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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 16, 1994

(AFTERNOON SESSION)

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Taken before William F. Wolfe,
Certified Court Reporter and Notary Public in
Travis County for the State of Texas, on the
16th day of September, A.D. 1994, between the
hours of 1:12 o'clock p.m. and 5:45 o'clock
p.m., at the Texas Law Center, 1414 Colorado,
Room 101 and 102, Austin, Texas 78701.

ORIGINAL

SEPTEMBER 16, 1994 MEETING

MEMBERS PRESENT:

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

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Hon Sam Houston Clinton
Paul N. Gold
David B. Jackson
Kenneth Law
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Denise Smith (with David Perry)
Jim Parker
Mollie Anderson (with Mike Hatchell)
Jeff Thompson (with Steve Susman)
Diana Thompson (with Steve Susman)
Jim Parker

MEMBERS ABSENT:

Alejandro Acosta Jr.
David J. Beck
Honorable Scott A. Brister
Ann Tyrrell Cochran
Michael T. Gallagher
Anne L. Gardner
Charles F. Herring Jr.
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable David Peeples

Doyle Curry
Hon. William Cornelius
Hon. Doris Lange
Thomas C. Riney

SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 16, 1994
AFTERNOON SESSION

INDEX

<u>Rule</u>	<u>Page(s)</u>
TRCP 1 (Discovery Period)	3252-3253; 3287-3394
TRCP 2 (Modification of Discovery Procedure and Limitations)	3253; 3394-3395
TRCP 3 (Permissible Discovery; Forms and Scope)	3253-3256; 3395-3432
TRCP 4 (Exemptions & Privileges from Discovery)	3256-3259; 3432-3480
TRCP 5 (Response to Discovery Request; Supplementation & Amendment)	3259-3262
TRCP 6 (Failure to Provide Discovery)	3262-3265
TRCP 7 (Presentation of Privileges & Objections)	3265-3269
TRCP 8 (Protective Orders)	3269-3271
TRCP 9 (Requests for Standard Disclosure)	3271-3272
TRCP 10 (Expert Witnesses)	3273-3274
TRCP 11 (Request for Production)	3274-3276
TRCP 12 (Interrogatories)	3276-3277
TRCP 13 (Request for Admissions)	3277-3278
TRCP 14 (Oral Examination)	3278
TRCP 15 (Examination, Objection & Conduct During Oral Depositions)	3278-3283
TRCP 16 (Non-Stenographic Recording)	3283-3284

TRCP 19
(Motion For Entry Upon Property)

3284-3285

TRCP 63
(Amendments & Responsive Pleadings)

3285-3286

1 (HEARING RECONVENED 1:12 p.m.)

2 CHAIRMAN SOULES: Steve, are we
3 working from a draft that's under a cover
4 letter from you dated September the 12th?

5 MR. SUSMAN: Correct.

6 CHAIRMAN SOULES: So you've got
7 a letter from Steve and then a bunch of
8 material behind it.

9 MR. SUSMAN: And an unofficial
10 explanation from Alex Albright under a letter
11 dated September 15th, 1994.

12 CHAIRMAN SOULES: And which was
13 distributed today?

14 MR. SUSMAN: Correct.

15 CHAIRMAN SOULES: Steve's
16 subcommittee has met -- as has the Appellate
17 Rules Subcommittee -- has met a lot since our
18 last meeting. They've done a tremendous
19 amount of work developing these rules and
20 trying to follow the suggestions that we gave
21 them by straw votes in the past and filling in
22 gaps that they and we noticed.

23 And Steve, I would just like to turn over
24 to you your explanation of what you've been
25 doing, where you are, and then if you can

1 suggest where we go from there that would be
2 fine.

3 MR. SUSMAN: Sure. I do want
4 to thank all the members of the subcommittee
5 who -- we really have -- they have spent a
6 lot of time on this since our last meeting.
7 We have met four times on Saturdays, basically
8 full Saturdays, since our last meeting in July
9 with the objective of presenting you today
10 with something which is complete in scope, as
11 it is, and which is also true to the prior
12 votes on two separate occasions of this
13 Committee.

