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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 September 20, 2002
9 (MORNING SESSION)
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in Travis County for the State of
21 Texas, reported by machine shorthand method, on the 20th
22 day of September, 2002, between the hours of 9:09 a.m. and
23 12:09 p.m., at the Texas Law Center, 1414 Colorado, Room
24 101, Austin, Texas 78701.
25 *-*-*-*-*

1 CHAIRMAN BABCOCK: Okay. We're on the
2 record. Thanks, everybody, for being here. I think for
3 one of the first times ever, and this may be the first
4 time ever, Justice Hecht was not able to be with us today,
5 but he has sent some remarks that I'm going to try to
6 read, as Chris says, in a Hechtian style. How did you
7 describe that?
8 MR. GRIESEL: I don't recall describing it
9 in any way, shape, or form.
10 CHAIRMAN BABCOCK: Something about awkward
11 pauses at inappropriate times, but we wouldn't want to
12 attribute that to you.
13 MR. GRIESEL: No, we wouldn't.
14 MR. CHAPMAN: Funny how the record brings on
15 amnesia.
16 CHAIRMAN BABCOCK: Yeah. The court reporter
17 gets started and all of the sudden.... So that's
18 unfortunate, and when I heard about that I tried to change
19 the date of the meeting, but as you know, we set these
20 things a year ahead of time, and the hotel is very
21 difficult to deal with because of the football weekends
22 and all sorts of things, and so we just couldn't do it.
23 So we're going to miss Justice Hecht, but we'll have a
24 record, and I know he reads these things, such is the
25 quality of his life.

1 And, interestingly enough, that's how he
2 starts his remarks which he asked me to read into the
3 record and to you-all. He said, "Such is the quality of
4 my life that I do my best to arrange it around these rules
5 meetings, first things first, but today I break a long
6 streak of perfect attendance for a long-standing
7 commitment to escort my octogenarian mother to Kentucky to
8 meet her first great granddaughter, through my brother, I
9 hasten to add, and provide the piano and organ music, my
10 night job, for my niece's wedding. I look forward to
11 reading the transcript" -- probably to see if I'm reading
12 this right -- "of what has the makings of a very
13 interesting meeting.
14 "As always, but never more than now, the
15 Court is grateful for the time you devote to this
16 important work. The Court's membership has changed since
17 our last meeting. We swore out Justice James A. Baker in
18 an emotional ceremony that some of you saw in which
19 Justice Enoch recounted James and Claudia's contributions
20 to the Court. Justice Baker attended a number of this
21 committee's meetings and helped with the adoption of the
22 home equity loan foreclosure rules. Minutes after his
23 exduction were sworn in -- minutes after his exduction we
24 swore in new justice Michael H. Schneider, formerly Chief
25 Justice of the First Court of Appeals in Houston and a

1 member of this committee, who was presented to the Court
2 by Governor Perry and by Chief Justice Linda Thomas.
3 "I note that, indicative of this committee's
4 prestige, two of the Court's last three appointees have
5 been drawn from committee ranks; and rumor has it that the
6 next appointment may go to Beaumont, depending on how well
7 the evidence rules fair."
8 (Laughter.)
9 MR. LOW: Don't tell Governor Perry.
10 CHAIRMAN BABCOCK: "The Court's membership
11 will change again in November when Justice Rodriguez will
12 leave, having lost the primary election, and a new justice
13 will replace retiring Justice Hankinson. We will miss
14 both departing justices, but I do not expect that either
15 change will diminish the Court's intent to pursue rules
16 revisions for the good of the legal system.
17 "The committee, too, is changing. Three
18 members, all judges, have resigned since our June meeting.
19 Chief Justice Phil Hardberger, citing his retirement from
20 the bench at the end of this year, says he intends to new
21 challenges" -- "he attends to new challenges." Did he say
22 sailing around the world?
23 "Justice Ann McClure, whose help with the
24 parental notification rules has been invaluable, notes
25 that her health often keeps her in El Paso; and Judge

1 Scott McCown is retiring from the bench to go, where else,
2 to the Austin Think Tank where he will be able to devote
3 his considerable energies to developing strategies for
4 meeting the needs of the poor. We will miss their wisdom
5 and wit, and in Judge McCown's case, his whimsy. The
6 practice is better for their service on this committee,
7 and they all have the enduring gratitude of the Court.
8 Their vacancies will not be filled until the end of this
9 year when all members' terms expire and the committee is
10 reconstituted."
11 I had not heard about judge -- this is
12 Babcock talking, not Justice Hecht. I had not heard about
13 Judge McCown's retirement from our committee, but he will
14 be sorely missed, but Justices Hardberger and McClure I
15 thought were two of the most thoughtful and steady members
16 of this group, and their comments I thought were always
17 right on the mark. I have written both of them saying how
18 much I personally regret their leaving our ranks, and I
19 wanted to say that and insert that in Justice Hecht's
20 comments.
21 Now back to his report, "Revisions to the
22 Rules of Appellate Procedure were tentatively adopted by
23 the Supreme Court and the Court of Criminal Appeals in
24 early August, were immediately posted to the Supreme
25 Court's website, and were published in the September

1 edition of the *Bar Journal*. We have already received a
2 number of comments, copies of which Chris will hand out
3 today. I will report the Court's response to these
4 comments at the committee's November meeting. The public
5 comment period extends through November.
6 "Also in August the Court revised the Code
7 of Judicial Conduct in response to the United States
8 Supreme Court's June decision in Minnesota Republican
9 Party vs. White. The Court was advised by a select group
10 of leading scholars and practitioners in the areas of
11 First Amendment and speech law. Chip Babcock" -- that
12 would be me -- "served as the group's Chair, Justice
13 Jefferson was the Court's liaison, and Elaine Carlson was
14 a member. Responding to the urgencies of the pending
15 action in Federal court challenging the Texas Code as well
16 as questions from candidates and others in this election
17 season, the group conferred several times to triage the
18 code and make recommendations, which the Court accepted.
19 "As a result, judicial speech is freer, but
20 minority views expressed by Chip and others made me think
21 that the Court's changes did not go far enough. On the
22 other hand, the implications for fairness and recusal
23 remain troubling. Jim George, a member of the group, told
24 me he had never been associated with more impressive
25 people or worked on more challenging questions. To

1 address these issues and others, the Court will soon
2 address a task force to make a thorough going review of
3 the entire code. Not only in light of the White decision,
4 but top to bottom. Justice Jefferson will continue to
5 serve as the Court's liason on this important project,
6 which will affect the entire Texas judiciary and public
7 interest in the justice system.
8 "The Jamail committee will report on most of
9 its charge before the committee's next meeting. I expect
10 that the Court will adopt for publication another large
11 package of rules before the end of the year. Justice
12 Hankinson's request that the committee review the cy pres
13 proposal, or the equal access to justice committee, has
14 been referred and is on today's agenda."
15 And that concludes the report of Justice
16 Hecht, who we will miss through the next couple of days.
17 The first item on our agenda today is something that the
18 Jamail committee is looking at and which, as you all know
19 from past meetings, is somewhat controversial. It is the
20 offer of judgment rule and its continued discussion on
21 settlement issues including the offer of judgment rule;
22 and Elaine Carlson, who is on both the Jamail committee
23 and this one, will take us through it.
24 PROFESSOR CARLSON: Okay. Since I see some
25 members who have attended a variety of meetings, it might

1 be fruitful just to go through a summary of what we have
2 already voted on and what remains to be, at least for
3 today, discussed. As you recall, prior to June we voted
4 that we wanted to -- if we were going to have an offer of
5 judgment rule, which the Court has asked us to draft, that
6 it would include a cost-shifting measure that provided
7 hopefully certainty in its application, that was not
8 punitive, that would be fairly mechanical in the way it
9 was applied, and would shift costs of court as opposed to
10 attorney's fees.
11 We voted earlier in the year that we thought
12 it would be appropriate to have a cost-shifting measure of
13 10 times cost when the offer of judgment rule is
14 triggered. As you recall, the offer of judgment rule says
15 if one party makes an offer and it's rejected by the other
16 side, if the offer is more favorable -- or, excuse me, not
17 more favorable, then the party who refused the offer would
18 then be subject with some buffer to 10 times the costs of
19 court. That was the vote of our committee. We decided in
20 an earlier vote that we would recommend to the Court that
21 unlike the Federal rule, the offer of judgment rule, we
22 would propose would apply to both plaintiffs and
23 defendants.
24 We suggested that the offer of judgment
25 should require that the offer include all claims in the

1 litigation and that it should include some buffer, that
2 before we would have a triggering of the cost-shifting
3 measure under the offer of judgment there would have to be
4 a 25 percent margin. So if a litigant offered a hundred
5 thousand dollars, the defendant offered the plaintiff a
6 hundred thousand dollars, and the judgment did not exceed
7 that by 25 percent, the cost-shifting measure would not
8 apply, because we felt that it was many times very
9 difficult to predict with certainty what the judgment
10 would be, particularly in a jury case. This followed the
11 Florida rule, which includes a 25 percent buffer.
12 Different rules -- different states have used different
13 buffers; but I think Florida, from what I could see, was
14 most generous in its 25 percent application.
15 We talked about at the June meeting whether
16 or not we should have some sliding scale, if we should
17 have 25 percent if you missed the offer by X percentage,
18 and less than 25 percent would include a cost-shifting of
19 some lower denomination, maybe five times costs, two times
20 costs. There was a strong sentiment at the last June
21 meeting that that was not appropriate, and we left that
22 meeting confirming the 10 percent cost-shifting notion.
23 The full committee felt that there should be
24 a cap on the exposure a litigant would bear when the offer
25 of judgment rule was triggered, that if costs are shifted

1 they should not in any event exceed the amount of the
2 judgment that was awarded in the case, so, in effect, you
3 couldn't lose more than the judgment.
4 We thought that there should be an ability
5 of litigants to make joint offers and condition an offer
6 on multiple parties accepting it. We had a vote that the
7 offer of judgment should be kept open for a sufficient,
8 realistic period of time so that the offeree could confer
9 with the client, insurance companies, etc., to determine
10 whether or not to accept the offer or risk the
11 cost-shifting. As you know, the Federal rule has a very
12 short time fuse for the operation of the offer of
13 judgment, and it has been criticized on that basis.
14 We, of course, thought that the offer needed
15 to be unconditional to trigger the rule, as would the
16 acceptance. We also thought it would be appropriate that
17 a party who made an offer would have the ability to
18 withdraw it at any time before the acceptance. If a party
19 withdrew the offer of judgment, it would not be effective
20 for purposes of the cost-shifting. We also discussed how
21 we're going to figure out what is a more favorable
22 judgment for purposes of determining whether the offer of
23 judgment cost-shifting should come into play, and we
24 talked about the fact that the -- and we voted on this --
25 that the offer of judgment should construe "judgment" to

1 mean the final judgment after remittitur, set-offs,
2 counterclaims, etc. And we also talked about the fact
3 that the offer of judgment rule could be triggered by a
4 judgment that's a final judgment like a summary judgment,
5 so we're not necessarily talking about a jury trial on the
6 final judgment based on the verdict.
7 We talked about the fact that statutory cap
8 cases present a real problem. Paula Sweeney brought this
9 up last spring, that if you have a statutory cap case, of
10 course, the incentive for the defendant would be to just
11 offer 75 percent of the cap and shift the costs, even
12 though the case could be worth substantially more, and we
13 have tried to rework a provision based upon that problem
14 we will hopefully get to today.
15 At the June meeting we talked about whether
16 we should exclude from the offer of judgment rule
17 nonmonetary claims. The subcommittee was of the mind that
18 we should, that that was very problematic in applying the
19 offer of judgment rule when you have nonmonetary claims,
20 and so we include -- and you saw in our draft that's on
21 the web page at 2(a)(4) that a claim for declaratory,
22 injunctive, or other nonmonetary relief is excluded from
23 the operation of the rule for purposes of cost-shifting,
24 but that that would not apply if a claim was primarily for
25 damages and only incidentally for nonmonetary relief.

