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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

May 17, 2002

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 17th day of May, 2002, between the hours of 9:01 a.m. and 12:16 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

Votes taken by the Supreme Court Advisory Committee during this session are reflected on the following pages:

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CHAIRMAN BABCOCK: Okay. We're on the record now. Welcome, everybody. We start as usual with the report from Justice Hecht. Is there anything to report?

JUSTICE HECHT: I visited with Judge Womack last week, and he indicates that their Court has talked about our appellate rules changes and is going to make a final decision this coming week and tentatively are of the view that all the changes are good except they're not sure they're going to join us on Rule 47, and so we'll just have two rules if that happens, and he's got -- they've got a couple of other changes that are unique to their Court or criminal cases, so we'll see what those are.

But I told him I didn't anticipate that those would be problems and I hoped they would act as quick as possible because we hadn't bothered them about this because of the election cycle, but it's getting time to do something about these. So that's -- hopefully at the June meeting I will have -- we will know where we are on the appellate rules.

We have received a letter from the Governor that was -- the issues were public at the time, a couple, three weeks ago, asking us to re-examine Rule 202 and saying that he has heard that there are abuses involving

Rule 202, which some of you use some and some of you don't, and Rule 202 is one of the discovery rules that allows taking of testimony before a cause of action is filed, so we need to look at that. And we have gotten one unsolicited letter that says it works fine. So so far it's one to one, but one of them is the Governor, so...

Then we have a letter from Constable Hickman raising some issues regarding executions, and so we might need to look at those. I haven't mentioned them to you yet, Judge, but those are Rules 646 to 653.

And then we received a request from Fred Bosse, Representative Bosse, who is Chair of the House Civil Practices Committee, indicating that they're concerned that our Rule 76a, which has to do with the sealing of court records and unsealing, is -- whether it's working as it should and whether there should be legislation; and if so, what; and they've sent us over a bill that may get introduced asking us to look at that; and, of course, we're happy to oblige on that.

So that's 202, 646, 653, and 76a; and Chris can give us some additional details when we get to working on 76a about what the House committee's concern is, but we'll look at those. What else?

MR. GRIESEL: That's it.

JUSTICE HECHT: That's it.

CHAIRMAN BABCOCK: Okay. What -- can you tell us where the Jamail committee is?

JUSTICE HECHT: Yeah. Sort of. We haven't met since this committee met last. We had a scheduled meeting, but people weren't -- people had conflicts, and I talked to Joe a couple weeks ago, and he is drafting a rule regarding ad litems. And, coincidentally, the Federal committee just adopted significant changes in the rule on -- Federal rule on masters, and, of course, we have a rule on masters, and not the same as ad litems, of course, but we may -- they've done a lot of work, and so we may want to look at that.

But, anyway, Joe said he would have a report soon on ad litems and referral fees, which is another issue that he's working on, and that -- I think, I haven't talked to Tommy either, but I think maybe he and Tommy are working on an offer of judgment.

MR. JACKS: I've circulated -- well, Elaine and I have been kind of doing double duty for that committee and this committee on --

JUSTICE HECHT: Right.

MR. JACKS: -- further investigation of offer of judgment, and Elaine will have the report about that I guess when we get to that agenda item. On -- I've circulated amongst the Jamail committee a draft of one of

my two assignments, and I've got the other one ready to go, and I'm about to send it out.

JUSTICE HECHT: Okay. So there's that. On class actions, the committee, the Jamail committee, is still sort of unresolved as to how to go forward. Again, the Federal committee met just two weeks ago, and they're going to make -- they propose to make significant -- well, I should say extensive changes in Rule 23 of the Federal Rules of Civil Procedure, but they're not very -- nobody thinks that they move the world. They mostly have to do with appointment of attorneys for the class and getting the judge involved in attorney compensation more and tweaking some of the certification issues. So they have been under discussion nationally for about a year and a half to two years and will doubtless provoke more comment, and -- but I think there's not an idea that these are sweeping changes or that they will address some of the serious problems in class actions. So I don't think the Jamail committee has been -- they have been kind of watching to see what would develop of the Federal rules committee, and so I don't know that they -- how far along they are on that.

And then on mass litigation, repeat litigation, or mass tort litigation, there has been some talk among lawyers in both the plaintiffs and defense Bar

about some sort of multi-district litigation panel, some sort of consolidation of these cases beyond what's permitted by Rule 11 of the Rules of Administration, and I think the Jamail committee is still thinking about those things, whether they would be a good idea or not and how best to implement them. So I suspect we'll get a report from them on that in June. We'll have the summer to worry about it and start on it in earnest in the fall, is my guess.

CHAIRMAN BABCOCK: Okay. Great. Thank you. With respect to the Rule 202 matter, Bobby, Steve Susman is not here, but you're vice chair of that subcommittee, whether you know it or not, and so if you could pick up the ball on Rule 202, just get with Debra and make sure you get the materials that we need to look at.

MR. MEADOWS: All right. Is this for this meeting?

CHAIRMAN BABCOCK: No.

MS. SWEENEY: This afternoon.

MR. TIPPS: We'd like a recommendation by 9:30.

HONORABLE SCOTT BRISTER: He's ready for trial, Judge.

MR. EDWARDS: Not before 1:00 o'clock.

CHAIRMAN BABCOCK: Pick a jury by 1:00.

MR. MEADOWS: I'm glad to know we'll have Steve's help on this.

CHAIRMAN BABCOCK: And executions, that looks to me like, Judge Lawrence, that's your bailiwick, so if you would do that. And 76a would be Orsinger and Albright. Alex, apparently is it -- it's Representative Bosse, right?

MR. GRIESEL: Yes, sir.

CHAIRMAN BABCOCK: Representative Bosse asked us to look at a 76a issue, so that's your subcommittee, so if you-all would get with Chris and find out what it is that they want us to look at and get after it, and that will work great.

So the first thing up today is offer of judgment, and I got a number of e-mails about this over the last day or so, and people wanted to know whether it was going to be first, and sure enough, it is. So, Elaine.

PROFESSOR CARLSON: As you know, at our last meeting we had a pretty extensive discussion on the desirability of having an offer of judgment rule and took a vote, and the Court has requested that we present a rule for their consideration. So I hope today we won't spend our time rehashing whether we should have a rule when that has been debated, but instead to focus today on the

components of a rule that we would propose to the Court.

Since we last met our subcommittee met by phone conference, and we -- and our subcommittee is John Martin, Judge Peeples, Tommy Jacks, and myself, and the consensus was that it would be fruitful to speak to rule-makers in other states that have the Federal rule and variations thereof to try and get a sense of what seems to be working, what seems not to be working, and what the concerns and fall-off have been of adopting that kind of procedure.

Tommy Jacks and I had a phone-a-thon the other day meeting with -- I think we met with six different folks who had a variety of rules, stemming from Florida, which has the most teeth in its rule, to those states, a couple states, that have slight variations on the Federal rules, and I really hate to admit that Chip is right, but --

CHAIRMAN BABCOCK: You're getting this down, right?

PROFESSOR CARLSON: One of the consensus, clear consensus that we can discern in talking to those jurisdictions that use the Federal rule that shifts only costs and not other litigation fees, is that the rule is largely ineffective and it's simply not used, and it has not resulted in a significant promotion.

In talking to Florida, which, as you may recall, Florida has the rule that has offer of judgment shifting significant litigation costs, including attorneys fees, expert fees, trial preparation, as well as costs of court. The gentleman we spoke to in Florida said that his take on it was that it is not so effective as to promote settlement -- I think that's fair, Tommy. You tell me if that was your impression, but he said it certainly is used as a strategy to shift costs in large cases and that they do see quite a bit of use in the Florida experience.

Tennessee, which has something akin to a Federal rule, their rule committee felt it was ineffective. A commission was appointed. They did an extensive study of offer of judgment, and they were not able to come to a consensus. Their rule has -- they have no proposal on the table, although they think they need something different, which was interesting; and I understand there's significant research been done there, and we'll follow up on that.

One of the concerns that we heard from several of the folks we chatted with was a concern to what extent you shift costs and at what point constitutionally, you know, that affects litigants' access to the courts under what would be akin to our open courts provision, and I think that issue is being litigated in Colorado. That

was my impression.

No one reported any serious malpractice concerns that we spoke with, and, of course, we didn't speak to everyone that has the rule, but of the folks we spoke to said that they felt that that really kind of fell under the attorney judgment privilege and that did not -- the fallout of adopting an offer of judgment rule was not malpractice cases brought against the lawyer for guessing wrong in the offer or the denial of the offer.

Almost everyone we spoke to said they didn't see it used in nonmonetary cases at all, but that it was used primarily in monetary cases.

What I propose that we do today in the interest of time and focus, is that we go through the various factors that could be incorporated in an offer of judgment rule one by one and get the committee sense, looking at the same time at what I'll call the Jamail proposal, the Rule 166b that was on the web page, and then like Dell Computer, we'll go build you a rule.

The first -- and in the memo that I disseminated at the last meeting, it was on the web page, the March 1st memo beginning on page 15 enumerates different factors and maybe some pros and cons on how we might proceed under the various factors, the first one being the timing for making an offer of judgment.

One of the purposes, of course, of the offer of judgment is to encourage serious consideration of a proposed settlement at an earlier stage of litigation before significant costs are incurred. That's what the purpose supposedly is. Should a party be able to make an offer of proof immediately after service of process, some point after service of process, some point after substantial discovery, not until after adequate time for discovery, and how long before trial. That's really the first issue that we need to look at, the timing of when we would allow a party to make an offer of judgment that potentially would shift from that point forward costs and whatever litigations costs we decide are appropriate or we recommend to the Court.

I think we want to be mindful that you don't want to do it too early in the litigation because it's really not fair because the litigants aren't likely to have seriously assessed the bona fide merits of either side. On the other hand, you don't want to do it too late in the process because then you're really not shifting very many costs. It's just going to be on the eve of trial.

The way the Jamail proposal is set up under Rule 166b(5)(c), an offer of judgment can be made up to 10 days before trial. So it doesn't really have a beginning

point that I could see, but it does have an ending point. Our subcommittee when we initially discussed this thought that an offer of judgment would be appropriate after a reasonable time for discovery, whether this committee thinks that's too late for purposes of fulfilling the rule, you know, we're interested in your feedback.

So I guess the first thing I would throw out is does anyone have any comments or concerns or ideas about what's the appropriate timing on when an offer of judgment could be made to potentially shift the cost?

CHAIRMAN BABCOCK: Elaine, again, when did you say you thought was the best time?

PROFESSOR CARLSON: A reasonable time after discovery.

CHAIRMAN BABCOCK: Okay.

MR. HAMILTON: Can we get some idea of what we're going to be shifting? Because that may make a difference on the timing. What kind of costs and expenses are going to be shifted?

PROFESSOR CARLSON: Well, that's probably the most controversial matter, but maybe it is the appropriate matter to take up first. We certainly can do that.

CHAIRMAN BABCOCK: How does everybody feel about that? Paula.

MS. SWEENEY: Well, I just think -- did you say a reasonable time after discovery --

PROFESSOR CARLSON: You can make an offer of proof. An offer of judgment. I'm sorry.

MS. SWEENEY: Discovery begins, ends, is substantially completed?

CHAIRMAN BABCOCK: In the middle of it?

MS. SWEENEY: Or does it just stop after the word "discovery"?

CHAIRMAN BABCOCK: Yeah. Judge Medina.

HONORABLE SAMUEL MEDINA: One of the complaints that you'll always get when you say that is, well, from the defense perspective, by the time the plaintiff files the suit, they've really discovered it, if it's a big case, and they've done it, so reasonable from what perspective is going to be my problem.

CHAIRMAN BABCOCK: Well, and it's like the no evidence summary judgment rule. You know, that's the same kind of language there, and most people -- I think a lot of people just wait 'til the end of discovery so that there's no question about it.

HONORABLE SCOTT BRISTER: That's what the comment suggests.

CHAIRMAN BABCOCK: And that's what the comment suggests.

HONORABLE SCOTT BRISTER: Usually, you know, after the discovery period is over, it's fine, but usually before the discovery period is over, it's not. So if it's reasonable time for discovery there's going to be a strong argument on the 166a comment that means right before trial.

CHAIRMAN BABCOCK: And that means that you're going to be way, way, way down the road and now all the money is spent.

PROFESSOR CARLSON: And just to follow up on Judge Brister's comment, I think there's a number of court of appeals cases that say it's a case-specific inquiry, but I think most people feel when discovery closes.

HONORABLE SCOTT BRISTER: But every one of them says one of the main things you look at is the discovery deadline, which is the end.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: You know, we're seeing -- as in Enron, we're seeing with regard to the tire company that the judge is holding hearings on up in Arkansas that went public yesterday, that there's a tendency on the part of some of these defendants in a lot of these cases where the big costs are involved to destroy, hide, and do other things with evidence.

I understand in a case I'm involved in that

as of today there's a mandamus going to be filed to get back stuff that had been produced with respect to a deposition on written questions. Here's what happens. The question is, "Did hydrogen sulfide get outside the bounds of the refinery when there was an explosion?" On the same day that a no evidence motion for summary judgment was filed the defendant got out a notice to take the deposition of somebody we didn't know who it was on written questions. We got that discovery back two weeks after trial was supposed to have started. It was already stopped by another mandamus.

What they had taken the deposition of was a testing company that they had employed who had tested outside the refinery and had found hydrogen sulfide all over the place outside the refinery. Now, you get into this motion for judgment bit and you run into things like that, and some of these -- you know, what are you going to do?

CHAIRMAN BABCOCK: So your point is that --

MR. EDWARDS: My point is that the later -- if you're going to it at all, it should be at the later, the better, because it's not going to be fair; and the people I'm worried about is not the poor people, not the rich people, but people like all of us, because we're the ones if we get stuck, we can afford to pay, and they're

going to come after us.

CHAIRMAN BABCOCK: Okay. Anybody else have thoughts about the timing?

MR. JACKS: Related to what Bill said, the Florida rule has a provision in it, and it's not all that artfully drafted, but what it says is that the court can take into account in determining whether or not to apply the penalty whether the party that made the offer had withheld information --

CHAIRMAN BABCOCK: Uh-huh.

MR. JACKS: -- that the opposing party might have benefited from in evaluating the settlement offer. That's only a partial response to what Bill's talking about, but it does seem to me that there is value in the rule to allow the court to consider certain things, and that might be one of them.

CHAIRMAN BABCOCK: Bill, how does that fit with what you're saying?

MR. EDWARDS: Yeah. I think and what I was -- my thought hadn't been complete. What I'm worried about is that you get an offer of judgment real early on people that it's going to make a difference to and they may be forced to take a settlement before they have an opportunity to find out they're really being skinned.

CHAIRMAN BABCOCK: Gotcha. Yeah.

MR. JACKS: Another point that was brought up by the lawyer we talked to in Florida, who I believe was the chair -- I think he was their Chip Babcock, if I am not mistaken.

PROFESSOR CARLSON: He was a Chip wanna be.

CHAIRMAN BABCOCK: Yeah. I'm not sure that he was like that.

MR. JACKS: But he said that it was his impression, and he said he didn't think there would be much controversy about this if we were to call a bunch of lawyers and ask them the same thing, as Elaine said, that as it works in practice, their rule, he didn't think, promotes more settlements or earlier settlements. He said the thing that does do that is the mediation process, which he thinks has been successful.

I wondered whether the timing or even the operation of a rule could somehow be folded into the mediation processes that we employ, because I don't think there's any court I practice in in the state courts where mediation isn't required whether by standing rule or by custom and practice, and I don't have clear vision right now of how to do that, but it does seem to me that the parties tend to mediate cases at a time when both sides feel that they can evaluate the case. And so we've already got something in our system that kind of has its

own timing and it seems to be working pretty well, and I wonder if we couldn't somehow dovetail the timing of the offer of judgment with the timing that's already in place on mediation.

I mean, in Travis County, for example, the local rule is that the case must be mediated no later than 45 days before trial, and, now, the parties can agree around that and do it later if it's more appropriate for their case, or with a court order they could not do it at all, if there's a case just doomed not to settle.

CHAIRMAN BABCOCK: Okay.

MR. JACKS: But that's almost never done.

HONORABLE SAMUEL MEDINA: I like Tommy's idea on that, and mostly because we're giving people at that mediation an added incentive to want to settle and -- by that time, and I think it works well with the jurisdictions that have the scheduling orders and have things that you try to schedule those when you feel like everybody is pretty well prepared; and like Tommy said, sometimes they say, "Judge, instead of going to the local can we just agree to hire another person to come do this," if it's a specialized case; and I think if they're that far along that probably would work. I join Tommy on that.

CHAIRMAN BABCOCK: Yeah. That's a good idea. Justice Hecht.

JUSTICE HECHT: What is the mediation practice in Lubbock County, Sam?

HONORABLE SAMUEL MEDINA: We have -- of course, we have the South Plains Association of Governments and we schedule that. It's automatic. You automatically go to mediation. We do it in family law cases. We do it in every case, and we do it -- it's at least I think 45 days before trial, but we allow them to go earlier if they want to go earlier, and we have them contact the local center, and there's a time by which they can do it, but they can do it earlier.

JUSTICE HECHT: But everybody has to do it?

HONORABLE SAMUEL MEDINA: They have to do it.

CHAIRMAN BABCOCK: Okay. Bill.

MR. EDWARDS: We have been exploring presuit mediation and if -- in other words, if you have a case and you get the other side and you say, "Look, here's what we've got. Why don't we get together and swap what we've got and get us a mediator and see if we can get rid of this before we even have to file suit?" If we -- when we start thinking of these rules, I think those kind of things or early mediation after suit where you say, "Let's get it mediated before we go through all this" need to be taken into account.

One other thing is, and that is the reasonableness of the offer to settle. A 10,000-dollar offer to settle in a case brought by a quadriplegic against General Motors which is tendered with the answer is unreasonable. A 10,000-dollar offer in the same case which is done after all the evidence and just short of summary judgment being rendered may be reasonable.

CHAIRMAN BABCOCK: Yeah. Yeah.

MR. EDWARDS: And so the timing of the offer can make a difference, and there has to, seems to me, be something reasonable about the offer that's made and not merely made to shift the costs.

