* * * * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

JULY 22, 1995

(AFTERNOON SESSION)

* * * * * * * * * * * * * * * * * *

Taken before William F. Wolfe, Certified Court Reporter and Notary Public in Travis County for the State of Texas, on the 22nd day of July, A.D. 1995, between the hours of 12:30 o'clock p.m. and 1:45 o'clock p.m., at the Texas Law Center, 1414 Colorado, Room 104, Austin, Texas 78701.

JULY 22, 1995

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Honorable Scott A. Brister
Prof. Elaine A. Carlson
Honorable Sarah B. Duncan
Michael T. Gallagher
Anne L. Gardner
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
Donald M. Hunt
David E. Keltner
Joseph Latting
John H. Marks Jr.
Honorable F. Scott McCown
Russell H. McMains
Anne McNamara
Robert E. Meadows
Honorable David Peeples
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta Jr.
Charles L. Babcock
David J. Beck
Hon. Ann Tyrell Cochran
Prof. William Dorsaneo
Tommy Jacks
Franklin Jones Jr.
Thomas S. Leatherbury
Gilbert I. Low
Harriett E. Miers
Richard R. Orsinger
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

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

EX-OFFICIO MEMBERS ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 22, 1995 - AFTERNOON SESSION

INDEX

	Page(s)
ns Report	
le 13	2034-2088
le 166d	2088-2100

(MEETING RECONVENED 12:30 P.M.)

CHAIRMAN SOULES: Okay. You should have a hand-out that came in the mail, a letter from Joe Latting dated July 18th, 1995, with a Rule 13 and a Rule 166d. And because we've got legislation becoming effective September '95 on the subject of Rule 13, we probably need to give that more of the emphasis in the next hour, which will be our last hour. We'll quit at 1:30. And then we'll do some talking about 166d to see how it's squaring with people's conceptual approach to sanctions for discovery problems.

Rule 13, then, Joe Latting.

JUSTICE HECHT: Luke, may I make one statement?

CHAIRMAN SOULES: Yes, sir, please.

JUSTICE HECHT: One thing the Court would like to have your input on is what we should do, if anything, between now and September the 1st about Rule 13 as it relates to the legislation passed this last session, which I know Joe is going to talk about. And part of his proposal involves a new Rule 13

which would incorporate the statute as well as some other things. But we couldn't possibly do that before September the 1st because the statutory requirements on giving notice of rules changes would not allow us to do that. It's like a minimum of 120 to 150 days for us to be able to put rules in effect from the time that we adopt them. So even if we decided tomorrow this is what we wanted to do, it couldn't possibly go into effect before the end of the year. Meanwhile, you'll have a Rule 13 on the books as well as this legislation which will have taken effect that are not parallel really at all times.

So our query is, should we just leave that for everybody to be in a quandary? There is a statement in the statute that the Supreme Court cannot make rules in conflict with the statute, but this is a rule that is already there. And as I recall, the statute does not trump this provision; in other words, they don't have a provision in the statute that says this rule applies and not anything else. Is that right?

MR. LATTING: That's right.

JUSTICE HECHT: So I guess the other choice the Court has is, there's no law on this one way or the other, but I suppose we could consider issuing an order that would suspend Rule 13 effective the effective date of the statute.

So in the course of talking about the proposals here, we need to have your thoughts on that as well.

MR. HERRING: Luke, I might mention something. Judge, with respect to that, the statute, the effective date applies to a pleading or a motion in a suit commenced on or after September 1, and the statute provides that previous rules will still apply to previously filed lawsuits. So you would still, even if you left Rule 13 on the books, you would still have application for those previously filed lawsuits, which is probably better so you don't have a gap.

MR. LATTING: You will have the problem of suits filed after September 1 and alleged violations of the rule that occur after that time that are in conflict with the statute. But as I read the statute, you can

just leave them both in place, and the message for the bar is you better not violate either one of them until we amend 13, I think. I don't see why that would hurt.

MR. HERRING: Judge, could you refresh my recollection? How did we -- how did the Court do the September 4th, 1990, amendments? You know, we had some rules that went into effect September 1, and then there were some retroactive amendments adopted three days later which were corrective amendments.

JUSTICE HECHT: That's right. I think we just took the view that they were corrective. We slipped them in without anyone noticing, is my recollection.

CHAIRMAN SOULES: Don't ask questions like that.

MR. HERRING: Well, that type of creativity might be useful in effecting these rules.

MR. LATTING: Well, you have before you a draft of Rule 13, and we have circulated earlier a copy of Chapter 10 of the Civil Practice and Remedies Code, and you need to read that in order to draw up Rule 13. I

don't know how you want to say that except to say here it is.

I'll repeat one thing Judge Hecht said, which is that under the statute it says the Court cannot make -- it says, "Notwithstanding Section 22.004, Government Code, the supreme court may not amend or adopt rules in conflict with this chapter." So that's there and we've got to live with that.

Now, one of the things that we have put into the draft of this rule, and this is Chuck Herring's doing, is that there is a 21-day safe harbor, I guess that's what we call it, provision, which is in paragraph (b) of the rule. Now, it says in effect that if you are challenged under this rule, that if you withdraw the offending document within 21 days then you don't face sanctions under the rule.

The question that I have, and I think it's an open question and I'll just put it this way: There is no safe harbor provision in Chapter 10 of the Government Code, and so is that part of the -- first of all, do we want a safe harbor provision? And I think the sense of the Committee has been yes. I don't

think anybody has been saying no, you shouldn't have one. But the real question is, do we want to include that, and does it conflict with Chapter 10? So that seems to me to be a major substantive question that is before us.

CHAIRMAN SOULES: Where is Chapter 10, Joe?

MR. LATTING: Chapter 10 is right here (indicating). It's the -- Section 10 is for frivolous pleadings and motions.

MR. HERRING: Joe, do you want me to explain origins or how we matched it up?

MR. LATTING: That would be fine. Chuck is asking do you want to go through and have an explanation on how we matched this up, and I think that might be helpful, and then just watch for hands, I suppose, and see if anyone wants to --

MR. HERRING: Let me try to run through the structure of the rule so you'll know the origin of it and how it got to be what it looks like right now. This, as you know, the Chapter 10, which goes into effect

September 1, basically supplants Rule 13. That began as Senate Bill 31, which was the frivolous suits bill, and that was a very inclusive bill that dealt not only with pleadings but all conduct of litigation. It ended up at the very end of the session being amended.

And what this does, this draft that you have in front of you, is an attempt to be as true and faithful as possibly to Chapter 10, which more or less completely supplants Rule 13, and then it incorporates a couple of concepts that have survived perhaps, if you decide to include them, from the Task Force on Sanctions' version of Rule 13.

For example, let me -- and there are a few differences here from the statute. Let me highlight those for you so you know the difference in structure.

