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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 15, 1994

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones,
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 15th day of
July, A.D., 1994, between the hours of 1:00
o'clock p.m. and 5:20 p.m. at the Texas Law
Center, Room 104, 1414 Colorado, Austin, Texas
78701.

ORIGINAL

JULY 15, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney
Stephen Yelenosky

EX OFFICIO MEMBERS:

Honorable Sam Houston Clinton
Honorable William Cornelius
Doyle Curry
Paul Gold
Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
Honorable Paul Heath Till

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Holly H. Duderstadt, Soules & Wallace
Carl Hamilton
Denise Smith for Mike Gallagher
Jim Parker

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Honorable Scott A. Brister
Honorable Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
Anthony J. Sadberry

EX-OFFICIO MEMBERS ABSENT:

Thomas Riney
Bonnie Wolbrueck

SUPREME COURT ADVISORY COMMITTEE
JULY 15, 1994
AFTERNOON SESSION

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1 CHAIRMAN SOULES: Okay. Steve,
2 we will be in session here a couple of minutes
3 late. I don't know whether the --

4 MR. KELTNER: Luke, may I bring
5 up one item? This is something I talked to
6 you in the hall about.

7 CHAIRMAN SOULES: No. We have
8 voted. We have voted on that.

9 MR. KELTNER: Well, no. My
10 point is I think there are a number of people,
11 and especially I am reinforced after listening
12 to people during the break, who thought that
13 we misunderstood the vote a little bit, and we
14 would be for a limitation on the hours of
15 depositions but not be for a limitation on
16 total hours, and to get the sense of the
17 committee my suggestion is we take a vote on
18 it.

19 CHAIRMAN SOULES: It's been
20 voted on. It's on the record.

21 MS. SWEENEY: This is a third
22 proposal. You voted on two, but this is a
23 third, and since we are getting the sense of
24 the committee it seems that it would be fair
25 and appropriate to get the actual sense of the

1 committee.

2 CHAIRMAN SOULES: State the
3 third proposal.

4 MS. SWEENEY: To have a cap on
5 the depositions per deposition but no overall
6 cap, and it was certainly implied in the
7 discussion that that would be something that
8 we would be allowed to voice our opinion on,
9 and I think it is fair and appropriate to
10 follow through with that and let us voice our
11 opinion on that.

12 HONORABLE DAVID PEEPLES: Luke,
13 may I say, I am against their proposal. I'm
14 for the hybrid, but I think in fairness we
15 ought to see what the whole floor thinks. I
16 really do.

17 CHAIRMAN SOULES: That's fine.

18 MR. LATTING: The trouble is
19 it's kind of thinned out. We got rid of a few
20 of people.

21 MR. MARKS: Yeah. We sent
22 quite a few of them home.

23 MR. LATTING: I think they
24 opened a bar somewhere.

25 MR. KELTNER: Luke, I don't

1 mean to throw a monkey wrench in this. My
2 point was there were a number of people
3 discussing that around the table and I think
4 had the idea that we would vote on it, and
5 again, I don't mean to mess up the works, but
6 I think it might be helpful.

7 CHAIRMAN SOULES: So you think
8 that we don't have evidence on the record of
9 those people who assuming a cap per deposition
10 would be opposed to an overall cap; is that
11 right?

12 MR. KELTNER: Would be opposed
13 to -- would favor over the 50 hours total,
14 would favor the limitation of a per hour limit
15 per deposition.

16 MR. SUSMAN: What now? In lieu
17 of.

18 MR. KELTNER: In lieu of the 50
19 hours would favor a limitation of hours on
20 depositions.

21 MR. MEADOWS: So you would have
22 limitless depositions or no limits on
23 depositions.

24 MR. KELTNER: No limits on the
25 number of depositions but a limit on the hours

1 of individual depositions, and maybe I'm
2 wrong, and maybe people don't feel that way,
3 but I'm not convinced.

4 MR. SUSMAN: Why don't we
5 have -- there are seven people here who voted.
6 I mean, there are seven people that have got
7 to change their mind, who voted for a 50-hour
8 cap that now believe that is unwise and that
9 they prefer to cap depositions and not the
10 50-hour cap. I would like to hear from the
11 seven who voted in favor of a 50-hour cap,
12 being honest, if you voted in favor of the 50
13 overall cap who now want to change their mind
14 and argue in favor of no 50-hour cap but only
15 a cap per deposition? That's the people who I
16 think should be entitled to speak now because
17 they obviously want to change their mind.