CHAIRMAN BABCOCK: What if we did something like having a -- the timing tied to a mediation, if any, and have it far enough in advance of the mediation so that the mechanism of the rule would work? In other words, the time limits would play out, and there would be a default that if there was no mediation then 45 days before trial you could do it or 60 days before trial or some time period? Bill, how would that work?

MR. EDWARDS: I'd have to think about that one a little bit.

MS. SWEENEY: Yeah. Will you say it again?

CHAIRMAN BABCOCK: Well, I was trying to play off what Tommy and Bill were saying and say what if

you had -- if you're going to have a mediation in the case, and most cases in the state now have a mediation, so have the timing mechanism play off that date so that the offer of judgment could be whatever the number of days is, whatever we decide the time period is for the response to the offer of judgment prior to the mediation; and then if there is no mediation, in those cases where it just doesn't go to mediation, then some time period, 45 days before trial, 60 days before trial, something like that.

MS. SWEENEY: Chip.

CHAIRMAN BABCOCK: Yeah. Paula.

MS. SWEENEY: Wouldn't you want to do it after mediation to give the parties an opportunity to resolve the case without sort of that artificial element being inserted in it with the parties having in the back of their mind, "And if we don't get it settled today, we're going to have this offer of judgment issue come up."

CHAIRMAN BABCOCK: Another way to play it. My recollection of talking to the Florida guy, and I think I sent you his name and phone number, so I assume you talked to the guy I talked to.

MR. JACKS: Peter Sacks?

CHAIRMAN BABCOCK: Yeah. He said -- I remember him saying anyway that their offer of judgment rule came up a lot in mediation. In other words, whether

you call it strategic or whatever, that that was something that was in play in their mediation. Did he repeat that to you --

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: -- or say something different.

MR. JACKS: He didn't say that, although we may not have asked the question to elicit it. He said that it was common practice for there to be just sort of a fixed number, like a thousand and one dollars --

CHAIRMAN BABCOCK: Uh-huh.

MR. JACKS: -- is an example that he used. And I suppose that would be a defense offer.

CHAIRMAN BABCOCK: Right.

MR. JACKS: Either that or a plaintiff with some pretty heavy medications, but -- and then the idea was that if there were a defense verdict, well, then the making of that offer would have automatically triggered the cost shifting. The -- we've -- and from my part I'd like to see a rule that avoids that kind of gamesmanship. We've talked in the Jamail committee and I believe here as well about the idea of a cap on the -- the cost shifting, the cap being measured in relation to the recovery by the plaintiff, and I suppose that in itself would take care of just the stock hundred or a thousand-dollar offer across

the board because if they were taken from judgment, well, then there's a no penalty involved.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Chip, the language, you find any rule that would prohibit somebody from just making a hundred-dollar offer so that the offer has to be greater than what the ultimate cost and attorneys fees and everything are so that -- in other words, a lot of people say, "Well, I'll pay costs," you know, or what, so that the offer has to also put another burden on them that the offer would have to be at least equal to costs and attorneys fees and what you're going to penalize them.

PROFESSOR CARLSON: I didn't see that. We didn't look at every single --

MR. LOW: Well, I never heard of it either. It just sounded pretty good.

CHAIRMAN BABCOCK: Why don't we try to stay on timing, if we can.

MR. GILSTRAP: Maybe some clarification would help here. Are we talking about a time limit beyond which you may not make an offer of judgment, or are we talking about a period that has to go by before you can make an offer of judgment?

CHAIRMAN BABCOCK: I think --

PROFESSOR CARLSON: Both.

CHAIRMAN BABCOCK: Are we talking about both? I thought we were talking about just the first.

MR. GILSTRAP: I think that needs to be clarified because I think some people are talking about one and some people are talking about the other.

CHAIRMAN BABCOCK: The rule is -- as the draft that came out of the Jamail committee, I think anticipated there could be multiple offers of judgment.

PROFESSOR CARLSON: Uh-huh. Yes.

CHAIRMAN BABCOCK: So but that may not be a good idea.

MR. GILSTRAP: But you can do it from day one under the draft.

CHAIRMAN BABCOCK: Right. Right.

MR. JACKS: I think, you know, the Florida rule has both; that is, one cannot make an offer until the suit has been on file for, what is it, 60 days?

PROFESSOR CARLSON: I think that's right.

MR. JACKS: And then one must make an offer no later than I believe it's 45 days before trial so that there is a window. Now, I don't suppose anything prohibits multiple offers within the window period under their rule.

MR. GILSTRAP: But, Chip, I think -- I think that the allowing it from day one pretty much encourages,

I think, what some people are talking about, and basically that suit is filed, defendant says, "We offer one dollar."

CHAIRMAN BABCOCK: Right. Right.

MR. GILSTRAP: And if the plaintiff takes nothing, defendant gets his lawyer fees. I mean, that's what they're talking about.

CHAIRMAN BABCOCK: And I sense in the room that nobody thinks that's a good idea, but if somebody does, they probably ought to speak up. Yeah.

MR. HAMILTON: I don't think there ought to be a cutoff time for when you can make an offer, but I have a question about whether or not there are two kinds of offers, one under this particular provision and then just an ordinary offer like we have today that does not invoke any of these consequences, or is there just going to be one offer that always comes under the provision in the rule?

PROFESSOR CARLSON: Different rules and statutes deal with that distinction. Some say any offer that meets this criteria is considered an offer of judgment. Others say you have to enumerate certain things and contain certain formalities to make it clear that it's an offer of judgment. One state you had to go before the court to make -- right, Tommy?

MR. JACKS: Yeah. Actually in Nebraska they

apparently don't seem to mind the court knowing what the offers are. In fact, they insist on it. So it has to be -- the making of the offer and the rejection of the offer have to take place in open court on the record.

HONORABLE SAMUEL MEDINA: This -- I'm sorry.

CHAIRMAN BABCOCK: Judge.

HONORABLE SAMUEL MEDINA: Chip, the reason I want to go back to mediation --

CHAIRMAN BABCOCK: Right.

HONORABLE SAMUEL MEDINA: -- is that oftentimes you here that, "Well, this certain insurance company, Judge, is just making ridiculous offers at mediation, you know, and we've got to do something." Well, a judge can, under what we're doing is say, "Well, I want a status conference between you. Come see me," basically, and we send out notices and say, "How did the mediation go? Talk to me about it," and we -- sometimes that really works. I mean, they have to go on record saying, "We evaluated the case. It's just not worth anything," and, you know, that might be something on record, if we're talking about offers of judgment.

CHAIRMAN BABCOCK: Can I ask this -- and I think that's a good point. Can I ask this question, though? Does anybody think in this room that the rule, as it is currently in draft form from the Jamail committee,

should be in place timingwise from the minute the suit is on file, like the next day the defendant can make an offer of judgment? Does anybody think --

MR. JACKS: Or the plaintiff, for that matter, who may know a lot more about the case than the defendant does, who hadn't gotten the file yet.

CHAIRMAN BABCOCK: Right. Does anybody think -- anybody here think that that's a good idea, that we should have that available? I don't see any hands up, and I don't see anybody talking real loud, so I assume that nobody thinks that's a good idea.

So the question then is, you know, how far down the time line we should go. Where is the 60-day after filing? Is that in Florida, Tommy?

MR. JACKS: The Florida rule.

MR. GRIESEL: It's 90 days.

CHAIRMAN BABCOCK: 90 days? Chris says it's 90 days.

MR. JACKS: That could well be. I've got it somewhere on the computer.

CHAIRMAN BABCOCK: What's the benefit of that? I suppose that 90 days gives you some discovery time --

MS. SWEENEY: Not really.

CHAIRMAN BABCOCK: -- but it's not so far

down the road that --

MR. EDWARDS: 90 days doesn't give you any discovery time. You can't get -- you can't in any way make a response to discovery due less than 50 days after the defendant is served.

CHAIRMAN BABCOCK: Yeah, it doesn't give you very much.

MR. EDWARDS: Well, it may take 10 days to serve them, and that's -- 60 days after filing you don't have anything, and the way things go today, you don't get anything in the first round. You've got to file a motion to compel, have a hearing, maybe a mandamus, what I've seen.

MS. SWEENEY: And I agree with that.

MR. EDWARDS: 60, 90 days don't make any difference.

MS. SWEENEY: At 90 days you're lucky if you've got the defendant's deposition and that you haven't already had two or three or four hearings trying to compel any discovery at all. You can't do something that early in the case.

CHAIRMAN BABCOCK: Okay. Does anybody disagree that 90 days is -- everybody -- we've got consensus that no days is too soon.

MR. JACKS: It depends on the kind of case.

HONORABLE SAMUEL MEDINA: Right.

MR. JACKS: The kind of cases that Bill and Paula handle, they're absolutely right, and then there are lots of small cases on Level 2 schedule where 90 days would be okay.

HONORABLE SAMUEL MEDINA: Why can't we have a range between 90 and -- I mean, I don't know. I hadn't thought it out. Between 90 to X amount of days?

MR. YELENOSKY: Because in a complicated case the defendant will pick the shorter time and then you'd have to cure it in the case.

MR. JACKS: You could perhaps tie it to the Level 2, Level 3 --

CHAIRMAN BABCOCK: Discovery.

MR. JACKS: -- discovery schedules.

HONORABLE SAMUEL MEDINA: That's true.

MR. JACKS: And so in Level 3 you could actually have that as part of the scheduling order and let the court determine that along with all the other things the court has to determine.

MR. EDWARDS: Maybe you can put in a time that's an automatic time that's way down the line somewhere, and anybody that wants to make an offer of judgment before that time has to get leave of court.

JUSTICE HECHT: The -- you know, I don't

sense much of a problem, but I am not the one that asked, but I don't sense too much of a problem in larger cases or certainly in well-lawyered cases. The problems develop when somebody -- and typically in smaller cases, where somebody is just not going to pay or not make an offer, and we do hear a lot of reports from around the state that that's a growing problem.

So we don't want to -- I mean, the tying it to the level might make a lot of sense because, you know, if lawyers want to get together and say, "We don't want this to pied us. We're going to settle our business, and we're perfectly capable of doing that," I don't see why we would want to interfere with that, but it's the cases where it tends to be the smaller cases that -- where the problem seems to be.

CHAIRMAN BABCOCK: So you think tying it to the Level 2, Level 3 is a good idea?

JUSTICE HECHT: Well, it might be.

MS. SWEENEY: It sounds more like Level 1 only.

JUSTICE HECHT: And I certainly don't want to mess up -- certainly don't want to mess up mediation.

MR. JACKS: Yeah.

JUSTICE HECHT: But mediation, surely the cost of mediation has surely got to be a concern in

smaller cases where you've just got a 10- or 15,000-dollar claim and maybe people don't bring that sort of lawsuit, but --

MR. EDWARDS: Not many of them.

CHAIRMAN BABCOCK: Yeah. Ralph.

MR. DUGGINS: I think there should be a mechanism to make an offer, though. I can appreciate what Bill and Paula are saying, and I recognize that you do in most cases need some discovery, but I can think of one very substantial or one real complex case, though, where it's a contract argument and the plaintiff really didn't have any damages, and yet the thing is now in its third year over some what are perceived to be silly tort claims, and I don't think that the damage number is ever going to change. I just think there ought to be some mechanism to be able to do it. I don't know how -- what that is, but...

CHAIRMAN BABCOCK: Yeah. We're all driven by our own practices. I mean, I've got a case just like that, so that's what I think about, but I don't practice the way Bill -- I don't have their kind of docket.

MR. DUGGINS: I appreciate their situation, and those cases, we've got to deal with that, but I just think there ought to be some ability to do it in an appropriate case, whether it's discretionary with the

court or what I don't know.

CHAIRMAN BABCOCK: Well, if we tied it to the tracks, what would our time line be if we did that? For Track 1 when could somebody -- when would it be reasonable for somebody to make an offer of judgment? 90 days? Judge Brister.

HONORABLE SCOTT BRISTER: The Track 1 cases you know what the damages are when they start. They're sore back and neck cases, assuming it's a tort, and they're not going to get a surgery or it wouldn't be a Track 1 case. I don't see why you couldn't do it early.

CHAIRMAN BABCOCK: 90 days?

HONORABLE SCOTT BRISTER: People don't file Track 1 cases, sore back and neck cases, until one year and 364 days after the occurrence for some reason, and all --

MR. EDWARDS: They're trying to settle.

HONORABLE SCOTT BRISTER: All you end up disputing on those cases is whether there was due diligence and service because they're never served.

MR. JACKS: Because the clients always show up in your office one year and 363 days.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, when we were talking about discovery in Level 1, the discussion was

that in those cases discovery is often done immediately before trial. People don't pay attention to those cases until they're set for trial and actually going to go, so I don't know if you want to -- I am not sure how that fits this. You know, do you want to let them have an offer of judgment early to maybe start some of this or do you want to put it off 'til later on when you think the discovery is going to be happening?

CHAIRMAN BABCOCK: What was the thinking behind the Level 1 cases not waiting 'til the last minute to do discovery, that they would settle without discovery?

PROFESSOR ALBRIGHT: Well, I think the thought was, one, a lot of them will settle without discovery; two, you don't want to force them to do a lot of discovery early because in many cases there is no discovery; and so if you force it early then you might be imposing costs on those cases that you're not -- that they're not having before the new discovery rules. So discovery for them, they can conduct discovery any time up to 30 days before trial.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: If there's no discovery, what cost would we be shifting?

CHAIRMAN BABCOCK: Good point.

PROFESSOR ALBRIGHT: That's a good point.

HONORABLE SCOTT BRISTER: Well, on most of those cases they're -- if it's a defendant who's a repeat player, Kroger that gets sued all the time, their deal is "We'll pay your medical expenses to a real doctor, no chiropractors, and nothing else," and that's just the way it goes. And everything else, whether it's a day in mediation or discovery or depositions, is deducted from that. So it's just -- I mean, that's just what they do, and when you're a repeat player, you have something to gain from everybody knowing that's their rules and never violating them. And so it's just cheaper to put those cases to trial.

CHAIRMAN BABCOCK: Okay. Yeah, Frank.

MR. GILSTRAP: Let me just throw something out, just something to talk about. Level 1, you can't make an offer for 30 days; Level 2, 90 days; Level 3, the court has to set the deadlines as part of its pretrial order.

CHAIRMAN BABCOCK: Paula, what do you think about that?

MS. SWEENEY: I am not as worried about Level 1. I think Level 2 is a pretty broad category, and I think 90 days, at 90 days you're not done dealing with the obstructive boilerplate objections. You have not yet been able to get to a hearing in Dallas. Even if you send

your discovery with your pleadings you get the complete obstructionist no answers to anything, including disclosure. Trial courts do nothing about it when you get there, but first you've got to get there, and you're lucky if you've gotten any discovery in 180 days. So I think that it is unrealistic and it would just multiply the gamesmanship by a factor of about five if you did something that early.

I think if you do it, say, X days before trial and tie it closer to trial time then you have an opportunity to have it mean something, but to put it early in the case like something like 90 days --

CHAIRMAN BABCOCK: Judge Brister.

HONORABLE SCOTT BRISTER: How is this different? I mean, we already have this on residential construction cases and to some degree DTPA cases. Within the first 60 days after filing you make a tender, and if that's not accepted and judgment is that amount then the attorneys fees are flipped, and --

MR. EDWARDS: Not exactly.

HONORABLE SCOTT BRISTER: My experience is, of course, it worked fine, and those are within 60 days of filing. It's -- they're not tort cases, but you go out and you look at the house and you decide is that how much it costs to fix it, or if not, you make your choice. The

Legislature has indicated twice that they thought that was okay. Is this different from that?

MR. EDWARDS: Yeah.

MR. GILSTRAP: First of all, I'm suggesting -- and, again, these are just numbers I'm throwing up there as this is when the window opens. I am not talking about when the window closes. You see what I'm saying?

HONORABLE SCOTT BRISTER: But obviously it -- I mean, on those it closes within 60 days of filing. The Legislature thought that was fine.

HONORABLE SAMUEL MEDINA: What happens -- I'm sorry.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: The DTPA on the construction cases is a very finite thing. You have an argument over some part of a house. You're not talking about a -- you're talking about a house that is probably substantially completed. You're talking about whether it's going to cost $675 or $875 to fix the three toilets that don't work. That's a different deal from what we're talking here. Your damages are definitive. You know, you don't have -- you don't have the problems. I don't see any comparison between an over -- broad overall thing that we're talking about here today and something like DTPA, which is a very narrow and very specifically regulated set

of statutes.

CHAIRMAN BABCOCK: Sam.

HONORABLE SAMUEL MEDINA: What happens if, for example, in some jurisdictions you'll say, "You have X amount of days to come up with an agreed scheduling order among the lawyers. If you do not do that, we will enter a default scheduling order," and then if one side is trying but the other one isn't, you have a right to request a hearing before the court and we'll hear what the problem is about why you can't get a schedule.

Why can't this be part of a scheduling order? In other words, give the attorneys an opportunity to come together and see if they can and then you can hear plaintiff say, "Look, I mean, I don't even have discovery. I don't have this. I don't have that." Seems like to me there ought to be some windows there, sometime before trial, but it could be earlier by -- as somebody said earlier, a request at hearing.

CHAIRMAN BABCOCK: Yeah. But if you do that, aren't you just multiplying what the people like you are going to have to deal with?

HONORABLE SAMUEL MEDINA: Except that if I can get it -- if indeed it's going to work --

CHAIRMAN BABCOCK: Yeah.

HONORABLE SAMUEL MEDINA: -- my experience

is 96 percent of the cases are going to settle. They really are. I want to concentrate on those 96 percent and then try my other 4, and if this helps settle them, I want to do that. I'm just seeing it as another -- some more teeth to mediation, to be honest with you.

CHAIRMAN BABCOCK: Okay. Well, what do you think about -- what do you think about Frank's thought that Level 1 cases are 30 days, Level 2 are 90, and Level 3 the court sets it?

HONORABLE SAMUEL MEDINA: As long as it opens the door but doesn't force them to have to do it right then and there. It's got to be -- you know, they could say, "Judge, I don't want to do that."

CHAIRMAN BABCOCK: Frank, you're talking about door opening, not the --

MR. GILSTRAP: We're talking about opening, not closing.

