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6 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
7 SEPTEMBER 17, 1994
8 (SATURDAY SESSION)
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19 Taken before D'Lois L. Jones,
20 Certified Shorthand Reporter in Travis County
21 for the State of Texas, on the 17th day of
22 September, A.D., 1994, between the hours of
23 8:40 o'clock a.m. and 12:30 p.m. at the Texas
24 Law Center, 1414 Colorado, Room 101 and 102,
25 Austin, Texas 78701.

ORIGINAL

SUPREME COURT ADVISORY COMMITTEE
SEPTEMBER 17, 1994

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SEPTEMBER 17, 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
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

MEMBERS ABSENT:

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

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
David B. Jackson
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

Hon Sam Houston Clinton
Doyle Curry
Hon William Cornelius
Hon Doris Lange
Thomas C. Riney

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney
Jim Parker
Jeff Thompson (with Steve Susman)
Diana Thompson (with Steve Susman)

1 CHAIRMAN SOULES: Good morning,
2 everyone. It's 8:40. We will be in session.
3 Anyone that was here yesterday and didn't get
4 signed up we have a sign-up sheet up front
5 here for you to sign, so we will send this
6 around again this morning to get the
7 attendance recorded, and I made a suggestion
8 to Steve and actually Alex made it to me that
9 we maybe go on with another subject than the
10 work product issues in Rule 4 and let Alex and
11 maybe Richard Orsinger exchange -- and anybody
12 else who wants to be in that exchange --
13 positions so that we can more clearly focus
14 whatever may be the problems. I'm not sure
15 that we are able or were able yesterday to
16 articulate exactly what the concerns are and
17 come back to this at the next meeting. So
18 maybe, Steve, if it's okay with you --
19 MR. SUSMAN: That's fine.
20 CHAIRMAN SOULES: We will let
21 Alex be the clearinghouse for that exchange.
22 MR. SUSMAN: Right. Right.
23 CHAIRMAN SOULES: And anyone
24 who wants to participate in it exchange
25 information with Alex and then we will put

1 together a package where everyone's ideas are
2 summarized, and next time maybe we can get
3 right to the focus. Steve, if you all could,
4 though, in your committee meetings try to
5 address the issue as it develops in the
6 exchange, and we would have something to start
7 with.
8 MR. SUSMAN: Yeah. I think
9 what we need is Richard and Alex to get
10 together and see if Richard can convince Alex
11 or Alex Richard of their views.
12 MR. ORSINGER: Not likely.
13 MR. SUSMAN: I mean, I don't
14 really think this is a matter that's life or
15 death viewed by the committee. It's kind of
16 something --
17 PROFESSOR ALBRIGHT: It's my
18 pet peave.
19 MR. SUSMAN: It's Alex's pet
20 peave. I didn't say it. Alex said it. Okay.
21 It does, as Scott said, make it look elegant.
22 What does he call it, symmetry?
23 PROFESSOR ALBRIGHT: Yes.
24 MR. SUSMAN: Or symmetrical. I
25 mean, it looks good to have our rule the same

1 as the federal rule, but let's go on.

2 CHAIRMAN SOULES: She raised a

3 legitimate concern here. McCorkle was the

4 first attempt to cause a lawyer to produce his

5 notes of a witness' statement. The witness is

6 talking to the lawyer. The lawyer is making

7 notes. Witness never adopts it; witness

8 doesn't sign it; It's not in witness'

9 handwriting. McCorkle says "Lawyer, you can

10 keep that. It's your own handwriting." First

11 court said, "No, it's got to come out of your

12 file." So there are some issues here that are

13 kind of quirky that we need to get focused on

14 and get to. Okay. Where do you we go from

15 here?

16 MR. SUSMAN: Rule (5), the duty

17 to respond. I guess the issue we have here

18 for you is -- does anyone have any questions

19 or problems with this concept? Let's not

20 worry too much about the language but the

21 concept.

22 MR. MARKS: Are we satisfied

23 that all Texas lawyers have computers?

