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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 19, 1994

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Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas, on the
19th day of March, A.D. 1994, between the hours
of 8:30 o'clock a.m. and 12:35 o'clock p.m., at
the Texas Law Center, 1313 Colorado, Austin,
Texas 78701.

ORIGINAL

MARCH 19, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Professor Elaine Carlson
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
David E. Keltner
Joseph Latting
Gilbert I. Low
John Marks
Honorable F. Scott McCown
Russell H. McMains
Harriet E. Miers
Richard R. Orsinger
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
David B. Jackson

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Honorable Scott A. Brister
Honorable Ann T. Cochran
Professor William V. Dorsaneo
Michael T. Gallagher
Anne L. Gardner
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
Thomas S. Leatherbury
Robert E. Meadows
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Paula Sweeney

Honorable Sam Houston Clinton
Paul N. Gold
Doris Lange
Thomas C. Riney
Honorable Paul Heath Till
Bonnie Wolbrueck

SUPREME COURT ADVISORY COMMITTEE

MARCH 19, 1994

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1 to propose this morning is a comment to Rule
2 166, which is really the work of Pam taken from
3 the ABA, and it addresses the issue of what
4 kind of a hearing should be held, not what the
5 powers of the Court are so much, but what kind
6 of a hearing should be held and what the Court
7 may consider.

8 We say here that due process requires that
9 before sanctions are imposed the alleged
10 offender be afforded fair notice and an
11 opportunity to be heard. The procedure
12 employed may vary with the circumstances
13 provided that due process requirements are
14 satisfied.

15 The Court in its discretion shall
16 determine whether to hold a hearing on the
17 sanctions under consideration as well as the
18 type of evidence considered.

19 And then we say, "See the Rule on Hearings
20 Task Force on revisions of the Texas Rule of
21 Civil Procedure."

22 We have to wait to hear from them before
23 we know how to refer to that properly.

24 Then we go on to say, "A hearing is
25 ordinarily required prior to the issuance of

1 any sanction that is based on a finding of bad
2 faith on the part of the alleged offender. A
3 hearing is appropriate whenever it would assist
4 the Court in its consideration of the sanctions
5 issue or would significantly assist the alleged
6 offender in the presentation of his or her
7 defense.

8 "None of the subcommittee members is
9 entirely happy with this language, but we do
10 not feel it's a good idea to go further in
11 drafting a comment at this time for two
12 reasons:"

13 And then I won't read my letter, but what
14 we say here in essence is that we haven't heard
15 yet from Tommy Jacks, who is going to draft for
16 us the prevailing version of the sanctions
17 motion that we have debated for a long time in
18 here, and I won't go over that again, but Tommy
19 is the one who is going to -- who has
20 undertaken to draft that, and he is unable to
21 be here today and has not been able to do it so
22 far. It's really difficult to go forward any
23 more until we get that exact language.

24 Then we also say that we think that this
25 comment is such an important -- or this issue

1 is so important that it ought really be left
2 maybe to Bill Dorsaneo's group to talk about
3 what judges may consider at pretrial hearings.

4 And the issue that's out there floating
5 around there is this: A lawyer stands up and
6 says, "Judge, here is what happened." This
7 happens all the time. I'm looking at Judge
8 McCown. You know this happens. You get to
9 court, two lawyers stands up, one says, "Here
10 is what happened, Judge. A, B, C, D."

11 And the other one says, "No, that's not
12 what happened. What happened was such and
13 such."

14 Well, can the Court enter an order based
15 on that kind of representation? It's no
16 evidence at all, but my experience is that it
17 happens all the time. Should we even address
18 that in this Committee? If an unsworn
19 assertion is made by an attorney in an pretrial
20 hearing, should the other side have the right
21 to cross-examination that attorney? Those are
22 pretty important issues. I guess they are.
23 And that's right at the heart of what we're
24 doing.

