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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MAY 20, 1995

(SATURDAY SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 20th day of
May, A.D., 1995, between the hours of 8:00
o'clock a.m. and 12:00 noon at the Texas Law
Center, 1414 Colorado, Room 104, Austin, Texas
78701.

ORIGINAL

MAY 20, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
David E. Keltner
Joseph Latting
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Paul N. Gold
Carl Hamilton
David B. Jackson
Hon. Doris Lange

MEMBERS ABSENT:

Alejandro Acosta Jr.
Ann T. Cochran
Michael T. Gallagher
Anne L. Gardner
Hon. Clarence Guittard
Franklin Jones, Jr.
Thomas S. Leatherbury
Gilbert I. Low
John Marks, Jr.
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
W. Kenneth Law
Thomas C. Riney
Hon. Paul Heath Till

MAY 20, 1995

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1 CHAIRMAN SOULES: Thank you-all
2 for coming this morning on Saturday morning at
3 this early hour to get our work done. We are
4 over to, what, interrogatories?

5 PROFESSOR ALBRIGHT: Rule
6 No. 7, which is presentation of privileges and
7 objections. And as I recall -- I was just
8 trying to read the transcript and I didn't get
9 all the way through it, but my recollection is
10 on Rule 7 that the committee approved our
11 two-step concept of objecting to discovery and
12 then asserting your privileges, but the
13 comment was, is that our rule was too
14 difficult to understand. So we were sent back
15 to redraft to make the concept clearer in the
16 rule.

17 So we moved it around. We put the
18 objections first, and the objection concept is
19 that the first thing you do within the time
20 that you have to respond to a discovery
21 request is to object to the question itself.
22 If something is wrong with this question, I
23 don't have to respond to it at all, or I only
24 have to respond to a part of it because it's
25 overly broad, that type of objection to the

1 request for discovery itself.

2 After that has been resolved I guess it
3 doesn't really have to be -- yeah. I guess it
4 does have to be resolved. Then when you are
5 responding to your request you then say, "I am
6 responding to your request completely or
7 partially, and here is the information or
8 materials responsive to your request, but I am
9 withholding particular documents or
10 information or materials because they are
11 privileged," and then you state your
12 privilege. That is what we are calling a
13 withholding statement. I am withholding on
14 the -- the particular documents on the basis
15 of attorney-client and work product privilege,
16 for instance.

17 Then the next step would be that the
18 party that's requesting the discovery could
19 then ask the responding party who is
20 withholding the documents to describe the
21 information and materials in such a manner
22 that without revealing the privileged
23 information itself will enable other parties
24 to assess the applicability of the privilege.
25 So this would be some sort of privilege log.

1 It need not be a detailed document by
2 document, but I believe at the meeting in
3 January there was a discussion about you could
4 lump groups of similar documents together.
5 "Correspondence between Susman and client for
6 over these years or these months," whatever.

7 The (c) on page 14, trial preparation
8 materials, we are excluding from this entire
9 process trial preparation materials:

10 "Materials created by trial counsel in
11 preparation for the litigation in which the
12 discovery is requested need not be included in
13 a withholding statement or a description
14 except upon court order."

15 The third part of the rule is the hearing
16 where any party can request a hearing to
17 resolve the objection or the privileges
18 asserted, and the testimony is either by
19 affidavits or live testimony. Then we
20 just -- the hearing rule is really not
21 different from the current hearing rule. Then
22 on page 15, No. 4, ruling, we have the court
23 overruling the objection or granting the
24 objection.

25 If there is an overruling of the

1 objection or withholding statement, we would
2 require a response within 30 days of the
3 court's action, and then the last sentence
4 that is underlined was added in the meeting in
5 which we discussed this rule. "If the suit
6 proceeds to trial without a hearing on
7 properly asserted objections and privileges,
8 the objection or privilege is deemed sustained
9 unless during trial the judge determines that
10 the objection or privilege must be overruled
11 to prevent a miscarriage of justice."

