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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

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JULY 16, 1994

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Taken before William F. Wolfe,

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Certified Shorthand Reporter and Notary Public

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in Travis County for the State of Texas, on

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the 16th day of July, A.D. 1994, between the

23

hours of 8:30 o'clock a.m. and 12:30 o'clock

24

p.m., at the Texas Law Center, 1414 Colorado

25

Street, Room 104, Austin, Texas 78701.

ORIGINAL

JULY 16, 1994 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS:

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 Brister
Honorable Ann T. Cochran
William V. Dorsaneo III
Mike Gallagher
Honorable Clarence Guittard
Tommy Jacks
Franklin Jones
Thomas S. Leatherbury
Gilbert Low
Richard Orsinger
Anthony Sadberry

EX-OFFICIO MEMBERS ABSENT:

Honorable Sam Houston Clinton
Thomas Riney
Bonnie Wolbrueck

SUPREME COURT ADVISORY COMMITTEE
JULY 16 1994

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1 (Reconvened at 8:30 a.m.)

2 CHAIRMAN SOULES: I'll be
3 sending a sign-in sheet around so everyone can
4 sign up as it comes by.

5 Steve, are you ready? Where should we go
6 on this? Let's go to work, and we'll adjourn
7 at 12:30 noon.

8 MR. SUSMAN: Rule 168, Page 12
9 of the July 11th draft. This is the
10 Interrogatories to Parties Rule, and let me
11 tell you about the key features.

12 The key features are that there are an
13 unlimited number of interrogatories that
14 require a yes or no answer. Two, there is a
15 limit on other interrogatories to 30 in
16 number, including discrete subparts, whatever
17 that means.

18 Three, we wanted to get rid of that type
19 of contention interrogatory that requires a
20 party to marshal its facts, to essentially put
21 out or put together a pretrial order early in
22 the case; and use the contention interrogatory
23 that requires more than a yes or no answer
24 primarily as a vehicle to get more particular
25 pleadings.

1 The fourth feature of what we did, which
2 I do want some discussion on today because we
3 are kind of in a quandary ourselves, is you
4 will see that we do not have a rule on
5 requests for admissions, the feeling being
6 that you can get, through a yes or no
7 interrogatory, the same thing you can get from
8 a request for admissions. But there are some
9 people who have said recently that there is an
10 established body of jurisprudence on
11 admissions, you should not throw that away,
12 admissions are very helpful, and that the
13 consequence of a failure to admit or deny
14 something is more useful in litigation than a
15 failure to answer an interrogatory.

16 So we will come back to -- I'm not
17 skipping over it, I'm just kind of
18 highlighting what I consider to be the four
19 main topics.

20 Let's begin with Topic 1, and that is,
21 does anyone have any objection to an unlimited
22 number of interrogatories that simply require
23 a yes or no answer?

24 MS. SWEENEY: One question.
25 How do you determine which ones those are that

1 require a yes or no answer? Do you tell them,
2 "The answers to these are intended to be
3 yeses or noes"? Because I can see, you know,
4 that often on the witness stand you think
5 you're going to get a yes or no answer and you
6 get several paragraphs.

7 MR. SUSMAN: Well, I think the
8 answer would be, if it can be answered with a
9 yes or no, it's a yes or no question.

10 MS. SWEENEY: Does it have to
11 be answered yes or no?

12 MR. SUSMAN: No. I mean, a
13 person can -- well, if you want to put in
14 junk, if I send you an interrogatory that you
15 can answer yes or no and you want to make a
16 speech in response rather than put yes or no,
17 you're welcome to. As far as I'm concerned,
18 it doesn't count against my number of
19 interrogatories because you could have
20 answered yes or no. I mean, that's the theory
21 in counting it against me. Now, what we are
22 going to do to you if you make a speech, I
23 don't know.