24 MR. SUSMAN: Have what?

25 MR. MARKS: Are we satisfied

1 that all Texas lawyers have computers in this
2 day? It says "If the requesting party has
3 served on the responding party a readable
4 computer disk setting out the discovery
5 request," blah, blah, blah, and my question,
6 are we satisfied that all Texas lawyers are
7 now computer literate and have computers in
8 their offices?
9 MR. SUSMAN: I am not sure we
10 are satisfied. I don't think we are satisfied
11 with that. I don't think that was the goal.
12 I think the goal was that if you have it, it
13 is -- it makes it possible to put the question
14 first and then the answer.
15 HONORABLE F. SCOTT MCCOWN:
16 Well, Steve, this is like a ratchet. In other
17 words, right now if you don't have a computer
18 you have got to write the question and the
19 response, so this doesn't make it any worse
20 for you. It just says that you don't have to
21 write the question and response unless they
22 give you a disk. So those who don't have
23 computers are no worse off under this regime
24 than they are under the present regime, and
25 those that do have computers get to do the

1 disk, so it's a ratchet that goes one way.
2 MR. LATTING: Have we
3 considered making it a violation to use a
4 computer in any phase of discovery?
5 MR. SUSMAN: Yes.
6 MR. LATTING: Handwrite it.
7 MR. SUSMAN: And associates,
8 too.
9 MR. LATTING: By the lawyer.
10 Right. The attorney has to write it by hand.
11 MR. SUSMAN: We considered
12 that, too.
13 CHAIRMAN SOULES: Any problem
14 with part (1) of Rule 5? Okay. Anyone have
15 any objections to part (1) of Rule 5. Tommy
16 Jacks.
17 MR. JACKS: Oh, no. I'm sorry.
18 CHAIRMAN SOULES: Okay. Part
19 (1) of Rule 5 is then unanimously approved.
20 Part (2).
21 CHAIRMAN SOULES: We will start
22 right here. Bill Dorsaneo, and then we will
23 go around the table counterclockwise.
24 PROFESSOR DORSANEO: I think I
25 understand part (2). The two new concepts

1 would be the idea that if you learn something
2 during discovery there wouldn't need to be a
3 supplementation, and the supplements shall be
4 in the same form such that I guess if
5 something had to be done under oath it would
6 have to be supplemented under oath. Is that
7 the idea?
8 MR. SUSMAN: That's correct.
9 PROFESSOR DORSANEO: There is
10 the possibility, it seems to me, that someone
11 could be confused by the juxtaposition of the
12 two concepts that seem to be competing with
13 each other. One is that you don't have to
14 supplement if there was supplementation in
15 discovery. Okay. But yet you have to
16 supplement in precisely the formal way. I am
17 not sure that troubles anybody else, but it
18 seems a little bit inconsistent to me. I
19 mean, if we are going to have the concept that
20 they would know about it, fine. Then why are
21 we going to be so concerned about -- but if
22 there does need to be supplementation, it has
23 to be done formally, correctly. The Supreme
24 Court hasn't taken a position yet on whether
25 you have to, you know, supplement answers to

1 interrogatories under oath.

2 MR. SUSMAN: That's an

3 interesting point, but I see the point you are

4 making as is follows: I have a duty to

5 supplement. Instead of using the same form as

6 the original answer I simply write the other

7 guy a letter. Now, I have removed the duty to

8 supplement at that time because I have

9 informed him in writing of the new

10 information, and I know longer have a duty to

11 get the answers to the interrogatories sworn.

12 You're absolutely right. That's a loophole we

13 built in, and we need to think about that.

14 PROFESSOR DORSANEO: That's

15 what I was asking, if that's how it comes out.

16 MR. SUSMAN: That's a problem.

17 HONORABLE F. SCOTT MCCOWN:

18 Yeah. But there is a reason for that.

19 MR. SUSMAN: Why?

20 HONORABLE F. SCOTT MCCOWN: The

21 reason is when you learn of something in

22 discovery, for example, you are deposing a

23 witness and the witness names somebody new,

24 both lawyers have that information. It comes

25 from the witness who named them. They are

1 equally able to follow it up. When you
2 supplement you're putting something on the
3 table out of the blue that's totally in your
4 control that the other lawyers don't know
5 about. It's coming from you as opposed to
6 from some witness you are deposing or from
7 some document in the possession of a third
8 party, and we want you to verify -- if we have
9 required oath for the original, we want you to
10 verify that under oath.
11 MR. SUSMAN: Yeah. But Scott,
12 that's not the point. The point is that we
13 have written it in a way that there is a
14 loophole because it's either -- see, if the
15 information is otherwise known to the other
16 parties in writing all I have to do is write a
17 letter or write a little handwritten note to
18 my adversary and hand it to Harriet, for
19 example, in a case. There are three new
20 witnesses you ought to know about. I know I
21 am going to have to respond to that kind by
22 formal answer, sworn answers to
23 interrogatories, because she knows it in
24 writing. We just -- it's a problem.
25 HONORABLE F. SCOTT MCCOWN:

