what is appealable. When you get into that you don't

know just what you might be messing up; and in other areas you might be getting into the same problem of interfering, making special Rules with respect to appeals and you don't know whether to follow the special Rule or follow the general Rules.

And it seems to me that we just don't need this Paragraph 5 at all. Let these matters be taken care of by the established jurisprudence in the other Rules. For instance, there is Rule 43 that has to do with orders pending interlocutory appeal in civil cases, and Rule B says "except as provided in Paragraph A the trial court may permit interlocutory orders to be suspended pending appeal therefrom by filing security pursuant to Rule 47." We ought to at least look into that and see whether or not that take cares of the problem or something like it could.

There is also the point that if an order for immediate payment or something like that is so oppressive that the party liable doesn't have an adequate remedy of law, we have mandamus jurisdiction take care of

that, so I don't see why we ought to put anything else in here. The ordinary Rules you can -- anything that affects the final judgment you could appeal, you can assign as appeal as part of a final judgment or conceive it as part of the interlocutory judgment in an appropriate case. So I don't see any reason for this Paragraph 5 at all.

MS. DUNCAN: There is Rule 47f for other judgments covering supersedeas and I agree with what Judge Guittard has said, and I guess I will buck the trend and say in my view part of the motivation for the concern that Judge McCown as a for instance has expressed is the uncertainty of mandamus review, and in my view that goes to failing our appellate system. I think we need a certification process for getting really serious interlocutory orders up for review without having to go through and distort the test for mandamus review; but be that as it may there are procedures however inadequate some people may feel in place for reviewing interlocutory orders.

CHAIRMAN SOULES: Anyone

else?

MR. SUSMAN: I'm not sure I agree with Justice Guittard. I mean, these are orders directed, can be orders directed at a third party. That is what makes them a little different. It seems to me there is some advantage of having some certainty of when you have got to appeal, or if you've got to appeal and you don't appeal it, do you lose your right. Okay. And I mean, there is some advantage I think of fairness to the lawyers or third parties who might be recipients of these sanctions to know either "I have got to wait until the very end and appeal" or "I can." So I'm not sure that this one we should leave to general jurisprudence.

HONORABLE C. A. GUITTARD: Well, in that case what we need to do is craft and look at a Rule that would apply only for third parties.

CHIEF JUSTICE AUSTIN MCCLOUD: Well, I haven't thought this out. But I have a little bit of concern because somebody mentioned and said "What is this," and I'm not sure I know what it is. It seems to me that

what you're talking about is some judge ordering somebody to pay some money, and normally when that happens everything goes fine so long as that body pays that money; but frequently when that person elects not to pay that money, a lot of things can be taking place.

One thing that can be taking place is that is a constructive contempt as opposed to a direct contempt. If that is a constructive contempt, then all kinds of things are taking place. There is a whole body of law that is dealing out here, and probably the first impression is let him keep it if you've every been through that. And so I think we're not sure what it is; but we are talking about constructive contempt which it may well be particularly with the third party, and the judge says "Pay the money." He says, "I'd just as soon not to." "All right, then" he says, "if you're not going to pay the money, I'm going to tell you what I'm going to do to you." He says, "Fine. Tell me." Then there's all kinds of things that have to be done, all types of due process that has to

take place.

There are many, many things involved here that could be occurring here as I hear this problem; and I haven't thought it out well enough; but I just want to raise that problem, because constructive contempt is a difficult thing. Normally constructive contempt occurs when someone decides not to pay money that they've been told to pay. I'm just raising that question.

It could be that as a third party there is no final judgment until he refuses to pay and then a constructive contempt is brought. It's possible.

HONORABLE C. A. GUITTARD: You can't appeal for contempt.

CHIEF JUSTICE AUSTIN MCCLOUD: No. You can --

HONORABLE C. A. GUITTARD: Mandamus court.

CHIEF JUSTICE AUSTIN MCCLOUD: Not until he's put in jail. And then you have to have an order that he's confined before the appellate court can even hear it. So I think we better wait until next week.

CHAIRMAN SOULES: Unless he's a lawyer, then he gets an automatic walk under the Rules and doesn't have to go to jail. He can be released pending Habeas Corpus under the Rules.

PROFESSOR DORSANEO: Thank God or somebody.

HONORABLE F. SCOTT MCCOWN: I think we would be better off leaving this out. Sarah made a point that I don't guess we're ready to address today, but I don't want to lose; and that is it's true that we have statutes that say when you can appeal interlocutorily and when you have to have final judgment, but I'm not sure that the Rules Enabling Act doesn't allow the Court to write a Rule authorizing an interlocutory appeal and thus affecting a repealer of those statutes, and I don't think that the legislature has any kind of turf investment on the question of interlocutory appeals, and a certification procedure really would have all of the advantages that Sarah outlined.

MS. DUNCAN: And this is not the only problem in my view that we have on

interlocutory Rules. We have case dispositive rulings that are being made every day and we're trying to fit mandamus to those types of rulings, and we're getting Rule interpretations through mandamus and telling a trial judge he has abused his discretion or she has abused her discretion in interpreting a Rule a particular way when nobody knew to interpret that way; and it's not that the judge has abused his or her discretion. It's just that they've incorrectly interpreted a Rule that we want interpreted a different way. And I think that is part of what is breaking the mandamus original proceedings system is we are trying to make it fit something that it really wasn't designed to fit.

HONORABLE C. A. GUITTARD: I agree with that. That takes a lot of study.

MS. DUNCAN: I'm not suggesting we do it.

MR. ORSINGER: Insofar as third parties the language needs to be re-done; and the example a minute ago of the deposition in Dallas with the lawsuit in

Houston, if there is going to be any kind of order compelling a witness in Dallas, it's going to be issued by a Dallas district judge. If the lawsuit is in Houston, then this sentence doesn't make any sense about how it's subject to review on appeal from the final judgment, because the final judgment is going to go to the Houston Court of Appeals, and the discovery order is going to go to the Dallas Court of Appeals. We're going to have to write this in a way and maybe drop everything out, but I mean insofar as third parties are concerned this language I don't think is adequate.

MR. LOWE: Rule 215 was way back a long time ago and it has been amended some, but there was no provision in there about appellate procedure or what they could do, and it did deal with third parties, and I just haven't heard a lot of complaints that people don't know what to do, how to get appellate review in these matters. I don't know what they've been doing, but it just hasn't seemed to be a big problem, and we didn't talk about it there. There is no

provision in there about appellate review, and we seemed to make it okay for a number of years.

MR. HERRING: It has the provision on just the order. It says "The order shall be subject to review on appeal from the final judgment." It's 215.

MR. LOWE: I'm sorry. I overlooked that then.

MR. HERRING: 2152(b)(8).

MR. LOWE: Okay.

MR. HERRING: Page 76.

MR. LOWE: I stand corrected then, because I looked through here and I didn't see it.

MR. HERRING: It's buried in there.

MR. LOWE: It's buried for me anyway.

CHAIRMAN SOULES: Maybe this is an "If it ain't broke, don't fix it" problem. But still supersedeas is an issue. I don't think Rule 43 addresses an interlocutory order situation that is not already on appeal.

HONORABLE C. A. GUITTARD: That's right. I was just thinking that something analagous to that might be appropriate.

CHAIRMAN SOULES: So if the party who wants it or a lawyer who has been assessed sanctions directly against a lawyer doesn't want to pay or a party that doesn't want to pay, shouldn't there be a way to supersede during the trial the payment so that it can be reviewed on appeal? I mean some people if you pay them, it doesn't make any difference if it gets reversed. They're not going to have the money. You're not going to get it back. You'd rather put up security because you think you have got a good appeal. Then you may get it back.

MS. DUNCAN: But if you can't get a writ of execution to enforce it, why do you need to supersede it, and why would anybody pay it?

MR. ORSINGER: Motion for contempt.

