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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

SEPTEMBER 15, 1995

(MORNING SESSION)

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Taken before D'Lois L. Jones, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 15th day of September, A.D., 1995, between the hours of 8:30 o'clock a.m. and 12:30 o'clock p.m. at the Texas Law Center, 1414 Colorado, Rooms 101 and 102, Austin, Texas 78701.

SEPTEMBER 15, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo III
Anne L. Gardner
Honorable Clarence A. Guittard
Charles F. Herring Jr.
Donald M. Hunt
Tommy Jacks
Joseph Latting
Gilbert I. Low
John H. Marks Jr.
Russell H. McMains
Anne McNamara
Robert E. Meadows
Richard R. Orsinger
Luther H. Soules III
Paula Sweeney
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon. Ann Tyrrell Cochran
Sarah B. Duncan
Michael T. Gallagher
Michael A. Hatchell
Franklin Jones Jr.
David E. Keltner
Thomas S. Leatherbury
Honorable F. Scott McCown
Harriet E. Miers
Hon. David Peeples
David L. Perry
Anthony J. Sadberry
Stephen D. Susman

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
O.C. Hamilton
David B. Jackson
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Hon William Corneius
Paul N. Gold
Doris Lange
W. Kenneth Law

SEPTEMBER 15, 1995 - MORNING SESSION

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CHAIRMAN SOULES: I think everybody has got our schedule for the meeting. I appreciate you all being here today, and we are going to pass an attendance list around. It will be coming by you during the report. The first thing on our agenda this morning is Joe Latting and Chuck Herring with their sanctions report. Joe.

MR. LATTING: Did anyone fail to receive the letter of September 11th that has -- if you did, we have plenty of extra copies, and it has with it a proposed Rule 13 and a proposed Rule 166d.

MR. MCMAINS: Where are the copies?

MR. LATTING: They are on this table here. Holly will hand them to you. For those of you who were at the final part of the meeting last where we discussed the discovery rules we talked about this, these two rules, that Saturday; and these are substantially the same with a couple of exceptions. I think that one thing we ought to talk about in connection with Rule 13 is a concern that Pam Baron has raised, and it was raised at the

last meeting by Chuck. This is the rule, you will remember, that is passed in order to comply with the new Chapter 10 of the Practice and Remedies Code, which Chuck called not the English or the American but the Iraqi rule.

One difference between this and what we did last time was that we had earlier suggested that we call -- we entitle this rule "The effect of presenting pleadings, motions, and other papers," which would have made this consistent with Federal Rule 11, which talks about pleadings, motions, and other papers. We took it out of this draft because it was the feeling of the sanctions subcommittee that we didn't want to make the rule any broader than we needed to, since we don't like this statute. No, I shouldn't put it that way. Some of us feel the statute is pretty draconian, and that may not have -- and we don't want to extend it beyond where it needs to go, and I will remind you that in the statute it needs to go this far.

A court -- it says, "Notwithstanding section 22.004, Government Code, the Supreme Court may not amend or adopt rules in conflict

with this chapter." So we can't profitably suggest anything that's in conflict with Chapter 10, but at least we don't want to make the rule broader than Chapter 10. One thing that we have done in the rule that is not in Chapter 10 is that we have a safe harbor provision, and by that I mean in essence we can -- if someone violates Chapter 10 but then will withdraw the offending pleading as it says in paragraph (b) of the proposed motion, you have a 21-day safe think about it time. Whether that's in conflict with Chapter 10, I guess some court may get to decide some day, but we thought that all in all the purposes of that were laudatory, and so we have left them in.

A more substantive question that we need to cover is whether we have to go through a two-step process, and this is one that Pam will address and maybe others about whether you have to go through a two-step process in order to get what we will call a very heavy sanction. Let me read to you from section 10.002, subsection (c). The statute says this, and you may or may not have that in

front of you. The statute says, "The court may award to a party prevailing on a motion under this section the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion, and if no due diligence is shown, the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation," which is very heavy.

And we have not written the rule exactly that way, and that is, we have not repeated the requirement for another due diligence inquiry because we believe that the way that the rule is written that you have got to show that anyway before you would ever be entitled to get to that sanction because you have to show that there has not been a reasonable inquiry on the part of the lawyer or the party to get there in the first place.

So what I am concerned about and what the members of the committee are concerned about is to say that, first of all, in order to start the process you have to show that there was no reasonable inquiry, and then once you

get past that then you have another hearing where you have to show there is no due diligence. You have to show both no reasonable inquiry and no due diligence before this heaviest of sanctions can be imposed, and I don't know the difference between them, and I believe we have made a comment about that. That is our last comment.

We say, paragraph (a), if you will look at our last comment to the proposed Rule 13, "Paragraph (a) imposes an obligation of reasonable inquiry, which is the equivalent of due diligence. The subcommittee fears that using due diligence in addition to reasonable inquiry tends to create confusion." And so, I think -- and I will let Pam speak for herself, but I think her concern was we don't want to make it any easier than we have to for people to be having sanctions at the whole expense of the litigation awarded against them.

On the other hand, I think if we are going to say that you have to show lack of due diligence to start out with or lack of reasonable inquiry and lack of due diligence, that we ought to be willing to say what the

difference is, and so I think I have now set out the considerations of this rule, and Mr. Chairman, I will just leave it open to you to invite discussion and see what we want to do.

MR. CHAIRMAN: Okay. And was it Pam that had some comments? Why don't you speak to the points, Pam, that Joe has raised? Then we will open the meeting to discussion.

MS. BARON: Well, the legislature has set up a two-tier type of system where certain kinds of sanctions can be imposed if you have the findings on -- the first four findings on the page of the proposed rule. Then the legislature does require a second inquiry, which has due diligence being shown before you can award extreme sanctions, and I had the feeling that the agreement of the committee at large was to try and move away from sanctions on a regular basis, and by including the legislature's -- by compacting the legislature's two-part inquiry to one part we are getting to extreme sanctions faster and without maybe a second look.

And I know that due diligence is kind of weaselly language, but at least it tells the trial court you need to think a second time before you do this, and I don't think that we are able to define it, but I think if we define it to mean exactly what the first inquiry is, we are not looking at the statute because the legislature in theory must have meant something special by using another test. So there has to be two tests. If we compact them into one, I think we are kind of going against the words of the statute.

MR. LATTING: Just to comment about that, this rule does not -- neither the statute nor the rule requires a two-tier inquiry. It just says that before sanctions can be awarded under that bad section that it has to be lack of due diligence, and so we are just going to have one hearing.

MS. BARON: Right. I agree with that.

MR. LATTING: All right. I just want to make sure.

MS. BARON: But you only have to go through a certain level to award any of

the first three sanctions, but to get to the fourth you just have to show no due diligence, and I guess what I would propose if I could propose an amendment -- may I do that?

MR. CHAIRMAN: Well, yeah. Let me just do that. We have had some discussion about what this is all about. Rule 13 as proposed in your September 11th meeting, is that the rule that the chairman of the subcommittee proposes as the majority of the subcommittee's --

MR. LATTING: Yes.

MR. CHAIRMAN: Okay. So we do have that motion on the floor. The subcommittee moves that we adopt Rule 13 as presented here, and it doesn't need a second since it's coming from the subcommittee, and you want to propose an amendment to it, do you, Pam?

MS. BARON: Yes, I do.

MR. CHAIRMAN: What is that?

MS. BARON: On the second page on subsection (4) in paren., before the language that says "an award of an appropriate amount of costs," I would add the phrase "if

no due diligence is shown, an award of an appropriate amount of costs" and I would delete Comment 2.

HONORABLE SCOTT BRISTER: I will second that and let me make --

MR. CHAIRMAN: Let me see. Say it again, Pam, so I can follow it. I didn't quite follow it.

MS. BARON: On subsection (4) on page 2 I would say "if no due diligence is shown," and then continue with the rest of the phrase.

MR. MCMAINS: But isn't that the opposite version?

CHAIRMAN SOULES: Excuse me, Rusty. And you want to delete Comment 2?

MS. BARON: Yes.

MR. CHAIRMAN: Okay. That's the motion to amend. Is there a second?

HONORABLE SCOTT BRISTER: I second.

MR. CHAIRMAN: Judge Brister seconds. So we are now open to discussion on that amendment. Judge Guittard, did you have a question?

HONORABLE C. A. GUITTARD: With the proposed amendment how does that affect the burden? If no due diligence is shown or if due diligence is not shown, I am uncertain as to who has to show diligence or absence of diligence.

CHAIRMAN SOULES: Rusty, you had your hand up.

MR. MCMAINS: That's what I was getting at, is the way she framed the inquiry or the initial thing, it's not a burden. It's a shifting of the burden to the party on the pleading, and that's not what the statute says. The statute says in the absence of due diligence, you know, and so I think you really want to say that if there is -- if it is established that -- you know, if no due diligence is established.

MS. BARON: Well, that's the same thing.

MR. CHAIRMAN: Let's read the statute so we have it clear. What is the statute?

MR. MCMAINS: No, but I don't think it puts the burden on you.

CHAIRMAN SOULES: Let's hear the statute.

MR. LATTING: The statute says, "The court may award to a party prevailing on a motion under this section the reasonable expenses and attorneys' fees incurred in presenting or opposing the motion, and if no due diligence is shown, the court may award to the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation." So it's not a model of clarity.

HONORABLE SCOTT BRISTER: Could I suggest a different --

MR. CHAIRMAN: Judge Brister.

HONORABLE SCOTT BRISTER: I thought, reading this, was what it set up was costs for a particular motion, you file one bad motion, you did bad one time, versus what we would call a Rule 215 abuse of the discovery process, something that has permeated the case from start to finish. Because in the first phrase your sanction is limited to costs associated with this motion.

The second sentence, your costs are for

everything caused -- can be up to everything caused by the subject litigation. It doesn't make sense to me, which of course all legislation makes sense as we know by presumption, that you would want because of one bad motion to make somebody pay all of the costs of the whole litigation. It seems to me if we don't add a requirement on (4) we have, in fact, made the statute -- our rule is more draconian than the statute.

If I am interpreting the statute right, it says all costs of litigation only if something worse than one motion. Our committee draft rule would allow all the costs of litigation for one bad motion, and so what it ought to be is not just due diligence but if we -- I mean, if I am right about that interpretation, it ought to be if a lack of diligence has been shown throughout the litigation. In other words, this is a process of abuse, not an instance of abuse. Then you can go to the bigger sanctions of (4).

MR. LATTING: May I reply to that?

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: The rule contains this language, and this comes from the statute. Any -- and I am looking at the proposed Rule 13, the last line of the first page in section (d). "Any sanction shall be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated," and that's I think the shorthand sort of version of TransAmerican, which is sort of a due process rule, so for whatever that is worth. I don't envision a court being able to say, "Well, you filed one bad motion which cost $500 to reply to; therefore, you are going to have to pay for all the litigation."

HONORABLE SCOTT BRISTER: Make no mistake about it. There will be some judges who say, "I have had enough of this. $100,000." That TransAmerican would have never made it to court if there weren't judges out there that did do that.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Joe, the problem I have with your assumption there is that

right after it says that in the rule it says, "a sanction may include any of the following," and among the following -- and it doesn't say anything about that there is a hierarchy and you shouldn't do (1) -- or (2) until you have done (1). Your suggestion that it only needs to be that specific, it just says "a sanction may include any of the following." I think people will interpret that to mean that basically they can do any one of (1) through (4).

MR. LATTING: I think you have good support for that argument because that's what it says. The problem here is the way the statute is written, and we are trying to write a sensible rule to conform to what is --

MR. MCMAINS: What is a stupid statute.

MR. LATTING: Well, what is a statute that's difficult to understand, and I want to say that although I officially moved the adoption of this rule I don't -- it's not a big issue with me, and I don't think it is with the majority of the committee. We are trying to conform to this statute.

MR. MCMAINS: Well, since they don't want to have a conflict with the rule why don't we just decide if the legislature wanted to pass a law and preclude us from doing anything procedurally then why don't we just refuse to pass any procedural issue? Let them figure out what the procedure is directly under the statute.

MR. LATTING: Well, somebody asked us to pass this, and I will just leave it at that.

MR. MCMAINS: I'm actually serious. I'm saying why can't we say they can just go in and file a claim based on the statute, and let them figure out what it is. I don't know why we should give any deference to it.

MR. CHAIRMAN: In proposing the rules to the Supreme Court we do not have to track the legislature, the statutes. There can be a statutory remedy. It can be constitutional or not constitutional, there can be a rule remedy. It can be constitutional or not constitutional. Unless they are in conflict they are cumulative, or

at least they co-exist.

Now, what I am curious about is right now there exists in the law a good bit of privilege for what is stated in pleadings and in the court process. It looks to me like perhaps the legislation and perhaps this rule abolishes that privilege because if you file a pleading now and it falls short of the standards in this rule and in the statute, you are subject to a malicious prosecution action for all of the damages caused by this, all the consequential damages that flow endlessly, and you are denied a jury trial in that malicious prosecution.

You have a short hearing, and a judge awards whatever damage to a business that's been caused by somebody filing a frivolous lawsuit, without a jury. If we don't think that that is a lawful process, I don't think we need to follow it in passing our rule, and some day a court is going to decide whether that process is constitutional, and if it's not, it shouldn't be in our rule unless we think it's constitutional coming out of the gate. We don't have to track the statute, but

we can't conflict with the statute.

MR. CHAIRMAN: John Marks.

MR. MARKS: I agree with you, Luke, and maybe what we ought to do is go on and fashion a rule paying respect to what the legislature has done but fashion one that we think is fair and reasonable and just and present that to the Supreme Court and go with that rather than try to track the statute or be limited by what the statute tells us we need to do because I think there may very well be some serious constitutional issues in what the legislature is trying to do.

MR. CHAIRMAN: Joe Latting.

MR. LATTING: My heart and my head are in two different places on this because the problem I am having is that I don't know that it's up to us impliedly to declare statutes unconstitutional, and we have been asked to -- I have been asked to submit a rule that is in conformity or that will be a rule version of this statute, and so this is a tough one because the statute is so difficult, shall I say, that it's hard to write a rule that seems like it's all a real good idea.

I agree with both of what you are saying. I just don't know that we have much choice given that the Supreme Court has said "Give us a rule that's in conformity with this," and the statute says you can't do anything that's in conflict with it. So there we are.

MR. CHAIRMAN: The Supreme Court has not said, "Give us a rule that is in conformity." The chair asked that we start with a rule that was somewhat of a mirror of the statute so that we had that information in front of us as we began our discussion. Now, we are discussing it, and if we need to amend Rule 13, we should do it in a way that the conscience of this committee feels is correct, and obviously part of it being correct is it can't conflict with the statute, and the Supreme Court has asked us to present a rule that would not conflict with the statute, but beyond that we are free to use our own deliberative process to make a recommendation to the Court. Rusty.

MR. MCMAINS: Luke, historically did not -- this is, of course, where we have had the problem with the

legislature before in the previous tort reform stuff when we did a Rule 13, but we also repealed their statute, I mean, or the Court suggested that they repeal their statute thinking that this was in compliance, and basically a couple of the legislators got hot, was my recollection, and said, "You don't have any business repealing the statute when you pass a rule that's in congruence with the statute."

MR. CHAIRMAN: We tracked the first tort reform statute precisely in the original Rule 13. There was no difference in the words, and then we repealed that because we felt it should be in the rules and not in the statutes and then they disagreed with that last part.

MR. MCMAINS: Well, at any rate my recollection is there was some kind of a storm with the legislature.

MR. CHAIRMAN: That's because after tracking the tort reform statute --

MR. MCMAINS: But we gave them the same part.

MR. CHAIRMAN: -- we repealed

their statute.

MR. MCMAINS: Right. I understand that.

MR. LATTING: Well, we were nice about it. We at least tracked it.

MR. MCMAINS: I know, but the point is I think the argument that was made was that the safe harbor provision was not -- I'm not sure if it was the safe harbor or not, but there was some claim that our rule was different.

CHAIRMAN SOULES: No. Our rule had a safe harbor and so did the original statute. It was exactly the same. The Supreme Court later passed an amendment to Rule 13 that deleted the safe harbor provision that was in the tort reform originally.

MR. MCMAINS: Yeah. Well --

CHAIRMAN SOULES: But the original Rule 13 was exactly that.

MR. MCMAINS: At any rate, the only point I am making is if the legislature's intent -- and I have not attempted to analyze the legislative history or to any extent tried to make it a legislative history. If the

legislature's intent was to create this cause of action which basically the conscience of the committee is that this is wrong, I don't understand why there is any emphasis at all to provide a rule or guidelines for asserting that claim.

If somebody wants to assert that claim, let them plead the statute and assert it. They don't need us. They are not going to want their statute repealed with this rule. So they are not going to recommend that it be repealed. If we want to have an additional sanctions issue along these lines and less restrictive, specifically like more or less the sanction provisions we have now in 13, or adding the safe harbor, whatever we want to do, I don't see that that is in conflict at all as long as we say this has nothing to do with what the legislature passed and put in the commentary.

If they think -- you know, if you want to seek those then use the statute because there is nothing procedurally required. They don't require that the Supreme Court do anything for that statutory claim to be excellent. We

don't have to act one way or the other.

MR. CHAIRMAN: Steve Yelenosky.

MR. YELENOSKY: Given that the Supreme Court might be called upon to rule on the constitutionality of this statute what's its appropriate role at this point in promulgating the rule? Does it have an obligation to decide whether the rule is constitutional, or does it have an obligation to avoid deciding that, and is there any situation in which the Supreme Court has been in this position before?

CHAIRMAN SOULES: I think the Supreme Court in its own process should determine whether -- should at least think about whether a rule it's passing is a constitutional rule.

MR. YELENOSKY: Yeah. You would think so. Right. And therefore, if the Supreme Court doesn't or does promulgate the rule with the presumption that they passed on the constitutionality, what happens when the statute comes up to them on a constitutional challenge? Are they already prejudiced as to its constitutionality?

MR. PRINCE: They have to recuse themselves.

MR. YELENOSKY: Do they have to recuse? That's ultimately my question.

CHAIRMAN SOULES: Okay. Who now wants to speak? Richard Orsinger.

MR. ORSINGER: I believe that there is a Texas case that has addressed this point, although I can't think of it off the top of my head, but I believe in some prior rule situation the argument was made because the Supreme Court had enacted the rule that, therefore, they had implicitly determined its constitutionality, and the opinion said that that's not true, that the Supreme Court's function is in its legislative capacity, if you will, having been in my view designated as an agent of the legislature, so to speak, to legislate the practice in courts, that their function as a judicial review on the constitutionality was not in any way committed by the fact that they had adopted the rule to begin with.

PROFESSOR DORSANEO: That's a U.S. Supreme Court case.

MR. ORSINGER: That's a U.S. Supreme Court?

PROF. DORSANEO: Uh-huh.

MR. ORSINGER: Well, then maybe it's a U.S. Supreme Court case and not a Texas Supreme Court case, but --

CHAIRMAN SOULES: We can't all talk at once or we can't get you on the record. Steve. And then I will get to Judge Guittard.