1 Where are you reading at?

2 MR. SUSMAN: In the middle of

3 (2) we say you have got to supplement unless

4 the additional -- "if the additional or

5 corrective information has not otherwise been

6 known to the other parties in discovery or in

7 writing."

8 MR. MARKS: What's wrong with

9 that? What's wrong with that? I like that.

10 MR. SUSMAN: I am not sure

11 there is anything wrong with it. I just

12 think --

13 HONORABLE F. SCOTT MCCOWN:

14 It's contradictory.

15 MR. SUSMAN: We have a

16 contradictory problem obviously. We have got

17 to decide -- yes.

18 PROFESSOR ALBRIGHT: I am not

19 sure it makes all that much difference because

20 the only thing that you have to swear to, the

21 only written discovery, is the

22 interrogatories, and we have said that you

23 have to respond -- "A party shall make a

24 complete response based upon all information

25 reasonably available to the responding party

1 or its attorney." So a party cannot swear to
2 answers to interrogatories that this is
3 information within my personal knowledge
4 because that would not be a complete response.
5 So the oath has to be that I have made a
6 complete response based upon all the
7 information reasonably available to me and my
8 attorney. So how is adding that oath to a
9 supplement going to help it, going to make any
10 difference anyway? I just don't see that it's
11 a real problem.
12 CHAIRMAN SOULES: Let me show
13 you. We have already got litigation in the
14 courts of appeals, and they are split. One
15 court says if a lawyer writes a supplement to
16 interrogatories it's good because there is no
17 form in the rules that say how you -- what
18 constitutes a supplementation of
19 interrogatories. There is for answers but not
20 supplements, so the lawyer's letter is good.
21 The other court of appeals say, "No, it's not.
22 You have got to use the same form."
23 PROFESSOR ALBRIGHT: Luke, I
24 think the Supreme Court adopted your --
25 CHAIRMAN SOULES: Now, here we

1 have got a situation where Steve relying on
2 sentence No. 1, I guess that's a long
3 sentence, but anyway the last clause of
4 sentence No. 1, writes a letter to Joe and
5 says "Here is additional information in
6 response to Interrogatory 2," signed "Steve
7 Susman," and then they get into a debate.
8 Okay. Well, is that an in writing make-know,
9 or is that a supplementation because if it's
10 an in writing make-know, it's good; but if
11 it's a supplementation, it's not; and now we
12 have got another issue.
13 MR. LATTING: What if he hands
14 me this during a deposition and says, "Now I
15 don't have to supplement my discovery because
16 I gave it to you in writing"? That bothers me
17 about the informality of that, about how in a
18 complex case where we have got stacks of
19 discovery in writing is pretty lose. I have
20 some concern about that.
21 CHAIRMAN SOULES: But anyway I
22 think the issue here is is it an in writing
23 make-know or a supplement. It's got to be one
24 or the other, and we ought to make it
25 discernible.

1 MR. SUSMAN: One of the things
2 we may want to consider is -- we may want to
3 go back and consider, Alex, and I think we
4 wrote this part of the rule -- before we got
5 to what happens, we wrote the part of the rule
6 that what happens if you don't, which is
7 Rule 6, the failure to provide discovery. In
8 some ways I don't think it's a problem if you
9 require people to supplement, in fact, file a
10 paper. You cannot rely on otherwise known in
11 discovery or in writing.
12 If you retain Rule 6 as we have drafted
13 it, that is, the information is not excluded
14 unless it surprises and you can't be surprised
15 if you have -- I mean, if you can demonstrate
16 you otherwise knew the information. In other
17 words, I have a duty to formally supplement my
18 interrogatory to Harriet and tell her the
19 three new witnesses, but if I fail to do so
20 and she tries to keep me from calling those
21 witnesses, I could argue that she's not
22 surprised by that because she knew the
23 identity of the three witnesses. I gave her
24 the piece of paper during the deposition.
25 Now, I may have some sanctions imposed

