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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
NOVEMBER 18, 1995

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 Taken before William F. Wolfe,
Certified Shorthand Reporter and Notary Public
in Travis County for the State of Texas,
on the 18th day of November, A.D. 1995,
between the hours of 8:10 o'clock a.m. and
12:00 o'clock noon, at the Texas Law Center,
1414 Colorado, Rooms 101 and 102, Austin,
Texas 78701.

NOVEMBER 18, 1995

MEMBERS PRESENT:

Charles L. Babcock
Pamela S. Baron
Hon. Scott A. Brister
Prof. Elaine A. Carlson
Hon. Sarah B. Duncan
Hon. Clarence A. Guittard
Gilbert I. Low
John H. Marks, Jr.
Russell H. McMains
Robert E. Meadows
Harriett E. Miers
Richard R. Orsinger
Anthony J. Sadberry
Luther H. Soules III
Stephen D. Susman
Paula Sweeney

EX OFFICIO MEMBERS:

Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Prof. Alex Albright
David J. Beck
Ann T. Cochran
Prof. William Dorsaneo
Michael T. Gallagher
Anne L. Gardner
Michael A. Hatchell
Charles F. Herring, Jr.
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
David E. Keltner
Joseph Latting
Thomas S. Leatherbury
Hon. F. Scott McCown
Anne McNamara
Hon. David Peeples
David L. Perry
Stephen Yelenosky

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
W. Kenneth Law
O. C. Hamilton, Jr.
Paul N. Gold
David B. Jackson
Doris Lange

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1 (Meeting called to order
2 at 8:10 a.m.)

3 CHAIRMAN SOULES: We can come
4 to order now, and we'll go to work here. The
5 first thing I want to do this morning is get
6 these Sanctions Rules approved in their final
7 form so we can send them to the Court. They
8 were sent out on November the 8th, and
9 there -- you'll see it says "Report to the
10 Supreme Court Advisory Committee on Proposed
11 Changes to the Sanctions Rules." It's got a
12 Rule 13 and a Rule 166d not redlined, and then
13 it's got the same two rules redlined behind
14 it -- well, I don't think 166d is redlined. I
15 think it's probably sort of a departure from
16 215 that we just didn't -- it's not done in
17 redlines.

18 Anyway, the only thing that came to my
19 mind here is this on page -- the second page
20 of Rule 13, one, two, three, four paragraphs
21 up where it starts with the paragraph "an
22 order." And then on the first page of 166d,
23 the paragraph in the middle that says
24 "Order." They talk about "conduct meriting
25 sanctions," and that just doesn't seem like it

1 connects to me. I thought merits were what
2 you got for doing good things and -- I mean,
3 should we say "conduct demeriting sanctions"?
4 Can we find another word for that?

5 MR. BABCOCK: Warranting.

6 CHAIRMAN SOULES: Deserving or
7 requiring sanctions?

8 MR. SUSMAN: How about
9 deserving? Is "deserving" too English?

10 CHAIRMAN SOULES: What word?
11 Warranting or requiring?

12 MR. BABCOCK: Warranting.

13 MR. SUSMAN: Expressly or
14 implicitly.

15 HON. PAUL HEATH TILL: Never
16 use one word where two will do.

17 CHAIRMAN SOULES: Okay. We'll
18 change "meriting" to "warranting." And with
19 those changes does the Committee approve these
20 for forwarding to the Supreme Court with our
21 recommendation to adopt them? Any dissent to
22 that? No dissent. They will go forward
23 then. They will go with my signature to the
24 Court with the recommendation that they be
25 promulgated.

1 Okay. Richard, let's proceed with
2 whatever you think. Why don't you just give
3 us what you think or how you think your report
4 should be prioritized so as to flange it up
5 with the discovery and other rules that we've
6 worked on.

7 MR. ORSINGER: Let me say first
8 of all that in all the correspondence this
9 subcommittee was called Rules 15 through 165,
10 but there is a Rule 165a for dismissals for
11 want of prosecution that's not in Steve's area
12 of 166, so I went ahead and added it to mine.

13 CHAIRMAN SOULES: It needs to
14 be in yours. Thank you. 165a.

15 MR. ORSINGER: My original
16 desire would be to have Bill Dorsaneo explain
17 to everyone the Rules Revision Task Force
18 recommendation about restructuring the rules,
19 but he had to fly back to Dallas and promised
20 me he would be in this morning. I don't know
21 if he will or not. But I'm not going to get
22 into that at length right now. I think what I
23 propose that we do is see an example of how
24 this works by taking -- well, I don't know.
25 Luke, did you want to do just the discovery

1 related stuff first?

2 CHAIRMAN SOULES: It seems to
3 me that we should concern ourselves first with
4 the rules that are going to be essential to
5 the proper operation of the Discovery Rules.

6 MR. ORSINGER: Okay. Well, I'm
7 not sure we've written all of that.

8 CHAIRMAN SOULES: Do you agree
9 with that?

10 MR. ORSINGER: I'll go along
11 with that. The first one that probably
12 touches on it is Rule 47, and you should have
13 a single sheet that says "Subcommittee's
14 Proposed Changes to Rule 47." And all of this
15 material is on this table down here at the
16 end. It's a single page.

17 HON. SCOTT A. BRISTER: These
18 haven't been passed out?

19 MR. ORSINGER: No.

20 HON. SCOTT A. BRISTER: Why
21 don't we -- I'll pass them out.

22 MR. ORSINGER: There's a lot to
23 pass out there, Judge.

24 CHAIRMAN SOULES: Everybody
25 line up and pick up a copy of each thing.

1 MR. ORSINGER: This first one
2 is the one-page thing, "Rule 47, Claims for
3 Relief." And this came up to the subcommittee
4 in a dual proposal relating to Rule 45 and
5 Rule 47, which was initially a proposal that I
6 had made, and my proposal on Rule 45 was shot
7 down.

