SUPREME COURT ADVISORY COMMITTEE

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NOVEMBER 19 - 20, 1993

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NOVEMBER 19, 1994 MEETING

MEMBERS PRESENT:

Alejandro Acosta Jr.
Prof. Alexandra W. Albright
Charles L. Babcock
Pamela Stanton Baron
Pat Beard
David J. Beck
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Ann Tyrrell Cochran
John E. Collins
Tom Davis
Prof. William V. Dorsaneo III
Sarah B. Duncan
J. Hadley Edgar
Kenneth D. Fuller
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Tommy Jacks
Franklin Jones Jr.
Joseph Latting
Gilbert I. Low
Honorable F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriet E. Miers
Richard R. Orsinger
Honorable David Peeples
David L. Perry
Dan R. Price
Anthony J. Sadberry
Luther H. Soules III
Sam D. Sparks
Stephen D. Susman
Paula Sweeney
Harry L. Tindall
Stephen Yelenosky

MEMBERS ABSENT:

Gilbert T. Adams
Frank Branson
Judge Solomon Casseb
Vester Hughes
Donald Hunt
David Keltner
Thomas Leatherbury
John Marks
Steve McConnico
Charles Morris
John O'Quinn
Tom Ragland
Harry Reasoner
Judge Raul Rivera
Broadus Spivey

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
Doak Bishop
Hon Sam Houston Clinton
J. Shelby Sharpe
David B. Jackson
Hon. Doris Lange
Chief Justice Austin McCloud
Thomas C. Riney
Hon. Paul Heath Till
Hon. Bonnie Wolbrueck

EX OFFICIO MEMBERS ABSENT:

Paul Gold
Judge Bob Thomas

OTHERS PRESENT:

Chief Justice Thomas Phillips
Lee Parsley, Supreme Court Staff Attorney
Holly Duderstadt, Soules & Wallace

1 P R O C E E D I N G S
2 Friday, November 19, 1993
3 8:30 a.m.
4
5 MR. SOULES: I guess we'll
6 get started. I'm sorry that we didn't have
7 seating at the table when you got here. There
8 are materials, name tags up here on this
9 table; and then there are some materials that
10 Bill Dorsaneo, his task report and a
11 preliminary report from David Keltner's
12 discovery task force which is also behind us.
13 If you don't have copies of those, you can
14 pick them up when it's convenient. We aren't
15 going to get to those materials probably
16 before the morning break anyway, so you
17 can -- we can wait.
18 I'm Luke Soules. I'm the
19 Chair of your committee. The Supreme Court
20 has over the years given a lot of deference to
21 what this committee has been able to imbue to
22 the Court in its recommendations. I welcome
23 particularly all the new members that the
24 Court has recently appointed and the old
25 members with whom I've had the privilege to

1 work for several years.
2 To my right here is Holly
3 Duderstadt who is the real brains behind the
4 Chair of this committee, because she is the
5 one who puts the materials together and keeps
6 us organized over the months. I think it's
7 been at least a couple of years since we've
8 had a meeting, because the task forces have
9 been working, and these materials are what
10 have accumulated in addition to those that the
11 task forces have generated.
12 At the other end of the room
13 there is Anna Renken who is a court reporter.
14 She will be recording your comments, the
15 proceedings of this committee for the next day
16 and a half, and she asks that you state your
17 name before you give remarks so that she can
18 identify you on the record; and these name
19 tags are not -- aren't written large enough in
20 a room like this for her to be able to read
21 all the way across, so what will be
22 important. She may also at some point, as
23 court reporters do, stop us in midstream at
24 some because of interference with her ability
25 to transcribe. Feel free to do that if I

1 don't help you do it.
2 Again, welcome. And we'll be
3 in session. We have of course the liason
4 member of the Supreme Court of Texas with us
5 today, Justice Nathan Hecht. Justice Hecht,
6 welcome. If you have any remarks, we would
7 appreciate hearing them.
8 JUSTICE NATHAN HECHT: Let me
9 begin by saying that the Court looks upon this
10 group as one of the most important advisory
11 groups that it has. It has existed since the
12 Rules Enabling Act first gave our Court power
13 to promulgate rules of procedure for the
14 courts in Texas. It functions in the same
15 important capacity that similar groups around
16 the United States do including the Rules
17 Advisory Committees to the United States
18 Supreme Court.
19 Over the years in the 50 some
20 years that our Rules of Civil Procedure have
21 been in effect in their present form there
22 have been a number of changes, but they seem
23 to have increased in the late '70s and mid
24 '80s the number of changes and the frequency
25 of changes to the point that we have heard

1 some complaint expressed by members of the Bar
2 that the rules are changing too quickly and we
3 should settle on a set and let them work for
4 several years.
5 We have not made changes in
6 our Rules of Civil Procedure since 1990, but
7 in the few years since then already there have
8 been some of the most profound changes in the
9 operation of our courts across the country
10 that we have seen in the last 50 years and
11 really in this century.
12 So now we are confronted with
13 a number of very important issues that several
14 task forces have been working on, and the
15 Bench and Bar of Texas is waiting expectantly
16 for your wisdom on these changes. The good
17 news I have for you is that the -- my
18 colleagues have selected you among the lawyers
19 of Texas for your experience and intellect and
20 what you bring to the table, and for the
21 wisdom that we can get out of you on these
22 issues. So I pass that compliment on to you.
23 That is the reason why you are here. The bad
24 news is that your compensation is inversely
25 proportional to that experience and intellect,

1 and that makes your presence here all the more
2 important to us, because we are very aware
3 that you devote your time and energies to
4 this.
5 You can see from the materials
6 in front of you that the work over the next
7 several months will be daunting, but I believe
8 we look forward to making some real changes in
9 the Texas Procedure to bring our courts, make
10 our courts ready for the 21st century.
11 Every member of the Court is
12 aware that we are meeting, and they are all
13 interested, and many of them will drop by from
14 time to time during the course of our
15 meetings, and they have authorized me in a
16 rare display of unanimity to express my
17 gratitude to you on behalf of the Court and
18 our very high hopes for the product.
19 So thank you very much for
20 being here. Also let me mention we also
21 operate at another propitious moment in
22 history, which is that we seem to have the
23 blessing of the legislature on this. It has
24 happened that they have a number of other
25 problems to concern themselves with, and they

1 look at this work now as not interfering with
2 theirs, but in supplementing and really
3 relieving them of some of these problems.
4 So as a demonstration of that
5 the Court has been given an additional legal
6 position to help us assimilate your
7 recommendations and pass on our thoughts to
8 you. We have filled that position with
9 Lee Parsley who is seated here to my left. He
10 is now the staff attorney for the Court
11 assigned to my chambers to assist us in this
12 process. So Lee's presence here is not only a
13 relief to us, but is also a nice signal from
14 the legislature that they look favorably at
15 least for now on what we're about to do.
16 Thank you for being here.
17 MR. SOULES: Thank you,
18 Justice Hecht. In the interim since the last
19 rule changes four task forces have been at
20 work, one on sanctions which was chaired by
21 Chuck Herring, one on discovery which was
22 chaired by David Keltner who can't be here
23 today for a family illness matter, and a task
24 force to review whether or not the rules
25 should be essentially rewritten and

1 reorganized which was chaired by
2 Bill Dorsaneo, and a task force on the jury
3 charge which was chaired by Judge Ann
4 Cockran.
5 I thought we would -- my own
6 approach to organizing this meeting, to the
7 extent I'm capable of doing that, I thought we
8 would start with the task force reports and
9 take them one at a time and see if this
10 committee could conclude its proceedings on
11 those reports, at least two, the sanctions
12 report and the jury charge report today.
13 The discovery task force has
14 not yet completed its work, and it's expected
15 within the next month, so we're not going to
16 be looking at a final report for action from
17 them. And the report from Bill is more a
18 discussion item I think than an action item,
19 if I understand that. Justice Hecht, could
20 you maybe tell us exactly what the Court's
21 thinking is on Bill's report?
22 JUSTICE NATHAN HECHT: Well, we
23 just got it yesterday, so we haven't had time
24 to think about it too much; but one of the
25 reasons for the appointment of Bill's task

1 force was to consider recodifying all of the
2 Rules of Civil Procedure. You'll see from the
3 introductory memo to his report that there are
4 some very strong reasons for regrouping and
5 recodifying the Rules of Civil Procedure much
6 the same way that the recodification process
7 has proceeded in the legislature, the way the
8 TAP Rules have been regrouped; and there are
9 some very good reasons for this.
10 We are -- the Court is
11 sensitive to complaints that if you go through
12 and re-number all the rules and change them
13 all around, it's going to mess up legal
14 research, it's going to cause complications
15 with carry-over citations of authority from
16 the old rules to the new rules; but by the
17 same token if real progress can be made by
18 doing this, then we're very much in favor of
19 that. So as this proceeds we kind of need to
20 keep in mind the possibility of regrouping
21 Rules of Procedure to accompish that.
22 MR. SOULES: Okay. With the
23 Court's concurrence the Chair appointed
24 subcommittee Chairs and Vice-Chairs. In each
25 case where there was a task force the

1 Vice-Chair is the person who chaired the task
2 force. As far as the sanctions task force is
3 concerned the sanctions report, Steve Susman
4 is the chair for Rule 215, and actually that
5 that should include 13.
6 I'm sorry. Joe Latting is the
7 Chair of 215; and actually I should say 13
8 also, because that's made a part of the
9 report. And Chuck Herring is the Vice-Chair.
10 If you two of you would proceed to give us a
11 report on 215 and 13. So I'll call on you,
12 Joe, to begin.
13 MR. LATTING: Thank you,
14 Luke. I am Joe Latting, and I'm pleased to be
15 here. I don't think I'm officially a member
16 of this committee yet, but Luke said that
17 didn't matter.
18 MR. SOULES: You did a good
19 job.
20 MR. LATTING: In January I
21 will be. But also I didn't know that we were
22 in charge of work on Rule 13. We haven't met
23 yet since we were just appointed. What we'll
24 do is after we hear the remarks of the members
25 of this committee today and hear some of their

1 views we'll schedule a meeting at the
2 convenience of the members of the committee
3 and hear what people feel needs to be done
4 with sanctions.
5 Really the thing to be done
6 today I think is to hear from Chuck Herring
7 who has produced a very high-quality report
8 here on sanctions in the task force work. I
9 guess everyone has that. It certainly is a
10 place to start, and so without further adue
11 I'll recognize Chuck.
12 MR. HERRING: You have the
13 task force report. I doubt that anyone other
14 than those who are here who had to be on the
15 task force have read it. I'm not sure why
16 anyone would want to read all of it, but
17 anyway, you have that.
18 And I don't know how you want
19 to proceed, Luke, but I assume that the
20 subcommittee that have some jurisdiction on
21 this will meet and carve this up and play with
22 it some more, and then we will re-gather at
23 some point with specific rules in front of us
24 proposed that people have had a chance to
25 read.

1 But for now what I can do is
2 give you a little background of what the task
3 force did and point you to some of the rules
4 or at least those two you mentioned, Luke,
5 that I guess Joe and I am charge of in this
6 committee. We have a few other members of the
7 committee. We have the always voluble Rusty
8 McMains is here and the always hard working
9 Judge Scott Brister. I see a number of the
10 people who participated here. "Voluble" is a
11 compliment to you, Rusty.
12 The task force started in and
13 was appointed June 19th of 1991 by the
14 Supreme Court just as the other three task
15 forces were appointed the same day. We had 10
16 members. We had lawyers and judges. We had
17 about 40 other people who showed up at one of
18 the first two or three meetings. Over time
19 attrition kind of wore them down, and we ended
20 up with a smaller and smaller group. We had a
21 lot of people who participated in the
22 process.
23 The background as we
24 understood it was that the 1984 amendments
25 which increased sanction practice in Texas

1 really in an effort to decrease the amount of
2 discovery dispute, the pendulum had swung a
3 little too far the other way, and we ended up
4 spending too much time and effort on
5 sanctions. Tommy Jacks and others have
6 written about that and have raised the issue;
7 and with kind of that background we read
8 everything we could find and started looking
9 at the sanctions including obviously Rule 13,
10 the pleadings sanctions rule; Rule 215, the
11 discovery sanctions rule which was the major
12 focus, but there are several other rules that
13 had minor changes and provisions. We tried to
14 look at those as well.
15 We tracked the pending Federal
16 Rule amendments that are being developed at
17 the same time, Rule 11 in particular. We
18 spent a lot of time with the ABA litigation
19 section standards which are in the back of the
20 report. We sent out a questionnaire. We had
21 250 responses from lawyers and judges about
22 evenly divided between lawyers and judges, and
23 the responses were interesting.
24 I'll mention just a few of
25 them. Basically the lawyers and judges agreed

1 on a lot of the kind of simple conclusions
2 about sanctions practices. They agreed by a
3 very large margin that we're spending too much
4 time and money on sanctions practices in
5 Texas, that the rules have encouraged Rambo
6 techniques and practices, that the rules
7 regarding sanctions ought to be changed, that
8 we should require some form of trial court
9 finding in serious sanctions instances, that
10 sanctions should be discretionary instead of
11 having the mandatory language that appears in
12 some of the sanctions rules, that there ought
13 to be a Safe Harbor Provision in Rule 13,
14 pleadings sanctions rule more or less as it
15 now appears in Rule 11 in the new pending
16 draft, that there should be oral hearings
17 before the serious sanctions were imposed,
18 that the rules ought to include some comments,
19 some commentary that would give a little
20 further explanation of what is going on, and
21 several other items.
22 In the task force report you
23 have all of the questionnaires and all of the
24 results; and it makes interesting reading, I
25 think. Essentially though the changes that

1 were proposed in Rule 215, the discovery
2 sanctions rule attempt to codify the
3 Supreme Court's teachings in Transamerican v.
4 Powell and in Braden v. Downey.
5 Joe Latting told me this
6 morning he looked at the report and went
7 through it and said, "Really all it says is
8 read Transamerican"; and that may be a long
9 way of saying it, but there's a lot of truth
10 in that, kind of the essence.
11 The goals were to try to
12 reduce the amount of time and effort to try to
13 give us some procedure that made sense both
14 when you're dealing with minor sanctions and
15 then when you're getting into death penalty or
16 severe sanctions and to codify those cases.
17 What I'll do, as was proposed,
18 is talk through the Rule 166d proposal in 215
19 and point out some of the changes. Everyone
20 here is going to have to, if you have the time
21 and interest, go read that rule and decide if
22 it works and what is stupid about it, if any.
23 There is no magic to the task
24 force. We had a lot of people that worked on
25 it, but this draft that you will have at the

1 back of this report are the product of
2 compromise, and there is not a huge amount of
3 magic. About halfway into what is called the
4 Report Of The Texas Supreme Court Task Force
5 On Sanctions the appendices start. Appendix A
6 is titled Rule 166d. That's a meaningless
7 number. We stuck that on there simply because
8 we knew that Bill Dorsaneo was going to be
9 revising and reorganizing all of the rules,
10 and that probably the sanctions rule would end
11 up being put someplace closer to the general
12 discovery rules than where it is now. But
13 that Rule 166d was really for practical
14 purposes present Rule 215 as proposed to be
15 modified.
16 Let me get some of the key
17 points. The first sentence there is pretty
18 simple. It is very broad and perhaps somewhat
19 vague; but it's an effort to eliminate a lot
20 of the complicated and confusing itemization
21 that appears in Rule 215 right now of what is
22 sanctionable conduct that's kind of developed
23 and treated over the years; and the idea was
24 that we'd just put a sentence in there that it
25 was not intended to eliminate any of the

1 previous kinds of conduct that were itemized
2 in
3 Rule 215, but simply to have a shorter, more
4 succinct way of pointing to that conduct. And
5 you'll notice if you go into --
6 MR. SOULES: This is at
7 Appendix A? Excuse me.
8 MR. HERRING: Yes.
9 MR. SOULES: Is that correct?
10 MR. HERRING: "Appendix A,
11 Rule 166d" is what it says at the top.
12 And you'll notice there is a
13 long comment to the rule; and it pretty much
14 explains the rule and how it is set up. It
15 says there, for example, in that first
16 sentence it has the itemization, collected all
17 the previous kinds of specifically itemized
18 misconduct, and said that the rule is not
19 attempting as amended or as proposed to
20 eliminate any of that.
21 Section 1(a) deals with the
22 motion, and we tried to clarify what kind of
23 motion you have to file and what ought to be
24 in it and how it is handled. The motion is
25 supposed to be specific. You'll notice in all

1 of these proposals in the sanctions report we
2 have proposed eliminating sua sponte
3 sanctions; and there has been some
4 disagreement in the case law about when you
5 can and when you can't have sua sponte
6 sanctions by the Court.
7 The idea there was we've got
8 too much sanctions practice, too many people
9 filing sanctions motions. If the parties
10 don't care about it, why should the Court get
11 into sanctions practice? You may have intent
12 where they may need to do something there, but
13 it is pretty simple for a judge to invite a
14 motion, and if somebody is upset, they're
15 going to file it, and that that was one way to
16 perhaps reduce a little bit of some of that
17 sua sponte work.
18 There is a basic requirement
19 of an oral hearing, and we set out some
20 procedural sections, or tried to, that would
21 apply in major sanctions cases. And I'll talk
22 about a term on that, what will we talk about
23 as major sanctions in a moment. But the idea
24 is that there ought to be basically an oral
25 hearing unless the parties waive it, which

1 they're free to do, if there are what we call
2 substantial sanctions.
3 And in Paragraph 2 there is a
4 basic distinction that I really hope you will
5 think about and decide if it makes senese or
6 is practical or not. We were trying I think
7 with the leadership of Judge Brister to
8 distinguish between cases where somebody
9 doesn't answer interrogatories, or you just
10 need to go to court to get a response. It's
11 not a major, terrible, egregious sanction
12 situation, but you still have to go to the
13 courthouse and you ought to be able to get
14 attorney's fees. You ought not to have a very
15 detailed procedural exercise to just have the
16 judge say, "Answer the interrogatories, and
17 here is $250 attorney's fees." It ought to be
18 simple.
19 That is different from a
20 potential death penalty or major sanction.
21 And that's the theme, that distinction, that
22 we tried to build into the rule here. Thus
23 the Paragraph 2 of the rule which is entitled
24 "Relief" really attempts to deal in
25 significant part with that minor sanctions

1 situation.

2 But going back to the

3 beginning here just when you file your motion

4 it is pretty much standard. We require a

5 certificate of conference as we now have under

6 Rule 166b(7) before someone files a sanctions

7 motion. The hearing that would be required

8 unless waived by the parties or unless you're

9 dealing with a minor sanctions situation is

10 set out in Paragraph 1(b).

11 And then we say what the Court

12 should base its decision on, because there is

13 not really anything in the rule right now that

14 says that, and that is itemized in Paragraph

15 1(b). And then we talk about about the order

16 in Paragraph 1(c), and it would be a written

17 order. We make clear that sanctions, this

18 proposal does, may be against the party or a

19 lawyer or a law firm. Obviously that has been

20 up in the air, or there have been a few gaps

21 in the Federal practice in this regard.