HONORABLE C. A. GUITTARD: If you have a contempt order, you might pay it.

MS. DUNCAN: Well, but if we had a clear consensus in the Committee on the record, or the Court had an opinion or whatever that this is a money judgment like any other money judgment, you can not-pay the money judgments against you every day for the rest of your life, and you will not be in contempt of court.

CHIEF JUSTICE AUSTIN MCCLOUD: True.

MR. SUSMAN: You know, I mean you've got a major lawsuit, and the district judge who you have a client, you have got to try those cases, and the judge has said "You pay $50,000 in sanctions." I mean, for me I'd either want to have that on appeal or paid. I mean, what are you going to do? This judge is controlling the rest of the case. He's already pissed at you for something you did. He's asked you to pay $50,000. I mean, I guess you could say "Huh-uh. You can't do anything to me. You know, you can't put me in jail." But that seems unreal. I mean, the guy ought to have some way of telling the judge, "Judge I respectfully disagree, but I

respectfully appeal," or do something that does not really get in this judge's face where you have an obligation to the client to try the case for them.

CHAIRMAN SOULES: If at minimum you had the right to supersede that immediately, and the judge had no discretion if you put up all the money, a cash deposit or goods, security bonds, because that judge has to accept that as security under 47 and 49, then you would have -- you wouldn't be so much in the judge's face, because you'd be right in the Rules. I don't know whether that's a good idea or a bad idea; but this is not a fresh, new problem today for me. We've worried about what to do about monetary sanctions pending the resolution of the case, ordered paid now, what do you do.

PROFESSOR DORSANEO: My bias would be to say, as I think the current Rule does say, that these orders whether or not they're orders awarding expenses or more severe sanctions are subject to review on appeal from the final judgment, and I might add by any person or party aggrieved by the

order. I don't like the idea of having a whole separate appeal in the middle of the case regardless of the amount that is involved; and frankly supersedeas is a puzzle. I'd just leave it at that for now. That would be about as far as I think we could get today.

MR. MCMAINS: There is an additional problem. Even if you don't have to pay a -- if you physically do not have to part with the cash in that, thus far the case law says that the failure to pay can be taken into account as the judge in terms of cumulative conduct that will progressively get you more sanctions. So even if you can't be compelled to pay, you can suffer a penalty for not having paid at an earlier time. So it seems to me that and much in addition to the practical consequences that Steve referred to the concern that I have is that this could be a building problem if you have not satisfied the orders of the court without regard to whether anybody is actually trying to collect the money. They may just knock that up as one chit and decide that they're going to collect

all their chits at the end when they default you, because you have a series of these awards that you have not paid, any one of which may well be relatively miniscule in connection with the amount, but it sufficiently shows that the party, attorney, whatever is abusing the discovery process.

So one of Scott's comments I think is right. It does have immediate effect. It may have immediate affects in the course of litigation even if it doesn't cost you any money right then, because it is something that is cumulative in the way the discovery abuse considerations are made.

So I don't know what the answer to any of that is. And the problem with supersedeas of course is it costs money to supersede, and that money is not recuperable under our practice. I mean, you don't get the supersedeas premium back at the end under Texas law, so in reality if what you do is allow somebody to supersede, then you are costing them money that is unrecuperable under our practice, so you have successfully levied a fine of some amount, and if it's a

significant amount, may well be well beyond the $500 that you started out talking about as invoking a bunch of substantive due process rights that you can't get back and under any circumstances.

I really think you create an awful lot of problems if you start trying to set up interlocutory appeals and supersedeas and whatever that we had not thought about. But we do have a program with the accumulation effect.

MR. ORSINGER: It seems to me that apart from the third-party problem the greatest difficulty occurs when you have a sanction that is immediately enforceable and no way to suspend it and no right of appellate review before it's enforced. And it seems to me that maybe we ought to discuss as a matter of policy whether we want sanctions to be immediately enforceable when they can't be superseded and when they're not subject to review except perhaps subject to mandamus review if they meet certain standards about mandamus.

I mean, I'm not fundamentally

comfortable with the idea that a trial judge's judgment can become enforceable against a party who has no right at that point to seek appellate review; and I know there is practicalities of that time. The judge needs to be able to hold somebody in contempt if they won't reveal the source of their information, you know, or whatever. I know that that is practical. But we're designing a system here, are we not, that permits district judges to assess judgments and to order people to appear in places and everything else, and then at the same time we're telling them "You have to do that right now, and then you have to wait two years to find out whether you should have had to do that or not."

The only alternative we can offer them is mandamus on the grounds that appeal is not an adequate remedy; and that is not something we should be encouraging anway, mandamuses. And I don't think mandamus is necessarily as good a remedy as an ordinary appeal, because I think the focus of a mandamus is different; and I can show you cases, although in the mandamus area there is

a case to say anything, but one grounds for not granting a mandamus is that the law is not clear. That's not a grounds for refusing to entertain an appeal. And so if you have a question as to whether you should or should not have to do something and you apply to a court of appeals for mandamus and their attitude is "We don't know whether the law is A or B, so we're going to deny mandamus and take this up on direct appeal, but in the meantime they've got to do it until the appeal," I've got a real policy problem with all of that.

PROFESSOR DORSANEO: The only thing I'll say is that I guess in at least one other area we have significant temporary orders that are not subject to interlocutory review, and a large percent of the litigation is in divorce cases we have such orders. I don't know if that is a good thing or a bad thing, but it's a thing at least.

MR. LOWE: Even in the city court, any court if somebody is ordered to pay $50 or a $100 or whatnot, they have a right to susspend that payment pending an appeal. I

mean, we just generally don't make somebody just pay money and you have got to give it up now and then wait. You know, and if it's a party, I have had some cases which weren't worth more than $250. And so why fine somebody and have to pay that and then you can't appeal? You have got to pay it now, and there's no way to suspend the payment. I mean, it just seems I don't have the answer to it, but it just doesn't seem right.

CHAIRMAN SOULES: It seems to me it's fairly easy to write a Rule or a peice of a Rule providing for supersedeas, and it seems to me to be very complicated to try to write a Rule addressing when the order is appealable.

JUSTICE HECHT: I mean, it could be pretty easy if you just say these aren't an award of monetary sanctions. You can't order it paid until concurrent with or after the final judgment; and then you could put in there to solve the supersedeas problem that you don't even, because it's different from a monetary judgment you don't have to supersede it. It would be stayed. You could

make that decision to just stay the payment pending appeal.

I would be interested in what the district judges thought about how that would impact monetary sanctions. It seems to me like it could have a good effect in the sense that lawyers would be less inclined to run down and ask for a little of this and a little of that all the time because they're not going to get it until the great judgment day which may be way off.

By the same token or on the other hand you may lose the effectiveness of monetary sanctions, because theoretically one of the reasons that you award attorney's fees is because the other side is actually out that expense in having to deal with the discovery abuse. If you take that out, then he -- then it's as if no sanctions are being imposed at all. So that's a little troublesome.

HONORABLE ANN TYRELL COCKRAN: I think one of the problems is what Rusty mentioned about the cumulative nature. I think that is something. So many times what we see is, you know, the $350 payable in a

week, and the motion that comes on Day 8 is to "Now please strike their pleadings because they didn't." I don't see so many people going, you know, trying to get some sort of constructive contempt charge established. What they do is they play got-ya again and come in and say "Uh-huh. Well, yes they produced the 50,000 documents and they answered both sets of my interrogatories, but I haven't got my $350 yet. So will you please strike their pleadings and give me another $750 for my new attorney's fees in going through this"? And you know, even if it's not payable regardless of what we decide to do about the when payable Rule I think we've got to address the thing that if it is either -- you know, that it can't be used as, you know, gamesmanship in other sanctions.

I mean, if there is -- if it's going to be enforceable before judgment, then give the person a way to go. You know, make them either supersede and appeal it and give the other person a right to all of the post judgment writs to go collect their money; and if you're not going to do that, then just say

that you don't get to bring it up again until final judgment, but go one way or the other, but don't let it be, you know, another little tool.