24 CHAIRMAN SOULES: John Marks.

25 MR. MARKS: I think that just

1 kind of opens the door and says you can send
2 as many interrogatories as you want, because a
3 clever lawyer is going to be able to word an
4 interrogatory requiring a yes or no answer
5 that cannot be answered with a yes or no.

6 MR. LATTING: I can think of
7 some good ones.

8 MR. MARKS: Yeah, I can too. I
9 mean, I think lawyers spend hours trying to do
10 things like that with requests for admission.
11 Why wouldn't they try to do that with
12 interrogatories?

13 CHAIRMAN SOULES: Why are we
14 doing this? Is that so you can eliminate
15 requests for admissions and put this in the
16 interrogatories? Why do this at all?

17 MR. SUSMAN: Well, the feeling
18 was that it's to deal with the contention
19 interrogatory issue: Do you contend that I
20 committed a fraud by nondisclosure? Do you
21 contend that you relied on it to your
22 detriment? Do you contend that there was
23 consideration? Was the consideration limited
24 to "X"? I mean, the thought process was
25 that -- and you know, law professors do come

1 up with exams now that are yes or no exams in
2 law school. They're very clever and very good
3 exams, too. It was our feeling that the
4 questioner had to be better and cleverer to
5 come up with a question that requires a yes or
6 no answer. You had to give it a hell of a lot
7 of thought and it doesn't take a lot of effort
8 to answer. That was the theory.

9 CHAIRMAN SOULES: Why can't you
10 do that with requests for admissions?

11 Paul Gold.

12 MR. GOLD: I've probably spent
13 as much time drafting clever requests for
14 admissions as anyone around, and judges hate
15 clever requests for admissions. No, you
16 cannot get that through requests for
17 admissions. I've tried relentlessly to get
18 admissions to contentions, and the objection
19 is that that's not the province of requests
20 for admissions, even though the rule was
21 amended in, what, '84 to allow requests for
22 admission on anything within the scope of
23 discovery. Still, all the responses I get
24 cite the old cases that say, you know,
25 requests for admission aren't to be used for

1 this, they aren't to be used for anything but
2 to admit or deny the facts or the authenticity
3 of documents.

4 And one of the reasons why we did this
5 is, as Steve was saying, that we wanted to get
6 away from the contention interrogatory, "State
7 the complete factual basis for your claim that
8 this, this and this," or whatever, but at the
9 same time allow a simple mechanism without a
10 lot of preexisting baggage adorning it that
11 would just allow someone to say, "Yes, I'm
12 contending that you violated 1746(4) or
13 1746(5); yes, I'm contending this; no, I'm not
14 contending that."

15 And it's a different concept than "I
16 admit this. I admit I did this. I admit I
17 did this. I deny I did this." It's not an
18 admit/deny thing, it's just identifying what
19 the issues are in the case. But it's not
20 admitting or denying anything.

21 CHAIRMAN SOULES: Robert
22 Meadows.

23 MR. MEADOWS: The problem with
24 contention interrogatories is not with stating
25 the contention, the problem is stating each

1 and every fact upon which you base the
2 contention. That's what needs to be stopped.

3 MR. GOLD: The other problem
4 with that was that everybody was frustrated
5 with contention interrogatories and thought
6 that it required a tremendous amount of
7 attorney time having to answer "List all the
8 contentions." And what we thought is that it
9 would be much simpler for someone merely to
10 say, "Are you contending this?"

11 "Yes, I am."

12 I mean, you can answer yes or no to a
13 whole number of interrogatories in a very
14 short period of time without having to waste a
15 lot of time and money drafting very precise
16 responses or very calculated responses or
17 responses that protect you a hundred ways from
18 Wednesday. You just say, "Yes, I'm contending
19 this. No, I'm not."

20 The whole idea was not to avoid the
21 contention issue but to make it a lot easier
22 and a lot more efficient in answering it. The
23 person that's responding doesn't have to waste
24 a lot of time and the person that's requesting
25 knows what the issues are then, and you can

1 ask any number you want.

