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7 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
8 JANUARY 21, 1995
9 (SATURDAY SESSION)
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18 Taken before D'Lois Jones, a
19 Certified Shorthand Reporter in Travis County
20 for the State of Texas, on the 21st day of
21 January, A.D., 1995, between the hours of 8:05
22 o'clock a.m. and 12:05 o'clock p.m. at the
23 Texas Law Center, 1414 Colorado, Room 101 and
24 102, Austin, Texas 78701.
25

ORIGINAL

JANUARY 21, 1995

MEMBERS PRESENT:

Luther H. Soules III
Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
Prof. William V. Dorsaneo III
Sarah B. Duncan
Anne L. Gardner
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Honorable David Peeples
David L. Perry
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Charles Babcock
David J. Beck
Michael Gallagher
Michael Hatchell
Franklin Jones Jr.
Thomas Leatherbury
Harriett Miers
Richard Orsinger
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS PRESENT:

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

EX OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Doyle Curry
Kenneth Law
Thomas Riney

Also present:

Lee Parsley
Holly Duderstadt

SUPREME COURT ADVISORY COMMITTEE
JANUARY 21, 1995

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1 MR. SUSMAN: Rule 2, page 4, is
2 no change from the way you have seen it
3 before, and I don't really think it was
4 controversial before. It probably will not be
5 controversial now. Any comments about Rule 2?
6 All in favor of Rule 2 raise your right hand.
7 All opposed? Rule 2 passes.
8 Rule 3 we have done some work on since
9 you have seen it. 3(1) we have not changed
10 basically. It defines -- it first sets out
11 the permissible forms of discovery then
12 defines what is meant by "written discovery"
13 for use elsewhere as we go through. The term
14 "written discovery" does have meaning and
15 makes it clear that these forms of discovery
16 can be used at any time and any sequence, et
17 cetera. Any comments about Rule 1, which I
18 don't think is basically much a change.
19 MR. LOW: Part (1) of Rule 3.
20 MR. SUSMAN: I'm sorry. Part
21 (1) of Rule 3. All in favor of part (1), Rule
22 3 raise your right hand. All opposed? That
23 passes.
24 Rule, part (2), scope of discovery. Let
25 me tell you, the general is not different,

1 documents and tangible things are not really
2 different from what you have seen. (C),
3 persons with knowledge of relevant facts. I
4 think this is the way we did it last time and
5 the way you instructed us to do it, and that
6 is that insofar as persons having knowledge of
7 relevant facts you must not only list them.
8 You must provide a brief statement of each
9 identified person's connection with the case.
10 Now, we make clear in the comment that that's
11 not what they know or what they are going to
12 testify. It is simply with such simple
13 designations as eyewitness, secretary, the
14 board of directors, sales representative,
15 economist, banker, some brief description of
16 the person's relationship to the case.
17 Item (d) is -- was put in at Luke's
18 suggestion. We thought it was a good
19 suggestion, which is trial witnesses. "A
20 party may obtain discovery of the identity and
21 location of persons who are expected to be
22 called to testify at trial." Expert witnesses
23 and indemnity insuring settlement agreements,
24 no change. Witness statements, my
25 recollection is we didn't change that either.

1 A witness statement is discoverable where it's
2 a statement that the witness adopts or
3 approves.
4 HONORABLE DAVID PEOPLES:
5 Steve, isn't that a change in the law?
6 MR. SUSMAN: What?
7 HONORABLE DAVID PEOPLES:
8 Nonparty witnesses?
9 MR. MARKS: Yes.
10 MR. SUSMAN: Yes. It is a
11 change in the law. And that is a change in
12 the law, and we discussed that I think at the
13 last meeting that that was a change. All of
14 these rules have been discussed before, and
15 people generally thought that was a good idea.
16 Yes.
17 MR. LATTING: Is what we want
18 to say is that we want to know who the other
19 side expects to call at trial? Is that really
20 what we want to do? We want to know who they
21 intend to call, or who they are going to call,
22 or who they may -- I think that's a pretty
23 important word.
24 HONORABLE F. SCOTT MCCOWN:
25 Remember this is an interrogatory. It's