Don't let people have their pleadings stricken for not paying the money. You know, if you really want to make them pay it before judgment, give them the right to get writs of attachment and garnish their bank accounts, but don't use it as another way to hammer them.

CHAIRMAN SOULES: Judge McCown, would you care to respond to Justice Hecht's inquiry?

HONORABLE F. SCOTT MCCOWN: I was just wondering if people had finally come around to my original suggestion which is getting rid of sanctions all together.

HONORABLE ANN TYRELL COCKRAN: Amen.

HONORABLE F. SCOTT MCCOWN: I think this proves that it's just too pernicious an evil.

HONORABLE ANN TYRELL COCKRAN: Second.

CHAIRMAN SOULES: Judge Brister, would you care to respond to Justice Hecht's inquiry about delaying all monetary sanctions to the end and what effect that might have on your sanctions pending the trial?

HONORABLE SCOTT F. BRISTER: As I understand where we are now with the Jacks amendment no attorney's fees are recoverable other than unreasonably burdensome amounts anyway. Is that right?

HONORABLE ANN TYRELL COCKRAN: The first round of motions only.

CHAIRMAN SOULES: I think that's probably right.

MR. LATTING: First round, that's right.

HONORABLE SCOTT A. BRISTER: Second time around $250.

MR. LATTING: Right.

HONORABLE SCOTT A. BRISTER: Second time around more than $250. Well, I mean, if you're asking me am I going to award anybody $250 sanctions if I can't make it effective until the end of all of the case,

the judgment and all appeals, the answer is "No. I'm not going to waste any time on it," because one out of 100 cases will actually go to trial. The rest of them will be settled and be forgotten about. The one out of 100 that actually goes to trial and you incorporate a judgment, a third of those get reversed even in my court; and you know, the rest, another half settle on appeal; and five years from now I will not waste any time at all. I will let it be known in the community that I never grant $250; and in my opinion the people who do not respond to interrogatories when sent them will continue to do so, because they know there is no down side to refusing to respond to a motion to compel the first time it comes to them; but there is just no point in wasting my time if it's not going to ever be enforced.

MR. BABCOCK: Isn't that more than likely to be a repeat offender?

HONORABLE ANN TYRELL COCKRAN: No.

HONORABLE SCOTT A. BRISTER: That remains to be seen.

HONORABLE ANN TYRELL COCKRAN: No. I don't think -- I mean, I think it's clear that we by adopting the Jacks proposal for the first round we're going to go back to the way we all used to do it, which is that you don't worry about answering your interrogatories until you get the motion to compel. It was a tradeoff. Yes, we will have that. So I think the first-round motion is not going to get the expense. It will instill a bit of laziness, or there will be no sense of urgency; and lawyers will respond to the sense of urgency because there is not enough time in the day. So we did make that tradeoff, so that will happen. People will blow up interrogatories.

CHAIRMAN SOULES: Judge Brister, if there were supersedeas available, in other words that $250 could either be paid to the other side or deposited in cash to the court, how would that affect your practice?

HONORABLE SCOTT A. BRISTER: I can't imagine that many people superseding $250. I don't think that question will come up.

HONORABLE F. SCOTT MCCOWN: It would cost more to enter a grievance than pay the fine.

MS. DUNCAN: Yes. And what is that going to do to Stephen for whom the $250 that he's now expended and is gone from his budget, you know, if it is superseded and deposited in the registry of the court, that's not going to help him at all. Why give him the $250 fees under Subsection 2(c) if they are not going to go into his pocket and make recompense for the harm that's been done?

HONORABLE F. SCOTT MCCOWN: It seems to me that we want this to operate at two different levels. One level is we want a judge on the basis of intuition to be able to impose a very small amount of money to encourage compliance with the Rules somewhere around $500, and the only due process we want anybody to have is their ability to make their pitch to the judge with no appeal, payable immediately, and we get compliance with the Rules because of that. And at the other level if it's serious, we want it treated just like any other kind of governmental action; and

that's what we've got.

If you're going to load it up so that for the $500 attorney fee assessment you get real due process, you just as well not have the $500 attorney fee assessment.

CHAIRMAN SOULES: Take a bigger situation. The party comes in like Judge Brister I think spoke about last session, and on the week before trial they've finally produced all the documents that are really germane to the case, and the opposite party comes to court and says "I want sanctions," and for whatever reason death penalty sanctions are not what the judge orders, but they put on proof that now they're going to go back and re-depose this 25 witnesses and spend a lot of money. They've already spent half a million dollars getting ready for trial and with this material concealed they're going to have to go back and spend another $300,000 now to get ready for trial. They need a continuance. The $30,000 might have been $50,000 if they had this material, because the deposition would have been a little bit longer, but not that much

longer, and they had to have some people go through these documents and spend some time anyway, but now they're going to have to re-plow old ground, so they want $250,000, and it's very reasonable.

It's the really right thing to do in the circumstance whether they win or lose their case they shouldn't have to spend that $250,000 to get ready to go to trial when it would have only cost them -- the $300,000 to get ready for trial when it would only cost them $50,000 to get ready to go to trial. So he says, Okay. $250,000 and pay it now, because these people need the money to get ready for trial. They shouldn't be out of pocket that additional money." What then?

MR. LOWE: Are you going to give that person the right to depose them, discovery on that thing, or do they just have to accept their word? Or can he say, "Okay. Wait a minute; I have got to go depose your expert and see if it did"? And then you create you another field of litigation. Or are you just going to cut it off and going to let them have some discovery on that

discovery? When you get that much money, start talking about that, I guarantee you my clients will want to do discovery and want to know how come it's that much more.

CHAIRMAN SOULES: Or they order any discovery you take is at your expense, pay their fees. But it seems to me like supersedeas there if they say, "Well, we're going to appeal your order; we think this was inadvertent; we don't think we should have been sanctioned, so whatever the grounds may be we will put the $250,000 in the registry of the court and it goes up." Even if the party who receives the benefit of the sanctions loses the case, if the sanctions are sustained, they still get the $250,000, but the $250,000 is not paid right now. And if the party assessed the $250,000 penalty is right, on review they say "Well, Judge Brister shouldn't have done that because" and explain whatever abuse of discretion and then they get their $250,000 back, I don't know. To me supersedeas does have a place in the practice even if we don't approach the appellate issues; and I guess I'm probably beating this

horse to death.

MR. ORSINGER: Your example right there just made it plain to me that it's the party who is receiving the sanctions that would like to have immediate appellate review rather than waiting three years, because if the outcome of that appeal is you get your sanctions, then you get them now or in three months instead of in two or three years. I was thinking it was the party who suffered the sanctions that would want to be having immediate review, and it's the opposite. It's the guy who is out the $250,000 to do the discovery again would love to get that sanction appeal resolved immediately.

MS. DUNCAN: That was the example I was thinking about when I was talking about Stephen or thinking about some clients I used to have. Three years later the $250,000 may or may not help. At that point if they've won their judgment and they're flush with money, they'll forgive you. It's at the time the harm is done that they probably need that money to go prepare for trial; and you're suggesting that we not even

let them know if they're going to have that money to use to prepare for trial so that somebody might give them a loan to prepare for trial until three years down the road.

MR. LOWE: Would that be an incentive for that person to tell his clients "Wait a minute; here's a little discovery abuse; I think we can get us a little money to prepare from trial; let's get this thing going by saying it's this much and everything"? And that's inviting the devil to come in your house.

MS. DUNCAN: I think he's already there.

MR. MCMAINS: Certainly in Buddy's house.

CHAIRMAN SOULES: A motion has been made that we accept Paragraph 5 as it's written in the subcommittee report.

MR. MCMAINS: Who seconded that one?