MR. YELENOSKY: What I hear you saying then is contrary to what would seem natural and I think what Luke said, which is that they are making some review of the constitutionality before promulgating the rule.

MR. ORSINGER: I think it's a different question.

MR. YELENOSKY: I understand you are saying they are acting in a different capacity.

MR. ORSINGER: Well, I agree. There seems to be an attitude, particularly in the U.S. Congress, in this day and time to pass a statute that's popular and allow the

U.S. Supreme Court to declare it unconstitutional, and I think that they're basically abandoning their responsibility to perform their governmental services consistent with the Constitution, and I think that every legislature, every trial judge, every committee that's working in a quasi-legislative function ought to do what it thinks is consistent with these constitutional limitations.

So I don't have a problem with us as a committee or this Supreme Court in its, quote, "legislative capacity," passing a rule that it thinks is constitutional, but I don't think that they are committed by that decision that, therefore, what they pass is constitutional; and the Supreme Court can come later and evaluate it on the basis of pleadings and briefs and the record and decide maybe their own rule is unconstitutional.

CHAIRMAN SOULES: Judge Guittard. Then I will get Judge Brister.

HONORABLE C. A. GUITTARD: It seems to me that Rusty is basically right, that if we pass a rule that provides for

sanctions that don't go as far as the statutory sanction might, that's not in conflict with the statute, that we can -- it just puts the burden on the person seeking that kind of sanction to go outside the rule and invoke the statute.

It seems to me that if the problem is subdivision (4) here, we could cut that subdivision down to where it makes sense to us in language such as this: "If a lack of due diligence is shown, an award of appropriate amount of costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the violation found." In other words, that would be a sensible sanction, but it would not be contrary to the statutory sanction, which might be in addition.

CHAIRMAN SOULES: Well, doesn't that still run afoul of the privilege to assert a cause of action in court, and it still gives you a malicious prosecution case without a jury, doesn't it?

HONORABLE C. A. GUITTARD: That would be a different question.

MR. LATTING: Can I speak to

that?

CHAIRMAN SOULES: I said Judge Brister next.

HONORABLE SCOTT BRISTER: Let Chuck go ahead.

CHAIRMAN SOULES: Chuck.

MR. HERRING: Well, as to the answer to that question, I don't think that's right at all, Luke. I think you have got right now the right under Rule 13 to seek sanctions against someone for a bad pleading, one that's groundless and in bad faith. The standards that are set out here in section (a), which I think is what your point goes to, those are right out of the federal rule.

In this statute when they finally enacted this statute they just basically pulled those four subdivisions out of the federal rule, very, very minor wording changes, but that's basically where those come from. I think the judge is right that really the question, the major question here, the rest of the rule there is nothing particularly unusual about it, is how do you deal with Pam's initial point on those so-called apocalyptic damages.

Do you have to have a due diligence finding first before you can assess those damages for inconvenience, harassment, and out-of-pocket expenses, and if so, what does due diligence mean? Because under subdivision (a) of the rule the pleadings have to -- there is a reasonable inquiry requirement. If you don't make a reasonable inquiry on those four things then you are subject to some form of sanctions, but before you go to those apocalyptic kinds of damages should you have due diligence as a prerequisite, and if so, what does that mean?

To me that's the issue, and either we solve it here or we kind of pass the buck and leave a statute out there that is going to cause us all uncertainty, and I'd rather try to tackle it here.

CHAIRMAN SOULES: Well, where in the current rule does the -- can the court award costs for inconvenience, harassment --

MR. HERRING: No. That's the difference. That is the difference.

HONORABLE SCOTT BRISTER: I don't necessarily agree with that. Rule 13

says you can get any appropriate sanction in 215(2)(b). 215(2)(b) says for one of them, of course, by interpretation you can get any order that's just, but 215(2)(b)(2) says you can get an order charging all or any portion of the expenses of discovery, not limited to this motion. All the costs of discovery, every dime of it.

MR. HERRING: And there are several cases that have held that that other order encompasses a financial penalty separate and apart from costs. So you are already potentially subject to that now. I don't like this language that the legislature came up with, but it seems to me we ought to try to figure out a way to temper it and put it in a good rule that works procedurally as well as plausible, and I just throw that out. I mean, I would rather solve the problem here if we can and have a rule that works as well as it can consistent with the statute because otherwise everybody just goes off and uses the statute, and then we are left with kind of who knows what that means.

CHAIRMAN SOULES: Are you

saying then that you want a rule that permits the judge to award costs or to award damages for inconvenience and harassment caused by the litigation?

MR. HERRING: I do not want a rule that does that, but I think because we have a statute that does it we ought to have a rule that's consistent with it.

CHAIRMAN SOULES: But I think that's unconstitutional unless you get a jury trial.

MR. HERRING: Well, you can make that argument. You can make the argument under present Rule 13.

CHAIRMAN SOULES: No.

MR. HERRING: Sure you can. Sure you can. Because you don't get a jury trial under Rule 13, and you can have a financial penalty. They could fine you, as they have done in some cases, a million dollars under Rule 13. You had a million-dollar award in Harris County under Rule 13. You can have a fine that's unrelated to costs. It's just a deterrent.

CHAIRMAN SOULES: But the

doctor says, "As a result of this baseless lawsuit, I lost my medical practice."

MR. HERRING: It's being done all the time, Luke. There are Rule 13 cases right now where people have made that argument. You may be right that in reply you could say, "Well, I don't think you can do that constitutionally," but there are cases that have upheld financial penalties unrelated to costs today under Rule 13.

Anyway we have got a statute out here, and my thought is we ought to have a rule that is as consistent as possible. If you decide you want to ignore that provision, that you think apocalyptic damages, the harassment/inconvenience damages, just shouldn't be in there, maybe you leave that provision out of the rule. The rest of the rule is pretty close to the statute.

I'd say leave it in because the legislature wrote it. My sense of the Supreme Court's approach right now is that they don't want to have unnecessary conflict with the legislature and would like a rule that is as consistent as possible with the statute.

CHAIRMAN SOULES: Judge Brister. And then I will get Bill Dorsaneo.

HONORABLE SCOTT BRISTER: Okay. It seems possible again to me that when the legislature said "inconvenience, harassment, and out-of-pocket expenses" they were not thinking of defamation damages or the value of your practice. It seems to me, you know, that reasonable minds could construe this as what they meant, what we have always thought of as costs and expenses of litigation, maybe a little bit more; like, for instance, if your client has to spend -- take a day off from work, that is an expense of litigation. It's nonrecoverable we all know as attorneys' fees or anything else, but it is related so that there is some lines that will be drawn.

What I would suggest maybe as a counterproposal, again if I am correct reading this as drawing a distinction between an instance of error and a pattern of error, is that you make (4) instead read, "If there has been a lack of diligence throughout the litigation, an award of an appropriate amount of" -- and you might even just say "costs and

expenses." I think if you don't put -- I am not sure to be consistent with the statute we have to put every word from the statute in, which may create problems.

You just say "costs and expenses," and say those words come as directed from the statute. We don't intend to conflict with the statute. We are being consistent with the statute, and let these things work out in cases if necessary. So I would propose we make that read, "If there has been a lack of diligence throughout the litigation, an order of appropriate amount of costs and expenses incurred or caused by the litigation," and then claim it's all consistent.

CHAIRMAN SOULES: What if the only thing that's been filed is a baseless petition? There is no -- is that throughout the litigation? It's not a very long duration.

HONORABLE SCOTT BRISTER: Well, as a judge I would think I would -- of course, not that I have any opinion on what comes before me, but I would think I would construe -- if there has only been one thing

done, it is an instance rather than a pattern.

MR. LATTING: Look what the statute says. We need to see the statute on this.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Why don't you see if you can --

MR. LATTING: Okay. The statute doesn't seem to me to be that broad. It just says that -- it says "may award to the prevailing party all costs," costs, "for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation." Once again, that's not a model of clarity, but that doesn't sound to me like a doctor losing his practice. That sounds more like what Scott's talking about.

CHAIRMAN SOULES: It cost me my practice.

MR. LATTING: Well, you know, I agree that could be --

CHAIRMAN SOULES: Bill Dorsaneo, you had your hand up.

PROFESSOR DORSANEO: Well, we

have, of course, encountered this problem in other contexts before where we have a statute that is ambiguous, and we have recommended to the Court to pass rules of procedure to clarify with the Court acting in its rule-making capacity in much the same manner as the Court would act in construing the meaning of a statute in an opinion.

We in my experience have had even with the Court itself indifferent success in that respect. For example, in the venue statute, Rule 86 was crafted in such a way that the statute was given a slightly different meaning than someone could argue for it to mean. Yet, when the matter was presented to the Supreme Court in a particular case, they weren't particularly impressed by their own rule.

So I am not sure that this is something that can be solved at all, and one path would be to just simply get out of the game and let the statute handle the problem and to do away with Rule 13 altogether. However, Judge Brister's point to try to give the statute a sensible meaning that we would hope that the legislative leaders would embrace is the

opposite and other sensible path, and you know, I think those are the alternatives.

Now, I would not make the statute worded -- you know, the statutory words any different, the cost part that Joe talked about. It would make sense to me to give some meaning to the due diligence that's an acceptable and sensible meaning.

MR. LATTING: I liked Judge Guittard's language earlier.

CHAIRMAN SOULES: Chuck Herring. And then we will go around the table.

MR. HERRING: Just a brief comment to follow up what Joe and Judge Brister said. That statute, the difficult language there on the additional damages, the inconvenience, harassment, and out-of-pocket expense language came out of the Senate bill, and the House amended that, and it went back to the Senate. The Senate language said "may award additional damages for inconvenience, harassment, and out-of-pocket expenses."

I think that militates a little bit in favor of what Joe and Judge Brister have said,

that if you give a more confined meaning to it, since the House chose not to say "damages" but simply to confine it in terms of costs for those kinds of expenses, maybe we can give meaning to it that's consistent with that legislative history but soften it a little bit.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I think I agree with Chuck if he's suggesting that maybe we define "costs" in our rule, define what it means, and maybe take care of the situation that way because there is not a definition of costs in the statute. And it is sort of a term of art which requires definition, and maybe we can take care of it that way.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: Well, I just wanted to make an observation about this distinction or attempted distinction between due diligence and all of the other parts; the first part being already in there in terms of the nonfrivolous and so on, it seems to me that perhaps the legislature -- and maybe I am attributing too much sense to it -- was really

on a very simplistic view that we have the one area where when you file something initially in the heat of the moment or whatever, you could easily have done all you could do.

It could have been basically, you know, reasonable at the time to you but then later things come to light in which you should withdraw it, or it may be that your client comes to you. You have got one day to file the petition. You have done as much inquiry as you can do before you file the petition.

It's one thing to say that you are entitled to sanctions for filing the petition. It's another thing to say that when the truth comes to light you don't have a claim, that the due diligence stuff may be something that happened after the initial act of the filing of something, but there are differences.

In the (a) part, for instance, in our rule we deal with presenting pleadings and motions, and we talk about filing, submitting, or later advocating. Well, filing and submitting frequently doesn't entail anything other than filing. It's automatically submitted frequently by a lot of the courts,

but if you are in the process of advocating -- if you acquire additional information, additional information comes in, I mean, maybe that's where the due diligence part of it -- why it was separate is that it's separate in time sequentially.

I mean, that is another argument, and one of the reasons that I have a problem with trying to say, well, we are going to define it, it's perfectly reasonable it seems to me to say that the act of filing you get these things, but the maintaining of it after various information comes into your possession or in which you have a basis for reasonable inquiry and don't follow it at all, that that may be the type of due diligence inquiry that they are talking about that would warrant the sanctions area.

CHAIRMAN SOULES: Okay. Anyone else along the table here? Buddy Low.

MR. LOW: Luke, it looks like to me we only have three things we can do. No. 1 is nothing and just rely on the statute. No. 2 is just forget the statute and go on our own on the theory that the Supreme Court has

the right under the Constitution to draft rules, and No. 3 would be to do what Judge Brister says, give an interpretation to the statute which would be consistent with our own feeling of what's constitutional and what's right and fair, and then you avoid the conflict. So I think the No. 3 choice is the best choice of all. That's my view.

CHAIRMAN SOULES: Joe.

MR. LATTING: I do, too, and I think we should do that. One of the things that I started thinking about while Rusty was talking is I am not sure that we are not making it tougher on ourselves to include a continuing due diligence standard because that worries me some that not only did I have to make a reasonable inquiry before I file a petition, which I think I ought to have to do, by the way.

Somebody said earlier nobody on the committee is in sympathy with the basic idea of this. I am. I think you ought to have to make a reasonable inquiry, and I think it ought to be a certificate by a lawyer that there is a reasonable basis, or rather, an

evidentiary basis. Maybe it's a squirrely witness, but at least you have got a witness that's going to say that this happened before you go suing somebody.

But it bothers me that there is a continuing obligation of due diligence because I can picture a hearing where there is some lawyer in a dark suit sitting up talking about what due diligence means and all the things you have to do in order to be duly diligent. I didn't do any of that stuff. I just -- they came in and told me what happened, and I filed the petition, and we took some depositions, and now here it is a year later. No, it won't be a year later. It will only be nine months later. Excuse me. But the -- now I am accused of not having exercised due diligence through this proceeding, and that seems to me worse than the statute is. So I don't know if we want to do that.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: It seems to me that we are having two conversations. I interpret Judge Brister's suggestion to be

more akin to when is a lawyer liable; whereas the debate about cost versus damages is more in the nature of what damages is there if there is liability, and it seems to me that Judge Brister's suggestion about when you are liable, personal opinion here, that it's different from the thrust of the statute.

The statute to me suggests in subdivision (d)(3) that you can recover your reasonable expenses that resulted from the presentation of any motion, which would be part of the lawsuit or the pleading itself, which to me would mean the entire lawsuit, and that means reasonable expenses to me I think would definitely include attorneys' fees and litigation costs. I don't know that it would be broud enough to include loss of profits or the loss of your medical practice.

(4), to me is trying to reach something different from (3), and in my opinion it's trying to reach something different in damages. It's trying to award broader damages upon some finding, somehow more than just the reasonable expenses incurred because of the pleading, and to me the legislature is making

an effort to say in certain circumstances we are going to punish you by giving even greater damages than just the reasonable expenses, and it's my view that the idea that they put due diligence in the statute is some kind of conception that before you amp up the damages to include collateral stuff, or whatever you want to describe this broader scope of damages, you have to have some finding that's more severe than just the reasonableness standard that's triggered by (3).

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: I wonder if we could do without the word "due" and then it would at least make sense; and I am not sure that no due diligence is not different or not the same as, you know, no diligence; and that seems to be consistent with what Judge Brister was saying; and frankly, you know, who knows what they meant; but due diligence is kind of a thing you say like, you know, horse and buggy. No due diligence means no diligence to me and then it makes sense.

MR. LATTING: Then undue

diligence.

CHAIRMAN SOULES: Anyone else down the table here? John Marks.

MR. MARKS: What would be wrong with, you know, if we have got this problem about extra damages in (4) other than just out-of-pocket expenses, making a provision about how you go about that? In other words, if you are asking for something other than traditional costs and expenses then you have got your due process problems, and what would be wrong with the court making rules about how you go about it? For example, allowing a jury trial on the issue.

HONORABLE SCOTT BRISTER: (Indicating)

MR. MARKS: And I see Judge Brister agrees with me.

CHAIRMAN SOULES: Rusty McMains.

MR. MCMAINS: Luke, with regard to the particular inquiry of whether or not we should be recommending the rules to be changed right now in this conformity and, Joe, you-all have the statute in front of you correctly.

When I looked at it that statute does not apply to any case that is filed before September 1 of '95. Any pleadings or motions made in any case filed prior to September, however frivolous it is subsequent, has no application to it.

MR. LATTING: That's correct.

MR. MCMAINS: Is that right?

MR. LATTING: If I understood you to say it does not apply to any suit that was not --

MR. MCMAINS: That has been commenced before September 1.

MR. LATTING: The suit that is not filed after September 1.

MR. MCMAINS: Right. So all I am saying is you can file, A, a frivolous lawsuit and then conduct a lot of frivolous discovery in that frivolous lawsuit for all the period of time you want as long as it was filed before September 1 of '95.

MR. LATTING: Well, and not run afoul of the statute.

MR. ORSINGER: As long as you don't amend your pleadings.

MR. MCMAINS: All I am saying is if you try and pass a rule now or in the immediate future that doesn't have such limitations -- in other words, the advantage of keeping our rule separate and distinct is that we are not putting in some of these draconian things to things that clearly this legislation does not apply to. I don't see why -- and that's one of the problems I have with the rule.

The vast majority obviously of the litigation that is pending in this state right now is pre-September 1, 1995, filed. There was a hell of a lot of it done in August, in fact, and the point is that, therefore, if we pass a rule that is of general applicability and we make it more draconian because we are attempting to keep it into the statute and it's effective whenever our rules go into effect then all of those that are immunized from statutory application are automatically caught under our rule.

Now, the alternative of doing that, you are talking about the rules coming before us any time soon is to have two different rules,

and if you are going to have two different rules then why not just have one rule that deals with what we think is legitimate and in the manner it's to be punished right now consistent with our beliefs. They want to punish under the statute then let them go.

CHAIRMAN SOULES: Why don't we just delete (4)?

MR. LATTING: Well, could I speak?

CHAIRMAN SOULES: Joe.

MR. LATTING: I'd like to make a procedural suggestion, and that is I think we ought to resolve the issue that Buddy Low raised; that is, are we going to not try to pass any rule? That's No. 1, just let the statute stand, or are we going to pass whatever we think is a good idea, or are we going to try to write a rule that's what I am going to call Scott Brister's approach, to try to write a rule that is in conformity with Chapter 10? And I am not advocating right now. I am just thinking. It seems to me procedurally we ought to decide that and then start trying to do whatever we decided we were

going to do. As Richard said, we keep going back and forth between what kind of a rule and what ought to be in it.

CHAIRMAN SOULES: Well, somebody make a motion. You are withdrawing your motion to pass this Rule 13?

MR. LATTING: No. Because I think that's what -- I think what this does is what Scott Brister says, and we may need to tinker with it, but I think we should try to pass a rule that is consistent with the statute and that is as reasonable as we can be within that framework and give the Supreme Court something that says given this statute here is the best rule we can come up with, and Rusty is shaking his head, and maybe that's not a good idea. All I am suggesting is procedurally that we decide that issue and then go one way or the other.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I think ultimately obviously the Supreme Court -- if there isn't going to be a rule, the Supreme Court is going to make that call. If they are

going to do a rule, we ought to present them with something that is most palatable. So we can present a palatable rule and say in the alternative no rule, but our vote on that isn't going to decide what the Supreme Court does anyway.

CHAIRMAN SOULES: Okay. We have got a motion to pass Rule 13 as presented. We have got an amendment to add the language that Pam wants, motion to amend to add the language that Pam suggested and delete Comment 2, and that's what we are discussing unless somebody makes another motion that's appropriate.

MR. LATTING: Well, can I amend my own motion then? How about that?

CHAIRMAN SOULES: Do you want to accept Pam's amendment?