22 And then we come to kind of a

23 fun part, and that is under Paragraph 1(c) the

24 order and the findings issue. Should a trial

25 court have to make findings before it imposes

1 sanctions? And the basic approach that this
2 rule adopts is if there again are substantial
3 sanctions, yes, unless the parties waive it.
4 Should the judge have to enter a written
5 finding? We decided, again with the
6 leadership of Judge Brister, I think, that
7 "no," because a lot of our trial judges
8 because we underfund our trial judges in
9 Texas, they don't have secretaries and don't
10 have the time to be able to write up findings,
11 and it gets to be a little bit of a joke
12 sometimes when the other side just submits
13 written proposed findings to be signed. But
14 at least the judge ought to state findings
15 into the record.
16 And the four elements are set
17 out there that need to be stated in those
18 findings in the substantial sanctions
19 situation. Number one, the conduct merit in
20 sanctions. Number two, the reasons for the
21 Court's decision; number three, why a lesser
22 sanction would be ineffective; and number four
23 which really goes to a death penalty
24 situation, if a sanction would preclude a
25 decision on the merits of a claim,

1 counterclaim or defense, the conduct
2 demonstrating that the party or the party's
3 counsel has acted in flagrant bad faith or
4 with callous disregard to the rule. You'll
5 recognize a lot of that language as being
6 pulled directly out of Transamerican and
7 Chrysler v. Blackmon. But anyway, that's the
8 findings provision there.
9 The relief Paragraph 2 that I
10 had earlier alluded to which deals, first of
11 all, we clarify that you can still get an
12 order to compel and an order to quash
13 discovery as provided in 166b, and this rule
14 is not entitled to change that practice. And
15 then it goes on to say in addition so long as
16 the amount involved is not substantial, the
17 Court may award the prevailing party
18 reasonable expenses necessary in connection
19 with the motion including attorney's fees.
20 And then
21 it -- we have a provision that simply says the
22 Court may presume the usual and customary fee
23 in connection with the motion is not
24 substantial unless circumstances or an
25 objection suggests that it may preclude access

1 to the court. So again, this is basically a
2 small motion, a little bit of attorney's fees,
3 a simplified procedure is what the goal of
4 that is.
5 Now, what's substantial?
6 That's a good question. And we wrestled with
7 that that we could either come up with a
8 clear, bright line artificial and arbitrary,
9 or that we could have a flexible standard that
10 is vague; and that's I guess the limit you
11 always have in writing the rules. In the
12 comments someplace we say as long as the
13 amount awarded -- "the additional safeguards
14 are required unless waived by agreement. If
15 the amount involved is substantial either in
16 absolute terms or in relative terms taking
17 into account financial resources of the
18 parties or entity liable," so it's a relative
19 standard.
20 Why have a relative standard
21 on what is substantial? We had Legal Aid
22 lawyers who made the point that a sanction of
23 $100 for someone who is indigent may be very
24 substantial and have a real impact, whereas a
25 sanction of $10,000 for IBM may not be

1 substantial. That approach may or may not
2 work and you may or may not like that
3 distinction, but that was the idea: more
4 procedural protection of "substantial," and
5 that would be a relative standard. Does that
6 get us into a Lunsford kind of situation where
7 every time you want to have a hearing you've
8 got to decide, "Well, what is this, what is
9 the financial status, does this outfit really
10 have a bunch of assets or not, what is the
11 trial judge going to do?" As a practical
12 matter in any questionable case he or she will
13 have a hearing, and we'll go from there, the
14 procedure from there.
15 Anyway, that was how that came
16 out. Paragraph 2 continues the ability of the
17 trial court to apportion expense awards and to
18 kind of go back and forth between the parties
19 or award no expenses.
20 Paragraph 3 is entitled
21 "Sanctions," and this lists the Paragraph 3
22 sanctions, "If the Court is going to award one
23 of these, it must go through the hearing
24 procedure." There is not a lot of difference
25 in these sanctions than you would see in the

1 current rule. They are very similar. That
2 list is. There is a little bit of
3 clarification, a couple of changes I want to
4 draw to your attention or at least a couple of
5 items that the cases have been split on.
6 The rule however at the
7 beginning says that -- again, this is language
8 right out of Transamerican and out of
9 Chrysler. "Any sanction imposed must be just
10 and must be directed for remedying the
11 particular violations involved. The sanctions
12 should be no more severe than necessary to
13 satisfy the general purposes." And then it
14 lists the sanctions.
15 Let me mention a few of them.
16 The rule alludes to "reprimand," and in fact
17 we've had just a little recent discussion
18 about the reprimand provision on our task
19 force. Should a judge be able to reprimand
20 someone without going through the procedural
21 rigmarole? Part of the answer to that is,
22 "What is a reprimand?" Is a reprimand when
23 the judge off the record says, "You guys have
24 got to cut out this discovery feuding. This
25 is a waste of all of our time. Let's get down

1 to the meat of the case"? Or is a reprimand
2 where a judge says something on the record
3 that is more formalized, actually a written
4 reprimand?
5 The reason that that was
6 considered important or that we talk about it
7 at some length was the potential effect of a
8 reprimand. We are seeing that more and more
9 in Federal Court. There have been some
10 instances where lawyers have had their careers
11 and their reputations and their clients,
12 reputation of clients affected very negatively
13 by reprimands.
14 "Reprimand doesn't sound bad.
15 Who cares what the judge said." But it can
16 have an effect. When you fill out your
17 certification form if you've been certified in
18 Texas in an area of practice, there is a
19 question on there "Have you ever been
20 reprimanded by a judge?" So it can have some
21 effect.
22 We are seeing it more in the
23 grievance setting. I recently defended a
24 lawyer in the grievance setting where the
25 basis of the grievance was the sanctions order

1 which contained a reprimand and a finding that
2 talked about the lawyer. So there was
3 consideration that reprimand really is and can
4 be very significant and that ought to be
5 considered a substantial sanction and there
6 ought to be protections built in.
7 Nothing is going to prevent
8 the judge from having that warm conversation
9 off the record saying, "Lawyers, you have got
10 to stop this. Party X, You need to stop this
11 kind of conduct in the case." That's one
12 thing we talked a little bit about.
13 The Paragraph 3 or Item 3(c)
14 there talks about assessing a substantial
15 amount in expenses including attorney's fees
16 of discovery or trial. That's the substantial
17 financial award would come under that, except
18 that you will also see that Paragraph or
19 Subpart (g) there refers to granting to
20 movement a monetary award in addition to or in
21 lieu of actual expenses. So even above
22 attorney's fees that would allow a financial
23 award.
24 Should the rule have that?
25 Should it not have that? The cases right now,

1 as you know, are split in terms of whether
2 there must be a sanctions monetary award that
3 is tied to actual expenses, or whether the
4 judge has the authority to go farther in some
5 cases and say, "Well, there may not have been
6 much lawyers fees here or other expense, but
7 darn, this is a time where there ought to be a
8 financial negative deterrent applied in this
9 case."
10 The Justice Gonzalez'
11 concurring opinion in Transamerican and the
12 ABA standards and most the commentators would
13 allow at least the possibility of a financial
14 award over and above attorney's fees in a
15 severe sanction situation. One of the
16 subissues that we talked about a lot, we
17 didn't find solutions for, but it relates to
18 that a little bit, is the problem of legal
19 malpractice. As you know, most legal
20 malpractice insurance policies have an
21 exclusion for amounts awarded as penalties or
22 sanctions, and that creates the ironic
23 situation that in some cases it's better if
24 the judge death penalties you out of
25 existence, because then the client can sue the

1 lawyer and recover under the malpractice
2 policy; whereas the sanctions, the monetary
3 award may not be. There is nothing we can do
4 about that that we can think of, but that is a
5 problem out there.
6 We are also beginning to see
7 in Federal Court, as you've noticed probably,
8 some cases where the judges hold Lawyer X, and
9 there have been a couple of these in
10 government lawyer cases, "You cannot get
11 reimbursed from an insurer, law firm, anybody
12 else. This is personal financial sanction
13 penalty that you pay." We didn't try to get
14 into that or address it.
15 The other sanctions are pretty
16 clear. You'll notice Part (h) there requiring
17 community service, pro bono legal services,
18 Continuing Legal Education or other services.
19 Judges are doing that, those kinds of things
20 all over now. Obviously <u>Braden</u> involved an
21 award or a requirement of the performance of
22 10 hours of community service for the Harris
23 County Protective Services or Child Protective
24 Services Agency to the lawyer, and that's been
25 affirmed now going back. And then judges are

1 awarding or requiring Continuing Legal
2 Education. We tried to clarify that in the
3 broad language of the rule.
4 And then we continue to have
5 the broad last provision there under Paragraph
6 3 which would allow other orders as are just,
7 the theory being the judges need to have the
8 freedom to adapt and creatively adapt
9 sanctions practices involving fact situations
10 experiences.
11 Paragraph 4 is the compliance
12 paragraph, and that is really just a Braden
13 paragraph is what that is. It says, "Monetary
14 awards pursuant" and those subparagraphs above
15 that deal with monetary awards "shall not be
16 payable prior to final judgment unless the
17 court makes written findings or oral findings
18 on the record stating why an earlier
19 assessment of the award will not preclude
20 access to the court." That essentially is
21 exactly what Braden says.
22 One difference there is, that
23 again, we would allow the trial judges to make
24 oral findings on that point stated in the
25 record; and Braden I think talks in terms of

1 written findings.

2 And then the personal service,

3 the next sentence there, the personal service

4 sanctions under Paragraph 3(h) also would have

5 to be after judgment just as the Court ruled

6 in Braden to allow somebody to appeal before

7 they performed the services. And then the

8 Review/Appeal provision.

9 That is a pretty quick

10 introduction as to how that proposal is set

11 up, and there is nothing magic. That can be

12 improved, and some of those concepts the

13 committee may decide that you do not like.

14 Our subcommittee hasn't even addressed the

15 rule yet; and I understand the Chairman here,

16 Latting, is requesting any input and is going

17 to meet at some time to address that. That's

18 Rule 215.

19 MR. SOULES: Okay. We

20 would --

21 MR. HERRING: I can talk about

22 Rule 13, if you want.

23 JUSTICE NATHAN HECHT: Let me

24 say that the Court of Criminal Appeals has a

25 liason to this committee also, and he is a

1 senior judge of that court, Sam Houston, who
2 has come into the room.
3 MR. SOULES: Good morning,
4 Judge. Welcome. Nice to see you.
5 MR. SOULES: By way of
6 clarification, we want to try to get this done
7 today, if we can.
8 MR. HERRING: That's up to the
9 committee, if everyone here has time --
10 MR. SOULES: We're here --
11 MR. HERRING: -- to analyze
12 and digest and make improvements. That's fine
13 with me. It seems a daunting task. Whatever
14 you want to do.
15 MR. SOULES: Well, we have a
16 lot on the agenda. We probably are going to
17 meet at least every other month over the next
18 18 months, and we may not be able to get this
19 buttoned up. Probably we won't, but we can at
20 least get a lot of what we -- we can work
21 through this, see what the committee feels is
22 okay, determine what the committee feels needs
23 additional work in the subcommittee, if there
24 is any such additional work that is needed;
25 and on this and the Court's charge we would

1 like to get as far as we possibly can today
2 towards the final recommendation to the
3 Supreme Court on what the committee
4 recommends, and then go on forward later with
5 other pieces of the agenda.
6 So that the purpose of the
7 debate is clear, we are trying to work through
8 here to say, "This looks fine. This doesn't,"
9 and then debate that out to either resolution
10 or recommendation on how it should be changed
11 and get down to business.
12 MR. HERRING: That's fine.
13 Our subcommittee had talked about going at it
14 a little differently, but we can certainly get
15 all the inpit or whatever you want to do,
16 Luke. I think our view was in the future at
17 least it would be more helpful to us if we had
18 a subcommittee that proposed a rule in advance
19 of meetings of the subcommittees that were
20 able to meet and let us have some time to read
21 the rules and think about how they work or
22 don't work with the backup materials before we
23 just showed up at the meeting with everybody
24 saying things for the first time. We would be
25 glad to --

1 MR. SOULES: Is this what you
2 have though?
3 MR. HERRING: Well, the task
4 force. The subcommittee hasn't met.
5 MR. SOULES: Right. Okay.
6 MR. HERRING: Would you
7 like -- do you want to talk about that rule
8 now, or do you want me to tell you what the
9 task force proposed for Rule 13?
10 MR. SOULES: What works
11 better for you? Do we need a picture of 13
12 and some of these other rules before us before
13 we go into it?
14 MR. HERRING: I have a
15 judicial ruling to my left from a local judge
16 that we should talk about this first rule
17 first.
18 MR. SOULES: The first rule
19 first. Okay.
20 HONORABLE F. SCOTT MCCOWN:
21 That's only because, Mr. Chairman, that there
22 is something that I wanted to say about this;
23 and I think Chuck's group did a good job on
24 this rule, and what I'm about to say now I
25 went to his group and said, and it was

1 rejected there and may well be rejected here,
2 because I guess I'm just swimming upstream.
3 I think this whole approach is
4 a mistake and there is no tinkering with this
5 rule that is going to solve the problem; and
6 if the Supreme Court would authorize an
7 experiment to pick a dozen or 20 trial courts
8 at random and said, "The rule in those trial
9 courts was motions to compel only, no
10 sanctions," and another 20 trial courts and
11 said, "The rule in these trial courts is
12 Chuck's 166d," and ran that experiment for a
13 year or two years, and then went back and
14 evaluated how fast the cases were resolved and
15 the cost of resolving the cases and the
16 justice that was done, no sanctions is going
17 to be a superior system to sanctions.
18 And sanctions doesn't work.
19 It's satellite litigation. It doesn't produce
20 justice. It's expensive. It's slow, and what
21 we have been trying to do now for years is
22 tinker with our sanctions rule to somehow
23 solve the underlying problems. This rule is
24 no different than the rule we have. It's just
25 fancier, and I think we ought to try something

1 radically different.

2 MR. HERRING: Let me add in

3 addition to Judge McCown there was as least

4 one other that came and said that we really

5 ought to not even rule on attorney's fees, I

6 guess, because we had one discipline. You

7 might even have --

8 HONORABLE F. SCOTT MCCOWN:

9 Well, but this is an area where no rule

10 produces a superior product than a rule.

11 MR. HERRING: And we did not

12 feel as a task force free to go quite that far

13 in terms of, and I would never call Judge

14 McCown radicalizing, but substantial change in

15 current practice. Our effort really

16 was -- he's exactly right -- an incremental

17 effort to try to address some of the problems

18 within the rules under the teachings of the

19 Supreme Court. And he makes a very, very good

20 point, a very good philosophical point the way

21 we do litigation generally. That's something

22 I know Mr. Keltner's task force on discovery

23 and changes in procedure in Federal Court,

24 that all of us are very sensitive to. We felt

25 that Judge McCown, if not ahead of his time,

1 was ahead of our time and our task force and
2 couldn't go that far. We were sympathetic to
3 his perception of the bigger problem here.
4 And do sanctions work? The
5 other place that came up very strongly was on
6 Rule 13; and again the Legal Aid community
7 perceived use of the groundless pleadings
8 sanctions to chill kind of cutting-edge
9 advocacy, and certainly when we get to Rule 13
10 we can talk about that. We didn't find it
11 quite as big a problem in Texas as they did in
12 Federal Court, but a very strong argument was
13 made by a number of people that that rule
14 ought to be abolished completely, that you've
15 got summary judgment. You don't need to have
16 sanctions, because you can file pleadings that
17 ultimately some Court decides to grant.
18 MR. SOULES: Steve Susman.
19 MR. SUSMAN: My question is,
20 if the lawyer's position in the Bar of the
21 State is that sanctions have been over-used
22 and has spurned a lot of unecessary expenses
23 for litigation, if you're still going to have
24 rules that allow a Court to impose sanctions,
25 why don't you make them real specific? Why

1 don't you provide the laundry list around the
2 state to whoever will use it. Why don't you
3 define what "substantial" means rather than
4 have -- I mean, you are just creating more
5 litigation by making the terms general. I
6 mean, if you're going to have them, they will
7 do less harm I think if they are clear, red
8 flags for the Bar "If you do this, you're
9 going to get punished, and this is how much
10 and how quickly" rather than create this whole
11 body of jurisprudence and court decisions and
12 arguments over these kinds of terms.
13 One thing that occurs to me,
14 for example, on the sanctions which are the
15 monetary sanctions which are not substantial,
16 why even have them? If they aren't
17 substantial, what is it discouraging anyone
18 from doing? Just get rid of them.
19 MR. HERRING: You've got two
20 questions there. We had exactly that same
21 debate at a length of some hours, and there
22 are stated strong positions both ways. This
23 is a, as I said, a product of compromise; and
24 you'll see it kind of does both things. That
25 is we have a general statement in the first

1 sentence of Paragraph 1; and then if you look
2 over at the comments to Paragraph 1, you'll
3 see that it alludes to the same itemization
4 and tries to clarify to some extent the same
5 itemization that you extract from all the
6 different cumbersome provisions in Rule 215
7 now, but you are correct in that it is two
8 ends of the spectrum. One way is specific and
9 clear in a laundry list, or you can have some
10 general language and have some guidance in the
11 laundry list in the way it appears in the
12 comment to the rule.
13 The reason we didn't say,
14 "Here's the laundry list" is because, and I
15 think there is some judicial sentiment to this
16 effect, it's very difficult to have an
17 all encompassing laundry list that imagines
18 every way we lawyers can engage in
19 sanctionable conduct of creative, devilish
20 people. And some of the judges wanted to not
21 try to end up with what purported to be an
22 absolutely exhaustive list; but you can argue
23 both sides of that issue.
24 MR. SUSMAN: You have to weigh
25 the possibility that the bad conduct would go

1 unpunished because it's not specifically
2 prohibited with the weight of judicial
3 research in litigating what is bad conduct
4 every time.
5 MR. SOULES: Ken Fuller.
6 MR. FULLER: My question, does
7 your proposed 166d take over the 215 sanctions
8 regarding experts, or is the 215 provision the
9 exclusion, nondesignated experts don't
10 remain?
11 MR. HERRING: It was moved.
12 There are other rules in here we haven't
13 gotten to that would deal with experts.
14 MR. FULLER: Will deal
15 specifically with experts?
16 MR. HERRING: We have a whole
17 section in here on that, and it's pulled out
18 of that rule. We also thought that Judge
19 Keltner in the discovery context might end up
20 addressing that.
21 MR. FULLER: Okay. It's not
22 what we've gone over so far though?
23 MR. HERRING: No. It's a
24 different proposal in here. And without going
25 through that, let me go back to Steve's point,

1 and we can come back and talk about
2 recommendations and report on that.
3 MR. FULLER: Okay.
4 MR. HERRING: But your second
5 point on the nonsubstantial, why have them at
6 all, why say anything, part of it is are
7 attorney's fees ever a sanction? Are they
8 ever a substantial sanction? And if they are
9 a substantial sanction, we all believe they
10 can be at some level, a million dollars or so
11 of sanctioned attorney's fees, then should you
12 have some procedural protections on those?
13 Yes, if they're large. If they're going to
14 get small, you almost have to have some
15 language to carve them out and say, "No, you
16 don't have to do all this with smaller
17 sanctions." That's why there is the
18 distinction drawn in the rule to try to not
19 have to have a hearing in every case, but to
20 recognize that in some cases expenses can be
21 very much a real and severe sanction.
22 MR. SOULES: Alex Albright.
23 PROFESSOR ALBRIGHT: I'd like
24 to go back to Judge McCown's point about
25 revolutionary changes. I think this whole,

1 all of the task forces are going to be coming
2 out with revolutionary changes; and I know
3 that the Court and this committee has been
4 criticized for making changes without knowing
5 what the results of those changes are; and it
6 seems like now is the time to look at what the
7 effect of what we're going to do is, and maybe
8 we should look at more revolutionary changes
9 since this is going to be the only time. I
10 know Justice Hecht has been revising Rule 95.
11 I really thought we have two years. Maybe we
12 should talk about that. Is that something we
13 can do if we need to do it and it's at all
14 practical?
15 MR. HERRING: That's being
16 done on the Federal level with the 1990
17 Improvements Act Committees. All the plans
18 are being put in effect in different judicial
19 districts and federal districts around the
20 country.
21 MS. ALBRIGHT: We can
22 certainly look at what they're doing. It
23 seems like if we have two proposals on the
24 table for discovery or whatever, it makes
25 sense to do some experimentation over a period

1 of time and see what works. I think we can
2 all imagine what might work the best or make
3 changes based on cases that have come down
4 recently, but maybe we should do some major
5 experimentation.
6 HONORABLE F. SCOTT MCCOWN: Is
7 that a possibility?
8 MR. SOULES: Scott McCown.
9 HONORABLE F. SCOTT MCCOWN:
10 Well, I was going to ask Justice Hecht, I know
11 the Court has authorized experimentation with
12 electronic recording as opposed to
13 court reporters in some local courts. Would
14 the Court be willing or do you think there's a
15 possiblity to actually do some big
16 experimenting?
17 JUSTICE NATHAN HECHT: I think
18 the Court would certainly consider it, and it
19 might well be possible. The problem, of
20 course, is measuring which one is better; and
21 we can get apocryphal and those kinds of
22 information that sometimes is not all that
23 helpful, or you can get, try to devise some
24 sort of study. And if you did the latter,
25 you'd have to have the funding, and I don't

1 know what the prospects of funding would be.
2 You might get some grant money some way, but
3 other than that I don't know.
4 MR. LATTING: I was wondering
5 if you were going to publish a list of courts
6 in which you can't be sanctioned. I can go
7 on.
8 MR. SOULES: Judge Brister.
9 HONORABLE SCOTT A. BRISTER:
10 Yes. The idea was, I mean, sanctions is just
11 another name for punishment. I was taught if
12 you've got a rule with no punishment, it's not
13 a rule. It's a suggestion. If we want to
14 just make the discovery rules and discovery
15 suggestions, that's fine; but if they're going
16 to be rules, there's got to be some penalty to
17 doing them. And those penalties are
18 sanctions.
19 Now, the vast majority of the
20 time the sanctions have to do with people that
21 forgot stuff, or were slow with stuff, to busy
22 to do other stuff, and they imposed on
23 somebody else their attorney having to do more
24 than was reasonable, more than was expected,
25 more than would have been required if they