CHAIRMAN SOULES: And it was seconded. I think Tommy, somebody. I can't remember who seconded it. No. There was a motion to pass this all as is, and so...

HONORABLE F. SCOTT MCCOWN: I thought the motion was to delete it.

CHAIRMAN SOULES: I haven't heard that motion. Early on when we began all this Joe this morning, Joe Latting made a motion that we pass this subcommittee report as it's written, and that was seconded, and Tommy made a motion to amend and substitute his; and we've dealt with that. So I'd like to hear something specific about what we do about Paragraph 5 if anybody wants to do something other than adopt it.

MS. DUNCAN: I would like to drop it.

HONORABLE F. SCOTT MCCOWN: Second.

CHAIRMAN SOULES: All together? You want to drop it all together?

MS. DUNCAN: Yes. Drop the whole thing.

CHAIRMAN SOULES: And not even carry the language that was in the old rule forward?

MS. DUNCAN: No. Drop the whole thing.

CHAIRMAN SOULES: The motion has been made to amend, to drop Paragraph 5. Is there a second?

PROFESSOR DORSANEO: Second.

CHAIRMAN SOULES: Any further discussion on that?

HONORABLE SCOTT A BRISTER: Keep in mind 4 is going to say you can make it unless it precludes access to the court make it payable immediately, and then dropping it leaves no statement about what happens then; and if that was me, which unfortunately it will not be -- I'm not a litigant. I'm a judge -- I would be concerned what to do at that point.

HONORABLE F. SCOTT MCCOWN: Pay it.

PROFESSOR DORSANEO: In my opinion taking it out would not have any effect on the aggrieved person's right to appeal on final judgment the order of sanctions, except somebody could argue that if you paid it, I don't think they could argue this very successfully, that if you paid it, you can't argue about it later.

I don't think that that's the way I would rule under the case law that we have about voluntary payment, because it's hardly voluntary; and but I think that's part of the reason why those sentences are in the current Rule now.

CHAIRMAN SOULES: But before that voluntary payment precludes appeal -- I mean voluntary payment does preclude appeal unless in the cases that I've seen there is something else. The sheriff knocks on your door with an execution, and you're forced then to pay it, and you show that in the record as how the payment was involuntary. Does it have to go to, for example, a contempt hearing, but you don't --

CHIEF JUSTICE AUSTIN MCCLOUD: I think the trial judge -- I've had a couple of those cases, tax cases where you pay under protest and that sort of thing. This is just off the top of my head, of course. I think if you had a court order telling you to pay it, I don't believe the Supreme Court would hold that to be a voluntary payment. That is if you paid it.

CHAIRMAN SOULES: If you do have the trial court's judgment which of course is an order and then you pay it, you're out of business on appeal.

CHIEF JUSTICE AUSTIN MCCLOUD: I can't believe they'd hold that to be a voluntary payment.

PROFESSOR DORSANEO: Especially since if you don't pay it, things can get a lot worse pretty fast.

CHIEF JUSTICE AUSTIN MCCLOUD: If you don't pay it, there is all kinds of things that could happen.

CHAIRMAN SOULES: If you pay the judgment without some sort of resistance, you waive your appellate right. If you pay that order without some sort of additional resistance, does the same consequence occur?

CHIEF JUSTICE AUSTIN MCCLOUD: Except you've got a Court telling you to pay it. Not exactly telling you to pay it, indicating you should.

CHAIRMAN SOULES: But the Court's judgment tells you to pay it too.

CHIEF JUSTICE AUSTIN MCCLOUD:

Let me say there are two things there. The Court's judgment may say you're liable. That's what I was asking. Are the judges saying that you're either liable for this, or they're ordering you to pay?

HONORABLE ANN TYRELL COCKRAN: Ordering you to pay.

CHIEF JUSTICE AUSTIN MCCLOUD: Ordering you to pay.

HONORABLE ANN TYRELL COCKRAN: Ordering you to pay. Because just a declaration of liability triggers no duty to pay.

CHIEF JUSTICE AUSTIN MCCLOUD: Okay. I don't know where we are.

MR. LOWE: Would we not? I've been corrected once about I didn't think there is anything in here about this, but they are correct. There is a sentence in here about authorizing the appellate procedure, a short sentence. If we take that out, is that going to be then, "Well, that was in there and now it's not in here anywhere; there is no appeal; that's it"? Is that going to be taken that way? Every time you take something out they

say it's taken out for a reason, and therefore the appeal is denied. What is the harm of leaving the simple sentence we had in There there that hasn't caused a lot of problems?

CHAIRMAN SOULES: That's an amendment to the amendment. You are suggesting --

MR. LOWE: No. I'm just raising -- I'm probably confused again, but my confusion is more the point now.

MR. MCMAINS: Addressing the relevant confusion I do believe if you take it out, if you take out all of Paragraph 5 and you take out any references that we have currently had in 215, that the only thing, the closest analogy you will have is the cases that deal with turnover orders which will say that when an issue has been disposed of entirely and there is nothing else pending before the court to do, then they're going to treat that as a final judgment.

There will be efforts to appeal those awards. And people will probably tell their clients, or if it's against the lawyers, they will appeal protectively at

least so that they have not blown their opportunity to appeal; and you will have appeals of any monetary award that is ordered payable prior as a protection, if nothing else by careful lawyers, and I'm not sure that they aren't right that they don't have a right to appeal if it terminates the interest and the issue in the case particularly if it's against non-parties or lawyers. You don't have anything or any mechanism by which you have anything else pending before the Court involving that party. If there is nothing else there, that may well be treatable as a final judgment and may well be subject to appeal immediately, and will add considerbly to the dockets of the courts.

I think frankly that by ignoring it that you are ducking the issue. I feel much more comfortable with the notion of simply, because I do think it's a resolution of the issue if you say you leave the part in on 5 except expand it to include all the monetary awards. I just throw this out. If you say that no monetary awards shall be payable, shall be ordered to be paid prior to

and deemed to be as a part of the final judgment, then there is no question about timing, no question about it being subject to all the Rules on supersedeas, no question about being in essense treated as a final thing there.

Now, the suggestion that there may be orders going on elsewhere with regards to third parties is a problem; and that frankly does not solve that particular aspect of the problem, because you may lose your right to appeal without ever knowing that the case was over if you're a non-party and not otherwise participating in the course of the action, but you can solve supersedeas. You can solve immediate payment. You can just take that out all together. You can solve immediate mandamus. You can solve it in terms of a cumulative violation, which was one of my concerns. If you're ordered to pay and you don't pay, that could be treated as a cumulative violation. Well, if it can't be ordered to be paid prior, then that can't be used as a basis for a cumulative violation.

So a lot of those problems

would be solvable, but what you sacrifice is what Judge Brister has been trying to accomplish is the ability to get people off their ass to do the work.

MR. SUSMAN: You could authorize them to paddle lawyers. That solves the problem.

MR. MCMAINS: Why don't we issue State bull whips or something. But anyway, I think frankly that that notion solves most of the problems apart from non-parties in a different jurisdiction than where the appeal would be.

MR. LOWE: But you could provide a Rule for a non-party, person gets any monetary, has been sanctioned shall be given by the clerk notice of any final judgment.

MR. MCMAINS: I think with the Rule as currently prepared he will still be required to be give notice under the Rules. But remember the effect of that under our Rules is it extends your time, but there is a period of time when it ends. Like 180 days after you were supposed to have done something

it ends.

MR. LOWE: But he's going to keep up with it if he's got a good bit of money riding on the pot.

CHAIRMAN SOULES: All right. I guess we'll take a vote, and let's vote without prejudice to putting something in the place of 5; and I'm leaving that issue out of this vote. Those in favor of the amendment to delete all of 5 as now written show by hands. 11. Those opposed? This is to leave 5 in.

MR. MCMAINS: In some form.