MR. LATTING: No. I would like to offer an amendment to that, and the first is that we pass a sense of the committee that we are going to try to pass a rule that is in conformity with the statute to present to the Supreme Court of the State of Texas for its consideration.

CHAIRMAN SOULES: You said conformity rather than not in conflict, correct?

MR. LOW: Well, conformity means not apparent conflict.

MR. MCMAINS: A concealed conflict.

MR. LATTING: What I am really trying to do in the truss of my words is not build into the record some argument that we have tried to sabotage the rule -- I mean, the statute in sort of an underhanded way. My motion or my sense of the committee is that do we want to try to pass a rule that is not in conflict with this statute. I will put it that way. To present to the Supreme Court.

CHAIRMAN SOULES: Okay. Those in favor show by hands.

MR. MARKS: Is this to do with --

CHAIRMAN SOULES: 16 in favor. Those opposed? 16 in favor and 1 opposed.

Now, look, we are focusing on probably the only real problem we have with the statute and that is No. (4). Let's figure out how to

deal with it, and that's -- well, we will let somebody else talk for a minute. Richard Orsinger.

MR. ORSINGER: I'd like to revisit my analysis a little earlier. It seems to me that we are dealing with two issues here. One is liability triggered and the other one is when liability is triggered then what are the damages that you award.

MR. LATTING: Yes. Yes.

MR. ORSINGER: And it seems to me that the legislature conceived that, especially the House when they amended the Senate bill, by moving from the word "damages" to "costs," they are talking about what you recover in the event of liability. I see the term "no due diligence is shown," to be a higher standard for liability for the expanded damages, and I am going to propose a thought.

I don't know if this makes any sense to you, but one possible difference between reasonable inquiry and due diligence is that reasonable inquiry could mean that you just ask some questions, maybe to no more than your client; whereas due diligence may require you

to do some discovery, to get the -- consult with an expert witness, and to take some depositions, and that the due diligence will only be demonstrated -- you may get by the first part of the sanction by saying, I reasonably inquired with my client, and I filed a pleading based on that, but then nine months later you can't still be sitting there having done nothing to support your claim but interviewed your client.

You are going to have to show some due diligence to validate your contentions while the case was pending, and that's the increased liability standard, and we still need to go in and define what the damages are.

CHAIRMAN SOULES: All right. Next around the table. Joe Latting.

MR. LATTING: What scares me is that he's right about that, and what scares me is that -- and the thing that really frightened me was earlier when you -- and I agree with you, Richard, what you said, we could amp up the damages. If somebody is coming after us, what's going to happen is they are going to say not only did they not

make a reasonable inquiry, they didn't have due diligence. They didn't follow it with diligence through the litigation. They didn't go out and make the investigation. They only talked to their client, and therefore, we are entitled to all of these amped up damages.

As a practical matter, the burden of proof is not any higher. You get somebody up there to offer the opinion that it's a lack of due diligence and then we have built in a way to have our damages amped up. It seems to me that we are better off to leave it alone and to say that if you made a reasonable inquiry when you filed a motion or pleading, that's what the rule says, if you have made a reasonable inquiry when you filed a motion or pleading, then you are not guilty of these things; and therefore, the issue of due diligence doesn't come up. So you don't get to any damages.

CHAIRMAN SOULES: So we just delete (4).

MR. LATTING: Well, I am afraid to do that because I am afraid if we do that we will --

CHAIRMAN SOULES: Why not?

MR. LATTING: We will be in conflict with -- I am just thinking outloud.

CHAIRMAN SOULES: If that's the only reason is -- is that the only reason not to delete it, because it may be determined to be in conflict with the statute?

MR. LATTING: I think so.

CHAIRMAN SOULES: Anybody else see any other reason?

MR. LATTING: But I think it's blatantly in conflict with the statute, and I think the rule would have a better chance of survival if we leave it in and just say that we put in the rule that we have -- in order to fall under this rule you would have to fail to make even a reasonable inquiry to find out if there was any evidence. Then what we could do, Luke, in addition to leaving it alone we could do what Scott or Judge Guittard suggested, which was to define what "costs" meant and try to limit it that way.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: Well, the

more I look at the statutory penalties -- and I don't like any of them. "An order directing the violator to perform or refrain from performing an act." Come on.

MR. ORSINGER: Public service.

PROFESSOR DORSANEO: Well, yeah. You could say what it means, but what it says is much broader than that. Pay a penalty into court, what's all that about? Why don't we just stick with our current language about an appropriate sanction and make reference to 215(2)(b) and conform to the statute by a reference to the preliminary parts where it does make sense to use conforming language, "nonfrivolous argument."

MR. ORSINGER: The statute says, "may embrace a directive to conform with" --

PROFESSOR DORSANEO: Well, I don't want to embrace what the statute says in terms of penalties. I just don't understand -- I don't know what it means, and I am afraid that I won't like it when I find out.

CHAIRMAN SOULES: Judge

Guittard.

HONORABLE C. A. GUITTARD: I want to withdraw my earlier suggestion. It seems to me that lack of due diligence, I am persuaded by the argument that that may require something additional than reasonable inquiry. So I want to withdraw that, and so far as caused by the violation, the penalties here caused for inconvenience, harassment, out-of-pocket expenses seem to be rather limited or at least can be construed that way, and it doesn't scare me as much as it did when I first read it. I am inclined to agree that the original proposal here without amendment is probably the best course.

CHAIRMAN SOULES: Well, maybe I am just super sensitive because I just defended an attorney malpractice case where we got sued for filing a petition against some doctors, and he had some witnesses.

HONORABLE C. A. GUITTARD: Yeah. Well, that's something different, it seems like to me. I agree with Chuck.

CHAIRMAN SOULES: And they claimed they both retired from medical

practice over the lawsuits being filed.

HON. GUITTARD: Well, that's a permissible suit, but --

CHAIRMAN SOULES: Without a jury?

HONORABLE C. A. GUITTARD: No.

CHAIRMAN SOULES: They felt they had been harassed and inconvenienced. The doctor did. So maybe I am the only one that's that sensitive about it. Judge Brister.

HONORABLE SCOTT BRISTER: I just wanted to get my proposal as a potential amendment, which was to say if there has been a lack of diligence throughout the litigation, an award of appropriate amount of costs and expenses incurred are caused by the subject litigation. That's my proposal.

CHAIRMAN SOULES: You are saying "lack of diligence throughout" and then you would strike the words "inconvenience, harassment"?

HONORABLE SCOTT BRISTER: Right. In other words, unless you can, it seems to me, go the route and define which of

the millions of things people claim as damages we mean to cover and not cover or you can say costs and expenses and assume that would be worked out case by case -- and I obviously think the legislature has left it fairly ambiguous -- we shouldn't try to read too much into it, especially by leaving it costs and expenses.

You make it consistent with current law. You don't have the problem with the pre-imposed September 1, '95 cases. It's exactly the same. If you have been undiligent throughout the whole case causing people expenses then under current Rule 13 you can be assessed all of the costs of discovery. So you don't have conflict with the legislature. You don't have conflict with the past or the future. Everybody is happy.

CHAIRMAN SOULES: Let Pam speak to that because we are kind of debating your amendment.

MS. BARON: Well, I would like to withdraw my amendment because I think I have the burden in the wrong place. I think the burden needs to be on the moving party to

show a lack of diligence instead upon the defending party to show diligence. So I just want to withdraw it at this point.

CHAIRMAN SOULES: Okay. Then, Judge Brister, your amendment is the only one on the floor. State it again so that we can --

HONORABLE SCOTT BRISTER: Insert before the start of "for," "if there has been a lack of diligence throughout the litigation" and then drop the words "for inconvenience, harassment," and drop the words "out-of-pocket."

CHAIRMAN SOULES: Is there a second?

MR. MARKS: Second.

CHAIRMAN SOULES: That's John Marks?

MR. MARKS: Yes.

CHAIRMAN SOULES: Okay. Moved by Judge Brister and seconded by John Marks. Discussion? Judge Guittard.

HONORABLE C. A. GUITTARD: I am concerned about the phrase "throughout the litigation." That seems to be too much. If

you just make one good motion then you haven't been without diligence all during the litigation. It seems to me that what Judge Brister is really getting at is something like this. If there has been a repeated -- if there are repeated violations of some sort of rule, language like that, would be preferable to "throughout the litigation."

CHAIRMAN SOULES: Anyone else around the table to my right? Okay. Tommy Jacks. You have got your hand up, and I will get to Judge Till.

MR. JACKS: Well, I want to second what Judge Guittard just said. My concern is -- and I don't think this is what Judge Brister intends. My concern is that the phrase "lack of diligence throughout the litigation" could be read to say that there is a duty to exercise diligence at all times through the litigation and that if at any point in the litigation there was a failure to exercise diligence, even on one occasion, and, Scott, I don't think that's what you are trying to do. I think what Scott is trying to say is it would be the burden on the moving

party to show that at no time throughout the litigation was any due diligence ever exercised, and I think we can get that idea across perhaps more clearly.

CHAIRMAN SOULES: Judge Till.

HONORABLE PAUL HEATH TILL: Well, I guess Judge Guittard is right. I would speak against that because I thought Rule 13 was primarily intended to be a rule that would allow the parties of the court to be able to gleam out or to remove frivolous and groundless pleadings, and this would convert it from that to a trial strategy, where either side would be able to get at the other, at whatever point, that you didn't show due diligence up until now or diligence up to now, and it would be constantly put to that burden. I don't feel that that's what this rule is all about.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: Well, maybe I am saying the same thing in a different way, but I have a concern about the use of the negative language, "lack of due diligence." No. 1, I am involved in a case right now where in my

opinion the party on the other side is affirmatively filing frivolous pleadings and motions, and he's exercising a great deal of diligence in doing so, in harassing the heck out of the defendants. So how would you cover that type of situation, which I think is what Judge Till was saying? It seems to me that the thrust of Rule 13 is to punish filing of frivolous motions and pleadings rather than the failure to exercise the diligence required to support them during the suit, which gets into more of an are you prosecuting your case correctly type thing. Thanks.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Here is some other language that Judge Brister and I were just discussing. I'm not sure it solves all the problems, but I think those are problems with respect to the need not to have one violation or continuous course that one violation of which you are subject to liability. What if we said, "If the court finds that a person has failed to exercise due diligence on a continuing basis through the

course of the litigation"?

HONORABLE SCOTT BRISTER: How about drop "due"?

CHAIRMAN SOULES: Aren't we really talking about repeated violations then?

MR. MARKS: Continued course of conduct.

HONORABLE SCOTT BRISTER: Or continuing basis, or what does that "on a continuing basis" mean?

CHAIRMAN SOULES: I am talking about just forgetting due diligence and diligence and talking about repeated violations.

HONORABLE SCOTT BRISTER: Well, I don't like "repeated" because that gets back to that same problem about technically they need to prove up two times, find two places. The idea is that this is continuing throughout this litigation. This is a pattern. This is not I can pick out two instances that it happened, it's repeated.

MS. GARDNER: Excuse me.

CHAIRMAN SOULES: Anne Gardner.

MS. GARDNER: I'm sorry, Luke.

Anne Gardner. What about "continued or repeated violations of this rule" since you already have the violations described in the first section?

HONORABLE SCOTT BRISTER: Because you are trying to -- I mean, the only reason I am suggesting any of this, I agree, if we didn't have a statute, drop the thing, but my purpose was to try to please the legislature and the Supreme Court, and the legislature has a section where they make a distinction for lack of diligence. They want something else done.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Could we tie in the language in (a)(1) to sub (4)? Because it seems to me that's what we are talking about.

MR. LATTING: That's what Anne is talking about.

HONORABLE C. A. GUITTARD: Well, subdivision (d) does that.

CHAIRMAN SOULES: I am not understanding what you are saying, John.

MR. MARKS: Well, the penalties of sanctions talked about in sub (4), relate

those to the conduct referred to in sub (1) of (a). I mean, that's pretty bad stuff there. You could say, you know, continuing course of conduct presenting for an improper purpose, so on and so forth.

CHAIRMAN SOULES: Okay. Anyone? Okay. Joe Latting.

MR. LATTING: But, John, the only problem with that is that that's not the only thing that that section (4) ought to apply to if it ought to apply to anything because surely that ought to apply to making a factual contention in a motion that has no basis, and that's in No. (3). So it's not only (a)(1) and -- but the thing I really wanted to say to the members of the committee, do we -- I'm scared to death to impose a duty of continuing due diligence throughout the legislation -- I mean, throughout the litigation.

I don't want this to happen. I don't want to be told, yes, I made a reasonable inquiry before I filed this suit, but I didn't exercise due diligence throughout the litigation. Therefore, I am going to have a

judge decide we have to pay for the costs of the other sides, all their legal expenses.

It seems to me that the way that the rule is proposed -- and I don't have any personal stake in the way it's written here, but it seems to me once a reasonable inquiry is made in filing the lawsuit that we are then safe from these things and that the only way that we can be exposed to them is to not to have made any reasonable inquiry before we filed the suit.

If we say, well, then we have got a different thing for the amping up the damages for a maintenance of due diligence then it seems to me as a lawyer I have got to keep checking to see through the litigation is this witness still around, does he still think the same thing. It seems to me we are making it rougher on ourselves and not safer.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I agree with Joe's philosophy, but I am worried that you weaken the predicate for the award of No. (4) damages if you don't have a more stringent

liability test. As Joe's suggesting, that reasonable inquiry should be the sole standard by which all four sanctions are measured means that (4) can be triggered just as easily as (3) can, and I don't think it should as a matter of policy, and I don't think the legislature intended for (4) to be triggered as easily as (3).

CHAIRMAN SOULES: Why not delete (4)? If we modified (4) as Judge Brister suggested, to delete "inconvenience, harassment," and then the words "out-of-pocket," which are just modifiers, inconvenience and harassment. Then you have really got (3) and only (3).

MR. LATTING: How about if we do this?

CHAIRMAN SOULES: Judge.

HONORABLE SCOTT BRISTER: Not necessarily. And someone might interpret it that way. Someone might interpret because it's incurred or caused by the subject litigation. One might interpret it a good deal more broadly, but we wouldn't have to get into a fight or be seen as intentionally

taking on the legislature on that issue.

CHAIRMAN SOULES: All right. Well, what about then this, leaving (4) in but modifying it without the due diligence or diligence concept, and just say "an award of an appropriate amount of costs," strike the "inconvenience, harassment, and out-of-pocket," and "cost and expenses incurred or caused by the subject litigation."

"Cost and expenses incurred or caused by the subject litigation" and strike the part that may be unconstitutional.

HONORABLE SCOTT BRISTER: Well, again, it seems to me that the problem is there a judge could do that if you screwed up one time. The legislature sensibly has made a distinction between all the costs of litigation. So you have got to do something extra, something tougher. We certainly don't disagree with that. We don't think it should be easier to get a sanction for anything in the world. Technically we agree with them. It should be something harder. We are a little confused about what that standard should be, but --

CHAIRMAN SOULES: What about "repeated violations" and then the rest of it? That's more than one.

HONORABLE SCOTT BRISTER: Well, I know a lot of people who will specifically set up two fights over a request for production just so it will be repeated.

CHAIRMAN SOULES: Well, then the judge has to get proactive.

HONORABLE SCOTT BRISTER: Right. Right.

CHAIRMAN SOULES: Anyone else? Joe Latting.

MR. LATTING: How about if we do this? How about if we say on No. (4), "and if throughout the litigation there has been a lack of due diligence, the court may also..." In other words --

CHAIRMAN SOULES: That doesn't change what Richard's concerned about and Tommy Jacks is concerned about.

MR. LATTING: Well, I know, but it addresses your concern, and it means that you are safe if you have made a reasonable inquiry in the first place.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: I'd like to suggest a completely different approach, try to solve the same problem, and maybe this is going to be considered to be a good idea. In my view the reasonable inquiry is all you should expect of someone before a lawsuit is filed. Especially if the limitations period is about to expire.

The due diligence concept is that you have met your filing deadline. You have asked your client the pertinent questions, maybe done a little bit to verify stuff and then you have made a reasonable effort to see if you can develop the proof in court to back up what your client told you that caused you to file the lawsuit in the first place, and I think you should be able to do that, which I think the legislature is calling due diligence, and then decide I can't prove the case that my client thought he had when he walked in the door when I filed the pleading.

So I want to dismiss it because I have made these inquiries. I don't think I have

got a case I can win. I want to dismiss it, and I think the rule ought to make it -- ought to encourage lawyers to dismiss it if after they do the discovery they feel like they don't have a case that they have provable in court.

So what if we say -- what if we craft some trigger liability on (4) that if after due diligence or discovery or further investigation the proposing lawyer feels like the claim should be withdrawn, they should be free to withdraw that without suffering any sanction of these additional damages for having initiated the suit and then voluntarily withdrawn it.

And then couple that with a longer safe harbor period than 21 days because if you file your petition and when the answer is filed they file a motion under this rule, you have got three weeks to decide whether you want to nonsuit your lawsuit or whether you are in all the way for whatever sanctions may eventually occur, and it seems to me that the safe harbor ought to be long enough for the proposing lawyer to verify whether the case is a

provable case or not and then voluntarily nonsuit it without having to pay any sanctions.

CHAIRMAN SOULES: What if your client won't let you nonsuit the case?

MR. ORSINGER: Then I think that -- I was just sitting here thinking what clause am I going to write into my employment agreement to allow me to either withdraw or refuse to file something that the client wants and I don't.

CHAIRMAN SOULES: Bill Dorsaneo. Then I will go around the table.

PROFESSOR DORSANEO: Chuck Herring can correct me on this if I am wrong, but it seems to me that at least the federal cases on the reasonable inquiry standard basically impose an obligation on counsel to when counsel finds out that what the client said about particular publications or books that were allegedly copied really isn't right then there is a duty that extends into the litigation itself, not just at the commencement of the litigation, and I have no idea what the legislature meant by this

different standard, but it seems at least as likely that they meant not about continuing -- not something additional about the continuation of a litigation, but a situation where there not only isn't a reasonable inquiry, that there is in effect, no inquiry, you know, no diligence, a lack of diligence.

And that's a plausible interpretation of the heightened standard. I don't think adding "throughout the litigation" to that adds very much. Frankly, John Marks' suggestion that no due diligence might well mean that there was a litigation -- a pleading or motion presented for an improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation, makes as much sense as anything else; but I come back to the ultimate point after considering all of these various alternatives and think that we should not recommend to the Court that it either embrace or embroider on the legislative standard.

Why don't we just stick with what we know, where we have case law? An appropriate sanction, a sanction that's not just is

inappropriate. We have a body of case law. We know at least what our rules mean, and I don't see any need -- I guess I am getting back to agree with Rusty, except not on the first part of the rule. Okay. But why don't we stick with what we know and then be happy with that? It doesn't conflict. We are not repealing the statute. We are not even impliedly criticizing the statute. We are just not completely embracing it because we don't want to do so literally and that seems to me to be the most sensible course, at least a course that would let us move forward.

CHAIRMAN SOULES: Are you saying no amendment at all to the current Rule 13?