MS. SWEENEY: Can be made no sooner than.

MR. GILSTRAP: Right.

MR. JACKS: There's a third timing question we haven't talked about yet, and that's how long the offer must remain open.

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Well, that's the closing window issue.

MR. JACKS: Not really.

CHAIRMAN BABCOCK: No, no, no. That's how long before you have to accept it or reject it.

MR. GILSTRAP: You're right.

MR. JACKS: There's the window during which the offer can be made beginning no later than -- or no sooner than so-and-so, ending no later than so-and-so else. But then how long is it left open? Under Florida it has to be left open for 45 days.

CHAIRMAN BABCOCK: Right.

MR. JACKS: So that there's time for a party to react --

HONORABLE SAMUEL MEDINA: Sure.

MR. JACKS: -- and presumably to request further information and actually do some things, and it seems to me that's an important feature as well.

MR. GILSTRAP: You're correct.

CHAIRMAN BABCOCK: Should there be a mechanism, too -- and, Paula, think about this. Should there be a mechanism as well that during the period that the offer is open, whether it's whatever period of time, 30 days, 45 days, 60 days, that if somebody feels distressed like this is a coercive offer and there has not been discovery forthcoming that you need to evaluate your case, you can go to the judge and ask for the offer of

judgment period to be extended.

MS. SWEENEY: And I would say any period that you're going to have is going to have to be at least 90 days because right now in a lot of courts you can't even get a hearing in 45 days to get the issue brought to the court's attention. They will tell you literally you can come in in two months for a hearing on anything. It doesn't matter how emergent it is, and so -- and then it's not just in Dallas. It's happening in other parts of the states, or of the state.

So, you know, if you've got a 45-day window and you can't get before the judge for 60 days, they don't have to give you anything.

CHAIRMAN BABCOCK: Bill, then Alex, then Stephen.

MR. EDWARDS: We can solve Paula's problem by simply saying that --

HONORABLE SAMUEL MEDINA: Automatic.

MR. EDWARDS: No. If a request is made to the court that the time is stayed until the court hears it.

MS. SWEENEY: And then I would like --

HONORABLE SAMUEL MEDINA: Automatically?

MR. EDWARDS: Yeah. Automatic stay until the court hears the issue and rules on it.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I was just thinking about the discovery periods. That was one thought I had, is the problem is not so much when you can make the offer but how long the offer is to stay open. And the problem is, is that you need to have the opportunity to conduct some discovery to be able to evaluate this settlement, right, and just -- you know, I don't practice, so I don't know if anybody pays any attention to the 90-day discovery window on Level 2, but is there -- you know, is there some reason to maybe tie how long this offer of settlement has to be open to the discovery period?

MR. YELENOSKY: What 90-day? You mean the nine months?

PROFESSOR ALBRIGHT: Nine months, whatever that time is.

MR. YELENOSKY: Yeah. Nine months.

CHAIRMAN BABCOCK: Yeah, but the thing is about this, though, is that at least the way the draft rule is framed, if I make -- let's say on a Level 2 case I make an offer on the 90th day and then that causes everybody to scurry around and do discovery and a lot of discovery and maybe a motion to leave the offer open for a period of time. All the expenses are running from the time I made my offer, right?

PROFESSOR ALBRIGHT: Right.

CHAIRMAN BABCOCK: So all that activity there is going to be captured under my offer, if it's rejected.

PROFESSOR ALBRIGHT: So it may well really start -- an offer of settlement may well -- offer of judgment may well start the discovery period more realistically than anything.

CHAIRMAN BABCOCK: That may not be a bad thing. I'm just saying we ought to keep in mind that that's something that could happen the way the draft rules are structured right now. Yeah, Stephen.

MR. YELENOSKY: Well, when we talk 30, 60, 90 days, are we talking from date of filing?

CHAIRMAN BABCOCK: That was Frank's proposal. Date of service.

MR. YELENOSKY: Because I'm thinking why wouldn't we go, as we do with the discovery period, trigger it with the first due date, first written response, because otherwise if you have a 30-day on a Track 1 from date of filing, by the time you've served the person and also for, you know, a defendant acting in bad faith who avoids service, having an incentive to avoid service and get served on the 29th day and the next day they can make an offer of judgment. So why wouldn't we

trigger it from a trigger we already have which makes more sense, which is the one that starts the discovery period?

CHAIRMAN BABCOCK: Yeah. Good point. Judge Patterson.

HONORABLE JAN PATTERSON: I have a question for Elaine and Tommy. Are there certain kinds of cases that this is most effective with, or can we identify who we are trying to incentivize, if that's a word, and direct this effort to so that we know the optimum time? I am not sure our goals are articulated, or is it most helpful for the smaller or the larger or the middle, or are we trying to reach all cases? Have we talked about that?

PROFESSOR CARLSON: We really haven't, and other states don't seem to carve out by level of damages. It's just across the board with very few exemptions in most of the states, the types of cases being exempted under the rules. I think anecdotally we've heard that this is probably the most effective in PI cases. Is that the impression you get, Tommy?

MR. JACKS: Well, I think it was created with the routine PI cases in mind. Very little use in cases for not monetary relief. There are some states that exempt family law cases as a class. The -- I get the idea it was created for kind of the routine two-party PI.

CHAIRMAN BABCOCK: Yeah, Judge Medina, then

Bill.

HONORABLE SAMUEL MEDINA: I would agree. I think I'm looking at it from the perspective of, I think Justice Hecht said, the well-lawyered cases. Those are the big ones. Those are either -- you know, by time you're getting there you're going to get settle it or it's just going to trial. You pretty well know on those. It's the fender-bender cases, the ones where the plaintiff's lawyer says, "Well, they're not going to offer anything. What am I going to lose?" Just, you know, roll of the dice. "I'll just go try it in a day or day and a half and see what I can do." I mean, those are the cases that I think this would work at. I think that would be the emphasis.

CHAIRMAN BABCOCK: Bill, you still want to say something and then Ralph?

MR. EDWARDS: The question was what kind of cases will this impact? I believe it's going to impact the cases where the person who has to make the decision has enough personal assets that are non-exempt, the MDs, the professional people, the small business owners, and that sort of thing, where they can actually -- the other side can actually have a reasonable chance, can realistically recover those costs from those parties.

Now, there's another problem, and that is

what happens in those cases where under our unique rules in a contingent fee contract the lawyer can agree to advance the costs for the client, in effect hold a client free from any costs that come out of the lawsuit, and where there is no requirement that the client has to pay that money back after the lawsuit. Now, you get an award of a hundred thousand dollars in defense costs, you've got that contract sitting out there, and now you've got the situation where when you're talking about accept the offer or not accept the offer where the lawyer is in an absolute conflict with the client because the lawyer has now got a hundred thousand dollars in the other side's expense sitting on his back where the client doesn't. I see a terrible conflict in that kind of case.

CHAIRMAN BABCOCK: Yeah. If I could offer a friendly amendment to what you're saying, is in the first instance the people who have non-exempt assets, what you're saying is that the coercive effects of this rule are going to be felt by these people.

MR. EDWARDS: That's correct.

CHAIRMAN BABCOCK: As opposed to the insurance company who are too big --

MR. EDWARDS: Too big or too small or people whose lawyers have agreed to indemnify them for the cost of litigation.

CHAIRMAN BABCOCK: Yeah. Does anybody disagree with that, by the way, with what Bill just said, that somebody with non-exempt assets who's in litigation is going to feel the weight of this offer more keenly than other people?

MR. GILSTRAP: I'll have one point, and that is if this begs the question of whether insurance companies have to pay the attorneys fees, but if insurance companies do have to pay the other side's attorneys fees, I think they're going to feel it, too.

MR. EDWARDS: They will feel it, but it won't be coercive.

MS. SWEENEY: Yeah.

CHAIRMAN BABCOCK: Well, maybe not in the same way, but it will be coercive to some degree because it raises the stakes of how much money is at issue. That's why I've always wondered about this rule from the defendant's perspective, because you go into mediation and there are certain, you know, dollars that are at risk; but now the plaintiff makes a demand and you go into mediation, and now maybe there's additional risk for a solvent defendant; whereas, you make an offer of judgment going back to a not solvent plaintiff, there's nothing to risk. Yeah, Buddy.

MR. LOW: I think we've created a second

Stowers thing.

MS. SWEENEY: Exactly.

MR. LOW: I've got insurance. The first thing I'm going to do is -- say they offered to settle. I say, "I hereby demand you settle, therefore" -- then is that Stowers where they're going to have to pay the attorneys fees, so you've got -- and then you'd have a second Stowers.

The thing that worries me, though, the most is on deadlines. I'm defending a case, and it's a sore back case, like Judge Brister says, but we depose the doctor, and he says, "Well, I think that, but I may send him to doctor so-and-so," and time runs on and then Bill says, "Okay," finds out the guy probably does have a ruptured disk. It expires. He sends him. He has a surgery, and here I am caught. I mean, that's not fair. That's a different case. So what do you do in those situations?

CHAIRMAN BABCOCK: Well, how are you caught? If we have a window closing?

MR. LOW: No. No. I'm caught because say, for instance, I offered to settle, but just for a sore back.

CHAIRMAN BABCOCK: Gotcha.

MR. LOW: And, now, you know -- and they

offer, you know, a modest settlement for if there's surgery or something, and now it ends up a different case.

HONORABLE SAMUEL MEDINA: Why can't you make -- I'm sorry.

CHAIRMAN BABCOCK: Yeah. Go ahead, Judge.

HONORABLE SAMUEL MEDINA: Why can't you make -- again, make your request to the court and show --

MR. LOW: No, that may be the answer. I'm just saying if you just automatically cut days and there's nobody that has any discretion to do that, then -- maybe that would take care of it.

HONORABLE SAMUEL MEDINA: Yeah. You need an out.

CHAIRMAN BABCOCK: Yeah, Elaine.

PROFESSOR CARLSON: In Florida they have both a statute and a rule because they couldn't figure out whether it was procedural or substantive.

CHAIRMAN BABCOCK: We're smarter than that, aren't we?

PROFESSOR CARLSON: You bet. The rule provides for the shifting of attorneys fees when the offer of judgment isn't accepted and the judgment is more favorable, but it includes a number of factors that the court looks at, including the then apparent merit or lack of merit of the claim.

MR. LOW: Okay.

PROFESSOR CARLSON: And other factors as well, the number of proposals, the closest of questions of facts in the law, whether the party making the proposal has unreasonably refused to furnish information, whether it's a test case on a matter of jurisprudential importance. So there is some ability, at least under the Florida scheme, to punish the person who makes too early an offer by saying, "No, we're going to judge the reasonableness by the then apparent merits of the case," but then, of course, you get into the satellite litigation on the reasonableness.

HONORABLE SCOTT BRISTER: And you just end up with the judge -- that's a rule that just says the judge decides when to shift fees and when not, and that's Rule 13, and the answer is in an elected state judges say, unless this is a case where it's not going to matter, "no."

PROFESSOR CARLSON: But we could factor in that notion.

MR. LOW: I have been in a lot of cases where I wish I had -- you know, they changed completely, and if I had been wise for my defendant client, I probably would have taken the first offer, but...

CHAIRMAN BABCOCK: It goes both ways,

doesn't it?

MR. LOW: Yeah.

HONORABLE SCOTT BRISTER: That's right.

CHAIRMAN BABCOCK: Well, why don't we get back to Frank's proposal, which was 30 days, and Stephen makes a good point, probably should be from the first response of pleading for Level 1, 90 days for Level 2, and then the court sets it for Level 3. All right. Is that --

MR. YELENOSKY: Just for whatever it is that triggers the beginning of the discovery period. Isn't it the due date of the first written response to discovery?

CHAIRMAN BABCOCK: Yeah. Whatever that --

MR. YELENOSKY: Rather than response of pleading?

CHAIRMAN BABCOCK: Yeah. Whatever that trigger is.

MS. SWEENEY: My brain stopped right at that point. Will you say the rest of it after that?

CHAIRMAN BABCOCK: Yeah. 30 days for Level 1, 90 for Level 2, and the court sets it for Level 3.

MS. SWEENEY: I have the same concern about 90 days being way, way, way too soon.

CHAIRMAN BABCOCK: Would you still have that concern if the offer was open for a period of time and if

you weren't getting your discovery you could basically file a -- Bill, you called it a stay motion, until you could get to the judge to talk to him about making them keep the offer open longer?

MS. SWEENEY: Well, of course, underlying every comment I make today and every comment discussing the issue, I think this is a terrible idea and this committee has no business doing it, but --

CHAIRMAN BABCOCK: You said that before, didn't you?

MS. SWEENEY: I did, but not today. Not today.

CHAIRMAN BABCOCK: And so the record today is clear...

MS. SWEENEY: Okay. The record is now clear. So for Bill's proposal to work I would be more comfortable if it was an automatic stay when the request is made to the court until the issue is resolved, and we're going to probably have to figure out what that means, "issue is resolved"; but either way you have at least until after the court ruled on whatever the concerns were.

MR. EDWARDS: I think it has to be more than just a stay. I think it has to be the beginning of the time for computing what costs are going to be recoverable.

MR. YELENOSKY: Right.

MR. EDWARDS: Not just staying it.

MR. YELENOSKY: Right.

MR. EDWARDS: So if you lose on your argument that it drops back.

MR. YELENOSKY: Right. You find out at the hearing that it's been running for --

MR. EDWARDS: You've got 30 more days to consider it, but it's been running for three months while you're getting your hearing or having a mandamus or whatever else you're doing.

CHAIRMAN BABCOCK: Yeah. And why is the -- what's the rationale for -- let's say you file your motion to stay, and you go have a hearing, and the judge says, "No, I'm not going to -- you know, you've got plenty to evaluate this case, and so I am not going to extend it, so you've got 30 days to," you know --

MR. EDWARDS: Because you won't know what the judge is going to do until after you got a ruling.

MR. YELENOSKY: Right. You have an ambiguous offer of judgment up until the judge rules, and you don't know whether you're at risk or not.

CHAIRMAN BABCOCK: The offer of judgment is not ambiguous in the sense that it's on the table, you know what it is. The reason why you want it open longer

is because you say, "Well, I don't have enough -- I mean, they're stonewalling me on discovery, and I can't evaluate this until I get -- until I get my discovery." So you're going to hurry up and do a whole bunch of discovery and then you're going to say, "No, I reject it" or "Yes, I take it."

MR. EDWARDS: Correct.

CHAIRMAN BABCOCK: And if you take it then you're not at risk for attorneys fees, right?

MR. YELENOSKY: Right.

CHAIRMAN BABCOCK: Because you've taken it. If you reject it then you are at risk, but the whole point of the offer is, well, okay, you ought to be at risk for that because at the end of the day we're going to prove that you should have taken it.

MR. YELENOSKY: But aren't you at risk for having done -- or on the hook for having done discovery, which you should have been allowed to do before the defendant was able to trigger your obligation?

CHAIRMAN BABCOCK: Yeah. I can see that as a closer question, myself, but who ought to bear that risk? I mean, and Paula's and Bill's hypothetical is, you know, the defendant who is stonewalling you, and so it's not fair to make us have to ultimately pay because you stonewalled us. That's what they would say.

MR. JACKS: Right.

CHAIRMAN BABCOCK: And the defendant would say, "Oh, the discovery was abusive and overreaching and our objections had merit and that's why we've got the discovery rules to go arbitrate those," etc., etc.

Yeah, Paula.

MS. SWEENEY: I think the question that has to -- maybe fits into this, maybe fits into a later part of the discussion, is what are we really -- are we trying to actually shift costs here or are we trying to coerce settlements due to the fear of shifting costs? And there's a difference there. Are we trying to make people take less than they would otherwise be entitled to, or, I mean, is that really what we're trying to do, get cases out of the system? Or are we actually trying to make people pay other people's costs? What is the -- are we clear on our goal?

HONORABLE JAN PATTERSON: That's my question.

CHAIRMAN BABCOCK: Well, I speak only for myself, but it seems to me that we're doing -- we're doing both, really. We are giving another incentive for people to be reasonable, but -- we're giving another incentive for people to be reasonable, so in that sense we're trying to coerce settlement, but we are also trying to compensate

people when one side or the other has been more than 25 percent unreasonable with the current number we have, the fudge factor we have now, unreasonable in their evaluation and approach to the case.

And that can cut on either side of the docket so that if I'm a -- if I'm a plaintiff who is clearly injured, clearly entitled to some money, and I've got some defendant that just has some rule that says "We're only going to pay X amount" and that's clearly inadequate, then I ought to benefit as a plaintiff and the plaintiff's lawyer ought to benefit if there's a contingent arrangement from that reluctance to make a fair offer of settlement.

And you can flip it around the other way and see why that would be fair to the defendant as well so that you're providing a tool to coerce settlement, true enough, but you're also providing compensation for people that have been victimized by parties that aren't being reasonable in their evaluation of the case and in their offer of settlement. That's just me thinking, but that's what I think.

MR. EDWARDS: To me it's a hammer, and it's a hammer on the folks that I've mentioned. You have a plaintiff that has a 90 percent chance of winning who gets a 50 percent or 25 percent offer. 10 percent of those

people, those plaintiffs, are going to get hammered.

CHAIRMAN BABCOCK: That's too much math for me, but I think I know what you're saying.

MR. EDWARDS: Just on statistically they're going to get hammered, and, again, it's not the -- it's not the poor fellow that can run through bankruptcy or doesn't even care that no one's going to come after him. It's not the major corporation that can pay or the insurance company that can pay that and go on. It's the people in between who have nonexempt assets that are subject to having to pay for what can be massive court costs that might be incurred.

CHAIRMAN BABCOCK: Well --

MR. EDWARDS: And, you know, that -- let me give you an example. In our town, for whatever reason, all the hospitals have reduced the amount of insurance that doctors have to have to be on the staff to a hundred thousand dollars. If I'm trying a case against the doctor, they're sure going to go to a hundred thousand because these folks think they're going to get a big reduction in their insurance premiums doing that. I make a hundred thousand-dollar offer that is totally unreasonable in terms of the amount of damages that are involved and everything else, and because it's early in the game it gets turned down. Now, who's on the hook?

I'm going to win the case, probably get a million dollars, and there you have probably 150, $200,000 in court costs that are going to get strapped on somebody, and it's not going to be me under those circumstances. It's not going to be my client. It's going to be somebody who can afford to pay it.