CHAIRMAN SOULES: Right now to leave it in or take it out? 8. By a vote of 11 to 8 the committee recommends to taking 5 out. Now, should there be some -- do we want to have some discussion about how to -- do we want to give the Committee any guidance about writing something else about review or supersedeas, or do we want to just drop it and leave it where it is with only four parts to 166d that we've discussed all day today?

PROFESSOR DORSANEO: I would just pick up on Buddy Lowe's suggestion that we stay faithful to the language in the

current Rule if we're going to have something like this Paragraph 5.

CHAIRMAN SOULES: Buddy, where is that language? I've looked for it.

MR. LOWE: I couldn't find it.

PROFESSOR DORSANEO: It's in three different places in the Rule.

MR. HERRING: The easiest one to find is Paragraph 3.

CHAIRMAN SOULES: 166(b)(3).

MR. HERRING: Yes. Paragraph 3, last sentence. It's also in Paragraph 2, the last sentence of Subparagraph 8. If you wanted to have that same language for this one, what you say is "An order under this Rule shall be subject to review on appeal for final judgment."

PROFESSOR DORSANEO: And I would add "by any party or person aggrieved by the order."

CHAIRMAN SOULES: Is the same language every place? Where are the three places?

PROFESSOR DORSANEO: "Party or

person aggrieved."

CHAIRMAN SOULES: Where is it? Let's look at it.

MR. HERRING: You found Paragraph 3, the last sentence. You found Paragraph 2, Subparagraph (b)(8) of the last sentence.

PROFESSOR DORSANEO: And then it's in Paragraph 1, the last sentence of the --

MR. HERRING: Paragraph (d).

PROFESSOR DORSANEO: (d).

CHAIRMAN SOULES: Paragraph (1)(d).

CHAIRMAN SOULES: So it would really suppose -- are you moving, Bill, that 5 say that "An order under this rule shall be subject to review on appeal from the final judgment"?

PROFESSOR DORSANEO: Yes, sir.

CHAIRMAN SOULES: That's your motion. Second. Anybody second that?

MR. HERRING: Second.

MR. LOWE: Second.

CHAIRMAN SOULES: Second by Buddy Lowe. Discussion?

HONORABLE SCOTT A. BRISTER: I thought he also added "any party aggrieved."

PROFESSOR DORSANEO: It means that anyway to me.

CHAIRMAN SOULES: An order under this rule can be directed to a person or entity. Let's see. Where does it say?

HONORABLE SCOTT A. BRISTER: How about just "from the final judgment by any person or entity affected by the order."

PROFESSOR DORSANEO: "Entity" strikes me like ghost busters. "Person."

MR. MCMAINS: Those are non-entities.

PROFESSOR DORSANEO: Bill, will you accept Judge Brister's discussion?

PROFESSOR DORSANEO: Yes.

CHAIRMAN SOULES: That's okay.

MR. BABCOCK: So if I understand this, a non-party who is a stranger to the lawsuit who lives in a different jurisdiction and gets sanctioned under this

Rule has to wait for and keep up with the litigation that may stretch on for two or three years before he can appeal?

CHAIRMAN SOULES: I think the answer to that is "we don't know."

MR. BABCOCK: We think it is.

CHAIRMAN SOULES: If the current Rule covers that, the answer is probably "yes." But if not --

MR. ORSINGER: The answer cannot be "yes" if they're in different appellate court districts. If they're in different Court Of Appeals Districts the answer simply cannot be "yes."

PROFESSOR DORSANEO: Why?

MR. ORSINGER: Because you can't appeal a Dallas district judge's ruling to the Houston Court Of Appeals.

MS. BARON: Richard might be able to help me on this; but I thought under current law a discovery order from a court that does not have power to the main litigation is appealable at the time it is ordered.

MR. ORSINGER: That's my

belief. And it's also appealable to the Court Of Appeals --

MS. BARON: In that district.

MR. ORSINGER: -- in which district the court is located. And if they're in different districts, you can't appeal a Dallas district court order into the Houston Court Of Appeals.

CHAIRMAN SOULES: But there is disagreement about that.

MR. ORSINGER: No, I don't think there is any disagreement about that.

PROFESSOR DORSANEO: I don't agree with anything you just said.

HONORABLE F. SCOTT MCCOWN: There is no authoritative disagreement.

MS. BARON: I think there is a Texas Supreme Court case. Do you know it?

JUSTICE HECHT: Appeal.

MS. BARON: A discovery order from a court that does not have jurisdiction over the main. I guess this usually involves cases pending in our states.

MR. MCMAINS: That's right.

MS. BARON: And you come in

and you get a discovery order in Texas. That is appealable.

MR. MCMAINS: That's right. Because that's all there is appealable.

PROFESSOR DORSANEO: That's somewhat different from what we just --

MS. BARON: Right.

MR. ORSINGER: No. But as a practical matter even under the Rule we've adopted you're required to go to the county where the discovery is going to occur and secure a ruling out of the district court in that county; and if that county is in a different Court Of Appeals district, this Rule purports to say that the order on the discovery which is the sole proceeding in Dallas County, for example, is not appealable until the judgment in Harris County court is signed, and then it's presumably appealable into the Houston Courts Of Appeals even though they're in the Dallas Court Of Appeals district; and I don't think that that is going to fly.

CHAIRMAN SOULES: Let me see if for purposes of clarification, are you

suggesting, Richard, that what you have just said is a part of 166d that we have worked on today?

MR. ORSINGER: Yes. I'm suggesting.

CHAIRMAN SOULES: Where is that?

MR. ORSINGER: It's not explicit. It's implicit.

CHAIRMAN SOULES: Okay. Because I think that is someplace else in the Rules actually.

MR. ORSINGER: I don't know. See, this is a sanction order. This is the Rule that governs sanction orders, and it says under Bill's proposed proposal that it will be appealable with the judgment; and that means that if it's discovery against a party in another county, it's going to be a court order pursuant to a proceeding brought for the sole purpose of securing that discovery, and when that discovery order is signed it will become final and go final because it's not interlocutory, but it's still not appealable.

MR. LOWE: Make it appealable

on final judgment.

HONORABLE F. SCOTT MCCOWN: I just have real problems with saying that a non-party, even the lawyer of a party has legal rights that have been finally adjudicated and that order may well have collateral consequences to him, for example, something simple as he has to disclose it and therefore is denied board certification in a specialty, and that he cannot have that review. It is as to the non-party even the non-party lawyer a final judgment in every sense of the word except the technical sense that we've got a Rule that says there can only be one final judgment. That's a Rule of procedure, not of statutory law, and it itself could be simply altered.

And I think if there is a non-party or a lawyer and there is an order that resolves a dispute and it's final as a practical matter and it may have collateral consequences, you ought to be able to go to the Appellate Court and not have to wait for people who he has no control over to get their litigation over with.

PROFESSOR DORSANEO: That's a standard problem that any party has in a multiple-party case.

HONORABLE F. SCOTT MCCOWN: But for a party it is to some extent within their control. For a non-party it's not within their control at all.

PROFESSOR DORSANEO: To the extent you're subject on an order you're a party in my view.

HONORABLE F. SCOTT MCCOWN: Well, that's not true. A lawyer is not a party.

MS. DUCAN: You become a party.

PROFESSOR DORSANEO: It seems like one if you've been charged with sanctions.

MR. MCMAINS: If you've been sanctioned, you are.

CHAIRMAN SOULES: Any more discussion now about Bill's proposed amendment accepting Judge Brister's changes?

MR. YELENOSKY: I mean, I would like to know whether Richard is right or

not, because to me that's almost dispositive; because if Richard is correct, then whether or not you have the right of appeal immediately depends on the happenstance of where the deponent happened to live, and that doesn't seem to make a whole lot of sense to me. So if he's right, that because you live in Dallas you suddenly would have a right of appeal or that that's the way the law breaks now, it seems to me that that leads me in the direction of saying, "Well, then in every instance when you have a non-party there ought to be a right of appeal."