25 The Sanctions Committee feels like that we

1 have the cart in front of the horse and that we
2 ought not talk about this any more at this
3 time, not because we're trying to prolong it or
4 dodge it; I think we should not duck it. I
5 think we should address this issue very
6 squarely, but until we see what discovery
7 direction we're taking and until we see what
8 Jacks is going to propose by way of actual
9 language, we really can't do anything further
10 except to suggest this rather innocuous ABA
11 language.

12 So that's what we've done. That's where
13 we are today.

14 MR. HERRING: And I think you
15 might add that we probably don't even want to
16 vote on this language today because, as we
17 talked about last time, Bill Dorsaneo is coming
18 up with a general rule to talk about hearings
19 and what courts may consider or may not
20 consider, and we would kind of like to see that
21 before we have a comment that takes that into
22 account.

23 CHAIRMAN SOULES: Okay. We had
24 a vote of 13 to 10 last time to redraft the
25 Sanctions Rule along the lines that Tommy Jacks

1 suggested. He has not participated in the
2 interim.

3 Does anyone in the 13 want to take a crack
4 at that? Because next time we're going to go
5 to a vote, a final vote on sanctions whether we
6 have input or not from the 13. So who wants to
7 take that on? Shelby?

8 MR. SHARPE: I don't want to
9 take that on, but I want to give you a report.

10 The State Bar's Committee on Court Rules
11 will take a final vote on a complete rewrite of
12 Rule 13 which is totally consistent with what
13 you did on Jacks' vote and what was the vote
14 back in November of this Committee. I think
15 you will have that, Joe. The meeting is the
16 first Saturday in April. You will have that
17 meeting before we meet next. You will see the
18 complete rewrite. It's coming from Bill Jones'
19 subcommittee on sanctions. There's also a
20 complete rewrite of Rule 215 with a new
21 number.

22 And by the way, what Bill Dorsaneo by and
23 large is using is what's coming out of Court
24 Rules because he also sits on that state bar
25 committee. So this Committee, when it meets

1 next in May, the subcommittee and the task force
2 will see from Court Rules its rewrite of Rule
3 13 which -- I can tell you right now it
4 completely passes muster on the hearings, the
5 procedures, the whole bit.

6 Also, Rule 13 will not apply at all to
7 discovery. It will apply to everything but
8 discovery. In fact, it will even have a
9 disclaimer that it does not apply to
10 discovery. And then the Rule that's coming up
11 will have basically the two-tier approach that
12 you asked for, which basically is motions to
13 compel, except in those circumstances where
14 it's just not practical, and then the
15 sanctions. And then it sets up all the
16 procedure and the process and it's very
17 concise.

18 I have seen their advance product, which
19 in fact it almost passed at this last meeting
20 but we just didn't have a chance to get the
21 wording exactly as Court Rules wanted, so your
22 Committee will have that. This Committee
23 should be able to act with some type of final
24 approval on 13 and whatever the number is going
25 to be on whatever relates to discovery.

1 MR. LATTING: Could you send
2 me --

3 CHAIRMAN SOULES: When will you
4 have that to Joe?

5 MR. SHARPE: Our meeting is, I
6 think, April the 9th, whatever that Saturday
7 is, and he should have it by the 12th or the
8 13th of April. And we don't meet until May.

9 MR. LATTING: Would you mail it
10 to me directly?

11 MR. SHARPE: Oh, it will come
12 direct to you. It will go directly to you.

13 MR. LATTING: Okay.

14 CHAIRMAN SOULES: What I would
15 like for you to do is to go ahead and send us a
16 draft.

17 MR. SHARPE: Sure.

18 CHAIRMAN SOULES: Whatever the
19 status of that is right now, send it to us.
20 Send it Joe so he can start thinking about it.
21 And tell the Court Rules Committee that this
22 Committee is going to act, probably take final
23 action on sanctions at the May meeting, and if
24 they're not on the train, it's leaving.