1 The problem here is if we totally carve out
2 nonmonetary claims, say any case that involves nonmonetary
3 claims is not covered by the offer of judgment rule, the
4 concern expressed is that then everyone could add
5 spuriously a nonmonetary claim and effectively opt
6 themselves out of the offer of judgment rule, and that's
7 why we came up with the language that if a nonmonetary
8 claim is included but the case is primarily for damages
9 and only incidentally for nonmonetary relief, you're still
10 in. You're still affected by the potential cost-shifting
11 under the offer of judgment rule.
12 At our June meeting there was concern raised
13 that that is not definitive. Now, what is incidental, for
14 example? What is a case primarily for damages? And we,
15 quite frankly, did not come up with a solution for that.
16 Our subcommittee felt that that was something that could
17 be developed through the case law.
18 I did take a nature walk through the
19 statutes in other states to see if we could get any
20 guidance. Many, many statutes carve out nonmonetary
21 relief claims from the offer of judgment rule. None of
22 them attempt to try and define things like incidental or
23 primarily, because they are problematic. Of course,
24 problematic for the committee will be problematic for the
25 Court. I understand that, but we don't have a definitive

1 solution for that.

2 We discussed at the June meeting excluding

3 from the offer of judgment rule claims by or against the

4 state or any unit of state government or political

5 subdivision of a state. By a vote of six to four, which

6 will give you some idea of the fervor behind this

7 discussion, this exclusion was rejected.

8 We discussed also how to handle the

9 operation of the offer of judgment rule when the case

10 involves a statutory cap damages. I would like to leave

11 that just for a moment until we look at the proposal that

12 Tommy Jacks on our subcommittee drafted after our June

13 meeting and see if we're comfortable with that solution.

14 We also discussed the problem of lawsuits

15 that would include claims covered under the rule and

16 claims that are excluded under the rule. Under our

17 proposal there are a number of types of claims that are

18 excluded from the operation of the rule, we felt for

19 practical reasons; and so what happens when you have a

20 lawsuit that has claims that are covered by the offer of

21 judgment and claims that are excluded under the offer of

22 judgment rule, how do you go about determining what is a

23 more favorable judgment to see if you've triggered the

24 cost-shifting measures.

25 As I said, I went back and I looked at all

1 the statutes in this area. Most of the statutes -- and I
2 don't know if Chip would agree with me on this one, but
3 most of the statutes seem to track the Federal rule. As I
4 said, many only apply to monetary claims and exclude
5 nonmonetary claims. What gets shifted varies, of course,
6 from jurisdiction to jurisdiciton, whether it's costs or a
7 multiple of costs or attorneys' fees or expert fees. Some
8 states actually impose a larger prejudgment interest as a
9 punishment, if you will, for failing to make an offer of
10 judgment.
11 Michigan is kind of interesting because they
12 include an average offer in computing what is a more
13 favorable judgment. They've worked out an incentive for a
14 party to whom an offer has been made to come back with a
15 counteroffer and then you average those two in figuring
16 out whether there is a more favorable judgment,
17 presumptively to try and get the offeree to come back with
18 a realistic offer and dispose of litigation.
19 It's difficult to deal with the complex
20 joint offer provision. What do you do when a party makes
21 an offer that's conditioned on Defendant 1 and Defendant 2
22 accepting it or Plaintiff 1 and Plaintiff 2 accepting it?
23 What if one accepts and one doesn't? Does the
24 cost-shifting measure -- should still be triggered in that
25 situation? That was something that our committee was

1 dealing with as well.
2 Many -- as Chip suggested to you, many of
3 the offer of judgment rules do shift attorneys' fees. We
4 voted not to do that. So with that background, if you
5 have a copy of the proposed Rule 166b dated 6-17, it was
6 on the website. I assume it's over in our --
7 MR. YELENOSKY: It's over there.
8 PROFESSOR CARLSON: -- archives.
9 MR. EDWARDS: May I make one addition to
10 your historical resumé that I think was important and
11 left out, and that was that on the initial vote by
12 overwhelming majority of this committee it was the vote
13 that there be no offer of judgment rule?
14 PROFESSOR CARLSON: You're quite correct.
15 MR. EDWARDS: And that doing what we're
16 doing is in the face of that vote and that -- and the
17 information brought to us by Justice Hecht that he wanted
18 to know what we would want if a offer of judgment rule was
19 going to be imposed in spite of that vote.
20 PROFESSOR CARLSON: Right.
21 MR. LOW: Elaine, can I ask one question?
22 Did you look at the version that our Texas Legislature
23 reviewed? Did you look at those versions to see what was
24 included in what the Legislature wanted?
25 PROFESSOR CARLSON: We looked at those very

1 early on when we were working on the draft out of the
2 Jamail committee.
3 MR. LOW: I'm just curious. I don't know
4 what theirs included, but --
5 CHAIRMAN BABCOCK: Yeah. Buddy, I know
6 about that. The first draft of the Jamail committee rule
7 was patterned on what Governor Ratliff had introduced in
8 the Senate.
9 MR. LOW: But did not pass?
10 CHAIRMAN BABCOCK: It didn't pass. That's
11 correct.
12 MR. LOW: That's what I say, though, is if
13 it didn't pass the committee it's been turned down, or the
14 majority of them didn't favor it, and I just wonder if
15 their terms -- I don't know why they did it, but to me I'd
16 look closely at those terms that the Legislature -- okay.
17 That's --
18 CHAIRMAN BABCOCK: Before we go any farther,
19 some of you may have noticed -- I've noticed people
20 looking, that the news of Judge McCown's demise from this
21 committee may have been slightly exaggerated and --
22 MR. EDWARDS: This is an open meeting,
23 though.
24 CHAIRMAN BABCOCK: This is an open meeting,
25 so maybe he's not here -- maybe he's a stealth person, but

1 Judge McCown wanted to address us for a couple of minutes
2 before we get into the --
3 HON. F. SCOTT McCOWN: Well, thank you for
4 letting me interrupt. I'm glad that Justice Hecht has
5 reported my demise because the last time I tried to resign
6 he sent me an order reappointing me, and so I've spent a
7 very long time on the committee. I'm here today because
8 my therapist told me if I wanted to stop my civil
9 procedure nightmares I needed to come over and get
10 closure.
11 PROFESSOR CARLSON: I need the name of your
12 therapist.
13 HON. F. SCOTT McCOWN: And so I'm here.
14 Today is my last day on the bench, and I won't be able to
15 be with you-all today. I have sent my resignation for
16 this committee to the Court and am ready to send my
17 resignation today to the Governor; and I'm real excited to
18 be retiring and going to become the executive director of
19 a Center for Public Policy Priorities, which is a think
20 tank that works on the problems of the poor; and they have
21 an office over in East Austin; and when I drove my son by
22 he said, "Well, Dad, when you told me they had their own
23 office I envisioned something different," but it's going
24 to be an exciting change of direction.
25 I wanted to say, though, I wanted to come

1 over to say to you-all that I really have enjoyed working
2 with this group. You-all are really an incredible
3 collection of right minds, and I have heard Justice Hecht
4 say before and I really agree with him that it's just
5 amazing that so many lawyers who can be so
6 well-compensated for their time are volunteering to be
7 here to improve -- improve our rules and improve the
8 administration of justice, and I'm sorry that I won't be
9 working on the problems with you, but I know you'll be
10 here working on them.
11 When I joined the committee I really wanted
12 to develop a set of short, simple rules that vested
13 discretion in the trial judge, and I've actually decided
14 it's going to be easier for me to solve the problems of
15 poverty, so I am -- I'm going to move on, but I did want
16 to come over today and say good-bye and wish you-all well.
17 Thank you very much.
18 (Applause.)
19 CHAIRMAN BABCOCK: Well, let me add to what
20 Justice Hecht said in his remarks, that your
21 contributions, Scott, to this committee have just been
22 tremendous.
23 HON. F. SCOTT McCOWN: Well, thank you.
24 CHAIRMAN BABCOCK: Your comments are always
25 right on the money, and you lead the discussion, and you

1 will really be missed.
2 HON. F. SCOTT McCOWN: Well, I appreciate
3 that.
4 HONORABLE JAN PATTERSON: Does this mean we
5 don't have to meet on Saturdays?
6 CHAIRMAN BABCOCK: Depending on how long he
7 stays. We might meet Saturdays.
8 Okay. Bill and Buddy, I think have
9 correctly noted for the historical record that this
10 committee has been lukewarm at best and probably "cool" is
11 the better word.
12 MR. EDWARDS: Cold.
13 CHAIRMAN BABCOCK: Cold. Cold, at least
14 down in Corpus, to the offer of judgment rule, and from
15 canvassing -- from canvassing the Chairs of the advisory
16 committees around the different states that do have this
17 rule, I concluded that this is a -- this is a bold step if
18 we take it, if we take it in such a way that it's
19 meaningful; and all of the practitioners I know who
20 practice in Federal court under Rule 68 and the Chairs of
21 the advisory committees that I talked to in states that
22 had a Rule 68-type rule said that it didn't play a part in
23 their practice, it just wasn't -- it's a nonfactor.
24 And my own view is that to add a complicated
25 rule that is going to be a nonfactor doesn't make very

