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8 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
9 MAY 21, 1994
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18 Taken before D'Lois Lea Nesbitt,
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 21st day of
21 May, A.D., 1994, between the hours of 8:30
22 o'clock a.m. and 12:30 o'clock p.m. at the
23 Capitol Extension, Room E1.002, 1400 North
24 Congress Avenue, Austin, Texas 78701.
25

ORIGINAL

MAY 21, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta, Jr.
Prof. Alexandra W. Albright
Honorable Scott Brister
Professor Elaine Carlson
Honorable Ann Cochran
Professor William V. Dorsaneo
Anne Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
John Marks
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Luther H. Soules III
Stephen Susman
Paula Sweeney

MEMBERS ABSENT:

Charles L. Babcock
Pamela S. Baron
David J. Beck
Michael T. Gallagher
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Gilbert I. Low
Stephen Yelenosky

EX OFFICIO MEMBERS:

Doyle Curry
Paul Gold
Honorable Nathan L. Hecht
David B. Jackson
Thomas Riney
Bonnie Wolbrueck

Honorable Sam Houston Clinton
Honorable William Cornelius
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

SUPREME COURT ADVISORY COMMITTEE

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1 CHAIRMAN SOULES: Let's be
2 in session. It's about 8:45. I passed a
3 sign-up list. It's somewhere in circulation.
4 Okay. Welcome back everyone. Steve, we're
5 happy to have you here and know you've got
6 your report from the Discovery Subcommittee.
7 Why don't I just give you the floor this
8 morning. We have got materials up here to my
9 right, three different items for those of you
10 who didn't bring yours, and Holly and I will
11 try to give you a list of what materials to
12 bring next time because by now we have got so
13 much paper that it's hard to carry all of it,
14 but we will need you to bring the materials
15 each time to the meeting because we are
16 getting some complaints about the cost of
17 producing and reproducing copies. Okay.
18 Steve, go ahead. What should we --
19 MR. SUSMAN: Let me give you a
20 little overview before we turn to the draft
21 itself.
22 CHAIRMAN SOULES: Okay.
23 MR. SUSMAN: In an effort to
24 give this entire committee a package that as
25 we discussed changes, maybe even modified,

1 adopted, at this meeting the Discovery
2 Committee has held three meetings in Austin
3 since our meeting here on March 18, a number
4 of long telephone conference calls, and I want
5 to begin by especially thanking Alex Albright
6 for the work she did in putting this all
7 together. She fortunately was not teaching
8 this semester and was able to give us a
9 package. We would never have accomplished it
10 in this amount of time without Alex's help.
11 Jeff Harrison -- Jeff, I want to introduce
12 you. Jeff, will you stand? A young lawyer
13 with my law firm that attended all the
14 meetings and served as our scrivener, keeping
15 minutes so we had minutes of each of our
16 meetings, which helped us recall what we had
17 already covered and avoided the anticipated
18 backslide.
19 And then the members of the subcommittee
20 themselves all drafted parts of what you have
21 before you, Paul Gold, David Keltner, Scott
22 McCown, and David Jackson, spent a lot of time
23 working on this. Our guiding principle in
24 doing these changes to the discovery rules was
25 to remain loyal to the sense of this body as

1 expressed in the meeting on March 18th. And
2 Richard Orsinger did a wonderful job of
3 maintaining detailed minutes of that meeting,
4 particularly our discussions. So we went back
5 to that frequently to see what you-all thought
6 the first time around.
7 We carefully considered the work of the
8 State Bar Committee on Rules, Court Rules,
9 which we had a draft of and the Discovery Task
10 Force, task force for which also we had some
11 draft rules from. And then finally we were
12 aided kind of accidentally because there was
13 some recent publicity in the TEXAS LAWYER
14 about the general outlines of what we were up
15 to recently. We had a lot of letters from
16 members of the Bar, judges, law professors,
17 making suggestions and criticisms, and we
18 considered them all. We rejected some,
19 adopted others.
20 Our final version does reflect what we
21 considered to be the best and brightest among
22 the input we got. We got a lot of input from
23 the Bar. Now, the package before you consists
24 of both a red-lined version and an unred-lined
25 version. Probably it's easiest to begin with

1 the unred-lined version because so many of the
2 rules you have are brand new, and we do not
3 have a counterpart. You should have a package
4 of materials with a cover memo from Alex
5 Albright that makes it distinct which just
6 does a great job summarizing a phrase or two
7 of our changes, and then she has enclosed two
8 versions, the red-lined version to show
9 changes from the existing rule, where we took
10 an existing rule and modified it, and then
11 there are some brand new rules. The package
12 is pretty much ready and complete except for
13 some minor changes which I spotted this week
14 in looking at the final product, so I will
15 give them to you as we go.
16 We basically left unchanged Rule 166(a)
17 and any attempt to modify the permissible
18 scope of discovery. We removed request for
19 admissions as a permissible discovery device
20 in the belief that interrogatories seeking a
21 "yes" or "no" answer which are unlimited in
22 number under our plan accomplish the same
23 thing. We had to make changes in certain
24 related rules for adding parties and amending
25 pleadings, and we tried to simplify the