1 would have followed the rules. The question
2 is whether the client, somebody else's client
3 who was innocent of all of that should have to
4 pay their attorney to do that. And the idea
5 is very simply one of justice, no, they
6 shouldn't. Whoever caused that extra expense
7 ought to bear it.
8 Now, that is normally a small
9 amount. That is the vast majority of them, so
10 the idea of the rule was to cover those with
11 the existing practice, because I don't think
12 the cases that have addressed sanctions have
13 been the $250 or $500 sanctions assessments,
14 that the perception is that those are being
15 abused. I don't think most attorneys think
16 those are being abused. When they have to pay
17 them, they have to incur them, they want to
18 get them back.
19 Unfortunately the problem was
20 the cases where some judges who may not have
21 wanted to try the case, or just got frustrated
22 or tired or it was a bad day decided to do
23 something significantly more than that; and
24 the idea of the rule in accordance with
25 Transamerican and Downey is to make that very

1 difficult to do, so make it just as hard to do
2 that so that the judges in those cases tries
3 other things first.
4 I don't see really any way to
5 avoid those things if you want to have
6 discovery rules and if you want to avoid
7 situations where judges just do something out
8 of hand that really prejudices a client in a
9 case.
10 HONORABLE F. SCOTT MCCOWN:
11 Luke, could I respond to that, because I think
12 that's a really important point? I think the
13 reason sanctions cannot work as punishment is
14 because most discovery problems are the result
15 of requests that are at a level of abstraction
16 that require the responding lawyer to do work
17 that he's either not smart enough to do or too
18 lazy to do or comes at too great a cost to do;
19 and punishing him will not solve his laziness,
20 will not make him smarter, and will not put
21 money in the client's pocket that is not
22 there.
23 And as far as the
24 reimbursement goes, the idea that, "Well, the
25 other lawyer and his client are out the bucks;

1 they need to be reimbursed," the cost to them
2 of getting that reimbursement exceeds what
3 they get in two different ways. It exceeds it
4 in an absolute way that pursuing the sanctions
5 is ultimately going to turn out to be more
6 expensive than the reimbursement he's going to
7 get. But it exceeds it in another way, which
8 is that as a whole the sanctions burden the
9 system resulting in them not being able to
10 process their case in a speedy, cheap way
11 because everybody else is processing their
12 sanctions cases.
13 I think that the cure is worse
14 than the disease. If you have an order to
15 compel, and if the order to compel is not
16 complied with, then it can be followed with a
17 motion for contempt. I mean there are ways
18 that the Court can punish and enforce its
19 order at the level that it really becomes a
20 specific order telling a guy to do something
21 that he doesn't do.
22 So you can put teeth into an
23 order to compel after the order, but the
24 sanctions process winds up as just not being
25 worth it either in an individual case or when

1 you look at what it does to the total system.
2 MR. FULLER: That sounds to me
3 like you want to roll the clock back about 15
4 years. Some of us remember when we used to
5 have to do that, and it sucks with problems.
6 It is just the worse possible system that you
7 have got to go down there two times to get it
8 done.
9 MR. SOULES: Let's focus for a
10 moment on Judge McCown's idea of having no
11 sanctions and see what the committee's
12 consensus is on that to begin with. Dan
13 Price.
14 MR. PRICE: Yes. Dan Price.
15 It just seems to me that there is about 90
16 percent of the discovery requests I send out
17 they come back just fine; and the reason they
18 come back fine, and I'm not at the courthouse
19 and nobody ever knows that the other side did
20 just fine in their discovery is because there
21 are ultimate sanctions that people are afraid
22 of; and I don't think we want to throw the
23 baby out with the bath water here.
24 MR. SOULES: Richard Orsinger.
25 MR. ORSINGER: I think we

1 ought to distinguish the recovery of fees
2 incident to resolving the discovery dispute
3 from sanctions that go beyond mere
4 reimbursement, and that you can more easily
5 justify the recovery of fees to someone who
6 has had to go to court to get discovery proper
7 from striking the pleadings or finds that go
8 way beyond the cost of going to court. And if
9 we make that distinction, then it might be a
10 little easier for people to focus on whether
11 we ought to go past reimbursement to
12 punishment. Right now I think we are mixing
13 them together.
14 MR. SOULES: Does anyone have
15 a response?
16 MR. BECK: I don't have a
17 response. But Judge McCown, do you anticipate
18 your sanctionless plan to allow
19 reimbursement?
20 HONORABLE F. SCOTT MCCOWN: I
21 could live with that.
22 MR. BECK: I could see a
23 scenario if a guy had to go to court two or
24 three times to get somebody to comply with the
25 rule that was costing your client some money

1 in attempting to help the client. I would,
2 while I've got the floor, I would also note
3 that with the Federal system there were early
4 implementations in the districts that did
5 their plan pass and was able, were able to
6 generate data that the judicial group is
7 looking at. It's not unprecedented.
8 MR. SOULES: Anyone else?
9 MR. PERRY: I had a case a
10 number of years ago in which the ultimate
11 sanction was imposed against a large
12 nationwide company, and in other cases around
13 the country and around the state in which I
14 was not involved that company began to
15 supplement discovery frantically over the next
16 few months, and apparently in 50 or 60 other
17 cases a tremendous number of discovery
18 disputes were quickly resolved. And it
19 occurred to me that Dan Price's comments about
20 not throwing the baby out with the bath water
21 and how the fear of those sanctions sometimes
22 makes the process run smoothly is something
23 that we should bear in mind.
24 MR. SADBERRY: I'd like to ask
25 Judge McCown do you have any data from any

1 other state systems where such an experiment
2 has been used and any type of response,
3 activity, results, any that have come from
4 that?
5 HONORABLE F. SCOTT MCCOWN:
6 Not that I know of. I've only been practicing
7 12 years, so my memory doesn't run back 15,
8 but most people that I have talked to that
9 practices before the time of sanctions had a
10 different reaction than was expressed by
11 Mr. Fuller. Most people I talked to think
12 that the system before we got a great deal of
13 sanctions litigation worked much better. So
14 if we look kind of historically, maybe factors
15 have changed, but...
16 MR. SOULES: Anything else on
17 whether we should attempt to operate either
18 permanently or temporarily with no sanctions?
19 MR. LOW: Somebody is going to
20 be sanctioned. Either he's going to grant
21 that one, or the man that filed is going to be
22 sanctioned. That could cut down in his
23 court.
24 HONORABLE C. A. GUITTARD: On
25 this question of experimentation, I would be

1 very interested in seeing how that kind of
2 experiment would be set up. It seems like to
3 me as indicated by the last comment that how
4 well the system work depends less on the rules
5 than it does on the judge. And how you're
6 going to account for that factor in evaluating
7 the different rules is something that I have
8 real questions about.
9 HONORABLE ANN TYRELL COCKRAN:
10 As a practical matter, and a lot of these
11 problems do bubble down to practicality and
12 how they work, which has a lot to do too with
13 what Judge Guittard said and also to the
14 lawyers; but as a practical matter one of the
15 things that I have seen resulting in a very
16 dramatic decrease in the number of motions for
17 sanctions filed has been rather strict
18 enforcement of the rule that the lawyers
19 actually try to work it out before the motion
20 is filed. And in Harris County we had a local
21 rule that predated the statewide rule
22 requiring conferences, but our local rule
23 required actual human conversation between the
24 lawyers.
25 And I really suggest that in

1 looking at the universe of sanctions that we
2 look at strengthening the language rather than
3 saying "I have attempted to resolve this and
4 the efforts have failed," which to a lot of
5 lawyers that means they use the fax machine,
6 and to strengthen that to require actual
7 one-on-one contact between the two lawyers
8 involved, not their paralegals, not their fax
9 machines, but the lawyer is as a practical
10 matter going to alleviate a lot of the
11 sanctions problems.
12 MR. SOULES: Okay. The
13 question is whether or not we operate
14 permanently or temporarily with no sanctions.
15 MR. MCMAINS: Judge, frankly
16 the problem I have with the notion that you
17 have no sanctions is that you condone the
18 conduct which many people here in the room
19 have seen of intentional concealment of
20 information, of destruction of documents or
21 evidence; and if you don't give the power to
22 the judges to punish that kind of behavior, it
23 will occur to some extent.
24 We have all seen it happen
25 under the context of the current rule, and so

1 it will damn sure happen if you don't have any
2 rules that sanction the conduct in terms of
3 the merits of the case or the lawyer. The
4 idea that you threaten their law license, you
5 can say that all you want to, but this conduct
6 occurred. I've been practicing law
7 unfortunately a little bit longer than 12
8 years, and I will assure you that that conduct
9 occurred back then when we didn't go to
10 sanctions directly as well; but I don't
11 believe this committee as an arm of the
12 Supreme Court can basically be in the position
13 of telling litigants or their attorneys that
14 they can without impairing the merits of their
15 lawsuit or impairing their own pocketbook be
16 free to destroy evidence, to hide evidence,
17 conceal documents, and to engage in other
18 types of tactics that obviously are
19 condemnatory.
20 HONORABLE F. SCOTT MCCOWN: Of
21 course. And all of that can be sanctionable
22 much more powerfully after an order to compel
23 by way of contempt; and you're talking about a
24 very small amount of behavior at the far end
25 which you say goes on regardless of what the

1 rule is; and what you have to do is
2 effectively catch it and deal with it, and
3 you're talking about a rule that embraces an
4 incredible range of cases at different dollar
5 levels and with different lawyers of different
6 skills; and you've got a rule causing serious
7 mischief in 99 percent of the cases, and you
8 worry about the one percent which can be dealt
9 with in other ways. It seems to me to be
10 unrealistic.
11 MR. MCMAINS: I frankly think
12 that your statistics are backwards.
13 HONORABLE F. SCOTT MCCOWN:
14 Well, what I see as a judge in trial court is
15 a far broader range than what any single
16 lawyer sees; and part of the problem with this
17 committee is it is a high-priced, high-talent
18 committee. And you're going to see cases at a
19 very narrow point on the spectrum, and most of
20 the cases the sanctions rule operates only as
21 a way to screw it up, make it last longer,
22 make it more expensive.
23 MR. SOULES: Anyone else on
24 this subject? Let's take just a show of hands
25 as to how many feel that we should temporarily

1 or permanently try to deal with no sanctions
2 in the practice?
3 HONORABLE F. SCOTT MCCOWN:
4 Could we modify that to say "motions to compel
5 with reimbursement," because I think that's
6 reasonable, is a reasonable approach.
7 MR. SOULES: Let's get the
8 first issue on the table, and then I'll go to
9 that, because that's been a historical subject
10 of debate, the second part, whether we go to a
11 two-step process to reach the ultimate
12 sanctions of whatever; and I know that that
13 was scrutinized by the task force as a
14 separate issue.
15 How many feel that we should
16 attempt to get along temporarily or otherwise
17 with no sanctions?
18 MR. JONES: Are you just
19 talking about an experiment here or there?
20 MR. SOULES: No. We're
21 talking about revising the rules here. I'm
22 not talking about on an experimental basis.
23 If the Court wants to do that, they can do
24 that with the current rules, or they could
25 that with the task force rules.

1 MR. FULLER: Temporarily? You
2 mean until they amend it again?
3 MR. SOULES: Pardon?
4 MR. FULLER: By temporarily
5 then you mean until the rules are amended
6 again?
7 MR. SOULE: Well, by
8 "temporarily" I mean until --
9 MR. FULLER: Okay. Thank you
10 for the clarification.
11 MR. SOULES: -- we get back to
12 another meeting sometime. How many feel
13 that? Did you want to speak?
14 HONORABLE DAVID PEEPLES: I
15 thought his proposal was to run an experiment
16 similar to what was done with electronic
17 recording, which is vastly different than the
18 way you're putting the question.
19 MR. SOULES: I'm not proposing
20 it. That's what I think is one of the topics
21 of discussion. Maybe I don't understand what
22 the topic was.
23 MR. GALLAGHER: Could I have a
24 clarification of what it is exactly that
25 you're seeking, judge, by way of either

1 reformation or modification, temporary,
2 permanent?
3 HONORABLE F. SCOTT MCCOWN:
4 Well, before we got lost in the details of
5 this rule I just wanted to put the fundamental
6 issue on the table, which is I think we're
7 going in the wrong direction, and that what we
8 ought to do, and I'm not wedded to do whether
9 it's no sanctions or whether it's an order to
10 compel first with reimbursement, or whether
11 it's some kind of very stringent modest
12 sanctions. All I'm saying is try to raise the
13 fundamental question before we just skip over
14 it that the way we're going is simply more and
15 more sanctions and tinkering with the rule,
16 and that we ought to moving to some extent,
17 and how much may be a matter of debate, in the
18 opposite direction. And that's all I'm trying
19 to raise right here at the get go, is there
20 any sentiment by anybody to move in the
21 opposite direction and not try to resolve it
22 today. I don't think we could write the rule
23 today, but to look at moving in the opposite
24 direction.
25 MR. SOULES: To what, judge?

1 MR. PRICE: To no sanctions?
2 HONORABLE F. SCOTT MCCOWN:
3 Well, I didn't come with the rule written.
4 But to change the philosophy from moving in
5 the way that Chuck has moved to moving in the
6 opposite direction to look at things like you
7 have to get a motion to compel first, or
8 you're limited to a motion to compel and
9 reimbursement unless intent can be proven, or
10 move some way to make sanctions less a part of
11 the practice instead of more a part of the
12 practice.
13 MR. GALLAGHER: Is there some
14 latitude that this committee can be given to
15 try to, and I understand that the subcommittee
16 may be addressed some of these issues, at this
17 strikes a resonant chord I think with a lot of
18 lawyers who are involved in the trial practice
19 on a regular basis. I know I hear from judges
20 and lawyers generally that sanctions take up
21 too much time; and I know that in
22 circumstances in which there is an omission
23 sometimes to supplement there is motions to
24 strike pleadings, which seems to me to be sort
25 of an overreaction on the part of lawyers that

1 are involved, but nevertheless it's something
2 under the current rules which the judge has
3 latitude to do and can do it perhaps without
4 much notice.
5 And I for one thing am in
6 favor of a system in which we would, or favor
7 an approach to this problem in which we
8 examine some alternatives such as a motion to
9 compel, so that somebody is put on notice of
10 the fact that this is becoming a serious issue
11 in this litigation without, Luke, having to
12 address the problem of sanctions at that
13 hearing initially. And I would favor a system
14 in which something like this is at
15 least examined.
16 MR. PERRY: Luke, as the judge
17 has restated his position, I'm very much in
18 favor of it. I would be very much against a
19 situation in which we go to a system where
20 there are no sanctions available, but I think
21 that it is very important that we change the
22 system to where sanctions and motions for
23 sanctions and motions regarding sanctions are
24 a much reduced part of the practice.
25 I think that the rules need to

1 make a much stronger distinction than they
2 presently do and I think and much stronger
3 than the proposed rule does between the kind
4 of minor infractions that Judge Brister talked
5 about and the kind of major misconduct that
6 Rusty McMains talked about that ought to
7 result in some sort of punishment; and I think
8 that the rules need to try to limit sanctions
9 motions and sanctions hearings to situations
10 in which the kind of major misconduct that
11 Rusty McMains talked about is at issue.
12 MR. SOULES: Okay. What I
13 want to try to do is we can work on this rule
14 or variations of this rule or any other rule
15 if we're going to have rules, and that's what
16 I'm trying to get at now to get down to
17 business working on this rule or some other
18 rule, get down to really scrutinizing what we
19 think the practice should be under the rule,
20 or do we have no rules. How many feel that we
21 need some rules regarding sanctions? Okay.
22 That's a consensus.
23 By way of background, when
24 this committee recommended the -- was it '84
25 changes, Bill?

1 PROFESSOR DORSANEO: It was
2 December of -- I think it went into effect
3 January 1, '84.
4 MR. SOULES: Right.
5 PROFESSOR DORSANEO: I think
6 we talked about it in December of 1992. We
7 worked on it basically from 1989 on.
8 MR. SOULES: Anyway, when this
9 committee recommended in 1983 the changes in
10 the Sanctions Rule 215 this committee
11 recommended to the Supreme Court of Texas a
12 two-tier process by which the first would be a
13 motion to compel, and the only sanction or
14 expense that could be assessed there was
15 reasonable attorney's fees and costs of the
16 motion. And only after an order had been
17 reduced to writing to the extent that it would
18 be punishable by contempt there was a
19 violation that it would be punishable by
20 contempt using those as standards could the
21 other sanctions be imposed.
22 PROFESSOR DORSANEO:
23 Essentially Federal Rule 37.
24 MR. SOULES: The Supreme Court
25 rejected that idea and wrote a rule that took

1 us straight to whatever sanctions the trial
2 court felt was necessary for hearing; and I
3 suppose as I understand the reason for it from
4 the members of the Court at the time it was to
5 permit a judge to address the problem such as
6 Rusty has raised here without having to go
7 through a motion to compel which would be to
8 no avail, destroyed evidence, that sort of
9 thing.
10 There has always been some
11 lingering sentiment here that the Supreme
12 Court shouldn't have done that and Rusty's
13 problem could be addressed some other way.
14 But the task force has also looked at that
15 very carefully. One of its specific charges
16 was to determine whether or not this should be
17 a two-tier process of sanctioning the first of
18 which would be a motion to compel subject only
19 to cost and expenses and legal fees, and then
20 after that a violation of that order would
21 give rise to further sanctions.
22 And, Chuck, what was the
23 debate or the result of that debate? Not that
24 we need to follow it, but so that we have the
25 benefit of it.

1 MR. HERRING: We looked at
2 that very, very, specifically, because the
3 first question or one of the first questions
4 that came up is, "Look. In 1984 the Supreme
5 Court created this new sanctions practice and
6 did not go along with the recommendation of
7 the Supreme Court Advisory Committee that we
8 just established, first a motion to compel and
9 then to go to sanctions."
10 So that was very obvious. Is
11 that a solution to go back to the system that
12 was proposed, the Rule 37 more or less? Not
13 exactly, but more or less the system. And we
14 debated that long and hard, as we will no
15 doubt debate it here. I think Judge Brister
16 was probably one of the most articulate
17 spokespersons for the idea that trial judges
18 ought to have some discretion in some
19 instances that it's just so clear the very
20 first time that people have engaged in abuse,
21 deliberate, callous abuse; and therefore the
22 judge in some instances from the get go ought
23 to have the discretion at least to impose some
24 sanctions rather than make people build up a
25 defense where they have to go through the

1 second step.

2 The whole idea of the rule, if

3 you read through it, it's a lot harder to get

4 sanctions of any significance under this

5 proposal. If you look at the last 50 cases

6 that have been decided by the Court Of

7 Appeals, you'll find out that two thirds of

8 them have overturned severe sanctions, death

9 penalty sanctions. That's the message coming

10 out of the court. The procedure that is in

11 this rule is designed to protect people if

12 there are severe sanctions proposed, but

13 you're not going to want to go through most of

14 this.

15 But anyway, let me turn it

16 over to Judge Brister and let him articulate

17 better than I can the adea of what I guess is

18 the dominant sentiment of the task force that

19 we looked at, is that we should not go back to

20 a two-step system.

21 MR. SOULES: Okay. Judge

22 Brister and then Steve Yelenosky.

23 HONORABLE SCOTT A. BRISTER: In

24 effect the rule does that. In any situation

25 where a motion to compel does any good, it

1 will always be a lesser available sanction
2 that can cover the situation. That's
3 TransAmerican. That's written in the rule.
4 If a motion to compel and attorney's fees
5 filed in the motion will cover the problem,
6 the judge will have to do that. Or if he or
7 she is not going to, they're going to have to
8 explain on the record why that would do no
9 good. If that would do no good, then there is
10 no reason to require that step.
11 This rule as drafted was
12 intended to draw, to have exactly the two
13 different kinds of situations that we're
14 discussing here. One, the 90 percent problem
15 where somebody forgets something, is too lazy
16 to do something, forgotten about something,
17 and get that done; and the 10 percent
18 situation where there are serious, significant
19 criminal acts going on that need to be fixed
20 now, and this rule splits those apart. It
21 makes one easy. It makes the other hard.
22 Maybe it needs to be made harder, but I think
23 for most judges going through, jumping all
24 these loopholes, having to have an oral
25 hearing, other changes like that that are in

1 this rule set up those two very different
2 situations, treat them differently, and that
3 that's what I think the sense of most people
4 on the task force was that that's the way it
5 ought to be.
6 MR. YELENOSKY: Clearly
7 Russell McMains has mentioned the issue of
8 destruction of evidence, and Luke Soule has
9 mentioned that as well. I guess the converse
10 of what you're saying is, and maybe this
11 should be put up to Judge McCown, is if you
12 had a requirement of a motion to compel, how
13 do you deal with things such as destruction of
14 evidence that may be criminal? Is there
15 another way of dealing with those? Would
16 those be dealt with in this rule? And there
17 may be other examples besides destruction of
18 evidence. But that's my question.
19 HONORABLE F. SCOTT MCCOWN:
20 First, to add to my credibility on this
21 argument I want to confess that I'm a few
22 years older than I told you and I've actually
23 been doing this for 14 years, which is getting
24 us closer to the magic 15 year point.
25 All I'm saying is that you

1 could write a rule. This rule makes it not
2 substantively harder, but procedurally harder,
3 which is only going to add to the Court's
4 problem and the party's cost. It's not going
5 to change the outcome of what we're dealing
6 with. If what you want is a way to get an
7 intentional conduct that in fact is criminal,
8 you could write an exception for that.
9 And I guess the question that
10 I'm putting to you is, do we want to try to
11 write a rule that goes in the opposite
12 direction of present law? This is present
13 law. You could write a rule all the way from
14 no sanctions to this, and you've got a
15 thousand miles to play with, and you could get
16 at the limited kind of intentional conduct
17 you're talking about without going this far.
18 MR. SOULES: I think we have
19 to take that in specifics though, Judge. What
20 change would you suggest and where?
21 HONORABLE F. SCOTT MCCOWN:
22 Well, Luke, do we have to resolve this today?
23 If there is sentiment to do it, can we put
24 together a small group and have it at our next
25 meeting?