1 upon me for not following the proper
2 procedure, but she may have a difficult time
3 getting the witnesses excluded because she can
4 hardly claim surprise. I think we may be able
5 to deal with this in connection with whatever
6 we do with Rule 6. It seems to me they are
7 related, and I do think we wrote them at
8 different times and while we have hit it in
9 the same way basically.
10 CHAIRMAN SOULES: Harriet
11 Miers.
12 MS. MIERS: I do think it's
13 make work to make people supplement marshaling
14 everything that everybody already knows,
15 that's been talked about in discovery, to
16 supplement your interrogatory answers. So I
17 hope the committee will head in the direction
18 of not causing you to sit down at the end and
19 figure out all the little facts that weren't
20 in the original answer and stick them in a
21 sworn answer.
22 CHAIRMAN SOULES: Well, this is
23 a matter of form. This is a matter of form.
24 This isn't a matter of substance. It's what
25 form does this information have to go to you

1 in? I think the balance is if we go back and
2 look at the reasons for why parties sign
3 interrogatories. They thought that lawyers
4 were jacking around with the interrogatory
5 process and then the party gets on the witness
6 stand and says, "Oh, I didn't make that
7 answer. I didn't answer the interrogatory.
8 My lawyers did." So you can't cross-examine
9 them. That was all the debate that went on.
10 So somebody finally said, "Okay. We are
11 going to make the parties sign
12 interrogatories." Okay. Lawyers may still be
13 able to jack around with the answers if the
14 parties don't have to sign supplements, but
15 what happens when you get to the point of
16 supplementing 30 days, and this says 60, but
17 30 days ahead of trial like we do right now if
18 you are representing a corporation, it takes a
19 while to get somebody to sign interrogatories
20 at wherever, Dow or Baxter, 3M or Exxon.
21 So really that moves your supplementation
22 deadline back ahead of time. I mean, to me
23 supplements ought to be let the lawyers sign
24 them, however. They don't even have to be
25 under oath, and I don't think that's a

1 problem. It is problem to the extent that
2 lawyers jack with the supplements like they
3 used to jack with the interrogatories, but how
4 big a problem is that when you balance it
5 against what we are really trying to do is
6 tell everybody the information they need to be
7 prepared for trial? And we are doing it at
8 the last minute. So we are talking about what
9 are the formalities that need to be attached
10 to supplementing interrogatories, not the
11 substance but the formalities of delivery and
12 execution.
13 MR. SUSMAN: Well, keep in mind
14 here -- let's not get ahead of ourselves. We
15 have not gotten to the interrogatory rule
16 which talks about who can sign it, what form
17 it has to be in, whether it has to marshal
18 evidence or not, and some of the things I am
19 hearing are addressed to the rule itself, to
20 the interrogatory answer rule itself, which
21 maybe we ought to skip to, but I don't think
22 there can be any quarrel that if you get new
23 information you ought to -- and you should
24 have turned it over in the first place, I
25 mean, you would have had to turn it over in

1 the first place, you should turn it over. Can
2 anyone quarrel with that concept? I don't
3 think you can.
4 CHAIRMAN SOULES: That's three.
5 MR. SUSMAN: And I mean, I'm
6 not sure you can quarrel very much with the
7 concept that -- I don't think it's too
8 objectionable to say, well, it should be in
9 the same form it was in the first -- why
10 shouldn't it be in the same form it was the
11 first time? And maybe we should go and change
12 the form of the interrogatory answers to begin
13 with. We shouldn't require them to be signed
14 by a party or something like that, but what's
15 the objection to requiring it be in the same
16 form?
17 The only other thing that's in this rule
18 then is the timing. When do you want it done?
19 I mean, we have a timing concept in here, and
20 we have said amendments should be as soon as
21 you know the new information or the different
22 information and supplementation at a fixed
23 period of time before the end of discovery.
24 Does anyone have any problem with that
25 concept?