12 I think the best thing is for you-all to
13 read over this rule pretty carefully and see
14 if you think it adequately states the concept
15 that we are trying to put into place. I think
16 we voted on the concept, as I recall, but
17 everybody -- a majority approved of the
18 two-step concept of objection and then
19 withholdings on the basis of privilege.

20 CHAIRMAN SOULES: Okay. Don
21 Hunt.

22 MR. HUNT: Let me ask you a
23 question in connection with 7(1) on page 13.
24 This has to do with the exchange of language,
25 the last sentence which was struck and the

1 sentence in the middle which was added after
2 the "unless."

3 PROFESSOR ALBRIGHT: Okay.

4 MR. HUNT: It appears as if the
5 party who has an objection can hold his own
6 hearing and say it's unreasonable and not do
7 anything, where the prior language at least
8 had an obligation to respond to that to which
9 he had no objection. Now, he can just say,
10 "Well, I object to just about everything, or
11 even that to which I have no objection I can't
12 supply very easily because of the stuff to
13 which I do have objection."

14 PROFESSOR ALBRIGHT: Well, I
15 think the intent was to continue that
16 obligation, that if you object to part of the
17 discovery request. You have requested
18 documents from 1950 to the present, and I just
19 think that's unreasonable. I will agree to
20 produce documents from 1980 to the present.
21 In some circumstances it may be reasonable for
22 me to go ahead and produce the documents from
23 1980 to the present. In other situations it
24 may not be. If the documents from 1950 to the
25 present are all mixed up and I would have to

1 do two identical searches then it makes more
2 sense to get the objection resolved before the
3 search is made.

4 MR. HUNT: Oh, I agree.

5 PROFESSOR ALBRIGHT: We were
6 just trying to protect that ability in this
7 rule.

8 MR. HUNT: What troubles me is
9 the language "unless the party has determined
10 that it's unreasonable." Perhaps if we just
11 said that unless it's unreasonable under the
12 circumstances. It's this power that the rule
13 gives the party to sort of be judge and jury
14 at that point until you go to court.

15 PROFESSOR ALBRIGHT: Scott, do
16 you recall where that language came from? I
17 think we probably put it in there so that we
18 do have a unilateral determination so that you
19 just say whether you are going to do it or
20 not, and if the other party doesn't agree,
21 they can say, "Okay. We have got to have a
22 hearing to determine that right now."

23 HONORABLE F. SCOTT MCCOWN: It
24 does in a sense do exactly what you are
25 saying, which is allow a party to make his own

1 initial decision about that, but what the rule
2 is designed to do is say that -- and I don't
3 know if the words captured this exactly, but
4 it's designed to say you've got to produce
5 everything you don't have an objection to, and
6 then like Alex said, it may be that you don't
7 have an objection to producing it, but it's
8 mixed in with a bunch of stuff that you do
9 have an objection to producing, and rather
10 than make you do two expensive searches it's
11 reasonable to wait and go to the courthouse to
12 have a hearing to decide what it is you are
13 going to have to produce so you just have to
14 do the search once.

15 And the enforcement, I guess, of that
16 would be that, you know, if they ask for tax
17 returns from '70 to '90, and you had them in
18 chronological order, and you had an objection
19 to everything but '90 and you didn't produce
20 '90, you know, it would be pretty clear you
21 would be in violation of the terms of the
22 rules. So the reasonableness of your call is
23 going to be subject to scrutiny by the judge.

24 CHAIRMAN SOULES: Well, I think
25 Don's pointing out something a little

1 different from that. You wouldn't be in
2 violation of this rule if the party -- if you
3 thought it was unreasonable, even if it was
4 not -- even if it was unreasonable for you to
5 so behave objectively you wouldn't be in
6 violation of this rule as written if you
7 subjectively thought you were being
8 reasonable.