14 I want to give special thanks to Alex
15 Albright who has basically been -- served as
16 our reporter and has done a hell of a lot of
17 the drafting; and to Jeff Thompson in our
18 office, in my office, who is an associate with
19 my firm who volunteered -- well, he didn't
20 exactly volunteer; I asked him to volunteer to
21 be part of this very exciting project. And
22 one thing that Jeff did which we found
23 extremely helpful was to take detailed minutes
24 of every one of our subcommittee meetings.

25 And those minutes, by the way, are

1 available to anyone, if you want to see what
2 our positions were and how they changed. But
3 the function of those minutes was to make sure
4 that people did not backslide and there was no
5 backtracking, because that seems to me to be
6 very counterproductive. This process would
7 never end if you didn't vote on things and
8 then go on to the next thing. And obviously,
9 nothing is final until it's final, but we
10 tried to follow that rule at least. We were
11 not going to go back and revote things of this
12 nature from meetings like this and meetings of
13 our subcommittee. There are different people
14 that attend the meetings; sometimes everyone
15 is present; the next time there's a slightly
16 different composition. It simply would not
17 have worked for our subcommittee if we always
18 moved backwards.

19 Now, you have -- as I said, what we have
20 elected to do is to give you rules which are
21 complete in scope. We have renumbered these
22 discovery rules Rules 1 through 19. There
23 are -- that's Part One, and we renumbered
24 them. And some of these rules, many of them
25 are completely different from the existing

1 rules, so we frankly did not think that a
2 red-lined version would be very helpful,
3 although we certainly are not trying to keep
4 you from having that and at some point in time
5 we'll provide it. We just ran out of time in
6 doing it this time.

7 All right. Let me also say that I think
8 what we're doing is we're -- we were, of
9 course, very excited by what we were doing
10 because we feel that we are part of something
11 that's important to the Bar and the state. I
12 must say that the only time in the last five
13 years that I've seen newspaper editorials
14 favorable to our profession are those that
15 picked up the work of this Committee on these
16 discovery rules. There was an editorial in
17 the Dallas Morning News, the Fort Worth paper,
18 the Austin paper, one of the Houston papers,
19 that basically says the Bar is finally doing
20 something that they should have been doing a
21 long time ago, so I mean, I think we have a
22 real opportunity here. That's not to say we
23 should rush through and do just anything, but
24 it is -- it can be a very exciting and I think
25 historic project.

1 Now, let me go through and tell you what
2 we have just -- my notion is to take you
3 through the rules quickly, all of them, and
4 then to return and take up one rule at a
5 time.

6 And basically my preference would be that
7 we ask for people who find the concepts of our
8 rules obnoxious, I mean, because then we have
9 a real problem and then we ought to have a
10 discussion. If it's just the drafting you
11 don't like, if it's some minor drafting, we
12 should not worry about that too much today.
13 If it's a concept problem and if your aversion
14 to the concept is shared by a majority of this
15 Committee, then obviously we've got to go back
16 and do some rethinking of everything.

17 On the discovery period, which is Rule 1,
18 you will recall that at the last meeting the
19 vote was 11 to 11 on whether there should be a
20 six-month discovery window or period. And the
21 Committee, after a lot of discussion, or the
22 subcommittee, of a number of alternatives
23 including the same six-month windows that
24 varied with the amount in controversy and also
25 no windows, came up with what is now in

1 Rule 1, which says that there is a discovery
2 period that begins when the action is
3 commenced or filed and it ends 30 days prior
4 to the first trial setting. The mere fact
5 that a trial is moved does not reopen the
6 window unless there's an order by the court or
7 an agreement of the parties to do so. So we
8 have not come back to the six-month period.
9 This will give people a much longer period,
10 but it still has the concept that discovery is
11 not something that lives forever. It does
12 have a finite beginning and a finite end.