18 MR. MARKS: Do we have a
19 motion?

20 CHAIRMAN SOULES: I don't know.

21 MR. MARKS: Is that a motion?

22 MR. KELTNER: I was just trying
23 to get a sense. Maybe I'm wrong in my thought
24 process, but if we need to get it on the table
25 I would move that we consider in lieu of a

1 50-hour total cap that we would -- that I
2 would propose that there be a limit on hours
3 on each individual deposition.

4 CHAIRMAN SOULES: And no
5 cumulative cap?

6 MR. KELTNER: And no cumulative
7 cap.

8 CHAIRMAN SOULES: Is that your
9 motion?

10 MR. KELTNER: Yes.

11 MR. MARKS: Second.

12 CHAIRMAN SOULES: Moved and
13 seconded. Discussion?

14 HONORABLE DAVID PEEPLES: I
15 want to stress something I don't think has
16 been mentioned. In the criminal justice
17 system even in a capital murder case there is
18 almost no discovery where life is at stake.

19 MR. MARKS: We have got money
20 involved.

21 HONORABLE DAVID PEEPLES: Yeah.
22 We have got money involved. No. Our mindset
23 is you can't go to trial unless you have
24 uncovered every stone in the county, and we
25 need to move away from that mindset, and we

1 need to help lawyers by forcing them to narrow
2 what they are used to doing.

3 MS. SWEENEY: Well, can I have
4 a search warrant in my next case, and can I
5 force the other side to open their file and
6 let me come in and browse through it?

7 HONORABLE DAVID PEEPLES:

8 Paula --

9 MS. SWEENEY: I don't mean to
10 be that harsh, but there is a big difference
11 in trying to compare those two. We don't have
12 the rights to go take stuff from people like
13 they do in criminal court.

14 HONORABLE DAVID PEEPLES: There
15 is no comparison, no comparison. And what we
16 have done with the hybrid, the overall cap and
17 the cap per deposition, which is a default
18 rule and you can change it by agreement and by
19 court order, is a major step and something
20 that has to be done and so I oppose this, the
21 revote that we are going to take.

22 CHAIRMAN SOULES: Any further
23 discussion? Those in favor of the motion show
24 by hands.

25 HONORABLE DAVID PEEPLES: What

1 is the motion?

2 CHAIRMAN SOULES: The motion is
3 in effect to rescind the 50-hour cap.

4 HONORABLE DAVID PEEPLES: Okay.

5 CHAIRMAN SOULES: Those in
6 favor of the motion show by hands. Those
7 opposed? 10 to 5 the motion fails.

8 MR. KELTNER: Let the record
9 reflect I was wrong.

10 MR. SUSMAN: Shall I move on?

11 CHAIRMAN SOULES: Yes. I think
12 where we are heading now is two questions,
13 what is the cap, what number of hours would be
14 the cap per deposition, and how do you divide
15 that, per side or per party or how? Whichever
16 way you want to take those or maybe you see
17 some other agenda.

18 MR. SUSMAN: I'm sorry. We
19 voted on the 50 hours. Now the question is
20 that 50 hours per side or 50 hours per party?
21 The vote was taken 50-hour cap. That issue
22 has been resolved. Now the issue is how do
23 you count and what counts in the 50 hours. I
24 will tell you what we agreed.

25 CHAIRMAN SOULES: Okay.

1 MR. SUSMAN: Included within
2 the 50 hours are the time -- it's 50 hours per
3 side and there is some -- but we add some
4 hours, as I recall it. What is it, 204?

5 PROFESSOR ALBRIGHT: 204(2).

6 MR. SUSMAN: 204(2). A
7 third-party defendant shares the
8 defendant's -- "Each side, the plaintiffs and
9 defendants, have 50 hours to examine and
10 cross-examine deponents other than their own
11 expert witnesses. Third-party defendants
12 share the defendants' 50 hours with regard to
13 issues common to the defendants. However,
14 third-party defendants have an additional 10
15 hours for examination regarding issues upon
16 which they oppose the defendants. Breaks
17 during the deposition do not count."

