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By Mary Ann Vorwerk

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805 West 10th, Suite 301 • Austin, Texas 78701
(512) 478-2752

SUPREME COURT ADVISORY COMMITTEE
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1 NOVEMBER 2, 1985

2 CHAIRMAN SOULES: It's 9:30 and we're
3 going to go ahead and convene.

4 For purposes of your planning -- and I don't
5 know whether you'll be able to -- how many of you
6 will be able to stay, but I'm committed to Sam
7 Sparks and Bill Dorsaneo to complete review of
8 their rules today, and we'll stay until that's
9 done. I will and I guess they will. So that's
10 what we're going to do. Sam has several rules to
11 speak to and then Bill has those items --
12 particular items that he raised yesterday as well
13 as trying to wrap his package up.

14 Judge Clinton has joined us I believe. Is he
15 here?

16 HONORABLE CLINTON: Right here.

17 CHAIRMAN SOULES: Your Honor, we're
18 pleased to have you this morning to confer with us
19 on these harmonized appellate rules.

20 And, Judge Cofer, welcome back, too. We
21 appreciate your being here this morning.

22 Because we have Judge Cofer and Judge Clinton
23 here, I think it would be appropriate to take the
24 appellate rules first so that if they would like to
25 stay for the balance of the session, they are

1 certainly welcome, but if not, then they would be
2 free to go about the rest of their day wherever
3 else.

4 So, Bill, if you would resume. If you have
5 any thoughts you need to go back and gather up from
6 yesterday, well, just take over.

7 We're now in this Joint Report of the
8 Standing Subcommittee on Court of Civil Appeals
9 Rules & Supreme Court Rules.

10 Judge Clinton, do you need a set of those
11 materials or do you have a set?

12 PROFESSOR DORSANEO: All right. I'm
13 going to try to go through this in the same manner
14 as yesterday. And I think we can proceed fairly
15 quickly.

16 To refresh your recollection, yesterday we
17 finished, aside from our discussion of the
18 remittitur rules, with the consideration of old
19 Rule -- or current Rule 373 and proposed Rule
20 42(b). Remember that 42(b) dealt with offers of
21 proof and bills of exception in question and answer
22 form, the problem of Texas Rule of Evidence 103.
23 And please also note that this is the one
24 substantive area that will have to be worked out
25 with the Advisory Committee for the Court of

1 Criminal Appeals. This is one area where we appear
2 to have some further work to do.

3 But at any rate, I think we got through that
4 42(b) for our purposes yesterday. If you'll look
5 at the little memoranda and if we follow the items
6 along, 376a, that particular proposal by Jeremy
7 Wicker (Phon.) has already been taken care of, I
8 believe.

9 377 -- is Ray Judice here? That problem has
10 always also been taken care of, I believe, by the
11 Supreme Court by its order of December 19th.

12 385. This little memoranda says that this
13 change had also been made in Rule 385, and that's
14 accurate. The change that the memoranda is about
15 concerns a proposal, I think, that was made
16 initially to the Supreme Court by this Advisory
17 Committee November 11th and 12, 1982, and finally
18 got put into the rules December -- by the Supreme
19 Court's order of December 19th of this year.

20 But there is one other matter with respect to
21 accelerated appeals that we could take up now. If
22 you look in the Table of Contents for the proposed
23 rules, accelerated appeals are now on Rule 32, and
24 that begins on page 44 of the text. At the
25 suggestion of one of the Houston Court of Appeals,

1 I forget which one now, what is currently Rule 385
2 has been modified in this draft such that
3 accelerated appeals are divided into two types.
4 The one type is the type we have now, the type that
5 are accelerated appeals as a result of the
6 mandatory provisions of the rule, that is to say,
7 "Appeals in quo warranto proceedings" and "Appeals
8 from interlocutory orders (when allowed by law)"...

9 At the suggestion of one of the courts of
10 appeals a new sanction has been added, Section (b)
11 which indicates simply that the court of appeals on
12 motion of any party or on order of the court may
13 advance any appeal and give it priority over other
14 cases.

15 Now, Justice Guittard and I talked about what
16 this proposal would mean and debated about whether
17 the matter should be defined further as to what it
18 means that an appeal may be advanced and decided
19 that the matter was clear enough, that it simply
20 means nothing more than that this appeal can be
21 taken out of its regular order and dealt with
22 before other cases, not that the timetable could be
23 changed or anything like that for filing a record,
24 et cetera, et cetera. So that's the idea. The
25 note indicates that I, at least at an earlier

1 point, would have preferred to have the term
2 advanced, defined a little more. My interpretation
3 of this is that it would not authorize a court of
4 appeals to impose an accelerated appeal, in the old
5 sense, timetable on a regular appeal that is
6 advanced. Understand what I'm saying? But there
7 is that problem.

