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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE
JULY 22, 1995
(AFTERNOON SESSION)

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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

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

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 ABSENT:

Hon Sam Houston Clinton
Paul Gold

JULY 22, 1995 - AFTERNOON SESSION

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(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

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

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

25 MR. LATTING: That's right.

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

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

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

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

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

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

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

16 CHAIRMAN SOULES: Don't ask
17 questions like that.

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

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

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

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

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

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

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

7 CHAIRMAN SOULES: Where is
8 Chapter 10, Joe?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The other concept in that introductory

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

9 MR. LATTING: Does it apply to
10 interrogatories?

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

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

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

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

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

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

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

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

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

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

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

25 Well, it seems to me that the safe harbor

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

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

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

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

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

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

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

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

25 The second sentence of paragraph (d),

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

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

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

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

1 underlying pleading that's been challenged.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 CHAIRMAN SOULES: Oh.

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

5 MR. LATTING: Well, I wrote
6 you.

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

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

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

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

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

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

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

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

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

25 The next provision, the next sentence

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

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

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

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

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

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

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

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

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

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

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

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

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

5 MR. LATTING: All right.

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

12 MR. LATTING: Yeah.

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

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

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

1 actual damages.

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

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

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

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

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

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

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

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

4 And I asked, "And did what?"

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

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

17 PROFESSOR ALBRIGHT: I think
18 we're having a problem about what the
19 legislature meant by "due diligence" here.
20 Did they mean "due diligence" as defined in
21 (1)(3), or did they mean something different?
22 And if we don't define it, then what we're
23 doing is leaving it up to the courts to define
24 it, which is one way to handle it.

25 But what I'm thinking is, maybe another

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

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

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

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

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

25 And the real question is, do we want to

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

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

7 MR. HERRING: You leave it out.

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

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

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

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

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

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

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

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

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

7 MR. LATTING: The Visigoth
8 provision.

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

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

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

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

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

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

18 CHAIRMAN SOULES: Yes.

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

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

25 MR. LATTING: That's a crazy

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

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

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

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

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

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

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

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

17 MR. HERRING: That's already
18 built in.

19 CHAIRMAN SOULES: Where is it?

20 MR. HERRING: In (a).

21 CHAIRMAN SOULES: (a)?

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

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

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

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

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

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

12 CHAIRMAN SOULES: Well --

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

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

1 all of these things when you filed a lawsuit.

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

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

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

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

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

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

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

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

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