25 MR. SHARPE: Yeah. We knew

1 that. That's the reason why we scheduled that
2 April meeting.

3 CHAIRMAN SOULES: Okay. But we
4 do have -- the Supreme Court wants work product
5 out of this Committee in its hand and we
6 haven't done it. In three meetings we haven't
7 sent anything and we're not going to get
8 anything to it as we go through this meeting.
9 This is the third meeting, of course. The next
10 meeting we have to get something to the Supreme
11 Court.

12 MR. SHARPE: Well, these Rules
13 have been in the process through this
14 subcommittee for two years of work on 215 and
15 three years on 13 and I really think they have
16 it down in good form.

17 CHAIRMAN SOULES: Okay. That's
18 fine. Well, there has been some sensitivity in
19 the past on that State Bar Committee that this
20 Committee wasn't receiving its work product,
21 but that's never been the case. It's just that
22 this Committee has got work to do and we want
23 the input from that committee.

24 Every request that I get from anyplace
25 goes to your staff, the State Bar staff of the

1 Court Rules Committee, so you're -- they had
2 this agenda before it was ever distributed to
3 our membership as it came from time to time,
4 and we do want input on everything, but we've
5 got to, of course, keep our docket too.

6 Pardon me, go ahead, Joe.

7 MR. LATTING: Two things. I
8 think that if somebody besides Tommy is going
9 to be responsible for writing this Rule that on
10 our Committee it should be Pam. I volunteer
11 Pam to do it. She's articulate.

12 MS. BARON: Thank you so much.

13 CHAIRMAN SOULES: Okay.

14 MR. LATTING: And the other
15 thing is I want to respectfully -- this is not
16 personal at all -- I want to say that I hear
17 what you're saying and that the train is
18 leaving. I personally feel that the train
19 ought not to leave on sanctions until we decide
20 what we're going to do with discovery.

21 And for Dorsaneo, I think we're writing
22 the Rule that we ought to write last first,
23 because until we see those other Rules, we're
24 trying to make this -- we're doing the
25 pathology before we've done the anatomy.

1 CHAIRMAN SOULES: Well, the
2 Chair is doing the best I possibly can to
3 advance the ball.

4 MR. LATTING: I understand.

5 CHAIRMAN SOULES: And discovery
6 has been later than sanctions in developing and
7 we've got to keep rolling.

8 MR. LATTING: We're going to do
9 it.

10 CHAIRMAN SOULES: Okay. We're
11 going to do it.

12 MR. SHARPE: One final comment,
13 Mr. Chairman. For Joe's comfort level, Bill,
14 of course, has been a member of the State Bar
15 Committee on Court Rules for as long as he has
16 probably been on this Committee, and he is
17 familiar with where he is going on the
18 discovery aspects of it, which are also
19 consistent with what he's been working with on
20 Carl Hamilton's subcommittee on discovery
21 there, so I think you're going to find that
22 this Sanction Rule fits in with what Dorsaneo
23 and the others have been doing on discovery.
24 It is not incompatible with what's coming out
25 of Steve Susman's committee in principle, so

1 it's going to fit.

2 MR. LATTING: Okay. Well, I'm
3 glad to hear that. I just didn't know either
4 one of those things.

5 MR. SHARPE: Correct. No, it
6 will fit.

7 CHAIRMAN SOULES: Okay. We
8 spent a lot of time on 166d, very little time,
9 if any, on 13 in sessions here, and then there
10 are some other Rules that the Sanctions Task
11 Force felt needed some adjustment. And I want
12 to go through all that next time and at least
13 get 13 and 166d done. The rest of it may have
14 to wait for final action until all the other
15 Discovery Rules.

16 If anything else can be accomplished
17 without going to the rest of the Discovery
18 Rules, let's get that out of the way, too, so
19 we can get the sanctions subcommittee wrapped
20 up, except as we may need to make adjustments
21 much later in the year whenever discovery is
22 completed, and then we'll have to look to see
23 how they work one set of Rules with the other,
24 the Sanctions Rules with the Discovery Rules.