Beginning with paragraph (a), which says, "Presenting pleadings, motions, and other papers," that paragraph sets out four certifications. If you present a pleading, you're certifying to four things. Those certifications, subparagraph (1) through (4),

come directly from the statute. That's Chapter 10. Chapter 10, in turn, took those provisions directly from Federal Rule 11.

Most of Chapter 10, with a couple of major exceptions, adopts the structure of Federal Rule 11, the frivolous pleadings rule in the federal practice. However, not all of it does, and those are a couple of inconsistencies you're going to have to deal with.

But just to take you through paragraph (a): By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, motion or other paper, an attorney certifies to the best of knowledge, information, belief, formed after reasonable inquiry the following four things. Let me stop there. There are two concepts there to focus on.

The first is that "presenting" concept. Chapter 10 does not talk about presenting. It talks about filing or maybe signing, actually signing. That concept of presenting is the concept that's in Federal Rule 11. The reason we put that in, that introductory sentence, is

because you'll see that the first subdivision (1) refers to the pleading, motion, or other paper is not being presented for any improper purpose. "Presenting" is the concept the federal rule used. And then in Chapter 10, when the legislature has pulled in that presenting concept in the first paragraph, it's inconsistent with the notion of simply filing up in the introductory clause.

Now, the reason we went to the broader concept of presenting instead of just assigning is the reason that the federal rule adopted it, and that is this: If you know a pleading is -- if you don't know when you file a pleading that it's there for an improper purpose, that it's in bad faith or for harassment, but you find out 30 days later, you should not be able to rely upon the pleading in presenting it to the court thereafter. That's the underlying concept behind the notion of "presenting" in the federal rule, and that's what we've adopted there or suggested there.

The other concept in that introductory

clause in paragraph (a) that's different from the statute is the reference of "pleading, motion, or other paper." The statute refers only to a pleading or a motion. It doesn't refer to other documents. That created the ambiguity of does the statute apply to briefs? Does it apply to responses to motions? Does it apply to affidavits?

MR. LATTING: Does it apply to interrogatories?

MR. HERRING: Yeah. The concept we adopted is the federal rule concept, which is just to have consistency. So that some documents you file are not treated differently than others, we've added "or other papers," which is the same phrase used in Federal Rule 11. So basically it applies to everything you file or present with one exception, one broad exception, which you'll see in the very last paragraph on the second page, and that is discovery requests, responses or objections.

Those are not covered by this. That exclusion appears in the Federal Rule 11 as well. Now, it's only discovery requests,

responses or objections, so it would apply, the rule would, to discovery motions.

All right. But that's the introductory clause to (a). Again, those items (1) through (4), the subparagraphs under paragraph (a), are directly out of the statute and we tried not to tinker with the statute any more than necessary. If the Committee decides it wants to, that's certainly in the Committee's discretion. But we decided we were not going to get in the legislature's face at all on this and we were going to try to live with it.

Further, I guess there's another argument that because that language is right out of the federal rule, we'll have a little bit of consistency between the state and federal rule. That's unusual for us; it would be novel.

Okay. And I'm not going to read through the certifications, and I'm not going to tell you to spend any time today on how they're different from what current Rule 13 does, because we're more or less stuck with them, I think. That's what's in the statute.

Paragraph (b) simply says you file a motion. And then it has the safe harbor concept that Joe mentioned, and the safe harbor concept I think is a major issue for this Committee to think about at least. And basically the concept, which is directly out of Federal Rule 11, is this: We're spending too much time, money and effort on sanctions. The federal rule allows a party to withdraw a pleading that could be sanctionable. What it says is, if you're going to file a motion for sanctions, you send the motion to the other side before you file it or present it to the court, and within 21 days the party whose pleading you're attacking can withdraw the pleading and then no sanctions can be levied. It's an idea to let the parties work out on their own these problems and not bring them to the court's attention and not clutter up the docket with a bunch of unnecessary pleadings sanctions work, if we don't need to get into it.

Is that inconsistent with Chapter 10 because there is no safe harbor provision in Chapter 10? I don't know. I think I would

argue that it is not because it is really a procedural issue. And if you're going to take advantage of it, if you're the opposing party and you're going to send the motion, you know, you're not going to be handicapped. You're not going to be out a bunch of expense, because you've given -- it's only been on file for 21 days since you challenged it. So you're not really precluding a party from recovering sanctions over conduct that has prejudiced a party very much, because you're really just talking about 21 days.

MR. LATTING: Let me talk about that for just a second. I think this is a good place to interrupt. Let me tell you what the statute says. I think that we're pretty much okay on a lot of all of that except one little part.

The statute, the Chapter 10, says that you can make a motion for sanctions and that the court may award to a prevailing party on a motion under the section "reasonable expenses and attorneys' fees incurred in presenting or opposing the motion."

Well, it seems to me that the safe harbor

rule would not be a problem there, because if the offending document is withdrawn, then there really wouldn't be any expense in connection with opposing it or presenting it because it would just -- the problem would go away.

But the statute also says that the court may award the prevailing party all costs for inconvenience and harassment caused by the subject litigation. So I'm not exactly sure where that leaves us; that is, if -- I mean, that's just hazy to me, so maybe somebody can help me with that.

MR. HERRING: Well, that's the other big problem in the statute. I'm going to get to that and talk a little bit about that under the sanctions section of the statute, because that's where we put that language, and that's the other second major issue of the safe harbor I think that you have to talk about. I think Joe has fingered it well.

The last sentence of that paragraph (b), which is what Joe just read the first part of, and that's right out of the statute, "The

court may award to a party prevailing on a motion under this rule the reasonable expenses and attorney's fees incurred in presenting or opposing the motion."

So you file your motion and it costs you a thousand dollars to handle the motion. That's the reasonable attorney's fee the court may award.

Paragraph (c), the court's own initiative, that is directly out of the statute, Section 10.002(b). The court on its own initiative may enter a show-cause order essentially.

Paragraph (d) of the rule, the first sentence again is directly out of the statute, Section 10.004(a). Well, it's not directly, but it's essentially the same. It says a court that determines that a person has presented a motion, pleading, or other paper in violation of those certifications up in paragraph (a) may impose a sanction on the person, a party represented by the person, or both. Those concepts, either the lawyer or the client or both, are in the statute.

The second sentence of paragraph (d),

"Any sanction shall be limited to what is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated," is directly out of the statute, a quote.

And then there are, under (d), there four sanctions listed. The first three come directly out of the statute. The first one is an order directing the violator to do something or not do something.

The second one is an order to pay a penalty into court. And we received the comment, a couple of comments on what's this penalty, we've never heard of penalties, who gets it? Do we have, you know, a Selma speed trap or bounty hunting now for courts? We might talk about that, but that's right out of the statute.

And the third one is an order to pay reasonable expenses incurred because of the presentation of the pleading, motion, or other paper. That's different from the earlier expense provision, which applies only to the motion that you're filing. This applies to the reasonable expenses caused by the

underlying pleading that's been challenged.