1 pretrial conference rule.
2 As an overview our premise in doing what
3 we did was that neither the courts nor counsel
4 can be relied on to eliminate discovery. We
5 must, we think, have rules which operate by
6 default and impose limits, arbitrary limits
7 where courts are unwilling or disinclined to
8 micromanage their dockets or where counsel,
9 though cooperative and kissy-kissy, still
10 cannot agree on mutual rules of engagement,
11 and all of these rules are default rules and
12 can all be changed by agreement of counsel or
13 court order.
14 The overriding goal is to reduce the
15 expense of discovery without too much
16 sacrifice of justice. Although, we don't live
17 in a perfect world and there may be some
18 slight sacrifices as there is always that
19 possibility when you impose limits. We
20 recognize that in most cases our time limits
21 will allow too much time for discovery. Not
22 every case, indeed few cases, justify 50 hours
23 of depositions per se, but we felt it too
24 difficult to adopt a system which classifies
25 cases on the front end and imposes limits

1 which vary depending upon the complexity of
2 the case.
3 We also found it important to start
4 somewhere. Our fear to do more should not
5 justify our feeling to do something at this
6 time. These limits work for most cases
7 indeed. Most complex cases, it is our hope
8 that future amendments can be devised which
9 will fine tune these limits even further for
10 cases that do not justify so much. We felt an
11 urgency to act now. The courts of our state
12 as you know have been under attack as being
13 user-unfriendly, and the principal features of
14 our proposal is a six-month discovery window,
15 a limitation of 50 hours per side depositions,
16 the restrictions on interrogatories that
17 require the marshalling of evidence, and a
18 relaxation of the exclusionary rule we believe
19 may not deliver better justice but will
20 certainly and demonstrably save litigants in
21 this state millions of dollars a year.
22 These proposed rules are neither
23 pro-plaintiff nor pro-defendant. Objections
24 have been indeed voiced from both sides. The
25 old-time defense lawyers say we are telling

1 them how to prepare their cases for trial, and
2 they don't want that. Plaintiffs products
3 liability lawyers tell us cases -- stories
4 about when they got their confession of guilt
5 in their 53rd hour of depositions. So from
6 both extremes there is resistance mainly to
7 changing the way we do business, and to that
8 the subcommittee answers the public is
9 demanding.
10 There is no question that these rules
11 will change the way we do business. Maybe we
12 can't handle as many cases as we are used to.
13 Maybe we will have to more carefully plan whom
14 to depose and what to ask when we take
15 depositions. Maybe we will have to do a
16 better job of preparing our clients for their
17 depositions before we put them up in a no
18 objection regime. That's a dawning task for
19 trial lawyers, but again, it would be, I
20 think, a default for us not to undertake it.
21 Now, let's begin with the summary. Let
22 me walk you through these rules and tell you
23 about the principal features. I would like to
24 begin with the rule that appears on page 5,
25 again, using the unred-lined version, and I

1 begin with this rule because of it is
2 important that everyone realize that the whole
3 scheme is that by agreement of the parties or
4 order of court anything can be changed. We
5 have used the concept of good reason as
6 recommended at our last meeting on March 18
7 rather than good cause as the standard for the
8 court changing the limits. Obviously we will
9 have to develop a body of caselaw on what good
10 reason means. I assume we could put some
11 things in the comments about good reason, but
12 if we put anything in the comment at all it
13 should be very clearly good reason does not
14 mean that counsel is too busy or didn't have
15 time or that witnesses are too busy or don't
16 have time.
17 We believe that if the lawyers and judges
18 cooperate cases can be discovered in a compact
19 period of time. We believe that the most
20 inefficient -- one of the most inefficient and
21 expensive parts of litigation is starting and
22 stopping in that -- and the fact that I have
23 tried a lot of complex cases in my short
24 career, I do not know of any case that I could
25 not have completely discovered in a two-month