13 Rule 2. Modification of Discovery
14 Procedure and Limitations. This you've seen
15 before. It is true to the vote of this
16 Committee. There's nothing different here.
17 The discovery procedure and limits can be
18 modified by either agreement of the party or
19 order of the court for good reason.

20 Rule No. 3 is new, and I call your
21 attention to the following aspects of it. We
22 talk about the forms of discovery and there
23 are eight forms listed, of which only the
24 first five we call "written discovery" because
25 we use the term "written discovery" throughout

1 these rules to describe certain kinds of
2 things.

3 For example, usually responses to written
4 discovery need to be amended and
5 supplemented. But responses to oral
6 nonwritten discovery like depositions, for
7 example, do not need to be amended and
8 supplemented except in the case of an expert
9 witness, so we define written discovery.

10 There's nothing new in the Scope of
11 Discovery. I think it's pretty -- and Alex,
12 you all will correct me if I'm wrong on
13 anything. There's nothing new on the scope of
14 discovery. Scope of discovery is the same as
15 it's always been.

16 On the "Documents and Tangible Things,"
17 we, of course, as it currently is, made sure
18 that it's defined broad enough to include
19 electronic data of all kinds which we deal
20 with in our request for production rules.

21 We make it clear on Page 4 of the rules
22 at the top that if a person does not have
23 physical possession, but has a superior right
24 to compel the production from a third party,
25 the person has possession, custody or

1 control. This is sometimes an argument that
2 occurs: "I don't have the document. My
3 lawyer has it, my agent has it or my wife has
4 it." That's no longer, we try to make it
5 clear, a reason not too engage in discovery
6 insofar as that document.

7 We talk about persons with knowledge of
8 relevant facts as being discoverable. No
9 change there, except we do now require that
10 the party who responds describing persons with
11 knowledge give a brief statement of the
12 identified person's connection with the case.
13 We do not mean a treatise, we do not mean
14 subject-matter substance of their anticipated
15 testimony; we mean eyewitness, employee of
16 defendant, inventor of invention, something
17 fairly limited. But that would prevent you
18 from giving the other side a list, a phonebook
19 list of people with knowledge where it's
20 impossible in that haystack to find the
21 needles, and so that's why we have added
22 that. We make it clear also that you should
23 put on this list people who do not have --
24 people who have -- personal knowledge is not
25 a requisite to being listed and disclosed.

1 Item number (e). I'm skipping over
2 those of which I don't think there's any
3 change from the existing law or at least that
4 I know of. On (e) we clearly there, and I may
5 be -- and some of these may be existing law
6 but I just -- I'm not that familiar with
7 existing law. Witness statements. We try to
8 make it clear here that witness -- we have
9 taken the position that witness statements,
10 all witness statements, are discoverable.
11 Even if a lawyer procured it, obtained the
12 statement through an interview and got the
13 witness to either sign it or adopt it, it is
14 discoverable, unless it happens to be a
15 statement from the client to the lawyer, which
16 would be protected by the attorney-client
17 privilege. But work product or communication
18 of a party is no longer a good reason to
19 refuse to turn over a witness statement.

20 Item No. 4. Exemptions and Privileges
21 from Discovery. We have taken a major, I
22 think, step forward here, as Alex explains in
23 her letter and as it's explained in the
24 notes. We have opted to really telescope what
25 had previously been four privileges into two,

1 or four into three or something like that. I
2 mean, basically we're talking now attorney
3 work product is a privilege. That's covered
4 by the Rules of Evidence.