25 Anything else on sanctions today? All

1 right. Who is going to be the draftsman for
2 yours? Is it going to be Pam Baron?

3 MS. BARON: Only reluctantly.

4 CHAIRMAN SOULES: Pardon me?

5 MS. BARON: Only reluctantly.

6 CHAIRMAN SOULES: Only
7 reluctantly.

8 MR. LATTING: That's a yes.

9 CHAIRMAN SOULES: Okay. Well,
10 somebody in the 13 who wants to carry the ball
11 needs to get involved, because otherwise we're
12 not going to get the changes made.

13 MR. HERRING: Well, Pam needs to
14 talk to Tommy. That's what needs to be done.

15 MS. BARON: And I'll do that.

16 CHAIRMAN SOULES: That's right.
17 But if that doesn't work out, then we've still
18 got to wrap it up next time.

19 MR. LATTING: We'll have a draft
20 here for next time.

21 CHAIRMAN SOULES: Okay. And I
22 think that brings us to discovery. And Steve,
23 you've got a report that says "Working Draft
24 3/14." Is that the current -- is that what we
25 should be looking at?

1 MR. SUSMAN: That's it.

2 CHAIRMAN SOULES: Okay. It
3 looks like this (indicating)?

4 MR. SUSMAN: Correct.

5 CHAIRMAN SOULES: You mailed
6 this to the members, did you not, Steve?

7 MR. SUSMAN: It was mailed on
8 Monday to all the members.

9 MR. ORSINGER: I have one extra
10 copy if anybody wants it.

11 CHAIRMAN SOULES: Do you have a
12 copy, Judge?

13 MR. ORSINGER: Sorry, it's
14 gone.

15 CHAIRMAN SOULES: Somebody may
16 have to look on with somebody.

17 Now, let's see, Shelby, is this the paper
18 that you said -- request for new Rule or
19 change of existing Rules and so forth, 166d?
20 Is this it (indicating)?

21 MR. SHARPE: That's the medical
22 mal.

23 CHAIRMAN SOULES: This is the
24 medical mal?

25 MR. SHARPE: Correct. Unless

1 your secretary distributed that, that's not in
2 their packets.

3 CHAIRMAN SOULES: Okay.

4 MR. SHARPE: It went to you for
5 distribution, so you'll have to look at that in
6 the next meeting.

7 CHAIRMAN SOULES: Okay. Is this
8 for Court Rules?

9 MR. SHARPE: Yes. That was done
10 at the request of Chief Justice. We faxed him
11 a draft to see if we were on line with what he
12 had in mind, and he confirmed that he had
13 finalized that at the last meeting.

14 CHAIRMAN SOULES: Okay. Steve,
15 are you ready to go?

16 MR. SUSMAN: Ready.

17 CHAIRMAN SOULES: Okay. Please
18 take the floor.

19 MR. SUSMAN: And I've moved over
20 here because some say it's easier to hear than
21 in the middle and I've got some stuff on the
22 chart here to use to demonstrate kind of what
23 our theme is.

24 The discovery committee has now held a
25 number of meetings in Austin, the subcommittee,

1 and a number of phone conversations. And we
2 decided, as we began our work, to begin with
3 discussing the discovery vehicles and the
4 limitations on them rather than go to the more
5 general subjects of the scope of discovery and
6 whether it should be voluntary disclosure or "I
7 don't give it to you until you ask for it" or
8 the role of the Court in pretrial conferences
9 or the need to supplement discovery answers,
10 all of which are subjects that we will come to,
11 but they seem to have been subjects that have
12 been thought a lot about by the Discovery Task
13 Force; and whereas we thought this issue of
14 limitations was something we could get into
15 real quickly, come up with some very concrete
16 proposals and it would also be an area in which
17 we could make a lot of changes.