18 Again, you're into the actual language of
19 the rule. I don't think any of us -- we knew
20 we needed to deal with the problem where there
21 were parties who had genuine conflicts like a
22 third-party defendant with other parties. At
23 the same time we did not want to give
24 defendants who are aligned or plaintiffs who
25 are aligned with each other the full amount of

1 hours any more than the court will allow the
2 full equal amount of voir dire time or equal
3 amount of final argument time or equal
4 strikes.

5 And the notion is that somehow we can
6 determine -- a judge will be able to determine
7 if the parties cannot agree what constitutes
8 the plaintiffs and defendants. I mean, we
9 were troubled with this and how you identify
10 it, but that was the notion, that -- now I
11 would be happy to go ahead and discuss this
12 now, Luke, or we can kind of leave this to
13 more -- this is more detailed. Like, once you
14 establish the general 50 hour per side, the
15 50-hour cap, how you divide that up is kind of
16 a detail on what counts, but either way you
17 want. I mean, I was thinking it would now be
18 appropriate to deal with the conduct of the
19 deposition in general and see what people feel
20 about that.

21 CHAIRMAN SOULES: All right.
22 Before we go to what is going to be the size
23 of the per deposition cap?

24 MR. LATTING: When are we going
25 to do that if we don't do it now?

1 MR. SUSMAN: What now?

2 MR. LATTING: When are we going
3 do get to that issue of how these
4 depositions -- because that's a critical
5 topic. Are we going to do that later today
6 or --

7 MR. SUSMAN: I'm sorry. Like,
8 we didn't --

9 CHAIRMAN SOULES: We did not
10 determine what was going to be the size of the
11 per deposition cap, how many hours per
12 deposition. We need to do that now, or we can
13 talk about deposition conduct first. We only
14 voted to have a cap on the individual
15 deposition. We did not set a size of that.

16 MR. GOLD: Are you entertaining
17 motions?

18 CHAIRMAN SOULES: Pardon?

19 MR. GOLD: Are you entertaining
20 motions now?

21 CHAIRMAN SOULES: Yes.

22 MR. GOLD: I would move that we
23 consider the conduct of the deposition before
24 we talk about the cap on the individual
25 depositions.

1 CHAIRMAN SOULES: Everybody
2 feel that's the most appropriate way to go?
3 All right. Doyle.

4 MR. CURRY: If you are going to
5 be considering conduct since you have got a
6 50-hour limit you need to consider conduct of
7 the depositions in the 50-hour limit, too,
8 because the big concern everybody has is that
9 there is a 50-hour wall there, and people with
10 information can maneuver. I think somebody
11 made the comment that they can give you the
12 phone book with a list of people and then you
13 use up your time trying to find out what's
14 going on and then 60 days out of trial they
15 tell you "Well, here are the people we are
16 going to use, bang, bang, bang," and you are
17 out of time. So the conduct of the deposition
18 and the conduct of the discovery is something
19 you need to consider in the 50-hour limit,
20 too, in deciding whether to award more time.

21 CHAIRMAN SOULES: What page is
22 the conduct on?

23 MR. SUSMAN: This is Rule 204,
24 page 19. Is that what we are going to now?

25 CHAIRMAN SOULES: Page 19.

1 Okay. Yes.

2 MR. SUSMAN: Let me tell you
3 what the committee -- let me suggest that we
4 begin with subdivision 204(3). There are two
5 issues we tried to deal with in the
6 subcommittee. One issue was that if we were
7 going to limit time, you cannot tolerate any
8 system whereby the other side can
9 unnecessarily waste time at a deposition. The
10 second thing was we just felt that a lot of
11 the hostility and the things that -- you know,
12 the judgmental-type comments and stuff that go
13 on on depositions need to be eliminated. It's
14 uncivil. It not productive, and we felt that
15 what ought to happen is that the deposition
16 room ought to become like a courtroom, and the
17 only difference is that you don't have a judge
18 in the deposition room and you do in the
19 courtroom.