1 MR. SOULES: We have a task
2 force report on the table. We should address
3 it. If we're going to depart from it, we
4 ought to say I think specifically what it is
5 we dislike about it so that when this
6 committee meets there is some consensus of
7 what its direction should be.
8 MR. JACKS: I respectfully
9 degree. I think that Judge McCown has raised
10 an important issue that this committee, and I
11 appreciate the task force's work, and Chuck
12 Herring and I had many long conversations
13 about it. And but I think that this committee
14 should appropriately address the broad issue
15 of direction.
16 I'm in the 23rd year of my law
17 practice. I cannot remember the last time I
18 was involved in a sanctions hearing. They've
19 never been imposed against me, and I really
20 can't remember the last time I was in a
21 hearing where it was even an issue. But when
22 I go to meetings like the Travis County Bench
23 Bar Conference which we have each spring where
24 many younger lawyers that are coming up half a
25 generation behind me talk about their everyday

1 experiences I hear story after story after
2 story of a generation of younger lawyers that
3 I think are being ruined by the belief that an
4 important part of their law practice is
5 attention to the issue of sanctions.
6 And I think the question of
7 direction is important, and I don't think that
8 it should be incumbent upon Judge McCown to go
9 through and do a red line version of the task
10 force's proposal, but rather to raise in a
11 broad sense as he's done "Do we want to
12 continue down this road, a road that we've had
13 now about a decade's worth of experience on,"
14 or "Do we want to consider another direction?"
15 I do think there needs to be a
16 provision for the kind of sanction that
17 David Perry talked about, for the intentional
18 or criminal violation that Judge Brister has
19 spoken about, but it seems to me that there is
20 a way that we can approach this issue that
21 hopefully will make it less an obsession of
22 the Bar.
23 And I'm particularly concerned
24 about the young members of the Bar. I do
25 think that at the level of the ages of lawyers

1 I see around this table most of us are in a
2 more rairified practice, so I'd say I'd like
3 to see a vote and a record vote on the general
4 proposition that Judge McCown stated.
5 MR. GALLAGHER: Just one last
6 question. Sanctions is not a big part of my
7 practice. I have never filed a motion for
8 sanctions, but I would like for somebody to
9 shed some light on the question of whether or
10 not if you have a circumstance that Rusty was
11 talking about, the contempt powers that the
12 court has previously used in circumstances
13 like this would be capable, would give the
14 Court enough power in a circumstance after due
15 process that the Court was of the opinion that
16 a serious, serious issue of destruction of
17 evidence existed and had a hearing on it,
18 would the contempt powers enable the Court to
19 strike the pleading and impose those kind of
20 sanctions? Do you know the answer to that?
21 PROFESSOR DORSANEO: It's my
22 understanding that the severe sanctions,
23 establishing precluding orders and things of
24 that type that are not in Paragraph 2(b) were
25 developed because the contempt sanction is

1 insufficiently viable a technique to compel
2 compliance or to punish recalcitrants. I
3 think all of us if we spent more than 10
4 minutes thinking about it would realize that
5 giving the trial judge these tools is better
6 than giving the trial judge a ball-peen hammer
7 that is essentially only punitive and pretty
8 much ineffective as a device.
9 Maybe if we have kind of come
10 to agreement on the question of an award of
11 expenses being appropriate when there is some
12 form of non-compliance, perhaps not negligent
13 non-compliance, all we really are talking
14 about is whether we have a one-step or a
15 two-step process. That's what I'm hearing.
16 If the first step is there is
17 non-compliance and we are going to have a
18 motion to compel with the potential award of
19 expenses, that seems to be something that all
20 of us could agree upon; and then even Scott's
21 notion that there can be something more severe
22 later, intent is essentially indicating that
23 the debate is evolving around whether it's a
24 one-step process or a two-step process with
25 the second step perhaps being more

1 sophisticated in some views than in the views
2 of others. And I don't see it as that
3 complicated.
4 I've been practicing for 23
5 years, and this debate sounds pretty similar
6 to debates that I heard 14 years ago. I don't
7 see the issue as being something that requires
8 another group of people to go out and study
9 this for a long period of time.
10 MR. SUSMAN: I'd like to focus
11 on and I'd like to visit the category of bad
12 conduct, the 10 percent category that does
13 require sanctions and requires very special
14 procedures. It should be difficult for judges
15 to impose, and they should be severe. I think
16 those are the kind of sanctions that really
17 motivate lawyers. Lawyers think about the
18 pleading getting stricken, evidence being
19 excluded, kind of bad monetary sanctions.
20 I'd like to talk about the 90
21 percent, the percent of sanctions that this
22 rule makes is easier to impose, okay. That's
23 what is going to cause the volume of work,
24 because you have got to have a motion to get
25 it. Isn't it malpractice for a lawyer not to

1 file a sanction motion to get expense? I
2 mean, I'm seeking reimbursement of legal
3 fees. Someone files a frivolous objection.
4 All right. Actually I don't have to show it
5 was frivolous. He's got to show it was
6 substantially justified to avoid having to
7 imposed upon him my attorney's fees. I mean
8 you really put the English Rule now on every
9 single rule. It has become you make every
10 litigant pay for the price of the ruling of
11 the Court on discovery matters. I think it
12 could have this effect.
13 I think that's what we ought
14 to talk about, the easy, the 90 percent of the
15 cases that will account for the volume where
16 there is going to be a real incentive for
17 lawyers to file the sanctions to reimburse
18 their expenses. There are no oral hearings
19 required. There are no findings required. If
20 the lawyer has got to meet, is that worth it?
21 I mean, have you really accomplished anything
22 with that group of sanctions? Does anyone
23 really -- is that going to affect, tell
24 lawyers how to do business? I don't know.
25 That's a question.

1 MR. SOULES: For
2 clarification, are you suggesting that there
3 not be a vehicle for award of attorney's fees
4 and expenses in connection with a motion to
5 compel?
6 MR. SUSMAN: I guess I am in
7 some ways. That there ought to be serious
8 cases and there ought to be procedural
9 functions in cases, but to have to file
10 motions to get your expenses back.
11 MR. SOULES: Let's see. David
12 Perry, you had your hand up first.
13 MR. PERRY: I would suggest
14 that we approach this on the basis of having
15 two separate rules, one that would deal with a
16 motion to compel, and the other that would
17 deal with serious sanctions, and that we write
18 one rule to deal with the 90 percent of the
19 problems that are relatively minor, and a
20 different rule to deal with the five or ten
21 percent that are very serious, and that we try
22 to draw a bright line distinction between the
23 two to the point of dealing with them in
24 separate rules so that they do not get
25 confused one with the other.

1 HONORABLE PAUL HEATH TIL: I
2 think we've been around the mulberry bush
3 about five or six times here. And is this
4 supposed to be a subcommittee report presented
5 to us to either approve or disapprove?
6 MR. SOULES: No. For debate.
7 HONORABLE PAUL HEATH TIL:
8 All right. Then are we here to debate to
9 instruct the subcommittee as to what we want
10 to do, or what we don't want to do?
11 MR. HERRING: Well, there's
12 not even a subcommittee report, because the
13 subcommittee has never met.
14 HONORABLE PAUL HEATH TIL:
15 That's what I thought.
16 MR. HERRING: All this is is a
17 historical background report from the task
18 force on sanctions.
19 HONORABLE PAUL HEATH TIL: So
20 there really isn't a subcommittee as such.
21 MR. SOULES: Well, I'm
22 regarding the task force report as the
23 subcommittee report for now, and we're going
24 to tee off with that.
25 HONORABLE PAUL HEATH TIL:

1 Okay.
2 MR. SOULES: Or we don't tee
3 off with that depending on how the committee
4 decides to approach this, because the Supreme
5 Court Advisory Committee is a committee, not
6 any one individual. But this has had a couple
7 of years work. It was done under the auspices
8 of the Supreme Court, and it is a very
9 thorough report, gives us something I think to
10 work with or work from. That's what we're
11 trying to do here.
12 Maybe it's not as formal as it
13 should be, but this committee has not always
14 honored all the formalities of committee
15 work. It's really just a working group.
16 HONORABLE PAUL HEATH TIL: I
17 can certainly appreciate that; but my point is
18 that if we're going to debate this, then we
19 really are the subcommittee that is going to
20 decide this issue. Is that what you're
21 saying?
22 MR. SOULES: Well, the way
23 this committee has worked many times before is
24 that we get a consensus of the committee as a
25 whole. And if we don't have a rule before us

1 that we can actually pass on because it needs
2 a lot of rework or it needs new philosophy
3 behind it, then at least the subcommittee gets
4 the benefit of what the philosophy of this
5 committee is, so that when it goes and does
6 its work it is not working in a vacuum. It's
7 responding and bringing things back that are
8 going to be responsive to the consensus of the
9 committee already given.
10 HONORABLE PAUL HEATH TIL:
11 It's in the hope of not working in a vacuum
12 that I'm speaking. What I'd like to know is
13 is there -- I gather there are two
14 philosophical approaches here: One, the
15 sanctions as proposed by the subcommittee; the
16 other, that we shouldn't go that way. Could
17 we just vote one way or the other, because I
18 never have got a consensus here of which way
19 the majority of us want to do one way or the
20 other.
21 MR. SOULES: Another important
22 piece of this committee's work historically
23 and through several Chairs is that the
24 Supreme Court is rarely interested in our
25 vote.

1 HONORABLE PAUL HEATH TIL: I
2 can understand that.
3 MR. SOULES: They are very
4 interested in our comments and our debates,
5 because that gives them the guidance that they
6 feel they need. If we don't develop through
7 listening to everyone who wants to speak to an
8 issue a full basis for the Supreme Court
9 consideration of our rules, then it's not as
10 much help to them as they want.
11 HONORALBE PAUL HEATH TIL:
12 Okay. I understand that.
13 MR. SOULES: So that's why --
14 HONORABLE PAUL HEATH TIL:
15 That being the case, I'll yield to one of the
16 other gentlemen, if you'll come back to me in
17 a minute. I've got a few things to say then.
18 MR. SOULES: Pardon me?
19 HONORABLE PAUL HEATH TIL: I
20 said that being the case, I yield to the
21 gentlemen that have something to say, and then
22 I'll be glad to enter into the debate myself
23 then. I just misunderstood what our purpose
24 was here.
25 MS. DUNCAN: From what I'm

1 hearing there are a lot of different good
2 ideas of how we may can better approach the
3 sanctions problem; and what I for one would
4 like to see I would like to see what happens
5 have it performing if you have an inadvertent
6 violation of the discovery rules rules over
7 here and a serious violation of the discovery
8 rules rule over here.
9 I would also like to see how
10 could a motion to compel, how are you going
11 to -- what is that bright line going to be
12 between the two? How are you going to
13 distinguish those cases where a motion to
14 compel is required.
15 I remember before sanctions as
16 a baby lawyer when nobody paid any attention
17 about anything, and trying to get post
18 judgment discovery even with a motion to
19 compel; and what I would like to see are maybe
20 we can break or maybe we can refer it to the
21 various subcommittee that might form along
22 "Here is what I think the rule ought to be"
23 lines. But let's see what people come up
24 with.
25 I don't want to vote up or

1 down on 166d without seeing what other people
2 think are viable alternatives.
3 MR. SOULES: I think we're
4 talking about a two-tiered process, are we
5 not? Is that what the hands are up to speak
6 to? Judge Cockran.
7 HONORABLE ANN TYRELL COCKRAN:
8 I think that the important focus has to be,
9 and this goes back to what Steve Susman and
10 Tommy Jacks and others have said, has to be on
11 what has been referred to as the 90 percent,
12 although Scott McCown says it's more like the
13 99 percent, and the fact that more and more
14 lawyers, particularly the younger lawyers who
15 are handling that 99 percent many lawyers do
16 not believe that there is any discretion on
17 their part involved on whether or not they
18 should file a motion for sanctions. They feel
19 of the sanctions malpractice, that they have
20 to for every little thing.
21 Oftentimes lawyers will come
22 in and apologize to the trial judge being
23 embarrassed. Since the rule is there they
24 feel that they have to do it even though it is
25 silly. And, you know, it's the 90 percent to

1 99 percent that is the real problem. That's
2 where lawyers are being drained now; and I'm
3 really afraid that if we keep on -- that to me
4 is where the problem is.
5 If we keep on the track we're
6 on now, 20 years from now we're not going to
7 have any more lawyers who can proudly say
8 they've never filed a motion for sanctions.
9 It will just -- we'll be dinosaurs and that
10 will be gone if we don't do something about
11 that.
12 I think that the serious
13 problem where somebody lied to you and is
14 stealing their way through discovery I think
15 it would probably be very easy to get mere
16 unanimity on how to handle those; but the
17 problem is for every little minor infraction
18 or seven-day delay people want to take, you
19 know, children hostage as sanctions.
20 And that's what I think Scott
21 is talking about. That's what trial judges
22 see all the time. That's where the serious
23 problem is.
24 MR. SOULES: Sam Sparks.
25 MR. SPARKS: I think we're

1 getting the cart before the horse. You know,
2 a long time ago when we did trial by
3 ignorance. Nobody knew what anybody else
4 had. We didn't exchange any discovery. We
5 are talking about sanctions for discovery. We
6 made the decision, or the Supreme Court did,
7 that we should have a free exchange of
8 information. We took off on that concept.
9 I say "the cart before the
10 horse" because when we get -- we've gotten to
11 the point now how good a lawyer you are is how
12 well you can hide evidence under the adversary
13 system from the other side. I've never had a
14 sanction, and I just don't do sanctions
15 practice. I filed one under 513c because I
16 wanted the Defendant who was carrying 150
17 pounds of marijuana when he had the accident
18 to tell me that he was claiming the Fifth
19 Amendment to incriminate him. I wanted to
20 tell the jury that. We have a rule that says
21 you can use that. And I've been to
22 San Antonio three times from San Angelo, and
23 that gets expensive, three days of my life.
24 SO I filed one sanction. "You lost. I'm
25 gone. I'm done."

1 But the point is when we
2 change the rules of discovery then the
3 sanctions practice, the bottom is going to
4 drop out of it. It's no longer going to be
5 what it is today in front of the court. We're
6 getting the cart before the horse.
7 And I really like Judge
8 McCown's suggestion for this reason: We're
9 now embarking on the process of teaching young
10 lawyers that to be a good lawyer is how well
11 you can screw the other side. We're
12 destroying the integrity of the Bar because
13 when you hear it every day out on the streets
14 what people think of lawyers.
15 So I'm interested in a concept
16 where we don't train or measure how good we
17 are by how we can keep the other side -- how
18 we can prevent justice from happening, if that
19 makes sense. I'm real interested in the
20 concept of studying what the judge is saying.
21 MR. LATTING: I was just going
22 to say I may be in the minority, but speaking
23 individually I like this rule. I think it's a
24 pretty good rule, and not because I'm a member
25 of th e task force. I think it addresses

1 these problems.

2 I don't think that by amending

3 the sanctions rule we're going to address the

4 problem of the fundamental Gestalt of young

5 lawyers. I think that's a much deeper issue,

6 and I'm not belittling it. I think that is

7 important, but I don't think we can do it.

8 Another thing is I think we

9 have got to write a rule here. We can't just

10 say that we're in favor of justice. We're all

11 for that, I guess. The question is, do we

12 need to have a subcommittee meeting, or do we

13 need to -- and get all of these ideas and

14 present them again to the committee, or is

15 this task force a place to start.

16 MR. SOULES: I think the Court

17 wants us to start with this and make some

18 progress as to whether we shuck it and start

19 over again, or whether we --

20 MR. LATTING: I just want to

21 say I'm happy to have numerous and immediate

22 meetings of the subcommittee starting the day

23 after tomorrow literally and have everybody's

24 views, but personally I like this approach.

25 MR. SOULES: We have to

1 develop those views here today.
2 MR. HERRING: Well, let me add
3 to that, a lot of very, very good comments, a
4 lot of good, strong philosophical reflections,
5 almost all of which with a couple of
6 exceptions came before the task force again
7 and again. This is not written in concrete,
8 and it sure isn't art; and the idea was we
9 would give something to this committee for
10 this committee to look at, and if it's
11 adopted, fine; if it's thrown out, fine; if
12 it's changed, fine.
13 One thing that I suggest
14 having spent a good bit of time on this and
15 going through the logistics of writing about
16 40 or 50 drafts, I guess, by the time we got
17 through -- we've got the two-stage drafts.
18 We've got all kinds of drafts in the files --
19 is that if somebody, Joe's subcommittee is
20 going to meet and play with some of these
21 other proposals, what we really need from the
22 committee are more than simply "We like this;
23 we have this philosophical point that we think
24 is very important to be taken into account in
25 the rule."

1 You need a rule. You need a
2 draft, or you need a revision. And if you're
3 going to do what Joe has suggested, which is
4 say you've got some other ideas and some other
5 proposals, you need to get somebody to either
6 work with the subcommittee to come meet and
7 present it, or give some very, very specific
8 direction, because otherwise you end up
9 recreating the wheel. And it's very, very
10 hard with simply a broad, philosophical
11 direction to sit down and then have a rule
12 that works procedurally.
13 HONORABLE F. SCOTT MCCOWN: If
14 I could respond to Joe's comment and just take
15 him head on, I think he's wrong that this rule
16 isn't a major part of what is affecting the
17 Gestalt of young lawyers. A young civil
18 lawyer spends his professional day primarily
19 in the pursuit of discovery; and one of the
20 problems with the pursuit of discovery is that
21 unless they are forced to deal with the
22 opposing young lawyer as a human and in a
23 humane fashion, then we are parenting them to
24 deal with them in an unhuman, unhumane
25 fashion; and that's what this rule does.