2 MR. MARKS: This goes beyond
3 contention interrogatories, though.

4 MR. GOLD: That's right. You
5 can ask yes or no to your heart's content.

6 CHAIRMAN SOULES: Joe Latting.

7 MR. LATTING: Well, I would
8 like to say that I hate contention
9 interrogatories. I hate answering them. But
10 I hate answering them because they're so
11 pertinent. It's not because their
12 impertinent, it's because I'm scared I'm going
13 to leave something out.

14 CHAIRMAN SOULES: You're tying
15 yourself down.

16 MR. LATTING: I'm tying myself
17 down, is the real reason I hate them. And the
18 fact of the matter is there's nothing
19 complicated at all about somebody saying,
20 "Tell me all the reasons you're suing me."
21 That's what my clients want to know when they
22 get sued, "Why is this guy suing me? Why
23 don't you ask him?"

24 I say, "Well, we can't find that out."
25 We can file special exceptions and we can set

1 hearings, but we can't just ask him and have
2 him tell us.

3 And I guarantee you that by asking
4 interrogatories that can be answered yes or no
5 I'm going to get stuff from lawyers that I'm
6 against that I'll never be able to answer yes
7 or no, because what they do is they'll swerve
8 right up against what I'm contending but they
9 won't state it quite right.

10 They'll say, "Are you contending A, B, C,
11 D and E?"

12 And I'll have to say, "Well, yes, except
13 that as to E, it's not really E. What I'm
14 contending is" -- and then I'll have to write
15 a little essay about that, and then I'll
16 object to it and say, "Only to this extent do
17 I say yes," and put the usual stuff.

18 So we're not solving the problem here,
19 we're just moving it down one more tier, I
20 think. I mean, the question is, we had a
21 meeting here several times ago where I thought
22 we had a discussion that said one of the
23 things that was fundamental -- in fact, it was
24 the Richard Orsinger that made the point; I
25 wish he were here now. He said that you ought

1 to be able to find out why somebody is suing
2 you. At some point you need to come down to
3 the lick log and say, "Yeah, this is
4 everything I know about that you've done
5 wrong. I think you've done A, B, C, D, E and
6 F and there's nothing else that I'm
7 contending, and I want to know the same thing
8 from you."

9 So I don't think we're saving any money
10 by addressing it this way.

11 CHAIRMAN SOULES: Steve
12 Yelenosky, you had your hand up?

13 MR. YELENOSKY: Yeah. If we do
14 this, why is it important that it be
15 unlimited? I think an aspect of it being
16 unlimited is that you're going to get a lack
17 of precision and they're just going to ask the
18 same question 15 different ways. And although
19 it doesn't take long to answer what is
20 purportedly a yes or no question, as Joe
21 points out, it often is not -- it may take
22 some time to figure out whether you can answer
23 it yes or no, and I think that putting some
24 limit, whatever it is, encourages some
25 precision.

1 CHAIRMAN SOULES: Steve Susman.

2 MR. SUSMAN: Well, I think our
3 feeling, again, is that it is so hard to ask
4 those questions to get any useful answers that
5 it will not be a vehicle that will be used
6 very much, and that if it is used, that it's
7 not a vehicle that requires much effort to
8 respond to. A yes or no is -- I mean, it is
9 shooting with a rifle for sure, but I think
10 it's shooting with such a rifle that you may
11 never hit anything and that's why it won't be
12 used very much, but that was just feeling.

13 I mean, maybe it's best to kind of skip
14 down to see how we deal with contention
15 interrogatories and come back to the yes or no
16 thing, I mean, because they're related.

17 CHAIRMAN SOULES: Okay. Well,
18 David Perry had his hand up. David.

19 MR. PERRY: I would just throw
20 out the comment that I think the rules should
21 make a very clear distinction between
22 interrogatories that are asking about specific
23 facts, pieces of data, versus contentions. I
24 personally think that interrogatories that ask
25 for a specific piece of data like social

1 security numbers and addresses and the doctors
2 that people have seen and that sort of thing
3 which can be answered without the intervention
4 of the lawyer generally, by a paralegal or an
5 investigator or someone like that, are a very
6 efficient means of discovery and should be
7 unlimited in number.