1 period of time, period, no exceptions, if
2 that's all I had to do. If witnesses were
3 available and judges would cooperate. Those
4 are some big if's.
5 The function of these rules is to make
6 the if's come true, to make the witnesses
7 available, and to urge the judges in view of
8 these short discovery windows to rule
9 promptly. The notion is we can prepare a case
10 for trial, put it in the can, put it on the
11 shelf, so that when the court's docket can
12 reach the case for trial, it's ready. You
13 will see in a rule that now appears, a new
14 rule, at page 7, subpart 4 our provision for
15 retouching the film before it is exhibited.
16 This is the refreshener, the cleanup. It is
17 essentially a re-opener of the discovery
18 period 60 days before trial for the purpose of
19 discovering information which has changed
20 since you put the film in the can. A little
21 more on that rule in a minute.
22 Rules 37 and 38 which appear at pages 1,
23 2, and 3 -- 37, 38, and 63, 1, 2, and 3 of
24 this handout, we changed to make clear that
25 parties can be added and pleadings amended

1 freely without leave of court as long as it's
2 done during the first three months of our
3 discovery period. Keep in mind we have always
4 been based upon the notion that there will be
5 a discovery period of six months. It will
6 commence when documents are produced or the
7 first -- in response to a request for
8 production of documents or the first
9 deposition taken. It will not commence if
10 interrogatories seeking certain standard
11 information are asked and answered, nor will
12 it commence if certain types of voluntary
13 disclosure are made, but it will commence --
14 which basically means that it opens when
15 counsel want it to open, and it goes for six
16 months.
17 In any event we had to have some way of
18 making sure the parties were not adding
19 pleadings willy-nilly at the end of the
20 six-month period and then you are extended
21 indefinitely. So we did that by providing
22 that, you know, for three months you can do
23 anything without leave, and after that time
24 leave must be sought, and we provided it
25 should be freely granted, the concept in both

1 Rule 37 and 63 for both the addition of
2 parties and the amending of a pleading. It
3 should be granted where -- it certainly should
4 be freely granted where the addition or
5 amendment requires no extension of the
6 discovery period. If an extension of the
7 discovery period is required, then leave
8 should also be granted and the discovery
9 period extended unless that will interfere
10 with the trial of the case. That's an
11 overview of what we did to Rule 37 and 38.
12 Rule 166 regarding pretrial conferences,
13 a brief overview of that rule. Basically here
14 we simply shortened the rule because we wanted
15 to emphasize that, as the rule says, "Any
16 matter that may aid in the disposition of the
17 action may be considered." Having said "any
18 matter" it seemed to us unnecessary to make
19 the list of illustrations exhaustive. We have
20 shortened the list of illustrations. We
21 believe that the rule as we have written it
22 allows the court at pretrial conference to do
23 anything that it now can at a pretrial
24 conference. We give a hint but not an
25 encouragement in section 1(c) that this is the

1 place for a court order, a court consideration
2 of modifying the discovery limits. The court
3 may consider the development of a scheduling
4 order including discovery. We do not want to
5 encourage pretrial conferences to be used
6 usually or customarily to modify the time
7 limits, but this is the appropriate vehicle to
8 get a modification if you need one.
9 While it was beyond the scope of our
10 committee I personally and I speak -- and this
11 is a personal note that someday, somehow this
12 group will consider adding to 1(e) of Rule 166
13 that the court may consider limiting the time
14 allowed for trial of cases at the pretrial
15 conference. If we simply added some language
16 to that effect in 1(e) most of the discovery
17 problems would go away, I believe.
18 The rule appearing -- now, I would like
19 to skip to the discovery period rule that
20 appears at page 6. Let me ask you to make
21 these changes in your rule to make it make
22 sense. The rules should be added. The blanks
23 should be 37 and 38, and the last sentence
24 should read like this. The last sentence,
25 something got missed on the last sentence, say

1 "Neither the addition of a party nor" and then
2 circle "after the first three months of the
3 discovery period" to say "Neither the addition
4 of a party nor the amendment of a pleading
5 after the first three months of the discovery
6 period, nor the intervention of a party shall
7 effect the duration of the discovery period
8 unless the court so orders."
9 Try it again: "Neither the addition of a
10 party nor the amendment of a pleading, after
11 the first three months of the discovery period
12 nor the intervention by a party shall effect
13 the duration of the discovery period unless
14 the court so orders." We have provided that
15 if you add a party without leave of court
16 during the first three months that party gets
17 an automatic -- automatically gets six months.
18 Now, that does not extend the time you get,
19 but the added party gets the six-months. If
20 you add a party after three months, how much
21 time you get or even whether you can add a
22 party depends on the court's order.
23 So the rule operates -- you don't have to
24 go to the court if you add a party during the
25 first three months. That party automatically