9 MR. KELTNER: Couldn't you take
10 out the language on that last "that party has
11 determined"?

12 PROFESSOR ALBRIGHT: Right.
13 But if I can respond, I think we put that in
14 on purpose because we did not want to make
15 this decision a sanctionable decision. I
16 mean, if it's -- we wanted you to be able to
17 make that decision fairly comfortably without
18 having to worry about if I'm wrong, if the
19 judge thinks, you know, I should have just
20 made the decision a little bit differently.

21 We are not talking about gross abuses of
22 discovery. We are talking about I made the
23 decision a little bit wrong. Should that be
24 sanctionable? And I think the reason we have
25 put that in there is to set a standard that

1 was, you know, if you in good faith make this
2 decision then it's not sanctionable, it's up
3 to the other party to get a --

4 CHAIRMAN SOULES: It looks to
5 me like this is going to build in incredible
6 delays. David Keltner.

7 MR. KELTNER: Yeah. I think
8 this is an exception that flaws the rule, and
9 it's one of those things that a party can
10 unilaterally take an action that appears under
11 the rule to escape any sanction, and one, I
12 doubt if the court is going to want to adopt
13 something in discovery that escapes a
14 sanction, and then two, I think the exception
15 is a little bit too broad.

16 I think by the eliminating of that
17 language a party knows that he or she is
18 constrained to be reasonable in the
19 withholding of documents or things, and this
20 is a response, remember, to written discovery,
21 and I would eliminate the language or the
22 words "that party has determined."

23 CHAIRMAN SOULES: Okay. Is
24 that a motion?

25 MR. KELTNER: Yes.

1 HONORABLE F. SCOTT MCCOWN: Can
2 I make one more comment about that?

3 CHAIRMAN SOULES: Not 'til we
4 get a second. Is there a second?

5 MR. HUNT: I will second it.

6 CHAIRMAN SOULES: Moved and
7 seconded. Now, discussion on deleting that
8 language?

9 HONORABLE F. SCOTT MCCOWN: I
10 don't feel strongly either way. I just want
11 to point out, though, that in terms of
12 delaying discovery that we are imposing a new
13 duty that you don't have now. Now you are
14 served with the request, you respond. If you
15 make objections to a particular request, you
16 have no duty to do a search or to try to put
17 on the table what you don't have an objection
18 to or to do any unilateral offer up. So this
19 imposes for the first time a duty of
20 unilateral offer, and so our thinking was that
21 that would speed discovery. It wouldn't make
22 it worse than it is now in any case, and we
23 wanted parties to be comfortable with assuming
24 that new duty.

25 CHAIRMAN SOULES: But you

1 didn't intend it to be providing them with
2 something else new, i.e., a new delay tactic?

3 HONORABLE F. SCOTT MCCOWN:

4 It's not a new delay tactic because right now
5 you have no duty to make a unilateral offer
6 up. So it doesn't make anything worse than
7 the present system. It improves it, and it
8 only speeds. It would never delay because
9 right now you have got no duty to do this at
10 all. You can make your objections. Then you
11 have to have a hearing. They have to get an
12 order. Then your duty to respond occurs.

13 CHAIRMAN SOULES: I think we do
14 have this duty today.

15 MR. ORSINGER: I do, too.

16 CHAIRMAN SOULES: And more and
17 more -- I know the way we practice and more
18 and more almost universally I see the other
19 side practice, they make these objections.
20 Some of them are prophylactic, and some of
21 them are real, but subject to that objection
22 even if it's a real one they respond to the
23 extent they can do so without going past their
24 real objection, and it is in the practice
25 right now.

1 MR. JACKS: And they are
2 sanctioned if they don't, commonly.

3 CHAIRMAN SOULES: It can be.
4 Certainly ought to. Anyway I guess it's
5 really do we leave the language in or out?
6 Richard Orsinger.

7 MR. ORSINGER: It seems to me
8 that we could take the language out and still
9 protect the example that you gave, Alex,
10 because if someone had their documents from
11 1950 mixed up with their documents from 1970
12 forward and they didn't want to have to make
13 two passes through the warehouse, they could
14 just object that it would be unduly burdensome
15 for them to have to make two passes, and
16 therefore, they don't want to make any passes
17 until after the judge has ruled how far back
18 they have to go.