PROFESSOR DORSANEO: In my recollection there first were the out-of-states cases; and the out-of-state cases since there is no Texas proceeding rightly concluded that the enforcement order is a final judgment. Then from those out-of-state cases one Court Of Appeals in a no writ case came to the conclusion that the in-state cases are the same. I think that opinion is just flat wrong, stupid.

MR. YELENOSKY: Well, that's my question. I think it makes a difference.

CHIEF JUSTICE AUSTIN MCCLOUD: I was never very proud of that case.

PROFESSOR DORSANEO: I said the opinion. Not the judge.

CHIEF JUSTICE AUSTIN MCCLOUD: It wasn't mine. Let me say this: I picked up something here in the last couple of days that sort of intrigues me, and I'm just going to pass it by, because we've been doing this for about 25 years or so.

I have picked up -- this is new to me in all of the various times that I've served on these committees for various things; and I see this group searching out what, say, the Supreme Court has said in TransAmerican and what the Supreme Court has said in this and what the Supreme Court has said in that. Now it seems to me, and in the past maybe I was out in left field, but this is the type of Committee that fashions the Rules that ought to be followed by the Supreme Court, by our court, and by the district courts, and not necessarily that we parrot what they have heretofore said all of which means that what they may have heretofore said

could have conceivably even been wrong. Certainly we've done a lot of things that have been wrong.

So I'm a little bit -- I'm interested in if we really think -- for instance, you raised a good point about a non-party, that maybe a non-party who receives one of these sanctions maybe we should fashion a Rule. The Supreme Court may not buy it, because they're going to be the ones who do the Rules. But this Committee might say, "Hey, if it's a non-party, we think under the circumstances the Rule ought to be this way and not necessarily what the Rule has heretofore been."

I mean, it seems to me like that's what we're here for is to try to determine what ought to happen, and then they go back and argue it, and there's possibly for instance some of the cases that we have been parroting they may think the Rule that we come up with might be better, or they may not like it as well, so they'll do what they want to.

I just pass that along because I've seen that; and I'm not being critical,

because I do the same sort of things. But it just seems to me like this group of people if you think this ought to be the way it ought to be and you've given it your very best shot, why don't we say that. Am I wrong on that?

MR. LATTING: No.

CHIEF JUSTICE AUSTIN MCCLOUD: Because I think that's what they want us to say. I mean, the fact that they have said something in a case before, number one, they didn't have the Rule that we were going to fashion.

I worked on 81c for the Court Of Criminal Appeals. They had never had a harmless error Rule, you know; and we finally said, "Yes, let's have a Rule." And so finally they buy the Rule, and they start applying the Rule; and I think that's just a philosophical message that I wanted to pitch in here, because I don't know that we necessarily have to do everything that has been done in the past if we think what has been done in the past could be improved upon. That's all I'm saying.

MR. ORSINGER: Insofar as the

collateral proceedings are concerned since nobody seems to be voicing agreement with my position, I would propose that we refer this matter for a determination by the Appellate Rules Committee subcommittee of this Committee, because it's my personal belief that the jurisdictional statutes of the Courts Of Appeals give them the power to sit in appellate review only of trial courts that are in that Court Of Appeals district; and I cannot imagine in my mind people as it may be how the Houston Court Of Appeals can evaluate an appeal out of a Dallas County district court and remand the case back to the Dallas County district court even if in some theoretical way it's ancillary to a lawsuit in Houston. I don't seem to be able to get any support from anybody here today, but --

HONORABLE F. SCOTT MCCOWN: I agree. And analytically the reason why, if you go to an out-of-county court to enforce a discovery order, you make an application, and it's assigned a cause number by the clerk, and it is a file, and the judge hears from both sides, and he rules, and he writes an order,

and that order ends that cause number, and it is a final judgment, and it is appealable.

And I don't agree with Bill at all. I think the out-of-state analogy to the in-state problem is the same. There is one final judgment in that cause number in that county that disposed of that dispute that is subject to review.

CHAIRMAN SOULES: Under what Rule does a trial court in the other county have authority to act? You're in Travis County.

MR. ORSINGER: It's in our Rule here. It's in 1(a). It says "The motion shall be filed in the court in which the action is pending except that a motion involving a person or entity who is not a party shall be filed in any district court in the district where the discovery is to take place. And so we, our specific Rule here tells them that they have got to go to the other county; and if it's in another Court Of Appeals district, I think we're just beating our gums here. There is no jurisdiction in the Houston Court Of Appeals to review a

Dallas County district court judgment.

CHAIRMAN SOULES: That's a big change from the current Rules.

HONORABLE ANN TYRELL COCKRAN: The Rule about depositions, no.

MR. MCMAINS: It's the same.

MR. HERRING: It's the same.

MR. MCMAINS: That's straight out of our Rules.

HONORABLE ANN TYRELL COCKRAN: And also the Rule about depositions talks about it there, the disputes about the deposition of a non-party where the district judge in the county of the non-party witness' residence, the Rules on those.

MS. DUNCAN: They don't otherwise have jurisdiction of the person.

MR. MCMAINS: Why?

MS. DUNCAN: Because they don't have the power to subpoena. Isn't that where it came from?

MR. MCMAINS: I understand that. What I'm getting at is why don't even if it may involve a change in the jurisdictional statutes along the line of what

Justice McCloud is saying, why shouldn't the discovery disputes with regards to compliance, noncompliance whether it be non-parties, third parties or otherwise be in the court where the case is pending? And if to the extent there are jurisdictional impediments, why can't we write around those from a statutory standpoint?

CHAIRMAN SOULES: This is a big change. The only discovery motions that go to the Court in another district is discovery relative to depositions, and the Rules say they do. 215(1)(a) says that. And you can get discovery from nonparties under 167, and that Rule says it goes back to the Court that issued the order.

MR. MCMAINS: That's right.

HONORABLE SCOTT A. BRISTER: But as a practical matter most people take the deposition and send the subpoena along with it for which you would have to go to Dallas under your hypothetical.

MR. ORSINGER: You could cure this by --

MR. GOLD: How can you have

jurisdiction over somebody outside of Harris County if you file a motion for production against them and they're in Dallas? You don't have any jurisdiction over them.

MR. ORSINGER: Sure they do.

HONORABLE SCOTT A. BRISTER: I don't enforce this, but I tell the Dallas sheriff to throw them in jail.

CHAIRMAN SOULES: This Rule says you do.

MR. GOLD: I think the Rule says that, but I think it's been a mystery how anyone would ever get jurisdiction since that Rule was written. It's always been an anomaly to me. The deposition Rule is the only one that makes sense, because that's going to be the county that has jurisdiction over it.

PROFESSOR DORSANEO: In other words, jurisdiction within counties or townships or statewide jurisdiction --

CHAIRMAN SOULES: It's not a jurisdiction problem.

HONORABLE ANN TYRELL COCKRAN: Not a juristictional problem.

MR. ORSINGER: In my view a

district court in Texas has jurisdiction up to the border of Texas. What is creating a problem here is that the deponent who is not a party has a right to be deposed in their own county, and they have a right to go file a motion for protective order in their own county, and we can take that out of these Rules, and then they're just as vulnerable to the trial court wherever it may be as they are under a request for production; but I don't think that's fair or right that somebody can be forced to fly across the state and bring gobs of information at the mere subpoena of someone who says they may have knowledge of relevant facts, and then their only alternative is to hire a lawyer in that far away place to go have a hearing in that far away place. I think politically we are smart to say that a non-party deponent is entitled to seek protection in his own county and that we ought to just live with the jurisdictional problem by letting those proceedings be treated as if they're stand-alone proceedings and appealed on their own, have a little sentence in here that kind of cuts them off,

and then let's write the rest of the rule for parties, which is about 99 percent of what we're dealing with anyway.

MR. LATTING: Here. Here.

MR. BABCOCK: Richard, lest you think you're alone, I agree with what you just said.