1 not -- you might be more specific in your
2 pretrial order closer to trial but the purpose
3 of this --
4 MR. LATTING: Okay. All right.
5 HONORABLE F. SCOTT MCCOWN:
6 -- is to identify for the 50 hours who the
7 target people are.
8 MR. LATTING: Okay. All right.
9 HONORABLE F. SCOTT MCCOWN: So
10 that's why we said "expects" as opposed to
11 "intends" or opposed to "will."
12 MR. SUSMAN: Bill.
13 PROFESSOR DORSANEO: We talked
14 about this before, but the provision
15 concerning settlement agreements is very
16 broad, broader than it was ever intended to be
17 when we -- probably than it was ever intended
18 to be when it was put in here to begin with
19 because it just means any settlement
20 agreement, and there has to be case law limits
21 imposed on it, and I would suggest that the
22 committee impose some sort of limit that is
23 similar to the limit that is applicable to
24 insurance agreements.
25 PROFESSOR ALBRIGHT: If I may

1 respond to that, Alex Albright. I have in my
2 notes that you were supposed to provide me
3 with something.
4 PROFESSOR DORSANEO: Okay.
5 PROFESSOR ALBRIGHT: So --
6 PROFESSOR DORSANEO: I will try
7 to do that then, and I don't remember talking
8 at this committee level -- and it may be that
9 I'm suffering from the same memory problem
10 that I just had a second ago, but do we really
11 want to say a witness statement regardless of
12 when made, one made before the transaction or
13 occurrence giving rise to the litigation is a
14 witness statement, too? And I guess --
15 PROFESSOR ALBRIGHT: Well, it
16 doesn't matter because they are all
17 discoverable.
18 PROFESSOR DORSANEO: Okay.
19 That's what I was going to ask. Refresh my
20 recollection on what it means.
21 PROFESSOR ALBRIGHT: The issue
22 is whether witness statements made in
23 anticipation of litigation are discoverable,
24 and now they are work product or a party
25 communication or a witness statement. So they

1 are not discoverable except that you can get a
2 copy of your own statement. We are making it
3 so that witness statements made in
4 anticipation of litigation are discoverable
5 unless they are protected by the
6 attorney-client privilege or some other
7 evidentiary privilege or constitutional
8 privilege or statutory privilege but not an
9 investigative privilege.
10 PROFESSOR DORSANEO: And
11 witness statements not made in anticipation of
12 litigation are --
13 PROFESSOR ALBRIGHT: Are
14 clearly discoverable.
15 PROFESSOR DORSANEO: Okay. So
16 it doesn't matter at all what it says here
17 about regardless of when made.
18 PROFESSOR ALBRIGHT: We could
19 check that out.
20 MR. MARKS: I have a question.
21 Why are we doing this? I mean, why do we have
22 to do this? I mean, a lawyer goes out, and he
23 works on his case and prepares his case. He
24 takes statements or investigator takes
25 statements. I mean, something has got to be

1 protected, and it seems to me this is part of
2 his protection, and if he makes available the
3 identity of the witness, the location of the
4 witness, the telephone number of the witness,
5 somebody can go get his own statement. Now,
6 why should they invade my stuff?
7 PROFESSOR ALBRIGHT: Well, I
8 think the answer to that is this came from the
9 task force's report, and we looked at it, and
10 I think the sense of the committee at the last
11 meeting was that witness statements are
12 usually purely factual. They are renditions
13 of fact, and especially when you are limiting
14 depositions that if you can get these witness
15 statements then that would save -- would make
16 discovery more efficient.
17 MR. MARKS: But why can't
18 people go out and get their own statements,
19 Alex?
20 MR. SUSMAN: Judge Cornelius.
21 JUSTICE CORNELIUS: I have a
22 concern about the requirement that a party
23 reveal the witnesses he expects to call at
24 trial. I believe that represents a change in
25 the law, and I have no problem with the