8 So, I guess the issue is whether you want to
9 change Rule 385 or not with respect to giving the
10 courts of appeals additional authority to what they
11 already have, I presume, to give some cases
12 priority.

13 For our purposes I'll move the adoption of
14 this language that's in proposed Rule 32 either for
15 inclusion in the whole package as proposed Rule 32
16 or as a replacement of current Rule 385.

17 MR. ADAMS: Second.

18 CHAIRMAN SOULES: Discussion? Those in
19 favor of the motion, then please say I. Opposed?
20 It's a unanimous approval.

21 PROFESSOR DORSANEO: All right. Moving
22 along back to the memo which will be pretty -- be
23 through with pretty soon. All right. Now, current
24 Rule 438 you will recall, whether you do or you
25 don't, we have two rules in our current Rules of

1 Civil Procedure that deal with the subject, in
2 effect, of damages for delay.

3 CHAIRMAN SOULES: I don't know if the
4 record properly reflects, that last action dealt
5 with the materials on page 44 of the committee's
6 report, styled Rule 32.

7 PROFESSOR DORSANEO: The current rules on
8 damages for delay are Rules 438 and a part of Rule
9 435. Now, one of the things that our subcommittee,
10 going back to the whole subcommittee appointed by
11 both courts and the Legislature, decided was that
12 we ought to have one rule for damages for delay.
13 That rule is now embodied -- or the proposal is
14 embodied in Rule 84 which begins on page 117 of
15 this text.

16 The second thing, at the suggestion of, I
17 think, mainly Chief Justice Guittard and, I think,
18 Justice Shannon of the Austin court was that the
19 current rules don't provide strong enough medicine
20 in terms of the problem of persons taking appeals
21 for delay purposes. And the proposed rule contains
22 in its first sentence different language from both
23 current rules -- both current Rule 435 and current
24 Rule 438. Look at the first sentence of proposed
25 Rule 84, please. "Where the court shall find that

1 there was no sufficient cause for taking an appeal
2 or writ of error, then the court of appeals may
3 award just damages and single or double costs to
4 the appellee." That language, as the note reflects,
5 is patterned upon language in Federal Rule of
6 Appellate Procedure 38 and gives the -- in our view
7 it gives the court of appeals more discretion to
8 punish, quite frankly, punish someone who makes a
9 frivolous appeal.

10 MR. WELLS: Couldn't -- previously
11 couldn't they apply a 10 percent --

12 PROFESSOR DORSANEO: 10 percent. A 10
13 percent limit.

14 MR. WELLS: Why is that out of there?
15 Are they just wholly unlimited in whatever is just?

16 PROFESSOR DORSANEO: Yes, yes. Limited
17 by justice, not limited by an arbitrary percentage.

18 MR. SPIVEY: What has been the complaint
19 from the appellate judges in the bar about the
20 extent of this abuse?

21 PROFESSOR DORSANEO: Well, I don't have
22 any report from the appellate judges. All I know
23 is that Judge Guittard thought that both Rules 435
24 and 438 weren't very good and that they didn't
25 provide enough flexibility. I don't think that his

1 attitude expressed -- or any of the other judges on
2 our committee that they had an attitude that they
3 were going to immediately start awarding large sums
4 of just damages. But --

5 MR. SPIVEY: I'm concerned about the
6 chilling effect on that because I've had both sides
7 of the case where an appeal was taken and there was
8 a white horse civil appeals' opinion directly in
9 point against the appellate and the Supreme Court
10 ultimately granted writ and reversed. And it seems
11 to me that it is -- unless there's some clear abuse
12 present that it has such a detrimental effect to
13 discretion to appeal, that it's not warranted. It
14 doesn't seem to me that it's particularly one side
15 of the bar or the other is affected, but it seems
16 to me that we ought not to just look for ways to
17 close the door to the courthouse, trial or
18 appellate.

19 CHAIRMAN SOULES: Justice Wallace.

20 CHIEF JUSTICE WALLACE: One problem with
21 the 10 percent is where you have a case and
22 somebody -- it's just so clear all the way up that
23 they had no hopes of getting anything reversed, but
24 there's no -- there's not a liquidated damage
25 situation where you don't have any amount to assess

1 a 10 percent on and that would give the court
2 flexibility to assess a reasonable penalty for
3 frivolous appeals.

4 MR. McMains: Plus there are cases where
5 their 10 percent is not very much money. I mean --

6 PROFESSOR DORSANEO: There still has to
7 be no sufficient cause for taking an appeal. I
8 mean, that's a pretty tough standard.