5 PROFESSOR ALBRIGHT: No, it's
6 not, Steve.

7 MR. SUSMAN: I mean,
8 attorney-client communication is a privilege
9 covered by the Rules of Evidence. Work
10 product, we have adopted the federal rule.
11 The feeling of the members of the subcommittee
12 is that the federal rules work pretty good.
13 There's a lot of case law out there; Texas'
14 particular quirk with party communications and
15 different kinds of work product. It's better
16 to go with the federal rule, and that's what
17 Rule 4(a) as currently drafted intends to be,
18 the federal rule, so that there is work
19 product. If it's ordinary work product, it's
20 subject to being produced upon need. If it's
21 opinion work product it should be protected.
22 It's the federal rule.

23 PROFESSOR DORSANEO: But
24 witness statements aren't work product as they
25 would be under the federal rule?

1 MR. SUSMAN: A witness
2 statement is not work product. That's what
3 we've decided.

4 PROFESSOR DORSANEO: Then
5 that's a Texas anomaly if you adopt the
6 federal rule.

7 PROFESSOR ALBRIGHT: Well,
8 that's because, Bill -- Alex Albright.
9 That's because we have made a decision that
10 witness statements should not be
11 discoverable. But as far as work product --

12 MR. SUSMAN: Should be
13 discoverable.

14 PROFESSOR ALBRIGHT: Should not
15 be privileged.

16 As far as just privileges generally, we
17 have decided that the federal work product
18 rule is better than the current Texas rule of
19 dividing attorney work product with party
20 communication.

21 MR. SUSMAN: Okay.

22 PROFESSOR DORSANEO: Then we
23 have to be very careful about how we define
24 "witness statement" so we don't run into
25 ourselves.

1 MR. SUSMAN: Yeah. I mean, we
2 can always -- I think the concept is that if
3 a client comes into your office and writes a
4 statement to you, it's privileged under the
5 attorney-client communication; but otherwise,
6 if you go interview someone and they adopt it
7 or sign it, you have to turn it over.

8 Okay. Response to Discovery Requests,
9 Rule 5.

10 HONORABLE C. A. GUITTARD:
11 Excuse me, Steve. Does the witness
12 statement -- does that mean a written witness
13 statement?

14 MR. SUSMAN: Yeah. It
15 means -- it does mean a written witness
16 statement, I think, because it's got to be
17 something that's adopted.

18 PROFESSOR ALBRIGHT: Look on
19 Page 5.

20 MR. SUSMAN: Yeah. "Witness
21 statement," it's on the top of Page 5, "means
22 a written statement signed or otherwise
23 adopted," so it would have to be written.

24 MR. ORSINGER: No, no. A tape
25 recording also.

1 MR. SUSMAN: Okay.

2 MR. PERRY: That's the
3 definition that's in the present Rule 166.

4 MR. ORSINGER: If you don't
5 include tape recording, you'll throw the rule
6 off.

7 MR. SUSMAN: All right. Let's
8 go to Rule 5(1), the duty to respond. We make
9 it -- we have incorporated someone's idea
10 from the last meeting in Paragraph 1, the last
11 sentence, that if you provide the other side
12 with a computer-readable disk they have an
13 obligation to put the question before the
14 answer on the interrogatories or document
15 requests. But if you don't do it, then they
16 can give you the answers without having to
17 retype the questions. That gives everyone an
18 incentive to provide a computer disk to the
19 other side.

20 5(2). Duty to Supplement Discovery
21 Responses. We, again, have remained true to
22 what we understood to be approved here last
23 time, a distinction between supplementing a
24 response and amending a discovery response.

25 Supplementation is the duty that is

1 required when events subsequent to the time of
2 a prior answer mean that the answer needs to
3 be changed because it is no longer correct or
4 complete.

5 If the event or the facts took place
6 prior to the prior answer and the answer was
7 incomplete or incorrect when it was made, it
8 needs to be amended, even though the person
9 who made the answer did not know the
10 information. If he got the information later
11 but if the information existed at the time,
12 it's an amendment. Like who was the
13 eyewitness to a collision. There are three
14 eyewitnesses. You list three. You learn
15 later that there was in fact a fourth. Your
16 duty is to amend, not supplement, because the
17 fourth witness existed at the time you made
18 the earlier answer, you just learned about it
19 later. And that's significant because
20 amendment must be done when you learn that
21 your prior answer was incomplete or incorrect,
22 and supplementation is 60 days before any
23 trial setting.