1 gets six months, and you can freely add.
2 After three months you must get the court's
3 permission, and the court giving you
4 permission has got to say how much time that
5 party gets. That was what we were trying to
6 accomplish here in the discovery period.
7 Now we turn to the next rule that appears
8 at page 7. And that is the rule entitled
9 "Response, Amendment, Supplementation to
10 Discovery Requests." This is new. Subpart 1
11 of this rule at page 7 makes clear that the
12 information reasonably available both to
13 counsel and the client is required in response
14 to mandatory expert disclosures. Our only
15 mandatory disclosure, by the way, are expert
16 disclosures. We will get to that in the
17 expert rule.
18 Interrogatories and document requests.
19 It also makes clear that an objection to
20 certain disclosures does not relieve the
21 objecting party of the duty to provide
22 unobjectionable information. The duty to
23 supplement and amend does not apply to
24 mistakes or errors made in depositions. We
25 distinguish in this rule between two concepts,

1 an amendment which is a term which we apply to
2 an answer which when given was incorrect or
3 incomplete and which must be amended as soon
4 as you realize the mistake, and a supplement
5 which refers to a situation where a discovery
6 response when given was accurate and complete
7 but additional things have happened in the
8 world which now make it incomplete or
9 incorrect.
10 New information, change of events, that
11 kind of supplementation must be made, but you
12 don't make them when they occur. You save
13 them up and you make them under rule
14 subpart 3, the duty to supplement discovery
15 responses. You make them 60 days before
16 trial. So again, an amendment must be made at
17 the time it is discovered whether during or
18 after the discovery period. A supplement is
19 made only at the 60-day time frame before a
20 trial. The effect of making a supplement or
21 an amendment is dealt with in subpart 4.
22 Before I get to that I forgot to say that both
23 subparts 2 and subpart 3 make it clear -- at
24 the last sentence of both make it clear that
25 you need not amend or supplement to provide

1 information which the other side has gotten
2 anyway during the discovery process or in
3 writing, and we define during the discovery
4 process as to include depositions. So if you
5 heard it by the grapevine, the grapevine
6 happened to be in writing or part of the
7 discovery process or a deposition, you heard
8 it, and there is no duty to amend or
9 supplement.
10 We provide that if there is an amendment
11 or supplementation that there is, and again
12 this refers to subpart 4, a limited right to
13 reopen discovery on an expedited basis.
14 Whatever additional discovery needs to be
15 taken must be sought within 10 days of the
16 amendment or supplement, and the response must
17 be made in 20 days, not the usual 30, and if
18 it involves depositions for the new matter
19 only, you get five hours, five additional
20 hours. Again, these are default rules
21 designed to operate in those cases where they
22 have not been discovered by agreement or some
23 court order. We think that this timetable is
24 necessary to assure that in most cases the
25 refreshening of the film that has been in the

1 can for 18 months or a year can be done in a
2 timely fashion to avoid delaying trial.
3 Subpart 5 of this rule on page 7 is the
4 subcommittees's effort to provide a gentler,
5 kinder exclusionary rule. Under subdivision
6 (a) exclusion is tolerated only when the
7 omission has been deliberate or wreckless.
8 Otherwise under subsection (b) the remedy is a
9 continuance, but only where the failure to
10 disclose is likely to create a risk of an
11 erroneous fact finding. So the most extreme
12 thing is exclusion, but you must show
13 deliberateness or wreckless indifference.
14 If you're worried, then the next remedy
15 is a continuance, but you only get a
16 continuance if proceeding with the trial with
17 the last minute disclosure really presents a
18 danger of an erroneous fact finding and if
19 that occurs -- otherwise you go ahead, and you
20 know, deal with it like a real trial lawyer au
21 natural; but if there is a delay occasioned by
22 an inadvertent nondisclosure, which the court
23 punishes by a continuance, we have provided
24 that the party causing the continuance pays
25 the expense including any differential between

1 pre-judgment and post-judgment interest. We
2 want to make sure that it is not to a party's
3 advantage to cause continuances. Indeed it's
4 to their great disadvantage.
5 Rule 9, the rule which appears at page 9,
6 which I will point you to briefly, is our
7 effort to deal with the subject of mandatory
8 disclosures. We opted against mandatory
9 disclosure because many of us on the
10 subcommittee felt that there were many cases
11 where who the hell needed all of that
12 information anyway, that it just didn't
13 justify the make work of all this disclosure.
14 Instead we provided that certain types of
15 disclosure which must be specifically
16 requested are not objectionable, and those are
17 listed in subpart 1 of the rule that appears
18 on page 9. You will recognize many of those
19 subparts as having a genesis either in the
20 task force, the Discovery Task Force draft or
21 the court committee, State Bar Court Committee
22 draft. Some, but not all. We have provided
23 that disclosures of this type do not count
24 against the limit on the number of
25 interrogatories nor commence the discovery

1 period.