9 MR. SPIVEY: Maybe Justice Wallace can
10 answer that. I just am not that aware of an abuse,
11 and I know that the judge has obviously seen more
12 than the practicing lawyers do. But I have no
13 hesitancy in considering it if it generally is a
14 problem of abuse, but I'd rather see us attack the
15 specific problem of those instances where no relief
16 is available now, rather than just open it up to
17 everybody.

18 CHAIRMAN SOULES: Buddy.

19 MR. LOW: I think what Broadus is mainly
20 concerned with is it discourages somebody from
21 attempting to improve the law or change the law.

22 Isn't that what you're saying? That is, if
23 you feel the law is a certain way and should be
24 changed by the appellate court, it discourages one.
25 You might have a situation -- in Turner the law was

1 fairly clear. And I'm not saying there might not
2 be other points, so it would be a dampening factor
3 on somebody that just had a strong belief that we
4 should change the law on a particular point. And
5 it would give the appellate court the right to say,
6 "Well, look, he has no Texas case that supports
7 this." That would encourage him then to look for a
8 whole bunch of other points whereas he may want to
9 take it up on one clean point where he can argue
10 the philosophy of the law, but has no cases to
11 support him. And it would discourage that, I
12 think.

13 MR. SPIVEY: I was thinking specifically
14 the case of Patton versus Shamberger (Phon.). It's
15 a Supreme Court case. And they granted a writ in
16 that case and reversed the court of appeals when
17 there was a two-year old court of appeals opinion --
18 at that time the court of civil appeals -- directly
19 against the petitioner, the appellate. And we just
20 thought we were right and the court was wrong and,
21 you know, the Supreme Court agreed with us. And,
22 of course, you would have no problem if the court
23 granted relief, but it seems to me that you're
24 running a mighty big risk to appeal with the case
25 in directly on point.

1 We just filed an amicus brief in a case this
2 week or last week that there's a two-year old
3 Supreme Court opinion, with all deference to Judge
4 Wallace, that we think is just absolutely wrong,
5 and I was glad to see the appellate lawyer have the
6 guts to challenge it because he had a case that, I
7 think, showed that the -- the Supreme Court case
8 was white horse, directly on point. It just had
9 such disastrous results in his fact situation, and
10 the facts were a little different, but the
11 application of the law would have been the same.

12 MR. BEARD: Shouldn't it be more bad
13 faith than anything else? A couple of years ago we
14 had a canon in the Supreme Court that you can't
15 even appeal a divorce case on the ground that, of
16 course, they didn't have jurisdiction in the
17 divorce, but the parties -- one of the parties
18 didn't believe in divorce, their religion didn't
19 allow it. I would think that's kind of frivolous
20 myself, but I don't know that the man should be
21 assessed damages for it. I really think it ought
22 to be bad faith.

23 MR. SPARKS: You know, we rejected
24 yesterday a rule under the federal rules of
25 Representative Hill. It was, in effect, a

1 frivolous lawsuit rule. So we're doing something
2 in the appellate courts that we're not doing in the
3 trial courts. That doesn't make a whole lot of
4 sense to me.

5 PROFESSOR DORSANEO: Well, it makes sense
6 to me to have this kind of rule because it is
7 fairly clear to me that a lot of lawyers continue
8 with a case and appeal it because they've had it so
9 far, and they just continue to do the appeal and
10 maybe if they had a rule that they could show their
11 clients, say, "Well, we may run into a problem if
12 we continue this bad adventure," maybe they
13 wouldn't proceed.

14 MR. SPIVEY: You know, I wouldn't have
15 any problem with a bad faith requirement because I
16 agree that if somebody is just appealing for the
17 purposes of delay, then they ought to be struck.
18 But it seems to me the interest on judgment would
19 take care of much of that.

20 PROFESSOR DORSANEO: Let me point out one
21 other thing, Broadus, that I didn't mention. Rule
22 438 also is a little bit different in another
23 respect. It says, "where the court shall find that
24 an appeal has been taken for delay and that there
25 was no sufficient cause." This draft says, "where

1 the court shall find there was no sufficient
2 cause." Now, the reason in our meetings why that
3 was cut down eludes my memory.

4 MR. McMains: Well, the reason actually
5 is that the interpretation the courts should put on
6 the delay only penalty is that it had to be that
7 there was the bifurcated or dual test that you had
8 to find both that it was frivolous and that it was
9 taken for delay only before you could impose the
10 mandatory penalty. And the way the courts have
11 always gotten around that, the ones that do impose
12 the penalty, and there aren't that many, probably a
13 dozen in the last 20 years, but the way they got
14 around it was to apply the just damages rule, which
15 was the other rule. And that one you couldn't
16 exceed the 10 percent but you could award somewhat
17 less.