24 We have tried in this series of rules to
25 incorporate -- and you'll see at the end of

1 (2), the last sentence or the next to last
2 sentence of (2), we will try to deal with, and
3 I'm not sure we've dealt with it perfectly,
4 the notion that it's possible that in some
5 places you will get a 45-day notice of a trial
6 setting, and when you are given that kind of
7 short notice of a trial setting, what does it
8 do to your timetable. That's what that
9 "15 days after the receipt of notice of any
10 trial setting" is all about.

11 The duty to supplement and amend is a
12 continuing one, we try to make clear, that
13 continues beyond the end -- the close of a
14 discovery period; and therefore, there is an
15 opportunity for additional discovery after
16 supplementation or amendment.

17 Keep in mind there is no duty to amend or
18 supplement answers to oral discovery as
19 opposed to written discovery. Keep in mind,
20 furthermore, there is no duty to supplement or
21 amend when the information has otherwise been
22 made known to the opposing party in discovery
23 or in writing.

24 I now turn to Rule 6. I'm not trying to
25 railroad anything but just get you through the

1 overview very quickly and then we'll come
2 back. Failure to Provide Discovery. And this
3 should -- we probably should make -- there
4 is an exception to this, but let me give you
5 the general rule. The general rule now is
6 that if you fail to timely disclose something
7 you should have disclosed and the failure
8 leaves the opposing party unprepared for trial
9 such that there is a significant risk of
10 erroneous fact finding if the trial proceeds,
11 i.e., surprise, then the court, as is fair
12 under the circumstances, either excludes the
13 evidence or continues the trial.

14 We have, this is a major change, rejected
15 the rule of -- the current rule of automatic
16 exclusion of certain nondisclosed information
17 in discovery. Why did we depart from the
18 current rule? In the first place, we think it
19 operates unjustly in many cases. In the
20 second place, we think it is -- it does
21 not -- if you're going to impose limits on
22 discovery and make people do it in less time,
23 you need to be a little more forgiving. When
24 they forget to do something, they don't cross
25 all t's and dot all i's, when they forget or

1 do not have time to overturn every stone,
2 you're going to need to be a little more
3 forgiving in those circumstances. And what we
4 are really trying to do is cut down on
5 discovery expense and yet avoid trial by
6 ambush. And the only way to do that is to
7 just make the courts determine is it trial by
8 ambush or not. So the ultimate inquiry is, is
9 there surprise. If there's surprise, the
10 evidence stays out or you get a continuance.
11 If there's not surprise, it comes in and no
12 continuance.

13 Now, there are people who say that the
14 bench should not -- that it's not a good rule
15 because we shouldn't leave that kind of thing
16 up to courts. I think the subcommittee felt
17 that that's the kind of stuff that courts
18 ought to do and that's the ultimate question,
19 was someone surprised or not.

20 Notice that it turns not on the state of
21 mind of the party who made the omission, not
22 is it intentional, inadvertent, fraudulent or
23 something like that. You may want sanctions
24 to deal with that type of person. But rather,
25 it's on the effect on the rendition of a fair

1 trial through a surprise or ambush, to avoid
2 surprise or ambush.

3 Rule No. 7, another what we consider or I
4 would consider substantial change, and these
5 are rules that you did not see before. We
6 have tried to order or put them in the logical
7 order too, so they're all kind of ordered.
8 Presentation of Privileges and Objections.
9 This is Page 11 of what you have here. On the
10 subject of privilege, we have now provided
11 that the way you assert that something is
12 privileged is not to make a prophylactic
13 objection at the time you file some answer or
14 response where people object now because they
15 may have something privileged, they don't know
16 whether they will, but they don't want to have
17 to turn it over if they find it is; and
18 instead, simply say the way you assert a
19 privilege is to simply withhold what is
20 privileged.