8 I think that contention interrogatories
9 need to be limited strictly in number, and I
10 think that what Bobby Meadows said, that if
11 you have somebody state their contention with
12 reasonable specificity, the same that they
13 would in pleadings, don't require them to
14 marshal their facts, make them do that right
15 away -- and one of the provisions that's
16 somewhere else in these rules, it comes out of
17 some of the Task Force discussions, that I
18 think is very important is the requirement
19 that you're not supposed to be able to get out
20 of answering these by saying, "Well, it's not
21 time for me to answer it yet because I haven't
22 done discovery."

23 A plaintiff, for example, needs to answer
24 the contention interrogatories at the
25 beginning so that the defendant knows what

1 he's having to respond to. I think that we
2 could draw a more clear distinction between
3 interrogatories that go to factual data and
4 contention interrogatories and then have the
5 factual data be unlimited in number but have
6 the contention interrogatories be relatively
7 limited.

8 MR. SUSMAN: Let me invite
9 people to look at No. 4, 168(4), and also
10 invite you, if you can do better than this, to
11 do better and send us a draft as quickly as
12 you can, because we wrestled with that
13 language a whole lot, and with it goes the
14 note on the following page.

15 CHAIRMAN SOULES: Judge
16 McCown.

17 HONORABLE F. SCOTT McCOWN: Let
18 me follow up on what Steve is saying there.
19 Everybody remembers from first year of law
20 school procedure going through and trying to
21 figure out the difference in substance and
22 procedure and ultimately concluding there was
23 no difference in substance and procedure.
24 Well, that's the same problem with contention
25 interrogatories. This room could not define

1 what a contention interrogatory is, if we
2 undertook that task, and separating out what's
3 a fact interrogatory from what's a contention
4 interrogatory is very difficult. We know it
5 when we see it, but if you tried to draft a
6 rule to do it, it would be very difficult.

7 If you had a rule that said we will
8 outlaw contention interrogatories, you would
9 find yourself outlawing very reasonable
10 questions that have been asked for hundreds of
11 years that you want to continue asking. If
12 you say we're going to limit contention
13 interrogatories, you have to be able to define
14 what a contention interrogatory is in order to
15 apply the limit and you're going to have
16 trouble coming up with a definition of
17 contention interrogatory. So it's an easy
18 problem to agree on in principle; it's an
19 extremely difficult problem to come up with a
20 rule.

21 So that really was our best shot at the
22 bottom of Page 12 after a lot of work, and
23 it's a tough problem.

24 CHAIRMAN SOULES: Judge
25 Peeples.

1 HONORABLE DAVID PEEPLES: Two
2 points. Number one, I want to second what
3 Steve Yelenosky said a minute ago, which is I
4 have a real fear about allowing anything to be
5 unlimited in number. We've talked about the
6 young associate that's just been sent off to
7 the library to do a bunch of work and I can
8 just see him coming up with hundreds of these
9 unlimited interrogatories.

10 The second is more of a question. I'm
11 wondering how much of the problems that we're
12 dealing with here are related to the fact that
13 we've got noticed pleadings that can be
14 amended at will to trial, and I'm wondering
15 also if it would be fruitful to look and see
16 what other states have done. I mean, really,
17 if the problems we're having in discovery are
18 related very much to our pleading practice,
19 maybe we need to take another look at that.
20 But I just think the intelligent way to handle
21 this is to see what other states comparable to
22 Texas, I'm talking about big industrial states
23 with a lot of litigation, how they handle
24 these problems, because we're not going it
25 alone here.