18 PROFESSOR DORSANEO: Yeah, I think that's
19 right, Rusty, right. Now, but to put this in
20 context, too, I personally, I do, you know, some
21 appellate work and I am not afraid of courts of
22 appeals punishing a lawyer who is acting in good
23 faith if this is put into play. I'm not worried
24 about that. I would be a lot more worried about
25 trial judges doing a Rule 11 number on me than I

1 would be worried about the courts of appeals, you
2 know, assessing damages against people or just
3 trying to do their job.

4 MR. McMAINS: Would you feel more
5 comfortable if you put a limit on it? I mean, is
6 that your problem?

7 MR. SPIVEY: Well, I think it just needs
8 a little bit more identification of a specific
9 problem that's addressed to without being
10 subjective. We would never had the -- perhaps if
11 we hadn't had Judge Tunks on the trial bench,
12 Shamrock versus Tunks might never have come up
13 because poor Kronzer would have been afraid he was
14 going to bankrupt him.

15 PROFESSOR DORSANEO: Well, what should we
16 do?

17 CHAIRMAN SOULES: Well, I haven't heard
18 anyone make remarks about the courts, but it
19 doesn't seem to me that we've seen a lot of
20 appellate court, appellate judge persuasion that an
21 attempt to change the law is just going to get
22 squelched. I mean, it may be overruled, but the
23 lawyer who feels he's got a cause like you have
24 had, Broadus, and told us about and we knew about,
25 who really feels that, I don't believe is going to

1 run afoul of a court finding that there was no
2 sufficient cause for taking an appeal where it's
3 clear in your brief. You say, "There's the law.
4 It's against me, but I'm -- it's not right. It
5 should be changed." And that's your shot.

6 MR. McMAINS: If you file it.

7 MR. SPIVEY: But the best example given
8 over here -- and I'm just guessing that Pat was
9 talking about the Shelby Sharpe (Phon.) case. You
10 know, I think a lawyer ought to have the right to
11 challenge something -- the unconstitutionality of
12 something no matter how absurd it may seem to
13 others. You know, I've been accused of being
14 absurd before and the jury would agree with me and
15 occasionally a judge would agree with me. And it
16 seems to me that's part of what the process of law
17 is about.

18 Now, on the other hand, if we have somebody
19 that's creating a specific abuse or you can build
20 in some constraints so that it doesn't have that
21 chilling effect, I see nothing wrong with
22 occasional examples of bad faith or just pure
23 delay, because -- but you ought to have something
24 in there that it would at least place the lawyer on
25 notice that he's fixing to get zapped. Let him

1 brief the point and show the court why there's not
2 an absence of good faith there.

3 MR. SPARKS: Or at least advise his
4 client of what just damages are.

5 CHAIRMAN SOULES: Tom. And then I think --
6 David Beck, do you still have some comments
7 you want to make, too?

8 MR. BECK: I had a question to ask. I
9 mean, the courts have a rule now that they can
10 impose for what they believe are frivolous appeals,
11 and I would be curious to know how many times that
12 rule has been invoked, say, in the last year. I
13 mean are we talking about --

14 MR. McMAINS: Three times.

15 MR. BECK: I'm sorry?

16 MR. McMAINS: Three times that I know of.

17 MR. BECK: That's all? Just three times?
18 And so what -- Bill, what are we trying to do, just
19 put more teeth in the rule?

20 MR. McMAINS: Yes, that's -- the real
21 problem is that a lot of them simply say on their
22 face -- "we can't even" -- "it is true that they
23 don't have" -- "didn't have any reasonable basis
24 upon which to appeal, but we're not going to hold
25 that it was for delay only."

1 MR. BECK: Well, were any of those cases
2 the type cases that Broadus is concerned about?

3 PROFESSOR DORSANEO: No, they're cases
4 where there really is no -- where there's stupid
5 appeals. I mean, that's just -- that's just where
6 somebody is appealing because -- well, the ones --
7 my opinion of them is somebody is appealing because
8 we're still fighting. We've been fighting all this
9 time and we don't want to quit.

10 CHAIRMAN SOULES: Okay. Tom Ragland.

11 MR. RAGLAND: Under this proposed wording
12 of this Rule 84, what is the standard of review by
13 the Supreme Court or does the Supreme Court have
14 jurisdiction to review a finding or an assessment
15 of damage by the court of appeals?