1 MR. LATTING: I have one
2 problem, and that is I would like to echo what
3 Luke said earlier. As a practical matter when
4 we are trying to supplement interrogatory
5 answers and are worried about exclusion of
6 evidence and we are down to the wire, I just
7 don't like the idea of having to send my
8 answers to Minneapolis to get somebody up
9 there to sign them, to get them in on time,
10 and I don't think the plan of salvation would
11 be altered any if we allow lawyers to serve
12 formal supplements to interrogatory answers.
13 That wouldn't be a problem in either giving or
14 receiving from my point of view. It's just
15 one less thing that I have to do and plan for
16 in getting ready for trial.
17 MR. SUSMAN: How about the
18 original answers?
19 MR. LATTING: The original
20 answers, I like the idea of a party because it
21 gives you a mechanism to get the party
22 impeached.
23 CHAIRMAN SOULES: Paul Gold.
24 MR. GOLD: I really don't see
25 that much benefit in having the

1 interrogatories verified, period. Request for
2 admissions aren't verified. Requests for
3 production aren't verified. There is one case
4 out there that says you can't impeach someone
5 with their written response to a request for
6 production because it isn't verified, but I
7 think that's a nonsensical case. I think that
8 they are admissions. I mean, the effect of an
9 answer to an interrogatory by an attorney is
10 an admission on the party, and I think that
11 maybe how we handle it at trial is maybe the
12 same way you deal with a deposition or
13 whatever. You get an instruction to a jury
14 that an answer to interrogatory regardless of
15 whether it's by the party or the attorney is
16 an admission by that party unless it's
17 retracted and put all of this signature stuff
18 aside. It's a bunch of malarkey anyway.
19 CHAIRMAN SOULES: Okay. But
20 getting to Rule 5 --
21 MR. GOLD: And I think that
22 would dispense with this problem.
23 CHAIRMAN SOULES: I mean,
24 that's going to come up when we get to the
25 interrogatory rule. Right now we are on

1 Rule 5, 60 days or 30 days. My sense is that
2 the train -- that the 15 percent pulled the 80
3 percent out of the train and left all the
4 people standing. I don't think this works.
5 60 days won't work in 80 percent of the
6 cases -- we had trouble educating people to do
7 things 30 days out. If you have got a divorce
8 case you may not even know what you are going
9 to do 60 days from trial, and this just will
10 not work as a general rule. It ought to go
11 back to 30 days. That's my feeling. Anybody
12 else have anything they want to say about
13 that? Okay. Tommy Jacks.
14 MR. JACKS: I agree with you on
15 that. At some point I'd like to talk about
16 the concept of differentiating between
17 supplementing and amending because that seems
18 confusing to me, and I'd like to hear about
19 why that was done but --
20 CHAIRMAN SOULES: Okay. Let's
21 get to that --
22 MR. JACKS: I don't want to get
23 you off the timing issue.
24 CHAIRMAN SOULES: -- the very
25 next thing. Okay. Nobody else wants to say

1 anything about whether it's 30 or 60? How
2 many favor 60? Show by hands.
3 MR. SUSMAN: Let me articulate
4 why. Okay.
5 CHAIRMAN SOULES: Go ahead.
6 MR. SUSMAN: The 60 days was
7 set with a view to when the discovery window
8 or the discovery period under these rules
9 ends. In other words, our discovery period as
10 currently worded in Rule 1, which is what we
11 have been talking about, is the 30-day time
12 period, and the notion is you ought to require
13 supplementation a sufficient time before you
14 end discovery. So people have another 30 days
15 in the discovery period to discover about your
16 supplemental answers. That was the notion.
17 Now, you know, you could say, well, your
18 duty to supplement arises at a time the
19 discovery period ends. That seems silly to
20 me. How many days before the end of the
21 discovery cut-off date do you want to do
22 supplement? That's what you have really got
23 to decide and then when we go and figure out
24 what our discovery period is going to be we
25 now know it's going to be three months

1 and -- we know it's three months or nine
2 months from the date the answer is due. Okay.
3 We can tell you when the supplementation will
4 be.
5 Unless you now want -- well, let's see.
6 If you are going to go to the nine months
7 maybe we got to go back and look at this again
8 because -- no. You're right. I'm sorry.
9 You're right. We can change -- this is
10 confusing because we have now got -- the
11 default situation will be a discovery period
12 that's nine months from the date of answer.
13 That may or may not be close to trial. It
14 could be months from the time of the first
15 trial setting or the first trial.
16 We need to go back to our original regime
17 where we put this supplementation not at the
18 end of the discovery period but so many days
19 before the trial setting, and we can do that.
20 So we could do it either 30 days or 60 days.
21 It's likely to be outside the discovery period
22 anyway now, and you will have to rely on the
23 reopener of subparagraph (4) of this Rule 5 to
24 get additional discovery for a
25 supplementation. So we can do the 60 days or

1 30 days as you wish.