18 You basically have before you our idea of
19 interrogatories, experts, depositions and the
20 general discovery timetable. Coming to you
21 before the next meeting, we have it drafted but
22 we have not finally -- did not get it to you
23 in time, is a recommendation on the request for
24 production of documents, Rule 167.

25 The basic theme or the general philosophy

1 of the subcommittee is subject to your --
2 really what we want to know is are we going in
3 the right direction, because if this group
4 doesn't think we're going in the right
5 direction we need to make a lot of changes.

6 Our general notion was that we cannot
7 count on the micromanagement by courts through
8 the pretrial conference device or the good will
9 of counsel through a Gandhi-type cooperation to
10 solve the problem that we have in the courts
11 today, that the civil litigants have in the
12 courts today. It's just too damn expensive.
13 It takes too long and it's too expensive and no
14 one can afford to have a dispute resolved the
15 traditional old-fashioned way.

16 You've got to go to mediation because you
17 cannot afford to go to a trial, and so the
18 feeling was that it would be nice if Courts
19 could do it for us, but in a state where we
20 have an elected judiciary, it is unlikely that
21 the Courts are going to be willing on their own
22 motion to put the kind of limitations that
23 lawyers ought to have put on themselves. And
24 in every case we have been in, mostly one
25 lawyer -- it's rare that two lawyers will

1 agree on the way things ought to operate. It
2 happens periodically but not often.

3 So we began with the general idea of
4 imposing a discovery limit, a window of time
5 during which discovery can take place. And
6 that, as you can see what we have done -- and
7 by the way, as you see -- as you go through
8 these Rules, you will see that the Rule 166c
9 and all these numbers are kind of all mixed up
10 because we'll have to get them straight and
11 fixed up. But what we wanted to do and have
12 right at the front is the notion that
13 everything that we do on these Rules can be
14 modified by agreement of counsel or by order of
15 the Court on a motion made for good cause
16 shown, so it's all subject to change.

17 Everything is subject to change, but the
18 burden is upon the one who wants to change
19 these limits to come in and show some good
20 cause, or the Court can do it on its own motion
21 or the parties can certainly agree, but our
22 notion generally is that regardless of when the
23 case is filed and regardless of when the case
24 is set for trial, six months is enough time in
25 any case for the parties to complete discovery

1 if they work at it.

2 There is a tremendous -- one of the
3 biggest expenses in civil litigation today is
4 the starts and stops. You pick up a file, you
5 ask questions, you ask to take a deposition.
6 Two months later you come back for a summary
7 judgment hearing. Three months later you come
8 back for another deposition. There are too
9 many starts and stops.

10 I mean, the ideal solution, you know, in
11 the ideal world would be lawyers would work on
12 one case at a time. Well, we felt that's a
13 little too radical. Probably we can't do that
14 right now. But we didn't think there was
15 anything unreasonable about the six-month
16 window, particularly when there was some
17 ability for the lawyers among themselves to
18 agree when the window begins, when the
19 discovery period begins.

20 We said the discovery period should begin
21 at the time the first deposition is taken in
22 the case or at the time that the first document
23 is produced in response to a request for
24 production of documents, some kind of objective
25 event that says that's when the six months

1 begins. And then to some extent the lawyers
2 have control over when they want it to begin by
3 when they take the first deposition. And I'm
4 sure if we were in a case together, we might
5 discuss when are we going to kick things off
6 and how are we going to kick things off.

7 And then that discovery window runs for a
8 period of six months and then ends, and it ends
9 regardless of when the case is set for trial.
10 The case might be set three years hence. It
11 has nothing to do with the trial setting.

12 We've got to get people thinking that
13 discovery and trial are two different things.
14 That was the feeling of our subcommittee
15 because, you know, you get in these cases where
16 people say, "What's the harm of continuing
17 discovery until the trial?" Well, the harm is
18 that it costs a lot of money, and it seems to
19 me that that's something that we have to do
20 something about here. It's something that we
21 can do to save the public money and be very
22 proud of.