8 It would have -- it was in response to
9 the discovery limitations and the fact that a
10 case's preparation was now going to be
11 front-end loaded, as I saw it, rather than
12 back-end loaded. And so I had proposed that
13 we require that when a party relies upon a
14 constitutional, statutory or regulatory
15 provision, it shall be identified in the
16 pleading. When a party relies upon a
17 recognized cause of action or defense, it
18 shall be identified in the pleading.

19 And then some examples were given which
20 are now carried forward under 47: "Plaintiff
21 sues Defendant for negligence in part for
22 violating Revised Civil Statute Annotated
23 6701d, Section 35," or "Plaintiff was
24 contributorily negligent, and Defendant
25 invokes the comparative responsibility

1 provisions of Chapter 33," and similar.

2 And my thought was that we are going to
3 have to force lawyers to understand their
4 cases earlier on, because there are a lot of
5 lawyers that file lawsuits and get down to the
6 charge conference and still haven't figured
7 out exactly what their cause of action is or
8 how it's going to be expressed to the jury.
9 And my desire was to have everyone see in the
10 pleadings as early as possible what the theory
11 of the case was and whether it was supported
12 by a recognized tort, supported by a statute
13 or whether it was new law. The subcommittee
14 shot that down.

15 I had made also a proposal on Rule 47 for
16 claims for relief, that we insert this
17 underlined language "stating the legal basis
18 for each claim and giving a general
19 description of the factual circumstances."
20 And I had proposed stating the specific legal
21 basis, and the subcommittee shot that down
22 too.

23 So what we're left with is this proposal
24 here on Rule 47 that the pleadings filed by
25 the parties contain "a short statement of the

1 causes of action, stating the legal basis for
2 each claim and giving a general description of
3 the factual circumstances sufficient to give
4 fair notice of the claim involved."

5 And it was the subcommittee's view that
6 that is in fact what the cases say your
7 pleadings must do right now, but it's not what
8 the rule says that your pleadings must do
9 right now.

10 There was, however, support for some of
11 these examples that had been used under
12 Rule 45 in the proposal and have now been
13 moved over to Rule 47. But the examples are
14 something that are probably more intuitive.
15 In other words, you may like the examples or
16 you may dislike the examples that are under
17 the "Notes and Comments." Obviously they are
18 not required, but they give a form or an
19 example of a pleading that, if people followed
20 them, it would cause them to think through
21 what their case is and it would allow the
22 other party to see more evidently what the
23 nature of the claim is without having to rely
24 so much on the discovery process to figure
25 that out.

1 So what the subcommittee ultimately
2 recommended is no change to Rule 45 on
3 definition and system, but under Rule 47,
4 Claims for Relief, we insert this underlined
5 language and then we have a note or comment
6 here to explain what our goal is in terms of
7 pleading requirements.

8 Now then, I'm a little uncertain as to
9 whether this Committee recommends comments
10 that go to the rule or whether there is such a
11 thing as a comment to a rule or not, or
12 whether this is just us talking to each
13 other. Luke, can you enlighten me on that?

14 CHAIRMAN SOULES: Well, if we
15 recommend to the Supreme Court that they
16 publish a comment to a rule, they may or may
17 not do that. If they do, then you will see
18 that there are some Advisory Committee
19 comments at places in the rules, in the
20 published rules, not to the same extent that
21 you find in the federal rules, though.

22 MR. ORSINGER: Okay. Well, the
23 comments --

24 CHAIRMAN SOULES: But they may
25 be notes and comments to communicate to the

1 Committee rather than to the bar.

2 MR. ORSINGER: Well, there are
3 some of those in our proposals, but this is
4 conceived of as a comment to the judges and
5 the practicing bar. And it's by way of
6 example that maybe people would emulate, but
7 that is not -- we don't necessarily want to
8 mandate it.

9 CHAIRMAN SOULES: Steve
10 Susman.

11 MR. SUSMAN: Are these -- is
12 the language you've used here the exact
13 language we've used in the interrogatory --
14 we've put some language to get rid of
15 contention interrogatories but said you could
16 use contention interrogatories for the purpose
17 of obtaining the -- was this --

18 MR. ORSINGER: No.

19 MR. SUSMAN: Was this the
20 source of that language?

21 MR. ORSINGER: No. If it's
22 similar, I don't --

23 MR. SUSMAN: We ought to check
24 that language and make sure that they are
25 consistent. It sounds very close to the

1 language. Does someone have the Discovery
2 Rules here, I mean the ones we -- the
3 July 27th version of the Discovery Rules? I
4 can find exactly where that place is.

5 CHAIRMAN SOULES: We probably
6 have them here, Steve.

7 MR. SUSMAN: Oh, here they
8 are. Thanks.

9 All right. It's close. "Contention
10 interrogatories may only request another party
11 to state the legal theories and to describe in
12 general the factual basis for the claims or
13 defenses of that party." And there is a
14 footnote that reads, "Open-ended contention
15 interrogatories may be used only to secure
16 information that would be provided if the
17 other party were required to plead more
18 particularly."

19 I mean, that's -- I think it's good to
20 have these consistent. Now, one of the
21 questions one might ask is, I guess, do you
22 need contention interrogatories at all if the
23 pleading rule -- if a pleading rule is going
24 to require in the first instance that you do
25 that, maybe we just should can contention