1 CHAIRMAN SOULES: Most states
2 follow the federal rules.

3 HONORABLE DAVID PEEPLES: Well,
4 you sure can't amend at will in federal court.

5 CHAIRMAN SOULES: That's
6 right. But most state practices practice
7 under rules that are identical to the federal
8 rules.

9 HONORABLE DAVID PEEPLES: For
10 the last 10 minutes here we've been dealing
11 with the problem that is caused by the fact
12 that pleadings don't mean very much.

13 MR. LATTING: Yes.

14 CHAIRMAN SOULES: Sarah Duncan.

15 MS. DUNCAN: We're trying to
16 fix an insufficient pleading problem with a
17 discovery tool, and in my view that's why
18 contention interrogatories, one, are so
19 burdensome; and two, have never worked very
20 well. If my pleadings are sufficient to tell
21 you what I'm suing you for, then you're just
22 imposing make-work on me with contention
23 interrogatories, which frequently happens. If
24 my pleadings are insufficient, if I don't put
25 it in a pleading, I'm probably not going to

1 tell you in a contention interrogatory.

2 MR. MARKS: Well, what if we do
3 something that --

4 CHAIRMAN SOULES: Excuse me.
5 The idea of contention interrogatories came
6 really into the rules in 1984, and the debate
7 of this Committee at the time was that it
8 would enable the parties to use the
9 interrogatories as a substitute for the
10 special exception practice that calls for --
11 that required the engagement of the court or
12 the judge. It hasn't worked. That was the
13 purpose of it, and it didn't work.

14 So maybe what we ought to do is just back
15 the whole thing out and recognize that it
16 didn't work and go back to the special
17 exception practice and pleadings. That's the
18 background of this, for whatever it's worth.

19 Doyle Curry.

20 MR. CURRY: The pleadings in
21 federal court are less specific than they are
22 in the state court. There's almost nothing in
23 the pleadings. You find out in the
24 interrogatory system. And the interrogatory
25 process in the federal court is not as onerous

1 as it is in Texas on the state docket.

2 CHAIRMAN SOULES: How so? How
3 does it differ?

4 MR. CURRY: Well, you've got a
5 limit on the number; just the way they ask the
6 questions, it's just a different practice.

7 And while we're on this subject, every
8 time something comes up about the federal
9 system, everybody says, "Oh, no, no. We don't
10 want that because it's federal." But wouldn't
11 it be nice if lawyers not only didn't have to
12 shift gears but didn't have to change vehicles
13 going from one court to another but had some
14 similarity between them? I mean, I'm too old
15 to learn any new stuff, I guess.

16 CHAIRMAN SOULES: Okay. Paul.
17 We'll go down the table.

18 MR. GOLD: It has taken an
19 incredible number of years to get away from
20 the specific pleading process that we had in
21 this state. And I believe when this came up,
22 Justice Hecht was in one of our meetings and
23 he grimaced when the issue about going back to
24 specific pleadings came up. I don't think
25 there's any inclination on anybody's part to

1 return to that. If we did, I'd want to
2 immediately attach to it that the defendants
3 would have to specially admit or deny each
4 allegation, which I don't think they want to
5 go to in that situation either.

6 But the issue here, and I think that it's
7 a very clean, very efficient way of addressing
8 the problem, is that you have noticed
9 pleading, and what you're trying to do is
10 avoid a tremendous amount of wasted time and
11 energy expended by attorneys. Because the
12 clients don't answer this stuff; this is
13 totally an attorney deal.

14 And if we return to a special exception
15 practice, that's a tremendous waste of time.
16 You go to the court, the court doesn't want to
17 hear them, you amend the pleading, you amend
18 the pleading five or six times until you get
19 the specificity the other side wants.

20 With this, someone can send you a
21 question, "Are you contending this?"

22 The attorney is the one that's answering
23 it "Yes, I am," or "No, I'm not." You can
24 keep refining it.

25 And as to Paula's question about whether

1 you can answer it more expansively, yes, if
2 you want to, you can, but you don't have to.
3 All it requires is a yes or no. And we
4 thought that that was a very clean way and a
5 very expedient way of helping the two sides
6 identify what's an issue and what is not.