1 If you know that you can go
2 down to the courthouse with a motion for
3 sanctions and have a shot at getting them,
4 then you don't work as hard to get the
5 discovery and work the problem out. If you
6 know that the Court is going to force you to
7 work the problem out, then you work the
8 problem out; and it's just the direction that
9 we push them in.
10 They know if they come down to
11 court in a great many of our Travis County
12 courts that they are going to have to go to
13 the jury room and work the problem out and
14 that that's going to be the only relief they
15 get. Knowing that they work it out in their
16 law office; and I think that goes back to what
17 Ann was saying. If they know they can come
18 down and have a shot at sanctions, they're not
19 going to work it out; and I think this is a
20 major part of what is driving practice right
21 now.
22 MR. HERRING: Let me respond
23 specifically to that, because the rule
24 contemplates that you do have to try to work
25 it out. It specifically states you have to

1 have a conference before you go down there;
2 and that is I think as Judge Cockran points
3 out, that's how the judges administer it. If
4 the judges would read this and say, "Look.
5 You guys have done this. You didn't have a
6 meeting or conference. Go away. I don't want
7 to hear it from you" --
8 HONORABLE F. SCOTT MCCOWN:
9 Where are the incentives?
10 PROFESSOR ELAINE CARLSON: I
11 was just curious whether or not there is some
12 compromise in clarifying within the proposed
13 draft of Rule 166d the trial court discretion
14 to enter an order compelling discovery in lieu
15 of or as a precondition to a sanction order
16 and perhaps putting a standard in for
17 inadverent failure to comply with a discovery
18 rule or minor infractions, which is not a
19 bright line test, but it does make clear to
20 the trial court that that is an option, and
21 including within the comment to the rule that
22 counsel is encouraged to seek an order to
23 compel as opposed to sanctions for minor
24 infractions to maybe embrace the notion to
25 younger lawyers and to help clarify

1 malpractice or professional responsibility.
2 HONORABLE F. SCOTT MCCOWN: I
3 think that's a good idea; but to criticize
4 trial judges since I've been criticizing
5 lawyers, a lot of the problem is trial judges
6 won't take the time to be good parents, and
7 they're not going to make it hard to get
8 sanctions. They're going to make it easy to
9 get sanctions, and they're going to be grouchy
10 about it, and they're going to over-sanction.
11 And I think the rule has to
12 restrain the discretion of the trial judge and
13 channel it as much as it does the lawyers.
14 MR. BABCOCK: One of the
15 things that we haven't talked about that is
16 more on the philosophical lines is what
17 sanctions do to the whole process. It seems
18 to me I've seen in my own firm that when
19 sanctions are filed it tends to poison the
20 atmosphere of the litigation, and lawyers get
21 mad at each other not over their client's
22 problems, but over their own problems with
23 each other, personalizing the litigation. It
24 makes it harder to settle. It makes it more
25 expensive; and I'm finding myself persuaded by

1 Judge McCown on his philosophical bent that we
2 ought to cover the problems that Rusty is
3 talking about, but minimize this laundry list
4 of sanctions that a young lawyer can go down
5 and say, "Hum, maybe I can get the pleadings
6 struck if I posture this case in such a way as
7 to make it look like there is a major
8 infraction."
9 The other thing that seems to
10 me worth exploring is a remedy to the abuses
11 that is more result oriented. It gets the
12 focus back on the litigation and away from the
13 lawyers, and as the rule a few pages down,
14 Chuck's 166b(6)(d) talks about, if you fail to
15 make discovery or if you don't reveal a
16 witness or an expert that you want to call at
17 trial, then that evidence doesn't come in to
18 the case; and that it seems to me is a
19 powerful deterrent from destroying evidence,
20 not producing evidence, not listing your
21 witnesses.
22 MR. MCMAINS: Destruction of
23 evidence.
24 MR. BABCOCK: Of course, Rusty,
25 you're going to have to tackle it somehow,

1 destroying evidence.
2 MR. MCMAINS: You're going to
3 get somebody that is going to tell you the
4 truth too, and you're going to have to have
5 somebody that has the power to do something
6 about it.
7 MR. BABCOCK: The power, but
8 you're going to have to capture it anyway
9 somehow somewhere, and when you catch them the
10 remedy is that you don't get to put that
11 witness on. You don't get to get that
12 evidence on that issue in if you catch them
13 doing something like that; and that's to me
14 more a result oriented approach rather than
15 getting the lawyers at each other's throats
16 through sanctions. So I find myself moving
17 into Judge McCown's corner that we have got to
18 try to minimize the sanctions.
19 MR. MCMAINS: Luke, all I'm
20 wanting to do is to defend Chuck in the
21 running of the Committee which I think --
22 MR. HERRING: Defend? Could
23 you choose something better? Defend?
24 MR. MCMAINS: Certainly with
25 more chance of success. But the office of the

1 committee when we were formulated, when the
2 task force was formulated was and rapidly
3 became after TransAmerican the law
4 substantively moved much further than the
5 rule.
6 This rule comes extremely
7 close to what the law in Texas is today. You
8 can't find what the law in Texas is on the
9 discovery sanctions practice today in the rule
10 book. It ain't there. It's in the cases. So
11 our first task was "We've already gotten a
12 pretty damn good hint from the Court what is
13 not acceptable," and so we were forced to
14 formulate.
15 And so the idea of "Do we have
16 a new rule," and all the people have
17 criticized about we don't have a rule, we
18 thought if we are going to have the law and
19 it's going to be the law, we might as well
20 tell people that this is the rule and put it
21 in the rule book where it belongs. That is in
22 large measure what this is and comports with
23 the practice that we got input from around the
24 state with the judges as to how they are in
25 fact applied and applying the rules and the

1 regulations that had been set by the Supreme
2 Court in their decisions already.
3 So one thing that is not
4 acceptable it seems to me to the Court, the
5 Committee, or the Bar is to leave the rule
6 book with a rule that does not apply, because
7 that's not the way it works. The rule as we
8 now have it says you can go to sanctions and
9 strike pleading right now. The rule says
10 without anything. That's not what the law
11 is. That's not what this rule is; and this
12 rule is an attempt to comport in part. And
13 one of our tasks was to at least conform the
14 rule to the way the practice is, and we had to
15 continue to modify it as it kept moving
16 through the task force.
17 So I'm just saying that the
18 idea that we leave things alone, that is not
19 acceptable because our rules are misleading.
20 Our rules actually authorize a whole lot more
21 than what the law does.
22 MR. TINDALL: Luke, I like the
23 draft of the rule a lot, but my struggle is we
24 have a task force on discovery that hasn't yet
25 reported, and so it seems like we are going at

1 it backwards. We're trying to talk about a
2 rule for sanctions on a set of rules of
3 discovery that may be turned upside down.
4 Sanctions on not supplementing document
5 production, you know, may or not be
6 egregious. But do we have any idea when we
7 might see this review of the discovery rules?
8 MR. SOULES: Well, within a
9 month. And there is a summary that you have
10 now that just came yesterday from David
11 Keltner. But if you haven't picked it up,
12 it's up here. Obviously you haven't had a
13 chance to look at it. It looks like this
14 (indicating).
15 MR. TINDALL: But I mean if we
16 could overlay what we say are the rules of the
17 game for discovery before we know if we go
18 directly to sanctions or motions to compel
19 makes, seems attractive to me. And are we
20 going to continue automatic exclusion of
21 witnesses not disclosed? Are we going to have
22 continued duties to supplement? I mean, all
23 the --
24 MR. SOULES: That's in here.
25 That's a part of the sanctions that is before

1 you now, Harry. I agree. It would be great
2 to have the discovery task force report here,
3 but it's not here. It's probably going to be
4 a month away at least, and the Court wanted
5 this meeting even sooner than now, so I'm sure
6 they are expecting information from us.
7 MR. HERRING: That is a good
8 point. We had that problem with the
9 sanctions. If you're going to have mandatory
10 disclosure, you may eliminate a lot of the
11 stuff that comes up in interrogatory
12 practice. Now, you may not -- we didn't know
13 what this is going to be built on or what
14 system is going to be adapted this week.
15 You're right. You are in the dark a little
16 bit.
17 HONORABLE SCOTT A. BRISTER:
18 Just briefly on the two-step issue, I'll
19 repeat again this is basically a two-step
20 process since to get anything serious the
21 judge is going to have to state why a motion
22 to compel would be futile.
23 Second of all, I think if all
24 of us think about it, we can all think of
25 situations we've been in where a motion to

1 compel is a waste of time. In the task force
2 I brought up Alice Travathan, that big case in
3 Houston where 500 depositions taken,
4 documents, et cetera, and 45 days before trial
5 the Defendant discovers 10,000 critical
6 documents and immediately produces them.
7 Now, all of those depositions
8 have to be taken over again, or a lot of them.
9 A motion to compel is -- they've already
10 produced them. It does nothing to do a motion
11 to compel, but it has caused tremendous
12 expense and problems. I think all of us can
13 think of situations where there has been a
14 discovery abuse, but a motion to compel does
15 not address it.
16 I raise that as a situation
17 just because it is very difficult to draw a
18 rule, which is the committee's purpose that
19 covers all of those situations other than
20 something like this where you simply separate
21 out simple things from difficult things and
22 have two different procedures.
23 So the two-step process for a
24 lot of cases works. For a lot of cases it
25 will be nonsense and people will scratch their

1 heads and say, "What are these these people
2 thinking about," because a motion to compel
3 does no good.
4 MR. ORSINGER: I would like to
5 propose a distinction then that the two-step
6 process makes sense when you have a discovery
7 condition that is curable, and that it doesn't
8 make sense when your condition is not
9 curable. If the physical evidence has been
10 destroyed, then a two-step process doesn't
11 make any sense. But if a party has failed to
12 appear for a deposition, a two-step process
13 does make sense.
14 I don't see this committee
15 proposed rule as involving a two-step
16 process. You don't know for sure whether
17 you're pleadings will be struck until the end
18 of the first hearing. That's possible. And
19 what the trial judge is required to do in my
20 opinion is just articulate the reason why the
21 judge did what he or she says so that the
22 appellate court can better decide whether to
23 reverse it or not.
24 I think a two-step process is
25 better because as long as the uncertainty

1 exists as to whether you might walk out of
2 there with a default judgment on liability, as
3 long as that uncertainty exists there is an
4 incentive to go for that sanction on the first
5 motion. Whereas if the rule is written in a
6 curable discovery problem that you must first
7 secure an order, and then if the order is
8 violated, then you can drop some severe
9 sanctions, then there is no great incentive to
10 fight World War III on the first motion that
11 you file.
12 And I think 99 percent of the
13 cases are curable discovery problems where
14 someone probably should be warned before their
15 pleadings are struck, and that probably we
16 will not have to strike their pleadings as
17 long as they're in court first and they have
18 an opportunity to hear from the judge what
19 might happen to them if they don't.
20 MR. FULLER: I think the good
21 news is that I don't know who your judges are
22 and what they're doing, but even though we
23 don't have a two-step process written into the
24 rule now, that in essence has been my
25 experience of what we get anyway. I have not

1 been successful in getting the judge to strike
2 pleadings if something less will do.
3 I know I'll read the cases
4 where this does happen, but I think defacto
5 what is actually happening is that the great
6 majority of the judges are using their wise
7 discretion and not just saying, "I'm going to
8 chop you." You know, "Okay. You show up for
9 the deposition. If you don't, here's what is
10 going to happen."
11 But to write in a mandatory,
12 two-step procedure to me doesn't make sense.
13 Put it in there. I like 166d the way it is
14 suggested here, and I think it's built in in
15 such a way that if there is a need for a
16 second hearing, there can be one; but if there
17 isn't, he can go ahead and chop them off at
18 the knees right then.
19 And the only other comment is
20 I'm really impressed with the care and feeding
21 arguments that are being made about young
22 lawyers, but I don't buy it.
23 MR. DORSANEO: I think that if
24 you believe that there ought to be a motion to
25 compel client's practice codified in the

1 rules, and if you believe that someone ought
2 to be able to get an award of expenses but
3 that the Court has or should have discretion
4 to not order expenses, and I'm reading the
5 word "may" in Paragraph 2 rather than "shall"
6 to suggest that, and if you believe if there
7 is a more serious type of discovery violation
8 such as the violation of an order to compel
9 compliance, but among other things and that
10 that more severe sanction ought to be spelled
11 out beyond saying intent is available when it
12 is available, then I think you end up liking
13 this rule. However, you know, if you don't
14 believe that awards of expenses make any sense
15 or that severe sanctions are appropriate
16 because judges will abuse their authority
17 unless they're restrictd to something as
18 severe as putting sombody in jail, you don't
19 like this rule.
20 On balance I think I like it
21 because of what Rusty said. It seems to
22 codify our current law to be better than our
23 current rule; and my expectation is that most
24 people would think a motion to compel
25 compliance needs to be involved. There might

1 be a reasonable disagreement about an award of
2 expenses and about what kinds of severe
3 sanctions, but on balance I think it is a good
4 rule.
5 HONORABLE F. SCOTT MCCOWN:
6 Luke, if I could expound on and build on what
7 Richard said about why a formal two-step
8 process is different than this rule. In a
9 formal two-step process the motion to compel
10 is filed and all that's on the table is an
11 order to compel with the possibility of
12 reimbursement of some modest amount of
13 attorney's fees. That doesn't change the
14 dynamics between the lawyers very much in
15 working it out. And the lawyer doesn't go
16 home at night burdened with the thought that
17 "I got a motion for sanctions today, and
18 whatever the likely result from the wise
19 judge, the judge may not be wise," or "I still
20 have to worry about it, because I may be
21 misunderstanding the likely result."
22 These motions for sanctions
23 cause a great deal of mental stress, to be
24 honest about it, on the lawyer and on the
25 dynamics between the lawyers; and that's why a

1 formal two-step process that eliminates that
2 would make it so much more sane.
3 MR. SOULES: There is one
4 other feature of this rule that as written
5 that may be appealing, and that is that the
6 award of expenses in connection with the
7 motion to compel is not under the category of
8 sanctions. I never have thought that was
9 sanctions anyway, but I never have really
10 known how to tell my young lawyers how to
11 respond to the question have you ever been
12 sanctioned if they've gone to a hearing on a
13 motion to compel and had attorney's fees
14 awarded against them. I don't think that's a
15 sanction.
16 HONORABLE SCOTT A. BRISTER:
17 And that's why we put it in Paragraph 2 rather
18 than Paragraph 3.
19 MR. SOULES: And in
20 Paragraph 2 if the judge decides that somebody
21 ought to pay somebody else's expenses for the
22 motion because they should have made a better
23 decision earlier and gone ahead and made the
24 production or whatever and they're not
25 objecting, the judge gets the attorney's fees

1 paid so that the litigants don't have to pay
2 their own freight to get something they're
3 really entitled to; and it's only when you get
4 to the next stage that we call it sanctions
5 for something more egregious. I don't know
6 whether that has any merit or not.
7 MS. SWEENEY: The question I
8 have, we're entitled in this rule to discovery
9 violations, and we're including in there a
10 motion to compel where there may be egreious
11 behavior perceived, and we are making the
12 assumption here that because we have gone to
13 get a ruling from the Court there has been a
14 violation of the party rule here. And I don't
15 think that is right. I think that litigants
16 are going to have to avail themselves of the
17 courts and get rulings and not necessarily be
18 burdened by politics, certainly not to set a
19 predicate for so and so's first or second or
20 third or fifth motion for sanctions, that
21 there needs to be a process by which disputes
22 that need resolving by the Court can be, even
23 if it's not in a motion to compel where it is
24 not under the rubric of discovery violations
25 and there is not a penalty involved at all

1 other than getting the rulings.

2 MR. HERRING: To be clear on

3 that, that is preserved, and that is why the

4 second sentence of -- the first sentence of

5 the rule of Paragraph 2 says that. You still

6 have a compel to quash motion if you want it,

7 and you don't have to file a motion on

8 anything related to the sanctions as such if

9 you don't want to.

10 You're right in terms of the

11 discovery violations. We can wrestle with the

12 title of the rule. We didn't want to say, as

13 Judge Brister points out, "sanctions" because

14 this isn't sanctions, all of it; but the

15 sentiment we got was to stick all of this in

16 one rule and then have it broken down so that

17 you can deal with all kinds of situations; and

18 "discovery violations" may be a little too

19 strong way to word it, but it is really was

20 Rule 215.

21 PROFESSOR DORSANEO: Why don't

22 we just standard the title back to what it

23 used to be: "Failure to Make or Cooperate in

24 Discovery - Sanctions," and that takes care of

25 that.

1 PROFESSOR ALBRIGHT: What I'm
2 hearing is that this rule, most people like
3 this rule generally except there is concern
4 that it doesn't really address the problem of
5 stopping Defendants from violations of
6 sanctions awarding in a case; and I think like
7 Steve Susman was saying, the fact that you can
8 get attorney's fees in nearly every situation
9 encourges people to file sanctions. Where I
10 remember we could call the other side and say,
11 "Yes. I understand you've gotten busy, but if
12 you would just agree to an order that you need
13 to answer your interrogatories in 130 days,"
14 where now I think a lawyer might say, "Hey,
15 I'm not going to agree to the order, because I
16 can go down to the courthouse and get the
17 attorney's fees, and I can set a precedent
18 before the judge about that."
19 MR. LATTING: Don't you have
20 to verify that you have conferred with the
21 lawyer?
22 PROFESSOR ALBRIGHT: Yes. And
23 I can say, "I'll agree to the order if you'll
24 agree to pay me $500 worth of attorney's
25 fees." "I'm not going to pay you $500 worth

1 of attorney's fees." "I'm going to an enter
2 an order on interrogatories."
3 MR. LATTING: Scott doesn't
4 like to do that anyway.
5 PROFESSOR ALBRIGHT: But I can
6 foresee that dynamic going on between young
7 lawyers who are trying to establish who is
8 most macho. And if there is an incentive to
9 say to try to work it out and not pay
10 attorney's fees except in unusual situations,
11 if there is some way, I don't know how to
12 write the rule on that. I haven't thought
13 about it; but if there is some way, maybe it
14 is to split the rule out to say if you
15 need -- if someone doesn't comply with the
16 discovery, you then need to go to this rule;
17 if the next rule in situations where there is
18 conduct for rules something else, then you can
19 award attorney's fees; and in even worse
20 situation there's can be more severe
21 sanctions.
22 MR. HERRING: Those kinds of
23 sentences and guidelines are very hard to
24 write.
25 PROFESSOR ALBRIGHT: I know.

1 MR. HERRING: And that's --
2 MR. SOULES: Something like
3 this.
4 MR. HERRING: This rule, as
5 you'll notice, has a discretionary award of
6 expenses which our current rules does not.
7 PROFESSOR ALBRIGHT: Right. I
8 think what I'm hearing here is to have
9 something maybe more in the comments that
10 judges should award expenses only in more
11 egregious situations.
12 MR. SOULES: Why not just put
13 it in the rule, and if the Court finds that
14 there is not a bona fide dispute, he can
15 order attorney's fees.
16 HONORABLE SCOTT A. BRISTER:
17 "Substantially justified" covers that, doesn't
18 it, Chuck?
19 MR. HERRING: Yes.
20 MR. SOULES: Some words like
21 that; and that may respond to Steve's concern
22 earlier that do you have to file for
23 attorney's fees in a case. And right now
24 there is no limit on that, and I think that
25 was a very --

1 MR. HERRING: The rule though
2 as it's written, let me just point out that
3 provision, because it says, "The Court may
4 enter these orders for expenses without a
5 finding of bad faith or negligence, but shall
6 not award expenses if the unsuccessful party
7 or opposition was substantially justified, or
8 other circumstances make an award" --
9 PROFESSOR ALBRIGHT: Are you
10 talking about the current rule or?
11 MR. HERRING: This is the
12 proposed rule.
13 MR. SOULES: The proposed rule.
14 MR. HERRING: -- "or other
15 circumstances make an award of expenses
16 unjust."
17 MR. SOULES: I think Judge
18 Brister's point is that what we're speaking
19 about right now is already in this draft.
20 MR. HERRING: And we tried to
21 put that in there. That's the language. It
22 obviously can be changed.
23 MR. SOULES: Buddy Low, you
24 had your hand up.
25 MR. LOW: I'd like to see

1 something that encourages how the motion says
2 you can do it, but I think these rules as
3 proposed do not discourage the filing of
4 motions of sanctions as much as they should.
5 MR. SOULES: Is it possible to
6 put some balance in this by writing in for the
7 first time a sanction for filing a groundless
8 motion for sanctions?
9 MR. HERRING: You have that.
10 Rule 13 already covers that, and certainly the
11 amended rule here does.
12 MR. SOULES: Rule 13 --
13 MR. HERRING: Yes. It applies
14 to a case that is filed in bad faith,
15 groundless bad faith and for groundless
16 harrassment. You have that sanction for that
17 unusual, very unusual situation already built
18 in.
19 There are really three
20 anti-incentive things. The task force
21 absolutely agreed. There is too much
22 sanctions practice. We don't like it. We
23 want less of it. Everybody unanimously agreed
24 on that.
25 The question was how do you

1 deal with the sanctions steam that we have
2 now, and how do you build in some
3 disincentives. You make it nonmandatory,
4 which it is mandatory now if you read the
5 rules in terms of expenses, substantial
6 justification of opposition. So it is a
7 discretionary standard. Whenever you come to
8 court the court need not impose any
9 sanctions.
10 You have a conference
11 requirement. You can't even go to the
12 courthouse on a motion for sanctions unless
13 you confer with the other side. And if judges
14 will enforce that, get the message out,
15 "Folks, we don't want to hear any of these
16 motions." Nobody ever has to grant a motion
17 for sanctions ever again. That's built into
18 this rule.
19 And third, if you want to
20 really hit somebody with a severe sanction,
21 it's going to be darn tough to do under this
22 rule and you're going to get reversed if you
23 don't go through the procedures.
24 Those are the I think three
25 areas of disincentive we tried to build in.