19 And they could protect themselves from
20 that unnecessary work by objecting to the more
21 recent part because of the undue burden of
22 having to do it twice, and you don't need this
23 "unless" clause to protect that because you
24 can protect yourself with an objection, but if
25 you leave the "unless" clause in there, even

1 if you don't have an objection you could just
2 arbitrarily say that I find it unreasonable,
3 and there would be no -- nothing would happen
4 until the court ruled, and then if it was in a
5 bad faith assertion or arguably bad faith,
6 there is no sanction.

7 CHAIRMAN SOULES: Okay.

8 Everybody ready to vote? Those in favor of
9 leaving the language in, leaving it as written
10 here, leaving the language in. "Unless that
11 party has determined" -- no. The language
12 that we are talking about is the word or words
13 "that party has determined."

14 PROFESSOR DORSANEO: "That."

15 CHAIRMAN SOULES: "That."

16 Those five words. Those in favor of leaving
17 those in Rule 7 show by hands. Two. Those in
18 favor of it being deleted show by hands. Ten.

19 Now, it will be deleted by a vote of ten
20 to two. Okay. What's next? Anything else on
21 Rule 7, paragraph (1)?

22 MR. KELTNER: Yes. Yes. I
23 have one other --

24 CHAIRMAN SOULES: David
25 Keltner.

1 MR. KELTNER: I am a little bit
2 concerned about the first sentence, and I
3 intentionally am not raising this in
4 subcommittee. The first sentence reads, "A
5 party shall not object to an otherwise proper
6 request on grounds it calls for the specific
7 materials or information subject to the
8 privilege pursuant to Rule 4." That will
9 change our practice because unburdensome and
10 all-encompassing, harassing, all that kind of
11 stuff is not in a privilege and probably isn't
12 going to be in a privilege under Rule 4,
13 although it probably is going to be covered in
14 the rules.

15 PROFESSOR ALBRIGHT: No. Okay.
16 What this is saying is that you do not object
17 on the grounds of privilege which are stated
18 in Rule 4.

19 MR. KELTNER: Oh, that's right.

20 PROFESSOR ALBRIGHT: Okay. So
21 what we are doing is we are starting out the
22 very first sentence saying what you don't do
23 is assert your privileges.

24 MR. KELTNER: I agree with you,
25 and I know that's what we intend to do. I

1 think it's going to be read a little bit
2 differently by practitioners.

3 CHAIRMAN SOULES: How so,
4 David? I mean, I want to follow what you're
5 saying because we want to avoid that.

6 MR. KELTNER: Well, I worry if
7 somebody is just picking this up and reading
8 it, and says, "Well, I don't have to object.
9 All I have got to do is withhold, but that's
10 only for a privilege."

11 CHAIRMAN SOULES: Since (2)
12 says "if the written discovery request is
13 otherwise objectionable"?

14 MR. KELTNER: Yeah. I think I
15 am wrong.

16 PROFESSOR ALBRIGHT: We worked
17 and worked on this.

18 MR. KELTNER: I am wrong.

19 CHAIRMAN SOULES: Are you
20 satisfied now? Because, I mean, if you are
21 confused, we are going to have a whole lot of
22 other people confused.

23 MR. KELTNER: I'm satisfied.
24 I'm sorry.

25 PROFESSOR ALBRIGHT: I would

1 really appreciate everybody reading this
2 carefully. We have worked and worked trying
3 to make this clearer and kept changing the
4 order of sentences trying to make it as clear
5 as possible, but we would gladly accept
6 suggestions.

7 CHAIRMAN SOULES: Well, I
8 appreciate your flexibility on that, and I
9 think that's very important, and that's what
10 we need to get about. Bill Dorsaneo.