7 And what we wanted to definitely get away
8 from was this thing about state all the facts
9 that support your contention, identify all the
10 documents that support your contention, and
11 identify all the individuals with facts
12 relevant to your contention, because that is
13 definitely an invasion of attorney work
14 product.

15 And similarly, you start -- and one of
16 the things we asked in the committee is when
17 you start asking what facts support your
18 contention, so what if what a party says
19 supports their contention or not. If it's a
20 fact and on appeal it happens to support the
21 point, it's going to support the point whether
22 they thought it supported it or not, if it's a
23 fact in evidence. So what an attorney thinks
24 supports a point or not really is not very
25 germane to the discussion, so I don't think it

1 takes away from anything. I don't think it
2 causes anybody undue work. I think it's a way
3 of efficiently identifying more specifically
4 what the issues in the case are, and that's
5 why I would support it.

6 CHAIRMAN SOULES: David Perry.

7 MR. PERRY: I was just going to
8 say that I think we need to keep in mind what
9 we're trying to accomplish. Before 1984,
10 people used to get interrogatories, give them
11 to your paralegal or your investigator, and
12 say, "Get me the answers to these." They
13 would come back, you would look them over,
14 they could be signed and sent out, and it was
15 not a burden on the system. And part of what
16 we need to accomplish is to try to get back in
17 that direction.

18 Now, the change that was made in 1984 to
19 allow contention interrogatories, as you say,
20 was intended -- or it is intended to
21 substitute for a special exception. An
22 interrogatory that simply says, "List the acts
23 of negligence that you're claiming," or "Set
24 out the way in which you claim the design was
25 defective," that's going to require some

1 lawyer time, but it's not unfair, and in some
2 way or another we need to keep that.

3 But we need to outlaw the kinds of things
4 which we're talking about where you have to
5 marshal your facts. And marshalling the facts
6 may be the best way to say that or perhaps
7 there might be another way, but I think we
8 need to keep our eye on the ball; that we need
9 to allow for the discovery of facts and limit
10 the amount of lawyer time that is required to
11 respond to the discovery of legal theories,
12 because except for getting the pleadings in
13 effect down to what you get on a special
14 exception, discovery of legal theories is one
15 of the great time wasters in the system and
16 one of the great burdens on the system.

17 CHAIRMAN SOULES: Well, the
18 second piece of that, too, was that there was
19 a feeling that there should be some way to
20 smoke out the legal theories other than by
21 summary judgment, which there wasn't a vehicle
22 to do that before '84, so that was kind of
23 another piece of this contention thing. And
24 that probably hasn't worked either, but that
25 was one of the notions behind that.

1 Joe, and then I'll get to Steve.

2 MR. LATTING: Just a short
3 reply to what you said, Paul. I agree in
4 general with what you said, and I agree with
5 what you say, David. The problem with what
6 you said, Paul, is this: You said that a fact
7 is a fact if it comes in evidence whether it
8 was listed in response to a contention
9 interrogatory or not, and that's true.

10 The question is, does it come in
11 evidence? The fear I have is that I get a
12 contention interrogatory that says, "Tell me
13 what facts you're relying on to prove this
14 theory," which is the central theory of my
15 case, and I list A, B, and C. I then get to
16 the courtroom and I start wanting to prove A,
17 B, C and D and there's an objection. And the
18 objection is that it was not listed as one of
19 the facts relied on to prove the theory and
20 it's not admissible for any other reason, so
21 there's a motion to exclude.

22 And so when I answer these questions, I'm
23 going to have to be extremely careful to make
24 sure that I list everything for fear of not
25 getting this admitted.

1 Now, am I off the mark here somewhere?

2 MR. GOLD: No, no, no. That's
3 a problem. I'm grimacing because I'm hearing
4 what you're saying and I'm trying to think.