1 much sense, and so the issue is whether or not in the
2 interest of trying to encourage settlement you do a rule
3 that has greater consequences for the litigants than Rule
4 68 does, and so that's what Justice Hecht asked this
5 committee to try to look at as well as the Jamail
6 committee, and Tommy Jacks is on both committees, just as
7 Elaine is, and he sort of leads the effort along with Joe
8 Jamail on the Jamail side. So we'll see what they've put
9 together.
10 I don't want to spend a lot of time today on
11 this because I think we're going to have to come back in
12 November and react to what Joe's committee has suggested,
13 but I do think it would be appropriate to talk a little
14 bit today about the various tinkering and changes that
15 Elaine and her group have done to our rule which Justice
16 Hecht asked us to go ahead and draft despite the fact that
17 the majority of this committee is not -- I think it's fair
18 to say that a majority of this committee is not in favor
19 of the offer of judgment rule. Okay. So anybody have any
20 reaction?
21 MR. LOW: Elaine?
22 CHAIRMAN BABCOCK: Yeah, Buddy.
23 MR. LOW: Could I ask one other question?
24 CHAIRMAN BABCOCK: Sure.
25 MR. LOW: When you talked about how you

1 determined like who was the winner or was it more
2 favorable and so forth, and I know there are a lot of
3 cases that get into that in other areas, but did you
4 discuss that the person making the offer, the burden was
5 on him to come clearly within the terms of the final
6 judgment and include all elements like, for instance,
7 somebody tenders a settlement but they say you've got to
8 indemnify me from this. Well, that's not an offer that
9 invokes Stowers. So did you say, well, the person making
10 the offer must do certain things, but he must include all
11 elements that are included in the final judgment? In
12 other words, there may be some indemnity provision,
13 cross-claims. There may be certain things, and so it
14 should be the burden of that person to include everything
15 that's included in the final judgment, that he should win
16 on all of them and you shouldn't just balance, well, how
17 much is this worth and that worth.
18 PROFESSOR CARLSON: We did. We talked about
19 the fact that an offer -- and it's in the proposed rule --
20 an offer to settle would have to encompass the entire
21 claim --
22 MR. LOW: Right.
23 PROFESSOR CARLSON: -- except as claims are
24 excluded, you know, under the exclusion provision, but we
25 did not get into more detail than that --

1 MR. LOW: Okay.
2 PROFESSOR CARLSON: -- because of the
3 infinite variety of possibilities.
4 MR. LOW: No, No. I'm not being -- I'm
5 asking my questions out of ignorance, and that's what
6 drives most of my questions. I don't know.
7 CHAIRMAN BABCOCK: Okay. Yeah, Carl.
8 MR. HAMILTON: I may have misunderstood you,
9 but I thought you said our vote was that we rejected the
10 idea that the claims against the state or by the state
11 would be excluded.
12 PROFESSOR CARLSON: We did, and Tommy did
13 not take that out. Tom did the -- I don't want to speak
14 for him. He has been -- we have been going back and forth
15 on the drafting because of both subcommittees, and he did
16 not take that out of the exclusion. I know that there was
17 a sentiment expressed at the June meeting that there were
18 votes -- that we had limited attendance and maybe we
19 wanted to look at the exclusions, but you're absolutely
20 right, Carl.
21 MR. HAMILTON: And one other thing. You
22 mentioned that these lawyers in other states said that
23 this was sort of a nonentity for them.
24 CHAIRMAN BABCOCK: Not this rule, but --
25 MR. HAMILTON: No, but their rules.

1 CHAIRMAN BABCOCK: Yeah. The Rule 68 model,
2 which is a Federal rule.
3 MR. HAMILTON: But under this rule is there
4 a way that people could negotiate and make offers of
5 settlement that doesn't come within this rule?
6 PROFESSOR CARLSON: Yes. If you don't
7 comply with the terms of this rule, it's not an offer for
8 purposes of cost-shifting.
9 MR. HAMILTON: But if you accidentally
10 comply with them then it's --
11 PROFESSOR CARLSON: You're in.
12 MR. HAMILTON: Then you're in.
13 PROFESSOR CARLSON: But one of the
14 exclusions that's proposed under 2 -- I think that's right
15 -- (a)(8) is that parties can Rule 11 out of it, exempt
16 themselves out by agreement, which was another vote.
17 MR. EDWARDS: Is there a -- I thought we
18 talked at some point in time about the fact that in order
19 for an offer to come within this rule that the offer had
20 to specifically state that it was made pursuant to the
21 rule. Is that still in here?
22 PROFESSOR CARLSON: No.
23 MR. EDWARDS: It seems to me that that's
24 one -- you know, you may want to enter negotiations
25 without invoking the provisions of the rule, and the one

1 way you can make that clear is that in order to invoke the
2 rule you specifically state that the offer is made
3 pursuant to the rule.
4 PROFESSOR CARLSON: You know, Bill, that's a
5 good point.
6 MR. LOW: And isn't there a difference? I
7 write somebody and I say, "I offer to pay you X dollars,"
8 but if I'm tendering judgment I offer to tender a judgment
9 against me under these terms."
10 MR. CHAPMAN: Well, you say "pursuant to
11 Rule 68."
12 MR. LOW: Well, yeah. There's nothing wrong
13 with that, but I mean just as a practical matter you can
14 do that or not, but an offer is an offer, but a tender,
15 that's where you say you take judgment -- "I offer this
16 judgment against me."
17 CHAIRMAN BABCOCK: Yeah. Our rule is 166b,
18 by the way. John Martin.
19 MR. MARTIN: 4(b)(2) says that the offer
20 must state that it's an offer to settle pursuant to this
21 section.
22 MR. EDWARDS: Yeah. I didn't know whether
23 that was still in there or not. I know we had discussed
24 it.
25 MR. MARTIN: Another issue I was going to

1 raise, Elaine, in 4, section 4(b)(5) says that the
2 settlement offer may include a demand for taxable court
3 costs, including attorneys' fees; but then under the
4 attorney fee section, 10(a)(ii) it says the court shall
5 disregard any amount included as attorneys' fees in either
6 of the offer of judgment, so it seems to me that under
7 section 4(a)(5) the offer would have to separate out
8 attorneys' fees from other taxable court costs in order to
9 trigger section 10.
10 PROFESSOR CARLSON: And that's what's
11 envisioned, if that's not clear. That's what was
12 envisioned.
13 MR. MARTIN: I know, but I don't think
14 that's what it says.
15 PROFESSOR CARLSON: You don't think it's
16 clear enough?
17 MR. MARTIN: I think it ought to --
18 PROFESSOR CARLSON: Okay.
19 CHAIRMAN BABCOCK: Ralph had something and
20 then Frank.
21 MR. DUGGINS: What happens if you've got
22 multiple defendants and you make one offer and one of the
23 defendants wants to accept it and -- or there's a split
24 among the parties, and the judgment comes in. I mean, the
25 thing is -- the rule is triggered. Does that mean that

1 the defendant who wanted to accept it still gets hammered
2 or --
3 PROFESSOR CARLSON: Yes. We looked at some
4 of the provisions in other jurisdictions, and they get
5 very complex when you join offers, and our subcommittee
6 did not venture into adopting or recommending provisions
7 that carve out if the offer is to defendants who are joint
8 and several and one accepts and one doesn't, then the one
9 accepting is exempted out. We certainly could do it. It
10 just makes it more complex.
11 MR. DUGGINS: I just think that's real
12 unfair where you've got gamesmanship among multiple
13 defendants and somebody is trying to settle and can't.
14 PROFESSOR CARLSON: Well, the other concern
15 was let's say you have multiple defendants and one of them
16 says, "Well, I'm going to reject it," and the other one
17 says, "Well, I'll accept."
18 CHAIRMAN BABCOCK: Frank had his hand up and
19 then Bill.
20 MR. GILSTRAP: In response to Carl
21 Hamilton's comment, I think the history on involving the
22 state and local government entities or state entities was
23 this. The initial draft we saw allowed the state entities
24 to opt in or opt out. Okay. And I think we voted that
25 down, and I think then we did have a slight vote saying

1 the state should be in, and this draft is different from
2 that.
3 One unanswered question in that area is the
4 problem of sovereign immunity. I mean, if you are
5 starting to tag the state of Texas with 10 times the
6 actual costs, do they have to pay it, does it really mean
7 anything to put the state in there if they are immune.
8 Elaine, one question I have is this: The
9 big problem seems to me -- and I think you alluded to it
10 several times -- is the problem of segregating, you know,
11 the fact that we have some claims that aren't covered and
12 some claims that are. We have a claim for declaratory
13 relief or DTPA, which is not a fraud claim, which can
14 include the very same facts; and as I understand that,
15 you're rolling all of that down into 9(a)(3) where you say
16 -- there is the words "more favorable"; and it looks to me
17 like the judge -- I guess the judge -- is going to have to
18 sit there and decide, "Well, I've looked at this whole
19 thing. I've seen that really the DTPA claim was not
20 really important. This was really a fraud case, and so
21 I'm going to award all the costs under this provision"; or
22 "I've decided that this case was really a declaratory
23 judgment action over the title to land and the damages
24 really weren't the most important part, and I'm not going
25 to award it"; and we're putting a lot of discretion in the

1 judge to decide whether it's more favorable. I mean, is
2 that where we're going with it?
3 PROFESSOR CARLSON: I think you're correct.
4 In other words, we did not attempt to, again, define with
5 any particularity what would be a more favorable judgment
6 because of the infinite variety of cases; and, quite
7 frankly, I didn't see that in other jurisdictions. I
8 think it's a very difficult thing to do.
9 CHAIRMAN BABCOCK: Yeah.
10 MR. GILSTRAP: Well, I mean, I understand
11 it's a problem and we may not be solving it, may not be
12 albe to solve it other than to say, "It's your problem,
13 Judge"; but, I mean, I just want to make it clear that's
14 what we're doing with this provision. We're giving the
15 judge discretion to decide what is more favorable, and he
16 or she decides.
17 CHAIRMAN BABCOCK: Right. Bill.
18 MR. EDWARDS: On the question of the offer
19 to multiple defendants, it seemed to me to be pretty
20 simple, if we wanted to deal with it, to just make the
21 application of the rule apply among the defendants as
22 though an offer -- just the same way that if one side
23 makes an offer to the other, then if you make an offer to
24 multiple defendants, one wants to take it and another one
25 doesn't, just apply the same rules within that group just

1 like we do in -- we deal with -- under Chapter 33 we deal
2 with contribution defendants who are not in the regular
3 order of things separately as a separate group among
4 themselves. You could do the same thing here. I don't
5 know whether I'm making myself clear.
6 CHAIRMAN BABCOCK: So if you've got
7 defendants A, B, and C, and defendant C says, "Yeah, this
8 is a good deal, but I don't want to pay the whole thing."
9 MR. EDWARDS: Right.
10 CHAIRMAN BABCOCK: "So I accept," but
11 apparently A and B doesn't, so C insulates himself from
12 the offer of judgment rule down the road if the case turns
13 out bad. Is that what you're saying?
14 MR. EDWARDS: Well, it deals among
15 themselves. Yeah, among the defendants on who has to pay,
16 if it gets sanctioned who has to pay it from among the
17 defendants.
18 CHAIRMAN BABCOCK: Okay. Sarah had her hand
19 up and then Bill.
20 HONORABLE SARAH DUNCAN: I just have a -- I
21 guess a definitional question. 1(a) says that a claim
22 means a civil suit, which is contrary, I think, to the way
23 we use the word "claim," but then subsection 4 says, "A
24 party may serve on an opposing party an offer to settle
25 the entire claim." But then when we look at what's