But here is the big one in this paragraph, and that's item (4), and Joe fingered it, and let me go back and read you the statutory language. The statutory language, the whole sentence that Joe referred to, reads as follows: It says, "The court may award to a party prevailing on a motion under this section the reasonable expenses and attorney's fees incurred in presenting or opposing the motion." Okay. That's easy. That's the first part. We've already got that in there. "And if no due diligence is shown, the court may award the prevailing party all costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation."

So the first part of that sentence says you can get expenses and attorney's fees on the motion. But the second part has a totally different concept; and that is, if you didn't exercise due diligence -- and the statute doesn't say what the due diligence relates to. Is it due diligence throughout the case, or is it due diligence in making those

certifications or the reasonable inquiry that is supposed to underlie those certifications? I think it's the latter, and that's the way we've written this.

But anyway, if you didn't exercise due diligence, the court can obliterate you. It can impose all costs related to harassment, inconvenience and out-of-pocket expenses.

Somebody said this isn't the English rule; this is the Visigoth rule. It let's the court do some very severe things to you. There's no doubt about that.

Now, in the statute that's not in the sanctions provision, but we've stuck it in the sanction provision because that sounds like a sanction to us. Now, the reason that is in there, I believe, is because that language came out of the earlier version of the statute, the original Senate Bill 31. It had that as a separate, much more heinous provision there because it let the court focus not only on pleadings but on any conduct through the litigation.

But anyway, that got either snuck in or left in, but it's in there and we've had to

deal with that. And that's why we have put that as that subdivision (4) of paragraph (d), and it reads as follows: "If the court finds that a person has failed to exercise due diligence in making the reasonable inquiry required by paragraph (a) of this rule before filing," and that probably should be "presenting," but anyway, it says, "before filing pleadings, motions, or other papers, an award of an appropriate amount of costs for inconvenience, harassment, and out-of-pocket expenses incurred or caused by the subject litigation."

So that's a fourth form of sanction, and that's how we tried to deal with that unusual provision in the statute.

CHAIRMAN SOULES: Where are you reading from, Chuck? I've lost you.

MR. HERRING: The second page. But I don't know if you have the same draft that I have.

CHAIRMAN SOULES: We've got the July 18, 1995, draft.

MR. HERRING: See, I never got Joe's draft.

CHAIRMAN SOULES: Oh.

MR. HERRING: Yeah. It is on there, but Joe changed it on me without telling me, but that's all right.

MR. LATTING: Well, I wrote you.

MR. HERRING: Yeah, but I didn't get to see your letter.

MR. LATTING: I filed it with the court, though.

MR. HERRING: All right. What Joe has done is eliminate the predicate language that we had in the earlier draft, and that predicate language is the language I said that if the court makes that finding.

MR. LATTING: Well, the reason we took it out was that it's necessarily included. You can't have violated the earlier paragraph without a finding of that; that is, you wouldn't be under a sanction if you hadn't already got -- made that finding.

MR. HERRING: Yeah, you would, because there are three kinds of sanctions that don't require that finding. That finding is the second part of that sentence. If you

have not exercised due diligence, that's when you may assess those kinds of damages of costs, and I think you've got to have it in there.

We'll come back to that, because that's a big issue on this rule and we've got to figure out how to deal with that. No due diligence, all kinds of costs imposed.

The remainder of the rule, and I better look at Joe's draft here to make sure there are no other changes, but the remainder of the rule is pretty close to the statute with two exceptions.

Just below the numbered paragraph (4), the first sentence, "The court may not award monetary sanctions against a represented party for a violation of paragraph (a)(2)," paragraph (a)(2) is the certification that deals with legal claims. In other words, you don't punish the client because the lawyer failed to analyze the law. And that's right out of the statute. That's a quote out of the statute, so I think our hands are tied on that.

The next provision, the next sentence

says, "The court may not award monetary sanctions on its own initiative unless the court issues a show cause order before a voluntary dismissal" -- and it should be "or settlement" instead of "voluntary settlement" -- but "voluntary dismissal or settlement of the claims made by or against the party or the party's attorney against whom sanctions are proposed."

That language lets parties settle and then avoid sanctions. That's straight out of the statute, essentially quoting the statute.

The next sentence is simply the findings provision. It says that "An order under this rule shall contain written findings, or be supported by oral findings on the record, stating specifically (1) the conduct meriting sanctions, and (2) why a lesser sanction would be ineffective." And that is not in the statute, but we inserted that.

The statute says that the order shall state the reasons or explain the basis for the sanction imposed, and that was our effort to translate that and to include the Transamerica doctrine with respect to lesser sanctions,

trying a lesser sanction before you go to more severe sanctions.

The last sentence is not in the statute, the last sentence of (d), and it's an attempt to address an issue that Justice Hecht, I believe, raised, and that's -- what it basically says is you can only get sanctions during the trial court's plenary jurisdiction; that is, if you wait until the trial court's plenary jurisdiction has expired, there cannot be an imposition of sanctions. There are cases that go both ways on that now, and that's an effort -- it may not be worded exactly as we need to, but that's the an effort to resolve issue and limit it to plenary jurisdiction.

And then I've already mentioned (e), which is the last paragraph. It simply says this is inapplicable to discovery requests, responses or objections. That adopts the Federal Rule 11 approach. That is not in the statute, but of course, the statute would only apply to motions or pleadings, so it would not reach discovery, and that's -- I've taken too long to do it, but that's a summary.

MR. LATTING: Let me just respond to one thing, that while you were gone Alex and I and a couple of other members of the Committee had a chance to talk about this.

It says under (d) of this draft, the draft that we mailed on the 18th, it says, "A court that determines that a person has presented a motion, pleading, or other paper in violation of paragraph (a) of this rule may impose a sanction on the person."

Okay. Now, in order to find out that a person has presented a paper in violation of paragraph (a), of course, you've got to go to (a). And there you find that it is a violation of (a)(3) if the allegations and other factual contentions in the pleading, motion, or other paper have evidentiary support, et cetera. In other words, that's where the due diligence is found.

You're shaking your head, so I guess I'm just kind of misunderstanding what your problem is.

MR. HERRING: Well, I don't say we should do it this way, but here is my, I

guess, my concern, if we do it that way: You already have (a)(1) through (4) in the statute. They're in one section of the statute.

MR. LATTING: All right.

MR. HERRING: Okay. Then another section of the statute has this due diligence concept, and that's a separate section of the statute. If you delete it entirely, the reference to due diligence, but include the sanction which is tied to it --

MR. LATTING: Yeah.

MR. HERRING: -- it seems to me that the rule is a little bit inconsistent.

Further, I would like to limit that sanction, because that sanction is so awesome to me that I don't want that imposed very often, and I would like to include that due diligence language as a necessary predicate and finding before a court can get to the point of assessing all inconvenience and harassment damages associated with the subject litigation.