CHAIRMAN BABCOCK: Right.

MR. EDWARDS: Out of their pocket. Not out of the insurance company probably.

MS. SWEENEY: Well, and that's the next question, is are we going to require the carriers to pay this or the parties?

CHAIRMAN BABCOCK: Well, I don't know that this rule is going to try to address that. But maybe it is.

MS. SWEENEY: If you're coercing, who are you going to coerce then, the party or the carrier? If you're not coercing the carrier then there's no coercion.

CHAIRMAN BABCOCK: Well, we talked about that earlier, and I am not sure that most policies wouldn't pick this up. I mean, they would pick it up, right?

MR. JACKS: Well, you know, John Martin couldn't be here today because of a graduation in his family, I think, but John before our last meeting

actually pulled policies of a number of his clients, and there were some where he thought they would cover it, some where he thought they clearly would not. Now, John's practice, as you know, is on the defense side of the medical malpractice cases, so those are the kinds of policies he was looking at.

CHAIRMAN BABCOCK: Yeah, I know the media special perils policy that is the common one in the media industry I think would pick this up.

MR. EDWARDS: Would pick it up?

CHAIRMAN BABCOCK: Would pick up the offer of judgment litigation costs if we had such a rule.

MR. EDWARDS: Would it pick it up as supplementary payments or as part of the limits?

CHAIRMAN BABCOCK: Probably part of the limits. I haven't looked at it, but probably part of the limits.

MR. EDWARDS: For those of you who don't know, supplementary pay means in addition to your limits.

CHAIRMAN BABCOCK: Right. Yeah, I don't think so. I would have to look at it, though. But that's an issue, but I don't know how we can address that. That's just what kind of coverage people have.

MR. EDWARDS: Well, I know, but it's part of what we're talking about.

CHAIRMAN BABCOCK: Yeah. And can I just respond to something Bill said? I think -- I don't think anybody in the room -- if they do, speak up, but I don't think anybody disagrees that there is a coercive effect to this rule that will be felt more keenly by some people than others, and that's just a way of life. I mean, the people in the middle tend to bear the brunt of things sometimes.

So if we're going to have a rule, let's just try to keep that in mind that we try to build into the rule ways that that coercive effect, if it's going to be felt more keenly by one segment of society than others, is ameliorated in some fashion.

Yeah, Paula.

MS. SWEENEY: You know, we're not in front of a jury. We have to talk about insurance, because that is the driving factor in settlement in almost all the cases we're here talking about if we're talking about coercive settlements in personal injury cases; and if, for instance, you say that this cost will come out of the policy limits, as an example, you have a hundred thousand-dollar policy. They only have to come within 75 percent of your best recovery, so they never have to offer more than $75,000. They're going to fight you to the last drop of blood, so it's going to cost $250,000 in attorneys

fees, and no matter how well you do you can never get more than a hundred even if you get the attorneys fees because it comes out of the limits. So the only people who have any leverage put on them under that circumstance are the plaintiffs who are judgment-proof.

So, yes, we have to talk about insurance and, yes, we have to talk about who is it that's going to bear this penalty, this coercive sanction penalty, if it's imposed. Is it going to be the individual defendant who cannot make his carrier pay? Or is it going to be the carrier, and is it going to be part of the limits, or are we going to tax it over and above the limits?

CHAIRMAN BABCOCK: Can I just ask Paula a follow-up question on this? Paula, if you got -- if you as a plaintiff have made a demand under this offer of judgment rule to a defendant and the insured -- the insurance company is defending the case, but they write their insured and say, "By the way, we got this offer of judgment, and you should be aware that we're not going to cover these litigation costs. That's not under our policy, so we reserve our rights in that respect." That's the situation you're positing, isn't it?

MS. SWEENEY: I am not positing that they're going to write him a letter.

CHAIRMAN BABCOCK: Well, I mean, but

wouldn't they? Wouldn't they have to?

MS. SWEENEY: Those are two questions, not one, and I am not being disingenuous.

CHAIRMAN BABCOCK: Okay. Well, let's say that logically you would think they would write a reservation letter.

MS. SWEENEY: Logically.

CHAIRMAN BABCOCK: Okay. So now you've got a situation where the defendant insured is at risk possibly, potentially, and the insurance company is also at risk but not for litigation costs arguably. That's the situation, that's the hypothetical you're posing, right?

MS. SWEENEY: It is one way that it can play out. Yeah.

CHAIRMAN BABCOCK: The other way is that they just don't tell the insured, and at the end of the day when you win, when your demand is proven right at the end of the day, then all of the sudden the insured wakes up and they get a big bill from you that the insurance company says, "Oh, by the way, we don't cover that."

JUSTICE HECHT: I'm having trouble seeing how they couldn't, how they have got any claim that they don't have to pay that. Why would the -- doesn't the insurance company -- if they're not paying costs or fees at all, I could understand it.

MR. LOW: But, Judge, let me tell you what happens. It's just like mold. Now you try to get a policy, they will exclude it. You wait. This thing hits, what the policy is today is not what the insurance company is going to be writing tomorrow.

JUSTICE HECHT: Well, I understand that, but they can't exclude Stowers, and it seems to me this is just like Stowers.

MR. LOW: Well, that's what I was raising the point earlier. Then you would get to a Stowers situation and not a question of coverage because they're going to exclude it. There are things that are argued, punitive damages, were they covered, were they not.

JUSTICE HECHT: I don't see how this is any different than Stowers.

MR. JACKS: Some policies exclude payment for penalties or sanctions.

MR. LOW: Right.

MR. JACKS: And so if this were deemed to be one of those things then it wouldn't be covered.

CHAIRMAN BABCOCK: But Paula says, you know, in practice they might not write a reservation letter, and if they don't, then I think Justice Hecht is right. Then they're in a Stowers situation because their duty to the insured is compromised by their -- you know, "We know in

our head we're not going to pay this, but we're not going to settle either" and thereby put their insured at risk.

MR. JACKS: I could make room for the possibility that -- I think Buddy made the point earlier that this may be creating sort of a second aspect of Stowers.

CHAIRMAN BABCOCK: Right.

MR. JACKS: And it may be.

CHAIRMAN BABCOCK: Did the Florida boys have anything to say about that?

MR. JACKS: I don't think we asked about their practice in that regard.

CHAIRMAN BABCOCK: Because it ought to be raised in Florida.

MR. JACKS: Yeah.

CHAIRMAN BABCOCK: This problem should be raised in Florida.

MR. JACKS: I don't think -- I know Elaine looked at some of the Florida cases, and I don't -- did you see any cases about the insurability?

PROFESSOR CARLSON: I didn't. I really didn't study all the cases, either.

MR. JACKS: Yeah.

PROFESSOR CARLSON: That did not come up in our conversation, but we didn't really ask about it.

MR. JACKS: No.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Under the Florida statute or rule, are they treated -- if the award is granted, is it treated as an award of costs, or is it considered a fine or a penalty or sanction?

PROFESSOR CARLSON: My understanding was a cost.

MR. DUGGINS: Well, if it's denominated in the rule as a cost of court, the policies, at least as written today, are going to cover it. I don't disagree with Buddy. They may start to exclude it, but I think it's going to be hard to differentiate in the rules if it's cost of court.

MR. LOW: Right. But, I mean, you get into questions of like fraud is not covered, constructive fraud is. You get into so many different interpretations, what is this, and they will say like -- they will do like the IRS, that "We don't care what you call it. This is really what it is."

That's what the -- and so, I tell you, our policy and what we put on this is going to have a great effect because are we by this rule trying to just shift, or are we telling people, "Look, we don't want you to have a jury trial. We want to do everything we can to

discourage your trial"? If we're saying that, that is a bad, bad thing, because right now you've got to go to mediation, you've got to go to that. Are we just saying we don't want to try any more cases?

So I think the way it's worded and the policy behind it is going to have -- even though it might be one thing, we don't want to tell people that, I don't believe.

CHAIRMAN BABCOCK: Well, Buddy, you say you don't want a jury trial. I mean, you wanted -- I mean, your highest and best use is if you can get the defendant on the other side to pay a reasonable settlement. That's better for you and your client because he gets his money earlier. You get your cut earlier. You know, we all go home happy.

MR. LOW: Well, that's not necessarily true.

CHAIRMAN BABCOCK: If your cut's big enough you go home happy.

MR. LOW: Well, but --

CHAIRMAN BABCOCK: And that's a good thing for you and that's a good thing for your client if it happens, so...

MR. LOW: Well --

CHAIRMAN BABCOCK: But even though they have been quote-unquote "denied" a jury trial, I mean, they go

home happy.

MR. LOW: I know, but each time you do -- I mean, some people want to know, you know, what a jury is going to do, or they're -- and I like to try cases. I mean, you know, okay.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: We have been focusing on the personal injury and insurance, but I can tell you one area where I think this would have a very positive effect is in family law cases where you get to the courthouse and suddenly the division you've been offering all along, which is close to 50/50 is accepted, and if you could have a rule like this applicable to family law cases, at least in Tarrant County, I think you'd cut back significantly on the gamesmanship that goes into those cases.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: One problem with that, with the way the rule is drawn, is there's another exception including family law, and we need to talk about those exceptions because they to me kind of smack of legislation, but I think that's another issue, but right now as the rule is currently drawn it doesn't include family law, comp, several other things.

MR. DUGGINS: I think it should include family law. That's what I'm --

MR. GILSTRAP: I agree.

CHAIRMAN BABCOCK: Tommy. Then Judge Peeples.

MR. JACKS: One of the difficulties you run into in the family law cases is that there's quite a bit of relief that's not monetary. Visitation rights, for example, and so how do you make the determination whether the final decree was or wasn't 25 percent more or less valuable than the rejected offer, where the difference between the relief granted and the offer is not so much on the -- you know, the property division itself may be within the 25 percent parameter, but there were differences having to do with the nonmonetary aspects of distributing it.

CHAIRMAN BABCOCK: Judge Peeples, then Buddy.

HONORABLE DAVID PEEPLES: Yeah. Could Bill and Tommy and Paula elaborate on the pressure they think their clients will feel, the judgment-proof clients? I mean, on the face of it you would think that the judgment-proof plaintiff would not worry about a judgment for costs and so forth. I mean, is it psychological or what?

MR. EDWARDS: Pressure on the judgment-proof plaintiff is that there will be a recovery of some sort

but which will be taken away because of the costs. That's the only real pressure on that -- on that kind of plaintiff. If the offer is insignificant, it would be eaten up by the expenses and fees and that sort of thing, and there's nothing on the table, well, that person isn't going to feel any pressure. They're just going to say, "No, I don't care what the lawyer says. I don't care what anybody says." They're going to say "no," you know, because they can afford to go in there and see what's going to happen.

There's another problem that I see in this as well, an increased pressure on the physicians in this state, because we have what's known as the National Registry where every settlement and every adverse verdict against a physician has to be reported, and it has an adverse impact on their ability to change hospitals, gain privileges, and an adverse impact on their ability to get insurance at the cost they pay for it. What we're doing with regard to those folks is adding an additional risk of the amount of money that they're going to have to pay out of their own pocket to try a lawsuit to stay off the registry list, which is a real hammer on them.

The other thing I see, and it doesn't matter whether we're talking about these things as being damages or supplemental costs, which are paid by the insurance

company, insurance premium rates will be adjusted to incorporate this additional cost, and you can bet when the company starts making that actuarial adjustment, they're going to determine that on the basis that they lose the cost in every case, not some percentage of the cases.

CHAIRMAN BABCOCK: Does everybody understand the registry point that Bill made, because I didn't?

MS. SWEENEY: You've got the National Data Bank. Any time a doctor settles a case or his carrier settles a case, they're now required by law and its burden is on the carrier by legislation, Federal legislation, to report it to the National Data Bank. It's only accessible to insurance companies and hospitals in the credentialing and insuring process, so it's not available to plaintiffs or the public in litigation, and it's already a problem for some doctors who want to settle a case but they're afraid of the data bank, and so it is an issue now.

But now what you're going to get into is a situation where you are -- what Bill is saying, you're coercing a settlement, you're putting him at risk that he's going to have these extra policy costs taxed against him, for example, therefore, has to settle, feels like he has to settle, but at the same time he's got this horrible problem that that's going to go to the data bank, and --

CHAIRMAN BABCOCK: Okay. So the doctor's

sitting there saying, "I don't want to settle. I want my insurance company to fight this thing to the death, even though I'm guilty as sin, because I don't want the settlement reported," and but now he's saying, "Ooh, now I may be at risk for fees if my insurance company doesn't pick this up," and so that's an added coercion. Is that --

MS. SWEENEY: It's an added problem for him, and Bill's other problem is, you know, we've just had the picketing down in South Texas at the courthouses because they can't get insurance, and there's already been legislative hearings held on the insurance issue. There's now only four carriers in the state, one of which is JUA. So there's really three carriers plus JUA, which is the assigned risk type pool that's over some of --

CHAIRMAN BABCOCK: Yeah, but one of your arguments is you think the insurance companies are going to use this rule as a hammer to coerce cheap settlements.

MS. SWEENEY: I'm not making my argument right now. I'm making their argument.

CHAIRMAN BABCOCK: The insurance companies?

MS. SWEENEY: No, the doctors. The doctors can't get insurance. There's only three carriers plus JUA, and there's a bunch of doctors just can't get insurance or it's so expensive they're changing their

practices. They're dropping OB, they're moving out of rural areas, they won't take ER coverage. This is the testimony that was just given to the Legislature that I'm reporting to this committee, and what Bill's point is very true. The insurance companies as soon as this happens are going to jack their rates even further to incorporate it, making insurance unaffordable to even a greater number of physicians, so I think that we need to consider the physical implication.

CHAIRMAN BABCOCK: Yeah, but to flip that argument around, if, as you fear, the insurance companies will use this rule to coerce these horrible settlements, unfair settlements to the plaintiffs, that will lower their costs on the one hand. You know, maybe it will raise it on the other with doctors, but it seems to me that that was a -- that's a yin yang --

MS. SWEENEY: No. I think the rule is unfair both ways. It's unfair to plaintiffs and to doctors. I didn't realize I had been unclear on that. I think it's a terrible rule, and this is another example of that, and the insurance companies will actuarily benefit from it one way or another by, A, coercing cheaper settlements from some plaintiffs and, B, jacking up their rates to doctors.

CHAIRMAN BABCOCK: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: On this registry, if they take it to trial and lose, does that not go to the registry, too?

MS. SWEENEY: Yes. Yeah, but having gone through a bunch of mediations, that's a different analysis if you're sitting there as a doctor thinking about, "Well, maybe I won't lose, maybe I won't lose." And so there is sort of a -- it's a -- that's a real hard sort of psychology, but, yeah, verdicts go. Judgments go. Verdicts -- Tommy, verdicts or judgments? Judgments?

MR. JACKS: I think it's judgments.

MS. SWEENEY: I think it's judgments.

HONORABLE DAVID PEEPLES: Well, a verdict that gets settled and there's no judgment would be --

MS. SWEENEY: Then it's a settlement.

MR. JACKS: Settlements have to be reported as well.

MR. EDWARDS: It's still reported.

HONORABLE DAVID PEEPLES: I guess I don't understand how the doctor's calculus is very different. He's got a lawyer, and they're not going to dismiss it. He's either got to try it and win it or he goes to the registry because he either settled or lost. I mean, how's that different?

MR. EDWARDS: Statistics show that doctors

win about 80 to 85 percent of the cases they try, and for many of these doctors, depending on the exposure, they're willing to take a 15 to 20 percent risk. Now, if you -- the cost of putting on one of those cases is very high from both sides, and if you -- and getting it ready for trial is high on both sides, and so if you crank that into the equation, the pressure on the doctor to not take his chance because of the data bank situation is much higher.

CHAIRMAN BABCOCK: Well, we've strayed a little bit from the topic that Elaine -- the agenda she sat out for us, which is to talk about timing.

MR. EDWARDS: Well, that's why we -- no, we're talking about timing because timing makes a great difference on the amount of knowledge you have and whether you really ought to settle or not settle.

CHAIRMAN BABCOCK: No, I'm not saying we haven't been talking about timing.

MR. EDWARDS: Well, that's what the data bank has to do with it.

CHAIRMAN BABCOCK: But the last couple of minutes maybe not as -- yeah, Stephen.

MR. TIPPS: And on the subject of timing, it seems to me --

CHAIRMAN BABCOCK: You want to take a break, right?

MR. TIPPS: Good idea. It seems to me that the motivation here ought to be to -- if we're going to have this rule with the hammer, it ought to be structured in such a way as to encourage people to settle their cases if they can be settled before either side has the right to hammer the other, either through mediation or through normal settlement negotiations; and so I wonder if we ought not to tie the -- or ought not to make the -- or tie the date on which you can first make one of these offers to the end of the discovery period so as to encourage people to do discovery earlier rather than later and maybe say, you know, 60 days before the end of the settlement -- end of the discovery period you're entitled to make one of these offers and it stays open for 60 days so that the litigants who have been diligent in conducting their discovery are going to be in a better position to respond to that; and there's going to be an incentive to get your discovery done so that if this does happen you can know whether or not to accept it.

CHAIRMAN BABCOCK: Yeah. Jan.

HONORABLE JAN PATTERSON: I think that has a great deal of appeal, because what worries me about this rule is a philosophical one, and I think we ought do everything we can to reduce the gamesmanship or the unintended consequences of the rule and to keep in mind

whatever our goal or incentive is, and I think it's not to have fewer trials. I think it's to benefit a certain class of litigants and to reduce costs for those litigants. And I think that to the extent that you encourage expeditious viewing of discovery and maybe working together, if you can, and I also resist the notion entirely of coercion. I do think that there ought to be more incentives to accomplish this rather than hammers, if that's possible.

And these are just sort of philosophical thoughts, but I don't -- I think we're all thinking about that case in our minds, and I think we need to think about sort of a broader class of cases, but I really agree with Stephen. I think that has some appeal.

CHAIRMAN BABCOCK: Okay. Well, we're -- yeah, Elaine.