11 PROFESSOR DORSANEO: Well, I am
12 concerned with two things with respect
13 primarily to the first sentence of proposed
14 Rule 7 in the objection paragraph and also the
15 first sentence in the withholding privileged
16 information and materials paragraph. My
17 concern essentially involves the idea of
18 building in waiver problems unnecessarily by
19 virtue of requiring a strict adherence to a
20 particular method of preserving complaints.

21 I think the first sentence of the entire
22 rule would work as well mechanically if its
23 tone was changed to say that a party, you
24 know, need not object to an otherwise proper
25 request and if the first sentence in the

1 second paragraph was framed affirmatively but
2 without saying "only in accordance with this
3 section," you know, by just taking out the
4 "only."

5 Maybe that doesn't make that large a
6 difference to anyone, but I wouldn't want to
7 get in a position where somebody, you know,
8 makes an objection with respect to a matter
9 that's privileged, and they don't exactly file
10 a thing that's a withholding statement, and
11 some court somewhere says, "Well, you did it
12 with the wrong club, and therefore, even
13 though I am completely aware of what you're
14 saying you've waived your complaint. Welcome
15 to Texas."

16 You know, I appreciate the importance of
17 having a procedure that is the procedure to be
18 followed, but I think we ought to provide for
19 a little bit of play in the joints from the
20 standpoint of how the language is crafted.

21 CHAIRMAN SOULES: So as I am
22 understanding what you're proposing -- and
23 let's put it in the form of a motion if you
24 wish -- that we would change the word "shall,"
25 the third word in the first sentence here, "a

1 party shall" to "a party need not."

2 PROFESSOR DORSANEO: Uh-huh.

3 CHAIRMAN SOULES: And also that
4 we delete in subsection (2) the word "only"
5 from the first line after the word -- after
6 "discovery."

7 "A party may preserve a privilege from
8 discovery in accordance with this section."

9 PROFESSOR ALBRIGHT: If we do
10 that, I would like to delete "may" and just
11 say, "A party preserves a privilege in
12 accordance with this section." Because "may
13 preserve" sounds like it's optional.

14 CHAIRMAN SOULES: Okay. Is
15 there a second, and I'm not sure exactly what
16 the language is but the concept --

17 MR. LATTING: Yes. I second
18 it.

19 PROFESSOR DORSANEO: I am more
20 concerned with the concept than the specific.
21 There may be some other only's and some other
22 shall's in here that --

23 CHAIRMAN SOULES: I am trying
24 to just get it in words so we can get it in
25 the form of a motion, but there is a motion

1 and a second to the concept. At least I think
2 we all have that. Discussion? Judge McCown.

3 HONORABLE F. SCOTT MCCOWN:

4 Well, I think Bill makes an interesting point
5 from the point of view of the responding
6 party, but we were thinking of it from the
7 point of view of the asking party, which is
8 that our task was to get rid of prophylactic
9 objections. If you allow a responding party
10 to object and preserve objections that way as
11 opposed to go through our regime of the
12 withholding statement then you haven't gotten
13 rid of prophylactic objections.

14 They will continue to be there. If they
15 are there then you have got the same problem
16 you have now, which is you have to go down,
17 you have to get a hearing. You have to get
18 them overruled to know with any certainty that
19 you are getting the things you have asked for
20 and they are not hiding behind the objections,
21 which they are entitled to rely upon until
22 it's overruled, and so we deliberately went in
23 this direction to say you can't do this by
24 objection, but you have to do it through the
25 procedure that we have outlined. So while I

1 understand what you're saying, it gives us
2 back again the problem that we were trying to
3 fix.

4 CHAIRMAN SOULES: Paul Gold.
5 Then I will get Tommy Jacks.

6 MR. GOLD: Yeah. I see where
7 Bill is coming from as well, but if you put
8 the language at the beginning that Bill is
9 recommending, "the party need not," it's
10 pretty much the same thing as what you have in
11 the deposition rule right now where you can
12 reserve objections until the time of trial and
13 everybody proceeds with making objections
14 during the deposition, which is what we are
15 trying to correct as well.