2 Rule 167, page 10. The subcommittee felt

3 that this was the most -- the document request

4 and production was the most useful discovery

5 device and one that should be limited --

6 should not be limited as long as the expense

7 of compliance or inspection is properly

8 allocated between the parties. We felt we had

9 to modify parts 1 and 2 to deal with the

10 subject of electronic data, and there are

11 modifications in 1 and 2, and basically what

12 we did is you can get electronic data which

13 includes everything but the lies and bowels of

14 your little laptop computer including the hard

15 disk, but you have got to specifically ask for

16 it.

17 Subpart 3 of this rule, 167, is

18 self-explanatory. We have added some

19 provisions. In most cases we believe

20 documents today are produced -- people produce

21 copies, not originals, and so we have a

22 specific rule that deals with what happens

23 when you produce copies in lieu of originals.

24 The documents must be produced in a certain

25 organized way as subpart 3(b) says. It's

1 nothing new. That comes from our existing
2 rules.
3 We have subpart (b), objections and
4 responses, is new, and basically we provide --
5 that together with the first sentence of
6 subpart 3 provides for distinct deadlines, and
7 here they are: Objections to the manner,
8 time, or place of production must be made
9 within 10 days of the time you receive the
10 request. Objections as to the substance must
11 be made within 30 days of the time you receive
12 the request. If an objection is made as to
13 the manner, time, or place, a response -- a
14 response, not objection -- a response, written
15 response, must nonetheless be made in 30 days
16 describing what documents you have and where
17 they are kept and how many there are. The
18 fourth deadline is if you don't object to
19 producing the documents, you must produce them
20 at the time and place requested, which could
21 be whatever date is set in the document
22 request.
23 Subpart 6 on page 11 allocates costs
24 between the producing and expecting parties.
25 Generally you pay -- the party who is

1 producing pays that cost. The party who's
2 expecting pays that cost.
3 Now, we turn to interrogatories, 168,
4 page 12. And this interrogatory you ought to
5 add to this interrogatory the following phrase
6 at the beginning. I'm sorry. It got dropped
7 out, and it should be "At any time prior to 30
8 days before the end of the discovery period."
9 That makes it exactly equivalent to our
10 document request any party may file.
11 MS. SWEENEY: Say that again.
12 MR. SUSMAN: Try again, "At any
13 time prior to 30 days before the end of the
14 discovery period, any party may file with the
15 court and serve upon the other party," et
16 cetera. I noticed the last sentence of
17 paragraph 1 of subpart 1, Alex, we probably
18 ought to eliminate, although it needs to be
19 there. I mean, the committee agreed that
20 interrogatories and document requests can be
21 served with the citation of potential, but I
22 think we cover that by saying at any time
23 prior to 30 days before the end of discovery
24 window that can be done. If we want to say it
25 expressly, we can. We need to get these rules

1 conformed as to request and interrogatories,
2 which we intend to treat the same, but there
3 they are treated the same.
4 We also have to provide there is a little
5 more time when you have -- when they come with
6 the petition. The defendant has more time as
7 the current rules do, 50 days rather than 30
8 days to respond. We have to look at our
9 timetables for things served with a petition.
10 We have retained the limitation of the current
11 rules of limit of interrogatories may not
12 exceed 30 in number. We have, however, made
13 two noticeable exceptions. One is if you are
14 asking the other side to identify or
15 authenticate specific documents. You have an
16 unlimited number of interrogatories to do
17 that.
18 If you frame an interrogatory that seeks
19 a "yes" or "no" answer, a contingent
20 interrogatory, for example, unlimited in
21 number. Our feeling there was that the burden
22 of that question is more on the person who
23 frames it than on the person who answers it.
24 As any law student knows you can finish a
25 yes/no exam in about an hour. Hundreds of

1 questions can be finished in a very quick
2 period of time. The hard thing is to ask the
3 question, and so if one wants to ask a zillion
4 yes/no questions, fair, and we will allow
5 that.
6 We have retained party verification of
7 the answers but have required that the
8 attorney sign the objections. Also we have
9 eliminated from the current rule any limit to
10 number of sets of interrogatories. Our
11 general notion, and this goes back to the
12 depositions, too, rather than -- we do impose
13 limits, but we try to impose kind of gross
14 limits so that there is some creativity among
15 the lawyers as to whether they are going to
16 divide their 50 hours into 8 depositions or 50
17 depositions, an hour each. It's your choice.
18 You are not limited as under the federal
19 regime to so many depositions, nor are you
20 limited to so many sets of interrogatories.
21 You can ask 30 sets if that's your preference,
22 but you certainly are not limited to two as
23 under the current regime, again allowing
24 lawyers to maintain maximum flexibility within
25 these outer limits.