PROFESSOR CARLSON: Ralph, I think you asked me earlier, I'm not sure, whether the Florida rule considers this as a cost or a penalty. I'm looking at the rule. It's worded as a sanction, so I misspoke when I said it's considered a cost. It's considered a sanction.

MR. EDWARDS: Which is a penalty.

CHAIRMAN BABCOCK: Yeah. Judge Brister.

HONORABLE SCOTT BRISTER: I'm not sure what the impetus is, but one of the things that just strikes me

from the discussion is one of the things that jurors are the most upset about. I mean, in Harris County the vast majority of the cases we try are very small or borderline frivolous cases, and the jurors really -- I think it carries over to the whole system. This is just a very expensive way to fool around with frivolous cases.

My friends in the plaintiffs Bar that have yellow pages practices that get these cases are kind of stuck because you get the case and then you find out there's really not much to it, but the client thinks it's a great case because they saw your ad saying you would get them money and it wouldn't cost them anything, and they want it. They want the money and it doesn't cost them anything, so why not go to trial? They have nothing to lose. It's not costing them a dime.

And the fact of the matter is nobody in this room has those kind of clients, but a lot of people do, and they -- the plaintiffs attorneys try to get out. The judges like me say, "I see, so you've got a bad case so now I'm going to get to try it pro se rather than with you who brought this becket. No. You'll be sitting in your office sipping coffee wondering how Judge Brister is doing with that crazy client that you filed the case for. No. You'll be here with me."

So now we're all stuck with this case and

the jurors come in and they hear about it, and they're just mad, and there's literally nothing we can do with these cases because -- a lot of other cases in the world, but the one thing this seems to -- motivation behind this, there are some plaintiffs who need to -- you know, their own attorney needs to have a stick. Not the other side. I don't care about giving the -- the insurance people beat these people down, don't pay them a dime, and always win. They don't need any more sticks, but their own attorney needs a stick to say, "This is five hundred bucks, and it's more than you're ever going to get. We need to settle this right now, and if you don't then it will cost you money," because otherwise nothing else costs them money. Why not go to trial?

So I don't have any problem saying let's just do this on Level 1 cases or small. We have a ton of these cases, and it's making people mad about the whole civil justice system because that is usually what they sit on if they come down on a civil jury case.

CHAIRMAN BABCOCK: Let's take a break, Bill.

MR. EDWARDS: Just in regard to that, what we would do if we have a case like that, and we get the 500-dollar offer before we filed suit, if the client wouldn't take the offer, we wouldn't take fees or expenses. We would prepare a petition pro se, give it to

him and say, "If you want to continue with this, take it down and file it in Judge Brister's court by yourself."

CHAIRMAN BABCOCK: Just for scheduling purposes, a lot of -- a lot of people want to know when we're going to get to the FED rules, and I've sent e-mails to people saying that it's likely that we're going to get to it immediately after lunch, and what I propose is to continue this discussion after our break, break for lunch about noon or thereabouts, and come back at 1:00 o'clock with the FED rules, whether we're finished with offer of judgment or not; and since Orsinger is not here, unless he's assigned electronic coverage to somebody else -- has he? Okay. Tommy.

MR. JACKS: At the risk of incurring everybody's -- I would encourage some time limits on this conversation because it's an interesting one, and we could spend all of our time today and tomorrow on this, and perhaps we can figure out a way to move it along a little bit.

CHAIRMAN BABCOCK: Yeah. We're not going to go beyond noon on this topic. Okay. So let's take about a 10 or 15-minute break.

(Recess from 10:39 a.m. to 10:56 a.m.)

CHAIRMAN BABCOCK: Okay. Let's get back to it. We're having lots of fun talking about the timing of

this thing. A proposal that Frank put forth some time ago, 30 days for Level 1, 90 days for Level 2, court sets it for Level 3. There are provisions for the time the offer would be open. The suggestion was by Paula 90 days, automatic stay until the court rules if you need -- if you want to try to move to extend the time that the offer is open, so that's sort of what's on the table.

Have we talked all of that out enough so that we could go to another substantive issue? Anybody in favor of moving on to another substantive issue? David says "yes," and I think so, too. So, Elaine, why don't you talk about the next issue?

PROFESSOR CARLSON: I think the next issue will not be as controversial.

CHAIRMAN BABCOCK: Oh.

MR. JACKS: She said "hopefully."

CHAIRMAN BABCOCK: Yeah, right.

PROFESSOR CARLSON: The Federal rule only allows the offer of judgment to be made from the defense side, apparently the thought being if the plaintiff prevails they're going to win the costs only, and that's all you can get under the Federal rule. The Jamail proposal under Rule 166b and several of the other states we looked at, but certainly not uniform, would allow the offer of judgment mechanism to be used by both sides of

the docket, by both plaintiff and defendant.

So that's our next issue, should it be unilateral -- should offer of judgment be unilaterally available to the defense or should it be available to both sides?

CHAIRMAN BABCOCK: How many people think it ought to be defense only?

MR. HAMILTON: Sure solve a lot of problems if it's just defense only.

MR. EDWARDS: I think it depends on what the sanction is going to be. If it's going to be only costs then it doesn't make sense to have it go two ways, because it doesn't make any difference.

HONORABLE SAMUEL MEDINA: That's right.

MR. GILSTRAP: But it does make sense if it's going to be attorneys fees to have it both ways.

MR. EDWARDS: That's correct.

CHAIRMAN BABCOCK: It's going to be litigation costs, and that's -- in reality that's what we're talking about because all the research we've done says that these rules that just have costs are -- you know, nobody uses them and why do it.

MR. EDWARDS: Well, I don't know, but I thought we had voted last time that we were against this rule in the first place and we were asked to construct a

set of rules, and I don't think that the Federal rules are necessarily off the table.

CHAIRMAN BABCOCK: Okay.

HONORABLE SAMUEL MEDINA: And I think it also goes back to something Paula said earlier. It depends on who's taking the risk. In other words, if, for example, I've got a small case and I'm a plaintiff's lawyer and I think my client is truly judgment-proof, so to speak, you know, I may throw something out there and we might collect and -- but if we don't, hey, we're judgment-proof anyway.

CHAIRMAN BABCOCK: Okay. Well, is it fair to say that people think that if it's a -- if litigation costs include attorneys fees and the bigger bundle of costs, that it ought to go both ways, but if it's only going to be traditional court costs as we know them today, then it could just go one way or maybe it doesn't matter? Is that where we are pretty much?

Okay. So let's defer this issue and get to the tough one, which is --

PROFESSOR CARLSON: Which issue would you like to -- would you like to go to the actual fee shifting formula?

CHAIRMAN BABCOCK: You've got a plan, I know, so we'll follow your plan.

PROFESSOR CARLSON: Well, let me work with another, I think, noncontroversial one. I think every rule we looked at required -- I think every rule we looked at required that in order to have a valid offer of judgment it must extend to all claims, that you cannot make a piecemeal offer of judgment and trigger any cost shifting, and that seems to me to be fairly noncontroversial. You can still make a settlement offer outside of the offer of judgment rule for part of the case, but in order to shift costs between two litigants, the offer has to extend to everything encompassed within the pleadings. Any controversy?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH DUNCAN: If we're going to include family law cases, I would agree if the rule is written to speak to monetary claims.

PROFESSOR CARLSON: Only.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Can I ask a -- since you brought it up, we were talking at the break. I know the policy reason, for instance, why we don't have contingency fees in family law cases. I learned that in law school, but why -- someone who understands this, why are family cases sort of automatically excluded from this? What don't I understand?

CHAIRMAN BABCOCK: Well, because Orsinger is usually here.

HONORABLE SCOTT BRISTER: And he always says that.

MS. SWEENEY: So the Rule of Richard. But what is it --

PROFESSOR CARLSON: Paula, I think what Richard said on the record was that in family law cases it's a constantly changing situation because the assets and the positions of parties continues to change up until the time of trial so it would be unrealistic, I think was Richard's position, to require someone to lock into an offer. Ralph, I think, has a very contrary view.

MR. DUGGINS: I think that, as I was telling Elaine at the break, at least in Tarrant County practitioners use delay and extensive discovery on alleged tracing and separate property issues to just run somebody into the ground with an amount to pay more than they would ever get, and they never settle. I mean, excuse me, when you get to the courthouse they don't get any more than 50, 51 percent.

It's just harassment, and if this rule were to apply to a property setting -- I don't disagree with Sarah on that -- but apply to a property division, I think it would make a huge difference on the amount of time it

takes to resolve property disputes, and we don't have the kind of mediation in those courts that we do in the civil courts, notwithstanding that statutory acknowledgement that's required when you file your pleading about "I agree to try to resolve it out of court." People don't pay any attention to that. The lawyers say, "Don't. I'm going to keep this thing in the air for three years."

CHAIRMAN BABCOCK: Judge Duncan and then Frank and then --

HONORABLE SARAH DUNCAN: I think the realistic answer, Paula, is that the family law Bar has a very powerful legislative presence, so we know that if we don't exempt them the Legislature will.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Just a question. I mean, it looks like we're going over into the exemptions, and that might be what we have to do first; but if we're going to talk about the exemptions, I don't think we ought to talk about them piecemeal. I think we ought to -- I think we ought to address them all at once. You know, I would just suggest that as a way of thinking about what we're going to talk about.

CHAIRMAN BABCOCK: Okay. Judge Medina.

HONORABLE SAMUEL MEDINA: I'm not sure what we're saying about whether it's piecemeal or not. I think

what you're saying, Elaine, it ought to be an offer for all of it or none of it, basically.

PROFESSOR CARLSON: To conclude the litigation between those parties.

HONORABLE SAMUEL MEDINA: Okay. And, again, are you saying, Ralph, that maybe property but not worry about visitation?

MR. DUGGINS: Yes. I don't disagree that that's too difficult.

HONORABLE SAMUEL MEDINA: Okay. Right. Okay. I'd agree with that.

CHAIRMAN BABCOCK: Judge Peeples and then Buddy.

HONORABLE DAVID PEEPLES: I spend about two thirds of my time doing family law. Okay. To have a property division case, the kind that Richard Orsinger tries, might happen once a year. The vast majority of the family law is other. There's a whole bundle of issues, and it's usually the personal issues like visitation and supervised visitation and custody and all the rest of it. Okay. You know, the bottom line for me is we shouldn't spend very much time on whether this ought to apply to family law. I don't think it should.

These property division cases, they don't come in saying, "I offer you X and, you know, you want Y"

and so forth. It's, you know, "You take the house, but we disagree about what the fair market value is. We know what the mortgage is, on the value, and we've got this 401(K) plan and retirement plan and some investments and stock options," and, you know, how in the world do you have an offer of judgment on that? I just think it would be incredibly hard to do, and the amount of court time taken up with property division cases in my experience is just minuscule, and I just would like to hear someone make the case that it ought to apply to family law rather than why should it not. We just shouldn't be wasting time on this.

CHAIRMAN BABCOCK: Buddy, then Judge Medina.

MR. LOW: Not only that, but often your property depends on, you know, "I'll agree to custody if you'll -- and then I get the house or you get the house," so there are a lot of mixed things.

HONORABLE DAVID PEEPLES: Sure.

MR. LOW: I've seen custody determined, you know, "I'll give you X if you'll give me custody."

HONORABLE SAMUEL MEDINA: Well, maybe I'm the only one getting these cases, but most of the time they're arguing over visitation and they're using property to delay the case, and it seems like to me -- not both of them, one of them. One of them is really just either "I

don't want the divorce, by God, and I'm going to do everything to stall it" or "I want to do something else to delay it." It seems like to me that I'm more for applying it, for including family law.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: Let me rephrase what I was saying. If this is going to apply to family law then a provision that requires the offer of settlement to settle the entire case is in my view wrong.

CHAIRMAN BABCOCK: Is --

HONORABLE SARAH DUNCAN: Wrong.

CHAIRMAN BABCOCK: Wrong. All right.

HONORABLE DAVID PEEPLES: Chip, the court already has the discretion within a wide playing field to tilt toward one side or the other on the property. Why does the court need more authority to zap somebody with what amounts to sanction when you've already got incredible discretion to go in either direction? You don't need it.

CHAIRMAN BABCOCK: Okay. Yeah, Bill.

MR. EDWARDS: How do you determine 25 percent difference on visitation or custody?

HONORABLE SAMUEL MEDINA: You don't. That's what she's saying. You leave that out.

MR. EDWARDS: I know, but I'm saying

somebody said put it all in. How can you?

CHAIRMAN BABCOCK: Let's see if -- let's assume just for the sake of argument that family law is going to be exempt and it's not going to be part of this rule. In that event, should the rule extend to all claims, including nonmonetary claims as the draft 166b does now? Can we talk about that a little bit? Sarah, what do you think about that?

HONORABLE SARAH DUNCAN: How do you measure -- don't you have the same problem with all nonmonetary claims that you have with nonmonetary claims in family law cases? If the relief requested includes a request for an injunction --

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: Declaratory judgment.

HONORABLE SARAH DUNCAN: Declaratory judgment.

MR. GILSTRAP: Receivership.

HONORABLE SARAH DUNCAN: Receivership.

CHAIRMAN BABCOCK: Do you want anybody else to prompt you?

HONORABLE SARAH DUNCAN: It seems to me you have the same problem.

CHAIRMAN BABCOCK: Elaine, what's the subcommittee's thinking about this? Have you thought

about it?

PROFESSOR CARLSON: Yes, we have, and I actually wrote down here "no subcommittee recommendation," but in reading the literature on that, you know, it can be extremely difficult to determine when a judgment is more favorable in a nonmonetary relief situation; and everyone we spoke to, right, Tommy, said they don't really see offer of judgment being used in those kinds of cases?

MR. JACKS: Yeah. That was true. Personally I wouldn't include claims for nonmonetary relief.

HONORABLE SAMUEL MEDINA: Wouldn't?

MR. JACKS: I would not, and certainly would not until we had a chance to see how a more limited rule operates in practice and then make some judgment, perhaps, but I wouldn't start out that way.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: That seems plausible to me, but are we going to say that if there's a claim for nonmonetary relief in the suit then the offer of judgment rule doesn't play? Because then you can just sabotage it by putting in a claim for equitable relief or declaratory judgment, something like that. So it seems to me then if you're going to exclude out nonmonetary relief then you're going to be talking about a piecemeal approach to settling

the case, and that's not what we do with that.

PROFESSOR CARLSON: Which is contrary to the purpose of the rule.

CHAIRMAN BABCOCK: Right. So why wouldn't you be willing to make a recommendation? Too hard?

PROFESSOR CARLSON: You know, help me out here, Judge Peeples.

HONORABLE DAVID PEEPLES: Well, if a frivolous claim for equitable relief to what really is a damages case, I would imagine the person resisting that claim would say, "My offer is you lose on your equitable claim"; and if it's truly frivolous, I think that's going to be a winner; and when all is said and done it's still a case about money, isn't it?

On the other hand, if there's really something to it, they ought to have to make a realistic proposal on it.

CHAIRMAN BABCOCK: Yeah. How does the 25 percent cushion apply to nonmonetary?

PROFESSOR CARLSON: It doesn't the way that the proposed rule is drafted. The Jamail 166b --

CHAIRMAN BABCOCK: Right.

PROFESSOR CARLSON: -- carves out the 25 percent on monetary, and for nonmonetary it says the judgment more favorable to the party that made the offer

but leaves it -- whatever that means.

MR. EDWARDS: How do you figure that out? You've got a declaratory judgment suit and you get some but not all. You've got a partition suit, you get some but not all.

PROFESSOR CARLSON: The court would just have to sort it out, I guess.

CHAIRMAN BABCOCK: Yeah, Paula.

MS. SWEENEY: I know we're going to stop this at lunch and this doesn't seem to be a very stimulating area, and I want to get to the 25 percent area.

PROFESSOR CARLSON: It is for me.

MS. SWEENEY: I'm not too excited about it. Are we going to get to that 25 percent stuff before lunch while there's time to talk about it? Not to barge into your agenda, Mr. Chairman, but --

CHAIRMAN BABCOCK: No, I think that's a good point. We've got what's the bundle of costs that are going to be included. That's a big issue, and the cushion is a big issue.

PROFESSOR CARLSON: That's where we're going next.

CHAIRMAN BABCOCK: That's where we're going next.

MR. GILSTRAP: Exemptions are an issue at some point, per se.

CHAIRMAN BABCOCK: And exemptions. So anybody -- do we have a consensus on whether we ought to put nonmonetary things in the rule or out of the rule?

Ralph, in or out?

MR. DUGGINS: I feel like it ought to be in.

CHAIRMAN BABCOCK: In.

MR. HAMILTON: Out.

CHAIRMAN BABCOCK: In/out? Judge Patterson?

HONORABLE JAN PATTERSON: For the reason that I think we ought to go for a limited, more simple rule to see how it applies, I would say out.

CHAIRMAN BABCOCK: Out. Andy, what do you think? Have you got a decision?

MR. HARWELL: I'm neutral.

CHAIRMAN BABCOCK: Neutral. Wendell?

MR. HALL: I think it ought to be out.

CHAIRMAN BABCOCK: Out. Buddy?

MR. LOW: No opinion.

CHAIRMAN BABCOCK: Neutral. Bill?

MR. EDWARDS: The issue is --

CHAIRMAN BABCOCK: In or out.

MR. EDWARDS: Which?

CHAIRMAN BABCOCK: Nonmonetary.

MR. EDWARDS: Out.

CHAIRMAN BABCOCK: Bobby?

MR. MEADOWS: This is family law and all other --

CHAIRMAN BABCOCK: We're not talking about family law.

MS. SWEENEY: Just nonmonetary.

CHAIRMAN BABCOCK: Just nonmonetary, whether it should be in the rule or not. Forget about family law. We're excluding it for the time being.

MR. MEADOWS: Out.

CHAIRMAN BABCOCK: Tommy, I'm coming to you next.

MR. JACKS: Out.

CHAIRMAN BABCOCK: Out. Judge?

HONORABLE SCOTT BRISTER: In.

CHAIRMAN BABCOCK: Paula?

MS. SWEENEY: Since I think this is a bad idea, in.

CHAIRMAN BABCOCK: Pam?

MS. BARON: Out.

CHAIRMAN BABCOCK: Out. Bonnie?

MS. WOLBRUECK: No opinion.

CHAIRMAN BABCOCK: No opinion. Judge?