1 excluded, 2(a)(2) says, "A claim under the DTPA is
2 excluded." What happens when you have a suit that has a
3 DTPA claim -- I mean, I am very much opposed to an offer
4 of judgment rule, so in a sense I don't have a dog in this
5 hunt, but I would like to be able to understand what
6 "claim" means in the context of this rule, and it seems to
7 me that "claim" is being used both for the entire suit and
8 for a particular claim.
9 PROFESSOR CARLSON: Yeah.
10 CHAIRMAN BABCOCK: Your dog in the hunt to
11 the extent that you may have to construe this rule
12 someday, so we probably ought to make sure we --
13 HONORABLE SARAH DUNCAN: I don't think there
14 are enough years left in my term.
15 CHAIRMAN BABCOCK: Bill had his hand up,
16 Carl, and then you. Dorsaneo.
17 PROFESSOR DORSANEO: My question is when
18 there is a recovery of court costs, is that -- and this
19 relates to what Bill was talking about in multiple
20 parties, multiple defendants. Is that part of the
21 judgment? What form does this recovery take and how would
22 that -- because I think that will be related to principles
23 of contribution, if not indemnity, and I think the
24 multiple defendant thing would be -- would work its way
25 out more or less adequately by making this recovery part

1 of the judgment. I think that would improve things
2 because then you would buy into the other law. But then
3 again, I haven't thought about it more than just this five
4 minutes here.
5 I think the definition of the term "claim"
6 would probably be best, if we wanted to define it, to use
7 something like the definition of "claim" in Federal Rule
8 8, would be a good definition. It's very similar to our
9 definition of "cause of action" in Rules 45 and 47. Okay.
10 CHAIRMAN BABCOCK: Carl.
11 MR. HAMILTON: I thought we decided once
12 that under section 2 that if your petition had a claim in
13 it for DTPA that you couldn't use this rule at all. You
14 didn't have to wait to see what the judgment was and how
15 the judge elected over fraud or DTPA. I thought you just
16 couldn't use it if the petition contained one of these
17 excluded items.
18 PROFESSOR CARLSON: I don't think that's
19 what the subcommittee understood the vote to be.
20 MR. GILSTRAP: Carl, the problem with that
21 is that allows someone to opt out by just putting in a
22 declaratory judgment claim, and you can always do that.
23 MR. HAMILTON: But that's what it says. The
24 rule doesn't apply to a claim.
25 HONORABLE SARAH DUNCAN: When claim is a

1 lawsuit.

2 CHAIRMAN BABCOCK: Buddy.

3 MR. LOW: Elaine, when you say in 1(a)

4 "recover damages" and then down here you have "exclusion,

5 nonmonetary relief," are you meaning that -- does damages

6 mean only monetary? That's the way I've seen it put. You

7 know, when you're talking about monetary damages, they

8 usually put "monetary damages." Is there some other kind

9 of damages, or is that what you really intended, monetary

10 damages?

11 PROFESSOR CARLSON: I think our subcommittee

12 intended it to be monetary damages.

13 PROFESSOR DORSANEO: Well --

14 CHAIRMAN BABCOCK: Bill Dorsaneo.

15 PROFESSOR DORSANEO: I could see why you

16 wouldn't use the term "equitable" because equitable -- you

17 know, the terms that you used seemed to indicate that you

18 sidestepped the use of the word "equitable," rather than

19 putting that in you put in "injunctive or declaratory

20 relief" because "equitable" can include a monetary

21 recovery, but I still think that I agree that monetary

22 damages is clearly a redundancy when monetary relief would

23 seem to be more accurately what you're talking about,

24 whether it's characterized as legal or equitable relief.

25 MR. EDWARDS: If my lawsuit is over a

1 royalty interest, and I say my royalty interest is .002
2 percent and the other guy says, "No, it's .0002 percent,"
3 is that within this rule? Is that monetary damages, where
4 it's going to be -- the decision is going to be a
5 percentage of royalty?
6 PROFESSOR DORSANEO: Tough one.
7 PROFESSOR CARLSON: Sarah?
8 CHAIRMAN BABCOCK: Just having a talk on
9 this side of the room.
10 MR. LOW: You're going to include in that,
11 though, that they've been paying under the other and you
12 will have sued and calculated that they owe you X dollars
13 or back pay without saying it should be figured, so you're
14 really going to be talking about money, and that's going
15 to be the main gist of it, the money that hasn't been paid
16 you and the money that's going to come.
17 HONORABLE SARAH DUNCAN: But, Buddy, that
18 depends on when you file this "claim," in quote marks. If
19 I file it early on in the royalty paying process, it may
20 be that my declaratory judgment --
21 MR. LOW: Well, then that is declaratory.
22 HONORABLE SARAH DUNCAN: -- for future
23 royalty is worth a lot more to me than what you haven't
24 paid me in the past.
25 MR. LOW: Well, I understand, and that would

1 be declaratory judgment if it has not. You know, you're
2 just trying to interpret that.
3 HONORABLE SARAH DUNCAN: Well, what if I
4 file it right in the middle of the payout period?
5 MR. LOW: Well, if you do that, most judges
6 aren't going to give you a trial till you've had monetary
7 damages. I mean, you know, you're not going to get
8 it until -- and there's money there to be paid.
9 HONORABLE SARAH DUNCAN: You know, every
10 time we talk about this we come up with insoluble
11 problems.
12 CHAIRMAN BABCOCK: Professor Edwards is --
13 MR. EDWARDS: I got the same answer from
14 Elaine that I got from my Kenyan taxi driver this morning
15 when I asked him, "How long do you have to stay at a
16 broken red light before you can legally go?"
17 MR. YELENOSKY: You're always thinking.
18 CHAIRMAN BABCOCK: Skip.
19 MR. WATSON: Well, Bill voiced the problem
20 that I was having in my practice. So much of it is oil
21 and gas, and so much of it is not necessarily the past
22 royalties or the past production or anything else. It's
23 that plus who has the rights for the future, and because
24 those future rights are defined as interest in real
25 estate, that opens up the whole area of suits for property

1 in general, which may have enormous monetary value but
2 dollars are not being awarded. The fight may be over
3 millions or tens of millions of dollars, but it's an asset
4 in place, and in all that I've been trying to think
5 through this and having missed the benefit of being at the
6 June meeting in Dallas, like so many of us missed, it
7 makes me wonder, have we ever asked how many of the
8 lawyers in this room and/or judges have ever actually
9 dealt with a Rule 68 Federal offer of judgment? Either
10 made one or responded to one, have any of us?
11 MR. LOW: I heard about one at the
12 barbershop.
13 MR. WATSON: So we've got four or five of
14 the people in the room.
15 CHAIRMAN BABCOCK: Yeah. But it just
16 doesn't happen very much.
17 MR. WATSON: Yeah. I mean, it's -- I've
18 considered them, but the -- you know, even when defending
19 a case and it's an unrealistic plaintiff, for whatever
20 reason, whether it's plaintiff's attorney or plaintiff, I
21 always thought that the downside of actually making a Rule
22 68 offer of judgment and the potential traps for the
23 unwary in that negated doing it, even negated the
24 potential savings of just stopping the hemorrhage of
25 attorneys' fees for my client, and I'm just wondering, you

1 know, did anyone actually have success in using it? I
2 mean, we had five or six hands go up, but did it ever
3 actually work out and resolve the situation or result in
4 money changing hands?
5 CHAIRMAN BABCOCK: Well, speaking only from
6 my perspective, the answer to that is "no," but the
7 problem is with Rule 68 the potential benefits of even if
8 you're successful in your Rule 68 tender it does not
9 outweigh the pitfalls that you have and in many cases
10 where you have -- speaking from the defense side, where
11 you have a plaintiff that is asserting an unreasonable
12 claim with unreasonable demands, that person is more often
13 than not judgment-proof in the sense that if you -- even
14 if you get your costs, your enhanced costs from the time
15 of your offer, they're not going to be able to pay them
16 anyway. So why bother?
17 MR. WATSON: That's precisely my experience.
18 Has anybody else had a different experience that's dealt
19 with it?
20 CHAIRMAN BABCOCK: I don't think there's
21 much debate, Skip, that Rule 68 is not worth the effort;
22 and if all we're doing is just putting, you know, the
23 Texas version of Rule 68, I think -- I think, frankly,
24 that the downside to it from a policy question and from a
25 mechanical perspective is it's not worth the effort.

1 That's just my opinion.

2 MR. WATSON: I understand, Chip, and the

3 point that I'm making is Rule 68 has been out there for

4 awhile. Some of us have tried to use it. There is some

5 precedent on it. There's some bright minds that have

6 tried to figure out how to apply it to get the benefit

7 from it and have backed off of it because of the potential

8 pitfalls; and yet we're trying to say, okay, that doesn't

9 work; but we're going to try because the Court has asked

10 us to, even though we've said, "No, it's a bad idea," to

11 make something out of whole cloth; and I guarantee you

12 we're not going to see the pitfalls in making something

13 out of whole cloth when the existing rule that we have as

14 a template is unworkable. It's just not going to work.

15 CHAIRMAN BABCOCK: Bill.

16 PROFESSOR DORSANEO: It seems the key

17 question in terms of experience would be what the

18 experience has been in jurisdictions that shift something

19 more than costs.

20 MR. WATSON: Absolutely. And that's what I

21 would very much like to hear, but to me that's a research

22 project for somebody that may be, you know, too big.

23 CHAIRMAN BABCOCK: No. Elaine and I and

24 Tommy have talked to practitioners in a bunch of states.

25 MR. WATSON: Please educate us.

1 CHAIRMAN BABCOCK: Well, I think in summary
2 -- and Elaine can supplement this, but in summary, the
3 jurisdictions that have a Rule 68-type rule say it's a
4 nonfactor. It's not used, just might as well not be
5 there. The only jurisdiction -- the only person I talked
6 to from a jurisdiction where there was a rule with some
7 bite in it was Florida, and we borrowed a lot of the
8 features of the Florida rule and put it into this proposed
9 rule, 166b, the 6-17-02 draft.
10 The one person I -- the one person I talked
11 to in Florida, who was Chair of their rules committee,
12 said that their rule is a factor and it does encourage
13 settlements and at mediation there's always a question by
14 the mediator, "Have you done your" -- whatever their rule
15 number is. "Have you done your Rule 166b tender? Has
16 that happened as a prelude to this mediation?" And he
17 says it's a factor and it helps get cases settled. Now,
18 that's one guy, and, Elaine, you talked to somebody else
19 in Florida or maybe the same guy?
20 PROFESSOR CARLSON: We talked to Peter Sacks
21 in Florida, Hugh Moore in Tennnessee, Warren Silver in
22 Maine, Justice Eisman in Idaho, and that's what my notes
23 reflect.
24 CHAIRMAN BABCOCK: What did your Florida guy
25 say?