16 This is critical, I believe, and everyone
17 that I have talked with at seminars that I
18 have spoken at, everyone agrees that this
19 prophylactic objection regime is causing more
20 wasted time than anything else, and I don't
21 think that we should put into the rule
22 something that will give a responding party
23 the idea that they can preserve those
24 objections that way, because we are just
25 opening the door right back up again.

1 CHAIRMAN SOULES: Tommy Jacks.

2 MR. JACKS: I am not sure I
3 understand the full extent of Bill's proposal.
4 Under Bill's proposal could a party object,
5 withhold, but not file a withholding statement
6 and still be considered to have preserved a
7 ground of privilege?

8 CHAIRMAN SOULES: They don't
9 object. You're saying --

10 MR. JACKS: They object just as
11 they do now.

12 HONORABLE SCOTT BRISTER: They
13 do now file a prophylactic objection.

14 CHAIRMAN SOULES: Yes. This
15 proposition would allow that.

16 MR. JACKS: Then I'm against
17 it, and the reason I am against it is because
18 another of our aims here was not only to
19 hopefully prevent prophylactic objections but
20 also to let the requesting party know when
21 they see an objection on grounds of privilege
22 whether there are, in fact, documents being
23 withheld or not, and that's the function of
24 the withholding statement, so that you get
25 around this game of withholding without really

1 disclosing that you are withholding.

2 CHAIRMAN SOULES: Joe Latting.

3 MR. LATTING: I think my second
4 was intemperate, and I now wish to withdraw
5 it.

6 CHAIRMAN SOULES: Let me put
7 this concern out, and I don't know how to fix
8 that. It's kind of sort of maybe a silly idea
9 about how to fix it, but what we are going to
10 run -- we are going to change the practice
11 absolutely, and these rules are going to come
12 effective on some date, and how many lawyers
13 will by that date really understand what this
14 is all about we don't know, but certainly not
15 all of them will. Perhaps, most of them will
16 not.

17 Then a serious problem comes up because
18 somebody uses the old practice instead of the
19 new practice trying to preserve error. Is
20 there any way or does it make any sense to
21 have a grace period maybe written into this
22 rule which we would repeal next time so that
23 it says for a period of one year either way
24 goes? They can do it under the old rule or
25 the new rule. I mean, the consequence of

1 privilege waiver is pretty severe, and it
2 bothers me to change this so completely and
3 absolutely and then visit on a lot of our
4 brothers and sisters some malpractice issues.
5 I don't know whether that makes any sense or
6 not, but it's my concern. Could you-all
7 discuss that for me? Tommy Jacks.

8 MR. JACKS: I guess -- and I
9 recognize the concern, and I think it's a
10 valid concern. At the same time I would say
11 we have got lawyers practicing today that
12 haven't yet figured out our current discovery
13 law even though much of it's been on the books
14 since the 1970s. We are changing the
15 landscape, and we are changing the landscape
16 in other important ways as well. The
17 limitations we're putting on discovery, I
18 mean, the lawyer that, you know, forgets about
19 the 50-hour rule could find himself totally
20 screwed because there is important discovery
21 yet to be done and then the lawyer is out of
22 time.

23 It seems to me that the promulgation of
24 these rules is going to be accompanied by such
25 fanfare and that every CLE provider in the

1 state is going to be scrambling falling all
2 over each other trying to be the first to
3 offer definitive seminars on these new rules.
4 All of our lawyers are required to attend 15
5 hours of that stuff every year, and board
6 certified lawyers more than that, and I don't
7 think it's asking too much.

8 Frankly, I think the committee has done a
9 great job with this rule. I think when you
10 read it, and read the comments that accompany
11 it, it's very clear what they are doing. It's
12 a clearer road map in some ways than trying to
13 piece together our current discovery law when
14 one has to consult, heaven forbid, cases as
15 well as rules in order to figure out
16 everything that's going on, and so I'd say a
17 grace period is unnecessary. I think lawyers
18 can be expected to read it and learn it.