1 requirement that they reveal the identity and
2 location of witnesses who have knowledge of
3 relevant facts, but to require an attorney to
4 commit himself in advance to the use of
5 particular witnesses at trial I think invades
6 his strategy and is probably not a good idea.
7 MR. SUSMAN: Okay. Let me just
8 do this so we can get through this a little
9 more organized. Subdivision (a), (b), (c),
10 all in favor of (a), (b), and (c) raise your
11 right hand. All opposed? That passes.
12 Now we are going to vote on (d), trial
13 witnesses. And let's limit the discussion of
14 that. Then we will get to witness statement.
15 I just want to make sure we move through it,
16 and I made a mistake by not -- yes. We are
17 talking about trial witnesses now.
18 HONORABLE SCOTT BRISTER: Yeah.
19 I would favor putting something in with
20 parties to discovery that certainly under 166
21 that I could order at pretrial conference the
22 parties to tell me who their actual witnesses
23 are going to be. If somebody wants to hide
24 the ball, I assume a large number of these
25 people when they get to section (d) will say

1 "see the list at section (c)" and hide the
2 ball if that's what they really intend to do.
3 On the other hand, people in good faith
4 don't expect to call 100 people who may know a
5 little bit about it. They want to just put
6 down 10 that they really think they are going
7 to call, which is what I do at pretrial
8 conference. Who are you really going to call?
9 Most people will readily tell you, and if
10 attorneys can tell each other that, boy, you
11 sure can save a lot of time and money on who
12 you have got to depose and spend time
13 concentrating on.
14 HONORABLE DAVID PEOPLES: What
15 happens to someone who lists as trial
16 witnesses every person who's already listed as
17 having knowledge of relevant facts? Is there
18 sanctions for listing too many people?
19 MR. SUSMAN: Well, I would
20 approach the court under those circumstances
21 and ask the court to sanction them. That was
22 not in good faith. I mean, I would invoke the
23 sanction rules. I would say, "Judge, I have
24 got 50 hours of depositions. The reason this
25 rule was changed, as the comments will

1 reflect, are so I will know how to use my 50
2 hours wisely." By simply reiterating the long
3 list that goes on for three pages under (c) as
4 the persons he expects to call, we know that's
5 impossible. It could never go to trial.
6 HONORABLE DAVID PEOPLES: Okay.
7 Can you get sanctioned if you -- let's say
8 there were 50 people with knowledge of
9 relevant facts, and you list 20, and your
10 position is, you know, I don't know right now
11 for sure, but I'm not calling anybody other
12 than these 20, but I will have to wait and see
13 how things go. Now, can that be sanctionable?
14 CHAIRMAN SOULES: No.
15 MR. SUSMAN: I don't think so.
16 I think that's pretty close to compliance.
17 HONORABLE SCOTT BRISTER: What
18 about if you don't -- you have somebody on (c)
19 but not on (d) and then less than 30 days
20 before trial you decide you are going to call
21 them?
22 MR. SUSMAN: That would be
23 dealt -- that would be dealt with our sanction
24 rule which we are coming to, the failure to
25 disclose information in a timely fashion.

1 HONORABLE SCOTT BRISTER: Well,
2 you did disclose them as a person with
3 knowledge of relevant facts.
4 CHAIRMAN SOULES: A timely
5 supplementation gets them on the list to
6 testify.
7 PROFESSOR ALBRIGHT: If it's
8 not timely, you go to our sanction rule, which
9 is not an automatic sanction like it is now.
10 You as the trial judge are going to have
11 discretion to determine surprise.
12 HONORABLE SCOTT BRISTER: Well,
13 what am I going to do if they were -- the
14 first week of discovery they were designated
15 as a person with relevant knowledge.
16 Everybody knew about them. It's just I didn't
17 make the decision I was going to call them at
18 trial until two weeks before.
19 PROFESSOR ALBRIGHT: Right. So
20 you as the trial judge -- the other side will
21 come up and say, you know, "They can't do
22 this. I'm surprised." You --
23 HONORABLE SCOTT BRISTER: Why
24 are you surprised? I told you who they were a
25 year ago.