1 They're not perfect, but we could do more.
2 MR. SOULES: Should the filing
3 of a groundless motion for sanctions be
4 governed as severely as Rule 13? You've got
5 to overstep your bounds big-time to get
6 Rule 13.
7 MR. LATTING: Well, if you'd
8 put a seniority provision, you couldn't file a
9 motion for sanctions. That's the way to get
10 away from the young blood.
11 MR. SOULES: We pretty much
12 have that rule in our firm. They can't file a
13 motion for sanctions without getting my okay,
14 and I don't give it.
15 MR. ORSINGER: The problem I
16 have with this whole thing is that as long as
17 there is discretion to award sanctions there
18 is an indication to lawyers to take it; and
19 that's why I like the two-step process, except
20 for the problem that Rusty McMains addressed
21 which is when you have been caught lying,
22 falsifying evidence, destroying evidence two
23 steps probably is not necessary, probably not
24 appropriate, but I think 99 percent of the
25 discovery disputes are resolvable by one visit

1 down to the courthouse.
2 Now, I understand that you
3 have all of these criteria that must be met as
4 you move up the scale of severity, but in
5 terms of inviting sanction litigation since
6 they're all available on the first motion
7 you're inviting people to seek the maximum
8 relief on the first motion.
9 If you really want to reduce
10 sanction practice, I think what you should do
11 is force people for the curable issues to seek
12 an order together with compensation for the
13 attorney's fees and expenses necessary to get
14 that order. Then no one will be asking to
15 strike your pleadings in the first trip to the
16 courthouse.
17 To mesh that is the real
18 disincentive to have sanctions spots, because
19 it will only occur -- the sanctions award will
20 then occur only after someone has been told
21 "This is what the ruling is. Abide by it, or
22 you will suffer." And having one rule with
23 gradations in it where everything is on the
24 table for the first hearing I think doesn't
25 change the sanction environment we live in.

1 MR. HERRING: What do you do
2 about the problem that Judge Brister talked
3 about, Judge Travathan and other judges he
4 said who get people who just won't do it until
5 you come to the courthouse? "We'll just award
6 expenses. We can't sanction." Or we get the
7 case where a week before trial somebody is
8 curable, but somebody doesn't produce the
9 1,000 documents or the 10,000 documents and
10 the whole thing is put off.
11 MR. ORSINGER: I think having the
12 second or possibly even the third hearing in
13 those instances of those recalicitrant parties
14 is a small price to pay to destroy the
15 sanction litigation that we have, because I
16 think a two-step deal like that is going to
17 take the sanction awards out and limit them
18 just to those people who really seriously are
19 abusing the system even though they've been
20 told by a judge that if you continue to do
21 this, we'll have your pleadings struck.
22 MR. SOULES: How does that
23 respond to Judge Brister's example of what
24 happened with Judge Travathan?
25 HONORABLE SCOTT A. BRISTER:

1 What do you do at the first hearing?
2 MR. HERRING: There were a lot
3 of district judges who said, "We see people
4 who come into our court. We can't ever get to
5 them except to award expenses the first time.
6 We're going to have more problems. The abuse
7 we'll never be able to address." And if you
8 have the occasional big case where the whole
9 trial gets put off because somebody doesn't do
10 it and it's curable, you'll never be able to
11 get any sanctions against them other than
12 "Okay, judge. I'll pay $250 because we came
13 over here today."
14 MR. ORSINGER: To me it should
15 not affect the trial setting, because this
16 ought to be done well in advance of trial. If
17 the problem comes up, it's the time to file
18 your motion.
19 MR. SOULES: David Perry.
20 MR. PERRY: I'm David Perry.
21 I agree with Richard. I think that we have to
22 make a distinction between motions to compel
23 and motions for sanctions. I think that
24 motions for sanctions ordinarily ought to be a
25 two-step process. Now, there may be an

1 exception to that if the person has
2 irrevocably destroyed evidence or something of
3 that nature; but the basic principle ought to
4 be that we make a distinction between
5 compelling discovery on the one hand and
6 sanctioning someone on the other hand.
7 And I would move that we adopt
8 as a principle that we have two separate rules
9 that deal with compelling discovery, one of
10 which deals with compelling discovery, and the
11 other of which deals with sanctions, and that
12 we consider the two issues as separate and
13 distinct issues.
14 COMMITTEE MEMBERS: Seconded.
15 HONORABLE SCOTT A. BRISTER: I
16 would suggest as opposed to setting up two
17 different rules, if you look at the third page
18 of the comment, the first full paragraph that
19 starts Rule 166d addresses the least severe
20 sanction principle, goes on to quote the
21 language from the rule that the judge has to
22 find why a lesser sanction would be
23 ineffective, and that the sanction itself as
24 reviewed on appeal that it's no more severe
25 than necessary.

1 One could add a sentence in
2 the comment that says "Unless there is some
3 evidence that a motion to compel appearance at
4 a deposition, production of documents, answers
5 to interrogatories would be utterly futile,
6 such would always constitute a lesser severe
7 sanction" making it clear in the comment that
8 that is what we mean when we use that
9 language.
10 I think that would take care
11 of the problem; but again, it will be futile
12 in a number of cases to have that first step
13 of the two-step hearing. So in my opinion a
14 rule cannot be drawn that covers both. Either
15 you have to double the rules -- and let me
16 reiterate, one of our goals in this, this rule
17 we drafted is one-third of the length of
18 current Rule 215.
19 Current Rule 215 sets out
20 provisions where you can recover attorney's
21 fees five different places. Part of the idea
22 was Rule 215 is so unwieldy it would take 10
23 minutes to read it, and therefore it's hard to
24 apply, was to keep it as few rules, as
25 succinct in one place as possible.

1 I would suggest that we add a
2 sentence like that to the comment saying,
3 making explicit what I think everybody is
4 saying. If unless it's futile to order them
5 to show up at the deposition, to produce the
6 documents, then that is the lesser severe
7 sanction that is readily available.
8 MR. GALLAGHER: I don't know
9 if David's suggestion was in the form of a
10 motion.
11 MR. PERRY: I intended for it
12 to be in the form of a motion, if that is
13 appropriate.
14 MR. GALLAGHER: If it rises to
15 the dignity of a motion in the mind and the
16 eyes of the Chair, then I second it.
17 MR. SOULES: I heard it
18 seconded several places, and we are debating.
19 MR. GALLAGHER: And I would
20 like to -- I think that if we deal with the
21 circumstance that Judge Brister addresses that
22 occurred in Judge Travathan's court where
23 everything had been done and there was really
24 nothing that a motion to compel would benefit
25 either side, there was no benefit to be

1 derived from the violation, then that's one
2 set of circumstances, Luke, that I think the
3 committee needs to address and deal with. And
4 then a motion to compel would appear to me to
5 be the kind of thing that Judge McCown is
6 suggesting from the standpoint of curable
7 discovery, and I think that's is what Richard
8 was talking about a minute ago, curable
9 discovery versus incurable problems in
10 discovery.
11 And I think that that kind of
12 system would be beneficial from the standpoint
13 of eliminating some of the rancor that has now
14 developed within the trial practice which our
15 objective should be to try to eliminate that
16 if at all possibile because the sanctions
17 carry such severe potential effects to the
18 litigants that are involved, that anything
19 that can be done to make it more difficult for
20 those to be granted should be done.
21 And I think two rules such as
22 David suggested is a good way to deal with it.
23 PROFESSOR DORSANEO: So I
24 understand it, what you're talking about is
25 these so-called sanction or severe sanctions

1 rule unlike the paragraph labeled sanctions in
2 the task force draft would require two steps,
3 and I heard you say "two different rules." But
4 the real important thing is that the sanctions
5 rule requires two steps, right?
6 MR. PERRY: That's going a
7 step beyond the motion that I made.
8 PROFESSOR DORSANEO: I'm just
9 trying to understand it.
10 MR. PERRY: Because the
11 motion, the concept that I have is that
12 compelling discovery is a different issue than
13 sanctioning somebody.
14 PROFESSOR DORSANEO: Tell me
15 about the sanctions.
16 MR. PERRY: I happen to believe
17 that if we are on the sanctions issue, that
18 sanctions should ordinarily be a two-step
19 process.
20 PROFESSOR DORSANEO: Okay.
21 MR. PERRY: Now, I think there
22 may be exceptions for irrevocable destruction
23 or something like that. But it seems to me
24 that we need to start off by separating in our
25 minds whether we're dealing with compelling or

1 sanctioning, and I also think that when
2 lawyers get down to the courthouse it needs to
3 be clear in the mind of the lawyers and in the
4 mind of the judge "Are we here to compel
5 discovery," or "Are we here to find about
6 sanctioning."
7 MR. SOULES: Yes. Stephen
8 Yelenosky.
9 MR. YELENOSKY: I agree with
10 the motion after listening to the debate. And
11 I went back and read the rule again after
12 listening, and I agree with Paula Sweeney's
13 comment of I don't like the title. First of
14 all in the first sentence it says the same
15 thing. It commingles a failure to respond to
16 a discovery request in good faith with
17 destruction of evidence. The very first
18 sentence of this rule essentially puts those
19 in the same sentence. For that reason I think
20 they should be bifurcated.
21 And I don't think that if
22 truly 90 percent of the practice is one in
23 which we are talking about compelling
24 discovery and we're not talking about
25 malfeasance, but nonfeasance whether it's

1 negligence or good faith, that we want to
2 separate the two merely with a comment. I
3 think that should be dealt with in the rule.
4 PROFESSOR DORSANEO: Part of
5 what happens or what happened effective April
6 1, 1984, the rule up until that time modeled
7 the old companion Federal rule, basically
8 thought of itself as a failure to make
9 discovery, and then if there is an order,
10 sanctions; or in certain circumstances
11 otherwise severe sanctions.
12 So in my view whether it's two
13 numbers, two rules, really doesn't make any
14 particular difference as long as the concept
15 is changed back to the way that it was
16 before.
17 MR. YELENOSKY: Essentially
18 that's the year that I was licensed, so I
19 don't have any...
20 PROFESSOR DORSANEO: The
21 Federal Rule right now is the same thing as
22 what we had.
23 MR. LATTING: Wait a minute.
24 The message if you want --
25 MR. SOULES: Just a minute.

1 Judge Brister had his hand up. He jumped in,
2 and I'll get to you next, Joe.
3 HONORABLE SCOTT A. BRISTER:
4 Well, I yield to the Chair.
5 MR. LATTING: That's my
6 concern.
7 MR. SOULES: Okay. Joe
8 Latting..
9 MR. LATTING: That's my
10 concern, that we are inviting litigants who
11 have deep pockets to file at least one
12 motion. Why give them the material to make
13 them take you down and get a hearing set and
14 go through all that. That will run them out
15 of a month of time, and how many thousands of
16 dollars not in every case, but we're
17 requiring. Keeping the trial judge in an
18 appropriate situation from doing what seems
19 appropriate under the circumstances, it seems
20 to me we can address that.
21 I agree with your comments
22 earlier that I think we ought to state in the
23 rule that moving for sanctions is a severe
24 step that ought to the discouraged, and maybe
25 even beefing up the requirement to be a

1 face-to-face communication between the lawyers
2 to secure a bona fide effort to resolve
3 discovery.
4 But sometimes that just
5 doesn't work. You have some lawyers who just
6 don't work that way. And I think trial judges
7 need to be able to take those situations into
8 account and not say, "Well, we have to give
9 this guy one trip down here to the courthouse
10 irrespecitve of the facts."
11 So I think we're headed in the
12 wrong direction and making it more expensive
13 and cumbersome to litigate cases if we require
14 a two-step process.
15 MR. SOULES: Judge Brister.
16 HONORABLE SCOTT A. BRISTER: I
17 would oppose making two rules. And I think if
18 we think about it more, for instance, my
19 situation where 10,000 documents are
20 discovered 45 days before trial, but you don't
21 produce them, then you think, "Uh-huh. Then
22 I'm going to fit under the rule that says it
23 is curable. So now all you can do with my new
24 10,000 documents is make me go down to the
25 courthouse, and the judge will order me to

1 produce them, and the attorney's fees for
2 going down for the motion," and you have just
3 avoided the severe sanctions that you would
4 have gotten if as soon as you got them, you
5 had turned them over.
6 In other words, I think when
7 you start -- it is hard to set up a situation
8 curable, noncurable and separate sanctions,
9 separate treatments, et cetera, where one can
10 never cross over into the other or you're
11 going to end up with situations, and that's
12 just the one that comes immediately to mind,
13 where you're going to be stuck in one rule
14 with injustice. "I've just discovered these
15 10,000 documents. I'll hold on to them
16 because that now makes this a situation that
17 is curable by a motion to compel, and that's
18 all you can do with me under this new separate
19 rule."
20 MR. YELENOSKY: I mean my
21 response to that is how you are defining
22 curable? And also doesn't that raise the
23 question of their intent to delay release
24 which could be addressed in this separate
25 rule?

1 In other words, if you're
2 saying curable means that you just want
3 something from them and then that cures the
4 problem, then you do have that problem. But
5 if curable means that presenting it in a
6 manner which is useful given the trial setting
7 or otherwise that you have a definition in
8 your sanctions provision that talks about
9 intentional concealment, then you can proceed
10 under both rules.
11 HONORABLE SCOTT S. BRISTER:
12 My point is just everything else in the rule
13 is going to be identical. We're going to have
14 two rules with the same provisions for the
15 motion, the same provisions for things you can
16 do. The only difference is going to be "If
17 the circumstances in this particular case
18 which in the close cases is going to be the
19 judge's discretion, say, fall under this rule,
20 then go to this rule. If the circumstances
21 suggest in the close cases fall under this
22 rule, go to this rule."
23 I don't think it's necessary
24 to have two rules. When you're going to have
25 close cases the judge like it or not no rule

1 we can draw is going to avoid the judge having
2 to make some calls. Otherwise we would be out
3 of a job. We're going to have to make some of
4 those calls someplace.
5 If that's the case, economy
6 says put it all in one rule; and if we need
7 further clarification, we can play with the
8 rule. Appeals cases can clarify it, that kind
9 of thing.
10 MR. SOULES: I think the idea
11 is we want a separation of the two concepts of
12 compel and sanctions whether in one rule or
13 two; but if it's in one, it's going to have to
14 be subparts to set them out separately. Is
15 that okay with you David?
16 MR. PERRY: Yes. I prefer two
17 separate rules. But however we do it, I think
18 they are very, very different concepts, and I
19 think they should be handled differently.
20 I do not agree with Judge
21 Brister's comment that the procedures would be
22 the same. I think one of the basic teachings
23 of Transamerican is that the procedures for
24 sanctioning somebody was going to be different
25 than the procedures from compelling

1 discovery.

2 HONORABLE SCOTT A. BRISTER: I

3 agree. If I said "procedure," I meant to say

4 the motion is going to be the same. You're

5 going to have to ask which court to file the

6 motion, and that's going to be the same. The

7 possible sanctions is going to have to be the

8 same. The certificate of conference is going

9 to have to be the same in both rules, that

10 kind of thing. Not procedure. I agree with

11 you. I agree with you as far as the

12 procedures will be different.

13 MS. DUNCAN: I think the two

14 are very different. I suppose to me as a

15 practicing lawyer, the real difference is the

16 motion. When I get hit with a motion for

17 sanctions or for liable procedures a month

18 old, I don't think I am unusual. I get

19 upset. It is upsetting to me.

20 We're all making different

21 assumptions about what is the cost that is

22 incurred as a result of a failure to provide

23 discovery. With Judge Brister's 10,000

24 document example in my view the cost of that

25 failure to make discovery is the cost of

1 retaking those depositions, of putting off
2 your trial, of changing those people's
3 schedules.
4 I would say there might be the
5 discretion of the trial judges to determine if
6 that failure to make discovery was intentional
7 or "We just found a warehouse." It happens.
8 I mean, sometimes you just find a new
9 warehouse of documents. It happens
10 particularly when your documents date back to
11 the 1930s. It just happens.
12 But to me they're very
13 different, and I think that the trial judge
14 can make a determination of intentional versus
15 inadvertent, because nine times out of ten
16 that's going to be fairly apparent.
17 MR. BABCOCK: I keep focusing
18 on the consent rule that gives the judge tools
19 for excluding evidence from the trial. I
20 agree. It would certainly prevent them from
21 using, the other side, if they claimed a
22 surprise.
23 PROFESSOR DORSANEO: How is
24 that different from an establishment order or
25 a precludement order or striking the

1 pleadings? How is that different?

2 MR. BABCOCK: How is it

3 different? The pleadings are different.

4 PROFESSOR DORSANEO: Well, if

5 you're not allowed to put on your evidence,

6 what good are your pleadings? I mean, it's

7 the same thing. The people who created it

8 thought about the same things that you're

9 thinking about.

10 MR. BABCOCK: Yes. But it

11 doesn't -- it is different. It is different.

12 But it doesn't necessarily go to the heart of

13 it all. (Inaudible.) It may be an important

14 witness that they need and the jury is likely

15 to go with. It's not the same thing.

16 MR. BEARD: Luke, I know you

17 don't like to close debate, but I think it's

18 time to vote.

19 MR. SOULES: David, do you

20 want to state, or does anyone else have

21 anything to comment about separating the

22 concepts of motions to compel from the concept

23 of sanctions?

24 MR. FULLER: I'd just make one

25 comment, and that is the present system works.

1 MR. HERRING: The concepts of
2 this rule are supposed to be separate, and
3 there are very different procedures and very
4 different effects depending on where you put
5 the expenses for attorney'S fees or motion to
6 compel or something else. That is the
7 separation. They are very, very different and
8 they are supposed to be treated differently.
9 The question then is how do
10 you want to separate them in some other way?
11 Conceptually if it's not done clearly enough
12 or completey enough, you can have two rules in
13 which Judge Brister suggests in which case you
14 re-write a lot of the same stuff in both
15 rules, or you can try to clarify the division
16 in the rule.
17 HONORABLE SCOTT A. BRISTER:
18 Yes. I would propose an amendment or whatever
19 way you want to do it. I think I would have
20 to do it as an amendment to that motion just
21 to put it up or an alternate vote that my
22 proposal to put it in the comment saying that
23 if it's curable by a motion to compel,
24 et cetera, you have to do that, to put that in
25 the comment as opposed to making two new

1 rules. I would propose that as an amendment.

2 MR. SOULES: Let me ask,

3 Judge Brister, what is your impression of the

4 force of the comment as being influential on

5 trial judges?

6 HONORABLE SCOTT A. BRISTER:

7 Because the rule says the judge has to say why

8 a lesser sanction is inappropriate. In my

9 opinion the appellate courts are going to say

10 the judge -- every time you do anything other

11 than your first step motion to compel the

12 judge is going to have to say why the motion

13 to compel was futile. So it's in the rule.

14 Obviously from the comments,

15 people are concerned that some judges or

16 lawyers might not think it's in there, so you

17 put it in the comment to make it explicit that

18 that is required, if it would do any good.