PROFESSOR DORSANEO: Just take paragraph -- take the (a)(1), (2) (3), (4), and maybe, you know, maybe some of the other procedural parts, but don't embrace the penalty part. Don't embrace the part that defines what the sanctions are. Stick with our own lingo, and I don't know what "to pay a penalty into court" means either, and I don't know what kind of limits there are on that,

but no doubt it has to be -- there are limits on that, but it's not articulated at all. No doubt something gets done with that penalty. I don't know what that is. I don't guess the judge gets to keep it.

CHAIRMAN SOULES: So you are suggesting if I understand you, Bill, that we just instead of listing sanctions in paragraph (d), 13(d), that we just incorporate the sanctions --

PROFESSOR DORSANEO: What our current rule says.

CHAIRMAN SOULES: -- of proposed 166, whatever we come up with under 166(d)(3)(b) and go with those? Isn't that what you are suggesting?

PROFESSOR DORSANEO: In essence, yes.

CHAIRMAN SOULES: Okay. Okay. Anyone else? Yes, sir. Michael Prince.

MR. PRINCE: I'm torn between either calling the previous question to move on or making yet another suggestion, but in the hopes that I won't be stoned, let me make another suggestion. I agree with Joe and

Chuck and Judge Brister and others who have said that I think the best course is to adopt a rule that tries to make some sense of the statute because I think that's the thing that makes the most sense.

This subdivision (4) on sanctions is horribly complex. It's not clear. It's bad. I think everybody would agree with that. My suggested language would incorporate the words, some of the words and phrases, that are used in the statute but maybe in such a way that it would leave enough discretion in the trial courts who hear these things that we won't be using these catastrophic damages, won't be making it an express rule that directs them to award catastrophic damages.

So let me make the following suggestion. Subpart (4), I would suggest that it say the following: "Upon a finding of no diligence in the subject litigation, an award of an appropriate amount of costs and expenses caused or incurred."

CHAIRMAN SOULES: "Upon a finding of no diligence in the subject litigation"?

MR. PRINCE: Comma.

CHAIRMAN SOULES: Comma, "An award of an appropriate amount of costs..."

MR. PRINCE: "And expenses..."

CHAIRMAN SOULES: "And expenses..."

MR. PRINCE: "Caused or incurred..."

CHAIRMAN SOULES: "By the subject litigation."

MR. PRINCE: Having used the words "subject litigation" in the introductory paragraph I wouldn't repeat it. "Cost or expenses caused or incurred," period.

CHAIRMAN SOULES: Okay. There is a --

MR. LATTING: Can we move that?

CHAIRMAN SOULES: Well, where is Judge Brister?

HONORABLE SCOTT BRISTER: Yeah.

CHAIRMAN SOULES: Will you accept that amendment?

HONORABLE SCOTT BRISTER: I don't think it's a big difference. I like Chuck's language and mine better I think

because it continues -- again, I like the idea of it continuing throughout the litigation. Then you get the whole litigation costs, makes it a little more explicit. I don't think it's a big difference between the two, though.

CHAIRMAN SOULES: Okay. John Marks?

MR. MARKS: I hate to belabor the point, but it seems to me that we need to make a distinction between (3) and (4), as somebody else suggested, and what we are trying to really punish is bad intent and conduct and a low down, no good, dirty lackey, and sub (1) under (a) does that. I would be concerned about (2), (3), and (4) because, you know, then you get into judgment calls as to what is no evidence, what is no law; and what about somebody that's trying to make new law in the area? And maybe they are not trying to do it right. So you have these other sanctions you can impose on them, but for the purposes of (4) it seems to me maybe we can in keeping with the spirit of the statute say this applies when somebody is really being nasty.

CHAIRMAN SOULES: Okay. How about this? "For a violation of (a)(1) and a further finding of no diligence in the subject litigation."

MR. LATTING: I like that.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: I return again to the concern that was raised earlier, and that is the placing of the burden. I mean, when we say "if the court finds" we don't say who has the burden of convincing the court that that's the case, and it seems to me we ought to speak in terms of "if the moving party shows and the court finds."

MR. PRINCE: That's fine.

HONORABLE SCOTT BRISTER: Well, the problem is, though, the court can do it itself. It may not be a moving party. That's part (c).

MR. JACKS: Well, I guess we could say "if it is shown."

MR. PRINCE: That finding is down at the bottom part of the sentence, as I read it.

CHAIRMAN SOULES: Tommy is

thinking through something. I want to let him finish.

MR. JACKS: Well, I mean, the fact that, again, we do have findings, but it's still not clear to me that there is any burden placed on the moving party in the broad sense to include the court. I mean, it may be too fine a point, but I don't think it is. I'm happier with some requirement for showing.

CHAIRMAN SOULES: Well, if we put hearing in there somehow then if there has to be a hearing, there has to be a showing.

MR. JACKS: Yeah. Although,, you know, the water is even a little more muddied by the sentence that talks about the court can award monetary sanctions without issue to show cause order, which places the burden I think on the party that's told to come in and show cause. I just would feel more comfortable if we did what we could to indicate our intention that the offended party have no burden or the party who's claiming to be the offended party have no burden and the burden be on those who are trying to do the violation.

MR. LATTING: Why don't we say that?

CHAIRMAN SOULES: Give me some words.

MR. JACKS: Well, I'm not sure whose language we are using now. So I don't know what words.

CHAIRMAN SOULES: Well, are we going to predicate this on a violation of (a)(1) only first? Those in favor show by hands.

MR. JACKS: (A)(1) only or (a)(1) in addition to something else?

CHAIRMAN SOULES: In other words, you only get to paragraph (4), subparagraph (4) penalties for violating (a)(1).

MR. MARKS: And no due diligence?

CHAIRMAN SOULES: Well, no. Take it a step at a time.

MR. MARKS: Okay. Okay.

HONORABLE PAUL HEATH TILL: Say that again now.

CHAIRMAN SOULES: Well, John

Marks has been advocating here and there has been some concurrence with that that you only get to (d)(4) penalties for violating (a)(1), that it's not being presented for -- let's see. It has to be harass or cause unnecessary delay or needless increase of the cost of litigation. "The pleading or motion is not being presented for any improper purpose."

MR. MARKS: So "being presented for an improper purpose." Drop the "not."

MR. YELENOSKY: Right.

CHAIRMAN SOULES: "Pleading or motion is being presented." I have got to read paragraph (a). By presenting to the court a pleading or motion an attorney to -- he's certifying that it's not being presented for improper purpose.

MR. YELENOSKY: Right.

CHAIRMAN SOULES: Okay. So if you violate (a)(1) is that the only circumstance in which a party would be subject to (d)(4) penalties, whatever those (d)(4) penalties may be?

MR. LATTING: May I speak to that briefly?

HONORABLE SCOTT BRISTER: It seems not right to me.

MR. LATTING: It's not right to me, either.

HONORABLE SCOTT BRISTER: Because what you are saying is so the situation would be you have the lawyer who had a case, files the claim. He names the wrong defendant, a trucking company. The named defendant sends him three lawyers -- three letters, everything, proves cause. You have got the wrong defendant. We are the wrong people. We don't want to have to file a motion. Let us go. Let us go. Let us go.

No response. I mean, if it's a lazy lawyer, he didn't file this claim to harass them. He's just lazy and stupid. So this guy doesn't have to -- I mean, the whole -- the statute is based on diligence. That's the word they picked that we are trying to construe with, and that seems to be just the opposite to say we are going to do worse things to you, but it's unrelated to diligence. It's only related to improper purpose.

CHAIRMAN SOULES: Okay. Let's get that out of the way then. Those that feel that (d)(4) sanctions should be available only for an (a)(1) violation show by hands. Four. Those that think otherwise. Okay. That fails. Richard Orsinger.

MR. ORSINGER: I would propose the same thing only it would be premised on a violation of (a)(3), which is there must be first a finding or that's limited to a finding that there was no evidentiary support and not likely to have evidentiary support.

MR. YELENOSKY: Luke.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: I may just need reassurance here, and it's not a question of wording but what Richard just said now -- thank you. Thank you. I am done. It's like the thing, you know, every once in a while if you feel, you know, you need applause, stand up and we will applaud you.

What Richard said earlier more than what he said now, I guess I have got an overall question about what's required of a

plaintiff's attorney when he learns something. It seems to me that Richard is saying if the plaintiff's attorney learned something that would make his case unprovable in court, at that point he has got to get -- dismiss the case, and there may be things that you learn that the other side hasn't learned because of their lack of diligence, their lack of diligence.

Are you saying that I have got an obligation subject to penalties to get out of that case rather than settle it? I mean, suppose I tell my client -- at the point I tell my client that your chance of winning in court is less than 50 percent, and it's zero if they ever depose this individual which they have been too stupid to depose, do I have some obligation? Rather than saying let's take a settlement I have to dismiss that case?

MR. ORSINGER: Can I respond to that?

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Now, hold on. When you are talking about dismissing or telling a client that, don't overlook the reality of

malpractice today because you get sued for abandonment, for -- you have got to put this in the real world, and another thing in the real world we need to put in, we don't have a doctrine of relation back rule like they do in federal court where somebody comes to you just a few days before limitation, the highway job out there, and you get the names of everybody out there, and you sue them all, and you can't learn within 21 days, you know, who, and if you don't get them all, you are going to get sued for malpractice.

So let's design this thing that we can live with. Judge Brister had an idea. The only thing anybody had that they were fearful of his idea that I heard was that it was the duty that you just daily have to do this, but what if you had an exception that the initial diligence in filing a lawsuit under the circumstances then wouldn't -- or there would be a presumption that if you made that initial diligence, that then the filing of the lawsuit wouldn't be some abuse. I don't have the words, but if you had what he said but make it clear that it's not a continuing duty, it

would appear to me to answer most of the things we have questioned here. That's all.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I'd just like to say that I have thought through here and listened to all of this, and the longer I have thought about it the more I think that the original draft covers these things. Judge Guittard is nodding his head. At least one person tends to agree. It seems to me every time we start modifying part of it we get stuck in that part of it. Then we modify this part, and we start getting kind of pulled over that way.

CHAIRMAN SOULES: Well, let me try this. If we said, "Upon a showing of a continuing lack of diligence an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation."

HONORABLE SCOTT BRISTER: That's fine with me.

MR. LATTING: How about "and a violation of" --

HONORABLE C. A. GUITTARD: "In violation."

MR. LATTING: In other words, I'd like to make the continuing lack of diligence in addition to (1), (2), (3), and (4).

HONORABLE SCOTT BRISTER: Or (4), "if in addition there has been a" -- and then continue with Luke's language.

MR. LATTING: Yeah. But I'd like to make it specifically so that we don't get caught in this notion that in addition -- besides this (1), (2), (3), and (4) category that the legislature passed we also have just an independent undefined duty of continuing due diligence.

CHAIRMAN SOULES: Okay. "Upon a showing of a continuing lack of diligence in addition to a violation of paragraph (a), an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation"?

MS. BARON: Well, it's really -- Luke?

CHAIRMAN SOULES: Pam.

MS. BARON: I think it's really a continued lack of diligence in violation of

paragraph (a). It's not just lack of due diligence unconnected with (a).

HONORABLE SCOTT BRISTER: Yeah. That's good. That's good.

MR. JACKS: I think that's right because otherwise, you know, when you think of lack of due diligence you think of like the DWOP case where you filed it and then you just didn't do anything for two years, and I don't think that's the conduct we are trying to get at here.

HONORABLE SCOTT BRISTER: I like that.

CHAIRMAN SOULES: Okay. What are the words?

MS. BARON: Well, of course I have forgotten.

MR. YELENOSKY: The court reporter has got them.

HONORABLE SCOTT BRISTER: We are showing a finding, back on Chuck's point.

CHAIRMAN SOULES: Well, I am trying to meet Tommy's concern that somebody has to show it, but we can debate that. I mean, that's the reason that I use the word

"showing."

HONORABLE SCOTT BRISTER: Continuing lack of -- what was it?

MS. BARON: It was, "If in addition, upon a showing of a continuing lack of diligence" --

MR. YELENOSKY: "In violation."

MS. BARON: -- "in violation of paragraph (a)" or I guess "in violating paragraph (a)." Which would it be?

MR. MARKS: "In violation of..."

MR. HAMILTON: "Failing to comply with"

CHAIRMAN SOULES: How about "Upon a showing of a continuing lack of diligence to cure a violation"?

MR. YELENOSKY: Yeah. Because otherwise you are showing a lack of diligence in violating. You should be diligent in your violations.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: The more I think about it the more I think that

putting "diligence" in there is a mistake, that really it doesn't catch the situation as mentioned over here where there has been deliberate conduct rather than a lack of diligence, and I think that the way the thing is written I don't like it. I'd rather go with Professor Dorsaneo's idea of just forget these sanctions and go with what we have, but since we have this statute we have to sort of deal with it in this rule, and I think the Supreme Court expects us to. I think Joe and his majority have done an excellent job, and I would support that.

HONORABLE SCOTT BRISTER: Doesn't Pam's thing take care of that, though? Say you have got somebody who is filing these terribly harassing improper motions. Each one of those is a violation. You write him letters, say, "Stop doing that or I am going to court." Then if they keep doing those, filing those bad things diligently, they are using and there is a lack of diligence to cure a problem.

MR. MEADOWS: I think that's right.

CHAIRMAN SOULES: Well, turn over here just a couple of pages, one, two, three, to the second page of 166(d), and this is something that we debated some time ago, and, Tommy, this was --

MR. LATTING: This is our proposal now?

CHAIRMAN SOULES: Yeah. Tommy, this is something that you had worked on months ago. We use the words "has repeatedly made" in one, two, three, four, fifth sentence from the top of that page in that paragraph small (2)(a). Can't that same concept be used in 13, "upon a showing or finding that a party has repeatedly violated paragraph (a)"?

MR. ORSINGER: In the same lawsuit or in all -- in their career as lawyers?

CHAIRMAN SOULES: Well, I don't care. Say it either way. Either way. Right now let's just talk about can we use those words in 13 that we debated and decided to use in 166(d)?

MR. JACKS: I think you probably can; although Scott had some concerns

about the word "repeated" in the context of Rule 13 because he said, well, that means two instead of one, and that's not egregious enough to --

HONORABLE SCOTT BRISTER: "Continuing and repeated."

CHAIRMAN SOULES: All right. "Continuing and repeated."

MS. BARON: That's three times.

CHAIRMAN SOULES: I am trying to get words to try to get to closure on this so that I can really focus on what's in people's minds, and we have talked generally about this. Now let's get down to words so that we can articulate in words what our concerns are and try to work them out. Michael Prince.

MR. PRINCE: "Continuing" or "continuing and repeated" or "repeated" is fine, and I think -- is it possible to get around the diligence thing?

CHAIRMAN SOULES: Instead of diligence?

MR. PRINCE: No. What I am saying is we feel the need to address that

because those are words used in the statute. Due diligence is used. Couldn't we say in a comment, use those words in the rule that you are talking about, "continuing and repeated" or "repeated," whatever we agree on, and in a comment say that it's our sense that a lack of due diligence or no due diligence exists in continuing and repeated violation of these rules.

In other words, say that we are addressing due diligence by use of the words "continuing and repeated" and just do it that way but not put it in the rule itself.

CHAIRMAN SOULES: All right. Well, if we ever get this rule passed, I will ask you to propose a comment, and we will get it to that. Bill Dorsaneo.

PROFESSOR DORSANEO: We haven't talked in the context in which this is likely to operate at all. Let's say you have a Plaintiff's Original Petition that you have -- when the context comes up, you talk to your client, and you file a Plaintiff's Original Petition perhaps somewhere approaching the end of the limitation period.

You don't have all the information that you need because it's just not available to you through your client. You believe there is a claim or you have an expectation that you will be able to come up with a claim, et cetera, and there are special exceptions filed to your Plaintiff's Original Petition, and you have a special exceptions hearing, or you don't and you amend your pleading, and there you have just done it again.

And maybe some special exceptions are sustained, and you amend your pleading again, and by the time you get down to the point where you are beginning to run into real limits getting there you are up to your fifth amended original petition, and then it's your turn to be liable, too; and you know, I think that that is the likely type of situation to come up. That would mean I don't -- even though I don't know what diligence means, the lawyer who has been amending and doing the best that he or she can has, I think, been exercising diligence. I am worried about this repeated --

MR. LATTING: I am, too.

PROFESSOR DORSANEO:

-- and continuing because that's what we do. We keep doing it and because we think it's justifiable, and I don't --

CHAIRMAN SOULES: Any response? Judge Brister.

HONORABLE SCOTT BRISTER: You're showing diligence in amending to try to get rid of things that are frivolous. I mean, the 11th amended petition itself would be evidence of your diligence.

CHAIRMAN SOULES: Rusty.

MR. MCMAINS: I am just curious. The motion on the floor, does it include the (e) section on the exceptions for discovery motions request?

CHAIRMAN SOULES: Say that again.

MR. MCMAINS: Is the motion on the floor to pass Rule 13, does that include the (e) section?

CHAIRMAN SOULES: Yes. But let's don't talk about that yet unless it fits this.

MR. MCMAINS: Well, no. The

reason I -- it fits on the question of whether or not you are going to pass something because you are trying to circumscribe or amplify what you think the legislature intended. Because I don't think if what you are working from is an idea that we are going to pass a rule in which we are going to say this rule doesn't have any application to discovery motions, I don't think that's consistent with what the statute says.

MR. JACKS: It doesn't say discovery.

CHAIRMAN SOULES: It says, "request, response, and" --

MR. MCMAINS: I know we're still on requests, responses, and objections.

MR. JACKS: Which are neither pleadings or motions.

MR. MCMAINS: You don't think an objection is a written pleading -- I mean, a written objection is not a motion amending pleading?

CHAIRMAN SOULES: Okay. Anything else up this side of the table? Joe Latting.

MR. LATTING: My concern about the -- Scott Brister, my concern about the repeated business is that under RICO two times is a pattern of racketeering activity, and I think we are making it worse on ourselves when we say "repeated violations." That means more than once to me, and I can think of several examples I will spare you where somebody could do something in 1994 and do it in 1995, and that's repeated violations, and I don't think we should put it --

MR. YELENOSKY: How about "a bunch of times"?

HONORABLE SCOTT BRISTER: "Continuing."

MR. LATTING: I don't think we help our situation by saying "repeated violations."

HONORABLE SCOTT BRISTER: That was my point.

MR. MEADOWS: I thought the proposed language was, "Upon a showing of a continued lack of diligence to cure a violation of paragraph (a)."

HONORABLE SCOTT BRISTER: Yeah.

What we wanted was "continuing."

MR. LATTING: Well, that doesn't worry me if I understand "upon a showing of continuing lack of diligence."

HONORABLE SCOTT BRISTER: My language was "throughout the litigation."

MR. LATTING: "Throughout the litigation."

HONORABLE SCOTT BRISTER: In the beginning, the middle, and the end.

MR. LATTING: Judge Guittard is shaking his head, which worries me.

HONORABLE C. A. GUITTARD: Well, I don't know what it means really. You have to violate it every day in order to be continuing throughout the litigation? I don't know what "throughout the litigation" means.