1 PROFESSOR ALBRIGHT: As a trial
2 judge you have discretion to continue the
3 case, to say "This doesn't make any
4 difference; you're not surprised; go on."
5 MR. SUSMAN: I mean, my
6 argument if I were arguing the case would be
7 that I only deposed people who he indicated he
8 expected to call. That was the purpose of it,
9 judge. He did not put them there. I did not
10 take the deposition. Even though he listed
11 them up here as a person with relevant
12 knowledge, the draft of this rule he was
13 supposed to give me that information. He did
14 not. It has prejudiced me. I mean, you might
15 deny the motion. You might not. I don't
16 know.
17 PROFESSOR ALBRIGHT: You might
18 say, "Go take a deposition and come back this
19 afternoon."
20 MR. SUSMAN: Buddy.
21 MR. LOW: Is anything changed
22 with regard to rebuttal witnesses? I mean, is
23 that the same as now, if you show they're true
24 rebuttal? You said "expected to testify."
25 What are we doing with rebuttal witnesses now?

1 MR. SUSMAN: We haven't really
2 changed that.
3 MR. LOW: Okay.
4 MR. SUSMAN: Luke.
5 CHAIRMAN SOULES: This is in
6 response to Judge Brister. The persons with
7 knowledge of relevant facts is in most cases
8 going to be a broader universe of people, of
9 course, than the trial witnesses. The persons
10 with knowledge of relevant facts is supposed
11 to reveal not only the persons with knowledge
12 of relevant facts that are helpful to me but
13 also persons with knowledge of relevant facts
14 that are harmful to me.
15 The trial witnesses designation is really
16 a means to focus the other discovery. Persons
17 with knowledge of relevant facts is a
18 discovery -- a universe to be used for
19 discovery purposes to let me do whatever else
20 I want to. Maybe by way of mere investigation
21 among that list. Trial witnesses, as I
22 comprehend this and the reason that I
23 suggested this, is a tool by which you could
24 focus the balance of the discovery,
25 particularly the use of depositions.

1 For this to work a person who is not on
2 the trial witness list but who is on the
3 persons with knowledge list should be subject
4 to automatic sanctions, exclusion. Otherwise,
5 it won't work. Now, they have a new test in
6 these rules for what a judge is to consider
7 whenever a witness is not listed, but it is
8 under the new test I think if it's not on the
9 trial witness list, a person is not on the
10 trial witness list, the persons with knowledge
11 of relevant facts list is no cure to the
12 problem. That's the way I envision it.
13 MR. SUSMAN: Yes, Judge.
14 JUSTICE CORNELIUS: I think
15 with respect to focusing on the witnesses at
16 trial it's really not going to work because
17 the lawyer is going to list -- he's going to
18 have to list there all persons having
19 knowledge of relevant facts. To protect
20 himself he's going to list all as trial
21 witnesses everybody he lists as having
22 knowledge of relevant facts. Don't you think?
23 MR. SUSMAN: Well, my view is
24 that it is time -- the only way we are going
25 to cut down expense of discovery and still

1 make trials fair is make lawyers make up their
2 mind. Okay. Period. Lawyers have got to get
3 to the point where they can make choices and
4 make up their mind, and it doesn't have to be
5 the day before trial.
6 MR. MARKS: 60 days after the
7 case is filed and you have to answer the
8 interrogatories? You have to make your mind
9 up that fast?
10 MR. SUSMAN: Well, I would --
11 yes, sir. Because I would think you could say
12 at that time I am clearly going to call -- I
13 do expect to call the president of the
14 company, the vice-president of development,
15 our chief accountant, and so-and-so. I have
16 not made up my mind beyond that at this time
17 who else -- I don't know who I expect to call
18 beyond that. That would be a fair answer, I
19 would think.
20 MR. MARKS: Well, I don't -- 60
21 days out I don't know in a case who I'm going
22 to call, necessarily how I'm going to defend
23 the case. I think this is terribly unfair.
24 Now, if you want at some point in time to
25 require a party to identify witnesses who are

