

1 SUPREME COURT ADVISORY BOARD MEETING
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3 Austin, Texas 78701
4 June 27, 1987

5 (VOLUME IV)
6 (Afternoon Session)

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1 June 27, 1987

2 (Afternoon Session)

3
4 CHAIRMAN SOULES: There was something
5 in 88. No, that's not right. 88 is a different
6 -- 88 --

7 PROFESSOR EDGAR: What page are you
8 on?

9 CHAIRMAN SOULES: I'm on page 252.
10 Rule 88, as it's now written, says that if there's
11 been a motion to transfer -- actually, this goes
12 back to the concept of venue and it's predated --
13 changed to 1995. I guess it goes all the way back
14 to the original rules. But it starts out,
15 "Reasonable discovery is permitted on any issues
16 relevant to a determination of proper venue,"
17 prior to determination of the motion.

18 The case law uniformly says that limitation
19 -- that's not a limitation. You can go on with
20 discovery on the whole case pending -- with a
21 motion to transfer pending. This just changes the
22 rule to state what the law is. General discovery
23 can proceed in the face of a motion to transfer,
24 and it changes -- and it talks about a motion to
25 transfer, whereas old Rule 88 didn't.

1 Is there any controversy over this? Any
2 discussion about it? It doesn't change anything,
3 just a textural update. Okay. Those in favor say
4 "I." Opposed? Then the only -- this 166a change
5 only would come into play if we stopped filing
6 depositions. And all it does is say that a
7 deposition can be considered in a motion for
8 summary judgment even if it's not filed because
9 we're not going to file them any more if the
10 subsequent rules pass.

11 Now, Rule 206, which is on page 255, 256, 257
12 and all the rules that follow there up through
13 262, mechanically eliminate the filing of anything
14 pertaining to depositions. You don't file your
15 notice. The deposition itself doesn't get filed.
16 The original deposition is delivered to the
17 attorney who asks the first question in the
18 deposition so that the -- that's for the purpose
19 of telling the court reporter you've only got to
20 look one place and you can't be confused. And
21 that attorney has the duty to maintain it for
22 trial.

23 Now, there is a provision in here, so that we
24 won't get into maybe something like we got before,
25 that any procedure that's spelled out in these

1 rules, or the deposition and custody and so forth,
2 can be changed by agreement of the parties so long
3 as that agreement appears in the transcript of the
4 deposition. So, it sets up a procedure to
5 eliminate the filing of depositions and a way to
6 handle the details of that, but it permits the
7 lawyers to agree on the record to do it any other
8 way they want to.

9 MR. LOW: Can they file it? Can they
10 agree to file it?

11 CHAIRMAN SOULES: No, because there's
12 not going to be any place in the clerk's office to
13 file them. The clerk won't receive them for
14 filing. That's why -- that involves the clerk. I
15 mean, they could agree to it but the clerk
16 probably wouldn't do it.

17 MR. JONES: We don't have any statutes
18 to worry about on this?

19 CHAIRMAN SOULES: No. There are no
20 statute problems. Any motion?

21 MR. RAGLAND: I have a question.

22 CHAIRMAN SOULES: Yes, sir, Tom.

23 MR. RAGLAND: I can't read this small
24 print too well. Does it have any provision in
25 there that the custodian of the original

1 transcript must make it available for examination
2 and copying by any other parties to the lawsuit?

3 CHAIRMAN SOULES: Yes. Let me see
4 where it is.

5 PROFESSOR CARLSON: Page 258(5).

6 MR. RAGLAND: Well, that talks about
7 me paying for a copy to the court reporter.

8 CHAIRMAN SOULES: Well, you get your
9 copy from the court reporter. It doesn't say that
10 a party holding a copy has to make it available to
11 copy. I think we probably --

12 MR. RAGLAND: Well, I think that
13 should be in there. There are many instances when
14 I may not want to buy a copy of it. I may want to
15 look at a copy. Sometimes the original has
16 exhibits attached to it where a copy doesn't come
17 out as well. I mean, the deposition is in the
18 lawsuit. Anybody that's a party to the lawsuit
19 ought to be able to look at the thing.