21 And when you withhold it, you notify the
22 other side that "I am withholding something on
23 the ground of the attorney-client or work
24 product privilege." You give a statement of
25 withholding, is the term I think we use. And

1 when you prepare such a statement that you
2 have a withholding statement, you have to
3 generally describe what it is you have
4 withheld and state the privilege relied on.

5 PROFESSOR ALBRIGHT: Only if
6 requested.

7 MR. SUSMAN: What's that?

8 PROFESSOR ALBRIGHT: Only if
9 they request it.

10 MR. SUSMAN: Yes. Only -- I'm
11 sorry, no. No, no. That's not right. I
12 think you have to give -- if a party has
13 withheld information other than that created
14 by its trial counsel in preparing for the
15 litigation, the responding party shall state
16 in writing the information that had been
17 withheld and specifically state the privilege
18 relied upon.

19 PROFESSOR ALBRIGHT: But you
20 don't have to describe what you have withheld.

21 MR. SUSMAN: That's the second
22 part. Okay? So you don't have to say
23 anything if you're withholding trial counsel
24 materials, your own lawyer's file. That's not
25 to be considered. You don't have to say

1 anything. But if you're holding something
2 other than trial counsel's file on a ground of
3 privilege, you have to generally say that
4 you're withholding something and state the
5 privilege, state what the privilege is.

6 Then the other party who wants to contest
7 that, the last -- this is the last two
8 sentences of Rule 7(1), is allowed to ask you
9 to, on request, to identify what it is you
10 have withheld and you must identify it with
11 sufficient particularity to allow the
12 requesting party to test the basis of the
13 asserted privilege or exception.

14 So this is all new. No longer -- in
15 fact, we make it clear that objections to
16 discovery are not the appropriate way of
17 preserving or asserting a privilege; a
18 withhold statement is.

19 Objections, we've changed that too. This
20 is Rule 7(2). "Objections shall only be made
21 if a good faith factual and legal basis for
22 the objection exists at the time the objection
23 is made." And we made it clear in the comment
24 no more of these prophylactic, anticipatory
25 objections. Any ground obscured by numerous

1 unfounded objections is waived, so if you make
2 a bunch of stupid objections, you will have
3 been held -- can be held to have waived your
4 good one.

5 The final concept in Rule 7(2), which I
6 think is -- I don't know whether it's new,
7 but we think it's important, is that if you
8 object to something, that does not excuse your
9 compliance with the part that would be
10 reasonable. You have got to provide discovery
11 to the extent it would be reasonable.

12 And the comment gives some examples. If
13 you are asked to produce all documents
14 relevant to your lawsuit, you need do
15 nothing. That is a ridiculous, burdensome,
16 broad request. On the other hand, if you were
17 asked to produce all profit and loss
18 information of Acme Brick Company from 1980 to
19 1994 and your position is that you shouldn't
20 have to go back beyond 1989, that's your
21 objection, you are obligated to produce '89
22 through '94 at the same time you object to
23 producing '80 through '88. We try to make
24 clear in the comment that an exception would
25 be where it would be unduly burdensome to make

1 the search twice through your files.

2 The hearing. We have provided for a
3 hearing on withholding statements or
4 objections, and that it's the burden on the
5 party -- any party may request a hearing on an
6 objection or withholding statement, but the
7 party seeking to avoid discovery shall --
8 bears the burden of proof by producing
9 evidence, so that covers basically that rule.

10 Rule 8. Protective Orders. We have made
11 it -- we think we have now made it clear, and
12 probably we should insert in the second
13 sentence of 8(1) "Any party may move for such
14 an order only when" -- Alex, I think that word
15 "only" needs to go in because I think that
16 was our intention. "Any party may move for an
17 order only when an objection is not
18 appropriate." You object when you can object,
19 but when the only way of avoiding discovery is
20 through a protective order, then you follow
21 the protective order procedure. That was our
22 intention at least, I think.