CHAIRMAN SOULES: Well, it seems to me like this diligence thing, the concept of diligence that the legislature has put in its statute is hard to understand, and probably we have got about 40 people here. We would probably get 40 different opinions about what it means.

"Repeatedly" is not acceptable. We seem

to have a consensus, although I am not certain of that, that the words "for inconvenience, harassment," that that comes out. We get back to the request that I had earlier. Why don't we propose to the Supreme Court a rule that does not have this paragraph (4) in it at all? Then let the jurisprudence develop as it may under the statute and see what becomes if that No. (4) is ever used out of the statute. See what the courts do with it.

MR. LOW: I would second that because we do have any sanction shall be limited to what's sufficient and so forth. We talk about what the sanctions are, and we can't seem to get there by revising (4). So I would -- I think I would second that.

CHAIRMAN SOULES: Okay.

HONORABLE PAUL HEATH TILL: By that, I take it you mean (d)(4).

MR. LOW: Yeah. (4).

CHAIRMAN SOULES: (D)(4).

MR. LOW: Yeah.

CHAIRMAN SOULES: And then we would be, I guess, debating Bill's concept of whether we simply put in this section (d) of

Rule 13, just refer over to 166(d) subparagraph (b) for the sanctions. Now, could we talk about that? Robert Meadows.

MR. MEADOWS: Luke, I am troubled by the approach of writing a rule to look like the statute and leaving part of it out.

MR. LATTING: We have the most important parts in.

MR. MEADOWS: Because I think, as Judge Brister pointed out, the part we are leaving out is the part we have been working on to try to make the rule more user friendly.

CHAIRMAN SOULES: All right. Well, I need somebody to make a motion and give me some words, and we will vote on it. Tommy Jacks.

MR. JACKS: Let me make another stab at trying to incorporate the idea that in order to get hit with whatever costs you can get hit with under (4) you have to have, one, violated paragraph (a) and, two, done something else on a continuing basis; and what I have tried to do with this language is to pick up on the suggestion that the other thing

you have to have done also has to do with subparagraph (a) violations.

My language is to be inserted at the beginning of subparagraph (4). "Upon a showing that the offending party or attorney has violated paragraph (a) and has additionally failed on a continuing basis to exercise due diligence in an effort to comply with said paragraph."

CHAIRMAN SOULES: "Upon a showing that the offending party or attorney has," what, "failed"?

MR. JACKS: "And violated paragraph (a)..."

CHAIRMAN SOULES: "Violated paragraph (a)..."

MR. JACKS: "And has additionally..."

CHAIRMAN SOULES: "And has additionally..."

MR. JACKS: "Failed on a continuing basis."

CHAIRMAN SOULES: Okay.

MR. JACKS: "To exercise due diligence in an effort to comply with said

paragraph."

MR. YELENOSKY: Can you change the word "said" to "that paragraph."

MR. JACKS: "That paragraph."

CHAIRMAN SOULES: "Due diligence to comply"?

MR. JACKS: "To comply with that paragraph."

CHAIRMAN SOULES: "An award of an appropriate amount of costs" and then strike "for inconvenience."

MR. JACKS: And then I leave to someone else -- you-all had some language on the costs that you had already worked with, and I am not unhappy with that language.

CHAIRMAN SOULES: Pick up and say "an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation."

HONORABLE SCOTT BRISTER: I will second that.

CHAIRMAN SOULES: Okay. Moved and seconded. Those in favor show by hands.

MR. ORSINGER: Can we comment on that?

CHAIRMAN SOULES: Let me see if there is enough consensus here to get -- right now there is eight. And those opposed? Eight to seven. We need to talk about it, I guess. Richard, go ahead.

MR. ORSINGER: I am bothered by the part of Tommy's proposal that would make the lawyer liable for what the party does that's a lack of diligence. This statute and the rule --

MR. JACKS: All right. You could put "unrepresented party" because the rule applies to attorneys and unrepresented parties.

CHAIRMAN SOULES: What about just "upon a showing of a violation"?

MR. JACKS: You could. That's fine.

CHAIRMAN SOULES: "Upon a showing of" --

MS. BARON: Or you could say "the offender."

CHAIRMAN SOULES: -- "a violation."

HONORABLE C. A. GUITTARD: "The

offending party."

MR. JACKS: And that the --

CHAIRMAN SOULES: "And an additional finding that" -- I don't know. "And an additional finding of failure on a continuing basis."

HONORABLE C. A. GUITTARD: "Continuing failure."

MR. JACKS: That's fine. Well, let's say "and a failure on a continuing basis."

CHAIRMAN SOULES: Okay. "Upon a showing of a violation of paragraph (a) and a further showing" --

MR. JACKS: "Of a failure on a continuing basis."

HONORABLE C. A. GUITTARD: Let's don't use "basis." Let's just say "continuing failure." "Basis."

CHAIRMAN SOULES: "A continuing failure"?

MR. JACKS: That's fine.

CHAIRMAN SOULES: "A continuing failure to exercise due diligence to comply with paragraph (a) an award of appropriate

amount of costs or expenses incurred or caused by the subject litigation." Richard Orsinger.

MR. ORSINGER: There is a difference between the meaning of the word "continuing" and the word "continual," and I think it has a practical effect here, and I will tell you what my understanding of it is. It's been a long time since I looked in the dictionary on this, but to me "continuing" means that it is unbroken, and "continual" could mean broken but repeated, and I don't know if anyone agrees with that distinction or if they think that --

MR. JACKS: There is a distinction, and I'm not sure which it is either, but I am happy to put in whatever words mean the last thing you said.

CHAIRMAN SOULES: Continuous.

MR. LATTING: Continuous means unbroken.

MR. ORSINGER: Are we looking for something that's unbroken? Are we looking for something that's unbroken, meaning there was not even a period of one month where diligence was shown, or we just want to show

that there were eight instances where they were not diligent?

HONORABLE SCOTT BRISTER: Surely not. Surely everybody agrees if you have done it 20 times but on five occasions you were a good guy those 20 times show something extraordinary.

CHAIRMAN SOULES: So what's the word? "Continual"?

MR. LATTING: "Continual."

CHAIRMAN SOULES: Okay. So let me see if this is right. "Upon a showing of a violation of paragraph (a) and a further showing of a continual failure to exercise due diligence to comply with paragraph (a) an award of an appropriate amount of costs and expenses incurred or caused by the subject litigation." Is that what somebody is proposing?

HONORABLE SCOTT BRISTER: Second.

CHAIRMAN SOULES: Seconded by Brister. Bill Dorsaneo.

PROFESSOR DORSANEO: Well, that's not talking about continuous

violations. That's still the one thing that you started with and I guess you didn't find a basis for in the discovery process.

CHAIRMAN SOULES: So you want to say "repeated and continual"?

PROFESSOR DORSANEO: Well, I don't like the whole idea, but I am just taking shots at whatever you have, but I mean, what does it mean in English if you say that there has been a continuous or continuing failure to do what you need to do. You started out with an allegation that was formed, and someone says it was not formed after reasonable inquiry. I guess you haven't in the discovery process shown after a reasonable opportunity for further investigation or discovery that the party that you have alleged is likely to have evidentiary support. I guess that's what that means, and I have alleged it, and I am trying to find some basis for it, and I still haven't done it, and that's all that it means. That's not much.

MR. LATTING: That's right. That's right.

CHAIRMAN SOULES: Carl Hamilton.

MR. HAMILTON: It seems to me if we add "continually" to the wording we are putting more of a burden than the statute does. It doesn't say anything about continually or repeatedly, and if we are talking about some other point in time the (a) part talks about first you have to make reasonable inquiry before you file something.

So paragraph (4) perhaps has to be at some later time after you have done something else. Well, what else have you done? We talked about that earlier. It's a failure to inquire into the evidence or develop sufficient evidence to support your claim or defense at some later point.

It seems to me if you make reasonable inquiry, you file the papers, you pass that test, but then at some point down the line with the filing of a motion you have got to come forward with sufficient evidence to support your claim or defense, or it ought to be dismissed. And that's I think what we are talking about in diligence through additional

investigation or discovery or whatever it is. So why can't we just say that? It's a failure to at some point produce sufficient evidence to support the claim or defense.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Summary judgment can take care of that. I don't think we want --

CHAIRMAN SOULES: Speak up, Buddy. I don't think the court reporter can hear you.

MR. LOW: Summary judgment can take care of that. I mean, you have discovery. I think the idea here is to get away from somebody that's filing something that's just frivolous, and you know, if you can't meet your burden somewhere down the line, I mean, a good lawyer is going to file an affidavit, summary judgment, and there it goes, I mean.

PROFESSOR DORSANEO: It has to be no diligence at the threshold.

MR. LOW: Right.

PROFESSOR DORSANEO: And then perhaps thereafter as well, but if you make it no diligence thereafter, I suppose you could

have a reasonable inquiry at the threshold and then not exercise diligence thereafter. You lose your case, and you not only get dismissed. You get punished.

MR. YELENOSKY: That's my concern.

CHAIRMAN SOULES: Okay. Joe. And I will go around the table again.

MR. LATTING: Just a word with Carl. I think we want to be careful about saying no -- not being able to come up with evidence sufficient to support the case because that scares me that any time a summary judgment is granted against me then I am open to the charge that I didn't have diligence to support my case.

MR. YELENOSKY: That's the same point I was making earlier, and other than the pat on the back from Pam I am not reassured.

CHAIRMAN SOULES: Well, we already have a case on that, the Tanner case.

MR. LATTING: But in order -- well, we have got these -- if you make a reasonable inquiry to begin with, you haven't violated anything here, and if you are

making -- you won't be in that trouble the way this is written. It can't be under the way we have drafted it.

CHAIRMAN SOULES: Anyone else?

MR. LOW: Can we have the language again?

CHAIRMAN SOULES: Judge Till.

HONORABLE PAUL HEATH TILL: The rule was intended to be a threshold test with filing the pleading and motion. I didn't take it to mean that we were trying to draft a rule that would be a continual test to make sure that some party had shown due diligence that they had a good case or that they had shown due diligence to properly develop the case. Because we are trying to do two things in this one rule is the reason we are getting wrapped around the axle here because I think this has been used consistently for a party to challenge the validity of a particular pleading or a particular motion when it was filed to show that they had a basis for filing it, some arguable point of law.

CHAIRMAN SOULES: Okay. Richard Orsinger.

MR. ORSINGER: The thing that bothers me about looking at the due diligence thing is something that exists at the time you file is that due diligence in my mind requires more effort than reasonable inquiry, and it doesn't make any sense to me to say you can't have any sanction unless you just ask one question to one person but then you can have these additional damages if you didn't ask 15 people the same question. It's just illogical to me.

Now, I think we ought to make it harder to make the lawyer pay for whatever the defendant can dream up in terms of economic loss as a result of the lawsuit. It ought to be harder than a 500-dollar fine. It ought to be harder than 100 hours of community service, and you probably ought to have a right to a jury, and maybe the proof ought to be clear and convincing.

Maybe we ought to do that, but it seems to me that if diligence has anything to do with this, it doesn't have to do with what you do before you file because reasonable inquiry seems to me to be your only duty before you

file and that the diligence aspect of this is that you should have a period of time in which you are diligent and then you decide that you don't have a case you want to pursue. You should be able to voluntarily dismiss it and not have anybody sanction you and say, "Aha, the voluntary dismissal is proof that the case was not meritorious, and we have all of these damages."

MR. YELENOSKY: And if you don't dismiss because -- at what point do you have an obligation to dismiss? That's my concern.

MR. ORSINGER: I am not saying you have an obligation to dismiss. I'm saying that we ought to have -- I think we ought to have a six-month safe harbor or a four-month safe harbor for the plaintiff's lawyer to figure out whether they want to voluntarily dismiss the case without having to pay all of these economic damages, and if you have filed a suit on reasonable inquiry and don't bother to take a single deposition or interview a single witness in a four-month period then at that point maybe we should be talking about

the lawyer getting out his checkbook.

The idea of Judge Brister's proposal and everything else here has to do with repeated filings of spurious motions, I guess, which to me is a different -- to me each one of those motions might or might not violate (a), and maybe cumulatively if there is 15 motions that were filed that were done without reasonable inquiry or for purposes to harass, well, maybe we ought to be sanctioning somebody for that, but to me that's not a diligence question.

That's a repeated violation of (a) over and over and over, gets you into this area of big penalty, and I have a problem moving everything down to where due diligence is the inquiry on the initial pleading, but I also have a problem that you have these super damages because you may have done something that the judge disagrees with twice or three times. So...

CHAIRMAN SOULES: Well, let me see if I can meet that. "Upon a showing of a violation of paragraph (a) and a further showing that after the violation there is a knowing and continuing failure to exercise due

diligence to comply with paragraph (a)."

MR. ORSINGER: I think we ought to add a good long period in there for some reasonably honest lawyer to have time to do the due diligence, not just 21 days or not just until the court on its own initiative issues the show cause order.

CHAIRMAN SOULES: Well, we have got to vote this up or down without getting the 21 days or six months or whatever we are going to do with that. Robert Meadows.

MR. MEADOWS: You know, I guess I am reading this a little differently because I view this whole system working, this mechanism working, in the situation where Buddy had his example of filing a lawsuit where he needs to name ten defendants because he's not sure who the real defendant is going to be, and he needs to name all of them because of the limitations or some other purpose.

Then the defendant writes him and says, "Look, you have got the wrong defendant. We don't even do business in this state, and here's what you need to know that," and Buddy

doesn't dismiss it. Now, that's a violation of paragraph (a). He has not exercised due diligence in curing it because he's been put on notice and satisfactorily -- been given satisfactory information that he's got the wrong party, and he doesn't do anything about it.

So he's in violation of (a) and in failing to exercise due diligence to cure it, and that's the way I see this working, and if you read through the four paragraphs of the wrongful conduct under (a) I am not seeing what Richard's -- you know, the demons that he's seeing in this, and perhaps the way to cure this to satisfy Richard is to say that you have to exercise -- you fail to exercise due diligence after being put on notice that you are in violation of (a).

CHAIRMAN SOULES: That's what I said, a knowing and continuing failure to exercise due diligence.

MR. MEADOWS: But you have to know that on your -- I mean, that has to require -- I mean, that somehow requires you to know that you are on your own.

CHAIRMAN SOULES: Right.

MR. MEADOWS: And imposes the due diligence requirement, but perhaps you shouldn't be subject to these heavier sanctions, failure to exercise due diligence, until you have been put on notice that you are in violation.

CHAIRMAN SOULES: Okay. Let me put that in there. "Upon a showing of a violation of paragraph (a) and a further showing that after notice of the violation there is a knowing and continuing failure to exercise due diligence to comply with paragraph (a)."

MR. MEADOWS: See, you are never in trouble. If you violated paragraph (a) and no one ever complains about it, the opposing side never says you are in violation of it, then fine. There is no -- there is nothing to worry about it.

CHAIRMAN SOULES: Okay. Well, it's got the notice in there now. Anne Gardner.

MS. GARDNER: Luke, I just want to be sure in your proposed language

that -- and maybe I am giving the legislature more credit than it should have for its language, but to me the language that it has in the statute that there is a requirement that no due diligence be shown just has a ring of sounding like that a heightened standard or burden of proof required of a -- in an insurance bad faith case under the Lyons and Dominguez cases where the -- let's see what is it? On a summary judgment or directed verdict the insurer can show or the insurer -- how does that go? There has to be --

PROFESSOR DORSANEO: No reasonable basis.

MS. GARDNER: Some evidence of no reasonable basis to raise an issue of fact, and the sum evidence has to specifically go to the issue of whether there is no reasonable basis. It can't just be like an argument of is it reasonable or not like a negligent standard, and I kind of like the idea of putting the burden on the moving party of having to come forward with specific evidence to show that the lawyer exercised no due diligence, and I just don't want us to lose

that concept if that's what the legislature meant because that creates kind of a heightened -- or the Supreme Court could ultimately determine that creates a heightened burden on the moving party, which would be good.

I just want to throw that in. I don't want to say a lack of diligence and lose that idea if that's possible to keep it, and maybe it doesn't change the meaning of it, but it's just a thought.

CHAIRMAN SOULES: You wanted instead of "failure to exercise due diligence" you want to use the words "lack of due diligence"?

MR. ORSINGER: How about "complete lack of due diligence"?

HONORABLE C. A. GUITTARD: Leave "due" out.

MS. GARDNER: Or showing there is no due diligence whatsoever.

PROFESSOR DORSANEO: I think that's the statute probably really when you read it. It probably should have been worded and does mean that if there was not only no

reasonable inquiry but no diligence whatsoever exercised before the damn thing was filed, and that's the most straightforward reading of it.

Going with this, saying that, well, we are going to look to the future, I think we extend the statute or arguably do into a whole different area where you could actually be guilty of no due diligence thereafter even though you had talked to your client and that was a reasonable inquiry under the circumstances that you were in one day before the statute ran.

But if you don't talk to anybody or if you don't talk to your client or you maybe talk to your client's ex-brother-in-law who knows something about some potential thing. You just haul off and file a lawsuit without even talking to the principals, or you don't bother to call the Secretary of State's office or you don't do something, you know, simple at the threshold such that someone could say that you really exercised no diligence whatsoever. You just sued somebody just to sue them.

CHAIRMAN SOULES: Buddy Low. And then I will come around the table.

MR. LOW: I don't mean to add more to the confusion or take away from all the good things that have been said, but when you start drawing a sentence that includes all of those things you get into a clumsy drafting problem, and it's apparent that we want section (4) of sanctions to be taken only after certain things have been proven by the moving party or proven by whatever standard we want.

So then wouldn't the language maybe come after and say, you know, subject after and only if all of the following are proven or, you know, however you want to do that, and then you can put, you know, that they didn't use initial inquiry. In other words, have several things, just one, two, three, four elements rather than a clumsy sentence to start.

CHAIRMAN SOULES: I'm willing to accept anybody's arrangement of words. I am trying to get the concept.

MR. LOW: I agree with all the concepts.

MR. LATTING: Do you want the

words to be passed this morning or do we need to --

CHAIRMAN SOULES: This sanction rule is going to go to the Supreme Court by noon tomorrow, or we are going to stay and keep working. This has got to go to the Court. We are in the same shape today on sanctions that we were last time on discovery. So eventually by attrition we are going to get this done.

MR. LATTING: Would it do any good to put this aside for a moment and see if we could come back to do what Buddy is talking about? Because we seem to be having a drafting problem more than a philosophy problem.

CHAIRMAN SOULES: Well, I think we are being at this point productive. We are developing notice, exactly how to say due diligence, lack of or none or what, showing, so that it reflects a burden. We are picking up some concepts that are going to give us some drafting, and I'd like to keep on with it.

Okay. Let's take no more than ten

minutes, please.

(At this time a recess was taken, after which the proceedings continued as follows:)

CHAIRMAN SOULES: Okay. I think Buddy Low had a good suggestion on the break here, and he left.

MR. LATTING: Well, it was a good idea. It was a good suggestion.

CHAIRMAN SOULES: First let me nail down what the sanction is going to be and then we will list the conditions in it. The sanction will be an award of an appropriate amount of costs and expenses incurred in the subject litigation. Anyone disagree with that?