1 PROFESSOR CARLSON: Well, he had mixed
2 feelings. He said that the 25 percent buffer creates a
3 window that allows a lot of cases not to fall within the
4 application of the rule, that that's a significant buffer
5 in the judgment that the offer of judgment rule is not
6 triggered very often because many times the judgment is
7 within the 25 percent of buffer. He talked about the fact
8 that the Florida rule carves out just straight discretion
9 of the trial court in applying the rule. They've got a
10 list of factors. There's a statute and a rule in Florida.
11 For example, in test cases, in close cases, etc., the
12 Florida judges have a great deal of discretion in not
13 applying the rule altogether.
14 So it's a pretty fluid system, but it does
15 come into play. It's a serious consideration for
16 litigators in Florida. Chip is quite right. The places
17 that just do the straight 6 -- Federal Rule 68 straight
18 shift of one-time costs, it really doesn't -- it's not a
19 big factor because it just isn't enough financial
20 incentive for litigators to worry about its application.
21 CHAIRMAN BABCOCK: One guy I talked to
22 didn't even know they had a rule in his state. Chairman
23 of their rules committee. He said, "We don't have a rule
24 like that."
25 "I don't know. I'm reading this thing."

1 Yeah, Carl.
2 MR. HAMILTON: It seems to me with all these
3 problems that if we're going to have sort of a trial run
4 at this anyway, why not limit the rule strictly to say
5 "personal injury tort claims" and eliminate all these
6 other problems. It would make it a lot simpler to use if
7 we're just going to see if it works.
8 CHAIRMAN BABCOCK: Bill is in favor of that.
9 MR. EDWARDS: If your net worth is more than
10 $25 million it doesn't apply, like the DTPA.
11 CHAIRMAN BABCOCK: Buddy.
12 MR. LOW: Chip, were there any who maybe --
13 you know, I've been defending cases and not getting stuff,
14 you know, so bad I couldn't stand it; but if you added
15 attorneys' fees to it it's just going to be a little more
16 than I can take. Are there any cases that -- I mean, do
17 they sever out and can they appeal in those states
18 attorneys' fees only or you have to appeal the whole case,
19 or how does that operate mechanically?
20 CHAIRMAN BABCOCK: I didn't talk to anybody
21 about that issue, but wouldn't you be able to just have a
22 limited appeal and appeal one issue if you wanted to?
23 MR. LOW: Well, I don't know. Then you'd
24 have to have some -- yeah, I guess you could limit it.
25 CHAIRMAN BABCOCK: Here's the other thing

1 that I see, Skip, and Chris just told me that apparently
2 there's a staff attorney over at the Court that actually
3 practiced in Florida and has substantial experience with
4 their -- with the Florida rule, and she's been in
5 insurance defense practice apparently in Florida.
6 MR. WATSON: By all means let's get somebody
7 in here who knows what they're talking about.
8 CHAIRMAN BABCOCK: As opposed to all of us.
9 Bill Dorsaneo.
10 PROFESSOR DORSANEO: I have a concern that
11 we're actually drafting a rule that has a good chance of
12 having some attorneys' fees shifting in it and have a lot
13 of concern about how that works from place to place. Is
14 it some lodestar method? Is it contingent fee contract or
15 whatever? To not deal with that because we're against
16 that seems to be a bad plan because I am not sure that we
17 won't end up with that done poorly.
18 MR. GILSTRAP: Bill, are you saying it's in
19 there now, the attorneys' fees?
20 PROFESSOR CARLSON: No. He said if the
21 Court wants to do that.
22 PROFESSOR DORSANEO: If the Court wants to
23 do that. Now, I can't conceive of them doing a rule
24 unless they do that myself, frankly. I may just be
25 imagining things, but that's what I expect is on the way.

1 PROFESSOR CARLSON: Connecticut will allow
2 you to shift attorneys' fees up to $350. We didn't love
3 the Connecticut model.
4 MR. LOW: But, Bill, in our charge to draw a
5 rule if we're going to have one, and wouldn't it be their
6 charge to say, "We want you to include attorneys' fees."
7 They've told us to do something we voted against. We're
8 voting against including attorneys' fees. If they want us
9 to consider that and put it in it, I would suggest they
10 come back and tell us that.
11 PROFESSOR DORSANEO: Well, that would be
12 good, but I don't know if they will heed -- I'd like to
13 know if they want us to draft something on attorneys' fees
14 that should be considered.
15 CHAIRMAN BABCOCK: Well, my sense of our
16 charge is they wanted us to draft -- I mean, assuming
17 there's going to be a rule, they wanted us to draft a rule
18 that we think is the best rule. The problem is that
19 there's so much sentiment in this committee that there be
20 no rule that we are putting bells and whistles on this
21 thing that gets it pretty close to the line of no rule.
22 That's the problem.
23 MR. GILSTRAP: Chip --
24 CHAIRMAN BABCOCK: It's not a problem. I
25 mean, it's just a reality. That's what we're doing.

1 Because the rule as we're proposing it here will have
2 minimum impact. And that's -- but that's what they asked
3 us to do, give them our best view of it, and so that's our
4 best view of it.
5 Now, the Jamail committee might have the
6 same idea or they might have a different idea. I know
7 Tommy feels very strongly about it, and I know that one
8 member of that committee, Dee Kelly, is his polar
9 opposite, so -- Dee Kelly wants a really Draconian rule.
10 So --
11 PROFESSOR DORSANEO: Well, it goes both
12 ways, and you're going to shift the contingent fee, that
13 could get pretty Draconian, it seems to me. I wouldn't
14 want any part of that if I was on the defense side.
15 CHAIRMAN BABCOCK: Well, yeah, and, you
16 know, this thing kicks as hard as it bites. I mean, it --
17 there's a downside for defendants, I've thought, all along
18 and maybe more downside for defendants than plaintiffs.
19 MR. EDWARDS: You know, the problem is it's
20 not for all plaintiffs or all defendants because if you're
21 General Motors, one case ain't going to make or break you.
22 If you're most of my clients, they don't care. But if any
23 of us are parties in the litigation, and particularly if
24 they amend the bankruptcy rules and say if you're making
25 money, you're going to have to pay the -- give for the

1 rest of your life, people like us in the middle of
2 America, it's going to kill us.
3 CHAIRMAN BABCOCK: Yeah. Yeah. Bill's
4 point, which was very well made in earlier meetings, is
5 that, you know, there are people at either end of the
6 spectrum, but where this is really going to hurt is the
7 person who has some but not a lot of value in his estate.
8 MR. EDWARDS: That's right.
9 CHAIRMAN BABCOCK: And that will just really
10 close the courthouse to that person because it will be so
11 dangerous to litigate that they won't be able to pursue
12 their claims. Or on the other side, maybe defend
13 themselves.
14 MR. EDWARDS: Or defend it.
15 CHAIRMAN BABCOCK: Yeah. Skip had his hand
16 up first.
17 MR. WATSON: No, go ahead, Frank.
18 CHAIRMAN BABCOCK: Frank.
19 MR. GILSTRAP: As I recall the history on
20 this, the committee voted rather resoundingly that we
21 didn't want a rule.
22 CHAIRMAN BABCOCK: Right.
23 MR. GILSTRAP: We were -- the response, I
24 believe, from the Court was, "Thank you very much, but,
25 you know, we'd like you to draft a rule anyway." Frankly,

1 I see some -- in that I see some desire maybe to preempt
2 the Legislature, because their -- you know, the
3 Legislature has attempted to do this in the past. I don't
4 know. But what we did then was we came back and we voted,
5 okay, well, attorneys' fees or something that's not
6 attorneys' fees but still is substantial, and we came up
7 with the 10 times costs figure.
8 CHAIRMAN BABCOCK: Right.
9 MR. GILSTRAP: And we thought that might be
10 something that would carry some weight, would keep it --
11 make it a factor, but wouldn't be kind of the ultimate
12 sanction of attorneys' fees, and I think that's where we
13 are, and the 10 times costs came out of this committee,
14 and that's the vote we have been working on since then.
15 CHAIRMAN BABCOCK: Yeah. That's a good
16 point, and to add only that Senator or Governor Ratliff
17 asked the Court to look at this, whatever that means
18 between the interplay with the Legislature. Yeah, Elaine.
19 PROFESSOR CARLSON: I wanted to respond to
20 Skip. We really have not been operating in a vacuum.
21 There is a tremendous amount of literature out in this
22 area.
23 MR. WATSON: I didn't mean to imply at all
24 that you had, Elaine. I was just being flippant.
25 PROFESSOR CARLSON: No, no. Just to give

1 you some background, there are a tremendous number of
2 articles in the area of offer of judgement, both from a
3 practical point of view and a theoretical point of view.
4 There has been empirical studies on whether it's effective
5 and when it's not. We had the benefit of the -- the
6 American Bar Association looked at the Federal rule and
7 their comments. We had the benefit of the Federal
8 advisory committee looking at its rule and proposed
9 changes and discussion. So I feel like -- and we have a
10 mountain of paper we could share with all of you, if you'd
11 like to see it.
12 MR. WATSON: No, no. We're just asking you
13 to distill it, which is an impossible task.
14 PROFESSOR CARLSON: That's what we've tried
15 to do, is to go through and try and identify, without any
16 of us having used the offer of judgment rule, what seems
17 to be the potential problems and identify them for this
18 committee so we could, you know, address them.
19 CHAIRMAN BABCOCK: Yeah. Skip and then
20 John.
21 MR. WATSON: One of the -- I mean, there are
22 just so many theoretical problems, but one of the things
23 I'm trying to think through, and some of the judges might
24 be able to help us. I've listened very carefully to what
25 Bill said, and I certainly think he's right that any

1 potential impact is going to be squarely hit at the
2 middle, at probably the small businesspeople, the injured
3 plaintiffs, the smaller defendants, maybe some insurance
4 companies, but I would think that there would quickly be
5 an exclusion, you know, written in this state on this type
6 of thing.
7 So, you know, how would it -- let's say we
8 got something out and are smart enough to figure out the
9 pitfalls and to write around them. How would it be used?
10 You know, I was hopeful when they amended the TRAPs a few
11 years ago to try to put some more teeth in the frivolous
12 appeal and actually wrote a frivolous mandamus provision
13 of cost-shifting that that might help. My anecdotal
14 evidence from, you know, just visiting with friends who
15 are on the courts is that it's never used and even the
16 courts with the greatest backlog like Dallas just don't
17 use it. It's just not used, and unspoken, I think part of
18 it is that we've got an elected judiciary, and
19 discretionary punitive awards that are ultimately going to
20 be seen by the client as directed against their lawyer or
21 caused by their lawyer are probably not going to be used
22 by judges, but I would like to be shown that I'm wrong on
23 that.
24 To me the only area that it would end up
25 actually having an effect, and this may be significant,