23 Anyway, that was the notion of the
24 discovery period being six months, and that's
25 basically what we had in Rule 166b, which

1 probably ought to be transcribed as Rule -- I
2 mean, we ought to begin with a modification
3 probably.

4 Before we go into detail, I want to just
5 kind of take you through these Rules and
6 explain them to you generally and then we'll
7 come back and discuss them in greater detail.

8 There is Rule 166(c)(3) at the bottom of
9 the first page where we have tried to determine
10 what a side is, because certain limits are
11 placed on each side in a deposition. This
12 could be a problem, we realized. For each side
13 in a trial this could be a problem, and we've
14 tried to do that in Subdivision 3 by saying
15 that should be determined by the Court pursuant
16 to the provisions of Rule 233.

17 The Interrogatory Rule, we have basically
18 set a limit on the number of interrogatories,
19 including subparts, at 30, but no limitation on
20 the number of sets. If a lawyer wishes to ask
21 six sets or 30 sets, one interrogatory per set,
22 he should be allowed to do so. Also we have
23 intentionally said that there shall be no limit
24 on the number of interrogatories which can be
25 asked to simply ask another party to identify

1 documents or authenticate documents, and that's
2 in Rule 168a.

3 In 168b, we basically take the position
4 and there was some argument as to whether the
5 answers to interrogatories should be verified
6 by the client or the lawyer. We know that
7 they're written by the lawyer frequently. We
8 opted for saying that the client should still
9 have to sign and verify the interrogatories in
10 spite of the fact that the lawyer usually
11 writes them. On objections we say you can
12 by -- and that includes answers to contention
13 interrogatories. Objections, of course, would
14 be signed by the attorney making them.

15 We thought that one of the biggest abuses
16 of interrogatories today was the use of an
17 interrogatory to require the other side to
18 marshal its evidence. "Tell me every fact,
19 please state every fact and identify every
20 document and witness that supports the
21 allegation on Page 8 of your petition." We
22 thought that's an abuse of the interrogatory
23 vehicle.

24 Yes, interrogatories need -- you need to
25 preserve the use of an interrogatory to

1 determine whether the person is contending this
2 as a tort or a contract. Yes, you ought to be
3 able to use interrogatories to determine the
4 contentions of the other party, and that's a
5 far preferable way, depending on what his
6 contentions are, than some summary motion or
7 some special exception hearing which requires a
8 lot of court time.

9 But contention interrogatories should not
10 go so far as to require a person to marshal
11 their evidence, and we tried to deal with that
12 on Page 4, little "d," in the middle of the
13 page, on contention interrogatories, where we
14 say that a party can use contention
15 interrogatories only to request another party
16 to generally state the facts and specifically
17 state the legal theories upon which that party
18 bases their particular allegations and to
19 request another party to admit or deny specific
20 facts. That wording, we hoped, together with
21 the comment on the following page will put an
22 end to the use of interrogatories as a vehicle
23 for requesting the other party to marshal
24 facts.

25 We retained the option to produce

1 documents in lieu of answering the
2 interrogatories, but make it clear that the
3 person who refers -- in a response to an
4 interrogatory -- refers the asking party to a
5 document must tell that party sufficient
6 information to allow them to locate the
7 document as easily as it would be for the party
8 responding to the interrogatory to locate the
9 document. That's the test we articulate at the
10 top of Page 5, so that they provide sufficient
11 details so that the interrogating party can
12 locate and identify the document as readily as
13 can the party served. That is a test that I
14 think is used in the Federal Rules.

15 On the subject of -- let me skip now
16 before I go to expert witnesses because I think
17 the next logical subject is depositions.