16 JUSTICE WALLACE: Where the court of
17 appeals has assessed the penalty?

18 MR. RAGLAND: Yes, sir.

19 CHAIRMAN SOULES: They've applied a legal
20 standard. It says there was no sufficient cause of
21 taking the appeal.

22 MR. RAGLAND: Sufficient cause, is that
23 the --

24 MR. McMANS: Well, I would assume that
25 your position was that there was no just cause. I

1 mean --

2 MR. RAGLAND: That's the question. I
3 don't know the answer.

4 MR. McMAINS: No, I'm saying, but the
5 court of appeals is having to make that
6 determination and the just cause is probably a
7 legal issue, a legal standard, and therefore,
8 reviewable on writ, would be my opinion. Now, we
9 might ought to put that in the rule.

10 MR. LOW: What? The Supreme Court, in
11 other words, could affirm the case but find that
12 the court -- that there was just cause? Is there a
13 procedure for that now that that can be done, the
14 appellate steps can properly be taken? That's a
15 new point.

16 MR. McMAINS: Well, you would be offended
17 by the judgment, so I would think you would have a
18 right to file an application for writ because the
19 only way they can get to you is by judgment.

20 MR. LOW: Yeah, but's a new point to the
21 Supreme Court, right?

22 MR. McMAINS: Right.

23 MR. LOW: I just wondered if the present
24 practice is the rules are sufficient to preserve
25 that point so that the Supreme Court would have

1 that right. That was the question I have.

2 CHAIRMAN SOULES: Okay. Specifically
3 what does someone suggest we do with proposed Rule
4 84?

5 MR. BEARD: Well, I'm opposed to anything
6 that has a chilling effect on what a lawyer thinks
7 he ought to do. When the Legislature put that
8 penalty on doctors' cases, a lot of lawyers are not
9 going to start against the doctor looking for that
10 evidence because if they don't find it, they get
11 burned, personally, in the process. I just think
12 it's bad to have a chilling effect on what lawyers
13 are going to do.

14 PROFESSOR DORSANEO: Well, I think when
15 you call it a chilling effect, that you -- and just
16 to characterize it, I think that lawyers perhaps
17 take appeals without sitting down and analyzing
18 beforehand whether they really have an appeal. And
19 I think the rule ought to encourage lawyers to
20 function in a lawyer like manner and not to do
21 something without getting into due consideration.

22 MR. SPIVEY: But what do you do about --

23 PROFESSOR DORSANEO: That's not a
24 chilling effect.

25 MR. SPIVEY: What do you do about the

1 case where you -- there's a case on point all
2 right. But it's directly against you and it's
3 fresh, it's Supreme Court and yet you generally
4 think the Supreme court is wrong and you want to
5 exercise your right to challenge the Supreme Court
6 because you've got a set of facts you say are
7 different.

8 CHAIRMAN SOULES: We've got a 10 percent
9 penalty now which doesn't work in unliquidated
10 damage judgments.

11 PROFESSOR DORSANEO: Or when cases don't
12 have damages.

13 CHAIRMAN SOULES: What?

14 PROFESSOR DORSANEO: Or non-damage cases.

15 CHAIRMAN SOULES: Or a non-damage case.
16 So we -- we've got a -- at least a ten percent
17 penalty and liquidated damage awards. And we don't
18 have anything -- Judge Wallace pointed out to take
19 care of awards -- judgments for other than
20 liquidated damage amounts.

21 MR. BEARD: If we've only had three cases
22 out of all the appeals and everything -- I think
23 it's kind of like the guilty that we turn loose
24 because of their constitutional rights. And I
25 would rather just leave it alone.

1 CHAIRMAN SOULES: Okay. But we do have
2 one point here that Justice Wallace wants to speak
3 to and it's this last sentence, which is an
4 important change and probably a real needed change
5 as far as the appellate court's burden would be
6 concerned.

7 Justice Wallace, do you want to speak to
8 that?

9 JUSTICE WALLACE: My impression is that
10 more often than not the appellate court is more
11 prone to want to assess this penalty when somebody
12 just screwed up his appeal, I mean it should never
13 even be in appellate court from the brief they
14 write.

15 And with that on us, on the appellate court,
16 okay, if you're going to assess a 10 percent
17 penalty, then you're going to have to brief the
18 case for him from the word go and make sure there's
19 no point there upon which he could appeal. Now, if
20 the -- if the judge is so upset with a lawyer he's
21 willing to do that, then maybe we ought to let it
22 be. But if we take away that burden, just say,
23 "The guy just screwed up and he doesn't know enough
24 to be in the appellate court, so we're going to
25 slap a penalty on him," I think that is that

1 chilling effect we've been talking about. So I
2 have questions about this last sentence, that you
3 don't -- that the court doesn't have to look for
4 non-preserved errors. In other words, you don't
5 have to do the briefing for him, you don't have to
6 check into the case to all that extent. Every
7 appellate judge I know is so busy right now I don't
8 think he wants to take on a briefing job for some
9 lawyer who screwed up his brief.