23 We have inserted -- one of the ways --
24 one of the common problems which uses the
25 protective order are depositions which are

1 noticed at an inconvenient time or
2 inappropriate place. We have -- by the way,
3 I think it was kind of our feeling that
4 protective orders would encompass motions to
5 quash. It's all the same thing as a
6 protective order now. And our rule in
7 depositions is if the movant had less than
8 10 days notice of the deposition, the filing
9 of the motion itself excuses compliance with
10 the notice or subpoena until the motion is
11 overruled. So you'll see our deposition rule
12 still goes to the reasonable notice. We've
13 debated that issue. If we go to a particular
14 number of days, no, that would be reasonable
15 notice, but if it's under 10 days, the other
16 side -- all they've got to do is file a
17 motion for protective order and then they need
18 not comply with your deposition notice or your
19 subpoena. On the other hand, if they have
20 more than 10 days notice, then the filing of a
21 motion for protective order does not excuse
22 compliance, unless they have also made a good
23 faith effort to get the thing heard by the
24 court. So if you've got more than 10 days,
25 you not only have to file a motion for

1 protective order -- and you don't like the
2 time and place of the deposition, you not only
3 need to file a motion for protective order,
4 you need to demonstrate some effort to get a
5 court to hear it.

6 Our feeling was that there's some benefit
7 achieved by having courts be under some
8 pressure to hear these things. "Judge, I need
9 to get a hearing on this because I filed a
10 motion and the deposition is set for such and
11 such date."

12 MR. LATTING: Calendar days.

13 MR. SUSMAN: Huh?

14 MR. LATTING: Calendar days.

15 MR. SUSMAN: Yeah. Okay. Then
16 we turn to Specific Discovery Vehicles, which
17 begins on Page 16. We have a form of -- we
18 don't call it mandatory disclosure, we call it
19 request for standard disclosure, because it's
20 not mandatory. It is invoked by a request.
21 You don't get this information unless you ask
22 for it. And you can ask for it in the form of
23 Rule 9(2), the Form of Request, and you simply
24 use that language and you can get the
25 information provided by 9(1). And that

1 information pretty much comes from the task
2 force, and I think that's where we got most of
3 it from. Witness statements, medical records,
4 names of the parties, persons with knowledge
5 of relevant facts, and we refer back to
6 Rule 3, our Rule 3, to tell you what is
7 discoverable. Okay. That's request for
8 standard disclosure.

9 Rule 10. Expert Witnesses. This rule is
10 not automatic. It only operates upon
11 request. The notion is that you have to
12 request the other side to designate experts
13 and to disclose information concerning those
14 experts. If you have made the request that
15 they designate experts, then the plaintiff has
16 60 days before the end of the discovery period
17 to designate its experts. The defendant then
18 has 15 days after the plaintiff is supposed to
19 designate to designate the defense experts.
20 At time of designation, upon request, the
21 designating party must provide the information
22 listed in Rule 10(3). Again, it's request
23 driven but the information is standard
24 information. The identity of the experts, the
25 background. This is all new, nothing like

1 this, I think -- I mean, you can get it under
2 the current practice, but it's just not
3 automatic. It's the general substance of the
4 expert's mental impressions and opinions and a
5 brief summary of the basis thereof. This is
6 stuff that you've heard before, because you
7 agreed on that language at our last meeting.
8 Documents and tangible things; the dates for
9 the expert to be deposed; and item (g) on
10 Page 19 is the identity, background,
11 et cetera, of consulting experts whose -- we
12 call them "reviewed consulting experts"
13 because their opinions or mental impressions
14 were reviewed by the testifying experts.

15 We make it clear that a party may obtain
16 further discovery only by oral deposition,
17 unless the court orders a report. The court
18 can order a report under Subdivision 5,
19 Page 19, but need not do so. And if the court
20 doesn't order a report, the only way further
21 discovery gets experts is the deposition.