20 MR. LOW: Reasonable access to any
21 interested party.

22 CHAIRMAN SOULES: Okay. There is a
23 reasonable access provision and I'm trying to find
24 it.

25 MR. LOW: Yes.

1 MR. JONES: Mr. Chairman, when you get
2 through with that language, I'm ready to move the
3 adoption of the rule.

4 CHAIRMAN SOULES: Okay. Provided that
5 we insert that the attorney in whose custody the
6 original is kept shall make that available on
7 reasonable notice, and Tom noting that, in other
8 words --

9 MR. RAGLAND: What paragraph are you
10 speaking from?

11 CHAIRMAN SOULES: Well, I haven't got
12 it in here. I'm going to try to work on it while
13 you-all are talking about something else. But
14 provided that we put a provision in there that
15 says the attorney in whose custody the original is
16 kept must make it available for inspection and
17 copying on reasonable notice -- provided I put
18 that in there, those in favor of this series of
19 rules, please say "I." Opposed? And then we
20 would take out the requirement in the summary
21 judgment rule that the deposition be on file,
22 because it won't be on file. We can use it but
23 it's not on file. Those in favor say "I."
24 Opposed? Okay. Those changes are made.

25 Now, who -- there's a textural change, and

1 I'm running on this -- on the -- in the supplement
2 on page 38, in retyping 204(b), it got garbled in
3 the Court's order, and that's probably my fault.
4 All I'm doing in this is restoring exactly what
5 this committee voted to do before it went to the
6 Court. And what happened, if you want to know
7 what happened, see where it says, "The Court shall
8 not be confined to objections made at the taking
9 of the deposition", at the very bottom, that got
10 made into a separate sentence when it was retyped
11 and it absolutely doesn't make sense. And the
12 first half of (b) was just left hanging, so you've
13 got to put them back together for it to make
14 sense, and that's what I've done. Any objection
15 to that? A change is in order. That's the only
16 reason I'm even bringing it back up again.

17 MR. RAGLAND: Is (4)(a) open for
18 discussion?

19 CHAIRMAN SOULES: No. That's already
20 been promulgated by the Court.

21 MR. BRANSON: Let me ask you a
22 question, Luke. Since you don't file depositions
23 now, let's assume there are some corrections to
24 the deposition. How are they handled?

25 CHAIRMAN SOULES: That is spelled out

1 in here pretty much the same way. The corrections
2 go to the reporter and the reporter distributes
3 them. Let me see where that is.

4 PROFESSOR EDGAR: It's on page 257,
5 isn't it -- no, that's exhibits.

6 CHAIRMAN SOULES: Oh, I know. What
7 happens, Frank, that takes place before -- that
8 takes place before it would be filed. See,
9 there's a procedure in the rules right now about
10 how it goes to the witness for corrections and
11 changes, and the corrections come back to the
12 court reporter and so forth. None of that has
13 changed, because that's all done before you get to
14 the point of filing it. This just says now that
15 you're at the point of filing it, what disposition
16 do you make of it.

17 MR. BRANSON: Okay. But let me --

18 CHAIRMAN SOULES: The changes become a
19 part of the deposition.

20 MR. BRANSON: But we've all been
21 sitting here on Friday afternoons having your case
22 mostly ready when your opponent delivers his
23 party's deposition to you and there's a hundred
24 corrections in it.

25 CHAIRMAN SOULES: Here it is,

1 "Certification," 256, "The officer must file --
2 the officer must attach as part of the deposition
3 transcript a certificate duly sworn by the officer
4 which shall state the following." And a part of
5 that is that the deposition was submitted to the
6 witness and so forth, and that changes, if any,
7 made by the witness in the transcript and
8 otherwise are attached thereto or incorporated
9 therein, that is in the certificate of the
10 officer.

11 MR. BRANSON: Timing wise, when is
12 that done? That's my only question.

13 CHAIRMAN SOULES: It's got to be done
14 within the 20 days prior to which a copy can be
15 used. In other words, that's the same; none of
16 that has changed.