HONORABLE SAMUEL MEDINA: Out. You can

always change it later if you need to.

CHAIRMAN BABCOCK: Stephen?

MR. TIPPS: Out.

HONORABLE DAVID PEEPLES: In.

MR. GILSTRAP: Out.

MR. HATCHELL: Out.

HONORABLE SARAH DUNCAN: Out.

PROFESSOR CARLSON: In.

CHAIRMAN BABCOCK: In.

HONORABLE TOM LAWRENCE: In.

JUSTICE HECHT: You guys need to be on the Supreme Court.

MR. JACKS: Is this how you guys do it?

MR. LOW: Is that an invitation?

CHAIRMAN BABCOCK: Well, the vote is 12 to 6 out. The 12 out, 6 in, with the Chair not voting, so --

HONORABLE SAMUEL MEDINA: Ho-ho-ho.

CHAIRMAN BABCOCK: So there you have it. There you have it. Let's go to the next --

PROFESSOR CARLSON: Okay. The next issue is the rules -- the concept involves fee shifting when the offer fails to receive a more favorable judgment. Should the rule include a buffer? It now includes a 25 percent buffer proposal, and should there be an ultimate cap on the ability to impose fee shifting, at least from the

plaintiff's perspective, to the amount of the judgment?

Those are two separate issues. So I propose we take up the buffer question first. Should we include, as is drafted in 166b, a 25 percent margin of error before a litigant can be subject to fee shifting? The Federal rule does not have that, but the Federal rule is only costs. It's not a significant issue.

CHAIRMAN BABCOCK: The Florida rule has it, though.

PROFESSOR CARLSON: The Florida rule has 25 percent and a few other ones do as well. Once you throw in a bigger hammer, if you go to attorneys fees and expert fees as well as costs, then it seems that we're really looking at whether or not a party has unreasonably rejected an offer. So what's the margin of error where you're going to presume that a party has reasonably rejected an offer in litigation? Should it be 25 percent? Should it be something more, something less?

CHAIRMAN BABCOCK: And for what it's worth, Dee Kelly thinks it ought to be either zero or 10 percent.

MS. SWEENEY: Zero percent?

CHAIRMAN BABCOCK: Dee Kelly thinks -- Dee Kelly is on the Jamail committee, and he was arguing -- when Tommy and I were in that subcommittee he was arguing for a lower number.

MR. JACKS: Yeah, but he lost.

CHAIRMAN BABCOCK: Tommy argued for the 25 percent, which prevailed. By at that time a vote of two to one, as I recall.

MS. SWEENEY: How do those states that have this factor in capped areas of recovery?

PROFESSOR CARLSON: You know, we asked a couple of them whether statutory cap damages -- is that what you're asking about?

MS. SWEENEY: Correct.

PROFESSOR CARLSON: Were exempted out, and I think the answer we got was "no."

MR. JACKS: They hadn't thought of that.

MS. SWEENEY: Because we do have caps in a lot of areas now, legislative. We have tort claim caps, we have got malpractice death caps, we have got punitive damages caps, and I'm sure I'm leaving some things out, that apply in a huge percentage of cases.

And if you say to a carrier, "The most you will ever have to pay if they nail you is a hundred thousand dollars," then they can never be wrong if all they offer you is $75,000, and we've just effectively reduced every cap in the state by 25 percent. I don't think that's the intent of the proposal, and I have some suggestions for how to remedy that, but if you just leave

it the way it's written, I promise that's how every carrier will handle it.

MR. JACKS: Don't leave us hanging.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Paula, we haven't gotten to the exemptions yet, but our subcommittee was recommending that statutory cap damage cases be exempted out for that reason.

MS. SWEENEY: I think that's a very good idea.

PROFESSOR CARLSON: I don't know how the full committee will feel about that.

MS. SWEENEY: I think that's a very good idea for the reason that I just stated. Otherwise, you've got an impossible situation, and we can talk about legislating ill-advisedly and unintended consequences. We've just stepped in and changed what's been done in the past 14 sessions of the Legislature and changed all the caps in the state by 25 percent.

I think they should be exempted out, and I think another way to approach it if that isn't the choice is that if the cap is not offered, in other words, if the carrier says, "The most you can ever stick me for is a hundred and I ain't offering it," then they don't get the benefit of the cap anymore. So if they're so brave and

you'll never do better than $75,000 on this hundred thousand-dollar cap and that's all we're going to offer and they're so right and they're not being frivolous and it's not a game, fine, then we just won't have a cap. And if I'm right, I get what the jury gives me.

CHAIRMAN BABCOCK: Okay. That issue aside, which may get dealt with by exemption, may not, that issue aside, is the 25 percent number about right, or is it too small, too high?

PROFESSOR CARLSON: And that was the ABA proposal a couple of years ago, but the modification of the Federal rule in the ABA did not pass, but that was their consensus.

CHAIRMAN BABCOCK: That was their consensus? It seems to me that 25 percent seems to be pretty generally accepted around the country. So unless anybody has a strong feeling about that, let's move on to the next issue.

PROFESSOR CARLSON: Insofar as a cap, do we want to include a cap of -- which I think the proposed Jamail rule in section (9)(d) does include that a plaintiff -- I think it's written that way.

I'm sorry. Let me read it literally. "The amount of litigation costs awarded against the claimant may not exceed the amount of damages recovered by the

claimant in any action for PI or death." In other words, a plaintiff in a PI or death case who gets hit with fee shifting could only be hit up to the amount of the judgment.

CHAIRMAN BABCOCK: Yeah. And let me tell you the origins of that particular provision of the draft rule. As I think I said last time, but some of you weren't here, this whole effort on our part was driven by a request by Senator Ratliff, Governor Ratliff, to have us look at this; and so in taking the first cut at this, I took the bill that he introduced and used that as a starting point, left that provision out; and then in the Jamail committee there was a discussion and recommendation that that provision of the Ratliff bill be put in; and so that got put in in that fashion.

MR. GILSTRAP: Say what it is again then.

PROFESSOR CARLSON: That when a claimant is facing fee shifting because they failed to accept an offer of judgment within the 25 percent range, and assuming the fee shifting includes something like attorneys fees, that plaintiff is only responsible for fee shifting up to the amount of the judgment.

So let's say the judgment is a hundred thousand and the other side, the defense attorneys fees is 250,000. The fee shifting applied. The plaintiff could

not be responsible beyond that hundred thousand-dollar amount.

CHAIRMAN BABCOCK: In personal jury and death cases.

PROFESSOR CARLSON: In personal injury and death.

MR. GILSTRAP: What if the judgment is zero?

MR. HAMILTON: Yeah. What if it's zero?

PROFESSOR CARLSON: The way I read the Jamail rule, there's no shifting.

CHAIRMAN BABCOCK: Right. Then there's no shifting.

MS. SWEENEY: So the only people who would lose are the people who just guess wrong on the amount, but the people who got totally bombed and got zero are okay?

MR. JACKS: Well, and there's actually some method to that, because one of the things that some of us thought we wanted to thwart was the stock defense offer of a hundred dollars or a thousand dollars, whatever it might be, so that if they end up with a defense verdict they automatically get cost shifting, yet they never made a reasonable offer.

MR. EDWARDS: They still get it here.

MR. JACKS: Not if the cap is out of

plaintiff's recovery and under the judgment the plaintiff has no recovery, so the defendant doesn't effectively get any cost shifting.

MR. LOW: Well, I guess --

MR. GILSTRAP: The plaintiff never has to pay anything to the defendant in personal injury and death cases.

MR. TIPPS: Out of his own pocket.

MR. GILSTRAP: Out of his own pocket.

MR. JACKS: That a plaintiff's assets aren't exposed beyond the assets of the lawsuit basically, whatever they end up being.

MR. LOW: As a reverse to that, the defendant gets stuck with $10,000 but the attorneys fees are 150. Is there a reverse or does it just operate one way?

PROFESSOR CARLSON: It says "claimant."

CHAIRMAN BABCOCK: It says "claimant." So what's the answer to that? I think the intent of it was to protect the plaintiff in the personal injury/death case, but I'm not quite sure how that will work anyway, Buddy, if you do that.

MR. LOW: Well, no. What I'm saying is if the -- if they -- if the plaintiff can only be required to pay no more than what he got --

CHAIRMAN BABCOCK: Right.

MR. LOW: All right. What about the defendant? It's $10,000, and he guesses wrong. Does he have to pay?

CHAIRMAN BABCOCK: What $10,000? What are you talking about?

MR. LOW: Well, say the verdict is $10,000.

CHAIRMAN BABCOCK: Verdict is $10,000.

MR. LOW: But attorneys fees are, you know, 20,000.

CHAIRMAN BABCOCK: Right. Okay.

MR. LOW: All right. Plaintiff doesn't have to pay -- I mean, so why should he then have to pay 20,000 attorneys fees?

CHAIRMAN BABCOCK: He doesn't. Right?

PROFESSOR CARLSON: Well, no.

MR. LOW: Yeah.

PROFESSOR CARLSON: The claimant is defined as the person making the claim, meaning claim, counterclaim, or cross-claim.

MR. LOW: I know. It is drafted one way.

PROFESSOR CARLSON: I think it is drafted one way.

CHAIRMAN BABCOCK: To protect plaintiffs, correct?

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: That's the way I read it, too.

MR. LOW: Well, I represent both.

CHAIRMAN BABCOCK: But how can you do it the other way around?

PROFESSOR CARLSON: Yeah. Because now the plaintiff has established the right to recover to the extent of $10,000.

MR. JACKS: Well, I think what Buddy is suggesting is that the defendant, the most the defendant should have to pay is --

MR. LOW: What you get stuck --

MR. JACKS: -- an amount equal to what they had to pay in damages.

MR. LOW: Right.

MR. JACKS: So in your example, if the plaintiff gets a hundred thousand-dollar judgment and the plaintiff's attorneys fees -- most plaintiffs' attorneys fees are on a percentage basis, so they are going to be something less than that, but let's say this is an hourly fee case.

MR. LOW: Right.

MR. JACKS: And the plaintiff's lawyer ran up 150,000 in fees. What Buddy is suggesting is that the

defendant should not have to pay more than the hundred thousand that is this cap. In either case it's the amount of judgment for the plaintiff.

MR. LOW: And, see, Tommy, in getting to the fees of the plaintiff, generally, you know, when you award it's not on a percentage basis. It's on a percentage with the client, what a reasonable fee they might factor in otherwise.

MS. SWEENEY: On the -- all right. If the defendant offers 50,000, plaintiff gets a hundred thousand-dollar verdict, so he's busted the 25 percent cap. He's now entitled to costs, expenses, and attorneys fees, which are 250,000. All right. It was a hard fight to get this hundred.

MR. LOW: Yeah.

MS. SWEENEY: So --

PROFESSOR CARLSON: And the plaintiff made an offer of proof -- offer of judgment, too.

MS. SWEENEY: Yeah. The plaintiff made their demand.

CHAIRMAN BABCOCK: So the plaintiff offers 50.

MS. SWEENEY: The plaintiff -- no, the defense offers 50, the plaintiff gets a hundred.

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: So he beats his 25 percent, but he's got 250 in costs, expenses, and attorneys fees. So under this theory then your individual defendant has to pay --

MR. LOW: It would be -- the amount he had to pay would be limited -- he didn't have to pay more. Just like the plaintiff doesn't have to pay more than what he got.

MS. SWEENEY: Well, if you do -- that's why I did that math. If you do what you're saying, you just eviscerated the rule.

MR. LOW: Well, maybe that's what I'm trying to do.

MS. SWEENEY: Well, then I'll agree with it if it goes both ways.

MR. HAMILTON: Paula, in your example the defendant is the only one that made the offer.

CHAIRMAN BABCOCK: Right. That's what I'm thinking.

MR. HAMILTON: And defendant doesn't have to pay the plaintiff any attorneys fees. The defendant just pays lost.

CHAIRMAN BABCOCK: Pays the judgment.

MR. HAMILTON: Yeah. Just pays the judgment.

HONORABLE DAVID PEEPLES: Did the plaintiff make a demand in your case?

MS. SWEENEY: Assume the plaintiff makes a demand.

CHAIRMAN BABCOCK: Yeah, the plaintiff has got to make an offer for the defendant to be at risk.

MR. LOW: That's right.

MS. SWEENEY: Okay. The plaintiff demanded a hundred.

CHAIRMAN BABCOCK: Okay.

MS. SWEENEY: And he got a hundred because he was right. That's my hypothetical, but the defense only offered 50, so they're wrong by a greater than 25 percent margin. It cost the plaintiff $250,000 to get there, shouldn't have, but if you're going to cap the plaintiff's recovery at his verdict of a hundred then there's no rule here.

CHAIRMAN BABCOCK: No, but we didn't do that.

MS. SWEENEY: Well, Buddy --

CHAIRMAN BABCOCK: We haven't done that. In your -- in that situation where the plaintiff demanded a hundred, made a demand of judgment or offer of judgment of a hundred, and went to trial and got a hundred then -- then it's a push because he didn't get more than the 25

percent. You'd have to have him getting --

MR. JACKS: If the plaintiff had offered 50 --

PROFESSOR CARLSON: 130.

CHAIRMAN BABCOCK: -- 130. You would have to have him getting 130, and in that event --

MS. SWEENEY: No, no, no, no, no. He demanded exactly what he got. He's not only not 25 percent wrong, he's a hundred percent right.

CHAIRMAN BABCOCK: No, but you're focused on the wrong person who's wrong about it. It's the defense lawyer who has got the 25 --

MS. SWEENEY: And he only offered 50,000.

CHAIRMAN BABCOCK: No. That's not how it works, I don't think.

HONORABLE DAVID PEEPLES: I guess the question here is does the 25 percent apply to the demand or the offer?

MS. SWEENEY: Yeah. Yeah. Exactly. Does this go both ways? Because under Buddy's hypo it didn't.

MR. LOW: No. All I was trying to illustrate, not any figures, is that plaintiffs' attorneys fees are capped because, you know, no more. Defendants are not capped. They guess wrong, there is no cap, is what I'm saying.

CHAIRMAN BABCOCK: Right. In your hypothetical, in your hypothetical, the plaintiff -- let's just play this through. The plaintiff makes an offer of judgment of a hundred thousand dollars. It's rejected within the time period called for in the rule by the defendant. The case goes to trial and the plaintiff gets $130,000. In that event then the fees -- then the costs, the litigation costs, are shifted so that in effect the plaintiff gets his 130 plus his lawyers fees. Or whatever the litigation costs are determined to be.

That's what happens there, and the provisions of this (9)(d) are not implicated, the way it's written now. They're not implicated.

MR. LOW: There's no cap. There's a cap on one side, but not the other side.

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: And the idea behind it was, I think, that in a certain class of cases for personal injury and death, which is a lot of cases, you know, you don't -- it's trying to take away the force of the hammer that Bill is worried about. Because in that case your plaintiff is -- it goes into the lawsuit with no financial risk, and this rule is not going to change that, because even if there is an offer of judgment that would trigger some fee shifting, it's always going to be capped

at whatever judgment the person gets. So he's going to walk away from it with no money, but he's not going to have any money taken out of his pocket.

MR. LOW: Not going to owe money in the end.

CHAIRMAN BABCOCK: Right. That's the whole thought behind that provision. Yeah, Bill.

MR. EDWARDS: Maybe the answer to taking the gamesmanship out of this is to -- because the offer of judgment is discretionary on the part of either party, is to just make the -- if somebody chooses to make an offer of judgment that then they're stuck with that offer, and if the other side gets either 25 percent more or less, however it works out, that party has to pay the expenses.

For example, if the defendant comes in and makes a hundred-dollar offer and the plaintiff gets a hundred thousand dollars without ever having made an offer of judgment, if the hundred-dollar offer is an offer of judgment then the defendant would be stuck because it was more than 25 percent, the hundred thousand-dollar judgment; and maybe that takes the game playing out of it and causes the reasonableness of the offer to be self-policing.

In other words, I make an offer of judgment, and I put the other side at risk, but if it's a reasonable offer, I'm not putting myself at risk. If it's an

unreasonable offer, I'm putting myself at risk as well as the other side.

MR. LOW: So --

MS. SWEENEY: So you can trigger in yourself the obligation to pay their attorneys fees by making a stupid demand.

MR. EDWARDS: Exactly.

MR. JACKS: You're calling it -- kind of like calling a fire on your own position.

MR. EDWARDS: Yeah. Exactly, and then you're not going to make an -- you can make all the offers you want, but you're not going to make an unreasonable offer of judgment.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Did any of the states have -- I can see right now this thing -- how this thing is going to be gotten around.

MS. SWEENEY: Right.

MR. LOW: Tommy sues my client. I'm going to say, "Tommy, we're going to mediate, we're going to make offers for settlement, but I will agree with you right now if you don't make any offers of judgment and I won't. We won't do that to each other." Zap, it's gone. Is there any -- I mean --

MR. EDWARDS: That's it.

HONORABLE SAMUEL MEDINA: Opt out.

MR. JACKS: In fact, I was talking with Justice Hecht about this during the break. I personally would favor an opt-out provision. Now, Buddy is right. The rule would have built in the ability of parties to agree around it anyhow because you just say, "This is an offer of settlement, but it ain't an offer of judgment. Don't you give me one back." But the -- I mean, the kinds of cases that a lot of us in the room handle are the kind of cases where we've got plenty of incentives already to try to figure out how to settle this case, and we don't need -- neither side needs any other hammers, and I think in that case the parties and litigants ought to be able to say, "Look, we don't need this rule; therefore, we're out of it."

CHAIRMAN BABCOCK: Yeah.

MR. JACKS: But in any case where any party thinks, "No, I think I want the rule here" -- you know, you're talking about the small cases. You've got an insurance company with a lawyer that thinks it's got a totally frivolous case, they shouldn't even be in the courthouse, they're not going to agree out of it. Or you've got a plaintiff's lawyer with an insurance company or a Kroger who never makes more than a medical offer, medical expenses offer, as a matter of policy. They are

not going to opt out of it. They want it. And so you kind of let the free market control the cases to which it applies in that sense.