20 So the biggest, I think, thing that a lot
21 of us thought would help was Rule 3 which
22 basically tells people that what goes on in
23 the deposition room is subject in all its
24 glory to being played to the jury with the
25 slow answers, with the giving of the phone

1 book when you ask someone who has the files,
2 and some guy sits there and gives you a long,
3 unresponsive bull answer with lawyers making
4 objections, conferring their clients, that you
5 capture it on videotape, and you tell the Bar,
6 "Folks, you are in jeopardy of having all of
7 this played in the presence of the jury. If
8 you want them to see this, great. Go after
9 it."

10 It was our feeling that that will in and
11 of itself deal with a tremendous amount of the
12 abuse that goes on in depositions because
13 lawyers are not going to be making stupid and
14 silly objections and instructions and
15 clarifications and speechifying things at
16 depositions if they know the jury is going to
17 hear them. So that, to me, was a starting
18 point. Now, does anyone object to the notion
19 of what happens in the deposition room -- it
20 doesn't say it necessarily will but we say, as
21 I recall it, "May upon leave of court be
22 presented to the jury during the trial." It's
23 the last sentence of paragraph 3.

24 MR. MARKS: Are you asking for
25 a vote? You say does anybody object?

1 MR. SUSMAN: Yeah.

2 MR. MARKS: I object. I think
3 it would be one of those things that would be
4 subject to abuse. It would also be an
5 opportunity for a lawyer to make a speech
6 during a deposition that he wants the jury to
7 hear, and I think it would probably result in
8 a lot of unfairness going in to the jury.

9 HONORABLE PAUL HEATH TILL: Can
10 you speak up slightly?

11 MR. MARKS: I think it would
12 result in a lot of unfairness to the jury
13 especially to the client or the litigant, the
14 party that's actually involved in the
15 litigation. So you have a lawyer that does
16 that sort of thing or does it or says
17 something that may not have been the
18 appropriate thing to say, you've still got to
19 think in terms of the client. The one that's
20 really going to be affected by this is not the
21 lawyer but the litigant. So any kind of rule
22 like this we should really be careful. I just
23 would be against it. I think it might create
24 more problems, Steve, than it would solve.

25 MR. SUSMAN: My personal

1 experience has been that, I mean, the advent
2 of the video camera has improved the conduct
3 of lawyers at depositions so much because they
4 are fearful that someday someone who counts
5 may see it, and now it's only the judge that
6 they are really fearful of, and I think when
7 that fear expands to it may actually be shown
8 to a jury, and I mean, this is not automatic
9 now, and I think a court -- if you make a
10 speech, a self-serving speech, on the record
11 and then plan to have the judge show that to
12 the jury I think courts have enough sense to
13 know we aren't going to have that happen.

14 MR. MARKS: Some do. Some
15 don't.

16 MR. SUSMAN: They have enough
17 sense, I think, to approach the judge and say,
18 "Judge, I think the jury is entitled to see
19 how this witness was coached, how he evaded
20 the questions, how every time I asked him a
21 question he had a conference with his lawyer,
22 how the lawyer reminded him of what the
23 evidence was and refreshed his recollection,"
24 things that the jury would see if you were on
25 the witness stand. So I mean, I believe that

1 this will have a very much beneficial effect
2 if we do this. Paul.

3 MR. GOLD: Yeah. When we
4 discussed this paragraph in the subcommittee
5 one of the reasons for the phrase "upon leave
6 of court" was exactly the point which you were
7 just making, John, is I had come back from a
8 discussion in Dallas with some attorneys, and
9 they had said, "Well, what we will do is just
10 use this opportunity to make statements in the
11 record and then they will have to be played to
12 the jury and we will just communicate to the
13 jury that way." That's why we put the "upon
14 leave of court" in the rule. Also, you could
15 modify this even more to have it in the nature
16 of like answers to interrogatories where the
17 party making the objection could never be the
18 one that was requesting that the information
19 be put before the jury. It would only be the
20 party that was conducting the deposition that
21 would have the opportunity to put that before
22 the court to put into the record.