1 Subpart 4 of this Rule 168 is our effort
2 to limit contingent interrogatories that
3 require more than a "yes" or "no" answer. We
4 rewrote this subpart 4, contingent
5 interrogatories, at least a dozen times
6 because we were trying to deal -- we were
7 trying clearly to prohibit the interrogatory
8 that requires the marshalling of evidence,
9 that says please state every fact you have
10 that supports the third paragraph of the
11 second count of your petition. At the same
12 time we were trying to provide a device which
13 allows one to get a little more specific
14 pleading in this state than is currently the
15 rule. So we have tried to say that the
16 interrogatories can require that the party,
17 responding party, state the factual and legal
18 theories upon which that party bases
19 particular allegations. Alex Albright assures
20 us that there is such a thing as a factual
21 theory. There was some question in the
22 subcommittee, but there is caselaw there are
23 factual theories, and the test is sufficient
24 to apprise the requesting party of the
25 positions the answering party will take to

1 trial, essentially a more definite statement.
2 Subpart 5 tracks the current rule except
3 for the last clause of subpart 5 as written
4 which now requires that not only if you
5 refer -- instead of answering the
6 interrogatory you refer the requesting party
7 to documents it's your obligation to tell them
8 where the documents are and that they will be
9 produced within 10 days, and that's what the
10 last sentence does.
11 Rule No. 170 on page 14, experts, is new.
12 Subpart 1 establishes a timetable for
13 designation. I'm sure this will be heavily
14 debated because there are defense lawyers who
15 would honestly, I am sure, believe that they
16 cannot designate experts until they depose the
17 plaintiff's experts and then it takes them a
18 great deal of time to travel around the
19 country and locate the hired gun who is
20 willing to refute what the plaintiff testified
21 to. It was the sense of the subcommittee that
22 there is an exaggeration, that any defense
23 lawyer worth his salt can identify experts to
24 respond to the plaintiff's experts perhaps
25 before the plaintiff designates but certainly

1 within 15 days of the time the plaintiff
2 designates, given the kind of information we
3 require at the time of designation.
4 We are trying to get the job done within
5 the 60 days. We put the time limits as close
6 to the end as we could. So basically the
7 notion is a plaintiff designates 60 days
8 before the end of discovery period, and
9 plaintiff's experts are deposed during the
10 following 45 days. The defendant then
11 designates 45 days before the end of discovery
12 period, and the defendant's experts are
13 deposed during the last 45 days of the
14 discovery period. The designation requires
15 under and our -- the only kind of mandatory
16 disclosure we have in these rules are subparts
17 2 and 3 of Rule 170. 2, information; 3,
18 documents. At the time of designation you
19 will provide the information in 2(a) to (e)
20 whether it's asked for or not, and that
21 includes two days on which your experts will
22 be available for their deposition during the
23 next 45.
24 It also includes a general -- a
25 description of the general substance of the

1 expert's mental impressions and opinions.
2 That is something more than he will testify
3 about damages and something less than a long
4 expensive report that requires the experts
5 spend a great deal of time preparing, and that
6 is going to be rendered superfluous by a
7 deposition anyway. It is essentially
8 something sufficient to allow there to be a
9 meeting for deposition, which these rules say
10 is a preferred way to engage in discovery of
11 experts.
12 Item No. 3 though is very, very
13 significant. Item 3 says at the time you
14 designate an expert everything that the expert
15 has looked at, written, considered, been
16 provided, must be turned over to the other
17 side. Okay. Now, if you can't figure out
18 what kind of expert -- if defense lawyers
19 can't figure out what kind of expert to
20 designate when they see that little treasure
21 trove of goodies they really need some work.
22 These are very crucial documents there will be
23 no arguments about in the future. They must
24 be turned over, and not only must they be
25 turned over at the time of designation, but if

1 they are prepared after designation it's a
2 constant -- here is a continuing, like the
3 duty to amend an erroneous answer, the duty to
4 make mandatory disclosure of what your expert
5 consults, reviews, prepares, continues during
6 the discovery period, but before and after his
7 deposition and after the discovery period up
8 to trial. So there will be no more expert
9 waltzing in on the eve of trial with new
10 charts and new studies. You will get them as
11 you go under this rule.
12 Subparts 5 and 6 are our efforts to
13 discourage the proliferation of experts. More
14 than two experts give the other side -- the
15 designation of more than two experts gives the
16 other side additional time to depose the
17 additional experts, six hours per expert, and
18 of course, we provide in subpart 6 that the
19 failure to call an expert who has been
20 designated and whom the other side has went to
21 the expense of deposing could, but not
22 necessarily will, but could result in the
23 court charging you the expense of having
24 designated an unnecessary expert.
25 The deposition rules, Rules 200 and 201.