17 MR. BRANSON: Within 20 days prior to
18 trial?

19 CHAIRMAN SOULES: No, within 20 days
20 after the deposition transcript is delivered to
21 the witness for signature.

22 MR. BRANSON: Any changes have to be
23 made?

24 CHAIRMAN SOULES: Right. Now, some
25 judges will permit them to make them later.

1 You've seen them probably made in trials. But
2 there's no change in that practice resulting from
3 these rules changes.

4 MR. BRANSON: Except used to, you
5 always had the filing. If they tried to correct
6 it after the filing, you had that to hammer over
7 the head with it.

8 CHAIRMAN SOULES: Well, you've got a
9 certificate from the court reporter that all the
10 changes that were made are attached to a
11 certificate at the time it goes over to the
12 original --

13 MR. BRANSON: That solves that
14 problem.

15 CHAIRMAN SOULES: All right. We have
16 -- Bill, do you have any more to your report? Oh,
17 there's 175 -- Rule 175 and I don't know where it
18 is.

19 PROFESSOR DORSANEO: It's in the
20 supplement.

21 CHAIRMAN SOULES: Okay. What page?

22 PROFESSOR DORSANEO: It begins on page
23 21. And the rule itself -- or the proposed rule
24 is on page 26. Basically, what we have is a
25 modified version of Federal Rule 68, I believe,

1 which is also entitled "Offer of Judgment." And
2 the rule provides, as redrafted, that one party
3 may make an offer of judgment including costs and
4 attorneys' fees accrued at the time of the offer,
5 and if that offer is rejected, the rejecting party
6 can be penalized. The difference between the
7 draft on pages 26 and 27 of the supplement and the
8 federal rule is that it is clear under the
9 proposed rule that the penalty can include the
10 offering party's attorneys' fees.

11 The federal rule has not been interpreted
12 that way except in cases in which attorneys' fees
13 are part of costs under the applicable federal
14 statute that is the subject matter of the claim in
15 the litigation. Several other adjustments were
16 made to the federal rule to deal with other
17 problems, but they're self explanatory.

18 CHAIRMAN SOULES: And it goes both
19 ways; either side can make an offer.

20 PROFESSOR DORSANEO: Yes.

21 CHAIRMAN SOULES: The federal rule, I
22 think, is a one sided rule --

23 PROFESSOR DORSANEO: One sided.

24 CHAIRMAN SOULES: -- where the
25 defendant can make an offer, but under this rule

1 either side can make an offer and put the other
2 side at issue on that.

3 PROFESSOR DORSANEO: One other thing I
4 should point out, with respect to the "can be
5 penalized" aspect, the rule says in making that
6 decision, the Court may consider among other
7 factors -- well, pardon me, "attorneys' fees will
8 not be awarded to the offeror unless the Court in
9 its discretion determines that the losing party
10 did not act reasonably in refusing the offer. In
11 making that decision, the Court may consider among
12 other factors the differential between the offer
13 and the judgment and the importance of the issues
14 involved." And that is the language that came to
15 our subcommittee from you, which I understand came
16 from the COAJ.

17 MR. ADAMS: What's the importance of
18 the issue involved? What does that refer to?
19 What types of issues are we talking about there?

20 PROFESSOR DORSANEO: I'm not really
21 sure. I think it's meant to be open ended to
22 provide a lawyer an opportunity to contend that I
23 didn't accept that -- I didn't accept that offer
24 and I was reasonable in not doing so given the
25 complexity of the issues of the case, the

1 importance of the issues.

2 MR. ADAMS: In other words, he can say
3 it was just important for my client not to settle
4 this case?

5 MR. McCONNICO: Bill, who instigated
6 or proposed that we adopt this?

7 CHAIRMAN SOULES: It came initially
8 from the COAJ, but it's very similar to Federal
9 Rule 68, as he said, but it's a better work
10 product. This is mutual.

11 MR. LOW: I'm just basically against
12 that. I mean, either side, I think, can take care
13 of itself.

14 MR. SPIVEY: I'm concerned that this
15 is a big old step toward technicality.

16 CHAIRMAN SOULES: Well, of course,
17 it's designed to help settle cases.

18 MR. SPIVEY: Yes. I don't have any
19 objection to any --

20 CHAIRMAN SOULES: Because the party
21 has got to respond to an offer. You've got to
22 respond to an offer, and you've got to have
23 somebody who can test the reasonableness of that
24 some day, whether you made a reasonable response
25 to an offer. And if we're --

1 MR. LOW: I'd move to reject that.

2 MR. JONES: I second the motion.

3 CHAIRMAN SOULES: The motion has been
4 moved and seconded to reject. Any further
5 discussion? Those voting to reject say "I."
6 Otherwise?