23 CHAIRMAN SOULES: Bill
24 Dorsaneo.

25 PROFESSOR DORSANEO: Well, I

1 think I agree with John Marks generally, but
2 what is the actual thing that makes
3 depositions longer and more difficult? Is it
4 somebody making objections when they don't
5 need to make the objections? Why not prohibit
6 the making of objections that don't need to be
7 made? Require somebody to make them when they
8 need to be made rather than at some earlier
9 time in order to have them recorded. When I
10 started practice nobody, not too many anyway,
11 unless somebody from another state, objected
12 to deposition questions except perhaps to the
13 form of the question because it wasn't, as it
14 still isn't, necessary to do so. I understand
15 that people are doing the objection practice
16 more and abusing it to --

17 MR. MARKS: Educate their
18 witnesses.

19 PROFESSOR DORSANEO: For
20 tactical reasons or in some other manner. I
21 think we should prohibit the conduct rather
22 than doing something else. I mean, the fact
23 that somebody made an objection at the
24 deposition that they shouldn't have made,
25 didn't need to make, I mean, how is playing

1 that to the jury going to do anything?

2 HONORABLE F. SCOTT MCGOWN:

3 Well, you need to look on page 20, Rule 7.

4 This rule is designed as a group of, as David

5 Perry would say, scalpel cuts. We cover

6 objections, what kind of objections can be

7 made. We cover conferences, what kind of

8 conferences you can have. That's on page 20.

9 Then the icing on the cake, we cover

10 instructions not to answer. That's on (4).

11 We have a mechanism for terminating the

12 deposition in (5). So we have a series of

13 ways to regulate conduct, and we probably

14 shouldn't have started with this subdivision

15 (3). That's just the icing on the cake; that

16 is, if things go badly in the deposition.

17 And in answer to John Marks we may need

18 to work on the drafting here. We never

19 envisioned that you could be the bad actor and

20 automatically get to show that to the jury.

21 What we envisioned was if you are the bad

22 actor, then the other party can say to the

23 judge "I want to show the bad acts to the

24 jury." The judge would have to decide whether

25 they really were bad acts and whether it

1 justified showing them to the jury and might
2 well decide they weren't bad acts or they
3 weren't bad enough to justify showing to the
4 jury or he wasn't going to get off on that
5 tangent, but that's an icing on the cake
6 provision.

7 PROFESSOR DORSANEO: What kind
8 of things did you have in mind? Like cursing,
9 like using an "F" word at a deposition or
10 something like that?

11 MR. SUSMAN: Yeah. That's --

12 PROFESSOR DORSANEO: What point
13 is there in showing that to the jury?

14 MR. SUSMAN: Well, I tell you
15 what point it is. I tell you what point.

16 HONORABLE F. SCOTT MCGOWN:
17 It's demeanor evidence. It suggests to the
18 finder of fact what kind of obstructionism is
19 going on and thus goes to their credibility
20 and the weight you want to give their
21 testimony.

22 MR. MARKS: Well, I mean,
23 that's the witness, but what about the lawyer?
24 I mean, that's --

25 HONORABLE F. SCOTT MCGOWN:

1 Well, we reasoned that for this highly abusive
2 kind of behavior that this icing on the cake
3 is designed to catch that you are going to
4 hold the client accountable for the behavior
5 of the lawyer, and if the lawyer is making --

6 MR. MARKS: Why not make it
7 sanctionable?

8 CHAIRMAN SOULES: Just a
9 minute. You-all talk one at a time. Judge
10 McCown.

11 HONORABLE F. SCOTT MCGOWN: If
12 the lawyer is engaging in the kind of
13 conduct -- this is not ordinary kind of
14 conduct. We don't see this happen a lot, and
15 so I'm sorry that we started with this rule
16 instead of took it at the last, but the
17 extreme kind of abusive deposition behavior
18 that unfortunately does go on -- I wouldn't
19 say it's common, but I wouldn't say it never
20 happens. I would say it's infrequent but it
21 happens. That could be captured, and if the
22 lawyer or the witness were behaving in a way
23 that if you showed it to the jury the jury
24 would say "These people are jerks and I'm not
25 believing any jerks" it would have an impact

1 on behavior, the kind of thing that doesn't
2 happen in the courtroom because you would be
3 embarrassed if the jury saw it. So it doesn't
4 happen in the deposition room because the jury
5 may see it.