HONORABLE SCOTT BRISTER: Why are you dropping "or caused by"?

CHAIRMAN SOULES: In order to get away from consequential damages. We are talking about litigation costs and nothing else.

MR. JACKS: Can we couple that with a comment that actually says that costs in this context does not include consequential

damages such as the loss of your medical practice or whatever?

CHAIRMAN SOULES: We are talking about litigation costs.

MR. JACKS: Exactly. Exactly.

MR. ORSINGER: Should you put the word "litigation" in there?

CHAIRMAN SOULES: Well, it says, "Costs and expenses incurred in the subject litigation."

MR. ORSINGER: Okay.

CHAIRMAN SOULES: Okay. Anyone disagree with that? No disagreement. So that is the sanction.

MR. HUNT: Does that conflict with the statute?

CHAIRMAN SOULES: It doesn't conflict with it. It just doesn't include everything.

HONORABLE SCOTT BRISTER: Well, it might or might not. I mean, to me if you have the "and caused by" in there, why I hesitate is you could make the argument it does include whatever is eventually determined, if it's eventually determined, the

statute does include.

CHAIRMAN SOULES: Well, they can try under the statute to get consequential damages beyond litigation costs, but they can get litigation costs under the rule.

HONORABLE SCOTT BRISTER: Well, "incurred in the litigation" is pretty much a defined term. The amount of time you missed from your office to come in and testify at court is not a cost that's incurred in the litigation.

CHAIRMAN SOULES: Right.

HONORABLE SCOTT BRISTER: I think maybe the legislature intended that to be included in this, and if you include the phrase "and caused by" if that's what is determined that that's what the legislature meant and that's what the rule means, the rule says what it needs it to say.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I agree with you that it would do that, but I guess if you put "or caused by" then you get back into everything else because then that includes not

just the day you missed coming into court. It includes all the days you missed because you just lost your medical practice.

CHAIRMAN SOULES: Well, anyway, no one opposed that.

MR. LATTING: I have a question about it, Luke, and I don't mean to slow this down, but I do have a serious concern about that, and here is the concern: It seems to me, you-all tell us whether it's right or wrong, if we take out language, if we make the language of our rule different from the language of the statute it seems to me that we are endangering the rule more than if we keep the language the same and put a comment in that says that this means only -- that this means litigation costs.

Because I guarantee you if we pass a rule that doesn't include the language of the statute which we are talking -- what is it, harassment, and where is the language? That does not include "inconvenience, harassment, and out-of-pocket expenses," I am going to be saying -- I am filing a motion under this rule and bringing an action under the statute both

and saying, "Judge, they used different language. They must mean different things, that the statute gives me all these rights that the rule doesn't give me." So I will catch them under the statute. So I think if we use the language of the statute, put it a footnote, say this is what it's limited to in our judgment, that we have got a better chance to prevent the evil across -- that's what I think.

MR. MARKS: I mean, we may be able to -- we were talking during the recess about putting maybe some legislative history in there talking about, you know, they have rejected the term "damages"; therefore, it is presumed that's all they are talking about is costs of litigation.

CHAIRMAN SOULES: The comments of the advisory committee are not binding on the Court. Its rules are.

MR. MARKS: Well, how about the comments by the Court in the rules?

CHAIRMAN SOULES: I don't think that's what these comments are.

MR. LATTING: And I will tell

you what. They may not be binding on the Court, but I think they are going to influence the Court that interprets this rule some day.

CHAIRMAN SOULES: I can't -- okay.

MR. YELENOSKY: Luke, well, our proposed rules aren't binding on the Court either. The question is whether we propose a comment that the Court will then promulgate.

CHAIRMAN SOULES: They don't promulgate comments.

MR. YELENOSKY: Well, okay. They may.

CHAIRMAN SOULES: They don't.

MR. YELENOSKY: They won't make it. Okay.

CHAIRMAN SOULES: That's not what a comment is. It's not a promulgation of anything. It's just a comment.

MR. YELENOSKY: That they include a comment, could we ask that?

CHAIRMAN SOULES: Well, "or caused by" in or out? Those who want it in show by hands.

MR. HAMILTON: What are we

voting on?

CHAIRMAN SOULES: "Or caused by." I am going to try to get the sanction defined and then we will talk about the conditions of the sanction. Who wants "or caused by" in the rule? Six.

Those opposed? Three. Okay. So that vote signifies that any costs or expenses caused by the subject litigation including consequential damages are subject to the interpretation of this rule.

MR. HAMILTON: Not damages, just costs.

CHAIRMAN SOULES: "Costs or expenses caused by the subject litigation."

MR. HAMILTON: That's not damages, though.

MR. HERRING: It doesn't say damages.

CHAIRMAN SOULES: Well, I don't think you're right. I think you're wrong, but you may be right, and I hope you're right. One way to make you right is to take "or caused by" out and restrict it that way.

HONORABLE SCOTT BRISTER: Let's

just say "taxable costs" except we know the legislature did not mean just taxable costs. We know they didn't mean just attorneys' fees because that's already in there. We know they meant something more.

CHAIRMAN SOULES: And we mean something more.

HONORABLE SCOTT BRISTER: But if you just say incurred -- "costs incurred in the litigation," that has a meaning, and it doesn't include inconvenience, and it doesn't include harassment.

CHAIRMAN SOULES: That's right.

HONORABLE SCOTT BRISTER: Or consequential.

CHAIRMAN SOULES: But "caused by" may.

HONORABLE SCOTT BRISTER: "Caused by" may or may not. Avoid trying to draw the line where it means, and it will be drawn in due course the way the courts always develop "caused by the litigation."

CHAIRMAN SOULES: Okay. Tommy Jacks.

MR. JACKS: Can't we say

"litigation costs or expenses" and then put in the "caused by" language and then I guess that's point one. Point two, I see no good reason not to include a comment of the kind John Marks suggests. I grant that our comments have a limit to the weight and importance they are given, but we make them all the time, and what good reason is there not to make one here saying we believe this is what the legislature meant because they rejected the Senate's version and amended.

CHAIRMAN SOULES: I have got no problem with that. I have got no problem with that. My problem is writing a rule in the comment. If we are going to write the rule, we ought to write the rule and not write it in the comment.

MR. JACKS: Well, I guess --

CHAIRMAN SOULES: I think his suggestion is a good one, and there is no opposition to that, is there?

HONORABLE C. A. GUITTARD: What?

CHAIRMAN SOULES: To putting in the comment that John Marks suggested. Okay.

So those in favor of saying, "An award of an appropriate amount of costs and expenses incurred or caused by the subject litigation."

MR. JACKS: I say "litigation costs and expenses."

HONORABLE C. A. GUITTARD: Isn't that the statutory language?

MR. JACKS: Which can go beyond attorneys' fees and can go beyond taxable court costs but does not include consequential damages such as someone's lost earnings.

MR. MARKS: What does it include?

HONORABLE SCOTT BRISTER: Does it include the inconvenience?

MR. JACKS: It could include, for example, having to, you know, go hire an expert witness or having to fly halfway across the country to do something in a case.

MR. MARKS: I guess my question is how is that different from (3)?

CHAIRMAN SOULES: Tommy, "costs and expenses incurred in the subject litigation" includes what you are talking about, Tommy.

HONORABLE SCOTT BRISTER: And has the benefit of being the exact language of the statute.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, if we are trying to propose a rule that is consistent with the statute yet avoids our biggest fear here, at least some of us, the biggest fear that we have about consequential damages, I think we need to include the inconvenience language that Judge Brister is talking about and concede that's what the statute says and just make clear however we word that that we are not including consequential damages, and that's because the legislature didn't include that.

CHAIRMAN SOULES: Tommy. Tommy Jacks.

MR. JACKS: I think there is a difference between (3) and (4) even if you put the words "litigation costs" in (4), and the difference is that (3) is limited to those expenses caused specifically by the filing of that pleading, whereas (4) goes broader and

permits you to claim also litigation costs which you incurred in the litigation or were caused by the litigation, even though they may be ones that you can't tie specifically to the presentation of the particular pleading, and if we -- I know we are now focusing on what costs and not what conduct, but there is a nice logic about it.

If our conduct is a continuing series of violations, well, then it makes sense that you expand the costs to include not just the single pleading but the whole enchilada, the whole litigation. So I return to my point. I think we can put in the term "litigation costs or expenses" and not be doing violence to the legislature's intent.

CHAIRMAN SOULES: Didn't you vote to leave in "or caused by"?

MR. JACKS: I voted to leave in "or caused by," but I voted to couple that with putting in the word "litigation" before the phrase "costs and expenses." So it's "litigation costs and expenses caused by the litigation" and then a comment that --

CHAIRMAN SOULES: Everybody

that agrees with Tommy on that show by hands. Nine.

Those opposed? Five. Nine to five. It would read then, "An award of an appropriate amount of litigation costs and expenses incurred or caused by the subject litigation.

MR. LOW: Why would you put "litigation" twice?

CHAIRMAN SOULES: That's the way it would read at this point.

MR. LOW: But why wouldn't you put "an award of an appropriate amount of costs and litigation expenses incurred"? I mean, why "incurred in the litigation." I mean, that's what litigation expenses are, in that litigation. Why be redundant and say it twice?

CHAIRMAN SOULES: Well, that's another way to say the same thing. Is that okay with you, Tommy? "An award of an appropriate amount of costs and litigation expenses incurred"?

MR. JACKS: Yeah. That's okay.

CHAIRMAN SOULES: "Or caused" -- well, then take out "caused."

MR. LOW: And stop. Let's have a vote on that.

CHAIRMAN SOULES: Okay. One more time. "An award of an appropriate amount of costs and litigation expenses incurred." Those in favor.

HONORABLE SCOTT BRISTER: Just a second. Again, that leaves out the amount of time you have to come down, missed from your work to be in the hearing.

CHAIRMAN SOULES: Right.

HONORABLE SCOTT BRISTER: That is not a litigation expense. That is not a litigation cost. It hasn't been for a hundred years. There is no question in my mind the legislature intended that to be reimbursable under this rule.

CHAIRMAN SOULES: Joe.

MR. LATTING: And the statute so says. It says, "All costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation." Either costs incurred or caused by the subject litigation and everybody here knows that the legislature had in mind doing

something more than just what we think of as costs when they passed this statute, and I am afraid if we take this out and send it up there to the Court that it's making it worse than if we played it straighter.

CHAIRMAN SOULES: Well, we are playing it straight. We are talking about it. We are telling the Court that we are not agreeing with the legislature on those words, and we don't want them to agree with them either. Let them have some litigation over that language in the statute if they want to, but let's look at it. I mean, that's the message. No question about it. It's not hiding the ball.

MR. LATTING: Okay. Well, if that's legit, that seems to me to be getting to a constitutional issue that when the statute says they cannot pass something in contradiction of the statute and we are saying we don't like the language of the statute, pass this instead.

CHAIRMAN SOULES: That's not a constitutional issue. Well, I guess it is in the separation of powers sense.

MR. LATTING: It seems like if it's not then we are cooked. It seems like it needs to be a constitutional issue.

HONORABLE PAUL HEATH TILL: I think he's got you-all on that one.

MR. LATTING: It better be a constitutional issue.

CHAIRMAN SOULES: Well, I am just going to leave it the way it passed, Buddy, instead of going back to revise it.

"An award of an appropriate amount of litigation costs and expenses incurred or caused by the subject litigation." Now, that is the sanction.

MR. LATTING: I can say that we certainly are using due diligence here. We are doing our due diligence.

CHAIRMAN SOULES: Okay. On what terms is that the consequence? Let me just make a list of them here.

MR. LATTING: I have the Jacks proposal blessed by Judge Guittard.

CHAIRMAN SOULES: Which says?

MR. LATTING: "Upon a showing of, (1), repeated and continuous violation of

paragraph (a); and (2), a failure to exercise diligence to award such violation." Then No. (4) will come into play.

CHAIRMAN SOULES: Well, but that doesn't pick up Robert Meadows' notion of notice.

MR. JACKS: Yeah. And let me explain why I didn't pick it up, if I may.

CHAIRMAN SOULES: Okay.

MR. JACKS: The concern I have about Bobby's suggestion, I understand what he's trying to do. I think what he's trying to do is lawful, but I can see it leading to an abuse that occurs in every case. We have got this 21-day grace period. So I am the guy who is trigger happy on sanctions.

I filed a motion for sanctions, and I enclosed with my motion for sanctions a letter which says to the lawyer on the other side, "Here is my motion for sanctions. You have got 21 days. If you don't withdraw the pleading to which this motion is directed then not only will I get my sanctions under (3), but I am also going to go for my sanctions under (4) because I am giving you notice right

now. And if you continue for 21 days and beyond to not withdraw the pleadings you have just triggered (4), and I am going to go after you for all my litigation expenses and costs and attorney fees and everything for the whole litigation."

I think that by putting in -- I mean, because the filing of the motion for sanctions is notice of a violation, and I think we are really inviting an abuse so that the (d)(4) motion becomes the rule and not the exception that we intend for it to be. That's why I didn't put it in there.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: Bill Dorsaneo's comments before the break were that maybe the legislature didn't mean that due diligence was some higher test that you have to fail. Maybe what the legislature meant was a complete lack of diligence before you file the pleading, and so what you have really is three possible conditions. You made a reasonable inquiry, in which event there are no sanctions. You didn't make a reasonable inquiry, but you made

some effort, in which event you have the more limited sanctions; and you made no effort at all, in which event you have the greater sanctions.

So it would be like taking the word "failure to show due diligence" or "a proof of no due diligence" would be more like proof of a complete lack of diligence when the pleading was filed without regard to subsequent behavior in the lawsuit, reasonable inquiry, nothing. Some inquiry but not reasonable, limited sanctions. No effort at all, extreme sanctions. And the only time focus you are looking at is the state of mind or the events that existed at the time that you filed the motion or petition, pleading, or whatever it is.

MR. JACKS: Well, I think --

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Do you want to finish?

CHAIRMAN SOULES: Go ahead and talk, Paula. Then we will get to Tommy.

MS. SWEENEY: Okay. What

Richard just said brings up a very troublesome issue, which is we have all agreed the burden of proving no diligence should be on the movant. They need to come forward with some proof. I believe that we need to incorporate language that says that they must have proof other than putting the other lawyer on the stand and asking him questions.

In other words, I think you filed a lawsuit without doing didley. I think that because I just think it's a bogus lawsuit or a bogus motion of some kind, and I come down to the courthouse after my 21 days, and you didn't withdraw it, and the only thing I have by way of proof is to put you on the stand and ask you what you did, all that is is inviting a fishing expedition in every instance.

MR. JACKS: Good point.

MS. SWEENEY: And you need to have some -- there needs to be a requirement that when you file your notice within 21 days, that when you file your motion, you have to come to the court and say, "Here is my evidence that they didn't do anything or that what they did was inadequate," and then that

evidence does not come from putting another lawyer on the stand fishing around asking, "So what did you do? Who did you talk to? What kind of investigation did you do? Tell us all about it. What kind of diligence did -- what did your client tell you? What did your client tell you they had done?" There has to be some other burden that is met by the moving party.

CHAIRMAN SOULES: Tommy Jacks.

MR. JACKS: Yes. I think that in response to Richard's comments I think Bill Dorsaneo's interpretation of the statute may be entirely correct. I still like my version better because it requires repeated violations of subparagraph (a) and not just one.

In other words, under Bill's interpretation without the requirement of repeated and continuing violations one instance of a violation of (a) where there was no inquiry would trigger the draconian sanction, and I think the sense of this committee is that's not what we are looking for. We are really looking for the flagrant repeat offender.

CHAIRMAN SOULES: Anything else? John Marks.

HONORABLE SCOTT BRISTER: Can we get the language one more time, Joe?

MR. LATTING: The language is "Upon a showing of, (1), repeated and continuing violations of paragraph (a); and (2), a failure to exercise diligence to avoid such violations."

CHAIRMAN SOULES: John Marks.

MR. MARKS: Has the Court asked us to fashion a rule that is in keeping with the spirit and intent of the statute?

CHAIRMAN SOULES: They have asked us to propose a rule that is not in conflict with the statute.

MR. MARKS: I mean, the more we talk about this the more convinced I am that maybe the best thing to do is to do nothing.

CHAIRMAN SOULES: Okay. Any other discussion? Okay.

Those in favor of Tommy Jacks' language, "Upon a showing of, (1), repeated and continuing violations of paragraph (a); and (2), failure to exercise diligence to avoid

such violations," and then what we voted on a moment ago.

Those in favor show by hands. 13. Those opposed? Six. Passes 13 to 6. Okay.

Anything else on Rule 13? Richard Orsinger.

MR. ORSINGER: I am bothered by the same thing that Paula mentioned about putting the other lawyer on the stand or if the burden is wrong you have to get up on the stand and reveal all this work product, and I think we also need to be worried about the attorney-client privilege in relationship here.

You could argue that it is an inherent conflict between the lawyer and the client when a motion for sanctions is filed to seek sanctions against both the client and the lawyer, and there might be an issue there as to who has to accept the blame for the filing, and the lawyer may have a self-interest in putting the blame on the client, and the client may not want his lawyer that has access to confidential information revealing this to the court, and yet the lawyer may be on

penalty of having to write a check for all of these costs if they don't reveal.

And I think we have got -- I would be in favor of putting something in here that no one can be prejudiced by failing to voluntarily waive what's nonexempt, what's exempt from discovery like work product, party communications, or whatever it is after we get finished with our discovery rules, and attorney-client, and that the failure to reveal that does not have any negative consequence.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: That's a tricky one. I like the idea, and I think the circumstance or the case that I would be worried about is where I haven't been able to establish my claim from an evidentiary standpoint but the other side knows information that if they would tell me that, they could. Why don't you say that you waive your own claims of privilege with respect to the subject matter if you go after the other lawyer? I mean, that would be a way. And you

have to take the stand yourself if you attempt to prove your sanctions claim against the other lawyer. I think that would put a pretty quick stop to it.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: Well, Federal Rule 11, the cases that have dealt with the conflict issue, some of them hold it's an unwaivable conflict if in truth there is an issue on which the lawyer and client both need to testify. And there is a pretty -- you get into a problem there. What the federal rule says and the advisory committee note is, it has kind of preparatory language that such motions under Rule 11 shall not be made to create a conflict of interest between attorney and client.

Then it goes on to say the court may defer its ruling or its decision as to the identity of the persons to be sanctioned until final resolution of the case in order to avoid immediate conflicts of interest and reduce the disruption created if a disclosure of attorney-client communications is needed to

determine whether a violation occurred or to identify the person responsible for the violation.

One possibility -- and I don't think you can very easily come up with an absolute prohibition. I am sympathetic to it, but I think it's hard to do, but one possibility is to come up with some language like that, if we are going to have a comment anyway, that at least discourages courts from allowing that inquiry at a time it need not occur or allowing that invasion of the attorney-client relationship or communications any more than is necessary. Just say there are some things you can do as a court to postpone and minimize that. I think it's hard to say in no case can you get in a situation where the lawyer can't be called or couldn't testify because under some of these violations that might be necessary. I think it's a tough problem.