19 CHAIRMAN SOULES: Well, unless
20 somebody really disagrees with Tommy I don't
21 think we need to pursue this any further.

22 HONORABLE F. SCOTT MCCOWN: Can
23 I add one additional comment? This is
24 actually, the way this rule functions, it's
25 going to make the inadvertent waiver of a

1 privilege pretty difficult because you don't
2 have to assert the privilege until you have
3 actually got the materials in front of you,
4 you know you have got them, and you are
5 withholding them. So it's tied to specific
6 materials you have, and so because you don't
7 have to make any prophylactic objections to
8 preserve the privilege, it ought to be a more
9 gentle system than the present system.

10 HONORABLE SCOTT BRISTER: And
11 playing it out, so let's say you live in a
12 cave; you don't know the rules have been
13 changed; you file your standard prophylactic
14 objections; and then what happens? The other
15 side files a motion to compel saying, "Hey,
16 there is new rules. They haven't filed a
17 withholding statement. They are waived." You
18 wake up, file a belated withholding statement;
19 and as I read Rule 6, the sanction question is
20 going to be whether this belated withholding
21 statement would presumably before trial cause
22 the other side to be unable to prepare for
23 trial. The answer to that is almost always,
24 "No." No sanction. And now you know to do it
25 right in the future. Right?

1 CHAIRMAN SOULES: I don't see
2 how No. 6, Rule 6, address this. I thought
3 that was --

4 HONORABLE SCOTT BRISTER:
5 That's the only sanction for anything, right?

6 CHAIRMAN SOULES: Well, yes,
7 but that's -- can they use something they
8 failed to produce, not must you get something
9 they failed to protect.

10 HONORABLE SCOTT BRISTER: Yeah.
11 But the only -- so the only time limit -- if
12 there is no -- if you have got to do this to
13 preserve your privilege, you file it late.

14 HONORABLE F. SCOTT MCCOWN:
15 Wait. Can I address this?

16 CHAIRMAN SOULES: And that's
17 not the end of the sanctions consideration
18 either, Judge Brister. I mean, we are going
19 to be visiting sanctions as we go forward.
20 Judge McCown.

21 HONORABLE F. SCOTT MCCOWN: We
22 worked through this problem, and it's kind of
23 tricky. So let me kind of take you through it
24 because it took us a while to figure it out.
25 But here's how Rule 6 comes into play and what

1 the answer is. If you file a belated
2 withholding statement, okay, and it is, in
3 fact, privileged, which means that the other
4 side is not entitled to it, our reasoning was
5 that there probably ought not be any penalty
6 because you have filed a belated withholding
7 statement, but the court's determined that it,
8 in fact, was privileged which meant that the
9 other side never should have seen it.

10 The problem is you file a belated
11 withholding statement, and it, in fact, is not
12 privileged, and you should have produced it.
13 Well, then you are into Rule 6 because it's
14 stuff that the other side was entitled to that
15 you didn't timely produce.

16 CHAIRMAN SOULES: Bill
17 Dorsaneo.

18 PROFESSOR DORSANEO: How can I
19 tell the difference between a withholding
20 statement and a set of prophylactic
21 objections? I mean, what does a withholding
22 statement look like? From this paragraph it
23 just looks like it's a document that makes
24 claims of privilege.

25 HONORABLE F. SCOTT MCCOWN:

1 There is an easy way to tell the difference.
2 A withholding statement will always have
3 behind it specific documents that you are not
4 producing, and so if you file the withholding
5 statement and the other party then goes
6 through the procedure to put you to your
7 proof, there will always be something that you
8 would have to submit for in camera inspection
9 if you got down to it.

10 PROFESSOR DORSANEO: But
11 those -- when you say "it has behind it" --

12 MR. GOLD: Not literally.

13 MR. SUSMAN: It means only if
14 there are specific documents that you have in
15 mind at the time you give the other side a
16 withholding statement --

17 PROFESSOR DORSANEO: So why
18 would --

19 CHAIRMAN SOULES: Let Steve
20 finish.

21 MR. SUSMAN: Because what
22 happens is you give me a withholding statement
23 that says, "I am withholding documents on the
24 ground of the attorney-client privilege,"
25 which is what your statement says.