6 CHAIRMAN SOULES: John Marks.

7 MR. MARKS: It seems to me that
8 that sort of thing could be dealt with by
9 sanctions, but it seems to me that we are
10 mixing two concepts here. We are mixing the
11 concept of fundamental justice. In other
12 words, the jury deciding the substantive
13 issues in the case as opposed to controlling
14 the way a lawyer or a witness conducts
15 himself. Now, if a witness does a lot of
16 things like that, that may well go to his
17 credibility and his demeanor, but to say that
18 a party can always control his lawyer I don't
19 think is completely accurate, but it seems to
20 me that a lawyer certainly can be sanctioned
21 by the court, and if you made those things
22 sanctionable then you're punishing somebody
23 for something they did wrong without really
24 affecting his substantive rights but the
25 litigant's substantive rights in court.

1 CHAIRMAN SOULES: Judge

2 Peeples.

3 HONORABLE DAVID PEEPLES: Let's
4 say it's a discovery deposition, and it's not
5 done by videotape. How do you keep someone
6 from using up a bunch of time, you know,
7 that's ticking on the other side? I mean, you
8 are not going to show a written deposition to
9 them. I mean, it's not going to show it. The
10 witness dragged --

11 MR. SUSMAN: That is a problem.
12 I mean, the problem is that is a problem. We
13 don't know how to deal with that because
14 people speak at different rates, and you know,
15 how do you really say whether they are
16 speaking too slow. I mean, one of the notions
17 was that -- I mean, this will encourage the
18 use hopefully of video as a policing
19 mechanism. I mean, it is -- in fact, it is a
20 form of sanctions. I mean, that's exactly
21 what it's entitled to be, to sanction lawyers
22 for violating -- and it's a form of warning.
23 I mean, if you are going to sanction them by
24 letting it happen to them anyway, by reading
25 in the rule, you might as well warn them of

1 what might happen if they use the "F" word at
2 a deposition or any other bad words or just
3 general conduct.

4 It's basically saying -- you know, I
5 think it is prophylactic frankly when you say
6 to lawyers who come down here from New York or
7 somewhere else to take a deposition or defend
8 a deposition, you know, "Before you begin look
9 at our Rule 204(3), and remember if you mess
10 around I may move to have the court play this
11 to the jury." I have not yet heard,
12 though -- I mean, again, I have not heard any
13 meaningful objection to this. I mean, what is
14 the chilling -- I mean, what is the chilling
15 fact?

16 HONORABLE F. SCOTT MCGOWN:

17 And, Steve --

18 CHAIRMAN SOULES: Just a
19 minute. Paul Gold, you had your hand up.

20 MR. GOLD: Yeah. Let me walk
21 through what some of the rationale was for
22 this because we discussed it so long in the
23 subcommittee it's probably just engrained in
24 us, and I want to make sure that everybody is
25 aware of where we were coming from with this.

1 One of the problems that we perceive
2 takes place at a deposition is through the
3 guise of objections someone either coaches
4 their witness or tries to distract the
5 questioner or just distract everybody or
6 prolong it or whatever, and even if you put in
7 the rule, Bill, that, you know, you shouldn't
8 be able to do this the problem is is that by
9 the time you go and you seek a remedy from the
10 court the witness is either instructed or the
11 question has been obstructed. In fact,
12 generally the person that's obstructing it
13 will say, "Great. Let's go to the court.
14 Let's stop right now," and that's what they
15 would love, is for the whole thing to lock
16 down. They can go coach their witness. They
17 can stall a little bit longer.

18 And what we were trying to do with
19 paragraph (3) was to chill that for the person
20 to know that, yeah, they may accomplish some
21 obstruction of the deposition. They may coach
22 the witness, but the jury was going to be able
23 to see that. And I disagree with John Marks
24 on one regard, and it's a trouble that we have
25 got with the whole sanctions area right now, I

1 think, is trying to figure out, especially on
2 death penalty situations, whether the conduct
3 of an attorney should be impuded to the
4 client. I think that it should. I mean, I
5 don't think it's so much a substantive issue,
6 but I think that the jury by and large judges
7 the client by the conduct of the attorney
8 during trial.