HON. SCOTT A. BRISTER: He wants to bifurcate punitive damages from

actual damages.

MR. LATTING: But my belief, and still is, and I don't mean to be hardheaded, and I think it's Alex's belief too when we talked about this, was that a failure -- what is due diligence other than the failure to find out that the allegations or other factual contentions in the pleading or other paper have evidentiary support, or, for specifically identified allegations or factual contentions, are likely to have evidentiary support?

HON. SCOTT A. BRISTER: It's unclear, it seems to me, what due diligence is, but I agree with Chuck. It definitely appears to be something that's worse, because it's put different and it has a stiffer sanction. And it seems to me to make sense to separate it out and treat it as something worse that requires some other additional showing.

MR. LATTING: Well, I wish I knew what it was before we go and separate it.

HON. SARAH DUNCAN: Joe, what about if you had an argument that's determined

to be frivolous but you did due diligence on your research and you just happened to miss that it was overruled by the Supreme Court last week?

MR. HERRING: Well, you deal with that now under the federal rule. I mean, in theory this is not a strict liability rule at all. And all it requires in the first part, setting aside the due diligence and whatever that means, is a reasonable inquiry. If you make a reasonable inquiry, well, that's probably a fact question if you missed the Supreme Court decision. But if it was a Supreme Court decision last week, you know, you could have made a reasonable inquiry and still have not gotten around to reading the Supreme Court Journal that had just come in that day.

HON. SCOTT A. BRISTER: Or let me give another example. To me the main focus of this whole frivolous thing, there's a class of people out there who actually work very hard. They're just a little bit nutty to what most of us consider to be things that you should and shouldn't be complaining about. I

had a lawsuit about, well, the plaintiff wanted to sue the defendant "because they took my picture."

And I asked, "And did what?"

"Nothing, just took the picture, and that's an invasion of privacy."

Well, the lawyer had a 40-page petition. No question about diligence; it was just a frivolous claim. And that ought to be punished with the first section; that, you know, it wasn't because he didn't work or was lazy or something, it's just a frivolous claim and you need to just get rid of it. So there's definitely a distinction between those two kinds of claims that I think the rule ought to draw.

PROFESSOR ALBRIGHT: I think we're having a problem about what the legislature meant by "due diligence" here. Did they mean "due diligence" as defined in (1)(3), or did they mean something different? And if we don't define it, then what we're doing is leaving it up to the courts to define it, which is one way to handle it.

But what I'm thinking is, maybe another

way to handle it is saying, well, we're not doing anything inconsistent with the statute, but we're just merely trying to interpret the statute to give the court some guidance and give lawyers some guidance. Couldn't "no due diligence" mean continued violations of the statute?

MR. HERRING: We had that written in one earlier draft as we were tinkering with this, because the problem is, and you're exactly right, "due diligence" is just in a vacuum the way it's used in the statute. If no due diligence is shown, the court may do such and such. We have tied it, at least in the draft, the pre-Joe draft, we have tied it to due diligence in making the reasonable inquiry that must be made for those four certifications.

Someone said, "Well, could it be due diligence on a continuing basis all the way through in terms of all your pleadings and motions and other papers?" Someone said, "Well, could it be due diligence in the whole lawsuit? Are you just kind of lazy and not diligent in the whole lawsuit?" Because this

is a pleading rule, we didn't think it really went to other areas of activity in terms of no due diligence. I don't know. I mean, I honestly don't know what they meant by that.

MR. LATTING: I think it's pretty clear when you read the statute that what the legislature was trying to get to was that they were tired of people -- and wanted to sanction -- they were tired of people filing frivolous pleadings and motions and they wanted to sanction them for that. And so they said that the court may award to a party prevailing on a motion the reasonable expenses and attorney's fees incurred in presenting the motion, and if no due diligence is shown, the court may award the prevailing party all costs for inconvenience, harassment, and out of pocket expenses. I think they got mixed up with their earlier version of the bill, is really what I think happened, and they got some language that came over from the earlier version, I think it was Senate Bill 31, that got put into here, so it's not clear what it means.

And the real question is, do we want to

try to define it or help the Supreme Court define it for the bar, or do we just want to leave it out there hanging out to have people wonder what it means. It seemed to us that --

HON. SCOTT A. BRISTER: Where do you define it in your draft?

MR. HERRING: You leave it out.

MR. LATTING: We don't use the term "due diligence." We just say that here are the things that you have to do in order not to commit sanctionable conduct. We say that by presenting pleadings, motions, and other papers, and I'm paraphrasing, that you're certifying to the following things: (1) that it's not being presented for an improper purpose, including to harass; (2) that the claims, defenses, and other legal contentions are warranted by existing law or or by a nonfrivolous argument for the extension; and then (3), the third one, is the one that there's a reasonable basis for your allegations or you believe there will be after discovery.

Now, if you haven't performed due diligence, if you just haul off and make some

warrantless assertion, then it's not due diligence. But we don't use the term in our draft. We thought it was better to say what things you were certifying to, which the statute says, and then have the draft of the rule say that if you didn't do those things then you could be sanctioned.

MR. MEADOWS: Well, couldn't you just -- I mean, if that language needs to be in the rule, I mean, I suppose you could say, this is in the very first introductory language, certifying to the best of the presenter's knowledge and also after due diligence.

HON. C. A. GUITTARD: Well, it says "formed after reasonable inquiry." What's the difference?

MR. LATTING: It says "formed after reasonable inquiry," and to me that is due diligence.

MR. MEADOWS: And that's fine with me. I have no problem with not using the precise language, just in the same way, Judge Brister, I think that Paragraph No. 2 captures your right to deal with the crummy lawsuit

where they take a photograph but there's no real supportable damage claim.

HON. SCOTT A. BRISTER: But this is -- the statute is saying we go to punitive damages if there's no due diligence, is the way I'm reading it.

MR. LATTING: The Visigoth provision.

HON. SCOTT A. BRISTER: We go to punitive damages if there's no due diligence. And the Joe draft, it allows punitive damages for anything, if I -- if it's just the claim is crazy.

MR. LATTING: For filing a crazy lawsuit. But can we call this something other than "the Joe draft"?

HON. SCOTT A. BRISTER: Yeah, whatever. Whereas Chuck's draft requires -- okay. There's analysis. You violated Rule 13. Now a second analysis, a second step. Go to due diligence before we go to the punitive damages, again, roughly characterizing what that is, which I think makes more sense and fits more with the statute.

MS. GARDNER: Can I make a suggestion? This is just to throw something out. A showing of no due diligence sounds sort of like the concept of no reasonable basis for breach of duty of good faith and fair dealing. Could we couch it like that, that if there's a showing of no due diligence, in other words, if there's some evidence that there was some diligence, then it takes it out of that fourth category of punitive damages? It's just a thought.

CHAIRMAN SOULES: I guess the concepts are somebody could make a reasonable inquiry but then run afoul of these things anyway.