1 No major changes here. We have made subpart
2 2(b) of Rule 200 and subpart 4 of Rule 201
3 conform to the federal rules. Rule 202,
4 non-stenographic and telephone depositions.
5 This is largely new. The principal here is
6 that depositions -- there is no sacred,
7 magical way about taking and preserving a
8 deposition. The deposition taker can take the
9 deposition by whatever means he wants,
10 including smoke screen, sand scrit, Ouija
11 board, whatever he wants. He pays for it.
12 If the other side wants something else,
13 certified court reporter, a videographer, you
14 bring whoever you want to take the deposition,
15 and the court will decide at some appropriate
16 time on who is paying for what. That's
17 basically what these rules say. You just
18 simply have to give notice to how you are
19 going to do it so the other side can come in
20 with their counter means of preserving the
21 testimony.
22 Telephone depositions basically we now
23 allow to be taken without leave of court or
24 agreement of party, just like any other
25 deposition. You can take a deposition over

1 the telephone, and we provide that the officer
2 taking the deposition need not be located with
3 the deponent but instead can be located with
4 the interrogators as long as there is some way
5 of identifying the deponent and as long as the
6 deposition is going to be submitted to the
7 deponent sooner or later for verification
8 under oath.
9 Rule 204 may turn out to be one of our
10 more controversial provisions. Hopefully not.
11 Subpart 2 contains our limitation of 50 hours
12 per side for a deposition, and you will notice
13 after our discussion at the last meeting we
14 have now added 10 hours for third party
15 defendants for discovery that is unique to
16 issues between the defendants and the third
17 party defendants. It doesn't just extend the
18 defendant's side to 60 hours.
19 Subpart 3, and basically "a side" we mean
20 plaintiffs and defendants, and if you want, we
21 struggled with how to define and decided best
22 just to call them plaintiffs and call them
23 defendants and leave it to the good sense of
24 the court to figure out what we were trying to
25 say. Plaintiffs get 50 hours. Defendants get

1 50 hours, and third party defendants get 10
2 hours on issues that are between them and the
3 defendants.
4 Subpart 3 makes the deposition conference
5 room as close to the courtroom as we can get
6 it by providing that -- and the sanction, by
7 the way, if -- the sanction for that is
8 contained in the last sentence on page 20 of
9 subpart 6, "All statements, objections and
10 discussions during the oral deposition shall
11 be on the record, count against the examining
12 party's deposition time, and may, upon leave
13 of court, be presented to the jury during
14 trial." This does not -- if this does not
15 dispense with the notion that a video camera
16 cannot be on the examining counsel as he
17 examines, then we ought to make an express
18 note saying that it is intended to make the
19 deposition room look like the courtroom and
20 not some fake thing where the actor is on
21 center stage in the camera, and the stage
22 director is sitting to his left off camera
23 passing directions, which is what happens so
24 often.
25 Now, the subpart 4, 3 should provide the

1 protection that people may feel they lose by a
2 no objection regime. Subpart 4 says you may
3 instruct a witness not to answer an abusive
4 question. "When did you stop beating your
5 wife?" You do not have to sit there while
6 your witness answers that question. You can
7 instruct the witness not to answer that
8 question. If those questions are asked with
9 frequency, you can terminate the deposition
10 under subpart 5.
11 The last sentence of subpart 4 and
12 subpart 5, which are the same, make it clear
13 that you do have some risk in instructing a
14 witness not to answer or stopping a
15 deposition, and the risk is that the
16 re-adjourned deposition once your silly
17 instruction or objection is overruled, the
18 re-adjourned deposition will not count against
19 the time limit of the deposition taker whose
20 efforts were so rudely interrupted when you
21 instructed the witness not to answer or
22 terminated the deposition. That is not
23 automatic, but the court -- we suggested that
24 as an appropriate remedy.
25 We have basically -- on subpart 4

1 certainly there can be conferences
2 between -- actually we saw a lot of various
3 local rules, and one rule provided that during
4 the entire time of the deposition from 9:00 in
5 the morning 'til 5:00 the witness cannot
6 confer with the lawyer. That seemed a little
7 extreme because conferring goes on even in the
8 courtroom at various breaks, so we provide for
9 certainly there can be conferences during the
10 deposition during normal recesses and
11 adjournments, but on the record conferences
12 should be only for the purposes of determining
13 whether a privilege should be asserted and
14 should be on the record. I mean, in the sense
15 that the jury should be aware of what's going
16 on.
17 Rule No. 7, our no objection rule
18 provides that basically all objections are
19 reserved until time of trial except for
20 objections to leading questions, and the way
21 you preserve an objection to a leading
22 question is by advising everyone at the
23 beginning of the deposition, not repeatedly
24 during the deposition, that this is not -- you
25 are dealing with a friendly witness, not a