9 I don't think there is any reason why an
10 attorney under the cloak of discovery should
11 be able to obstruct and coach and do all sorts
12 of nefarious things knowing that the worst
13 that can happen is some sanction. You know,
14 some, you know, dollar amount in the big scope
15 of things, it's a cost analysis. Yeah. I'm
16 going to do it. I'm going to get sanctioned.
17 My client isn't going to hurt. I will take
18 the hit. I will pay, you know, a couple of
19 hundred dollars or a couple of thousand
20 dollars. It's worth it for him not to have to
21 answer this question right now, and I think by
22 putting it on film when you can do it I think
23 has a chilling effect, and I think that's what
24 the committee was trying to do is have this
25 chilling effect by No. 3.

1 CHAIRMAN SOULES: Judge McGown.

2 HONORABLE F. SCOTT MCGOWN: I
3 agree with what Paul said, but let me pick up
4 on what Steve said and add to it a little bit,
5 that if you look at Subdivision No. 4 what it
6 says is that instructions to the deponent not
7 to answer a question are improper except to
8 preserve a privilege, to enforce a limitation
9 on evidence that's already been ordered by the
10 court, to protect a witness from an abusive
11 question, or to present a motion under
12 paragraph 5. Then we provide the built-in
13 procedure that should a court later order an
14 answer to a question which a witness was
15 instructed not to answer that that doesn't
16 count against the deposition time of the party
17 taking the deposition.

18 Then you flip over and look at No. 6. We
19 say no private conferences except to determine
20 whether you have got a privilege, and on No. 7
21 we say no objections except as to leading
22 evidence if you put everybody on notice that
23 they shouldn't lead before the deposition and
24 even then it's supposed to be limited to
25 simply saying "objection, leading" providing

1 that if you do have a narrative objection that
2 that automatically means your error is not
3 preserved. So we have built the conduct
4 provisions in and then we have said --

5 MR. SUSMAN: Don't forget (5).

6 HONORABLE F. SCOTT MCGOWN:

7 Yeah. A mechanism to terminate the deposition
8 that, in fact, if it's becoming harassing that
9 you don't harass back and get in a tit for
10 tat. Instead we have got a mechanism to
11 terminate the deposition, and if the court
12 orders if you terminate it and you shouldn't
13 have terminated it and the court orders it
14 reconvened then that doesn't count in the
15 deposition time. So we have built in conduct
16 rules, and we have built in automatic kind of
17 default penalties based upon the deposition
18 time that are designed to make people follow
19 the rules.

20 If those are the rules, there is not
21 going to be a whole lot of opportunity for
22 this bad act to be captured either in the
23 written deposition or on video. Whether you
24 show it to the jury or not, again I want to
25 emphasize let's don't let the tail wag the

1 dog. But what if there is no video and it's
2 on deposition and the witness is obviously
3 slow-balling all of the answers and eating up
4 your time? Then that's going to be a reason
5 to apply to the court. We considered that.
6 You go down to the court and show them the
7 written deposition. You say I need another
8 two hours added onto my 50 because the witness
9 was obviously in a pattern of slow moving the
10 deposition, and that's how we would take care
11 of that problem.

12 JUSTICE CORNELIUS: Luke.

13 CHAIRMAN SOULES: Judge
14 Cornelius.

15 JUSTICE CORNELIUS: With
16 respect to paragraph (3) don't you think that
17 ought to be at the option of the aggrieved
18 party because otherwise a lawyer who commits a
19 bad act could make it self-serving and then
20 have that presented to the jury?

21 HONORABLE F. SCOTT MCGOWN:
22 You're right. We need to redraft that. We
23 assumed it would be at the option of the
24 aggrieved party, and it doesn't read that way,
25 and we need to redraft that.

1 MR. GOLD: Because that was
2 something that we talked about.

3 MR. SUSMAN: Yes.

4 CHAIRMAN SOULES: I mean, this
5 takes sanctions into a whole new arena. It
6 takes the sanctions to a jury trial for the
7 view of the jury. I mean, do we need to put
8 something in the Texas Rules of Evidence about
9 this? This is new evidence. Never before do
10 I know of admissible -- the only case where
11 there is not a claim for attorneys' fees, and
12 attorneys can whine all they want proving
13 their attorneys' fees and how bad the other
14 side acted, but in the absence of an
15 attorneys' fees claim I don't think this
16 evidence has ever been admissible in a jury
17 trial to determine the fact issues to the
18 parties' dispute.