1 going to actually testify, I think it needs to
2 be down the line.
3 JUSTICE CORNELIUS: I do, too.
4 MR. SUSMAN: David.
5 MR. PERRY: As I understand the
6 intent of the rule -- and I'm not sure that
7 it's drafted this way, but as I understand the
8 intent of it when we initially answer the
9 discovery we would be required to say who it
10 is that at that time we expect that we would
11 call at trial, but we would have the right as
12 the case proceeds to supplement and add more
13 people or to take people off as developments
14 might occur until the time that discovery
15 would close. Is that basically what we have
16 contemplated here?
17 CHAIRMAN SOULES: Yes.
18 MR. SUSMAN: Yes.
19 MR. PERRY: So that a person
20 theoretically could answer at the very
21 beginning, "I don't have anybody in mind that
22 I expect to call at trial." You might end up
23 in the situation that we have now with regard
24 to experts where the trial court would say,
25 "Well, I'm going to require that you make up

1 your mind by a certain date" and set a
2 deadline.
3 MR. SUSMAN: And if I were in
4 Judge Brister's court I would probably be
5 ordered to do so, and if I were in Judge
6 Cornelius' court I probably would not be
7 ordered to do so. I mean, there is a lot
8 going to differ from the judge's viewpoint,
9 but it is a opportunity to get before a court
10 and say, look, whoever drafted these rules
11 thought that it's time that lawyers make up
12 their mind earlier and not hide the ball.
13 And I mean, this would be my pitch to the
14 judge. Now, they might listen or might not.
15 Make up their mind earlier, not hide the ball,
16 tell me in good faith who they now think they
17 are going to call as witnesses. They have got
18 to have some idea or they are guilty of
19 malpractice, and so I can go out and depose
20 these people, and if they have haven't made up
21 their mind, then maybe, judge, you ought to
22 modify the discovery window and some of these
23 other rules so I don't have to waste my time
24 deposing unnecessary people. Maybe the window
25 ought to run from the time he does make up his

1 mind. My time, my 50 hours, ought to run from
2 the time that Mr. Marks does make up his mind,
3 or whoever would be on the other side. Yes?
4 HONORABLE F. SCOTT MCCOWN: In
5 many cases you won't even have to ask the
6 judge to do that because if you look at Rule 5
7 on page 10 supplementation is supposed to be
8 30 days before trial. So you can supplement
9 really without any problem at all, all the way
10 up to 30 days before trial if you supplement
11 after the discovery period is completed. So
12 the discovery period is over. You supplement
13 by putting new people you expect to call as
14 witnesses. The opposing party can re-open
15 discovery and is automatically given five
16 hours of additional deposition time, and so I
17 think that in most cases changing that list
18 toward the end is going to be automatically
19 handled, and you won't even have to see the
20 court.
21 MR. SUSMAN: All right. Let me
22 ask for then a vote on (d). If it's real
23 close, we will come back and continue
24 discussion. If it's not, we will move on.
25 All in favor of (d) as written raise your

1 right hand. All opposed? All right. We need
2 a count. There are opposed how many?
3 CHAIRMAN SOULES: Five.
4 MS. DUDERSTADT: Five.
5 MR. SUSMAN: All in favor raise
6 your right hand.
7 CHAIRMAN SOULES: 12.
8 MS. DUDERSTADT: 13.
9 CHAIRMAN SOULES: 13. 13 in
10 favor for --
11 MR. MARKS: Maybe if I didn't
12 say anything the vote would be higher.
13 MR. LOW: Steve, don't you
14 think that -- I mean, that's been one of the
15 problems. Lawyers just putting it off and
16 putting it off, and the way to save money is
17 to focus attention early and mean it, but have
18 some loophole for people that are acting in
19 good faith, and if we don't have some system
20 like that, we are not going to be changing
21 anything.
22 MR. MARKS: Well, this one is
23 going to be abused. I guarantee it. This
24 will be abused.
25 MR. SUSMAN: All right. We