1 would be the Florida example of mediation. That's exactly
2 what I was thinking, that when the mediator figures out
3 that this is not a lawyer-driven problem but is truly a
4 client-driven problem that the case is not settling and
5 that it's truly one that should settle, then it would
6 appear that the mediator could use that against the client
7 if the client is in the middle class that Bill has talked
8 about.
9 If it's a small businessperson or if it's an
10 injured plaintiff who does have an estate, a significant
11 estate, and who would not necessarily want the credit
12 report showing a bankruptcy on there, then it might be of
13 some use. I'm just wondering if anybody else sees any
14 other practical application where it would actually be
15 used, and I'm particularly interested in the trial judges.
16 CHAIRMAN BABCOCK: All right. Hang on for a
17 second. Having grown up in West Palm Beach, Florida, I
18 have a sense when a Floridian has entered the room.
19 Chris, do we have a Floridian with us?
20 MR. GRIESEL: I have a Floridian lawyer, but
21 I don't know whether Mr. Watson would choose to take her
22 and have her qualifications screened first and, thereby, I
23 only owe her a car washing, but whether you choose to
24 subject her to the entire committee, in which case I would
25 be painting her home. I leave that to the Chair's

1 discretion.
2 CHAIRMAN BABCOCK: Well, we'll kick that
3 ball back over to you guys. Would she care -- whatever
4 her name is, would she care to comment?
5 MR. GRIESEL: To introduce her to the
6 committee, "her" being Susan Bostic, who is Justice
7 Enoch's staff attorney. Before that she was the Court's
8 mandamus attorney, and before that she worked for the fine
9 appellate system of the State of Florida, and before that
10 she was in private practice in the great state of Florida,
11 and several weeks ago when we were talking about this
12 Ms. Bostick related several of her experiences, and I
13 don't want to hold her up -- besides being a model lawyer
14 I don't want to hold her up as having all the experiences
15 of the Florida Bar, but to the extent she could share that
16 with any of you on the record or perhaps off the record
17 then --
18 CHAIRMAN BABCOCK: Yeah, Susan, we're a
19 friendly group here. Why don't you sidle up to the table
20 and just give us three minutes on what happens in Florida?
21 MS. BOSTIC: Well, thank you. I haven't had
22 a chance to review fully the proposed rule.
23 CHAIRMAN BABCOCK: Don't worry about that.
24 It doesn't look anything like Florida's.
25 MS. BOSTIC: Okay. Well, we generally used

1 it in the defense context. We found that it did encourage
2 the plaintiffs' counsels to look seriously at their claims
3 and to see if we can settle a case right off the bat.
4 Sometimes it worked, sometimes it didn't. Sometimes we
5 were able to recover fees at the end of the day after the
6 case was over. You know, sometimes we weren't.
7 It was helpful in certain contexts, and I
8 think that it was something that we always took into
9 consideration from the defense side if we received a case,
10 whether an offer of judgment should be made, you know,
11 quickly. It was certainly something that we took
12 seriously and always took into consideration whenever a
13 case was filed.
14 CHAIRMAN BABCOCK: Susan, what I think a lot
15 of people on this committee are worried about is the -- is
16 the coercion of settlements that probably, you know,
17 shouldn't happen just because of the in terrorem effect
18 for either a plaintiff or a defendant who has modest
19 means, but some means, and is forced to settle their case
20 cheaply if they're a plaintiff or forced to overpay if
21 they're a defendant because they're terrified that at the
22 end of the day they may have to pay these attorneys' fees.
23 Is that a real concern based on your Florida experience or
24 not?
25 MS. BOSTIC: It was certainly a factor that

1 was always considered, whether or not -- I'm sure whether
2 or not they would be facing liability, you know, for
3 thousands and thousands of dollars in attorneys' fees.
4 Whether it forced settlement out of that concern, I never
5 got that impression that it, in fact, did. I'm sure that
6 it's something that was discussed between attorney and
7 client, but whether or not it forced the defendant to
8 overpay or the plaintiff to settle below what they valued
9 their case at, in my experience, which was limited, I
10 didn't find that to be the case.
11 CHAIRMAN BABCOCK: Okay. Yeah, Bill.
12 MR. EDWARDS: You were representing
13 primarily insurance companies in your actual practice?
14 MS. BOSTIC: Yes, in defense.
15 MR. EDWARDS: Did the insurance companies
16 get -- were any of your -- do you know of any of the
17 defendants who suffered a sanction under the Florida
18 rules, if they ever did? Any specific case that you were
19 involved in, your firm was involved?
20 MS. BOSTIC: Not to my knowledge, no.
21 MR. EDWARDS: Do you know of any defendant
22 anywhere in Florida that suffered any sanctions?
23 MR. GRIESEL: And I'll --
24 HONORABLE JAN PATTERSON: Are we moving into
25 the deposition phase?

1 MR. GRIESEL: Let me object.
2 MR. EDWARDS: No, no. I'm not trying to
3 make a point there. I was going to ask a question if she
4 did, and that was did the insurance company pay the
5 sanction or was that a sanction on the defendant himself
6 or herself or itself, if it was a corporation or small
7 business, and if you don't have any knowledge, you can't
8 give us an answer.
9 MS. BOSTIC: Right, and unfortunately I
10 don't have any knowledge of that specific circumstance.
11 MR. GRIESEL: And what Ms. Bostic did offer
12 was to give us a list of people within both the insurance
13 defense Bar and the plaintiff's Bar within the state of
14 Florida, and we could ask that empirical question and find
15 out.
16 MR. EDWARDS: Do you know what it was -- do
17 you know what the position of insurance companies? Did
18 you-all ever talk about that, or do you have any knowledge
19 of the position of the insurance companies as to whether
20 that was within or without their supplementary pay
21 provisions of the policy, because it is a penalty and most
22 of those -- most of those penalties are excluded by most
23 policies?
24 MS. BOSTIC: Right. No, I don't have any
25 specific knowledge to give you on that. As I say, I could

1 give you names of --

2 MR. EDWARDS: I am not trying to pick on

3 you. I'm just --

4 MS. BOSTIC: No, no, no.

5 MR. EDWARDS: If I start picking on you,

6 you'll know it.

7 CHAIRMAN BABCOCK: The real

8 cross-examination begins this afternoon. Well, Susan,

9 thanks for coming, and I tell you, we would take you up, I

10 think, on your offer, not of judgment, but to get the

11 names of people we could contact.

12 MR. WATSON: Not to paint her house, though.

13 MR. GRIESEL: That's just my job.

14 CHAIRMAN BABCOCK: Carlyle.

15 MR. CHAPMAN: Chip, I have, first, some

16 observations and then a question that I hope is not seen

17 as being snide, but it's heartfelt; and the observation is

18 that although under section 4(c) of the proposed rule of

19 version 6-17-02, the concerns that I had, Skip, with

20 regard to the use of Federal Rule 68 in large measure are

21 met; and that concern primarily was that the offer of

22 judgment came within two weeks of filing the lawsuit

23 before anyone had done any discovery and any testimony

24 either with regard to liability or damages had been

25 developed and it was made only as a stick to force early

1 settlement without regard to the merits of the case.
2 I thought that that was a misuse, but the
3 Federal rule allowed that because it has no limitations as
4 to when it may be used; and more of a problem that also is
5 dealt with in this proposed rule, it could only be used by
6 defendants. We've all talked about that, but that leads
7 me to the question that since we have dealt with those
8 abuses in this proposed rule and we've come to the
9 conclusion, I think properly, that as a practical matter
10 it's the middle that gets squeezed and affected by this
11 proposed rule, I come back to the question as to what it
12 is that the Supreme Court wants to accomplish by a rule.
13 Has the Court been clear as to whether or
14 not this is a -- intended to be a mechanism that promotes
15 settlement or -- at any cost or a mechanism that promotes
16 a reasonable settlement, because I'm struck with the
17 notion that at the end of the day that parties that are in
18 the middle tend to come to a reasonable settlement of
19 their litigation and/or try it because it cannot be
20 settled, and that's what we're supposed to be doing.
21 I don't have the sense that the parties in
22 the middle are abusing the situation. It's either the
23 plaintiff, who is making a completely unreasonable demand
24 and for whom we've already said in most instances this
25 rule will have no practical impact, or it is the defendant

1 who has buckets and loads and pockets of money that
2 without regard to the merits of the case will make a
3 nominal offer and force the other side to try the case.
4 Now, if the Court intends to deal with
5 either of those ends of the spectrum, I think that as a --
6 as a matter of a fortiori, a rule such as that that we are
7 dealing with is not going to assist, and I think that one
8 of the things that we might benefit from as a committee is
9 to ask the Court more specifically as to what goal it
10 seeks to accomplish by the rule that they've asked us to
11 draft.
12 CHAIRMAN BABCOCK: Well, before Buddy
13 speaks, can I just respond to Carlyle? I obviously don't
14 speak for the Court, but my strong sense is the Court and
15 perhaps others in government believe that this rule may
16 promote settlement; and if so, the Court thinks settlement
17 is a good idea and so it wants us to explore the rule with
18 that end in mind. So I think that's the impetus for the
19 rule, not only on the part of the Court but Senator
20 Ratliff and other members of the Legislature.
21 Buddy and then Judge Patterson.
22 MR. LOW: Yeah. Elaine and Sarah and I were
23 with Justice Hecht and I asked him that exact question,
24 and he said that more cases needed to settle and trying to
25 do that, and then I gave him the answer to that, but I

1 won't repeat that.
2 But let me raise one other thing that I
3 think we need to steer clear of, and that is -- Skip
4 raised the question of mediation. If we start mixing this
5 with mediation, mediation is supposed to be where I can
6 tell the mediator anything I want to, and mediation is
7 kind of holy in this state, and it promotes a lot of
8 settlements. If we mix this with mediation, it is a bad
9 mistake. It's going to dilute mediation.
10 CHAIRMAN BABCOCK: Judge Patterson and then
11 Judge Brown.
12 HONORABLE JAN PATTERSON: I think Carlyle
13 makes an excellent point, but I also think that we have a
14 mandate from the Court, and this committee, I don't view
15 that even though many and maybe most of us are against the
16 rule, I don't think that we had a cynical approach in
17 excluding attorneys' fees or making it an unworkable rule.
18 I think that the subcommittee has come up with an
19 excellent compromise. I don't think it has the in
20 terrorem effect, but it does have a bite of certain sort,
21 and it is a compromise. It will at least allow us to have
22 the experience of the rule, and I think that only with the
23 life of some experience with the rule can we figure out
24 how to tinker with it to improve it or to get rid of it.
25 So I don't think we ought to go with one