7 MR. SADBERRY: No.

8 MR. SPIVEY: There was a real quiet
9 one over here.

10 CHAIRMAN SOULES: Okay. It's house to
11 one -- that's house to two, Tony, because I kind
12 of like it myself.

13 PROFESSOR DORSANEO: I'd like to
14 commend the draftsman for the fine report and all
15 the work, but I don't have any particular
16 enthusiasm for the proposal either.

17 MR. McCONNICO: It's a very good
18 draft.

19 PROFESSOR DORSANEO: What?

20 MR. McCONNICO: It's a very good
21 draft.

22 PROFESSOR DORSANEO: I thought so.

23 CHAIRMAN SOULES: Bill, you've got
24 something on page 310 of the materials that's
25 left, and I think that's the last item. I don't

1 know what it is, something from Judge Schattman.
2 Why don't we take up Broadus' at the same time
3 because they both deal with exclusion of
4 witnesses? Broadus has passed out and written
5 up --

6 MR. LOW: Proposal (f), where he
7 added (f), the spouse of a party may not be
8 excluded under this rule or Rule 614, Texas Rules
9 of Civil Evidence, and I move for that adoption.

10 CHAIRMAN SOULES: It's been moved that
11 Broadus' suggestion be adopted.

12 MR. JONES: Second.

13 CHAIRMAN SOULES: We've discussed it.
14 Any further discussion? Those in favor say "I."
15 Okay. That's adopted.

16 This just wants to take the Witness Exclusion
17 rule to the deposition room. Now, in deposition,
18 in discovery, the question comes up, what about
19 experts? What about those people that you need
20 there to help you in discovery that -- you're
21 supposed to be able to do it a little bit -- it
22 may be more sacrosanct in the courtroom if we're
23 going to have the rule to exclude, which we
24 already have. But there are a lot of reasons why
25 you need some help in that deposition and you

1 don't want people excluded.

2 MR. McCONNICO: I don't want to -- I
3 propose that we do not exclude -- include the rule
4 of excluding witnesses to depositions. I'm not in
5 favor or that.

6 CHAIRMAN SOULES: You're moving that
7 this Rule 204 recommended by Judge Schattman be
8 rejected?

9 MR. McCONNICO: I am.

10 CHAIRMAN SOULES: Is there a second?
11 Bill, do you want to discuss it?

12 PROFESSOR DORSANEO: Well, I would
13 like to discuss it. I have noticed over the years
14 that some federal courts have extended Federal
15 Rule 613, which is the rule to depositions. And I
16 have encountered lawyers in Dallas County who use
17 the deposition as an intimidation tactic by
18 inviting a host of people --

19 MR. LOW: Right, or the man's
20 employer.

21 PROFESSOR DORSANEO: -- to come and
22 cause difficulties for the opponent requiring the
23 opponent to seek protective order relief from the
24 Court. It's usually someone like an employee or a
25 sick person. And I have thought as a result of

1 that that it might be a good idea to have some
2 version of the rule applicable to depositions
3 rather than leaving the matter to protective
4 orders. But I'm open to being convinced either
5 way.

6 MR. McCONNICO: My problem is -- it's
7 like what Luke was saying. What are you going to
8 do in an oil and gas case where you're taking the
9 deposition of a petroleum engineer or geologist?
10 You can't take an effective deposition of that
11 type of expert without having another petroleum
12 engineer or geologist at your elbow. You just
13 can't do it.

14 MR. LOW: Well, how do they make them
15 in the courtroom? We set them in there and let
16 them listen to testimony. How do we do that? Ask
17 for the Court to make an exception.