CHAIRMAN SOULES: Judge Brister.

HONORABLE SCOTT BRISTER: Was that part of the federal rule or the cases?

MR. HERRING: What I just read

to you in terms of the language is out of the advisory committee note which was both under the 1983 rule, and they have carried that language forward in the 1993 revision.

HONORABLE SCOTT BRISTER: Okay. Because I don't sense that this is that big a problem -- and if it's not that big a problem, it's going to be a big mess to try to write a rule to take care of it. The Rule 13 motions, at least I get, which are very infrequent as opposed to Rule 215 discovery sanctions motions, people only file them if they have already tried to tell the other side why it's no good. We have already gone through this stage.

I have never had somebody file a Rule 13 and try to do a fishing expedition or call the other lawyer. I have never heard of it happening, and if it's something that's more a problem that we can imagine it occurring than it's actually occurring, at most we ought to do a comment and just forget about it, it seems like to me, and let it be worked out in the cases.

CHAIRMAN SOULES: Anyone else?

Buddy Low.

MR. LOW: Luke, are we addressing any place in here the burden of proof or what standard of proof? It must be by clear and convincing evidence, or it must be by evidence other than calling opposing counsel. I mean, I think that what Judge Brister says is true, but this rule has just gone into effect, and these companies now are really conscious of tort reform.

This is tort reform. We are going to take advantage of it; and I think we are going to see more of it; and I think that it is going to be something that very well could happen where, you know, they call you down there and say, "Okay. I am going to find out just what you did." So we shouldn't encourage people to do that. The proof should be clear and convincing in my opinion, and it should be by means other than testimony by calling the opposing counsel to the stand. That's what I think. I don't want to invite that. That would be a requirement I would put.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would agree with both of those, and I would say to Judge Brister that I can easily foresee defendants, repeated defendants, targeting specific lawyers and coming into court with proof of what they did, not only in this case but other cases. Because one of the purposes of these sanctions against the lawyer is to deter repetition of the conduct or comparable conduct by others similarly situated.

So that means this plaintiff's lawyer or other plaintiff's lawyers -- and it may also mean defense lawyers if there is a secondary industry created about putting up nonmeritorious defenses, but I can easily foresee that this is going to be an opportunity to put the lawyer up on the witness stand and ask him what kind of diligence he does in his cases, what he did in this case; and as far as the conflict goes, you know the client who may be on the line for these damages versus the lawyer owns the attorney-client privilege and in my view, at least at first blush, could get up and say, "I don't authorize you to reveal what you and I

have talked about. You are going to have to get up there and honor my privilege about our communications, and if you take the hit, that's your problem. You signed on as my lawyer. I don't waive my confidentiality."

Deferring that decision until the end of the case is better than having to face it in pretrial, but it doesn't avoid the problem that you are breaching the privilege, and it doesn't avoid the problem for multiple similarly situated plaintiffs, and it doesn't avoid the problem in the event the case is reversed and remanded because that proof is going to have to occur before the case goes up on appeal, and if they are going into work product, party communications, and attorney-client communications, they have it on remand and for all similar litigation.

CHAIRMAN SOULES: Paula Sweeney.

MS. SWEENEY: Let me suggest some language. Why don't we put in after section (b) a new section (c) entitled "Evidence."

"A moving party must prove by means other

than by calling opposing counsel or the opposing party to the stand and by clear and convincing evidence that the sanctionable conduct has occurred."

CHAIRMAN SOULES: That should pretty well kill the root.

MR. LOW: I second it. I second it.

CHAIRMAN SOULES: Which is whatever, but since you must in order to get a violation of this rule prove the state of mind of the lawyer at the time, that's what is required in order to get a violation of the rule, is to prove the state of mind of the lawyer or some objective fact that the lawyer did or did not do.

MR. LOW: Not necessarily.

HONORABLE SCOTT BRISTER: I agree with that, Luke. I mean, the way sanction hearings go, the other side comes in, says, "Judge, he's doing this. He's doing that." You turn to counsel and say, "Are you doing that?"

And they say, "Yeah, I am," or they say, "No, no, no, no, no." And when you start into

clear and convincing evidence and not calling the witness that's -- all right. 50 lawyers in my courtroom. Everybody sit down; raise your right hand. The court reporter. I mean, that's a whole other field of satellite litigation, and I don't want any part of it.

I guarantee there is not a judge in the state that's going to want any part of it. We want to still do -- don't mind if the court reporter comes in and records it, but we still want to do -- speak to a man or a woman.

"What did you say he was doing? Are you doing that or not? Now stop it." That's the sanctions hearing, and you are going to get more complicated than that. You just are.

CHAIRMAN SOULES: Well, the whole predicate is to show that it was not that the party -- that the lawyer did not certify correctly that to the best of the lawyer's knowledge, information, and belief formed after reasonable inquiry, and when it's knowledge, information, and belief --

HONORABLE SCOTT BRISTER: When I turn to the lawyer and say, "Why are you doing that?" And he says --

CHAIRMAN SOULES: -- of the lawyer.

HONORABLE SCOTT BRISTER: And he's got to tell me why he's doing it. If it's not a good reason then I can make the conclusion.

CHAIRMAN SOULES: Well, I don't have any opposition to the evidence except that we want to -- evidence paragraph, if that's what we want to suggest as long as we don't -- and we probably need it. Steve Yelenosky.

MR. YELENOSKY: Well, I don't have any problem with asking the lawyer, "Are you doing that, and why are you doing that?" I guess the difficult point -- and, Chuck, maybe you could say how this has been handled in the case law in the federal court.

"Why do you believe that?"

"I believe it based on my reasonable inquiry," and then the next question, the lawyer's response would require telling what the client told him. He's going to have to assert the attorney-client privilege or maybe have to assert it.

And so have the courts required them to abrogate the attorney-client privilege? And if not, we don't need to say anything about it.

MR. HERRING: Well, of course, you could assert your attorney-client privilege and all sorts of confidentiality obligations if you need to defend yourself.

MR. YELENOSKY: So there is that exception.

MR. HERRING: There is that exceptioin. Further, if you have -- I mean, the federal courts have wrestled with it, and they haven't come up with a very complete answer because if the question is reasonable inquiry, how do you show what reasonable inquiry was, in fact, made? Some cases -- and there was argument when they adopted the new federal rule in 1993 that what you ought to do is have an objective standard, and it was purely objective, and you should not ever get into the subject of element. We have the subject problem now --

MR. YELENOSKY: Right.

MR. HERRING: -- in current

Rule 13, which is bad -- groundless and in bad faith or groundless and harassing.

MR. YELENOSKY: And if I can follow up on that, I think that's a problem that's inherent to the statute in anything that we write that attempts to state the statute, even if it's in a better light; and I think we say nothing; and I mean, this statute has problems that are going to have to be addressed. I object to the statute, and I object to the rule that's based on it, but we say nothing, and the inherent contradictions of having that kind of inquiry ought to come to light.

MR. HERRING: Well, but you have the problem now also, and you are going to have to confront it under 166(d) or the 215 analogue or whatever it is because you have right now mandated by TransAmerican the court must make a culpability determination and punish the guilty party and not punish the client for what the lawyer did or vice versa.

So the theoretical possibility of this problem coming up has existed in Texas under discovery hearings, which are the most common

kind of hearing, since 1991 when the Supreme Court decided TransAmerican. I hear about it very occasionally, and the way it's resolved is if there really is a major sanctions motion filed against client and lawyer, and it's a big deal, is that the client gets a different lawyer to handle the sanctions hearing, but the lawyer has got to be able to defend himself or herself. But we have got the same problem both places.

MR. YELENOSKY: Right. And I don't think we can solve it.

MR. HERRING: And if we are going to solve it, if we are going to do something about it, I think it's very difficult. I am a little -- I am concerned about an absolute prohibition because it seems to me that goes too far, but I think we ought to encourage the courts not to let this invasion occur any more than absolutely necessary, and if they can do it by postponing the determination, I mean, that's a partial measure.

CHAIRMAN SOULES: Steve Yelenosky.

MR. YELENOSKY: Well, I mean, I think we are going to spend an awful lot of time and not have any capability of solving this problem.

HONORABLE SCOTT BRISTER: Seconded.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would follow up on Chuck's comments by this breach of duty issue or the exemption of the attorney-client privilege under Rule 503(d)(3) is as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer, and I think that that's when you have a claim of wrongdoing by the client against the lawyer or the lawyer is suing for a fee.

I don't think that a third party can come in, put both of them on the spot, and then the privilege is waivable. I don't think that the past is any indication of the future because we have never had on the table the kind of sanctions that we have on the table now, which is lost profits, deterioration of business,

maybe emotional distress and interference with consortium with your spouse at home. We have a full scale damage lawsuit right here with no jury.

I'd also like to point out since it's not been mentioned that No. (1) and No. (2) seem to me to be punishments for contempt of court, and "order to pay a penalty into court" to me is a fine. I don't think it's anything but a fine, and you can't get fined unless you are held in contempt, and you can't be held in contempt unless you are found guilty beyond a reasonable doubt, and you can't be forced to testify. If there is a motion for contempt, you cannot be forced to testify against yourself at all on any subject matter, much less to penetrate the attorney-client privilege or any of these other discovery sanctions.

So I am very, very troubled by what could be something that just guts all of the protections that we have right now. We throw the protections of contempt out the window, and now contempt is limited to a 500-dollar fine under the statute, the jurisdiction is,

but under this rule I guess you could have a 200,000-dollar fine or just whatever, you know, the Supreme Court ultimately says the limit is.

I am not -- I don't think that we would overreact to say we ought to put some kind of constraints on this thing because this has been created and turned loose, and it doesn't have reference to any of our past, any of our traditions, any of our jurisdictional safeguards, any of our right to jury trial, or anything else, and I think we ought to somehow contain it somehow.

HONORABLE SCOTT BRISTER: The same thing could apply to punitive damages. How about a 2 billion-dollar punitive damages claim? You get a right to beyond a reasonable doubt.

MR. ORSINGER: I get a right to a jury. I get pleadings. I have attorney-client privilege. I have a lot of safeguards I don't have under this rule.

MR. HERRING: Same thing under Rule 13 now.

MR. LOW: One of the things

that -- first of all, you say how are you going to prove somebody's state of mind? Somebody shouldn't file one of these motions just because he thinks it. He should have some basis for it, that we weren't out there, that the people weren't out there. They shouldn't just be able to file it and say, well, we can't prove it without putting the other lawyer -- I mean, I don't have any evidence he's done it, but I am going to file it and put him up there and prove it.

It should be by some standard, as Richard says, a clear and convincing evidence or something like that. We have procedures to protect things that aren't that bad, and I don't see what's wrong with what we are proposing here that you need something besides the other lawyer testifying. If you don't have anything other than that, you shouldn't file it.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: I think that -- I don't know if there is a motion on the floor, but I think what we -- it seems like what we could do and get the sense of the committee is

I think we should have a comment and suggest that the Supreme Court make a comment that this Rule 13 ought not to be used as a fishing expedition, and it ought not to be used to be -- and great care ought to be taken in any invasion of the attorney-client privilege and leave it at that.

I think if we try to write something more definite than that, we are going to be here until in the morning writing how this rule has to be administered. We can't see everything that's going to happen. Judge Brister doesn't see any of these things. Buddy and Richard point out that a lot of them may be coming. We just don't know, but why don't we put our concerns in the form of a comment, let the Supreme Court have that, and see what develops? But that would be -- in fact, I will make a motion to that effect.

MR. MARKS: Second the motion.

CHAIRMAN SOULES: Moved and seconded. Steve Yelenosky.

MR. YELENOSKY: I will second the motion and speak to it. I think we have done what we can to circumscribe what we see

as a potential big damage here, both by saying it's litigation cost and expenses and by putting the specific conditions under which you could get to (4). Beyond that, I think it would do violence to the statute, and we have already agreed we are not going to do that.

I would be very much in support of giving a comment to the Supreme Court that, you know, we followed their direction on this, but we have a lot of reservations about whether, for instance, the point you make about a penalty is appropriate or is actually a contempt proceeding, but if we are not going to do that, certainly from this discussion the Supreme Court can tell that in proposing what we propose we are not endorsing the statute.

CHAIRMAN SOULES: Bill Dorsaneo.

PROFESSOR DORSANEO: In other contexts, at least in the past when we have been worried about a similar kind of problem, thinking about the prior law of jury misconduct, for example, we have required some sort of a specialized pleading requirement by way of verification or a supporting affidavit.

The Rule 13 experience that I have had versus other people has involved allegations that they have made that what my investigation revealed were baseless or made up allegations, and beyond that that was explained to the other lawyer or discussed with them at some particular point in time, and they persisted in continuing with the matter even though they didn't have any basis for it.

Now, I could certainly write an affidavit to that effect saying that this particular allegation was investigated and that it was determined that the heater was not sold at a Sears store in Beaumont, that it was actually purchased at a particular other place or, you know, something like that, and that would impose a kind of restraint on just going ahead and filing a motion and then having some sort of a hearing. I don't know of any other device that would be common place. That might be an idea.

CHAIRMAN SOULES: Okay. Those in favor of Joe's motion show by hands. Okay. Anyone opposed? Okay. Let me count them again because there were two opposed. It

looked like all hands were up.

Those in favor show by hands. 13 in favor. Those opposed? Three opposed. Okay. Anything else on Rule 13? Richard Orsinger.

MR. ORSINGER: I would propose that the fine be limited to $500 or the penalty paid into court be limited to $500. Say per transgression, or if you want to, but I think I am gravely troubled by the court on a preponderance of the evidence with no right to the jury to be able to fine a client or lawyer for more than they could fine them if they held them in contempt.

PROFESSOR DORSANEO: In civil contempt. It could be criminal contempt for more, but they would have the right to a jury trial.

MR. ORSINGER: Not on a fine. You max out $500 on a fine on a contempt.

PROFESSOR DORSANEO: Well, I am talking about the -- you know, if we consider this as equivalent of contempt in the constitutional principal the petit offense, major offense, that the U.S. Supreme Court developed as the reason for that statute.

MR. ORSINGER: That's right.

PROFESSOR DORSANEO: So it may well be pay a penalty into court if it's more than $500 would run afoul of the United States Constitution.

MR. ORSINGER: But I would say even apart from the constitutional aspect of that, the jurisdictional statutes of our trial courts limit the punishment for a contempt to $500. So why should a frivolous pleading have no limit on it if the actual criminal contempt of court can only be punished by $500?

CHAIRMAN SOULES: Is there a second? Fails for lack of a second. Anything else on Rule 13?

MR. HERRING: Go ahead, Judge.

CHAIRMAN SOULES: Judge Guittard.

HONORABLE C. A. GUITTARD: To what extent does this statute or our proposed rule apply on appeal to briefs, motions, things of that sort? I have been working on some general rules that would apply to both on appeal and in the trial court and --

CHAIRMAN SOULES: The statute

does not apply to anything on appeal.

HONORABLE C. A. GUITTARD: But would our rule?

CHAIRMAN SOULES: Well, our rules are in the Rules of Civil Procedure, not in the Rules of Appellate Procedure.

HONORABLE C. A. GUITTARD: Well, should there be a corresponding --

CHAIRMAN SOULES: Time out. Another day. Let's get on with this rule. I don't mean to cut you off, Judge.

HONORABLE C. A. GUITTARD: Okay.

CHAIRMAN SOULES: But if you want to propose a corresponding appellate rule, we have still got sanctions, discovery sanction, to try to get done before we get through here, and I need to get on with this.

Chuck Herring.

MR. HERRING: Luke, the only point of clarification, and I was not at the last subcommittee meeting where the subcommittee changed this rule, but I'd like Joe at least to speak to it so we could have some legislative history. The previous

version we had looked at last time had the language that the federal rule uses so that it referred to motions, pleadings, and other papers, and that's not in the statute. All the statute says is motions and pleadings, and we have deleted the language, "and other papers." That's fine with me, but does it apply as you understand it to replies to motions and to briefs, as the judge mentioned, in trial courts?

MR. LATTING: This rule as written, as I understand it, it would not apply to those.

MR. HERRING: Would not apply to a reply to a motion?

MR. LATTING: That's right.

MR. HERRING: Or a brief?

CHAIRMAN SOULES: Right.

MR. LATTING: Right.

HONORABLE SCOTT BRISTER: Or an affidavit?

MR. HERRING: An affidavit?

MR. LATTING: Right. And the reason that that doesn't offend me much is that those are covered elsewhere in the rules

if they are abusive.

CHAIRMAN SOULES: Paula Sweeney.

MR. HERRING: Well, let me finish.

CHAIRMAN SOULES: Chuck Herring, go ahead.

MR. HERRING: They are not actually covered -- they are covered under current Rule 13, but if we are excluding those other papers, they are not going to be covered in many instances. There is no general rule against an affidavit or a brief or a reply or response, and I am not sure why.

MR. LATTING: Well, maybe it's a good idea to put it back in.

MR. HERRING: I just raise the question.

CHAIRMAN SOULES: Okay. I have got a question. Anybody else got anything on Rule 13? Paula Sweeney.

MS. SWEENEY: Just a drafting consideration, Joe, when you-all are finishing this up. We have got a, quote-unquote, "safe harbor" in here for when the opposing party

files the motion, but I understand the court also has the authority sua sponte to act. Should we incorporate some sort of, quote-unquote, "safe harbor." You know, in other words, the court is browsing through the file one day and says, "Well, that looks like B.S. That's frivolous." You don't even get a chance to withdraw it. The court can just enter his order. So could you-all incorporate the safe harbor provision before the court sua sponte acts?

MR. LATTING: Well, that sounds more like a policy question than a drafting question to me, and that would be up to the committee.

MR. ORSINGER: It's not in the statute if you read it.

MR. LATTING: There is no safe harbor in the statute at all.

MS. SWEENEY: I understand that. I'm saying you-all have it in here. I think everybody agrees it's a good idea, and I think for exactly the same reasons it's a good idea to have it before the court could just happen one day to decide something you filed

was frivolous; and to say, you know, the court also should give you notice and give you the opportunity to withdraw it before hauling off and smacking you.

MR. LATTING: Well, that would be okay with me.

MR. MARKS: How about just saying "any person or party"? Would that include a judge?

MS. SWEENEY: No.

MR. MARKS: Oh, it wouldn't? A judge is not a person or party?

MR. PRINCE: Human beings.

CHAIRMAN SOULES: Do I have a motion?

HONORABLE SCOTT BRISTER: Does the show cause language take care of that?

CHAIRMAN SOULES: Excuse me. Rusty.

MR. MCMAINS: Why is it, Luke, that you just said out of turn it doesn't apply to appellate procedure? What does the statute say?

CHAIRMAN SOULES: The statute says that any pleading or motion filed under

the Texas Rules of Civil Procedure and so forth.

MR. MCMAINS: Okay. So you distinguish that meaning not under the Texas Rules of Appellate Procedure?

CHAIRMAN SOULES: It says Texas Rules of Civil Procedure. I guess that means what it says. I don't know.

Okay. Anything else under Rule 13?

MS. SWEENEY: Well, I'd like to move that we include judges under the safe harbor provision.