19 HONORABLE F. SCOTT MCCOWN:

20 Luke, could I ask again what exactly it is you

21 envision us doing today? Because after

22 hearing everybody's comments I can tell you

23 what I want. I want either one rule that has

24 very clear subdivisions, or two rules that say

25 we're going to require face-to-face efforts by

1 the lawyers to resolve discovery before they
2 file anything. We want a motion to compel
3 when that's possible. We'll provide
4 reimbursement for expenses on compelling
5 discovery if it was not a good faith dispute.
6 If it's an incurable discovery problem, and by
7 incurable we mean that a order to compel would
8 not address the problem created such as the
9 delay in the Judge Travathan example, you can
10 go directly to the motion for sanctions. If
11 there is a failure to comply with the order to
12 compel, you can go directly to a motion for
13 sanctions, that we have the procedural
14 safeguards that this rule has for resolving
15 sanctions, and that we have the least
16 sanctions that will do the job.
17 Now, I'm sure we could write a
18 rule to capture those comments. The devil is
19 going to some extent be in the details, and we
20 can't do that this morning. So I'm not sure
21 where you want to go with this, but that's
22 what I would like to see.
23 MR. SOULES: That pretty much
24 summarizes what I've got written down as to
25 what has been the focus of the debate. I

1 think two things were not included in your
2 summary. One is the change in the title of
3 it, so it's not necessarily a violation.
4 HONORABLE F. SCOTT MCCOWN: A
5 neutral title.
6 MR. SOULES: A neutral title.
7 And the other --
8 MR. TINDALL: What about
9 something like "Enforcement of Discovery"?
10 MR. SOULES: We are not down
11 to drafting it yet, but we can do that. But
12 the other concept was whether or not there
13 should be a sanction other than Rule 13 maybe
14 with lesser of the prior requisites for filing
15 a frivolous motion for sanctions. Those are
16 two things that were not covered in your
17 comments as I've written them down of what
18 seemed to be the issues.
19 MR. SUSMAN: Something that is
20 confusing, the relief in Paragraph 2 has
21 nothing to do with the procedure in
22 Paragraph 1. Any of the Paragraph 1
23 procedures you get the relief in Paragraph 2.
24 That's why it is written. And Paragraph 2
25 ought to go somewhere else, because

1 Paragraph 3 relates to Paragraph 1
2 procedures. Am I right?
3 MR. HERRING: No.
4 HONORABLE SCOTT A. BRISTER:
5 No.
6 MR. HERRING: Paragraph 2
7 deals with the relief there is for limited
8 relief we're talking about. You file your
9 motion to compel. And again just to restate
10 the obvious, the rule in that first sentence
11 recognizes the motion to compel.
12 If you're going to go beyond
13 the nonsubstantial expenses as an award, then
14 you're going to have to follow the hearing and
15 the order procedures.
16 MR. SUSMAN: The relief, I
17 don't have to go through any of the
18 Procedure 1 to get it.
19 HONORABLE SCOTT A. BRISTER:
20 No. You have to file a motion. You would
21 have to attach affidavits if you're going to
22 use it. You have to serve them. You have to
23 do 167. You don't have to have an oral
24 hearing.
25 MR. HERRING: The oral hearing

1 under (1)(b) and the order requirements under
2 1(c) are not applicable to the simple relief,
3 the little expenses. Everything else
4 procedurally applies.
5 MR. SOULES: Okay. What is
6 the sense of the committee? Do we want to
7 take up the issue separately either with the
8 same rules separated by subparts, or discrete
9 rules numerically? David Perry recommends to
10 address all the issues.
11 MR. ORSINGER: I think we
12 ought to vote on the proposals individually.
13 MR. SOULES: All right.
14 MR. FULLER: That's
15 presupposing you're going to have a two-step
16 process; and there are some people in here, me
17 being on of them, that opposes the two-step
18 process.
19 MR. PEEPLES: Luke, could I
20 have a clarification?
21 MR. SOULES: Yes, sir.
22 MR. PEEPLES: Judge McCown
23 stated his preferences, which sounded to me
24 like something David Perry would agree with.
25 Do you agree with how he restated his

1 preference, David Perry?
2 MR. PERRY: Judge, I agree
3 with most of what Judge McCown said, but I
4 don't think it would be fair to the committee
5 to try to take all of that and lump it all
6 together at one time and vote on it all at one
7 time. I think we ought to do it on an
8 issue-by-issue basis, and I think the first
9 issue is to separate out --
10 MR. SOULES: That's what we're
11 going to do.
12 MR. PERRY: -- motions to
13 compel versus sanctions.
14 MR. SOULES: That's what we're
15 going to do.
16 MR. GALLAGHER: Just the
17 general principle? Is that what we are going
18 to talk about or we're going to vote on,
19 separating sanctions from motions to compel?
20 MR. SOULES: That's right. And
21 this includes -- remember this includes the
22 acceptance, as Ken Fuller talked about, of a
23 two-step process. Otherwise you don't need to
24 bring it out.
25 MR. TINDALL: I thought Rusty

1 was saying the concern is --
2 MR. PERRY: Luke, my motion
3 was simply that we consider the issue of
4 compelling as a separate and distinct issue
5 from the issue of sanctions; and I do not
6 include in the motion itself any of the
7 details beyond that.
8 MR. GALLAGHER: You're not
9 contemplating necessarily the two-step process
10 in all circumstances?
11 MR. PERRY: Not as part of the
12 motion. Now, I personally think that's where
13 we'll probably end up. But the motion is just
14 to have two parallel tracks of consideration,
15 one on compelling and one on sanctions.
16 MR. SOULES: We've got to
17 separate the debate along those lines?
18 MR. HERRING: Not talking
19 about the rule. You're just talking about --
20 MR. SOULES: I don't know how
21 we can separate the debate along those lines.
22 MR. PERRY: I think we ought
23 to separate the debate along those lines, and
24 I think it makes sense to end up writing two
25 separate rules along those lines.

1 MR. SOULES: But don't we have
2 to talk about them in the context of each
3 other?
4 HONORABLE SCOTT A. BRISTER:
5 Because I would vote for that, also for this
6 rule, because I think this rule separates it
7 along two lines.
8 MR. SOULES: All right. State
9 your motion, and we'll vote on it. We've had
10 some debate already.
11 MR. PERRY: My notion is that
12 we adopt the concept of writing separate and
13 distinct rules either as separately numbered
14 rules or as separate sections of the same
15 rule. I would leave that to the discretion of
16 the drafting people, but that we adopt the
17 concept of writing separate and distinct rules
18 on compelling discovery on the one hand versus
19 sanctioning on the other hand.
20 PROFESSOR DORSANEO: Seconded.
21 MR. SOULES: That's been
22 seconded. All in favor raise your hand.
23 Okay. Opposed? The motion carries heavily.
24 MR. HERRING: We need to go to
25 the next step though, because obviously

1 Judge Brister and I believe that's what the
2 rule reflects now. It divides out the motion
3 to compel procedure with the relief area in
4 section two, and sanctions in section three.
5 And then the question is, as
6 the judge said, "The devil is in the
7 details." Where do you go from there? We all
8 agree on those concepts. They ought to be
9 different than the motion to compel.
10 MR. SOULES: I think it's
11 important to note here that what we've
12 developed here this morning in the past couple
13 of hours is the very thing that the
14 Supreme Court failed to see in 1984, and that
15 is compelling response to discovery is not
16 equivalent to sanctions; and I'm not sure that
17 the committee exactly saw it that way that
18 well defined, but that was the reason for the
19 two-step process then.
20 And now I think with this
21 background there is a good chance the Supreme
22 Court will give that a closer look if that's
23 what we suggest.
24 PROFESSOR DORSANEO: I move
25 that with respect to the compelling compliance

1 part of this analysis that the trial judge
2 have discretion to award expenses --
3 MR. SOULES: Always?
4 PROFESSOR DORSANEO: -- frankly
5 in the language with the limitations that are
6 contained in Paragraph 2 of the task force
7 draft which itself is built on our current
8 rule which it is mandatory, the substantially
9 justified language as in our current rule
10 taken from the Federal Rule. That's my
11 motion.
12 MR. SOULES: Is there a
13 second?
14 COMMITTEE MEMBERS: Seconded.
15 MR. HERRING: For
16 clarification, are you saying what this is?
17 PROFESSOR DORSANEO: That we
18 have two steps. One is compulsion of
19 compliance with the effect of that forget
20 sanctions, that an award of expenses be part
21 of the compelling compliance process as a
22 matter of trial court discretion when the
23 failure to comply is not substantially
24 justified or when the motion to compel is not
25 substantially justified.

1 MR. HERRING: That is the same
2 that is in here except you're focusing on the
3 two steps.
4 PROFESSOR DORSANEO: Yes.
5 MR. HERRING: Are you then
6 precluding any other award?
7 PROFESSOR DORSANEO: No. No.
8 I'm not talking about sanctions at all.
9 HONORABLE ANN TYRELL COCKRAN:
10 Are you limiting it to the extent it is
11 necessary --
12 MR. SOULES: We've got a
13 motion and a second. The motion is to permit
14 the court in some circumstances in language
15 that is here and use other language to award
16 the expenses including attorney's fees in
17 connection with a motion to compel. Okay.
18 That's what we're debating. And Sarah had a
19 question. That's not a sanction.
20 MS. DUNCAN: My question is
21 are expenses as he is using the word only
22 those expenses necessary in connection with
23 the motion including attorney's fees just for
24 bringing that motion and getting an order on
25 that motion? I need to know before I can

1 vote.

2 MR. SOULES: Now we're

3 debating. Now the question that is suggested

4 for debate is should the fees, the expenses

5 including attorney's fees be limited to those

6 incurred in connection with the motion that

7 the judge hears to compel, the motion to

8 compel that the judge hears, or can it be

9 broadened? Who wants to start? Buddy Low.

10 MR. LOW: I wonder does that

11 have -- and I'm not clear. Does that have the

12 reverse weight, the motion to compel and have

13 to go down here? "I'm not granting you fees.

14 I'm granting attorney's fees for the other

15 side." Is it a two-way street?

16 MR. ORSINGER: It is. You can

17 get it for defending it if it's not

18 substantially justified.

19 MR. LOW: Okay. I'm not

20 arguing the merits either way.

21 MR. SOULES: I think the

22 understanding is th at whatever the expenses

23 and fees are awardable, they can be given for

24 either the prosecuting function or defending

25 against it.

1 MR. TINDALL: And they're
2 payable at --
3 MR. HERRING: Not the delay in
4 trial.
5 MR. SOULES: That's what we're
6 debating right now. Who wants to speak to
7 that? Tommy Jacks.
8 MR. JACKS: I really have just
9 a question of Judge McCown, and that is could
10 you tell us if there is a difference, and I
11 think there is, between the standard that is
12 encompassed in the proposed rule that I
13 understand Bill Dorsaneo incorporated in his
14 motion versus the standard you would suggest
15 for the recovery of expenses?
16 HONORABLE F. SCOTT MCCOWN:
17 Yes. I think the issue is one of whether you
18 want an objective test or a subjective test of
19 good faith. Is the question calling it up or
20 down was this a good motion or a bad motion, a
21 good objection or a bad objection. Assuming
22 that it was bad, is it mandatory that the
23 trial judge award reimbursement, or does the
24 trial judge have discretion not to? And if
25 the trial judge has discretion not to, then

1 the test really isn't up or down, good or
2 bad. Instead it's a test of good faith which
3 is what I would propose.
4 PROFESSOR DORSANEO: Well, if
5 you want to think of your discretion and how
6 you would exercise it in terms of your
7 evaluation of bona fide, I think that that
8 would be fine. I would make it discretionary
9 and would not evaluate. You couldn't -- I
10 wouldn't test the ruling on that.
11 HONORABLE F. SCOTT MCCOWN:
12 Well, but it's not discretion unless you have
13 a standard.
14 PROFESSOR DORSANEO: And
15 objective facts.
16 HONORABLE F. SCOTT MCCOWN:
17 It's arbitrariness. You are saying the trial
18 judge could arbitrarily decide what he or she
19 wants to do about awarding attorney's fees
20 unless you have a standard. Once you have a
21 standard then it becomes discretion within a
22 range of whether the trial judge is
23 reasonable.
24 I think the standard ought to
25 be good fiath. If you've got a young lawyer

1 who comes down on an objection because they
2 just flat don't understand the law and it's
3 the first time they're down there and you
4 don't want to award attorney's fees, that's
5 fine.
6 On the other hand, I
7 understand the argument that, "Well, it costs
8 the other side for them not to understand the
9 law, and the other side needs to be
10 reimbursed." The reason I prefer good faith
11 is because when you require reimbursement you
12 move real dollars. You take $500 out of their
13 pocket and move real dollars over.
14 When you don't require
15 reimbursement it's not a real $500 cost,
16 because the lawyer inflated what he's asking
17 for to begin with. He's not going to charge
18 it all back to his client to begin with, and
19 the client is not going to pay it all to begin
20 with particularly in these small cases that we
21 see.
22 PROFESSOR DORSANEO: You said
23 a lot of things. But if you make it bad
24 faith, then you're just talking about the same
25 sanctions game we're talking about. I think

1 an objective test substantially justified, not
2 substantially justified is not something that
3 maybe would make somebody feel upset or like
4 he's been accused of being a thief or a
5 cheat. And when I say unreviewable discretion
6 amounts to arbitrariness I don't necessarily
7 disagree with that; but I like objective
8 tests, unreviewable discretion on this
9 particular question that should expenses be
10 awarded or not.
11 MR. SOULES: Steve Susman.
12 MR. SUSMAN: What would be the
13 measure of just saying you've got to pay the
14 other side's expenses if you lose, discovery
15 expenses? You bring on the discovery
16 dispute. You initiate it, and it is opposed;
17 and if you lose, you pay the other side the
18 expenses in connection with that. What is the
19 mischief? There's no motion. There's no
20 procedure.
21 HONORABLE F. SCOTT MCCOWN:
22 The mischief concern is --
23 MR. SOULES: I thought your
24 concern earlier was that that would grow
25 lawyers every time to file, request attorney's

1 fees because it might be malpractice not to.
2 MR. SUSMAN: No. This is
3 automatic. You don't file. This is no
4 motion. This is no hearing. It is
5 automatic. It's just, I mean --
6 MR. SOULES: If you lose, you
7 pay.
8 MR. SUSMAN: If you lose. If
9 you guess wrong, or whether you're ignorant or
10 negligent or bad faith, the other side wins
11 the motion to compel because you have posed a
12 bad objection, or you succeeded in getting a
13 discovery request quashed because he asked for
14 too much. They pay you the expenses of the
15 outing.
16 MR. TINDALL: Steve, I think
17 in many discovery fights there are no winners
18 or losers. You go down and you have a 45
19 minute hearing over a bunch of documents and
20 relevance and burdens, and the judge grants
21 some and denies some. I think that's the 90
22 percent result. Usually there are very few of
23 these fights where it's just a single fight
24 over one point. So I mean you would have a
25 situation where how do you decide. If it's a

1 mandatory award of fees, which I find
2 attractive, how would you do it if he grants
3 half of your motion and denies half of it?
4 MR. SOULES: 50/50. My hourly
5 rate is higher than yours though.
6 MR. TINDALL: Yes. That's
7 right.
8 MR. PERRY: It looks to me
9 like that -- I derived from the expressions
10 earlier that the general sentiment on the
11 Committee was that in the 90 or 95 or 99
12 percent of the cases where the disputes are
13 relatively minor that we should avoid trying
14 to become (avesh) in satellite litigation, and
15 that on the other hand in those relatively
16 rare cases where the infractions are severe
17 and the satellite litigation is necessary,
18 that we ought to be prepared to drop the
19 hammer on them; and it seems to me if that is
20 our philosophy, that a motion to compel
21 discovery ought to be like any other motion in
22 a lawsuit.
23 Now, I think there should be
24 an exception about requiring consultation, but
25 other than that where the consultation is

1 required ahead of time it seems to me that if
2 all you're trying to do is have a motion and
3 compel some discovery, that each party ought
4 to have to pay their own attorney's fees just
5 like they do for every other thing that
6 lawyers do for them.
7 MR. SOULES: Just like special
8 exceptions?
9 MR. PERRY: Whatever the hell
10 it might be.
11 MR. SOULES: Summary
12 judgment. There's an idea. Ken Fuller.
13 MR. FULLER: Luke, I've got
14 something that is really bothering me. I hear
15 everybody wandering around worrying and
16 wringing their hands about attorney's fees and
17 court costs, but I haven't heard addressed the
18 main problem that bothers me about the
19 two-step process. How about the delay that
20 results in getting a case to trial and your
21 client loses $150,000 because of this delay
22 when the stock market is jumping all over the
23 place, when the dry hole is being drilled?
24 I don't hear this addressed;
25 and that is my main objection to this two-step

1 process. You can pay attorney's fees until
2 the world looks level, but this guy
3 may -- your client may have still lost half a
4 million dollars because the trial was put off
5 for two months, five months, a year.
6 And I don't hear that
7 addressed; and it really disturbs me, because
8 we get involved in this. I'm a divorce
9 lawyer, and I'm telling you the market is
10 going crazy. And if you miss a trial date,
11 boy, you may -- you're forced into a position
12 you have almost got to settle to salvage your
13 client's financial situation.
14 MR. PRICE: Just to echo what
15 Ken is saying, you know, one out of every two
16 cases filed in this state is a divorce case or
17 a family law case, and in every divorce case
18 one side wants to delay; and it's going to
19 really cause some havoc in 50 percent of the
20 litigation in this state if you really go to
21 some type of two-part process.
22 I'm worried that we keep
23 forgetting about the fact that the vast
24 majority of cases aren't going down to the
25 courthouse for sanctions hearings. We're

1 overlooking that there is a tremendous amount
2 of litigation going on out there that is
3 running smoothly because of the fear of
4 sanctions.
5 We're saying we ought to get
6 rid of the criminal laws because we don't like
7 criminal trials. I think you have got to
8 think about the fact that there is a
9 prophylactic effect that these sanctions have
10 on the everyday practice, and we're forgetting
11 that average case, that is, that the average
12 case doesn't go down and have anything to do
13 with district judges.
14 MR. JACKS: This is the second
15 time that Dan has raised this, and lest my
16 silence be taken for agreement, I disagree
17 wholeheartedly with the idea that that is why
18 lawyers comply with discovery requests. I
19 think by and large the lawyers with whom I
20 deal comply with it because they simply,
21 that's how they practice law, and they know
22 that what goes around comes around, and they
23 have some respect for one another; and I don't
24 think that it is essential to the practice of
25 law in that manner that you have this bugaboo

1 of sanctions hanging out there.
2 I'm sorry. I don't buy that.
3 I don't see it in the world I practice in.
4 MR. PRICE: I think that's
5 where we got where we are. We used to
6 practice under the great system we're going on
7 now, and it got so bogged down because you
8 couldn't get any documents, that we went to a
9 sanctions rule. And maybe -- I mean I think
10 Tommy is right in a lot of respects. Most
11 lawyers are just going to do it because it's
12 the right thing to do. But I think those
13 lawyers that aren't going to do it because
14 it's the right thing to do do it because there
15 is the threat of sanctions.
16 MR. SOULES: Is there a
17 perception that there has been any change at
18 all in the responsivenes to discovery requests
19 since 1984?
20 MR. TINDALL: Absolutely.
21 MR. PRICE: There's a lot more
22 compliance.
23 MR. SOULES: That's what I
24 hear generally is that there is more
25 responsiveness to discovery requests after the

1 1984 sanctions.

2 MR. GALLAGHER: Is there more
3 judicial time being expended on discovery now
4 than there was in 1983?

5 MR. SOULES: A lot more.

6 MR. LATTING: I was just going
7 to say to Tommy that I agree with Tommy
8 Jacks. I think, and I mean this sincerely, I
9 think if you and I were on opposite sides of
10 the lawsuit, we wouldn't really need the rules
11 much at all. We'd do it the right way. But
12 we are writing these rules for people who
13 don't feel that way all the time. These are
14 the situations where people are on the edge
15 either inadvertently or trying to be. So I
16 think we have to address the bad guys as well
17 as those of us who are trying to do the right
18 thing.

19 MR. JACKS: And I think we can
20 do that. And it seems to me that where we are
21 on this particular motion that Bill proposed
22 is the difference between the words
23 "substantially justified" in the proposed rule
24 and "good faith" under Scott McCown's proposal
25 and get back to the specifics of this. And

1 I'm not saying we don't have any sanctions.
2 MR. SOULES: Well, that is
3 whether expenses can be awarded at all.
4 MR. LATTING: I wanted to ask
5 Sarah a question, and the question is this:
6 In connection with Bill's motion is
7 it -- maybe I'm asking Bill the question.
8 Either one of you. Is the suggestion that we
9 only have the judge be able to award the
10 attorney's fees for that outing if there's a
11 failure to make discovery, and if that is the
12 rule that we're suggesting, doesn't that mean
13 if you want to delay the case like what you're
14 talking about, you just say, "Well, that's
15 fine. Go give it to them. We'll pay their
16 fees." Is that the direction you want to be
17 taking here? And if not, aren't we back to
18 the sanctions that we've got in this draft
19 anyway?
20 MR. SOULES: Let me interrupt
21 just a moment. Justice Hecht wants to
22 recognize Chief Justice Phillips.
23 JUSTICE NATHAN HECHT: A
24 Chief Justice has come in; and I said several
25 members of the Court might be stopping by

1 today, and Chief Justice Phillips is here.
2 MR. SOULES: Chief Justice
3 Phillips, welcome.
4 CHIEF JUSTICE PHILIPS: Thank
5 you.
6 MR. SOULES: We're glad to
7 have you here today. Okay. Sarah.
8 MS. DUNCAN: That's my
9 objection. Bill says that the way he means
10 expenses is that you get your attorney's fees
11 for preparing that motion, going down to
12 court, getting your order compelling
13 discovery.
14 In my view there is a big
15 difference between negligently or
16 inadvertently or intentionally and good faith,
17 not providing requests for discovery and
18 paying the cost of doing that; and to me if
19 you can make a good showing that your failure
20 is intentional and not in good faith to
21 provide me with your assets in a divorce case,
22 to delay this trial, if you can show that that
23 was done intentionally and in bad faith, I
24 have no problems with your having to pay the
25 actual cost of that delay, not the attorney's

1 fees incurred in the motion to compel, but the
2 actual cost of what does it cost the husband
3 or the wife in terms or spouse to have this
4 trial delayed for 30 days. And that's my
5 objection to Bill's, and I assume I guess to
6 this rule, because I'm assuming that's what
7 you intended.
8 MR. TINDALL: All related
9 damages?
10 MR. HERRING: Now, you can go
11 back to the two-step and do it as Bill talked
12 about. What is the measure of attorney's fees
13 or expenses really is what you're talking
14 about on a two-step. This is what he's
15 dealing with.
16 MR. SOULES: Chief Justice
17 Phillips, would you like to give us any words
18 of direction here while? We do appreciate
19 you're being here.
20 CHIEF JUSTICE PHILLIPS: On a
21 specific subject or?
22 MR. SOULES: Since you're the
23 chief, on any subject.
24 CHIEF JUSTICE PHILLIPS: Well,
25 no. The Supreme Court does recognize the

1 sacrifice that you're making. We very much
2 appreciate your help. The Rules Committee has
3 been an integral part of this Court's work for
4 over 50 years, and I think I'll try to get
5 Judge Hightower to bring you a picture that we
6 found while we were moving of the first Rules
7 Committee in 1941 with all the signatures
8 under it.
9 We could not function without
10 your serious work, all of you reading these
11 books, thinking about this, talking to your
12 friends in various types of practice and
13 bringing the collective wisdom of your
14 experience together to give us the best advice
15 on these rules.
16 I think we're all coming more
17 and more to recognize how true
18 Judith Reznick's dictum was that all
19 procedural reform is an attempt to correct the
20 reforms of the previous generation, but I
21 really think that we have tried so many
22 different tacks that we're on the verge of a
23 new day when we really could make some changes
24 that produce some profound benefits to the
25 people of Texas.