18 MR. SPIVEY: Yes. And in nine out of
19 10 of those cases, don't you resolve that by
20 agreement?

21 MR. LOW: If you don't, you do it by
22 court order.

23 MR. McCONNICO: Not necessarily.
24 Because I've been in a lot of depositions where
25 the other side has said I brought in my petroleum

1 engineer and my geologist and they've said I
2 invoke the rule. And I say you cannot invoke the
3 rule for a deposition. I can think of four or
4 five occasions where that has happened.

5 MR. LOW: I would apply it to a
6 deposition under the same rule, that you can get
7 an exception like for an expert. But I would sure
8 apply it for depositions because that can be quite
9 abusive. I'm deposing seven witnesses to this
10 accident, and this person wants all these people
11 to sit in on there so they can hear each other
12 testify and come up with the same thing, and I
13 don't want it that way. I want each one of them
14 to tell what he says and I don't want seven of
15 them to sit there and by the time I get through
16 the seven, the same thing just rehash. That's not
17 right.

18 MR. JONES: I'm agreeing with both of
19 you. Excuse my ignorance. I thought it was the
20 law that you would try to invoke the rule in a
21 deposition.

22 PROFESSOR DORSANEO: It may be under
23 Rule 613 in the Rules of Evidence.

24 MR. JONES: But I believe there's a
25 case to be made, of course, for excusing an expert

1 witness from the rule. But, on the other hand,
2 whereas you've got all these fact witnesses and
3 somebody wants to bring them in there so they can
4 all get their story together, that frustrates the
5 entire concept of the adversary system, really.

6 MR. McCONNICO: I agree with that.

7 CHAIRMAN SOULES: I'm up in New York
8 and I've taken my petroleum engineer with me to
9 help me take the deposition of their expert.

10 MR. LOW: You've either gotten
11 clearance from the other lawyer that you're going
12 to do that or you've gotten a court order.

13 CHAIRMAN SOULES: So, I've got to go
14 to court and get an order. No one has even
15 suggested that they might invoke the rule to
16 exclude witnesses until I walk into the room, but
17 I'd better cover myself.

18 MR. LOW: Unless you want to go to
19 New York for nothing.

20 MR. BRANSON: But that's only if
21 you're going to use your engineer at trial. You
22 take whatever consultants --

23 CHAIRMAN SOULES: You may not know.

24 MR. McCONNICO: Generally, you do not
25 know.

1 CHAIRMAN SOULES: I think it ought to
2 be the other way around. I think if you're going
3 to invoke the rule to exclude, it ought to be done
4 on some kind of notice prior to the deposition
5 commencing.

6 MR. BRANSON: You can make it part
7 of --

8 CHAIRMAN SOULES: You don't even know
9 it's an issue. Make it an issue at least before
10 the deposition commences if it's going to be.

11 MR. BRANSON: You could make it a part
12 of the notice rule.

13 MR. ADAMS: But that's the unusual
14 event of where you're going to bring somebody.
15 And if you're going to do that, then you ought to
16 get the relief either by agreement or by the
17 Court.

18 MR. BRANSON: But I think if you have
19 purely consultants you don't need it.

20 MR. LOW: You don't need it. I don't
21 know, I've always just worked it out. I just tell
22 them, look, I'm going to bring so and so. Do you
23 have any objections? No, I don't. I'm going to
24 ask the Judge -- you know, as Mr. Adams said, I
25 thought like Franklin, I just thought that was the

1 way it was.

2 CHAIRMAN SOULES: Well, this gives a
3 person who doesn't want to go on with the
4 deposition an absolute -- if there's somebody else
5 sitting there, an absolute way to block you at the
6 deposition when the court reporter is there and
7 everything is going on. Now, if that's what we
8 want to do, I just want to be sure everybody
9 understands that's the tool we're providing.

10 MR. JONES: Well, Luke, he doesn't
11 block the deposition. What he does is block the
12 frustration of the witness rule.

13 CHAIRMAN SOULES: I'm there and I need
14 my guy to help me and you-all invoke the rule.
15 That means if there's any possibility he's ever
16 going to be a witness, I'm shut down right there
17 until I get a Court order that relieves this man
18 from the rule.