MR. LATTING: Yeah. Like Scott's example where you --

CHAIRMAN SOULES: Yes.

MR. LATTING: And I think that we should. That ought to cause somebody some -- I think the legislature would have wanted to punish that conduct.

HON. SCOTT A. BRISTER: Say that's a stupid lawsuit.

MR. LATTING: That's a crazy

lawsuit, and the guy had a 40-page brief where he cites 96 cases and he's just nutty, and he's cost me a lot of money for filing this case. I think we ought to be able to punish that, and that's why we did it.

CHAIRMAN SOULES: Well, maybe this could be fixed on No. 4 on Page 2 where we say at the end of -- or on No. 3 where we say, okay, all those things can happen to you even if you made reasonable inquiry if you do something frivolous. But on No. 4 say in the absence of reasonable inquiry, an award, because that's where due diligence comes in and punitive damages.

I mean, Judge Brister makes a point. There has to be more than just no basis for the lawsuit for whatever -- for some unintended reason before you get to this inconvenience, harassment, and out-of-pocket claim. It has to be basically you didn't even try. You just hauled off and did something without reasonably inquiring into its validity.

MS. GARDNER: Which is what the earlier draft said.

MR. HERRING: But the earlier draft says under (4), Luke, if the court finds that a person has failed to exercise due diligence in making the reasonable inquiry required by paragraph (a) of this rule before filing the pleadings, et cetera, an award of an appropriate amount of costs, et cetera. You're saying that --

CHAIRMAN SOULES: How can you have a nondiligent reasonable inquiry?

MR. LATTING: You can't. And that's why we went for the language in the second draft. And let me also say --

CHAIRMAN SOULES: But you could just say in the absence of a reasonable inquiry.

MR. HERRING: That's already built in.

CHAIRMAN SOULES: Where is it?

MR. HERRING: In (a).

CHAIRMAN SOULES: (a)?

MR. HERRING: Yeah. You've got to have knowledge in (a), and (a) is predicated on a reasonable inquiry. I agree with you, the concepts are somewhat

redundant. I mean, what's the difference between a reasonable inquiry and exercising due diligence? But the legislature put it in there in its wisdom or lack thereof. And my own preference, as Scott indicated, is not to go to these extraordinary damages unless a failure of due diligence is found. And maybe it means nothing, and maybe that is no impediment to a court imposing apocalyptic damages. But if you put it in there, a court and parties at least have to say due diligence, and we need to have that finding in there.

And then you've given -- you've bowed to the legislature, you've used their language, and also you've given a little bit of something for the parties to think about. If it's truly repetitious, then it doesn't slow them down much because it's the same thing as reasonable inquiry. But I agree, literally they're pretty redundant.

CHAIRMAN SOULES: I think what's missing here is, and really what we've been doing here in this last hour, is I think the legislature and the court in their

previous rules have intended to punish people for pleading for harassment and needless increase in the cost of litigation, regardless of whether there's been a reasonable inquiry. Now, we don't separate those concepts. We just say, if you're telling me that in order to violate (a), any part of it, I have to be without reasonable inquiry, and I don't think that's what --

MR. HERRING: That's clearly what the statute says.

CHAIRMAN SOULES: Well --

MR. HERRING: If you want to add sanctions and allow something more than what the legislature allowed, we could do that, but the statute reads exactly that way.

MR. LATTING: And let me tell you what I think happened. I think you're right, that that's not what they intended, but what I think the legislature intended was to make the punishment broader than the way they actually wrote the statute, because they made it clear in the things that they prohibited that you had to make a reasonable inquiry in order -- and that your certification covered

all of these things when you filed a lawsuit.

Then when they got down to the sanctions part, they said -- they used the term "due diligence" for the first time, which pretty clearly came over from an earlier draft of their statute. It got thrown in and it's kind of confusing. I'm not sure that this discussion is shedding any light on this, because the statute is not very clear itself.

HON. SCOTT A. BRISTER: I think everybody agrees on that.

MR. LATTING: And that's why it's hard for us to draw a rule, and I'm not being facetious. The rule in the second draft is really clear. The question is, do you want to add a requirement of due diligence for this punishment phase under No. 4, and if so, what does it mean?

The problem I have is that you have to show a lack of due didligence in order to get to that punishment, and it seems to me we ought to tell the bar what that means, and I don't know any way to tell them what it means, except by saying that there's a lack of reasonable inquiry as to these matters.

MR. HERRING: Well, I can give you one meaning. It's pretty small, but it is a difference. If you're going to use the concept of presenting, which is what the federal rule uses and what this one uses, one could make a reasonable inquiry but not be diligent in making it; that is, research the law but research it later and continue to present on an ongoing basis a pleading; presenting it by arguing your motion for summary judgment which is premised upon it. And then you may have made the reasonable inquiry, but you haven't really shown due diligence through the course of the litigation in making it. That's a pretty fine hair to split, I will concede.

Nevertheless, either we need to define it or we need to be very up front about saying, "Legislature, we can't give any meaning to the term you wrote and so therefore we're omitting it." That's what your draft does. I would rather have it in and have it as a little bit of an impediment. And that's the issue, unless someone can approach it from a different perspective.

HON. C. A. GUITTARD: I'd like to raise this question, that first of all, that lack of due diligence isn't the worst kind of conduct that you can have. It's much worse to have a deliberately malicious and frivolous suit, and that ought to be subject to both severe penalties rather than a lack of due diligence. And if we can be consistent with the statute to get to that result, I think that's the way we ought to go.

Now, the other point I'd like to raise is this: Rule 13, as it now stands, was taken from -- has been in the Rules of Civil Procedure for a long time. When the Appellate Rules were separated out, the Rule 13 was not incorporated into the Appellate Rules. I have been working on a draft of General Rules, which apply to both, to include those provisions of the Rules of Civil Procedure which really are indicated to apply to both trial and appellate practice.

Now, as we go through this -- and I've taken Rule 13 and with minor amendments have made it apply in these General Rules to both appellate and trial papers. Now, as we go

through, consider this: We might consider how this applies to appellate courts. I guess under the statute it does not, but still the appellate court needs some sort of parallel provision, maybe not all of these provisions, but at least some sort of provision that are to some extent consistent with what we're proposing here.

MR. LATTING: Well, the statute pretty clearly applies to appellate courts.

HON. C. A. GUITTARD: Does it?

MR. LATTING: I think it does.

MR. HERRING: Well, actually that's a good question. The statute begins saying this: The signing of a pleading or motion, pleading or motion, as required by the Texas Rules of Civil Procedure constitutes a certificate, et cetera. Well, some, arguably, Rules of Civil Procedure apply to some pleadings or motions that are filed in appellate courts, but there are a lot of other things filed in appellate courts that aren't pleadings or motions. I don't think the legislature thought about it in terms of application to appeals. The original bill

dealt with frivolous suits, so I think it was more focused at the trial court level.