1 extreme or the other, that we ought to have a limited rule
2 with some effect and see how -- see what kind of feedback
3 we get from lawyers and see what the experience of the --
4 we have with it, because I think lawyers in this state do
5 have a unique approach to litigation and these types of
6 rules, and we owe it to them not to do one extreme or the
7 other.
8 CHAIRMAN BABCOCK: Good point. Harvey.
9 HONORABLE HARVEY BROWN: I know Justice
10 Hecht, one of the things he talked about at this meeting
11 that Buddy was at, because I was in the last 10 minutes of
12 it, was the small cases that get tried, the auto wrecks;
13 and I want to clarify whether maybe there would be an
14 incentive for both sides to settle even if they fell
15 within these two categories of very poor or very rich.
16 Let's say you have a PI claim and auto wreck
17 and the defendant offers 75,000. The plaintiff recovers a
18 hundred. That's going to be the judgment with interest,
19 everything. It's $100,000. So the defendant was within
20 25 percent, right? The court costs are 10 grand. 10
21 times that is a hundred grand. Now the plaintiff has
22 gotten zero, I guess, in the judgment. Is that right? I
23 mean, the judgment, I take it, is after all this shifting.
24 So now the plaintiff has recovered zero; therefore, even
25 the poor plaintiff who is judgment-proof at least has some

1 risk that they didn't have before. Now, whether that's a
2 good thing or a bad thing, I don't know, but it seems to
3 me that there's at least some pressure placed on this
4 cost-shifting that wouldn't be there without it. Is my
5 example wrong?

6 MR. EDWARDS: No. There's pressure in the
7 example that you have given that is monumental because
8 it's the entire estate of the person that you're talking
9 about that's at risk a hundred percent. It would be like
10 General Motors betting the company.

11 HONORABLE HARVEY BROWN: Yeah. No, you're
12 right on that. I wasn't arguing for it or against it.
13 There is pressure on the plaintiff.

14 MR. EDWARDS: No, I'm just saying, it's not
15 side pressure. There is monumental pressure, is all I'm
16 saying.

17 HONORABLE HARVEY BROWN: Okay.

18 CHAIRMAN BABCOCK: Yes, Skip then John, or
19 John then Skip, whichever way you guys want to go.

20 MR. MARTIN: To tie into Bill's point about
21 liability insurance and to use your example, if that's a
22 situation where the defendant winds up paying a hundred
23 grand in attorneys' fees and it's not covered because it's
24 excluded as a penalty and this is just Joe auto driver,
25 you know, what's fair about that? The driver had nothing

1 to do with the decision not to settle the case, and to me
2 that's one of the biggest problems with this whole thing.
3 There are very few cases where liability
4 insurance is involved where the insured is the party
5 responsible for a case not settling. It can happen in a
6 case where the insured has the right to consent, and it
7 does happen occasionally, but the vast majority of those
8 decisions are made by a liability insurance carrier.
9 MR. EDWARDS: Or it's a hundred percent
10 retro or there's a million-dollar self-insured retention.
11 MR. MARTIN: Yeah. So if we're going to do
12 this, and I'm not in favor of it, but -- everybody seems
13 to want to say that, but if we're going to do this --
14 CHAIRMAN BABCOCK: Is there anybody that
15 doesn't want to say that?
16 MR. MARTIN: If we're going to do this, and
17 in general I have not wanted to give the judges a lot of
18 room to move in a discretionary way on this, but if we're
19 going to do this I think I would like to see the judge
20 have to make a decision if there's liability insurance
21 involved as to who is responsible for the fact that it
22 didn't settle, the insurer or the insured, and impose that
23 as a sanction against whichever entity is responsible for
24 the case not settling. I think that's the only thing
25 that's fair.

1 CHAIRMAN BABCOCK: Skip.
2 MR. WATSON: I agree a hundred percent with
3 what was just said, and I think that we're getting down to
4 it. If the Court and the Legislature are targeting
5 automobile cases that they perceive as clogging up the
6 courts and they should settle and if they're convinced
7 that the current practices of mediation, etc., are not
8 cutting into that, then it is critical that whatever they
9 do include some type of language that as a matter of state
10 policy -- and I'm talking about -- I don't think the Court
11 can do this, but I'm talking about the Legislature would
12 need to say that these penalties cannot be excluded from
13 the policy.
14 MR. LOW: Right.
15 MR. WATSON: That's got to apply to the
16 insurance carrier, and I am not anti-insurance carriers.
17 I'm just saying for it to work it has to be there, and
18 then Bill is right. The hammer is going to be
19 disproportionately against the plaintiff as opposed to the
20 insurance company because they may adopt a policy like a
21 well-known large discount retailer in this state of just,
22 you know, everything goes to trial, nobody has authority
23 at mediation, and everything will be appealed. And I
24 don't think that will affect them once they crunch the
25 numbers and see we're still saving money by paying 10

1 times costs.
2 CHAIRMAN BABCOCK: Okay. Here, let's do
3 this. We're going to get the Jamail report before our
4 November meeting. Let's see what the Jamail committee
5 comes up with and chew on that and then come back in
6 November. Elaine, you've heard some kind of tinkering
7 kind of comments about, you know, definition of "claim,"
8 that type of thing you can work on, and we'll digest
9 Jamail and then we'll continue to talk about it. Bill.
10 MR. EDWARDS: Can I deal with a couple of
11 tinkering things without the overall policy? It's on
12 9(a)(3)(B). There's something missing here, because we go
13 to (B) with an "and" and the only thing -- the only way
14 the penalty gets imposed, if I read it correctly, is if
15 the claim exceeds 25 percent as opposed to if it's less
16 than 25 percent.
17 PROFESSOR CARLSON: Yeah. I've got that
18 language targeted for a little revamping as well. I
19 understand what you're saying.
20 MR. EDWARDS: Yeah. The second thing is, if
21 I understand the way this particular provision is written,
22 that if you get to one of these statutory cap things that
23 the penalties are invoked if it's a tenth of a percent
24 above or below.
25 PROFESSOR CARLSON: We'll come back on that.

1 I understand what you're saying, Bill.
2 MR. EDWARDS: Two other things with regard
3 to policy. I'm not going to discuss the pros and cons for
4 something that if we're going to have a rule may ought to
5 be addressed, and there are two things that I see as cases
6 are actually in litigation and where there's not a
7 settlement going on particularly, it looked to me like
8 costing litigants on both sides of the deal. A tremendous
9 amount of money is no evidence motions for summary
10 judgment, which in my opinion are causing the development
11 of instead of five depositions in a case, 25 depositions
12 in a case, and Daubert motions where I have seen in our
13 county alone in the last couple of months cases where the
14 Daubert motions and the hearings on them have taken longer
15 than the trial, and in each case nothing has happened.
16 Nobody has been -- in those cases the experts have not
17 been disqualified.
18 The cost of putting those things on where
19 you have to get experts, either side, the experts in court
20 and have -- I've seen them go through reports line-by-line
21 by line-by-line day after day, and it seems to me that if
22 we're going to do something that cuts costs and we're
23 going to have some rule that shifts costs that we ought to
24 address those two problems at the same time, because it is
25 something that is important to both sides and costs both

1 sides a lot of money.
2 CHAIRMAN BABCOCK: We're going to be in
3 recess for 15 minutes. When we come back we'll talk about
4 cameras in the courtroom with Mr. Orsinger.
5 (Recess from 10:31 a.m. to 10:52 a.m.)
6 CHAIRMAN BABCOCK: Okay. We're back on the
7 record after our morning break, and we're moving into the
8 exciting area of cameras in the courtroom before we get
9 into the even more exciting area of forcible entry and
10 detainer.
11 HONORABLE TOM LAWRENCE: We call that
12 "evictions" now.
13 CHAIRMAN BABCOCK: We call that "evictions"
14 now. Sorry. So before we evict everybody, let's see if
15 we will allow the cameras in.
16 MR. ORSINGER: Okay. Chip, we debated
17 cameras in the courtroom on Saturday, March 9th. That
18 transcript is on the web if you want to look at it. I
19 thought I'd give us some highlights so we don't have to
20 redebate it today and see if we could drift towards some
21 kind of resolution so the issue doesn't just keep
22 festering here, if that's the proper description.
23 Some background is that the Legislature
24 expressed an interest in this, and there was an interim
25 charge from Senator Ellis' office to examine the condition

1 of cameras in the courtroom in Texas trial courts and
2 appellate courts, and the particular interest was to find
3 out if there should be uniform guidelines for pooling
4 electronic media, and that would, first of all, be sure
5 that we only had one camera or the trial judge was able to
6 control it so it would not be intrusive, and the other
7 thing is, is that it would eliminate the local option if
8 you had a set of uniform rules.
9 And so there was kind of a task force put
10 together by the appointment of the Supreme Court, and they
11 came out with uniform -- a set of uniform rules for
12 coverage of judicial proceedings in trial and appellate
13 courts, and that has been brought to us for comment, and
14 we never have actually gotten so much down into the detail
15 of that proposal about how you pool, etc., etc. We've
16 been more concerned with, if you will, the philosophical
17 issue of how open the courts should be to electronic
18 media, how to protect the integrity of the litigation
19 process, whether judges act differently with cameras
20 rolling, whether lawyers act differently, whether
21 witnesses might be intimidated into not testifying, and
22 larger questions about whether the public has a right to
23 know, whether it's good for the public to know.
24 There's quite a lot of difference of
25 philosophical perspective on this issue, as reflected in

1 the debates. Now, I feel like there's some issues that we
2 should focus on. If anyone wants to revisit those larger
3 societal issues, that's fine, but I really would hope
4 today that we can get down to some decisions on some
5 important points.
6 Number one is that we have a rule out there
7 right now, which is Rule 18c, and whether we like this
8 proposal for media pooling and whatnot, something probably
9 needs to be done with Rule 18c as it is written today.
10 Rule 18c starts out -- and it is the rule that governs
11 media in the trial court, and it relates to broadcasting,
12 televising, recording, or photography. It does not relate
13 to newspaper reporters who are taking notes or to sketch
14 artists, but it does include photography as opposed to
15 television, although I don't know that that's what excites
16 everybody.
17 But basically what it says is you can -- the
18 trial court can have broadcasting, televising, recording,
19 or photographing only in accordance with Rule 18c, and
20 there's three subparts. Subpart (c) is not important to
21 us because that's ceremonial occasions, investiture of
22 judges. No one is concerned about that. So we're
23 concerned about (a) and (b). (a) is that a judge can do
24 it only pursuant to guidelines promulgated by the Supreme
25 Court. No guidelines have been promulgated by the Supreme

1 Court for trial courts.

2 CHAIRMAN BABCOCK: Well --

3 MR. ORSINGER: There are some local rules
4 that have been adopted and have been approved by the
5 Supreme Court and are in place in various locales, but
6 argue whether those are guidelines promulgated by the
7 Supreme Court or local rules under a different rule that
8 have been approved.