CHAIRMAN BABCOCK: Well, Tommy, there's another thing at work here, too, and Judge Brister touched on it from kind of the nutty almost quasi-pro se litigant who has got unrealistic expectations, and we all know they're out there. There's another type of litigant in the system right now that's got the same problem, that has unrealistic expectations about their lawsuit and very little incentive to settle, and it doesn't matter if all the lawyers in this room who are representing that client, who are good lawyers and understand risk, and say, "Look, you know, this is a tough case and we could get really hit and we probably ought to make an offer of X dollars."

Justice Hecht and I were talking about this yesterday. The dynamic, at least in my side of the docket, is so much different than it used to be. It used to be the law firms had clients that were long-standing clients and you had done 20 cases for them and, you know, they knew who you were and they knew what your tendencies were. You knew them. So if you go to them and say, "Look, you know I'm not scared to try a lawsuit because I've tried a bunch of them for you and we've won most of them and lost a couple, but I'm telling you we should not

try this one because there is a lot of risk here," and in the old days the client would say, "Okay, I trust you. You know, you're my long time counsel, and so we'll go" -- that's not the way it is anymore.

Now you've got beauty contests and, you know, you've got the junkyard dogs and the Texas hammers and, you know, the tough, smart lawyers and all these people out there; and the clients, you know, don't listen to you, don't listen to us like they did; and this rule potentially can give us a tool saying, "Fine, don't listen to us, but remember, now you're going to be somewhat at risk beyond what you thought you were, so if you want to play hardball and play tough guy, fine, but the price of playing poker is going up," and on both sides of the docket. And, frankly, I think it may have more impact on the defendant's side even than in a lot of cases on the plaintiff's side.

MR. JACKS: Well, I guess if I'm the plaintiff's lawyer in that case, by the time we get to the point in the litigation where I've got to make an offer of judgment if I'm going to make it, I'm going to have a pretty good idea that that's the kind of situation you've got, and I'm not going to agree to opt out of the offer of judgment.

CHAIRMAN BABCOCK: Right, and nor should

you.

MR. JACKS: Yeah.

CHAIRMAN BABCOCK: And you shouldn't opt out, and you ought to make an offer of judgment, and that may cause the case to settle to the benefit of your client.

MR. JACKS: Yeah. And that's what I'm saying, and there are -- but at the same -- by the same token, if I've got a case with you and you say, "Look, I've got a client here and I've -- they've always listened to me in the past. I don't have any reason to think they're not going to listen to me now. I don't feel like I need it." I say, "Well, I don't feel like I need it either. Well, I don't need it."

CHAIRMAN BABCOCK: Then you just opt out. You just opt out.

MR. LOW: Did any states require that both sides make an offer, whether it's zero, but a tender of judgment? Was there any that made it mandatory in every monetary case that some offer of judgment be made?

PROFESSOR CARLSON: No. No, not that I saw.

MR. JACKS: No.

JUSTICE HECHT: But events have kind of overtaken us a little bit here because mediation, it doesn't make you make an offer, but as a practical matter

most people make some kind of an offer during mediation, and you have to mediate it, so...

MS. SWEENEY: But you couldn't use that to trigger -- those are confidential.

JUSTICE HECHT: Right.

MS. SWEENEY: So you can't use that to trigger --

JUSTICE HECHT: You couldn't use that to trigger this.

MR. LOW: Well, I tell you what you can do. When mediation is over you can then -- after they walk out you can hand them a letter.

CHAIRMAN BABCOCK: Judge.

HONORABLE SAMUEL MEDINA: If you opt out, is it a one-time thing or can you opt back in?

CHAIRMAN BABCOCK: Well, that's a matter of agreement between the parties, I would guess.

PROFESSOR CARLSON: The rule is silent.

CHAIRMAN BABCOCK: The rule is silent on it. What Buddy and Tommy are doing is getting together and saying, "Hey, we're going to opt out of this thing."

HONORABLE SAMUEL MEDINA: Okay. But my question is, all right, Buddy goes on to bigger and better things, somebody else takes over, and all of the sudden Tommy is not happy anymore. Does he opt in again or is he

out?

MR. LOW: Well, agreements between lawyers have to be in writing, and I wouldn't put that in writing, so I guess we would be back where we started.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: What effect, if any, does all of what we are talking about have on that mass of cases in which either by contract or statute you get attorneys fees, the winning party gets attorneys fees, court costs, and, for example, in fraud and real estate, expert witness fees and the like? Now, I don't think we can change that because those are statutory, a lot of them. I don't think we can change that by rule, and if we start trying to change contracts by rule, don't we run into a constitutional prohibition about impairment of contract?

CHAIRMAN BABCOCK: Didn't we exempt those cases?

PROFESSOR CARLSON: Which ones? I'm sorry.

CHAIRMAN BABCOCK: Where there's a statute.

PROFESSOR CARLSON: Laws for the recovery of attorneys fees?

CHAIRMAN BABCOCK: Yeah.

MR. EDWARDS: How about contracts that provided for it?

MR. GILSTRAP: Section 2 doesn't exempt all

of them. It just exempts DTPA, from what I can see.

PROFESSOR CARLSON: Yeah. Contracts are not in general exempted out, but what we found in other states, in at least one other state, is if you had a right to recover attorneys fees by statute and an offer of judgment was made -- plaintiff had the right to recover. The defense makes an offer of judgment. The plaintiff rejects it, and the 25 percent margin applies. So there's going to be fee shifting, and in at least one state the way that they apply that is that the plaintiff is entitled to the attorneys fees up to the time of the offer of judgment, and the defendant in that example would be entitled to attorneys fees from the time the offer of judgment was made on.

MR. EDWARDS: Was that done by a rule or statute?

PROFESSOR CARLSON: Let me look, because some of these are rules and some of these are statutes.

MR. EDWARDS: Well, I can understand how the Legislature can take a statute that they have in place that allows for attorneys fees and amend it by another statute, but I don't think the rule-making power --

PROFESSOR CARLSON: Idaho Rule 68.

MR. EDWARDS: What is their statutory rule vis-a-vis relationship? Is it like ours or is it

different?

PROFESSOR CARLSON: You mean the rule -- power of the court to enact --

MR. EDWARDS: The power of the court versus the power of the Legislature, and is it constitutional -- is it constitutional or statutory issue or how does that work in Idaho?

PROFESSOR CARLSON: That Idaho issue is on my to do list.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: I guess I agree with Bill. I don't believe that by a court rule we can change the effect of statutes. It seems to me what happens in Texas, if there is a rule that applies to a case where there's also a statutory right to recover attorneys fees, is that the -- I think the way they got to it in Idaho is because it affected what the court -- the court had discretion to determine who was the prevailing party, and so they handled it that way.

But the -- I could foresee a situation in which the plaintiff might win the case and, therefore, be entitled to recover attorneys fees in a suit on a contract, so the defense would be paying the plaintiff's attorneys fees; but the plaintiff might not win the case by the right margin to avoid the application of the rule

we're talking about, so the plaintiff would end up paying the defense attorneys fees, too, at least past the point of the offer; and that, you know, might be a wash or it might not. But I think absent some statutory change that that's how it would have to work.

CHAIRMAN BABCOCK: Can I just butt in for a second, Buddy? What we started on at this little segment was to discuss whether or not we ought to have a cap in personal injury and death cases, and we've wandered into other areas, productive, however, they are. But I don't sense that there is a lot of opposition to this cap, but am I wrong about that? Judge Peeples.

HONORABLE DAVID PEEPLES: Well --

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to know how it works. If the -- on a little bitty case, if the maximum exposure is the amount of the judgment, it seems to me that rewards somebody. The smaller the case, you know, the better the defendant does in holding down the damages, the worse off they are in the offer of judgment situation. Does it work that way? If you hold them down to a thousand dollars, you're worse off than if you had held them down to -- if they had gotten more?

PROFESSOR CARLSON: Judge Peeples, I'm sorry. I'm not following you.

CHAIRMAN BABCOCK: Well, you're never going to -- in those kind of cases you're never going to get your fees. The defendant is never going to get his fees.

MS. SWEENEY: Right.

CHAIRMAN BABCOCK: The only -- and so it's not a matter of an incentive to have a big verdict just so you can make the plaintiff feel bad because you took it away from them. I mean --

MS. SWEENEY: Because it's your own money you would not be giving them.

MR. TIPPS: You never have to pay.

CHAIRMAN BABCOCK: You just don't have to -- the plaintiff just never has to pay. So it doesn't matter. It could be zero. It could be a hundred thousand. Doesn't matter. It's just how bad people feel, I guess, because if you get a jury saying, "Hey, you're entitled to a hundred thousand," and then the fee shifting rule comes into play and says, "Huh-uh, you're not."

MS. SWEENEY: Here's the issue. I'm sorry, Judge.

HONORABLE DAVID PEEPLES: We had the argument made a half hour ago that a lot of little cases are brought that most of us would think shouldn't be brought.

CHAIRMAN BABCOCK: Yeah.

HONORABLE DAVID PEEPLES: And I think this proposal would immunize those cases from realistic sanctions here, because there are some people who would care about a judgment against them. A lot who wouldn't, but some who would, and I think what Judge Brister was saying about the run of the mind case in Harris County is -- you know, that kind of case would be basically opted out of this system if we do that.

CHAIRMAN BABCOCK: Okay. So there is opposition to this cap.

HONORABLE DAVID PEEPLES: I'm just asking if that's the way it would work.

CHAIRMAN BABCOCK: I think it is the way it would work for those types of cases, personal injury and death. That's how it would work. Yes. It would basically -- it basically takes this rule out of play in terms of risk for the plaintiff, and the reason for doing that is because of the coercive effect that Bill and others are worried about.

JUSTICE HECHT: But it still --

MR. JACKS: I don't agree with what you just said.

CHAIRMAN BABCOCK: Okay.

MR. JACKS: Because for many plaintiffs in a personal injury case the only assets they have or are

going to have that are worth a damn are what they're going to recover in that case. And that's more true the worse they've been injured.

CHAIRMAN BABCOCK: Right.

MR. JACKS: And so I don't think it's accurate to say that under this rule they don't have anything at risk. They're risking the right to recover in the case there at the courthouse.

CHAIRMAN BABCOCK: No. You misunderstood what I said. Under this proposal, under this (9)(d), is it, that this rule doesn't put them at risk for coming out of pocket with money.

MR. JACKS: That much is true.

CHAIRMAN BABCOCK: Yeah. That's all I was saying there.

MS. SWEENEY: But that's the -- go ahead, Judge.

JUSTICE HECHT: But it doesn't -- it still provides a disincentive in Scott's hypothetical cases where the plaintiff -- it won't be reasonable and it's a small case, because both the plaintiff and, more particularly, the plaintiff's lawyer are going to be looking at doing this as a water haul. I mean, no matter what kind of a judgment they get, it's not going to be enough to keep the defendant's fees from eating it up and

working for nothing. I mean, at least there's some -- it doesn't just exempt them out. I mean, it would have some effect there.

CHAIRMAN BABCOCK: Yeah. Good point. Paula.

MS. SWEENEY: There's another -- I agree that the -- we're not talking about nonmoney or a nonasset. I mean, the potential of a recovery when we're talking about not whether it's due but how much, that is an asset that they do stand to lose under this scenario if they guess wrong by a certain percentage. It's just not, as you say, out of pocket, but what I want -- would like the committee to focus on for a moment is there is a large class of cases that fall in the -- you know, in the mid-range, 2 or 3 or $400,000, where it is not at all inconceivable that the defense attorneys fees are going to amount by the time all is said and done. Right now in every case that we settle in that range there is a big defense attorneys fee that's been incurred before the stars are in alignment for the case to settle.

In each of those cases where there has been a big defense cost and attorneys fee incurred, over which the plaintiff has no control, because, you know, we're saying we've got to do all the discovery before this timing is reasonable. The plaintiff has no way to control

how much is spent, what it's spent on, doesn't even know it's being spent, doesn't know what the numbers are, doesn't have any idea what the costs and expenses are; and if they're in that mid-range, what we're running up against is the very real likelihood of penalizing people with a valid claim who guess wrong by 25 percent on the amount of the verdict and, therefore, have attorneys fees and costs that are greater than their recovery because they have a smallish cause of action.

If you have got a hundred thousand-dollar, two hundred thousand-dollar cause of action and it's litigated for two years before you can ever get to trial, that's going to be the amount of the defense expenses and attorneys fees, and so, two things. One, those are not frivolous, you know, "Gee, my neck is sore and I've been to the chiropractor" type cases. You're talking about somebody who has got a couple hundred thousand dollars in damages who cannot in any way control the other side's expenses or costs, and so I wonder what do we have by way of an audit provision or a reasonableness provision.

But in addition to that, are those really the people who we most want to penalize, are the people with a valid claim who have $200,000 in damages but maybe they think it's 250 and maybe the defense thinks it's 150, and shouldn't those people be able to go to trial without

the risk of having to give everything back because they guessed wrong on this percentage?

PROFESSOR CARLSON: May I respond?

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Paula, under the proposed 166b, subsection (9)(b), each element of litigation costs must be reasonable and necessary, and the court has the authority to reduce but not enlarge the amount of litigation costs that are shifted. So there is some checks and balances there.

You know, insofar as should parties be able to go and litigate when they have a bona fide difference in how they view the case, either you accept the 25 percent margin or you don't or you give parties the opt out of the rule if they want or you give the court discretion to exempt a case or it falls under the exemption. That's what's going to have to be.

MS. SWEENEY: And carriers won't opt out and elected judges won't exercise discretion in favor of one-time plaintiffs, because they can't; and if you've got people with a bona fide dispute in that range I'm talking about, they, by definition if they guess wrong, give back their entire recovery to the other side in attorneys fees and costs; and that is not fair or right.

MR. GILSTRAP: You're arguing against the

rule in general --

MS. SWEENEY: No, no. I'm arguing against --

MR. GILSTRAP: -- not against this provision.

MS. SWEENEY: I'm arguing against all of them, but this one in particular bothers me, and it's not just the rule in general. The same logic applies to this provision, and it needs to be on the record since we get these records smacked up side our head later on.

CHAIRMAN BABCOCK: Well, but, Paula, is your argument against inclusion of this provision that we're talking about which limits -- which has a cap on the fee shifting? So you're against it?

MS. SWEENEY: I think the problem that you have is -- you know, it's not the judgment-proof misty cases that I'm worried about, and I think if -- you know, if we want to do a pilot program on Level 1 cases, that's one thing, but we're talking about people in that range of 1 to $200,000 where we're really talking about eating up their entire recovery because they guess wrong by 25 percent.

CHAIRMAN BABCOCK: Well, I mean, so the way you would fix that would not have a cap, but not have a rule; but assuming you're going to have a rule, wouldn't

you be in favor of the cap? It would seem to me, being on the plaintiff's side of the docket, you would be in favor of this provision because it reduces the risk to your clients, to plaintiffs.

MS. SWEENEY: Well, I think I would rather see it be at least 50 percent. I think you would have to be really, really wrong to trigger this.

CHAIRMAN BABCOCK: No, we're talking about something different. Buddy.

MR. LOW: Elaine, has there been any -- I mean, lawyers are pretty creative a lot of times.

CHAIRMAN BABCOCK: Some lawyers are.

MR. LOW: And has anybody had experience with this? For instance, you signed your contingent fee contract with a client for 30 percent or what, and it says 30 percent of any judgment, not just -- you know. All right. So you get a judgment for a hundred, but you guess wrong, so that hundred, well, he's already got an assignment of 40 percent, and the client doesn't care. He says, "Well, I'll just owe him 40,000." Is there enforcement -- and he says, "I would rather you have it than them, so I'll just owe them 40,000."

And, I mean, have any states had experience with anything like that, or am I just creating something?

PROFESSOR CARLSON: Yeah. I don't know. I

don't know, Buddy. There are some statutes and rules that deal with the contingency fee, allowing the recovery of contingency fee from the point forward or backwards, depending on which --

MR. LOW: This deal on enforcement --

PROFESSOR CARLSON: Right. I understand.

MR. LOW: In other words, whether the defendant actually then had to pay nothing rather than --

PROFESSOR CARLSON: Right.

MR. LOW: -- how you draft it.

CHAIRMAN BABCOCK: Yeah. I wouldn't think, Buddy, that there would be a hundred thousand-dollar judgment because what would happen would be the verdict would be for a hundred thousand --

MR. LOW: Uh-huh.

CHAIRMAN BABCOCK: -- and then the fee shifting provision would come in and eat that hundred thousand up. So -- in your hypothetical.

MR. LOW: Well, but my hypothetical is that the lawyer has already got an assignment on that.

CHAIRMAN BABCOCK: On the judgment. Not a verdict.

MR. LOW: What? Assignment on a verdict. I mean, you change it. That's not the way the contingent fee contracts read now.

CHAIRMAN BABCOCK: Well, you only get your percentage of what you collect.

MR. LOW: Well, that's the way --

CHAIRMAN BABCOCK: If the judge takes it away from you NOV then --

MR. LOW: I understand, but that's the way it is now, but the contingent fee contracts could so read because of this thing, and a plaintiff wouldn't care, because he says, "I'm not going to get it anyway. Yeah, I'd rather you have it."

Now, whether that be ethical or unethical, but you would have to deal with enforcement because then you've got the lawyer saying, "Well, I've got the first claim on this," and I just wondered if that problem had come out.

PROFESSOR CARLSON: I have read a lot of literature, and I have not seen that one.

CHAIRMAN BABCOCK: Okay. How many people are in favor of this cap on personal injury and death cases? Raise your hand.

How many are against? 11 in favor, 7 against, the Chair not voting. So there's your direction on that, Elaine. Let's go to the final --

PROFESSOR CARLSON: All right. We have two big issues left, and that is what litigation costs should

be shifted and what's exempted out.

CHAIRMAN BABCOCK: Five minutes on each subject.

PROFESSOR CARLSON: You know, Federal rule shifts only costs. Some states have costs times a multiple, like costs times 10 like our old sanctions for frivolous appeals. Some include attorneys fees, some allow shifting the expert fees, some allow additional consulting experts and costs. So if we were to have an offer of judgment rule that shifts litigation costs what should be included?

The proposed Rule 166b includes not only costs but attorneys fees, expert fees, reasonable -- testifying expert fees, excuse me, deposition costs, including attorneys fees pursuant to a valid contingency fee contract.