But to address your first point, I think a truly frivolous suit is covered now by this. If there is a frivolous claim, it clearly would be prohibited, and particularly if there's an improper purpose, by (1) or (2) of paragraph (a), and that would be sanctionable.

HON. C. A. GUITTARD: Then it doesn't make any sense to condition (4) on the finding of a frivolous appeal.

HON. SCOTT A. BRISTER: There's definitely an anomaly to say, "Look, I'm doing this just to harass the other side, but as long as I work hard at it, then it's okay." But that ain't our anomaly; that is, the legislature has decided as long as you work hard at intentionally harassing the other side, there's not a lack of due diligence.

MR. HERRING: Right. And let me point out all you're talking about are the apocalyptic damages. You still, if you find that someone filed a frivolous suit, you get to award everything against -- you get to

award all expenses, reasonable expenses incurred because of the presentation of the pleading. That's in sanction -- that's subparagraph (3). I mean, that's kind of the English rule there. This (4) is the additional one.

HON. C. A. GUITTARD: But still you have this Transamerica concept here, and that's going to save from you from the Visigoths.

MR. HERRING: Or the Vandals, one or the other, I'm not sure. But yeah, it is the least severe sanction, but I think that concept should still be in there.

CHAIRMAN SOULES: Well, if you read the statute, a literal reading of it would say that there are no sanctions under this statute if reasonable inquiry has been made, due diligence and reasonable inquiry has been made.

MR. HERRING: Well, reasonable inquiry under (a).

CHAIRMAN SOULES: Under (a)?

HON. C. A. GUITTARD: Yeah. That applies to everything. That doesn't make

any sense.

MR. HERRING: Reasonable inquiry comes from the first part of the statute, Luke, Section 10.001. Due diligence is down below.

HON. C. A. GUITTARD: Well, can't we impose sanctions for malicious or frivolous conduct that's not particularly denounced by the statute because it's not a lack of due diligence?

MR. LATTING: I think we should, and for the very reasons you said. And I don't think that we ought to say that the only way to impose the most severe sanctions is because somebody is nutty and malicious but they're very diligent at it. I don't think there's any reason to separate those two things.

MR. HERRING: Well, I would disagree with that. You certainly can sanction anyone. You can risk the sanctions that you want. If someone just harasses, files a harassing lawsuit, that's sanctionable. They couldn't meet that reasonable inquiry standard. That's

sanctionable. There's no question about that, and you can sanction them for all of the costs for filing the lawsuit.

HON. C. A. GUITTARD: I don't know whether that reaches the reasonable inquiry sanction or not, because you can inquire and get all the information in the world and still be malicious.

MR. HERRING: Well --

CHAIRMAN SOULES: Let's try to be the Court's lawyer here for the next ten minutes, okay, and get away from the devil in the details of this and talk about -- I think you want some input from this Committee as to what direction the Court might take, did you not, Justice Hecht, as we approach the effective date of this statute and what concerns may be present?

JUSTICE HECHT: What, if anything, should we do before September the 1st?

CHAIRMAN SOULES: It looks like to me like, from what we're seeing here, and I'm going to state this and let everybody shoot at it, that Rule 13 will continue to

apply to all cases filed before September of '95, whatever the effective date is.

MR. HERRING: September 1 of '95.

CHAIRMAN SOULES: Septemeber 1 of '95. So if it were repealed or vacated or stayed, then there would be no sanctions to cover those cases any longer. Now, those filed after September 1, I guess the next question is, should it be suspended for cases filed after September 1? And it looks to me like the legislature has given a remedy under Chapter 10. We also have a remedy under Rule 13. They operate differently and they have different standards, but they are not in conflict with one another. You can use one or the other. And nothing in Rule 13 precludes using Chapter 10, if a party wants to use Chapter 10 instead or present them in the alternative.

And because of the way the legislature has written this Chapter 10, it's going to have probably some questions about its interpretation. Rule 13 probably has some questions about that, too, as I look at it.

But is there -- does the Committee feel that there is a situation where to continue the effect of Rule 13 after September 1 of '95 for new cases filed on or after September 1, '95, is in conflict with Chapter 10? Can we discuss that?

MR. LATTING: Yeah. I'd like to say that --

CHAIRMAN SOULES: Joe.

MR. LATTING: -- I agree. I think everything that you have said so far has been right, and I think that the Court should not do anything, and that if there are conflicts, they will just be dealt with on an ad hoc basis and you don't need -- I don't think there's any basis for repealing Chapter 13 -- I mean, Rule 13. We just do the best we can to pass a new rule as soon as we can and let those few cases that fall in the crack fall there.

PROFESSOR ALBRIGHT: I have one real problem that I'm afraid of, and that is that under the statute you can be sanctioned for denying -- making a denial that is unwarranted in the evidence, and so

technically you can't file a general denial.

CHAIRMAN SOULES: Well, they have an exception for that.

MR. HERRING: They've got a specific exception for general denials.

PROFESSOR ALBRIGHT: Okay. I thought it was only in our rule.

CHAIRMAN SOULES: No. It's 10.004(f). Sarah Duncan.

HON. SARAH DUNCAN: I guess I disagree with leaving them both intact for suits filed on or after September 1st. To me that just sounds really confusing.

MR. LATTING: Well, what can we do? Just to repeal --

CHAIRMAN SOULES: Well, let her explain. She's got a different point of view. Let's get it articulated.

HON. SARAH DUNCAN: I don't remember having seen this being published in The Bar Journal. And from the lawyers that I've talked to, not many of them know that it exists. I mean, I just found out about new CLE requirements. I mean, there's just a lot that have happened in the session that a lot

of people don't know about.

So what I would think about doing is suspending the application of Rule 13 to suits filed on or after September 1st, but publish and highlight with some discussion maybe by, you know, Chuck, Alex and Joe as to how we don't know what a lot of these things mean; that we're working on a rule, blah, blah, blah. But I think to have lawyers subject to two different rules for the same case is going to cause a lot of confusion within the lawyers and within the trial courts.

JUSTICE HECHT: I think the earliest -- I'm not sure about this, but I think the earliest you could publish it, short of paying $20,000 for it, would be the September Bar Journal, and it may be the October Bar Journal.

MR. MARKS: Can you do an interim rule, just kind of a quick interim rule, Judge?

JUSTICE HECHT: Well, the statute and the Rules Enabling Act would not permit that. Where the issue has never been decided whether the Court is bound by the

Rules Enabling Act, we tried not to pick a fight with the legislature over that subject, but the Act would not permit it.

CHAIRMAN SOULES: As Justice Hecht pointed out earlier, the prohibition is not to amend or -- excuse me, Joe, we're trying to make a record here -- is not to amend or adopt rules that conflict with this statute, so the present Rule 13 does not offend 10.006.