19 MR. SUSMAN: I thought -- I
20 mean, when I try a jury case I have been told
21 that the jury watches me a lot, what I do,
22 whether I have a toothpick. I mean, a jury is
23 watching the lawyers all the time. The
24 parties are responsible for their lawyer's
25 conduct in court. If the lawyer begins an

1 objection or treats a witness harshly or
2 treats the judge impolitely or his client
3 impolitely the jury makes that lawyer and the
4 client pay for it by what they see in the
5 courtroom. Why is this any different? Why do
6 we make the conference room sacrosanct so that
7 what goes -- you are free to act up, act out,
8 be an obnoxious idiot in a conference room,
9 part of a judicial proceeding; but when you do
10 it in court, the same conduct in court, you
11 pay a price for that. I mean, we don't try
12 cases behind screens. So I don't see where
13 there is any unfairness to this at all. I
14 mean --

15 MR. MARKS: Well, you asked --

16 CHAIRMAN SOULES: David Jackson
17 had his hand up, and then I will go around the
18 table.

19 MR. JACKSON: Well, the reality
20 of a videotaped deposition, though, is that
21 the lawyer is not going to be on camera
22 anyway. So if that's what you are trying to
23 get before the jury, that's not going to get
24 there. The words he says will be on the
25 written transcript, and they will be on the

1 audio track, but the jury is not going to get
2 to watch the lawyer's demeanor. He is going
3 to be watching the witness.

4 CHAIRMAN SOULES: John Marks.

5 MR. MARKS: I was just going to
6 say that a lot of things go on in a deposition
7 that aren't admissible in court. I mean, you
8 ask questions, you elicit information that
9 would not be admissible and yet it's
10 discoverable. So a lot of things happen in a
11 deposition that don't necessarily get into the
12 courtroom, and that's based upon what is
13 really evidence and what is not really
14 evidence, and this is certainly not really
15 evidence that I have ever known about.

16 MR. SUSMAN: That's why we
17 have -- you must get the permission of the
18 court to do it.

19 CHAIRMAN SOULES: Alex
20 Albright.

21 PROFESSOR ALBRIGHT: We talked
22 about all of this in the subcommittee, and I
23 remember asking the same question about, well,
24 how is this going to be admitted into
25 evidence, and I remember Scott McCown saying,

1 well, if it pertains to whether the witness is
2 telling the truth or not it is admissible
3 evidence, and so when you do have the
4 situation where you have the witness being
5 coached, the lawyer telling the witness what
6 to say, then it is admissible under the Rules
7 of Evidence, and we also have it at the
8 discretion of the judge. We don't really
9 think this is going to happen a whole lot of
10 times, and I think what Scott says is
11 absolutely right. This is only in the
12 absolute worst situation where the conduct is
13 such that you can't believe the witness
14 anymore and the lawyer -- and the jury is
15 entitled to know about why you can't believe
16 this witness.

17 CHAIRMAN SOULES: How is it
18 admissible, what a lawyer tells his client?

19 PROFESSOR ALBRIGHT: Well, it's
20 not what the lawyer is telling the client.
21 It's that the witness is being coached
22 throughout the testimony.

23 CHAIRMAN SOULES: So do you
24 call the lawyer in the trial to prove that the
25 lawyer coached the witness? Is the lawyer by

1 this made a witness at trial and disqualified
2 from continuing to represent his client?

3 PROFESSOR ALBRIGHT: I don't
4 think so at all.

5 CHAIRMAN SOULES: Paul Gold.

6 MR. GOLD: Wait. I don't see
7 this discussion here the way it's going. If
8 we start off with the assumption that
9 testifying in a deposition is the same as
10 testifying at trial, which it is, which it
11 most certainly is. You may use a deposition
12 just the same way as if the person were called
13 at trial. Now, I don't understand why in a
14 deposition an attorney can act like a complete
15 ass, and no one seems to care about that even
16 though we all get on this bandwagon of
17 civility and everything, but at a trial we
18 have to dress a certain way. We have to look
19 a certain way. How we ask the questions is
20 all considered.

21 If an attorney says something during
22 trial a judge can't prevent him from saying
23 anything during the trial, but if he says it,
24 it gets before the jury, and the same thing
25 should go with a deposition. I do not