18 Our Deposition Rule appears in several
19 places, but essentially it begins on Page 8,
20 Rule 200. We adopted a Rule that in every
21 case, every case, no side should get more than
22 50 hours of depositions, 50 hours of
23 questioning of a witness. We said it does not
24 count in that 50 hours the other side's
25 cross-examination of your witness at the

1 deposition. It does not count in that 50 hours
2 your examining your own expert for the purpose
3 of using his testimony as a trial -- for use
4 at trial. But that -- and of course, breaks in
5 the depositions do not count, and we have dealt
6 with that in Rule 200.

7 And at the bottom of Page 9 we talk about
8 what counts in the 50-hour limitation. The
9 notion is that the 50 hours, again, we -- some
10 of the local rules that we looked at around the
11 country limit the number of depositions, 10 to
12 a side, eight to a side. We felt it made a lot
13 more sense to just have a number of hours and
14 let the lawyers divide them up however they
15 please. Some lawyer may want to take 50
16 depositions, very short depositions. Another
17 lawyer may want to spend three days with a
18 witness.

19 By the way, I think this is going to be so
20 refreshing to practice law under a regime like
21 this. When you get in a case, instead of
22 sending out associates to just go forth and
23 depose, you actually have a sit down and think
24 about what your theories are going to be so
25 that they do not unnecessarily use up your

1 precious 50 hours. You'll think about what
2 your theories are going to be, what you're
3 going to get from each witness and how much
4 time you're going to spend with each witness
5 asking questions.

6 To make sure that that is not abused by
7 the defending party, we have provided that no
8 objections can be made during -- while you
9 defend a deponent. The only thing you can say
10 during a deposition is to advise your client on
11 the assertion of a privilege. That's all.
12 Anything else should be go to jail. The notion
13 again, and we made it very clear in our Rule,
14 is that anything that takes place at a
15 deposition should be recorded, a record made or
16 played back, certainly, if it's on video, or
17 read it to the jury. The conference room
18 should be like courtrooms, is the notion of our
19 subcommittee, and what happens in a deposition
20 room should be no different than what happens
21 in a courtroom. And if someone wants to act up
22 or be obnoxious or obstruct the deposition, the
23 jury ought to be able to see that, so we have
24 provided that.

25 Now, objections are -- I mean, you can

1 make objections to questions at time of trial.
2 They are not lost forever by not making them,
3 but they are all reserved, and that's basically
4 our procedure. That's what we have done on the
5 subject of -- I think I've barely covered
6 basically what we've done on the deposition
7 front.

8 We were concerned on the Deposition Rule
9 about the lawyer that badgers a witness, that
10 asks an extremely misleading question that can
11 only be answered in one way, but we concluded,
12 well, that goes on at trial, too; that the
13 defending lawyer has the option of coming back
14 and cross-examining the witness, has the option
15 of objecting to the question, in other words,
16 before it is read to the jury. And there are
17 ways to deal with -- ways to protect
18 themselves, and we cannot allow this continuous
19 objection to form, objection to this, objection
20 to that, to interfere with the deposition
21 procedure. That was basically our fix on
22 depositions.

23 There was a great deal of discussion about
24 it, and we can get into that in more detail,
25 about the means of taking depositions. Are you

1 going to do -- and we dealt with the subject
2 of telephonic depositions and depositions taken
3 by other than stenographic means. And
4 basically the view of the committee was that if
5 you take a deposition and you want to take it
6 by smoke signals, great, you can take it by
7 smoke signals. Whatever method you designate
8 in your notice, you can take it.

9 Now, the other side can come up with a
10 court reporter, a stenographer, and that the
11 Court at the end will figure out who pays for
12 the smoke signal and who pays for the
13 stenographer; but that basically we ought to
14 allow people to have the freedom to experiment
15 with different ways of preserving testimony.

16 A traditional stenographic record is not
17 needed in all cases, and that -- now, this
18 does not -- by the way, we have a court
19 reporter on our subcommittee who -- and
20 certainly we want to hear from David about his
21 views, but as I read the material he passed to
22 us, David's view is not so much -- and I mean,
23 we could probably have a more heated discussion
24 on this anyway, but his view is not so much to
25 limit the method you can use as to say when you

1 transcribe it, it ought to be transcribed by a
2 certified court reporter. I mean, maybe that's
3 not it, but that's certainly what the material
4 he passed out -- the thrust of it is that.