5 CHAIRMAN SOULES: But isn't
6 that what this is intended to solve?

7 PROFESSOR ALBRIGHT: That's
8 exactly what I was going to say. The problem
9 is not that contention interrogatories as a
10 vehicle are all that bad. It's a way to get
11 more detailed pleadings, and there has to be a
12 way to get more detailed pleadings either by
13 special exception or discovery and you just
14 decide whether you want it to be a pleading
15 practice or a discovery practice. But having
16 it be in discovery practice is not the
17 problem. The problem is the exclusion rule.

18 MR. LATTING: That's right.

19 PROFESSOR ALBRIGHT: We have
20 this automatic exclusion rule where if you
21 forget to put E down, then it gets thrown out
22 and so you're screwed at court. Where then if
23 you get to our -- and before the end of the
24 day we're going to talk about our requirement
25 of response and supplementation and then what

1 happens to you when you don't make a full
2 response to supplementation, and I think you
3 will find that you're not going to have this
4 problem under the regime we have here.

5 Number one, you can't ask a question that
6 makes you marshal the facts; and two, if you
7 forget to list a fact, under our
8 supplementation and response rule, if you have
9 given that information through any other
10 discovery or in writing, then you're okay.
11 You know, again, it's a notice concept instead
12 of "Have I marshalled every piece of evidence
13 in the right place?" eight zillion times.

14 CHAIRMAN SOULES: Do you have a
15 comment, Sarah?

16 MS. DUNCAN: Well, I just want
17 to say that I don't think exclusion is the
18 only problem with contention interrogatories.
19 Certainly that is a by-product and it is a
20 problem, but to me the biggest problem is the
21 amount of time that a diligent attorney is
22 going to take answering these things.

23 And I would like to, I guess, echo
24 Doyle. I think pleadings in federal court
25 work great. 12(b)(6), if you don't have an

1 element of your claim in your complaint, you
2 get noticed that you're going to get dismissed
3 unless you amend to fully state your claim.

4 PROFESSOR ALBRIGHT: But you
5 don't -- except if you read the 12(b)(6)
6 cases and the motion for more definite
7 statement cases, the motions for more definite
8 statements get granted only when you cannot
9 figure out what they're claiming. In other
10 words, the pleadings are so bad that you can't
11 tell what's there. And in federal court, when
12 you go to trial, you're not going to trial
13 under your pleadings; you're going to trial
14 under a pretrial order that has very detailed
15 allegations in it, so it's a completely
16 different system than what we have.

17 CHAIRMAN SOULES: Steve.

18 MR. SUSMAN: Mr. Chairman,
19 could we -- I would like to take a vote now on
20 whether people would like to outlaw contention
21 interrogatories entirely. If you vote in
22 favor of this, you make the subcommittee's
23 work easy, a lot easier than it has been.

24 PROFESSOR ALBRIGHT: Do we have
25 the drafts?

1 MR. SUSMAN: No. We outlaw
2 them. Just say you cannot ask a contention
3 interrogatory, okay, which is what we have --
4 we have not outlawed them, we have just tried
5 to restrict them, right? But we could put in
6 here, "Contention interrogatories will not be
7 allowed."

8 CHAIRMAN SOULES: This is just
9 a --

10 MR. SUSMAN: It's a straw vote.

11 CHAIRMAN SOULES: This is just
12 a straw vote. It has no meaning.

13 MR. SUSMAN: Yet most people
14 think that -- just give us some direction.

15 CHAIRMAN SOULES: I think we
16 want to find out whether this is something we
17 need to keep talking about. If it's obviously
18 so one-sided, we probably don't need to talk
19 about it.