MR. ORSINGER: I appreciate that.

MR. BABCOCK: The Federal Rules deal with this, don't they? I mean, the Federal Rules if you want to take a deposition of somebody in a different district or a different state, you apply in that district, and once the discovery is completed and if there is any dispute about it, then there is an appeal taken at that time to whatever United States Court Of Appeals that has jurisdiction over that district. And there is no big problem with it. There's no magic to it either.

CHAIRMAN SOULES: We're off the subject of the motion. At least we've gotten somewhat distant from it. The motion was that we pick up the language now in three

places in 215 and add Judge Brister's language to it. Is there any further discussion on that specific amendment to the motion? Those in favor say "Aye."

COMMITTEE MEMBERS: Aye.

CHAIRMAN SOULES: Opposed. That carries unanimously. So we'll make that 5.

MR. BABCOCK: Not quite.

CHAIRMAN SOULES: Oh, I'm sorry. Babcock dissented. The House against one. I didn't see your hand or hear your voice. I apologize.

CHAIRMAN SOULES: We've got a couple of minutes here. We did talk the last time about some sanction against a party who files a groundless or however you want to describe it, frivolous motion for sanctions, and that is not covered here. Is that something? There was debate about that. I'm not sure that we ever took a consensus. My memory is that we did, and that the Committee suggested that we have a sanction against a party who seeks sanctions without a valid basis.

MR. MCMAINS: I thought we had determined that it was already covered under Rule 13.

MR. HERRING: If you get to the point where you have a groundless and bad faith or groundless and for harrassment motion for sanctions, it would be sanctionable under Rule 13.

CHAIRMAN SOULES: But our sense was that we wanted to discourage motions for sanctions probably more than Rule 13 will do, because "groundless and in bad faith" is a pretty heavy standard. I thought that was our consensus. If it's not here, if we want to resurrect that or talk about it or deal with it, fine. I just didn't want the idea to be lost without our action of some kind.

MR. HERRING: In the transcript that was your sense, but there was no vote on it.

CHAIRMAN SOULES: That's right. I'm not sure there wasn't a vote. I just can't remember.

MR. HERRING: Yes. I looked at it.

CHAIRMAN SOULES: Okay. Good. Is that something we don't want to do, or we do want to do? Do we want to address that in the Rules?

HONORABLE ANN TYRELL COCKRAN: Other than in Rule 13.

CHAIRMAN SOULES: Other than in Rule 13.

HONORABLE PAUL HEATH TILL: Or in Rule 13 in that way.

HONORABLE SCOTT A. BRISTER: Well, let me point this out. The Committee Paragraph 2 was if the unsuccessful motion was not reasonably justified, i.e. a frivolous motion for sanctions, then you could get attorney's fees, et cetera. I just note the Jacks amendment which is now the Rule is just if the party against whom such relief is sought was not reasonably justified. I don't know if that was intended, but it definitely drops out that unreasonably -- that the party seeking sanctions was unreasonably justified. That's 2(c) of the new Rule, Part 2.

MR. LATTING: Why don't we vote again on 2. I believe we've got them.

HONORABLE PAUL HEATH TILL: Got them down.

MR. LATTING: Thinned out.

HONORABLE ANN TYRELL COCKRAN: No. No. No. Thomas told me I should throw myself on the podium and beg not to bring it up until tomorrow morning. He'll be back.

PROFESSOR DORSANEO: We need to go through this new 2 line by line. I think when we go through it that it will be different when we finish.

CHAIRMAN SOULES: Well, we will get back to it. Where was that, Judge Brister, in the old, in the Committee's report?

HONORABLE SCOTT A. BRISTER: In the old one it was under Paragraph 2, the last three lines, "unsuccessful motion or opposition was not reasonable" so that you could get attorney's fees if the motion itself was unreasonable.

MR. HERRING: And that basically picks up the provision in the current Rules.

HONORABLE SCOTT A. BRISTER:

Yes.

CHAIRMAN SOULES: It's under 2 in the Committee report?

MR. LATTING: Yes. The second page.

CHAIRMAN SOULES: The second page.

MR. LATTING: Where it says "the Court shall not award expenses if the unsuccessful motion or opposition was reasonably justified."

HONORABLE SCOTT A. BRISTER: Because if you start off in the second sentence "the Court may award the prevailing person or entity reasonable expenses," obviously if it's a frivolous motion for sanctions, then the person that made the frivolous motion will not be the prevailing party since it was a frivolous motion.

CHAIRMAN SOULES: All right. Tommy did ask that we not take up any changes to 2 without him being here, and I don't want to violate that; but we probably better talk about that in the morning whether to put this back like it was. I'm not sure that he

intended to change that, but it is different, so we'll take that up in the morning.

Could we get a status report on the Charge Committee? Has anything occurred there that will enable us to move forward with that tomorrow?

HONORABLE ANN TYRELL COCKRAN: No.

CHAIRMAN SOULES: Paula is not here.

HONORABLE ANN TYRELL COCKRAN: No. Not that I know of. There was one conference call set up which was canceled. I thought she would be here today. No action that I'm aware of.

CHAIRMAN SOULES: All right. We'll need some activity there for our next meeting. So those of you that are on the Committee if you will try to get together with Paula and get that wrapped up incorporating the suggestions or at least addressing the issues that we talked about last time.

HONORABLE ANN TYRELL COCKRAN: Sure.

CHAIRMAN SOULES: And if there

is some problem, Judge, you can maybe move that along too so we can have a pretty good report next time.

Judge Guittard, you probably have a few notes where you could give us a progress report on the Appellate Rules.

HONORABLE C. A. GUITTARD: Well, I'll make a brief one.

CHAIRMAN SOULES: I don't mean to limit you to five minutes or so. If you could start. If we get done in 15 or 20 minutes, fine. If not, we can carry it over to tomorrow.

HONORABLE C. A. GUITTARD: I think I can say in five minutes what I really need to say. Some of us on this Committee have been working on a Committee On State Appellate Rules of the State Bar Appellate Practices & Advocacy Section. We've been working for three years or more, and we've been quite active. We have -- I have currently with me our current draft report which consists of 55 pages, and we were hoping that we would have an opportunity to present that at the March meeting. We are still

hoping do do that.

The members of this Committee that are on our Committee are Dorsaneo and McCloud and myself and Mike Hatchell and Sarah Duncan, and I believe Elaine Carlson. Our effort has been to make appeals easier, to avoid nonmeritorious dispositions, and to make something that would last, that would not have to be changed every three or four years.

One of the principal proposals we make is to abolish the requirement of a bond or other security as a means of perfecting appeal. Since we generally require the appellate costs to be paid upfront, there is no reason to have any further security for those appellate costs, and have the appeal perfected by giving a notice of appeal rather than by filing a bond or other security.

Another change would be that to have the record instead of a transcript with copies we'd follow the Federal Court suggestion. I believe Judge Hecht has made this suggestion that the district court clerk bind up the original papers and the transcript form and certify it all out there without

making a copy unless somebody wants to pay for them. And that everything in the trial court record of file papers would be part of the record on appeal, and all anybody has to do in order to get something additional in there is just resort to the supplemental procedure and ask the Clerk to put another paper and put another transcript and send it on up.

The next point has to do with who is responsible for filing the record. Now, our additional procedure has been to make the appeallant's attorney responsible for that, and so he has to file a lot of motions to extend deadlines and that sort of thing. We really think that ought to be the function of the Court and its personnel. In other words, once an appellant has filed his designation of the record and has paid his fees, then everything else ought to work through the system. There ought not to be any deadlines that would affect the jurisdiction of the Court to pass on the appeal, that it ought to be the responsibility of the trial court clerk and the Fifth court reporter to prepare the record and file it. And if he

doesn't do it, then the appellate court personnel ought to have authority to monitor it, and get it done informally if possible. If not, refer it directly to the appellate court for some sort of order. This I understand is essentially the method that is used in the Federal Courts which on the whole I understand works quite quell.