1 I say, "Bill, tell me" -- I write you a
2 letter, and I say tell me -- or send a
3 request. "Tell me what they are. Comply with
4 the next sentence of the rule, (b)."

5 You have got 15 days then to identify it.
6 So you better -- I mean, if you don't have
7 something at the end of 15 days I am going to,
8 you know, raise hell, go to the court, do
9 something, say this is ridiculous. So that's
10 the point. I mean, the point is you have got
11 15 days after you say, "I did it," to describe
12 what it is you did. That's clearly not going
13 to be a prophylactic deal.

14 PROFESSOR DORSANEO: People who
15 want to make prophylactic objections when they
16 don't need to make them will want to make them
17 in withholding statements just as much as they
18 want to make them now in the list of
19 objections. They don't have to make them. It
20 seems clear to me that they don't have to make
21 them despite some courts of appeals decisions
22 now.

23 People like to make them because it's
24 easier to make them so they won't overlook
25 something and they won't have to do any

1 thinking. Now, if you allow the withholding
2 statement to make claims of privilege and you
3 only get to a level of specificity when there
4 is a "Okay. What are you really talking
5 about" letter. Then why require the thing to
6 be called a withholding statement?

7 MR. GOLD: Luke?

8 CHAIRMAN SOULES: Paul Gold.

9 MR. GOLD: What happens
10 now -- and I sense that everybody's experience
11 is a little bit different, but what I
12 typically get is I will get a response that
13 will set out a number of objections. They
14 will just send out all the objections that
15 they can conceivably think of, and then you
16 have to call the person or I have to call the
17 person and say, "Okay. You have listed all of
18 these objections, which ones are real and
19 which ones are virtual?" And you have to find
20 out if they are withholding particular
21 documents with regard to each objection.

22 With regard to the holding statement, the
23 withholding statement that we are talking
24 about, they have to specifically state that
25 they are withholding documents now, right now.

1 Not in the future, not some inchoate claim.
2 They are withholding documents now because of
3 this particular privilege.

4 And the reason for that is, is when we
5 were on the task force we explored the concept
6 of having -- we would say we are not
7 requesting attorney-client privileged matters,
8 attorney work product matters, and that got to
9 be incredibly difficult. This way you can see
10 I am withholding documents because of
11 attorney-client privilege. You can say,
12 "Well, I don't care about those documents,"
13 but if the person says, "I am withholding
14 documents because of trade secrets," you go,
15 "Okay. I want to know what those are." But I
16 believe it completely obviates this
17 prophylactic objection regime that we have
18 right now.

19 PROFESSOR DORSANEO: Well, I
20 think the withholding statement paragraph
21 should say something like current Rule 274
22 says with respect to charge objections about
23 prophylactic objections are inappropriate, and
24 it ought to be clearer that you only make an
25 objection with respect to information or

1 specific information or materials that you are
2 withholding.

3 MR. GOLD: We have that.
4 That's the one that John Marks was insensed
5 about several meetings ago, the one where you
6 cannot make multiple objections. I forget
7 where that is, though.

8 MR. KELTNER: You can't
9 obscure.

10 MR. GOLD: You can't obscure
11 the real objection with other types of
12 objections.

13 MR. SUSMAN: It's in our
14 comment. I mean, look at the comments. You
15 know, you-all, I will say this, that --

16 PROFESSOR DORSANEO: That's in
17 the paragraph on objections.

18 MR. SUSMAN: I mean, we are
19 redebating at the last meeting or at our
20 meeting in January on page 5858 of the
21 transcript this whole notion of withholding
22 statements as a way of asserting privileges.
23 The whole concept was approved in a vote that
24 was 13 to 3, page 5858.

25 CHAIRMAN SOULES: All Bill is