2 PROFESSOR ALBRIGHT: So the way

3 it would work is if you have a nine-month

4 discovery period and your trial date is at the

5 very end of that you still have a

6 supplementation requirement 30 days before

7 trial, and that may be within your discovery

8 period.

9 MR. SUSMAN: It may not be.

10 PROFESSOR ALBRIGHT: It may not

11 be, but in any event you just supplement 30

12 days before trial.

13 CHAIRMAN SOULES: Those in

14 favor of 60 days show by hands. 60 days.

15 Those in favor of 30 days show by hands.

16 Okay. It's the house to one, 30 days.

17 Bill Dorsaneo says he has a question here, and

18 then we are going to go to Tommy Jacks'

19 amendment versus supplement.

20 PROFESSOR DORSANEO: Maybe I am

21 even wondering about that. Say I make a

22 response to a discovery request that affirms

23 that I am the manufacturer of the product.

24 MR. SUSMAN: Right.

25 PROFESSOR DORSANEO: And then I

1 learn that that was -- well, I guess that's
2 something -- that's not supplementation.
3 That's amending.
4 MR. SUSMAN: No. Absolutely.
5 PROFESSOR DORSANEO: Okay. All
6 right. Okay. So then -- so what would this
7 one be about, I guess is what I am asking? I
8 have trouble why we wouldn't let somebody make
9 the correction later. I'm troubled by why you
10 can't correct it, why it wouldn't be good for
11 everybody for it to be corrected, if it was
12 correct when made but is no longer correct. I
13 have to have a context before I can really
14 appreciate what's happening.
15 MR. SUSMAN: Well, our basic
16 notion in doing this was that you can
17 either -- I mean, one option is to require any
18 corrections of answers which were wrong,
19 either were wrong when made or have now become
20 wrong by virtue of subsequent information you
21 have obtained or subsequent events, to let any
22 of those corrections be made at a time certain
23 before trial. 30 days, for example.
24 Another alternative is, again, not to
25 distinguish between the amendment and

1 supplementation and say whenever you have got
2 any new information, cough it up, to have a
3 continuing duty to cough up. We took the
4 position that you should treat -- there are
5 two different kinds. You ought to do it in
6 two different kinds of ways.
7 When a person learns that something that
8 they actually said was false, they now find
9 they weren't the manufacturer, there was
10 another witness to the collision, they were in
11 error about the amount of money they made in
12 1991 when they said they made 100,000 and they
13 in fact now know they made 150,000, that that
14 may be significant enough to require a person
15 to correct that as soon as it comes to their
16 attention. It's a bad answer.
17 On the other hand, we thought that things
18 that -- subsequent events, information that
19 arises through subsequent events, facts that
20 occur after the original answer, that we ought
21 to give people a time certain before trial at
22 which they can accumulate all that information
23 and turn it over to the other side, not make
24 them have to review their interrogatory
25 answers every week or their discovery requests

1 every week. There may be a whole group of
2 documents I asked for that develop after a
3 request is made. That was the distinction.
4 We tried to explain it in comment 2 on page 9.
5 PROFESSOR DORSANEO: How does
6 this affect my trial behavior? If I am at
7 trial and I know that what I said before is
8 something that I wouldn't say now, am I
9 allowed to say the right thing now, or am I
10 stuck with what I said before?
11 MR. SUSMAN: You mean -- what
12 are you talking about now? We have got to
13 figure out -- if it's a deposition or
14 testimony that's different from your
15 deposition, there is no duty to supplement
16 your deposition or to amend it. Okay. We
17 don't deal with correcting depositions. We
18 deal with correcting written discovery
19 responses. So whether you are going to go
20 back and correct an oral deposition or not
21 depends on whether you want to be impeached
22 with said or not, and I mean, we leave that to
23 a totally different area. I think that's
24 right. We did not deal with deposition
25 supplementation or amendment.