Now, that doesn't answer Sarah's comment or concern that to have both of these available for cases after September 1, '95, may create confusion. There's no reason under this statute to take Rule 13 off the books. There are some other things in Rule 13 that are not covered by this statute, like for this lawyer bringing a fictitious suit to get an opinion of the court. There's some of that old antiquated language we have in the former rule. Okay. Judge Brister.

HON. SCOTT A. BRISTER: Yeah. I think I don't have a problem with them both being on the books. I mean, this happens lots of times where rules or statutes are different

and we have to do our best with them. But the plain vanilla average Rule 13 -- and again, my experience is there just ain't that many of them out in the system anyway. It is -- it's a frivolous lawsuit, and under either the legislature -- either the statute or the Rule 13, which is not being newly adopted or changed, it's just still existing, I assess costs and whatever is necessary to do whatever sanctions are necessary on that.

The questions about the differences like do I have to follow Transamerica or not, it will be pretty much up to the trial judge. But you assume that you're probably going to follow Transamerica, because the statute doesn't say it, and maybe some of that will work out over those few months while the court is getting comments on this new proposed rule and getting those kind of comments from the people who have tried to work them out in the interim months, so I think your proposal is right.

CHAIRMAN SOULES: Well, Transamerica is based on federal cases, and they are constitutional due process cases, so

even under the statute there's going to be a Transamerican overlay on the legislative --

MR. LATTING: Well, the statute has sort of a Transamerican phrase in there already. It says that the sanction must be limited to what is sufficient to deter the repetition of the conduct or comparable conduct by others similarly situated. So that's kind of a Transamerican phrase.

HON. SCOTT A. BRISTER: So that's the hearing requirements and findings on the record?

MR. LATTING: Yeah.

CHAIRMAN SOULES: So what are we suggesting that the Court do? Somebody make a recommendation.

MR. LATTING: I'm going to recommend that the Court leave Rule 13 on the books pending the passage of a new Rule 13.

MR. PRINCE: Second.

CHAIRMAN SOULES: It's seconded. Sarah, do you want to speak to that again before we vote?

HON. SARAH DUNCAN: I don't feel strongly about it.

CHAIRMAN SOULES: You don't feel too strongly about it?

HON. SARAH DUNCAN: About the confusion that's going to be created, no.

CHAIRMAN SOULES: Okay. Those in favor show by hands. Is anyone opposed?

Does that answer your inquiry, Judge? Do you have any other need for information from us about this?

JUSTICE HECHT: No, sir.

CHAIRMAN SOULES: Okay. Let's get a real quick spin on 166d, and then we'll quit.

PROFESSOR ALBRIGHT: Can I move the adoption of the rule, of Rule 13?

HON. C. A. GUITTARD: Well, Rule 13 is as now enforced.

PROFESSOR ALBRIGHT: No. Rule 13 as drafted, so it can get to the Supreme Court so they can start working on it.

CHAIRMAN SOULES: I've got some details about this that I would like to present before we pass on it.

MR. LATTING: I'm happily willing for defer adoption of this rule so we

can think about these things that came up.

HON. C. A. GUITTARD: We need to work on the appellate aspect of it as well.

MR. LATTING: So why don't you not move that yet.

PROFESSOR ALBRIGHT: Okay.

CHAIRMAN SOULES: Okay. Motion withdrawn. Just give us a 10-minute spin on 166d.

MR. LATTING: Oh, I don't want to. It's after 1:30, but I will if I have to.

HON. SCOTT A. BRISTER: This is going to take at least two and a half hours.

CHAIRMAN SOULES: If we vote on that, I know how the vote will turn out.

MR. LATTING: This will take a good long time, so let's pass these -- do you really want us to take up sanctions?

CHAIRMAN SOULES: I do. I just want you to give us a spin on what you're thinking about on this.

MR. LATTING: Has everybody got copies of these (indicating)?

CHAIRMAN SOULES: Yes.

MR. LATTING: Now, let me say

that the way we have done this, too, is sort of a piecemeal approach. The starting place, although she may deny it, is Pam Baron's latest draft of where we were in the Sanction Subcommittee, and we started writing from there and we started passing these things back and forth, and we really are not in a position to be recommending this until there's consideration by the full Committee.

But I think what we do have is a structure of the rule, and I'm using the term tightly; that is, the structure of this rule I think is pretty good; that is, we have a procedure, we have what the sanctions are, we have the time and the review. I think that the layout of the rule is not very controversial.

Now, I think the place for the people of this Committee to focus is No. 3, where we started defining "sanctionable conduct." And then we define what the court can do if there is sanctionable conduct. And what we tried to do here -- we may also be trying to square the circle with this. You know, we had two or three meetings of this big Committee when we

started out trying to decide when could a trial court impose sanctions for discovery disputes.

In general, I think we decided that a court ought not to be able to impose sanctions for discovery disputes unless -- and we shifted our position some on this as a full Committee. We started out with the Committee being -- sort of a small majority of the full Committee -- being of the opinion that there had to be a violation of a court order before you could have serious kinds of sanctions or attorney's fees awarded. And that position began to be eroded when it was pointed out, well, what if there were things that attorneys did that were not violations of orders but were still reprehensible conduct, things that everybody knew you shouldn't be doing; for example, intentionally and illegally ditching evidence, shredding documents, doing things that there was no way to correct.

And so what we have said here is, in section 3, that in section 3(a)(i) "a person subject to a discovery order, other than a Discovery Control Plan under Rule 1, has

failed to comply with the order."

And the reason that we made that distinction was we didn't want to -- we didn't want to have it misunderstood that if you -- that if a couple of lawyers got together and agreed on a discovery plan, whether or not a judge had signed off on it, that missing a deadline under one of those was a violation of an order. We didn't think that that's what the full Committee had in mind. We're talking about an actual failure to comply with a court order, or, and this is where I think the policy needs to be looked at by you folks, where a party, a party's attorney, or a person under the control of a party has disregarded a rule.

And I'm not sure what "disregarded a Discovery Control Plan" means, but the term "disregard" was something that we thought was stronger than just missed a deadline; or a subpoena repeatedly; or -- and maybe we need to make it clearer what "repeatedly" refers to, whether you have to do it more than once.

And I'll sort of apologize for the indefiniteness of the wording of the rule, but

I will say in our defense that the full Committee has never really found itself on this issue. So you need to tell us how to write it and we'll write it.

It says "or in bad faith," so it's either repeatedly or in bad faith. The notion there that they were trying to get to was that in order to sanction someone heavily, they had to be in the wrong repeatedly or in bad faith or in violation of a court order; or in bad faith has destroyed -- (B) has destroyed evidence in bad faith or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy; or (C) has repeatedly made discovery responses that are untimely, clearly inadequate or made for the purposes of delay or discovery requests or objections to discovery that are not reasonably justified.

And we picked the phrase "reasonably justified" there to try to get -- that was -- we tried to get away from the goofy lawyer who is not in bad faith but who is just goofy.

Or (D), has otherwise abused the discovery process in seeking, making, or

resisting discovery.