1 will move on then. I mean, I think that's a
2 pretty good indication.
3 Next is experts. Experts, is there any
4 problem with experts? That's no change
5 basically. All in favor of (e) raise your
6 right hand. All opposed? (E) passes.
7 (F), all in favor of (f) subject to
8 Dorsaneo's providing some language to Alex,
9 noncontroversial language, which will put
10 similar limitations on settlement agreements
11 that now occur for insurance agreements. All
12 in favor of (f) raise your right hand. All
13 opposed to (f)?
14 MR. LATTING: This is no
15 change; is that right?
16 MR. LOW: No. On the
17 settlement agreement.
18 MR. SUSMAN: No change.
19 MR. LOW: Yeah.
20 MR. SUSMAN: Now we are in (g)
21 in witness statements. We will continue the
22 discussion here on witness statements. Anyone
23 else? David Perry on witness statements, and
24 the question here is should they be -- if a
25 witness statement has been made -- now keep in

1 mind, John, that by witness statement we are
2 not talking about you going out and
3 interviewing someone and putting notes and
4 writing a memo to your file. We are talking
5 about a statement which the witness adopts or
6 signs.
7 MR. MARKS: But you have
8 another provision in here, don't you, for
9 getting that?
10 MR. SUSMAN: What? No, sir.
11 MR. MARKS: Yes, you do. I
12 mean, you don't say he can get your notes, but
13 he can get everything in your notes.
14 MR. SUSMAN: Let's not get to
15 that right now. Okay. I want to limit this
16 discussion to that statement because it by
17 terms is limited.
18 MR. MARKS: Well, I know, but I
19 think we need to talk about that in context
20 with this because --
21 MR. KELTNER: I can talk about
22 it with you.
23 MR. MARKS: Okay.
24 MR. SUSMAN: I mean -- David,
25 yes.

1 MR. PERRY: The thinking out of
2 the task force on this provision is that as a
3 practical matter 90 to 95 percent of the
4 witness statements that are taken today end up
5 being discovered, and anybody who knows what
6 they are doing knows before they take the
7 witness statement that it is almost always
8 going to be discoverable. It's just that in
9 order to get it you have to go around and
10 touch a lot of bases, and the thought out of
11 the task force was that there is an undue
12 amount of time and trouble and effort and
13 money and transaction costs involved in
14 touching all of those bases and that it would
15 be much better to amend the rule to bring it
16 in conformity with current practice, which is
17 that as a practical matter you are going to be
18 able to get the witness statement. So we
19 ought to say that up front, make sure
20 everybody knows up front they are going to be
21 discoverable and cut out the transaction cost.
22 MR. SUSMAN: Other comments?
23 Okay. Let's do a vote on this and see where
24 we stand. All in favor of (g) as written
25 raise your right hand. All opposed? Let's

1 see if we get some negatives and see if we
2 have got to count. Okay. We have got how
3 many negatives? One negative.
4 CHAIRMAN SOULES: Wait. I
5 don't think that's a fair record vote. There
6 has been zero discussion on this. That may be
7 a straw vote, but I don't think there should
8 be any record vote until the discussion has
9 been taken, and Marks has got something to say
10 about it over here.
11 MR. SUSMAN: I'm sorry. I
12 thought they -- I'm sorry. Was there more
13 discussion of this then? Let's continue with
14 the discussion. I had asked for this.
15 MR. MARKS: Well, 20 to 1 makes
16 it a little --
17 MR. LOW: I didn't vote because
18 I haven't heard -- I want some answers to some
19 things.
20 MR. MARKS: Well, I guess we
21 need to ask the questions then, Buddy.
22 HONORABLE F. SCOTT MCCOWN: Let
23 me give an example of why I am in favor of
24 this rule. There was an entire apartment
25 complex that burned down in Austin, and the