1 CHAIRMAN SOULES: Well, is the
2 answer to Bill's question that he doesn't have
3 to supplement his deposition, and the only
4 thing you can do with it is impeach him?
5 MR. SUSMAN: Correct.
6 CHAIRMAN SOULES: He is not
7 stuck by his answer?
8 MR. SUSMAN: Correct.
9 CHAIRMAN SOULES: Not bound by
10 his answer?
11 MR. SUSMAN: Correct.
12 PROFESSOR DORSANEO: But if it
13 was an interrogatory answer, I am stuck with
14 it.
15 MR. SUSMAN: Well, I think you
16 are stuck with it to the same extent you are
17 today.
18 HONORABLE F. SCOTT MCCOWN: An
19 interrogatory answer now is not an admission.
20 It's exactly like a deposition. If it varies
21 from the trial testimony it's nothing more
22 than a prior inconsistent statement.
23 PROFESSOR DORSANEO: All right.
24 Fine.
25 MR. SUSMAN: It's the same

1 thing.

2 PROFESSOR DORSANEO: I guess I

3 am just trying to find out what happens here.

4 CHAIRMAN SOULES: Okay. Tommy,

5 you want to articulate your concern here so we

6 can get to that?

7 MR. JACKS: Yeah. It seems to

8 me that the information required by

9 supplementation may be just as vital to the

10 other party as the information required by

11 amendment. I mean, we have given an example

12 of you learn about three new witnesses and so

13 you have got to amend promptly your answer

14 regarding people with knowledge of relevant

15 facts, but if my client in an injury case --

16 and in an injury case there is always new

17 stuff happening. He goes to see a new

18 physician, and this client who had been, let's

19 say, diagnosed by the prior doc as having just

20 aches and pains is now --

21 MR. LATTING: So you sent him

22 to a new --

23 MR. JACKS: Yeah. Exactly.

24 And is now diagnosed as having a permanently

25 disabling condition. That may be far more of

1 interest to the other side than the fact that
2 I know about three more people, you know, who
3 are grunt and groaner witnesses, and yet I can
4 wait until the supplementation deadline,
5 whenever that is, to tell them about this new
6 stuff, but I have to tell them promptly about
7 the unimportant new stuff, and it -- I guess,
8 I would urge our thinking about the first
9 alternative you mentioned, Steve, which is
10 whether it's -- if it's something new that you
11 have learned, treat it all the same way,
12 however you decide to treat it.
13 If you are going to make it a continuing
14 duty, let's do it that way. If you are going
15 to make it something you do by a deadline,
16 let's do it that way, but you know, in my
17 office -- and I'm sure I'm the only lawyer in
18 the state that does this. I actually have
19 paralegals who do a lot of the interrogatory
20 responses, and I dread having to go back and
21 explain to them the difference between
22 amending and supplementing. I am going to
23 be -- everyday they are going to be piling
24 into my office saying, "Well, now, let me get
25 this straight. Is this one we are going to

1 amend, or is this one we are going to
2 supplement?" I don't see a policy basis for
3 the distinction.
4 MR. SUSMAN: Well, let me again
5 try and tell you what we are trying to do
6 here. I mean, clearly in all of these rules
7 what we are trying to do is -- I mean, again,
8 generally what we were up to was imposing
9 limits on discovery so discovery is more
10 affordable, less expensive, and it takes less
11 time. At the same time we did that we are
12 trying to make sure that we do not deprive
13 people of necessary protection either under
14 the current rules or even somewhat improving
15 the current rules to make sure that those
16 limitations do not result in the miscarriage
17 of justice at trial. That's fair.
18 But what we do not want to do is make the
19 safeguards against miscarriage of justice or
20 trial by surprise or trial by ambush so
21 difficult, so cumbersome, so expensive to
22 comply with, that everything we have gained by
23 limiting discovery in the way of saving money
24 on the one hand we are giving back by making
25 these make work projects on the other hand.

