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SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 19, 1993

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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 19th day of November, A.D. 1993, between
the hours of 8:30 o'clock a.m. and 5:50
o'clock p.m., at the Texas Law Center,
1414 Colorado, Austin, Texas.

ORIGINAL

SUPREME COURT ADVISORY COMMITTEE
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NOVEMBER 19, 1993

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NOVEMBER 19, 1994 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS:

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

OTHERS PRESENT:

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

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS ABSENT:

Paul Gold
Judge Bob Thomas

P R O C E E D I N G S

Friday, November 19, 1993

8:30 a.m.

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4
5 MR. SOULES: I guess we'll
6 get started. I'm sorry that we didn't have
7 seating at the table when you got here. There
8 are materials, name tags up here on this
9 table; and then there are some materials that
10 Bill Dorsaneo, his task report and a
11 preliminary report from David Keltner's
12 discovery task force which is also behind us.
13 If you don't have copies of those, you can
14 pick them up when it's convenient. We aren't
15 going to get to those materials probably
16 before the morning break anyway, so you
17 can -- we can wait.

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

1 work for several years.

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

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

1 don't help you do it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. HERRING: Yes.

9 MR. SOULES: Is that correct?

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

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

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

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

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

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

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

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

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

1 situation.

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

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

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

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

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

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

9 The relief Paragraph 2 that I
10 had earlier alluded to which deals, first of
11 all, we clarify that you can still get an
12 order to compel and an order to quash
13 discovery as provided in 166b, and this rule
14 is not entitled to change that practice. And
15 then it goes on to say in addition so long as
16 the amount involved is not substantial, the
17 Court may award the prevailing party
18 reasonable expenses necessary in connection
19 with the motion including attorney's fees.

20 And then

21 it -- we have a provision that simply says the
22 Court may presume the usual and customary fee
23 in connection with the motion is not
24 substantial unless circumstances or an
25 objection suggests that it may preclude access

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 The Justice Gonzalez'

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

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

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

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

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

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

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

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

1 written findings.

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

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

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

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

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

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

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

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

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

10 MR. SOULES: We're here --

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

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

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

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

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