22 Expert depositions. We have the period
23 of time when they are taken, 45 days following
24 designation; we have where they are taken, in
25 the county of suit; we have the number of

1 hours, six hours per expert; and we have the
2 fact that for two of the experts designated by
3 each side the six hours count in what we will
4 get to, the 50-hour limit, and beyond that
5 there are six additional hours provided for
6 each expert.

7 Supplementation. Page 20. Insofar as an
8 expert is concerned, we do not distinguish
9 between supplementation and amendment, because
10 both must be done when you learn additional
11 information about -- when you learn
12 additional information about the experts. You
13 can't wait on an expert to supplement 60 days
14 before the -- isn't supplementation normally
15 60 days before the end of the discovery
16 period? Yes. And that's the supplementation
17 on experts. I think that covers the expert
18 rule.

19 Rule 11. Request for Production and
20 Inspection of Documents. We have again
21 revised this from our last meeting because we
22 had some crazy -- two or three response times
23 under our old version of this rule. You all
24 didn't like it because it was confusing. Now
25 there's one written response to request for

1 production of documents and it's due within
2 30 days, unless -- and we have a 50-day rule
3 on all of these devices, interrogatories, for
4 document requests which are served with
5 citation or accompany service, but normally
6 it's 30 days and there's a response.

7 And the information -- if you don't like
8 when and where the other side asks you to
9 produce the documents, you've got to say when
10 and where you will produce it and you've got
11 to in fact produce at the time either
12 requested or at the time you say when and
13 where you will produce.

14 Nothing new on Subdivision 4 on Page 22.
15 It's pretty standard. I mean, it was in our
16 rule that you saw the last time.

17 Subdivision 5, electronic or magnetic
18 data, is pretty new. It was not in the old
19 version. We knew we had to deal with it. We
20 have dealt with it now. And basically it
21 works like this: Any kind of electronic
22 information on your hard disk, fingerprints on
23 your hard disk, anything that some genius can
24 get off your hard disk or your backup tapes or
25 your computer is discoverable. It's all

1 discoverable. Plus you can't get it -- you
2 don't just get it every time you ask someone
3 to produce documents. You have to ask for it
4 specifically. You have to explain what you
5 want a person to do to get that electronic
6 information so that they can understand they
7 are being asked to hire an expert to go take
8 the hard disks off all the laptops in your
9 office and try to get off of them something
10 relevant to this lawsuit, so that's the first
11 notion. Nothing is off base, but you've got
12 to make it clear to the responding party the
13 extent to which you expect them to work.

14 And if you are asking for something that
15 is not normally done in the ordinary course of
16 business, then the requesting party pays for
17 that. I don't -- I may have to turn over my
18 hard disk to you and maybe have to get an
19 expert to go through them, but you've got to
20 pay for it. And that in laymen's language is
21 basically what we did, I think, on that.

22 Okay. Interrogatories to parties,
23 Rule 12. You've seen this by and large. They
24 are 30 in number, no limitation of sets.
25 That's all from our prior meetings. We have

1 made it clear that we -- again, the only real
2 debatable part of this that we have come back
3 to over and over again is the language that
4 appears at the top of Page 25, which is
5 another effort yet to put in English a concept
6 that this group seemed to agree with the last
7 time. "Contention interrogatories may only
8 request another party to state the legal
9 theories and to describe in general the
10 factual bases for the claims and defenses of
11 the other party. Contention interrogatories
12 may not be used to require another party to
13 marshall all of its available proof or proof
14 it intends to offer at trial to answer the
15 interrogatory."

16 Again, I think that concept was fairly
17 agreed to in our last meeting and we have
18 struggled mightily with this language
19 virtually every time we go through a draft.

20 Rule No. 13. Request for Admissions. We
21 have looked at the rule and decided we cannot
22 improve it. If you want that vehicle as a
23 discovery vehicle, which I thought that was
24 indicated by your vote, we give it to you.
25 And simply because you're looking at mainly a