1 insurance company sent its lawyers out the day
2 of the fire. So they retained and sent out
3 counsel the day of the fire. Counsel
4 conducted all of the interviews on-site that
5 day, and the next day, the next day. No
6 insurance investigators, strictly counsel.
7 There was something like 200 interviews.
8 Well, the complex was burned to the
9 ground. So all of those people now disperse
10 heaven knows where, and you have got all of
11 these interviews made at the time. Now -- and
12 so the defense argued what John's arguing.
13 Hey, we were out there. Here is the last
14 known address of these people. You go
15 interview them.
16 Well, there is not really any work
17 product here. I mean, it's just the lawyers
18 asking what happened and the people saying
19 what happened. I mean, you really have to
20 stretch pretty hard to find much work product
21 in there. They are at the time. They are all
22 there. The cost to the plaintiff of gathering
23 that stuff up, even if it was possible, would
24 be astronomical, and you know, I guess our
25 thinking is the truth of the matter is there

1 is not a lot of work product in these witness
2 statements regardless of what lawyers tell
3 you, and it's just cheaper and fairer for
4 everybody to have what the witnesses have
5 said.
6 PROFESSOR ALBRIGHT: And but,
7 Scott, what you were talking about, where
8 lawyers' notes were interviews, right?
9 HONORABLE F. SCOTT MCCOWN: No.
10 PROFESSOR ALBRIGHT: Oh, these
11 were statements?
12 HONORABLE F. SCOTT MCCOWN:
13 These were statements.
14 PROFESSOR ALBRIGHT: Okay.
15 Because it is very different. Lawyers' notes
16 from an interview are very different from a
17 statement. Now, we are not talking about
18 lawyers' notes.
19 HONORABLE F. SCOTT MCCOWN:
20 These are at the scene statements.
21 MR. SUSMAN: Yeah. Keep clear
22 here that we are talking right now about
23 something that the witness signs or writes,
24 you know, or dictates or writes a letter
25 saying that's got it. That's it. An

1 affidavit, a witness affidavit. Bill.

2 PROFESSOR DORSANEO: I just

3 wanted to make the point that I have a

4 different attitude about a statement that

5 purports to be the witness' statement than I

6 do about notes of counsel with respect to the

7 same interview.

8 MR. SUSMAN: That's what we are

9 talking about.

10 HONORABLE SCOTT BRISTER: Or

11 even Q&A because the Q&A attorney, you know,

12 "Did you see" --

13 PROFESSOR DORSANEO: Yes.

14 HONORABLE SCOTT BRISTER:

15 -- "blue smoke?" Well, now why is the defense

16 attorney asking that? Because he knows

17 something about his construction that's in

18 attorney-client that says look for blue smoke.

19 You know, if the witness in their

20 recital, which as I read this is what we are

21 talking about, mentioned blue smoke, that's

22 their business; but if the attorney asks blue

23 smoke then you are starting all these

24 attorney-client things it seems to me.

25 MR. SUSMAN: I'm not sure if

1 you would cut it that -- my view is that if
2 you had a transcript. If I went out with a
3 court reporter and interviewed a witness, and
4 the witness signed it under oath that would be
5 a witness statement even though it does have
6 my questions like a deposition does.
7 HONORABLE SCOTT BRISTER: Okay.
8 I would have a problem with that.
9 PROFESSOR DORSANEO: I would as
10 well.
11 HONORABLE SCOTT BRISTER: As
12 you just stated because the attorney from the
13 apartment complex, insurer, whoever, is
14 disclosing matters -- may well be disclosing
15 matters by the type of questions you ask.
16 Certainly strategy, probably work product,
17 frequently attorney-client matters, and if
18 that's so, I would not consider a question and
19 responses to certain matters to be a
20 substantive verbatim recital of a statement.
21 If so, you need to make that clear because I
22 did not read that, this as saying that.
23 MR. MARKS: Well, it's in
24 there, Judge. Because it says "any recording
25 contemporaneously adopted."