CHAIRMAN SOULES: Okay. Is there a second?

MS. GARDNER: I will second that.

CHAIRMAN SOULES: Moved and seconded. How do we do it, by way of discussion?

MS. SWEENEY: Under the court's initiative section add the safe harbor language.

HONORABLE SCOTT BRISTER: Look on the second page. There is already on (d), "The court may not award monetary sanctions on

its own initiative unless the court issues a show cause order before voluntary dismissal," but it's clear to me from this and (c) that I have got to -- I can't just look at the pleading and issue a sanction.

I have got to issue a show cause order, which means show up at a certain time and place and show why, which gives you a reasonable time to safe harbor.

MR. LATTING: Well, but that doesn't really address that. It says that you have got to have a hearing, but it doesn't address what Paula says. You have got to call me into court before you can sanction me, but what if you say, "I want you in court in three days," and before I get there I say, "Oh, he's right. I'm dismissing this." Then the question can -- I think as it's written you could still enter that sanction, and her motion as I take it means -- and what we just passed is you shouldn't be able to do that.

CHAIRMAN SOULES: Okay. We are going to take a two-minute timeout and try to figure out how to possibly do this. Then we will decide whether we want to do it or not.

(At this time there was a discussion off the record, after which the proceedings continued as follows:)

MR. MARKS: I think we should say, "No sanctions shall be issued if the violation is corrected within 21 days after the show cause order."

HONORABLE C. A. GUITTARD: That's fine. That's about the same thing mine did.

CHAIRMAN SOULES: Well, I mean, that's different. Besides all of that we have got a bad word in (c). "The court may enter an order." The court doesn't enter orders in Texas. It should be "make an order" or "render an order."

HONORABLE C. A. GUITTARD: "Issue an order."

CHAIRMAN SOULES: Well, this says, "the court on its own initiative may make an order or enter an order describing the specific conduct it appears to violate and directing the alleged violator to show cause." The court is not rendering any sanctions without a hearing. We can say to show cause

on 21 days notice why the conduct has not violated the rules. So that gives you 21 days.

MR. MARKS: But you still have to say if it's corrected then that ends it.

HONORABLE SCOTT BRISTER: Then you just use the same language you do at (b).

CHAIRMAN SOULES: Then if the challenged pleading or motion is withdrawn or corrected prior to the hearing --

MR. YELENOSKY: Right.

CHAIRMAN SOULES: -- what?

MS. SWEENEY: No sanctions shall be imposed.

CHAIRMAN SOULES: No sanctions shall be imposed.

HONORABLE C. A. GUITTARD: That's right.

CHAIRMAN SOULES: Okay. That's the motion then.

MR. YELENOSKY: Then don't you need to delete the second sentence on the next page that talks about show cause order? The second sentence of that paragraph.

MR. MARKS: Which sentence

under what paragraph?

HONORABLE SCOTT BRISTER: "The court may not award monetary sanctions"?

MR. YELENOSKY: Yeah. The paragraph begins, "The court may not award monetary sanctions," in the second sentence, "on its own initiative unless the court issues its show cause order before a voluntary dismissal," blah-blah-blah. Just strike that.

CHAIRMAN SOULES: What does that hurt to leave it in?

HONORABLE SCOTT BRISTER: It probably doesn't. I mean, after the case has been nonsuited I could still issue a show cause, have a hearing, and force you to withdraw your case. It doesn't make much sense.

While you're drafting that language, on (b) and (c) I was going to also suggest on (b) after the first "21" I think what the subcommittee means to say is "before being either filed or presented to the court." If it's just 21 days before being filed or presented you might do it 21 days before you present it, but not before you file it. I

thought the understanding was before you could do either one of them you had to have 21 days. So it should be 21 days before being either filed or presented, and then the next thing is "the motion shall neither be filed nor presented to the court." Is that all right, Joe?

MR. LATTING: I don't see what the first one did. That is, it seems to me that it's --

HONORABLE SCOTT BRISTER: You file it. The first thing you know about my motion for sanctions is I file it on you, but I don't set it for 22 days in advance. I thought the idea was to keep them from even being filed until you had a chance to reconsider it.

MR. LATTING: Oh, I see. So it should say, "The motion shall be served at least 21 days before"?

HONORABLE SCOTT BRISTER: "Being either filed or presented."

CHAIRMAN SOULES: Okay. You think we ought to delete --

MR. LATTING: We just add

"either" for the first one.

HONORABLE SCOTT BRISTER: Right.

MR. LATTING: Yeah. I agree with that. You can't even file it before I've seen it for 21 days.

HONORABLE SCOTT BRISTER: Right. That was the idea, I thought.

MR. LATTING: Okay. Yeah. Now, the second one went by me.

HONORABLE SCOTT BRISTER: Same thing, in following. "If withdrawn the motion shall" --

CHAIRMAN SOULES: Not be either filed.

HONORABLE SCOTT BRISTER: No. "Neither be filed nor presented."

CHAIRMAN SOULES: Okay. Well, back to saying --

MR. LATTING: "Shall neither be filed nor presented." Is that what it should say?

HONORABLE SCOTT BRISTER: Yeah.

MR. LATTING: Okay. "Shall neither be filed nor presented." Okay.

CHAIRMAN SOULES: Okay. Well, let's get back to (c) and try to finish that up. Okay. The court on its own initiative may, what, make, issue, sign, render? Make? "An order describing the specific conduct that appears to violate paragraph (a) of this ruling and directing the alleged violator to show cause on 21 days notice why the conduct has not violated the rule."

MR. ORSINGER: Can you say "not less than 21 days notice"?

CHAIRMAN SOULES: "Not less than."

"If the challenged pleading or motion is withdrawn or corrected within" --

MR. ORSINGER: How about "before the hearing"?

CHAIRMAN SOULES: -- "the notice period." Okay. Corrected prior to the hearing.

"If the challenge, pleading, or motion is withdrawn or corrected prior to the hearing, no sanctions shall be imposed." Those in favor show by hands.

HONORABLE SCOTT BRISTER: That

works.

CHAIRMAN SOULES: 16. Those opposed?

HONORABLE C. A. GUITTARD: Let's say "before" instead of "prior to."

MR. LATTING: Have we done something we want to do here?

CHAIRMAN SOULES: Okay. That's passes by 16 to nothing.

MR. LATTING: Did we really mean to do that?

MR. YELENOSKY: Yeah.

CHAIRMAN SOULES: Okay. So, for the record, it seems to me now that a motion for sanctions is going to have to be served twice. It's got to be served 21 days before, and it's got to be served when it's filed. That's okay. The other rule says it's got to be served when it's filed, and that's the way it probably should be.

MR. LOW: That's all right.

CHAIRMAN SOULES: Serve me in 21 days. I don't know whether you file it or don't file it until you send me something else, which would probably be a reasonable

fee, and that's what we have got.

MR. LOW: Because if you don't have to file it, it may be too late,and the lawyer ought to know when it's filed.

CHAIRMAN SOULES: He can't file it for 21 days after you serve it the first time.

MR. LOW: I know, but if you have got it pending for another two weeks or so, you know, it may just drag on. The lawyer ought to at least know then when it's filed. So what you're saying is correct.

CHAIRMAN SOULES: Okay. Anything else on Rule 13? Richard Orsinger.

MR. YELENOSKY: I just want to understand -- I'm sorry. I just was going to ask what the effect of that remaining sentence is then on the second page. What does that mean?

CHAIRMAN SOULES: Okay. Steve, you're moving to delete the second sentence of the --

MR. YELENOSKY: Well, I was, and then I guess people said to leave it in, and I am not sure if it means anything now

with what we have done to (c).

HONORABLE SCOTT BRISTER: So you nonsuit your case. I didn't like your case in the first point. So I'm sanctioning you for your case and --

MR. YELENOSKY: Under (c) you have got to give me 21 days.

HONORABLE SCOTT BRISTER: 21 days to go forward, but what the legislature said is after it's nonsuited you can't do it at all. If you drop this, you may end up in a conflict with the statute.

MR. YELENOSKY: Well, what this language says is you have to issue your show cause order before I dismiss. So you issue your show cause order.

HONORABLE SCOTT BRISTER: If you drop that language, I can issue it after, and I'm in violation of the statute, but I'm okay under the rule.

MR. YELENOSKY: Well, you could issue it after, but you have to give me 21 days notice to see what is wrong.

HONORABLE SCOTT BRISTER: And the rules say that's okay, and the legislature

is saying, no, it's not. So we ought to leave it in.

MR. YELENOSKY: Okay. That's fine.

CHAIRMAN SOULES: Anything else on Rule 13? Richard Orsinger.

MR. ORSINGER: On the second page, subparagraph (3) you still have "or other paper" in there.

MR. HERRING: Yeah. Let me address that. I am going to make a motion on that point, Luke, in light of Joe's clarification of the legislative history that it doesn't apply. This rule would not apply to replies or briefs. I am going to move that we put "or other paper" back in there to be consistent, to be consistent with present practice, because our present Rule 13 applies to other papers, including replies and briefs.

The current Federal Rule 11 applies to other papers, and it seems to me if we immunize every reply and every statement and every brief we create a situation that is not desirable because, No. 1, it lets lawyers lie to do it in replies and briefs, and they

shouldn't ought to do it; and No. 2, it creates a different standard.

If I file a motion against somebody, I am held to a standard of truthfulness and reasonable inquiry. The reply, particularly if it's a motion where I have a bad actor on the other side and I have to file motion after motion, they could say whatever they want in the reply with no possibility of sanctions, and that doesn't seem to me that that's a good policy.

MR. LATTING: I will second it, and say that I am chasing that instruction, and I am happy to have that.

MR. HERRING: Just add back in "or other the papers."

MR. YELENOSKY: So it's going to say "pleading or motion or other papers"?

MR. HERRING: "Pleadings, motions, and other papers." That's how the title would read, and that's how we put it all the way through, which was the previous draft we had.

MR. LATTING: Good idea. We should have --

CHAIRMAN SOULES: Okay. So that --

MR. LATTING: Okay. We will just make those grammatical changes throughout.

CHAIRMAN SOULES: At some point in time the committee has discussed that they did not want to include briefs but --

MR. HERRING: They are covered now, and why should you be entitled to lie in your brief?

MR. ORSINGER: This isn't just lying, though. This also has to do with arguing extentions of the law. I mean, if anybody doesn't want satellite litigation, the last thing we want is to be sanctioning each other for trying to borrow the law out of California and bring it to Texas and trying to revoke the restatement of torts and bring it to Texas.

HONORABLE SCOTT BRISTER: This doesn't in any way do that.

MR. HERRING: This doesn't do that.

MR. ORSINGER: I don't agree.

MR. YELENOSKY: Well, if it doesn't, though, Richard, that's where you are going to be arguing that stuff, is in the briefs.

MR. ORSINGER: Sure, it is.

MR. YELENOSKY: So to say it doesn't apply to briefs sort of nullifies No. (2), which you may want to do, but --

PROFESSOR DORSANEO: We have kind of a not very well understood definition of pleadings. Pleadings are petition and answer. We have no definition of motions. We have a rule that talks about motions, Rule 21, which talks about an application to the court for an order, which is the federal definition of a motion, whether made in the form of a motion, application, or whatever. I don't have it in front of me.

So saying pleadings and motions says something that's individually meaningful to the person who's listening or speaking. There is nothing that says that a reply isn't a motion if it asks for an order denying the motion because the conventional definition of a motion in general jurisprudence is an

application to the court for an order, and you are asking for an order if you are asking that an order be denied. So I end up agreeing that it ought to say "other papers." Otherwise you get into a lot of confusion about what in the world this covers and what it doesn't.

CHAIRMAN SOULES: Okay. Those in favor show by hands.

MR. LATTING: Could I ask for a question? If we add "other papers," what happens if you make a discovery request of me and I give you 4,000 boxes of documents? Is that other papers?

MR. HERRING: We have excluded discovery in (e) in the last part of the rule.

MR. LATTING: We have excluded discovery requests and responses.

MR. HERRING: It's not a motion.

MR. LATTING: Is that a response to discovery? I don't know. I am just asking.

CHAIRMAN SOULES: Who wants to reply to Joe? Chuck.

MR. HERRING: The reason the

last time we visited that issue we had (e) read as it does is because we did want to capture motions at that time. We didn't want to capture discovery. So if you make a discovery motion, it's a motion, and it's caught. It's within the scope of the rule. If you make a discovery request, response, or objection, it's not.

HONORABLE SCOTT BRISTER: Different rule for those.

MR. HERRING: And then you go over to Rule 166(d), your discovery rule.

CHAIRMAN SOULES: Okay. So those in favor of "including pleadings, motions, and other papers" show by hands. 16.

Those opposed? 16 to 1 it carries. Anything else on Rule 13? Richard Orsinger.

MR. ORSINGER: I am a little concerned based on a conversation I had with Bill here that we are requiring them to show cause why they haven't violated the rule suggests that the burden is on the responding party to prove that they didn't violate, and I will tell you that in the family law business our show cause orders tell them to show cause

why they shouldn't be held in contempt for not paying child support, and that doesn't change the burden, but that's because we have got about 5,000 cases that say that.

We don't have any cases that interpret this, and does anyone else think that if the show cause order requires you to show cause why you shouldn't be sanctioned that the burden is on you? Because if you think that or if you think the courts may think that, maybe we ought to add a sentence in here saying the burden is on the court or the proponent so that we don't get confused.

MR. LATTING: How about a comment?

CHAIRMAN SOULES: How can you have a show cause order with a -- I mean, the burden is not on the court. The court is not an advocate.

MR. ORSINGER: Well, if the court is issuing a show cause order, who's the movant? Who's going to go first? Does the responding party come in and say, "I can't tell you anything, Judge, because everything is covered by the attorney-client privilege,"

in which event the court sanctions you; or is it the opposing party that has to come in and prove that you didn't do these things?

PROFESSOR DORSANEO: Normally a show cause order means if you are ordered to show cause you are ordered to be there.

MR. LATTING: My understanding is that that's all it means, that you just have to be there.

CHAIRMAN SOULES: You don't have to be there.

PROFESSOR DORSANEO: In order for me to be there and show cause --

CHAIRMAN SOULES: You can default. You are not in contempt if you don't show.

MR. ORSINGER: No. But they can issue a capias, but this isn't a contempt procedure, and that bothers me because we are punishing it like it's a contempt, but we are not giving them any of the safeguards of a contempt; but if it is a contempt, if it is a show cause order, you are directed to be here at 10:00 a.m. on Wednesday, whatever, and you don't show, ordinarily they can issue a

capias.

CHAIRMAN SOULES: Or they can take a default.

MR. ORSINGER: You can't take a default on a contempt, but you might be able to on this because although they punish you like it's a contempt they don't give you any of the safeguards of contempt.

MR. YELENOSKY: Well, like you said, the court can't have the burden. It's deciding the issue. If you are going to place the burden anywhere else, it's going to have to be on the other party. Do you want to say that in here? I mean, that's the only thing you can do.

CHAIRMAN SOULES: Anybody want to make a motion?

MR. ORSINGER: I would move that we have some little sentence in there saying that the burden is on somebody. I mean, the burden obviously is on the movant who's seeking sanctions if the party moves. If the court is the one who initiates it, I still think we ought to allocate the burden to somebody besides the respondent.

CHAIRMAN SOULES: Anyone want to make a motion, other than we ought to include some little sentence?

Okay. Anything else on Rule 13? Alex Albright.

PROFESSOR ALBRIGHT: I have a motion on subdivision (e). "This rule is inapplicable to discovery requests and responses, including objections and claims of privilege." We no longer make claims of privileges by objections, and I think we want to be sure to include that in there.

MS. SWEENEY: What do you mean we no longer do that?

PROFESSOR ALBRIGHT: Under Rule 7 of the new discovery rules.

MR. LATTING: Say that again, Alex.

CHAIRMAN SOULES: I will say it. "This rule is inapplicable to discovery requests, responses, objections, and claims of privilege."

PROFESSOR ALBRIGHT: And what I said was "requests and responses, including objections and claims of privileges," because

I think they really are responses to discovery requests.

HONORABLE SCOTT BRISTER: Second.

CHAIRMAN SOULES: Who seconded? Judge Brister. Okay. Made and seconded. All in favor show by hands.

Those opposed? No opposition. It carries unanimously. "Including objections and claims of privilege."

Anything else on Rule 13? Carl Hamilton.

MR. HAMILTON: The old rule provides for striking of the offensive pleading or the document. This one doesn't say anything about it. It looks to me like if the document is filed in violation and the court so finds, the pleading ought to be stricken.

CHAIRMAN SOULES: Make a motion.

MR. HAMILTON: I make a motion to that effect.

CHAIRMAN SOULES: To do what? Give me the specific, Carl.

MR. HAMILTON: Well, as part of

the sanctions the court ought to be able to --

HONORABLE SCOTT BRISTER: Probably ought to be No. (1) on (d), insert a new (1). "An order striking the motion, pleading, or other paper."

CHAIRMAN SOULES: "An order striking the pleading, motion, or other paper"?

HONORABLE SCOTT BRISTER: Uh-huh.

CHAIRMAN SOULES: Any opposition to making a new (1) and then renumbering the rest of them (2), (3), (4), (5)? Any opposition to that?

No opposition. It carries. Anything else on Rule 13? Elaine Carlson.

PROFESSOR CARLSON: I think that in the paragraph before (e) the references is made to postjudgment discovery under 162(a). I think that's just transposed, 621(a).

CHAIRMAN SOULES: 621(a). Right.

MR. LATTING: Where is it?

CHAIRMAN SOULES: Right here,

Joe.

MR. LATTING: There was a typo on the first page. "Party" instead of "part."

CHAIRMAN SOULES: Anything else on Rule 13? Those in favor of Rule 13 as amended by the committee in this morning's discussions show by hands. 14. Those opposed? Four. 14 to 4 it carries.

MR. LATTING: That was easy.

CHAIRMAN SOULES: Joe, if you will do a redline and submit that to me and to Lee, we will confirm it against our notes and send it to the Supreme Court. Send us a clean version with all of our amendments incorporated and also a redline from what you started with today to where we got to today. And if you have any questions about that, we will confirm before we leave Austin on this trip. Steve Yelenosky.

MR. YELENOSKY: Justice Hecht isn't here so he didn't hear the benefit of our discussion live on this. Do the transcripts go up with -- at the same time that we send this or just in bulk, or how do they get the transcripts of these discussions?

CHAIRMAN SOULES: The Court gets, I guess, the original and at least a copy. The court gets the transcript as soon as it's ready.

MR. YELENOSKY: Okay. So they get from each meeting?

CHAIRMAN SOULES: Right.

MR. YELENOSKY: Okay.

CHAIRMAN SOULES: Okay. What time is it? Why don't we break and get a sandwich? I think lunch is here. Let's try to keep it to 30 minutes, and then we will get to 166(d).

(At this time a recess was taken, after which the proceedings continued as reflected in the next volume.)

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on September 15, 1995, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $ 1,092.00.

CHARGED TO: Luther H. Soules, III.

Given under my hand and seal of office on this the 28th day of September, 1995.

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