What we're trying to get to here is the notion that you don't punish somebody or award attorney's fees to the lawyer for being wrong or for making an objection or for asking too many questions. What you're trying to do is limit sanctions to a lawyer who has done something that he or she just should not have done and is of a more serious nature.

We have not had any luck, and I think we've all pretty much run out of the idea that in order to impose any sanction there has to be an actual violation of an order in place, because there are too many things that lawyers can and have done and probably will do that aren't violating specific orders but that are just reprehensible conduct.

So that's really a short version of what we've done here. And we have a Transamerican standard built into this rule, and we have the sanctions listed here. Yes, Chuck.

MR. HERRING: We've got about 20 or 30 other comments since this draft came out.

MR. LATTING: Yeah.

MR. HERRING: So we haven't even been through this draft at the Committee. One thing, though, that I'm curious about, Alex, because I think you were working on it, is what is your thought on the Discovery Control Plan? If a court-approved Discovery Control Plan is violated, is that sanctionable or not?

PROFESSOR ALBRIGHT: Well, I raised the point that it seemed to me that in this draft, the point was to not impose sanctions unless someone had done something really reprehensible, like had been told by a court, "You've done it once. Don't do it again." So my feeling was that these sanctions were to be imposed for repeated violations. And it seemed to me that a Discovery Control Plan is merely a substitute for Rule 1(1) or Rule 1(2) -- I mean, 1(3). A Discovery Control Plan is just a substitute for limitations under the $50,000-or-less tier or the all-other-cases tier. So a violation of that should be treated as a violation of the rule. And if you violate it once and then there's a court order that says, "Don't do it

again," and then you violate that court order, then you get sanctions.

HON. SCOTT A. BRISTER: But wouldn't it fit more with Rule 166b? For instance, I mean, the things -- if you violate a Discovery Control Plan, it's because you didn't say your experts soon enough or you didn't amend your pleadings soon enough or you didn't join a party soon enough. And that seems to me it ought to fit under the one about the trial effect of failing to do things rather than the how much money and send you to CLE kind of sanctions; that the sanction for that is you can't use them at trial.

PROFESSOR ALBRIGHT: Right. I think you may be exactly right. All I did was just raise this as a -- we've got to deal with it somehow, and this may be something that we really need to think through a lot more carefully.

And throughout discussing the Discovery Rules, people have said, "Well, what are we going to do for somebody that does this?"

"Oh, that's for Sanctions."

And so I think there are a lot of

situations now where -- I mean, when the idea of this sanction rule was drawn up, we didn't have our Discovery Rules yet. And now we have a very tight schedule for Discovery Rules, so suddenly people may be a lot more willing to say you don't get a warning. If you violate anything, then you can be sanctioned. But that's something that philosophically people need to think about and talk about.

CHAIRMAN SOULES: Pam Baron.

MS. BARON: Well, I was one of the proponents of the two-step discovery sanctions, because the sense of the Committee was that we wanted to reduce sanctions and under the existing discovery schedules we had in place at that time, we had the time to absorb it. And my point is exactly yours, is now that we have reduced the timing so that it's so critical that a party dragging its feet and continually requiring you to go to the court and seek an order for a sanction you should automatically getting, I think that I would be certainly less tolerant in those situations, and that maybe the first five rulings need to be reconsidered.

Second, I do think of the rule provision as -- maybe not as a sanction, but it needs to explicitly tell the court one option is to adjust the window in these cases because you're losing time.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: It would seem to me that that's exactly right. And I think you're going to have to reconsider the focus. Additionally, some of the items in paragraph 3(a)(ii) go more to the interpretation of what sanction you will enter, not to whether the conduct was that bad.

For example, Item (B), "has destroyed evidence in bad faith." Well, I'm going to say that if you intentionally destroyed evidence that you had reason to believe was relevant, that's going to be just about enough for me.

"Or engaged in other conduct that an order compelling, denying, or limiting discovery cannot effectively remedy," well, again, violating the order ought to be enough. Whether there's an effective remedy

goes to the sanction, it seems to me. So I'd try to separate some of those things out.

And maybe that's a good guideline for the court to consider, because one of the problems that Transamerica has dealt with is also the notice, the constitutional notice of due process, and maybe we can institutionalize a little more of it.

I noticed at the bottom under Item 5 you've indicated that the nature of hearing and evidence is something you're going to further consider, and I think that's probably accurate.

CHAIRMAN SOULES: I think that the Committee is pretty true to what we voted on before from what I see here. They have made the "Expenses for compelling, limiting or denying discovery," that's not a sanction, that goes with just doing it, if the tests are met, which are the tests we were doing them for. Sanctions are really for something else.

MR. KELTNER: Well, maybe that's all right then.

CHAIRMAN SOULES: And I think that we should put in No. 1 that you would get

at least expenses under 2(a), noncompliance with any rule or request that prompts discovery. In other words, whatever happens that requires a discovery response, if it's not done and you have to file a motion to get it done, you ought to at least be able to have a shot at legal fees under (2), so that would be noncompliance with a Discovery Control Plan.

MR. LATTING: Well, I hear you, and I don't necessarily disagree with you, but let's talk about this some. This is contra to what the Committee as a whole has talked about earlier, but I realize times have changed.

CHAIRMAN SOULES: Back before we had the Discovery Rules --

MR. LATTING: I understand. I understand.

CHAIRMAN SOULES: -- No. 1 and 2 were designed to get compliance with a discovery request, if necessary, and you could get expenses. Now we've got other things that stimulate discovery besides the requests themselves, and I think it's consistent with that.

Okay. Anyone who has any comment about this, try to write Joe and get it to him in writing.

And we will take the sanctions matter up next time first. Our next meeting is when, Holly? September 15 and 16. We'll meet here at 8:30 on Friday, and we'll just run our regular session. I think we won't run any risk of running over.

MR. LATTING: Luke, just one second. Write me about your comments on this, please, and if you want to attend meetings of the Sanctions Subcommittee, let me know that so I can let you know when we're going to have our meetings, and we'll be responsive.

CHAIRMAN SOULES: I will probably relieve David Beck of the chair and make him vice chair of Rules 15 through 165 and promote Richard Orsinger from being a member to the chair of that committe, because David is so busy, and that's really going to take some time to get that rule right. I hope that I can get ahold of Richard and have him read some of the transcript that we've had on Rule 166d here and get moving on those rules.

Thank you all for staying late.

(MEETING ADJOURNED 1:45 P.M.)

- -

CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on July 22, 1995, afternoon session, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are $459.50.

CHARGED TO: Soules & Wallace, P.C.

Given under my hand and seal of office on this the 9th day of August, 1995.

ANNA RENKEN & ASSOCIATES
925-B Capital of Texas Highway
Suite 110
Austin, Texas 78746
(512) 306-1003

William F. Wolfe

WILLIAM F. WOLFE, CSR
Certification No. 4696
Certificate Expires 12/31/96

#002,323DJ