1 MR. SUSMAN: Ann.
2 HONORABLE ANN COCHRAN: I would
3 agree with Scott that it -- I would disagree
4 with him in that I think that kind of
5 statement needs to be included as a witness
6 statement. I would agree with Scott that it
7 needs to be clarified to say that, and I think
8 that there is a vast difference between
9 deciding -- announcing after the statement has
10 been taken that, a-ha, you know, maybe you
11 thought you were being able to protect that,
12 but you're not.
13 If lawyers know and it's very clear here
14 that lawyers are no longer going to be allowed
15 to quote just factual gatherings under some
16 sort of attorney work product privilege, that
17 no matter who takes the statement and no
18 matter how the statement is taken it's going
19 to be discoverable then it's not -- then it's
20 on the -- the burden is on the lawyer to be
21 careful not to disclose any secret work
22 product in the way the questions are phrased.
23 So I think it's important to make it clear
24 that that's what we are doing so that lawyers
25 don't --

1 MR. MARKS: That creates work,
2 Judge.
3 MR. SUSMAN: Buddy.
4 MR. LOW: I think that you have
5 raised a good point. The Supreme Court held
6 that pictures aren't -- you don't change
7 those. You don't formulate, but your
8 questions you do, and I just have some problem
9 with saying that David -- and he's got the
10 case. He can come out there, and he does all
11 the work questioning all of these witnesses,
12 and all I have got to do is just sit back and
13 say, "Okay. Give it to me, and then I will
14 try to supplement it a little bit." I have
15 trouble with that if David does it because if
16 that's not work product, my work, I do no more
17 important work than that, and if that's not
18 work product, I don't have any.
19 MR. SUSMAN: Alex.
20 PROFESSOR ALBRIGHT: Again,
21 remember we are talking about statements. We
22 are not going to get into every single time
23 you are out questioning witnesses. If you are
24 asking questions of a witness and you get the
25 witness -- you know, you get the witness to

1 write down a bunch of stuff, the witness
2 doesn't sign it, you don't have to disclose it
3 under here.
4 MR. MARKS: Well, now --
5 PROFESSOR ALBRIGHT: Let me
6 finish, please.
7 MR. MARKS: Okay.
8 PROFESSOR ALBRIGHT: Okay. And
9 then, you know, so the reason you take
10 statements from somebody is because you're
11 afraid they are going to fudge on you when
12 they are up on the stand, and you are going to
13 use the statement to impeach them. That's
14 when you take statements, and so if you don't
15 take -- if you are worried about what you
16 might disclose about the blue smoke, well, if
17 this is a third party witness, you better not
18 be talking to them because I can take their
19 deposition, and I can say, "What did
20 Mr. Brister ask you?" And he has to tell me.
21 But if -- it's different if you're
22 taking -- if you're talking under the current
23 law, if you're taking a statement of your
24 employee. Okay. Under current law that
25 is -- you know, we could say that's a party

1 communication. I think at one time we were
2 talking about that that witness statement
3 would be a party communication, and so we
4 would continue the privilege on that. Then,
5 you know, there is an issue about whether you
6 want to protect witness statements, only
7 attorney-client witness statements, or
8 attorney-client and party communication
9 witness statements.
10 So you can take the others -- the next
11 step to say you don't have a separate witness
12 statement privilege, but you can protect the
13 party communications one, which would be
14 statements that you take of your employees,
15 representatives, agents, et cetera; but again,
16 you have got to realize that, you know, it's
17 only the statements that you get them to sign
18 or contemporaneously adopt and then -- and
19 it's just I don't think -- and with third
20 parties you are going to be able to ask them
21 what you asked them anyway. I just don't see
22 that it's that big a deal.
23 MR. SUSMAN: I mean, I do -- I
24 mean, I see the argument between, I mean,
25 either not giving them at all or giving them