20 MR. SUSMAN: Yeah. I mean, if
21 people really want to get rid of contention
22 interrogatories --

23 CHAIRMAN SOULES: How many feel
24 that contention interrogatories should be
25 eliminated?

1 HONORABLE F. SCOTT McCOWN:

2 Could I ask a question before we vote?

3 CHAIRMAN SOULES: How many feel
4 that contention interrogatories should be
5 eliminated entirely?

6 How many feel they should be retained?

7 MR. PERRY: Do you mean
8 retained entirely or to some extent?

9 CHAIRMAN SOULES: To some
10 extent.

11 Okay. I think we still need to continue
12 talking about it.

13 MR. SUSMAN: Now, look, please,
14 rather than in a vacuum, look at No. 4, the
15 language we have elected, when coupled with
16 the footnote on Page 13.

17 CHAIRMAN SOULES: Steve, could
18 I ask a question for clarification? The
19 format that you have proposed here, is that
20 dependent upon an unlimited number of
21 interrogatories or not?

22 MR. SUSMAN: Oh, no, no.

23 CHAIRMAN SOULES: Okay.

24 MR. SUSMAN: This kind of
25 contention interrogatory that we're talking

1 about, one that requires other than a yes or
2 no answer, is within the 30.

3 CHAIRMAN SOULES: No. I'm --
4 does your format -- is it relying upon an
5 unlimited number of yes or no questions?

6 HONORABLE F. SCOTT McCOWN: No.
7 It's in between --

8 CHAIRMAN SOULES: Because if it
9 is, I don't think this Committee is going to
10 go with that.

11 MR. KELTNER: No, no. Our
12 scheme will work if you --

13 MR. SUSMAN: Take out yes or no
14 questions, if you want to.

15 CHAIRMAN SOULES: I'm trying to
16 engage the conscience of this Committee.
17 Yesterday we decided that unless you get some
18 special court order you can't find out what an
19 expert is going to testify to at trial without
20 taking his deposition. You know, we're going
21 to go tell the public whenever we get done
22 here that we're saving them a hell of a lot of
23 money in discovery. Now we're talking about
24 that the second thing we're going to tell them
25 is that "And we're going to save you a lot of

1 money by giving back unlimited
2 interrogatories." You know, we can't be
3 moving in the wrong direction if that's the
4 wrong direction. Maybe it's the right
5 direction.

6 MR. SUSMAN: They don't have
7 any -- okay. You can eliminate yes or no
8 interrogatories entirely; you can put them in
9 requests for admission; you can limit the
10 number of requests for admission. I mean,
11 these are all possibilities.

12 CHAIRMAN SOULES: Or you can
13 count them in the 30.

14 MR. SUSMAN: Or you can count
15 them in the 30.

16 CHAIRMAN SOULES: Okay.

17 MR. SUSMAN: Right now the
18 thought was that 30 -- the limit of 30 should
19 be on those that really require textual
20 answers, I mean, you know, where someone has
21 got to write a narrative, someone has got to
22 write something or get some information. I
23 mean, that's the kind of -- but in any event,
24 Item No. 4 is designed to apply -- I mean,
25 Subsection 4 -- to apply to those

1 interrogatories that will be limited in number
2 and that come within the 30.

3 And the question before the house is, can
4 you think of a better way to preserve
5 contention interrogatories and yet eliminate
6 what you find obnoxious in them? That's the
7 issue before the house.

8 MR. LATTING: Is there
9 something wrong with doing what Alex said,
10 which is to say that -- or someone suggested,
11 which is to say that -- or make a prohibition
12 against marshalling evidence?

13 MR. SUSMAN: That's what we
14 do. Okay? I mean, that's what we are
15 trying -- I mean, look at -- read -- take
16 five minutes, you all, or three minutes and
17 read No. 4 and the footnote. Just see if
18 we've got it.

19 HONORABLE F. SCOTT McCOWN: Let
20 me make a suggestion. If you look at the
21 bottom of Page 12 at No. 4 that Steve has
22 called your attention to, just take out the
23 words "that require more than a yes or no
24 answer." This yes or no business was a bell
25 and whistle we thought of that's causing you