19 MR. JONES: How often are you
20 confronted with that situation as opposed to how
21 often you're confronted with a situation where
22 you've got a bunch of fact witnesses that are
23 going to be deposed and --

24 MR. LOW: He might not even be called
25 at trial; the deposition is going to be read.

1 CHAIRMAN SOULES: In my practice it's
2 more what I'm saying than what you're saying. I
3 mean, there are not a whole lot of people that
4 come to these business depositions. But I've
5 nearly always got to have somebody there helping
6 me and it's usually a witness. And sometimes it's
7 my party representative and his bookkeeper who are
8 helping me go through this business and trying to
9 understand what the other guy is telling me.

10 And I've got maybe a couple of people from my
11 corporate client there who know enough of the
12 facts to help keep me rolling whenever the
13 corporate witness on the other side starts
14 squiggling. And I've got them there so that they
15 can keep me making discovery; whereas, otherwise,
16 I'm not going to be able to make discovery.

17 MR. JONES: You've just got the wrong
18 kind of law practice.

19 CHAIRMAN SOULES: And it is a
20 problem. This would be a problem for me. I mean,
21 the majority of this committee is going to control
22 it, but --

23 MR. BRANSON: Let me ask you a
24 question. Can you designate one corporate
25 representative for the deposition and another

1 corporate representative for the trial?

2 CHAIRMAN SOULES: Yes. And you can
3 designate a corporate representative --

4 MR. BRANSON: You shouldn't be able to
5 do that.

6 CHAIRMAN SOULES: Well, you can. And
7 you can designate a new one every hour, for that
8 matter.

9 MR. BRANSON: Well, but if that's the
10 case, then the rule really doesn't apply to
11 corporations.

12 CHAIRMAN SOULES: You only get one in
13 there.

14 MR. BRANSON: What?

15 CHAIRMAN SOULES: You only get one
16 person.

17 MR. BRANSON: Well, hell, but you get
18 one every hour, from what you just said.

19 CHAIRMAN SOULES: Well, you can. You
20 can change -- you're entitled to have a
21 representatives there at all times.

22 MR. BRANSON: Mr. McMains says that's
23 a rare occasion behalf of the Chair. For those --

24 CHAIRMAN SOULES: Do you think you get
25 one representative named and that's it for the

1 course of a trial? I don't think so.

2 MR. McMAINS: I think you can
3 designate a representative. I don't think you can
4 change.

5 MR. LOW: I don't think so either.

6 CHAIRMAN SOULES: I think you can. I
7 do.

8 MR. SPIVEY: Judge Wallace, would you
9 like us to vote on this so you-all would have some
10 guidelines?

11 MR. BRANSON: For those of us who are
12 in the unwashed masses, could we at least get a
13 consensus on what you can do on this?

14 CHAIRMAN SOULES: Sir?

15 MR. BRANSON: I said for those of us
16 who may be in the unwashed masses and who do not
17 know the answer to that, do you think we could get
18 a consensus of this opinion as to whether you can
19 only have one or you can have one every hour?

20 CHAIRMAN SOULES: Well, I change them
21 in court all the time. Maybe I'm getting away
22 with something I shouldn't be getting away with,
23 but I do.

24 MR. BRANSON: Nobody complains about
25 that?

1 CHAIRMAN SOULES: Sometimes, but I say
2 that guy is busy and this one can help. But,
3 anyway, what do we want to do about this 204?

4 MR. LOW: What page is it on?

5 CHAIRMAN SOULES: It's on page 312.
6 And I request at least if we're going to do it
7 that we put some kind of notice provision, "At the
8 request of any party" --

9 MR. LOW: Are we going to put the
10 burden on the -- most depositions are taken by
11 agreements. You're going to put the burden on
12 which party to notify that you're going to do
13 that? Or should it be an automatic thing with a
14 party that wants an exception to obtain it either
15 by agreement or by Court order? Because the one
16 that's going to want the exception is the one
17 that's going to know about it, and it's not going
18 to be the other one.

19 MR. JONES: I have a problem
20 acknowledging to the Court, the problem showing
21 good cause could exclude a party from the
22 deposition.

23 CHAIRMAN SOULES: If we can do this:
24 "On notice to all parties a reasonable time prior
25 to the commencement of the deposition all persons