1 hostile witness. You are not entitled to lead
2 this witness during this deposition, and if
3 you do ask leading questions, while I'm not
4 going to object, when it comes time for trial
5 I'm going to ask the court to exclude your
6 leading questions. That's how we deal with
7 that. Otherwise we do not provide for any
8 objections.
9 Our notion was that objections are
10 coaching. They are an attempt to subvert
11 justice. They will make a 50-hour limit on
12 depositions unworkable, and that's why we
13 opted for the no objection regime, and then,
14 of course, subpart 8 of this rule allows -- I
15 mean, if this is the kind of case or the kind
16 of animosity between lawyers or browbeating of
17 witnesses that justifies objections, it
18 justifies the court appointing a junior judge
19 to come sit in the conference room qua
20 courtroom and rule on the objections as they
21 are made assessing the cost of that junior
22 judge to the parties who have made it
23 necessary.
24 Rule 208, if you will look at the marked
25 up version of this, the blue line version,

1 there are very few -- there are not many
2 changes in this rule, and so I'm not going to
3 go over it. It pretty much is taken from the
4 existing rule.
5 And that, Mr. Chairman, constitutes an
6 overview of the subcommittee's recommendation.
7 THE COURT: Carl, would
8 you like to reply? I know that your committee
9 has done a great deal of work and has some
10 different concepts of the State Bar of Texas
11 Court Rules Committee, and the chair would
12 really like to hear your response or concerns
13 of this product so we will have the benefit of
14 that two years of work that you-all have done.
15 MR. HAMILTON: Yes, sir. We
16 have been working probably about three years
17 on this. Our task, I guess, was to -- was put
18 the brakes on discovery and those who abuse
19 it, to do something to try to reduce the cost
20 of the satellite litigation as it develops
21 probably, with the light in mind, though, all
22 the time though to insure fairness to both
23 sides and that we ultimately get justice and
24 not just a trial by who's the best lawyer, and
25 to reduce the acrimony among the lawyers.

1 Now, our committee has looked at a number
2 of different ways of doing things. We first
3 looked at standard interrogatories. I think
4 Paul Gold worked on some of those. He was on
5 that committee. We looked at standard
6 definitions, which he also worked on, and I
7 think we finally adopted a set of standard
8 definitions which include view and
9 identification and those things that you-all
10 have been furnished copies of. We looked at
11 the concept of doing something about making
12 parties plead more specifically the claims and
13 the defenses with the idea that maybe we could
14 somehow limit discovery to what's in the
15 pleadings, but that didn't seem to be a
16 workable solution because sometimes and in
17 some cases it takes some discovery before you
18 can finalize the pleadings.
19 We talked about limits on the number of
20 depositions that ought to be taken and various
21 ideas that were handed back and forth among
22 the lawyers, and I think one of the
23 philosophical problems that we recognized was
24 the philosophical problem that arises from the
25 fact that years ago we virtually had no

1 discovery. When I started practicing law we
2 never took depositions. We took it to trial,
3 and we tried the case based upon what each
4 side could develop, and that was called trial
5 by ambush, and at some point along the way the
6 Supreme Court or some courts told us we are
7 not going to have trial by ambush anymore. So
8 this has created kind of a war between the
9 role of the lawyer as an advocate and this no
10 trial by ambush concept.
11 In the advocacy situation that we have
12 and that has developed over a period of years
13 the lawyer gives up as little as possible by
14 way of discovery. You have to pry things out
15 of him, and the lawyers go to great measures
16 to keep information from being furnished from
17 one side to the other, and yet the courts tell
18 us we can't do this anymore. We can't have
19 trial by ambush. We have to have complete
20 disclosure. You know, so herein lies the
21 problem. Are we going to have lawyers that
22 are going to be advocates during the discovery
23 stage, or are we going to de-emphasize the
24 advocacy during the discovery stage and
25 perhaps let lawyers be advocates at the time

1 of trial but during the discovery stage be
2 more like an officer of the court who's role,
3 and the role of lawyers on both sides, is to
4 see to it that all the facts and all the
5 information is discoverable by both sides so
6 that we can have a trial based upon the facts
7 of the case and not by the absence of the
8 facts of the case.
9 We don't think that there is any art
10 particularly in disclosing the facts. The art
11 comes in how you avoid disclosing facts, and
12 so our approach is a little bit different from
13 Steve Susman's approach in that we don't think
14 that setting limits on discovery as his
15 committee has done does anything except
16 continue the promotion of advocacy during the
17 discovery period. It just gives the parties
18 less time to fight, less things to fight
19 about, but we don't think that that really
20 promotes justice to try to set arbitrary
21 limits on discovery.
22 We agree that the discovery process needs
23 to be contained. It has been allowed to run
24 wild, but we think that the better approach is
25 to do it kind of like when you build a house.