1 There has been enough
2 scientific study of what works and what
3 doesn't, and we're seeing what other states
4 are trying; and but by a group of this caliber
5 and talent and diversity coming together I
6 think all of us on the Court are really
7 excited. And our next rules amendments are
8 going to be something that are a positive move
9 for the people of Texas, and we'll be watching
10 what you do with great excitement.
11 MR. SOULES: Thank you.
12 CHIEF JUSTICE PHILLIPS: As to
13 your specific problem.
14 MR. SOULES: All right.
15 Steve Susman.
16 MR. SUSMAN: I think the
17 ultimate sanction is the sanction that trial
18 judges exercise an order at trial, excluding a
19 witness testifying on a subject, excluding a
20 piece of evidence, and that is -- I mean, you
21 don't have any hearing. You don't have any
22 oral findings. It's generally nonreviewable,
23 and it's the trial Court's willingness to say
24 it's unfair and keep out evidence or to keep
25 out testimony or strike an expert or not put

1 on a witness on certain subjects, and I think
2 that causes everyone today to be more
3 forthcoming in discovery. But I think that's
4 the ultimate sanction. What the trial judge
5 can do to you at trial is basically never
6 reviewable. So I think that is really the
7 ultimate sanction.
8 I have heard that the number
9 of sanctions motion is declining today, that
10 people generally are fed up with it. The
11 senses of the judges and the Bar is that it's
12 a waste of time; and apparently that's what
13 this group has concluded.
14 Now, if the current rule is
15 causing, has something to do with the number
16 of motions declining, why change it? I don't
17 care if it mean what it says. Leave it like
18 it is if the trend is in the right direction.
19 Why pass a new rule that is going to cause new
20 seminars, new institutes, new law review
21 articles, new court proceedings to determine
22 what is substantial, what is nonsubstantial.
23 Leave the mess like it is and just hope the
24 trend continues.
25 MR. LATTING: If it ain't

1 broke, don't fix it.

2 MR. SUSMAN: Is it your sense
3 that the number of these motions is declining,
4 that about five years ago that there were a
5 lot of them all the time, but now people have
6 heard the judges speak, and they say, "Yes.
7 We aren't going to file this"? They're
8 getting the message not to do it. So they
9 don't read the current rule. They don't care
10 what it means. It's not a real issue.

11 MR. SOULES: When this task
12 force was formed we didn't have Transamerican,
13 and things were in a big mess. So there have
14 been major changes and decisions of task force
15 reform.

16 MR. LATTING: That's what this
17 rule in the task force report does. It really
18 just says what TransAmerican says I believe
19 and is the current law and really articulates
20 what you said like it is now. This rule would
21 announce TransAmerican and cover the problem
22 Rusty mentioned which is you have got to go to
23 the cases to find out what the law is.

24 MR. ORSINGER: I'd like to
25 comment on the delay question. I think that

1 most of us are going to get our written
2 discovery out in the very first stages of the
3 lawsuit and we're going to get back objections
4 and production, and it may take some time to
5 go through the production. But I would think
6 that if we're going to have motions to compel
7 on written discovery, we will know that in the
8 very early stages of our case.
9 In Bexar County where I
10 practice primarily I will get a hearing on a
11 motion to compel in three days; and in the
12 rural counties around Bexar County I can get a
13 hearing usually within a month, although it
14 may not be in the county where the case is
15 pending. It will be in the county where the
16 judge is riding the circuit. I don't practice
17 in Houston much, but my practicing friends in
18 Houston say you can get a hearing on a
19 discovery motion within a month. And I really
20 don't see why a two-step processes imperils
21 the trial setting and is likely to cost a
22 client tens or hundreds of thousands of
23 dollars unless you as the party seeking
24 discovery wait until the last minute to file a
25 motion to have your motion to compel ruled

1 on.

2 So to me the issue of delay

3 and the cost of delay is not a very likely

4 issue if people are diligent about pursuing

5 their discovery.

6 MR. FULLER: Have you ever

7 tried to get a trial setting in Tarrant County

8 where you've got to request it three months

9 ahead of time?

10 MR. ORSINGER: Trial setting,

11 or a hearing on the discovery motions?

12 MR. FULLER: Trial setting.

13 Trial setting. So if your trial setting gets

14 put off, you have got an automatic three-month

15 delay.

16 MR. ORSINGER: All I'm talking

17 about is getting a hearing on a motion to

18 compel and how long does that delay your

19 case. In my opinion it shouldn't delay your

20 case one day.

21 HONORABLE SCOTT A. BRISTER:

22 Again, I just wanted to respond briefly to

23 Sarah Duncan's question. The way the proposed

24 rule deals with the extracurricular I'll call

25 them costs of motions, Paragraph 2, and Chuck

1 may -- my recollection is maybe, Rusty, you
2 can check me on this. Paragraph 2 covers,
3 limits the reasonable expenses in connection
4 with the motion, so the proposal does limit it
5 to costs or expenses on the motion. But if
6 there are the extracurricular expenses in
7 addition, likely it's because those are
8 substantial, 10,000 or 100,000, or if the
9 market moves or whatever, and then you would
10 go under Paragraph 3 to the awards of expenses
11 that are not substantial or amounts of money
12 in excess of expenses incurred. So both,
13 either way you could recover it, but again it
14 would depend on what amounts involved would
15 dictate what procedure you go through, which
16 again is a problem if you separate both rules,
17 you are going to have to define curable in
18 such a sense to tell us which rule, which set
19 of procedures you're going under, et cetera;
20 but the Committee proposal presumes the
21 informal procedure is just the attorney's fees
22 on the motion. If you want something more
23 than that, you need to go to a sanctions
24 motion.
25 MR. TINDALL: Luke, do you

1 still invision that there would be bright line
2 rules when we can grow directly to sanctions?
3 If we suspect fraud, criminal behavior, are we
4 going to have to -- I mean, I didn't
5 understand David's motion to be that we could
6 not go directly to sanctions. And so --
7 MR. GALLAGHER: David and I
8 were speaking on that very point a moment
9 ago. And he has in his motion two separate
10 rules or maybe one rule, as Judge Brister
11 suggested, two separate subdivisions.
12 MR. TINDALL: Sure.
13 MR. GALLAGHER: But I don't
14 think that he contemplated within the
15 egregious circumstance that was referred to a
16 while ago that there would have to be a
17 two-step process.
18 MR. TINDALL: I agree.
19 MR. SOULES: We're not there
20 yet. Right now we're talking about what kind
21 of expenses or fees, if any, should be
22 awardable by the trial court on the simple
23 motion to compel not aggravated by the kind of
24 conduct that contemplates sanctions.
25 MR. TINDALL: I move that we

1 certainly add attorney's fees including
2 expenses to the motion to compel because
3 Sam Sparks gave us an example of driving into
4 San Antonio three times, and I'm not sure
5 unless we hammer down what expenses are that
6 we're going to get those recovered in a simple
7 motion to compel.
8 MR. SOULES: How many agree
9 with that?
10 PROFESSOR DORSANEO: I'll
11 accept that.
12 MR. SOULES: This is not
13 limited to that, but at least that. How many
14 agree that at least attorney's fees and
15 reasonable expenses? It would be
16 discretionary with the judges.
17 MR. TINDALL: And then I think
18 at that the next question is what is the
19 standard by which you get attorney's fees on a
20 motion to compel?
21 MR. SOULES: Let's just take
22 it first. How many agree that the -- how many
23 are for permitting the trial judge on some
24 standard to be yet articulated trial judges to
25 award attorney's fees for reasonable expenses

1 on a motion to compel, discretionary? How
2 many oppose it?
3 All votes are for it. Now,
4 we've got to talk about the standard, right?
5 MR. TINDALL: Right.
6 MR. SOULES: What should the
7 standard be?
8 MR. TINDALL: I like what
9 Bill Dorsaneo proposed, because without
10 substantial -- wasn't it a substantial
11 justification standard?
12 PROFESSOR DORSANEO: Judge
13 Brister said it should be a subjective test.
14 HONORABLE C. A. GUITTARD:
15 Is this the same test, or should there be any
16 difference?
17 PROFESSOR DORSANEO: If it is
18 a true/false, I'd say true.
19 MR. HERRING: The standard
20 you're using is the one that's in the
21 proposal, which is that the "court may enter
22 an order without a finding of bad faith to pay
23 the attorney's fees, but shall not award
24 expenses if the unsuccessful motion or
25 opposition is substantially justified," and

1 then it goes on to say "or other circumstances
2 make an award of expenses unjust." I don't
3 know if that is yours or not.
4 MR. SOULES: Stephen Yelenosky.
5 MR. YELENOSKY: I think
6 earlier Steve Susman raised the possibility of
7 paying whoever loses; and as a legal aid
8 attorney, one hour of you-all's attorney's
9 fees could kill us. If I have to
10 substantially justify a motion to compel and I
11 lose it, and I still end up paying your
12 attorney's fees, even if it came out of the
13 award, it would kill us.
14 MR. SOULES: Discretionary and
15 not compel. We passed that issue.
16 MR. YELENOSKY: That's what I
17 wanted to make sure.
18 MR. SOULES: Does anyone have
19 anything to offer other than the standard that
20 has been articulated in the rules? Does
21 anyone want to see a different standard other
22 than Judge McCown has talked about?
23 HONORABLE F. SCOTT MCCOWN: I
24 don't think it matters much. Whatever the
25 standard is, I can articulate the necessary

1 findings.

2 MR. SOULES: He talks like a

3 true veteran.

4 MR. SOULES: Is there anyone

5 who oppose that standard, the one that is

6 essentially articulated already in the draft?

7 PROFESSOR ALBRIGHT: That

8 standard relates only to to attorney's fees?

9 MR. SOULES: And only on the

10 motion. Okay. We really haven't talked about

11 whether it's only on the motion. That

12 standard then is acceptable.

13 Now, will the fees and

14 expenses be limited to those related to the

15 motion or beyond?

16 MS. SWEENEY: (Inaudible due

17 to sidebar comments at rear of conference

18 room.)

19 HONORABLE SCOT A. BRISTER:

20 Again, as per the rule, I would suggest it

21 depends on if it's substantial. If you mean

22 $150 attorney's fees and $20 for having to

23 drive down from Conroe, that's one thing.

24 If you're talking about $150

25 attorney's fees and $10,000 for resheduling

1 the experts because we had to put the trial
2 off two weeks, that needs to go under
3 different kinds of protection, safeguards,
4 higher hurdles to jump over.
5 MR. BEARD: When you're
6 talking about assessment, one day out of the
7 office, is that substantial?
8 MR. SOULES: I think the
9 response to Paula is that what we're talking
10 about here being an ordinary motion is not
11 something aggravated by other circumstances.
12 MR. HERRING: I think what
13 he's saying is he would limit it to the -- he
14 would use the substantial standard. If you're
15 going to have a more substantial awarding,
16 then you would get into the procedure of
17 sanctions, the idea being we have a number of
18 cases now where people are awarding hundreds
19 of thousands of dollars on motions, and if
20 you're going to get into that and your
21 proposing it, you may want to have the
22 opportunity to have a hearing between
23 yourselves to talk more about it.
24 MR. SOULES: But this is not
25 the same substantial we were talking about a

1 moment ago about substantially justified.
2 This is a substantial violation.
3 HONORABLE SCOTT A. BRISTER: A
4 substantial amount of money.
5 MR. HERRING: No. A
6 substantial amount of money.
7 MR. ORSINGER: So long as the
8 amount involved is not substantial, that's
9 what he's talking about. Regardless of
10 whether you are right or wrong, if the amount
11 is big, you would have to proceed. If the
12 amount is small, legal fees relating to the
13 motion.
14 MS. SWEENEY: But, you know,
15 define big for us. It's not the same for me
16 as it is for him. And I think it's important
17 to qualify it. (Inaudible due to sidebar
18 comments at rear of conference room.)
19 MR. HERRING: That's what the
20 comment says.
21 MS. SWEENEY: I understand
22 that. But the difference -- in the situations
23 that you're talking about $100,000 and making
24 it limited, those have tended to be punitive
25 cases, not expense related cases.

1 MR. HERRING: No. There are
2 expense cases now that are in excess of
3 $100,000 just as attorney's fees in connection
4 with a motion.
5 MS. SWEENEY: And let's talk
6 about cases where the underlying suit is of a
7 different magnitude. (Inaudible due to
8 sidebar comments at rear of conference room.)
9 I think the cost provision has
10 to take into account the context. (Inaudible
11 due to sidebar comments at rear of conference
12 room.)
13 MR. HERRING: You would allow
14 then an unlimited award of expenses just on a
15 motion to compel without having to go through
16 the procedural activities?
17 MR. SOULES: Judge Cockran.
18 HONORABLE ANN T. COCKRAN:
19 (Inaudible due to sidebar comments at rear of
20 conference room.)
21 HONORABLE SCOTT A. BRISTER:
22 We discussed -- can I respond to that?
23 Because that was where we started, and as a
24 matter of fact the first speaker at our first
25 meeting was Justice Hecht who said, "You need

1 to address whether we need to set like a
2 thousand dollar cutoff for different ways to
3 apply Transamerican or not.
4 We didn't do it my
5 recollection is, Chuck, for two reasons. One,
6 $1,000 in the indigence cases substantial may
7 preclude access to the court. They're out of
8 court. Two, if you put $1,000, then it's like
9 a price fixing measure. Everybody asks for
10 $1,000 or $999. If you do $750, they'll ask
11 for $749. To state a number is to suggest how
12 much you're going to give roughshod without
13 looking at it twice. So we thought we would
14 just do substantial.
15 Three, tens years from now
16 depending on who is on the Federal Reserve
17 Board and that kind of thing, $1,000 may have
18 to be amended up or down, that kind of thing.
19 So we thought substantial was more lasting for
20 a rule.
21 MR. HERRING: Take the
22 standard as it appears in the comment it says
23 dealing with the other safeguards they are
24 required if the amount is substantial either
25 in absolute terms or in relative terms taking

1 into account the financial resources of the
2 person or the entity liable. Typical
3 standard, flexible standard and tries to
4 address the level aid, indigent was the idea.
5 MR. JACKS: It seems to me
6 that some thought ought to be given to the
7 idea if it's not substantial, life is too
8 short. Don't jack with it. I mean the 99
9 percent percent as Judge Cockran mentioned and
10 so much of the friction costs, and I don't
11 mean just the money costs, but also the
12 emotional costs between lawyers and litigants
13 it seems to me is frittered away over expenses
14 that, yes, maybe it's not entirely fair that
15 the other client had to pay, but it does come
16 with the territory in a sense.
17 And we're putting so much of
18 our judicial resources and resources of our
19 lawyers into bean counting. I'd seriously
20 propose that if it's not substantial, the hell
21 with it. Only substantial sanctions for
22 serious conduct deserve attention.
23 MR. SPARKS: We're not talking
24 about sanctions here at all.
25 MR. JACKS: Well, I know we're

1 not calling it sanctions anymore. We're now
2 being politically correct and calling it
3 something else. But we're still talking about
4 lawyer taking up the judge's time; and I'd
5 suggest that we cut all that out and just in
6 terms
7 of --
8 MR. HERRING: You would not
9 allow an award of attorney's fee unless it got
10 to be a substantial amount?
11 MR. JACKS: Unless it was a
12 serious situation.
13 MR. SOULES: Does anyone want
14 to reconsider the vote in any case award
15 attorney's fees and expenses in a motion to
16 compel? We're there. That issue is resolved,
17 I mean, unless we want to revisit it, which is
18 fine. Nothing is set in concrete until. We
19 write down the words and approve them, and
20 assign them to the Supreme court.
21 MR. SPARKS: My question, it
22 seems like to me in the first comment that the
23 motion to compel stuff we're talking about
24 compensatory. The substantial stuff we are
25 talking punitive. But if you're going -- I

1 don't know what Susman makes, but you know,
2 $250 for three days out of my office, that's
3 not worth the effort, but yet I feel like I
4 need to compensated for what is going on. So
5 I think that is something you start saying
6 substantial, to a legal aid person that's a
7 different question. If you're going to go
8 compensatory, then there has to be some
9 evidence of what is a fair fee for this
10 lawyer.
11 Punitive that's over in the
12 sanctions deal the way I heard it.
13 MR. PERRY: Well, I was out of
14 the room, I guess, when you took the vote that
15 you mentioned, and I was really moved to
16 reconsider, because the fact of the matter is
17 one of the things we really need to do,
18 discovery has become the tail that wags the
19 dog. The purpose of the discovery rule is not
20 to be an end in itself. It is to get the case
21 ready for trial so that you can go down to the
22 courtroom and try the lawsuit.
23 One of the philosophies that
24 the Discovery Rules Task Force has been
25 following is to try to write the rules in ways

1 that reduce the number of potential conflicts
2 and don't try to achieve perfect justice in
3 every situation. It seems to me that awarding
4 attorney's fees on ordinary motions to compel
5 is just more trouble than it is worth. It
6 would be my suggestion and my philosophy that
7 if somebody commits a serious violation, that
8 we go through a sanctions procedure and drop
9 the hammer on them. And if they have not
10 committed a serious violation, that each party
11 bear their own attorney's fees on this motion
12 just like on anything else and go on.
13 MR. SOULES: Then why do we
14 need two rules?
15 MR. PERRY: Well, because for
16 the very reason to make the distinction. One
17 is a simple motion to compel where you can't
18 get attorney's fees, and the other is a motion
19 for sanctions where you're not trying to
20 compel something. You're trying to prove that
21 somebody has been very, very bad.
22 HONORABLE ANN TYRELL COCKRAN:
23 I would like to make a suggestion about not so
24 much whether parties are entitled to
25 compensatory award, but the timing of it. One

1 of the problems is that I think a lot of our
2 problems would be alleviated if the rule said
3 that the order actually awarding the fees and
4 expenses was not entered during the pendancy
5 of the litigation, because that's when people
6 start using it as tools, but to say that the,
7 you know, entitlement the amount of
8 compensatory award will be, that will be
9 signed when the judgment is signed, because
10 the cases that are going to settle anyway
11 settlement is taking into consideration all of
12 these, you know, dickering back and forth.
13 You're trying to solve the problem of getting
14 the discovery done and doing the sanctions
15 that would affect the trial, but postpone the
16 question of actually trying to order an
17 awarding of attorney's fees until a later
18 point in the case.
19 MR. SOULES: How many feel that
20 the trial judge should have discretion to
21 award expenses including attorney's fees in
22 connection with an ordinary motion to compel?
23 Show by hands.
24 MR. GALLAGHER: Is there a
25 standard?

1 MR. SOULES: We're going to
2 draw the standard. David Perry wanted another
3 vote. We're going to take another vote.
4 MS. DUNCAN: The standard is
5 what is at issue.
6 MR. GALLAGHER: The standard is
7 the issue, Luke.
8 MR. TINDALL: He didn't want
9 any.
10 MS. DUNCAN: The issue then is
11 you can have a motion to compel and then in
12 the egregious circumstance you can also file a
13 motion for sanctions. I need my discovery,
14 but there is also the deplorable situation
15 going on.
16 MR. SOULES: Okay. Well, I'm
17 going to take a vote on it the way I stated
18 it. How many feel that attorney's fees should
19 be awarded?
20 HONORABLE SCOTT A. BRISTER:
21 Discretion to award.
22 MR. SOULES: The court has the
23 power to award expenses including attorney's
24 fees on ordinary motions to compel. How many
25 feel no? Okay. I'm going to need a count.

1 How many feel yes? 18. How many feel no?
2 18. A divided house. Well, I think we need
3 to talk about this some more.
4 MR. PERRY: Give Judge Hecht
5 the vote.
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23 (At this time there was
24 a lunch recess, after which time the hearing
25 continued as follows:)