1 On the question of supplementation or
2 amendment, I mean, I for one if I had to make
3 the choice between -- I mean, if you told me I
4 had to treat it all as the same, all the
5 information the same, I would say give them a
6 period -- give them the 30 days or the 60 days
7 before trial and let them do it all then
8 because frankly I think it's a tremendous
9 burden on people to have them constantly have
10 to review discovery responses to see whether
11 there is anything new and to impose sanctions
12 on them of any kind if they fail to do so.
13 MR. JACKS: Yeah.
14 MR. SUSMAN: And so I would
15 opt -- I mean, I have no problem with your
16 proposal as long as we opt to do it the 30
17 days before trial, but the problem is you are
18 going to have, I think, a lot of people
19 screaming that's unfair. When you give an
20 interrogatory answer and you know damn well
21 it's wrong, you made a mistake, does that make
22 sense to allow you to wait 'til this 30 days
23 before trial and correct it? I mean,
24 that's --
25 HONORABLE F. SCOTT MCCOWN:

1 Could I add to what Steve said that the task
2 force -- and David Keltner was part of our
3 subcommittee, and we talked at length about
4 this -- said that one of the things that they
5 got the most complaint about was the
6 tremendous cost of supplementation. So I
7 think we are all agreed with Steve that if you
8 are going to -- the only way to minimize that
9 cost is to have a single period in which you
10 have to supplement. The downside of a single
11 period at which you have to supplement is
12 losing the corrective process and maybe
13 spending a lot of money on discovery that you
14 wouldn't have done if you had had a correction
15 or with our time constraints wasting valuable
16 time you wouldn't have done if you had a
17 correction.
18 And so what we have tried to do is draw
19 these two categories, one where you have got
20 the continuing duty and one where you don't.
21 Now, admittedly it's going to take a little
22 time for people to understand them, and they
23 are going to be uncertain of application. For
24 example, in your hypothetical, Tommy, that you
25 posited, that would not be a supplementation.

1 That would be an amendment, and so your
2 paralegals had they come to you would have
3 gotten the wrong answer, see. Because what
4 happened was you said in your interrogatory, I
5 have aches and pains," when in fact you had a
6 ruptured disk. Supplementation is when the
7 facts change due to occurrences subsequent to
8 the prior response.
9 MR. JACKS: It's not that
10 simple, and what I was focusing on, I was
11 assuming I wasn't asked anything about my
12 symptoms. I was assuming I was asked what
13 doctors I had seen.
14 HONORABLE F. SCOTT MCCOWN:
15 What doctors. Okay.
16 MR. JACKS: Your example calls
17 that a supplementation.
18 HONORABLE F. SCOTT MCCOWN: If
19 you ask what doctors you have seen, that would
20 be a supplementation, but let me point out one
21 last thing. Given Rule 6, if you go with
22 something that looks like Rule 6, what happens
23 if you fail to provide discovery, there is no
24 big cost for getting it wrong. So if you make
25 an amendment and it should have been a

1 supplementation, obviously there is never any
2 cost there, but if you don't amend when you
3 should and instead you supplement, there is
4 not any cost there either. There is no
5 penalty for that, and so it's just a way to
6 try to get information that we all think ought
7 to be disclosed earlier disclosed earlier.
8 MR. JACKS: And I guess what
9 concerns me is that, again, we are taking -- I
10 think we are adding complexity, and I think
11 that adds costs because it's -- I think there
12 is going to be confusion, and I think that
13 people are going to end up probably doing
14 both, supplementing and amending just so they
15 are sure they have got their bases covered,
16 but I mean, what's important to us, both sides
17 of discovery, is that we get the information
18 we really need to get ready for trial and know
19 what to expect at trial, and the problem I
20 have got with this distinction is that it
21 doesn't have anything to do with how important
22 the information may be.
23 The information that here need not be
24 disclosed until late in the game may be far
25 more important information than information

1 that's being required to be reported earlier
2 in the game. I guess I would pick up on
3 something Harriet said a minute ago, and that
4 is I like your idea, frankly, of saying in the
5 rule that if the new information, regardless
6 of what kind it is, is known, you know, it's
7 discovered in a deposition so both sides know
8 it or I sent the other lawyer a letter, then
9 there is no need for a formal supplementation
10 in my opinion. And I think that is make work,
11 and I think that definitely does add to costs.
12 Clearly it does.
13 I would rather see us go towards
14 something that recognizes what really happens
15 between lawyers, and that is much of my
16 supplementation to other lawyers and theirs to
17 me is done by letter. You know, "My client
18 has seen Dr. So-and-so. I am planning to call
19 him at trial. We will make him available for
20 deposition. Let me know when you want to do
21 it." And I think that's the sort of thing
22 that ought to be encouraged by our rules. I
23 would urge us to think about not trying to
24 distinguish between whether we amend or
25 supplement but rather get them the new