We propose to abolish the six-month writ of error procedure which leads to the confusion about what is the face of the record for the purpose of a writ of error, and to just permit an appeal in the normal fashion within six months rather than 30 days by a party who has not participated in the appeal. We since there has been some decisions about cross appeals, and I believe the Supreme Court pretty well cleared that up with respect to the original parties, but as to procedures against other third parties on cross appeal that they had an appeal, then that needs to be defined, and we've drawn a Rule that would do something about that.

At Judge Hecht's suggestion we have drafted a Rule that will relax the point

of error practice to get rid of some of the technicalities and permit a statement of issues rather than the points of error practice which has been interpreted rather technically by some Courts and would permit the order to go either way. The Rules now provide in criminal cases you don't have to have a motion for rehearing. You get review in the Court Of Criminal Appeals. We have proposed to extend that to civil cases. So you don't have, require a point in the motion for rehearing for an application of writ of error. But as in the criminal cases the Court Of Appeals would have an opportunity to review the application for writ of error when it's filed in the Court Of Appeals and change this judgment or take further action if necessary subject to other proceedings.

And for instance in the original proceedings some of the trial judges are sensitive about having their names in the captions of these cases, so we propose that they be made Respondents, but they not be named in the caption, and that the real party at interest be made, be denominated the

Respondents.

MR. LATTING: Use their initials.

MR. MCMAINS: The Honorable R. W. --

HONORABLE C. A. GUITTARD: Now, we have other concerns about the review on the partial record where you make a statement of funds. We expect to strengthen that. We have sort of codified the Rules about signing filing, service, copies, leading counsel, and trying to consolidate that into one Rule. We have a proposal that when the Clerk's Office inaccessible for any reason, if there is a local closure of the Clerk's Office or if there is inclement weather or something and people can't get to the courthouse, that ought to extend the time. And all you would need is a certificate by the clerk that the office was closed.

There are several other things that are relatively minor, but I think that the major things have to do with the abolition of the bond and the transferring responsibility from the appellant's counsel to

the court officials and functionaries, the reporter, the clerk and the appellate court for getting the record filed and abolishing all the filing deadlines and just let that be a matter of administration by the court in cases.

CHAIRMAN SOULES: Real good suggestions. It sounds like what you're working at is to unburden the process with some things that --

HONORABLE C. A. GUITTARD: Don't make sense.

CHAIRMAN SOULES: -- are almost make-work.

HONORABLE C. A. GUITTARD: Right.

JUSTICE HECHT: Better move to approve it as presented, Judge.

HONORABLE C. A. GUITTARD: We're not ready to present it. We're going to have the complete report before you and everybody to discuss it.

MS. LANGE: I like most of what I heard. But what about the copies for the attorneys to examine?

HONORABLE C. A. GUITTARD: They can get it if they want to pay for it.

MS. LANGE: Right now the clerk has to have a copy for them to examine; but you're sending everything off and not providing a copy be left.

HONORABLE C. A. GUITTARD: They have their file if they want to examine it. Now, in criminal cases we would provide that there be copies kept in the trial court so that the criminal attorneys can examine the criminal cases; but otherwise if their files are not complete about what is in the file, they can order copies.

CHAIRMAN SOULES: Ms. Lange, did you have a suggestion maybe to make?

MS. LANGE: No. I was just wondering if you don't, like I said, at least keep a copy within the original court, then there's nothing for any attorney or anyone to go back to except the recording, I guess, but...

MS. WOLBRUECK: The only concern with that, I think it's a wonderful idea to send up the original file, but I can

see it put in the mail and possibly getting lost, and I could see possibly the need of the trial court clerk having a concern of maybe keeping us a copy.

HONORABLE C. A. GUITTARD: Our attitude toward that is that that is a very, very rare occurrence, and that if papers are lost, there is very likely no difficulty supplying copies from the attorney's file.

CHIEF JUSTICE AUSTIN MCCLOUD: Luke, let me -- we've talked about this. And I don't know how close we are on this business about the Court Of Appeals taking over the management and monitoring of this file and this case. I can tell you, number one, I didn't just buy on to that right away.

And I can tell you, number two, that none of the other Chiefs, and that's who I'm representing here, they don't know about this. I want to put it down right where we are. But I am on this committee. I will probably soon be leaving this Committee, but I have -- I'm dedicated. I have decided that I think that's the thing to do. I intend to write all of the Chief Judges of the Courts Of

Appeals and point out that I personally have been working with Judge Guittard on this and the Committee. I think it's the direction we ought to be going.

I tell you there will be some immediate opposition, you know, when they see that; and they'll probably want to take out guardianship papers on me for having even, you know, thought about it; but the idea would be, number one, they don't have the staff, they don't have the personnel, and all of those are true things.

We have decided, and this is quite a departure from our procedures to say the least, but we have decided that this is the direction we ought to be going, and that is that the Appellate Court take on the responsibility of getting that record. The court reporters are probably going to respond better to the Appellate Court than they will to counsel out there.

I heard some real horror stories from some of these appellate specialists who serve on that Committee about how difficult it is for them dealing with some

of these people, court reporters and that sort of thing. So I personally think that it's a good thing to do. I personally think it's the direction to go. We may have a lot of opposition on this, particularly in the beginning, from the Courts Of Appeals.

So what I'm saying this is not a done deal at all, this part of it isn't; and I as their representative I intend to write them and tell them that I think it will be a good thing, and they probably will say that it's damn sure time for me to retire. Anyway, I think that's where we are. I think it's the direction we ought to be going; but it's going to take a little bit to sell that, because there is going to be some opposition, and it's going to be legitimate opposition. They don't mind the work, but from the standpoint of personnel.

Actually we do it in the criminal cases anyway. We don't dismiss criminal cases if the statement of facts is not there and if these other things aren't current. Our computer kicks it out, and the Clerk starts writing certain letters like we

said before; and so I think that we've done that long enough that we can say "Okay. This is a thing we can also do in civil cases."

HONORABLE C. A. GUITTARD: My thought has been that the ultimate reponsibility for getting those things filed is the Court Of Appeals anyway. If they're going to put the reporter in jail, as some courts have done, and that hasn't always been very successful. Whatever is finally done is the responsibility of the Court Of Appeals, so let's get them in the act. Let's get them with some tools to get the process going before it gets to that point and maybe relieve the attorneys of a lot of burdens there, and maybe the system will work better.

CHAIRMAN SOULES: I know there can be a lot of criticism of court reporters. I think in most cases the court reporters are very cooperative; but we had a recent experience where after months of delay and then we finally got a statement of facts, and it was a mess, and it omitted the charge conference completely. And we had our paralegal call back over there to try to get

with the court reporter, and this was after our paralegal had called a number of times trying to get the record there in whatever shape it got, and the court reporter said to our paralegal "If you call me one more time, I'm going to kill you" and then laughed, a Bexar County court reporter.

HONORABLE C. A. GUITTARD: Under our system the lawyer would apply to the clerk of the Court Of Appeals, and the Court Of Appeals would -- and that clerk would say "What is going on here"; and we think there is a closed season on clerks in Courts Of Appeals.

MR. ORSINGER: Judge Guittard, just as a matter of curiosity, at the conclusion of the appeal would the transcript stay with the appellate court, or would it be sent back to the district clerk?

HONORABLE C. A. GUITTARD: It would be back to the district clerk.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: If anyone hasn't signed -- Chip I put you on the list. If anyone has not signed the list here, please

come up and do so that we can record your attendane today. With that we're in recess. Thank you very much for your attendance today. We'll be back in session at 8:30 in the morning.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, ANNA LOUISE RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on January 21, 1994, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for this hearing are $2073.00.

CHARGED TO: Luther A. Soules, III

Given under my hand and seal of office on this the 9th day of FEBRUARY 1994.

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