10 CHAIRMAN SOULES: Are you suggesting,
11 Judge, that that change be made or not be made?

12 JUSTICE WALLACE: Not be made.

13 CHAIRMAN SOULES: Well, there's the quid
14 pro quo to the court. The way it is now if the
15 judge is going to try to find for delay only and no
16 sufficient cause, he has to go through the entire
17 record and find out if there is any other reason
18 than what's been presented, basis on which that
19 appeal can be taken.

20 MR. SPIVEY: Well, why not put the burden
21 on the lawyers to raise this issue? I don't want
22 somebody taking just a meritless appeal against me,
23 but I guarantee you if you stick All State or TEIA,
24 for instance, in a property damage or a small case,
25 they're going to appeal anyhow. I'm not for

1 sticking TEIA and All State either, because they're
2 litigants, generally, in this judicial system. And
3 I just don't like the concept of discouraging them
4 from appealing unless they're -- you know, if you
5 have a clear abuse, if it's a clear abuse, bad
6 faith, but you ought to have a finding like that
7 rather than just leaving it discretionary, because --

8 MR. McMAINS: It's always been.

9 MR. SPIVEY: I'm not sure that the
10 appellate court's discretion is a heck of a lot
11 better than mine sometimes.

12 CHAIRMAN SOULES: Well, what if this were
13 changed to say that the appeal was taken in bad
14 faith and that there was no sufficient cause for
15 taking the appeal?

16 MR. McMAINS: That would suggest that bad
17 faith is something different. And what I'm trying
18 to get at -- what is it?

19 PROFESSOR DORSANEO: It's subjective. We
20 want an objective standard, I think.

21 MR. McMAINS: As long as you change
22 anything -- I mean, if you change anything from
23 where we are, you're still creating a standard
24 uninterpreted which is going to be discretionary
25 with the court of appeals. And that's what the

1 function of it is.

2 CHAIRMAN SOULES: Other than the point
3 made by Justice Wallace --

4 MR. McMAINS: No matter what you call it.

5 CHAIRMAN SOULES: -- that there's no
6 avenue for punishment other than cost for frivolous
7 appeal in a case other than liquidated damage
8 award, what's wrong with what we've got? It's got
9 a ten percent cap, it's got some standards in it
10 that have been used -- the "for delay only" has
11 caused the court some problems. They can't seem to
12 really find the evidence that, you know, that's
13 what's in the other guy's mind. Those are the
14 problems with it. But do we need to change it or
15 are we willing to live with it?

16 David Beck.

17 MR. BECK: I have another question aside
18 from the philosophical concerns that Pat and
19 Broadus have. I don't know what "just damages"
20 means. I mean, does that mean that a court of
21 appeals in its discretion can just arbitrarily
22 assess any damage sum they want? I mean there's
23 going to be no evidentiary hearing, obviously, and
24 I'm just not sure I want them to have that much
25 discretion.

1 CHAIRMAN SOULES: That's the difference
2 between just damages and 10 percent.

3 Harry Reasoner.

4 MR. BECK: Maybe the way to handle the
5 non-money judgment problem is just to come up with
6 some multiple of costs rather than just to have
7 this open-ended just damage provision in here.

8 CHAIRMAN SOULES: Harry. P MR. REASONER:
9 Well, I see from the notes that the just damages,
10 as I understand it, was adopted from the Federal
11 Appellate Rules, and I've just been curious whether
12 there's any learning on that. You know, my
13 impression would be that this is something that the
14 court is going to very rarely apply. I am
15 concerned about eliminating delay and injecting
16 sufficient cause standing alone, because I don't
17 think you ought to sock people for stupidity,
18 having done some stupid things myself in practice.
19 And the way it's written now, delay implies bad
20 faith to me. Now, of course, that does make the
21 courts very reluctant to apply it.

22 CHAIRMAN SOULES: How many feel just on a
23 quick show of hands that we can take care of the
24 unliquidated judgment by some multiple of costs?
25 All right. How many feel that that should not be

1 the answer to that problem? Well, it's pretty --

2 MR. ADAMS: I think there's an
3 alternative, and that is you can put a percentage,
4 like 10 or 15 percent -- or not to exceed -- just
5 damages not to exceed 10 or 15 percent.

6 CHAIRMAN SOULES: Well, I'm talking about
7 the -- where the judgment does not have a
8 liquidated amount. It's for -- it's an injunction
9 proceeding or something where there is not any
10 liquidated amount.