MR. EDWARDS: Are we going to have the side making the offer of judgment provide the side to whom that offer is made -- provide them with an itemized account of the attorneys fees by item and so forth that have been accrued to date and the other costs that have been incurred that might be covered by this in order that the person to whom that offer is made can make a reasonable determination on whether or not they should accept the offer?

CHAIRMAN BABCOCK: At what point in time are you talking about, Bill?

MR. EDWARDS: At the time of the offer.

CHAIRMAN BABCOCK: Well, at the time of the offer it would be irrelevant whether it had been incurred prior to that, right?

MR. TIPPS: It's only after the offer.

MR. EDWARDS: Well, between the offer and whatever time you have to accept the offer.

CHAIRMAN BABCOCK: Well, you wouldn't know for sure.

MR. EDWARDS: That's what I'm saying. Is it going to be necessary to keep that current so that at any given time during the period of acceptance the individual can make up his mind if reasonable, get somebody that's thrown 20 lawyers into the mix and hired 15 experts and gone up and run crash tests at a cost of about $150,000 a crash test for about 10 or 12 of them?

CHAIRMAN BABCOCK: As Elaine says, as Elaine says, there is a provision in the rule that says it has to be reasonable and there is a check on that, but --

MR. EDWARDS: Well, all of those things might be reasonable.

CHAIRMAN BABCOCK: Well, in that event you, as the experienced trial lawyer that you are, would know

that the other side is ginning up some costs.

MR. EDWARDS: I don't know what they've done. I don't know whether they've done it or not done it. It might be reasonable to do it, but they might not have done it. They might have done it.

CHAIRMAN BABCOCK: Well, you know that by the end of the day they're probably going to do it if you reject it.

PROFESSOR CARLSON: Well, maybe a better way to deal with that would be after an offer is made it must be kept open for a period of time, and during that period of time costs and fees don't accrue.

MR. LOW: Don't occur. Right. During that.

PROFESSOR CARLSON: I mean, maybe that's the way to deal with it. I don't know.

CHAIRMAN BABCOCK: Well, that is going to -- that may be the way to do it, but that is going to create a very intense period of activity where you're trying to jam in all your discovery in that period so you don't get tagged with it.

PROFESSOR CARLSON: Yes. Might be.

MS. SWEENEY: Or vice versa. You end up with during the period that somebody really is jacking up their costs, so either way.

CHAIRMAN BABCOCK: Right. Yeah. Somebody

is laying behind the log without doing anything that the defendant, for example, is going to make the offer, doesn't hire any experts, you know, knowing, that "A-ha, here's my point. I'm going to do that -- now I'm going to hire all my guys and I'm going to get them working and I'm going to do that because now I know I can recover those costs." That could happen. Judge Peeples.

HONORABLE DAVID PEEPLES: Elaine, I'm intrigued by this notion of a multiple of costs. Do any states do it that way?

PROFESSOR CARLSON: Yeah. There were a few that did costs times 10.

MS. SWEENEY: 10?

HONORABLE SAMUEL MEDINA: Automatic 10 or up to 10?

PROFESSOR CARLSON: Automatic.

MR. GILSTRAP: In lieu of attorneys fees.

PROFESSOR CARLSON: Yeah. It was costs times 10, no attorneys fees, no experts.

HONORABLE DAVID PEEPLES: Okay. Having attorneys fees and expert witness fees and so forth, I take it frequently there will be a hearing to determine the reasonableness of those, but it will only be in the cases that the judge actually tried, because anything that got settled they would have worked it out and you wouldn't

have a hearing on an offer of judgment.

PROFESSOR CARLSON: Right.

HONORABLE DAVID PEEPLES: Except on cases that went to trial, which, of course, is a small fraction, but if it was a multiple of costs it wouldn't have as -- the teeth wouldn't be as sharp, but it sure would be easy to apply. It would be symbolic.

MR. GILSTRAP: It could be real money.

MR. EDWARDS: We're talking about judicial economy and not justice anyway, so it's probably okay.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: Elaine, the states that use the multiple of costs, is that a multiple of taxable costs or --

PROFESSOR CARLSON: I don't know, Steve. That was my impression.

MR. TIPPS: That's what I would think, too.

MS. SWEENEY: Is that what the committee contemplates here?

CHAIRMAN BABCOCK: Is what?

MS. SWEENEY: Is that what -- when this committee uses "costs" do we mean taxable costs?

PROFESSOR CARLSON: Our subcommittee felt it would be taxable costs.

CHAIRMAN BABCOCK: I mean, I just had a cost

bill awarded in a case for $135,000. So you multiply that by 10 and you're talking about some "ker-ching."

Yes, Mike.

MR. HATCHELL: As I read the rule, Elaine, it applies to all costs, yet it would seem to me that the vice of not accepting an offer of judgment which is premised on the notion "I will pay you this and absorb my costs" is that you make me incur more costs. Is there any of the states that date the sanction after -- the costs incurred after the offer of judgment?

PROFESSOR CARLSON: Well, you could only recover in the fee shifting from the time the offer is made on.

MR. HATCHELL: Well, that's not what this says, is it?

PROFESSOR CARLSON: It should say that.

MR. HATCHELL: Well, it reads --

CHAIRMAN BABCOCK: I hate it when you read these things, Mike.

MR. HATCHELL: (d), (c), and (e) on -- I just don't find that limitation.

MR. JACKS: I think Mike's right in his reading.

PROFESSOR CARLSON: Well, look at 166b(1)(d), "costs incurred that are directly related to

preparing for trial, actual trial expense incurred after the date of the requested offer to settle."

MR. GILSTRAP: What page are you on, Elaine?

PROFESSOR CARLSON: That proposed Rule 166b, subsection (1)(d).

CHAIRMAN BABCOCK: Appendix 8. It's on page 25.

MR. HATCHELL: Well, that's somehow just a different version. Maybe I just have a different version.

CHAIRMAN BABCOCK: It seems to me that covers that, (1)(d).

MR. HATCHELL: Okay. Well, that would answer that then. I just have a different version of the rule, I think.

CHAIRMAN BABCOCK: All right. Well, let's talk about what litigation costs ought to be included. There is a body of opinion within this room that thinks it ought to be as small as humanly possible. Fair to say, Paula, that there is a group of people that think that litigation costs ought to be, you know, maybe what the Federal rule says or just minimal? Tommy.

MR. JACKS: One of the goals, it seems to me, ought to be to try to minimize the amount of satellite litigation over this stuff. I am satisfied after the conversation Elaine and I had the other day with lawyers

in those states that have adopted a Federal rule that that's not truly a waste of time and it's not used and it's not worth the effort.

If you have to have an inquiry into the reasonableness and necessity of the fees, reasonableness isn't hard, but necessity can be; and in the way this rule is written, the plaintiff's contingent fee is, I suppose, deemed to be reasonable, at least that would be an easy thing to prove up; but on the defense side or on either side when it comes to experts and so forth, there could be serious contests about whether the case was over-lawyered.

CHAIRMAN BABCOCK: Right.

MR. JACKS: And there is some appeal to me in the simplicity of having X times taxable court costs, whatever X is, as your standard because about that there's no controversy, where it's a fixed and easily ascertainable number. But I'd like to hear what others think about that.

CHAIRMAN BABCOCK: Yeah, Judge.

HONORABLE SAMUEL MEDINA: Yeah, any time you use things like "reasonable fees for necessary testifying experts," well, was it necessary, you're automatically involving the judge anyway I think.

CHAIRMAN BABCOCK: No question, but Tommy's got a good --

HONORABLE SAMUEL MEDINA: And I think that's why I agree. I think that we might want to look at what Judge Peeples is saying maybe.

CHAIRMAN BABCOCK: Yeah. Tommy raises a good point. Yeah, Judge Peeples.

HONORABLE DAVID PEEPLES: In addition to what Tommy said, I'm concerned -- this has the potential to make some major changes. They might be good or might be bad, but I don't think any of us are smart enough to see that far down the road and know whether this would cause more damage than it would cure; and, therefore, I think there's an argument to be made that you take a cautious first step and minimize the damage, the potential damage, by starting off modestly; and one way to do that would not to have the stakes so high to include attorneys fees and expert witnesses and so forth but limit it to some multiple of costs.

I mean, not only is it easier and there wouldn't be satellite litigation, but it just would be a baby step instead of trying to take a giant step; and sometimes reform -- and I know that that is not a word that some of you would use -- ought to proceed cautiously. I think there's a good argument for limiting what's at stake to a multiple of taxable costs.

CHAIRMAN BABCOCK: Okay. Ralph.

MR. DUGGINS: Question. If we're at or near the end of the discovery period, what taxable costs would be arising?

CHAIRMAN BABCOCK: Yeah. That's a good point. You might be 10 times -- in my 135 award, 135,000-dollar award was from the beginning of time, not from the time I would have made a --

MR. LOW: It wouldn't have to be then. If you did that, you could say "costs at the conclusion." In other words, you don't have to just --

CHAIRMAN BABCOCK: So you put all the costs in there?

MR. GILSTRAP: All the costs. That's the only way to make that work.

HONORABLE SAMUEL MEDINA: At the conclusion of what? The trial?

MR. LOW: Whatever the costs are when the case is over.

CHAIRMAN BABCOCK: At the end of the day.

MR. EDWARDS: If you had 135,000 in costs, I'd hate to see the attorneys fee bill.

CHAIRMAN BABCOCK: Yeah. She didn't give me everything I asked for, either.

MR. EDWARDS: That's vacation time for retirement in Hawaii.

CHAIRMAN BABCOCK: Yeah. We've done that.

MS. SWEENEY: The proposal now is for a multiplier, whatever it might be, of taxable court costs for the case.

JUSTICE HECHT: But I -- I mean, we're not trying -- it ought not to be a penalty, it seems like to me. It ought to be an encouragement to say, "Look, I don't want to spend these costs. I'm willing to give you this much money or take this much money today, but if you're going to to make me work for it then you ought to have to pay for some of my work" as opposed to everybody has done their work and then it's just a guessing game or a strategy tool to try to bend things.

I sort of like the mathematics of a multiple of costs, but I wonder if it should apply to the whole case. That seems kind of draconian, and you can't be faulted. Neither side can be faulted for taking discovery that they need to evaluate the case, it doesn't seem like to me.

CHAIRMAN BABCOCK: So you're saying if we do the multiple then it shouldn't be for the whole case; it ought to be from the point -- and, of course, that then --

JUSTICE HECHT: It just could be zero.

CHAIRMAN BABCOCK: Yeah. That plays back into Paula's thing, which is that she wants to do it late,

but if we have the multiple issue then that's going to be 10 times a very small number because everything will be done, and that's not going to satisfy anybody. So the way these two things play together is tough.

MS. SWEENEY: I think it's real important, though, as Tommy said, to minimize satellite litigation; and court costs is something in 20 years I've never had a fight in Texas state court over it either is or it isn't; and if there was a way to fight over it, we would have fought over it by now. So, you know, at least it's a defined number that we know what it is.

CHAIRMAN BABCOCK: Well, I mean, if you're going to get into the business of reasonable and necessary attorneys fees, there's no question that you can have satellite litigation because every time you have a big attorneys fees award in a case now, I mean, in a contract case --

MS. SWEENEY: Right.

CHAIRMAN BABCOCK: -- statutory case. I mean, I was an expert witness in a case that went on for a week about attorneys fees. That's the sole remaining issue and they tried it to a jury for a week.

Yeah, Tommy.

MR. JACKS: Well, it seems to me that if we were going to go to a cost measure then we would have to

rethink the timing issue --

JUSTICE HECHT: Uh-huh.

MR. JACKS: -- and try to encourage this earlier rather than later in the process, perhaps at a time after there has been an opportunity to at least investigate, if not discover the case.

CHAIRMAN BABCOCK: Yeah.

MR. JACKS: And perhaps maybe exchange some written discovery. I mean, the plaintiff's side, you need to know coverage limits before you start making offers, but before you run up a lot of court reporter fees on taking depositions.

CHAIRMAN BABCOCK: Yeah. You know, the other thing that -- as I was listening to Justice Hecht speak, the other thing is if you've got this offer of judgment out there that has been rejected by you, by your side, whichever side you're on, and the attorneys fees and these other things are going to be -- you're potentially at risk for them, you know, you may behave a little bit better. I know all the time clients are saying, "Let's do this. It will make them work harder." Well, I try to resist that, but it happens all the time; and if you can say to a client, "Okay, you make them work harder, but you may pay that bill," and so do we really want to do something that's unnecessary and unreasonable, you know,

even though ethical and proper, we can get away with it. So, anyway, that's something else to think about.

Why don't we -- why don't we just take a little straw vote on how we feel about this cost, you know, times X idea and for the -- can we put a number into X? Just do that maybe on --

HONORABLE DAVID PEEPLES: I find helpful to vote on the concept, costs plus or costs multiplied by something at some point, as opposed to the way it's written now, which is attorneys fees.

CHAIRMAN BABCOCK: Yeah. That's what I'm saying. Let's vote on that concept, but I'm just saying it might influence my vote if it was cost times 2 as opposed to costs times 10. So can we throw out a concept number?

PROFESSOR CARLSON: Costs times 10.

MS. SWEENEY: Two.

CHAIRMAN BABCOCK: Okay. Vote against it. Let's just --

MR. JACKS: Can we just say a significant multiplier?

CHAIRMAN BABCOCK: Let's say costs times 10. It's not binding on anybody. We can come back and reduce it to 2 if Paula can convince everybody, but costs time 10 as a proposal. Yeah, Ralph.

MR. DUGGINS: Back to the beginning of the case or not?

MR. TIPPS: Yes.

CHAIRMAN BABCOCK: Well, yeah. Back to the beginning of the case or some early stage. Okay. That's the concept. How many people --

MR. EDWARDS: Is it one question or two?

CHAIRMAN BABCOCK: One question. Costs times 10 back to an early stage in the case is the concept versus just straight costs, which is the Federal rule or what's the current proposed Rule 166b, which has a lot of stuff thrown in.

MR. GILSTRAP: Well, you're talking about attorneys fees in the latter.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: I mean, that's the meaningful vote, is attorneys fees or costs times 10.

MS. SWEENEY: Taxable costs.

CHAIRMAN BABCOCK: Okay. That's a fair way to put it. Okay. Let's start with --

MS. SWEENEY: Taxable costs.

HONORABLE DAVID PEEPLES: Yes.

CHAIRMAN BABCOCK: Taxable costs times 10 from an early point in the litigation.

MR. HAMILTON: Versus attorneys fees?

CHAIRMAN BABCOCK: Yeah. Versus attorneys fees. Everybody in favor of that raise your hand.

And people that would prefer to have the attorneys fees and the other goodies in there?

16 to 3, with the Chair not voting. Okay. So there you have it.

Exemptions.

MR. EDWARDS: I wonder if we ought to have a penalty on district judges who make a mistake in trying a case and get reversed.

HONORABLE SCOTT BRISTER: As long as we get a bonus if we get affirmed, that would be fine.

PROFESSOR CARLSON: And Bill raises an interesting point, because it's just trial costs. I mean, if a case goes up on appeal, because in Florida you actually can recover your appellate attorneys fees.

HONORABLE JAN PATTERSON: They would argue that they should only get docked if it's wrong and reversed, right?

HONORABLE DAVID PEEPLES: If it's really wrong.

HONORABLE SARAH DUNCAN: Now, that's something I -- as much as I disagree with this entire concept, what I could actually kind of get into is shifting appellate attorneys fees.

CHAIRMAN BABCOCK: We're talking about a TRAP rule now, aren't we?

MR. LOW: Yeah.

HONORABLE SARAH DUNCAN: A what?

CHAIRMAN BABCOCK: Wouldn't we be talking about a TRAP rule?

HONORABLE SARAH DUNCAN: Well, I don't see this as trial or appellate. I mean, 166b is just trial.

CHAIRMAN BABCOCK: Yeah. This is trial, but I am not against that, but we would be talking about engrafting whatever we come up with on 166b onto a TRAP rule.

HONORABLE SARAH DUNCAN: Uh-huh.

CHAIRMAN BABCOCK: And you're in favor of doing that? Or you could get into it?

HONORABLE SARAH DUNCAN: I could get into it. I could be persuaded out of it, but I could -- because after there's been a trial you know what the record is, you know what the applicable law is, and there's not the guessing game that there is --

MR. HALL: Wait, wait, wait. There's a huge guessing game. You tell me who my panel is on a large court of appeals, and I'll give you a much better idea. There is a huge guessing game, and I am totally opposed to that.

MR. GILSTRAP: Chip, that suggestion is really starting to hit close to home, and, you know, I don't -- I don't hear any -- any really desire from the Court for it, so, you know, and since this is to a certain extent being driven properly by what the Court wants, I think we ought to stay away from it.

CHAIRMAN BABCOCK: Okay. Well, we'll let the discussion lead where it takes us, but for now I'm kind of hungry, and I don't think -- I don't see how we can talk about exemptions without Orsinger here, just for the pure sport of it; and if I can make a recommendation that whenever he comes we'll all line up unanimously in favor of including family law cases.

JUSTICE HECHT: Change the percentage to 75 percent.

CHAIRMAN BABCOCK: In family law cases.

MR. GILSTRAP: Let me say, before you leave that --

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: I don't know that any of the others are controversial, but I'm very troubled by the one on the government. I mean, it just seems -- I mean, the government has every advantage now; they're immune, they can do an interlocutory appeal.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: And if -- it seems to me they ought to be either in or out, and this allows them to opt in. I mean, I don't think they need any more help.

CHAIRMAN BABCOCK: Well, and I think the reason for that, there was, as I recall -- and I think Senator or Governor Ratliff had some research done on that, and that was in there because of the immunity problems. I think.

MS. SWEENEY: I don't think we should let a little issue like sovereign immunity bother us at this point.

CHAIRMAN BABCOCK: Good point. Let's break for lunch.

MS. SWEENEY: If we're making a proposal, let's --

CHAIRMAN BABCOCK: Let's come back about 1:10.

(A recess was taken at 12:16 p.m., after which the meeting continued as reflected in the next volume.)

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 17th day of May, 2002, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,077.00 .

Charged to: Jackson Walker, L.L.P.

Given under my hand and seal of office on this the 30th day of May, 2002.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
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