5 Then on the subject of expert witnesses,
6 which is Rule 170 on Page 6, we thought that
7 the simple way to do this is to require that
8 the plaintiff must designate his experts
9 60 days before the close of the discovery
10 window, so after four months you need to
11 designate. It doesn't matter under our Rules
12 when you hire him or when you identify him.
13 You could have hired him before you filed your
14 lawsuit, and there's no longer this problem of
15 having to identify an expert as soon as you
16 know you've got him. And the plaintiff must
17 designate the expert, and what the plaintiff
18 must do when you disclose your expert is
19 contained at the bottom of Page 6, the
20 mandatory disclosure proviso.

21 The notion was that -- and we wrestled
22 with the question and basically we concluded
23 that you don't need an expert report and a
24 deposition, which is basically choose between
25 one of the vehicles of conducting discovery

1 using an expert. Since we concluded that most
2 people will probably want a deposition, we have
3 eliminated the -- or tried to eliminate,
4 through the language we have used in this Rule,
5 the need for an expert ever to prepare a report
6 as such. So when you disclose, you have to put
7 the name of the expert, his address, the
8 subject matter on which he is going to testify,
9 damages, and some general substance of his
10 opinions.

11 And we have in mind here something -- we
12 need to look at the wording, make sure we've
13 accomplished it, but the notion was enough kind
14 of to let the lawyer get prepared for the
15 deposition but it doesn't have to be
16 exhaustive, because all you're really doing now
17 is allowing the lawyer to get prepared for this
18 deposition and not doing something to
19 substitute for a deposition. And then you have
20 to in your designation provide two days in the
21 next 45 when these experts -- each expert will
22 be available.

23 And then the defendant has -- the
24 defendant is allowed 15 days after you learn
25 the identity of the plaintiff's expert to

1 designate their own expert, and that occurs
2 45 days before the close of the discovery
3 window. And the defendant has to provide the
4 same information and all experts are deposed 45
5 days after they were identified so it will all
6 be completed before the six months ends.

7 We dealt with what we thought was a
8 problem, we talked a lot about the problem, of
9 the proliferation of experts like nuclear
10 missiles in an arms race; that that is running
11 up the expense of litigation, and really we
12 should do something about it. There were
13 suggestions that maybe we could limit the
14 number of experts, as some local rules around
15 the country have done.

16 Our basic thought on that was that there
17 are cases, particularly kinds of cases where
18 you may need a lot of different experts but not
19 a lot of testimony from each one, but a number
20 of them, and that we would go ahead and allow
21 people to designate more than -- well, a
22 certain number of experts. But the notion is
23 that if you designate -- let me see where that
24 is in our Rules. The first two experts you
25 designate are deposed on your -- within your

1 50 hours. That's part of the 50 hours. You
2 can depose the other side's two experts during
3 those 50 hours. After two experts you --
4 there's an additional six hours added to the
5 time of the other party to depose your expert
6 or each of your experts.

7 Where is that in the Rule, Alex? I'm
8 sorry.

9 CHAIRMAN SOULES: Page 7.
10 Item 5 on Page 7.

11 PROFESSOR ALBRIGHT: Page 7,
12 Item 5.

13 MR. SUSMAN: Thank you. So that
14 two experts count within the 50-hour limit.
15 After that, the other side gets six hours of
16 testimony per expert, so there is a price you
17 pay for designating more than two experts.

18 And Subsection 6 at the bottom of Page 7
19 is designed to deal with the problem of someone
20 who decides they want to designate a bunch of
21 experts, uses their depositions as a method of
22 auditioning to see who is going to be best, and
23 then selecting from those experts who survived
24 their deposition for trial. And this Rule
25 basically says that if you don't call to trial