11 MR. REASONER: Well, does anybody know
12 what the federal courts do in this area?

13 MR. McMAINS: Yeah, not much.

14 MR. LOW: They also have a procedure
15 where sometimes they interview -- you know, they --
16 they're now starting to arbitrate, you know, and
17 get to talk to the lawyers after the appeal is
18 filed and that kind of stuff. They got a lot of
19 things they do that we don't want to get into.

20 MR. McMAINS: If the truth be known, the
21 5th Circuit has penalized less than the state
22 courts have.

23 CHAIRMAN SOULES: Let's get a consensus.
24 How many feel that the rule ought to be essentially
25 left as it is with a 10 percent cap and then speak

1 to the problem of how to handle the judgment other
2 than liquidated amount? How many feel that that's
3 what we ought to do? Okay. How many feel that it
4 shouldn't be changed at all? That's pretty much an
5 even division.

6 MR. REASONER: What about in the
7 unliquidated cases putting a "such multiple of cost
8 as the court shall find just?"

9 MR. McMAINS: Well, that's about 300.

10 MR. REASONER: Well, let me say, you
11 know, that the places that I think you'll find
12 abuse are in the unliquidated cases where somebody
13 is trying to create an uncertainty or something to
14 prevent a deal from closing.

15 MR. McMAINS: Cloud title or whatever.

16 MR. REASONER: Typical abuse is in tender
17 offer cases where law firms really ought to be
18 assessed. They just use the courts until the
19 investment bankers can cut deals.

20 MR. LOW: But the thing is, do you want
21 to close the courthouse doors to people because
22 there's been only a slight problem? The problem
23 just doesn't seem to have been that great. And
24 then --

25 PROFESSOR DORSANEO: Why do you distrust

1 the judges so much that that's what they're going
2 to do? They're not going to do that. They
3 haven't.

4 MR. SPIVEY: Bill, let me test your good
5 faith. Instead of penalizing the client who's
6 incapable, we assume, presuming a good lawyer is
7 making this decision, why not address the penalty
8 to the lawyer? That's us. Because that's who
9 really makes the decision on the recommendation of
10 the client and doesn't have to accept employment
11 for appeal.

12 MR. LOW: Well, you've started meddling
13 now.

14 MR. SPIVEY: That's right.

15 CHAIRMAN SOULES: Okay. Does anyone have
16 anything new on this now? We need to move on with
17 our agenda.

18 PROFESSOR DORSANEO: Let's vote.

19 CHAIRMAN SOULES: Does anyone have
20 anything new on this?

21 MR. RAGLAND: I have one.

22 CHAIRMAN SOULES: All right. Tom.

23 MR. RAGLAND: Just a question. If the
24 rule is adopted substantially as worded here where
25 it says that "the damages be assessed to the

1 appellee," how is this going to be apportioned in
2 the event of multiple appellees?

3 MR. SPIVEY: That's a frivolous
4 statement. Let's penalize him.

5 CHAIRMAN SOULES: All right. I'm going
6 to break this down in order to give Bill some
7 guidance. How many feel that the percent
8 limitation of the present rule should be retained
9 at 10 percent? Hold your hands up.

10 MR. McCONNICO: Liquidated cases --

11 CHAIRMAN SOULES: On liquidated cases.
12 Of course, it doesn't apply to anything else.

13 MR. McCONNICO: Yeah.

14 CHAIRMAN SOULES: Seven. How many feel
15 that just damages should be written into the rule
16 as opposed to a percentage limitation? Five. I
17 guess -- how many feel that there should be some
18 percentage other than 10? One.

19 All right. How many feel that a multiple of
20 costs is an appropriate remedy for a case where
21 there is not a liquidated judgment? Ten. How many
22 feel that some other way to handle that would be a
23 better way?

24 MR. LOW: I do, but I don't know what it
25 is.

1 CHAIRMAN SOULES: And if so, what is your
2 way. Here's Harry.

3 Finally --

4 MR. McMAINS: Luke, if I may add
5 something on that. If you're really talking about
6 costs, what you're really talking about are the
7 attorney's fees. No, what --

8 CHAIRMAN SOULES: Are they talking about
9 costs from the trial court and on appeal and so
10 forth?

11 MR. McMAINS: No, no, I mean -- what I'm
12 saying is, if you're really talking about trying to
13 do or undo the wrong of the frivolous appeal that
14 Harry is talking about, then -- you know, rather
15 than the -- if you don't have any money damages to
16 do it, shouldn't it be some form of a fee schedule.
17 Isn't that really what the damage is?

18 JUSTICE WALLACE: But aren't you getting
19 into an entirely new fact finding duty on the part
20 of the court of appeals to determine what
21 reasonable attorney's fees would be?

22 MR. McMAINS: The question is whether or
23 not you want to -- at the Motion for New Trial
24 stage you should know whether or not the guy has a
25 reasonable basis for complaint, and you could prove

1 up the attorney's fees at that time.

2 MR. REASONER: Or you could remand it for
3 finding of attorney's fees.

4 PROFESSOR DORSANEO: That would be nice
5 if we rewrite that. Why don't you move that? Make
6 them pay the appellee's attorney's fees.

7 MR. REASONER: Well, I would permit a
8 multiple of them.

9 PROFESSOR DORSANEO: At some rates you
10 wouldn't need to do that.

11 MR. REASONER: No, I guarantee you, if
12 it's a matter that's worth appealing, they'll sit
13 and calculate "Well, hell, we'll just throw in the
14 other side's attorney's fees." I mean to achieve
15 delay.

16 CHAIRMAN SOULES: How many feel that the
17 -- some arrangements should be written into the
18 rule for the court to either assess or remand for
19 assessment of the prevailing party's attorney's
20 fees in a frivolous appeal?

21 MR. BECK: What do you do about a
22 contingent fee, Harry? These guys make a lot of
23 money.

24 MR. REASONER: That's a good point, but
25 Rusty has tricked me again.

1 MR. ADAMS: Not with frivolous appeals
2 you don't.

3 MR. BECK: You would be the appellee.

4 CHAIRMAN SOULES: Or limited to fees on
5 appeal.

6 MR. McMAINS: No, but you're really
7 talking about limited to a situation where there
8 wasn't liquidated damage. I mean, you've already,
9 as I understand the vote, has already kept the 10
10 percent ceiling.

11 CHAIRMAN SOULES: Well, not necessarily.

12 MR. BECK: I think it's broader than
13 that, Rusty.

14 MR. BEARD: As I understand you go from a
15 third to 40 percent you get a big judgment. Lay
16 about seven percent on that other party, that would
17 be some penalty from a big judgment.

18 MR. McMAINS: Well, you can go 10 percent
19 now for frivolous appeal against an appellee under
20 the current rule.

21 MR. SPARKS: So, you get 20 percent, at
22 least, on a judgment, plus a possible multiple cost
23 if we go into it. That's not a bad deal.

24 MR. McMAINS: My suggestion was to cover
25 only the problem of what -- when you don't have a

1 liquidated damage. I mean, my understanding of
2 where the committee was and the context in which I
3 made the proposal was if you've got a damage number
4 which is affirmed -- and obviously I think you
5 would require an affirmance before you could
6 penalize the other the side for having taken an
7 appeal, which corrected or modified, anyway it
8 wouldn't be appropriate.

9 HONORABLE WOOD: Of course, also you've
10 got a number of cases where you'll have some
11 liquidated damages and some recovery of specific
12 property, like a trespass to try title case
13 sometimes.

14 MR. McMANS: Right.

15 HONORABLE WOOD: I beg your pardon?

16 MR. McMANS: Right. Of course, assuming
17 that there was a supersedeas bond filed, and you
18 know, what that -- there's been an assessment of
19 some kind.

20 MR. SPIVEY: You know, I'm concerned that
21 we don't consider the unwritten portion of the rule
22 and the effect of it. I really think this is a
23 basic philosophical argument and it's something
24 that we're -- it seems to me that we're -- if we've
25 got a specific problem, let's address the specific

1 problem. And it seems to me that there ought to be
2 some fact finding, not just the amount of the
3 damages, but there should be a standard in the rule
4 that the court has got to find were violated before
5 they oppose a sanction.

6 CHAIRMAN SOULES: Well, it's in there.
7 It's in 358.

8 MR. SPIVEY: It seems to me that no
9 sufficient cause is just like that's a pretty girl
10 or handsome man.

11 CHAIRMAN SOULES: No, we've already voted
12 not to use that. Well, as I understand it, we
13 voted to -- well, we haven't really, I'm sorry.
14 I'm in error. Are we going to maintain the
15 standard in the present rule that -- for "delay
16 only" and "frivolous"? How many feel that those
17 standards should be retained?

18 MR. BECK: Wait a minute. I thought --
19 the present rule talks about delay and not
20 sufficient cause.

21 CHAIRMAN SOULES: Okay. "Delay and not
22 sufficient cause." How many feel that that dual
23 standard should be retained? Nine. All right.
24 How many feel that the proposed Rule 84 standard
25 should be used instead? That's four. The