9 At the meeting on March 9th Justice Hecht
10 made the comment when the Court adopted the rule
11 originally they wanted to allow localities to have
12 different rules because, to use his words, "broadcast in
13 Palestine is different from broadcast in Houston or
14 Dallas," and they wanted to see what kind of local
15 practices developed to see if certain things were more
16 suitable than others.

17 As it turns out, some of the larger
18 jurisdictions have adopted local rules. Many of the rural
19 area haves not adopted local rules, and there doesn't seem
20 to be any growing impetus for anyone to adopt more local
21 rules. It's like the people that were going to adopt them
22 have adopted them, and it's just kind of static. So many
23 courts have no rules at all. Some of the big municipal --
24 some of the big urban areas have different rules, and it
25 seems to me like we ought to answer the question of

1 whether the Supreme Court should promulgate guidelines
2 under 18c, subdivision (a), which would be uniform across
3 the state, or whether we want to just allow to have local
4 rules and then when there is no local rule there's no
5 standard or guideline.
6 Go on to subdivision (b). If you have no
7 guideline promulgated by the Supreme Court, which in
8 practice has come to mean local rules approved by the
9 Supreme Court; and, Chip, I'm assuming they've all been
10 approved. I don't know that -- maybe some of them are
11 just operating without approval.
12 CHAIRMAN BABCOCK: No. They have all been
13 approved.
14 MR. ORSINGER: All been approved. Okay. If
15 you don't have a set of local rules that have been
16 approved that sets standards then you're under (b), and
17 the standard for the trial under (b) is that it cannot
18 unduly distract the participants or impair the dignity of
19 the proceedings and the parties must consent and each
20 witness who is going to have their testimony broadcast,
21 televised, or photographed must consent. I interpret that
22 that the parties -- one of the parties' failure to consent
23 can veto broadcasting or televising as to anything, but if
24 the parties consent, a witness can preclude only
25 themselves from being photographed or broadcast.

1 Well, because of the parties' consent
2 requirement, basically the trial judge doesn't have the
3 ultimate authority over that, and any one party can veto
4 it, and that makes it much more unlikely that there will
5 be this kind of broadcasting. So one of the things that I
6 think we could decide today is whether we want to continue
7 a situation where a single party can eliminate the
8 prospect of this kind of coverage or whether we want to
9 give that ultimate authority to the trial judge with
10 certain parameters on how to exercise that judgment, and
11 that basically moots -- takes the veto authority away from
12 each individual party and lets the trial judge decide.
13 If we decide that we're going to have the
14 trial judge do it, this uniform proposal is asking the
15 trial judge to engage in a thoughtful process to exercise
16 their discretion, not to just routinely reject or
17 routinely approve; and there is a suggestion or
18 requirement that the trial court articulate its reasons
19 for a ruling, not because somebody is going to overrule
20 them or by mandamus so much as to just guarantee that the
21 trial judge engages in a thoughtful process of balancing
22 the factors that the rule says the trial judge should
23 balance.
24 To me it's kind of analogous, for those of
25 you who practice appellate law, to the Supreme Court's

1 requirement that if a court of appeals is going to reverse
2 a jury verdict for factually insufficient evidence, they
3 have to articulate their reasoning, not because the
4 Supreme Court can override their reasoning but because the
5 Supreme Court wants to know that they are engaged in the
6 proper reasoning process with the evidence. So it's kind
7 of like we're going to assure ourselves that the trial
8 judge is considering these factors in making their
9 decision.
10 And then the next issue and last one really
11 that I feel like we've been debating is if we are going to
12 have uniform rules and if we are going to allow the trial
13 court to have the final call on recording or publication,
14 are the rules going to be neutral, are they going to be
15 tilted away from coverage, are they going to be tilted
16 toward coverage; and that's been a lot of debate as to
17 whether they should be tilted away and tilted for; and
18 sometimes when we discuss procedural safeguards, if you
19 start loading a lot of procedural safeguards in there, you
20 are creating a tilt away from coverage because you make it
21 so difficult to arrange coverage or so limiting to arrange
22 coverage that you're discouraging coverage.
23 And it seems to me like whether -- you know,
24 whether we actually vote up or down the proposals here,
25 that may be too much for us to do. At the very least we

1 ought to decide a fundamental question of whether we're
2 going to leave behind this party veto power and give the
3 trial judge the final say-so with parameters that are
4 statewide or are we just going to allow it to be a local
5 process, understanding that many trial judges around Texas
6 have no local rules to go by.
7 And so, having said that, Chip, I kind of
8 would open it up or turn it back to you for -- to run the
9 discussion.
10 CHAIRMAN BABCOCK: Okay. Frank.
11 MR. GILSTRAP: A question about the present
12 rule. Is -- Richard, is it -- you know, in 18c(a) it says
13 "in accordance with guidelines promulgated by the Supreme
14 Court." If there are no Supreme Court guidelines then we
15 have party and witness veto as set forth in part (b); is
16 that correct?
17 MR. ORSINGER: With the exception that if
18 you interpret "guidelines promulgated by the Supreme
19 Court" to be local rules approved by the Supreme Court
20 then in those counties you do have trial court discretion
21 because in those counties they are giving the trial courts
22 discretion and not allowing witness veto and party veto.
23 MR. GILSTRAP: If the local rules approved
24 by the Supreme Court are not interpreted to be guidelines
25 promulgated by the Supreme Court then we still have party

1 and witness veto.

2 MR. ORSINGER: Yes. We're under (b).

3 MR. GILSTRAP: Has that question ever been

4 answered in any litigation as to whether or not guidelines

5 promulgated by the Supreme Court are local rules?

6 MR. ORSINGER: I don't think it's been

7 challenged.

8 CHAIRMAN BABCOCK: I don't think there's

9 been a challenge to it that I'm aware of. In fact, I'm

10 certain I would be aware of it if there was a challenge.

11 I know that when the Supreme Court has issued orders

12 approving the local county rules they have done so in

13 language that is suggestive of the fact that they are

14 giving permission for electronic coverage pursuant to

15 these local rules.

16 HONORABLE SARAH DUNCAN: How has it been

17 interpreted?

18 CHAIRMAN BABCOCK: Excuse me?

19 HONORABLE SARAH DUNCAN: Do you know how

20 it's been interpreted?

21 CHAIRMAN BABCOCK: The local rules, you

22 mean?

23 HONORABLE SARAH DUNCAN: Do you know, have

24 any courts interpreted their local rules as being

25 guidelines promulgated by the Supreme Court?

1 CHAIRMAN BABCOCK: Oh, certainly.
2 HONORABLE SARAH DUNCAN: As its consent.
3 Yes?
4 CHAIRMAN BABCOCK: Yes. Certainly.
5 HONORABLE SARAH DUNCAN: To me they're two
6 entirely different things.
7 CHAIRMAN BABCOCK: Judge Brown.
8 HONORABLE HARVEY BROWN: That's the reason
9 they're written.
10 CHAIRMAN BABCOCK: Yeah. So they can have
11 them.
12 HONORABLE HARVEY BROWN: Is for this rule,
13 so courts can do it. The local courts interpret their
14 local rules as coming under (a).
15 CHAIRMAN BABCOCK: Right. And, in fact, the
16 rules were transmitted -- the Dallas County rules were
17 transmitted to the Supreme Court under Rule 18c, and the
18 order came back granting permission. This was over 10
19 years ago.
20 Yeah. Bill Dorsaneo.
21 PROFESSOR DORSANEO: If the local rules
22 provide guidelines, I don't see how they could be
23 interpreted as anything other than guidelines for that
24 purpose. I'm sure that's what the local rules are,
25 guidelines.

1 MR. ORSINGER: Well, the reason I brought it
2 up is because I believe that (a) was put in there with the
3 anticipation that eventually the Supreme Court itself
4 would promulgate uniform guidelines. In fact, though, we
5 have local guidelines that have been approved, which is
6 really under a different rule, even though they are
7 fitting it in here. And the question we really have
8 before us is not do we perpetuate -- I mean, we could
9 perpetuate the local practice with no rules in most of
10 Texas, geographically anyway, or we could go ahead and
11 have some guidelines promulgated under (a).
12 CHAIRMAN BABCOCK: Yeah. And, frankly, I
13 think that -- I'm trying to think of an example, but I
14 think there was one televised trial in a county that
15 didn't have local guidelines, didn't have local rules, and
16 the trial judge just figured he had discretion to let them
17 in. I think if anybody had squawked about it, it might
18 have been an issue under Rule 18c. Ralph.
19 MR. DUGGINS: Where there are local rules
20 you say they give the presiding judge the discretion to
21 determine whether or not it will be televised?
22 MR. ORSINGER: Yes. Isn't that right, Chip?
23 Don't you agree?
24 CHAIRMAN BABCOCK: That's right.
25 MR. DUGGINS: Doesn't that seem to signal

1 that the Supreme Court is okay with that concept, if they
2 have approved that rule?
3 MR. ORSINGER: There is no question that the
4 Supreme Court is okay with that concept where the local
5 judges want to do it. There is no sampling of the people
6 without local rules whether those judges want to exercise
7 the discretion or not; and I, frankly, don't know if they
8 have no rules because they tried to reach an agreement and
9 can't or whether nobody has ever undertaken the effort to
10 create an agreement among the local judges.
11 MR. DUGGINS: Harvey, has it ever come up in
12 Harris County?
13 HONORABLE HARVEY BROWN: Harris County we
14 have a rule.
15 MR. DUGGINS: You do have a rule.
16 CHAIRMAN BABCOCK: All the big counties have
17 a rule.
18 MR. ORSINGER: Because it comes up all the
19 time, and I think the judges there would like to have some
20 guidelines to go by.
21 CHAIRMAN BABCOCK: Yeah. I think, you know,
22 for example, there's a case going on in Harris County
23 today that has cameras in the courtroom. It's a criminal
24 case, and to my knowledge the Texas Court of Criminal
25 Appeals -- in fact, I know the Texas Court of Criminal

1 Appeals does not have a statewide rule even to the extent
2 of saying you can have local rules. It's just that the
3 local judges have banded together and decided that they
4 are going to handle things a particular way, and it's the
5 view of the Texas Court of Criminal Appeals -- I think I'm
6 speaking accurately -- that the only boundary on having
7 cameras in the courtroom is a due process issue that a
8 defendant might raise as part of an appellate argument,
9 that the cameras have precluded him or her from getting a
10 fair trial. Judge Lawrence.
11 HONORABLE TOM LAWRENCE: This rule would
12 apply to all trial courts, including JP courts? Because
13 the problem now is that JP courts can't promulgate local
14 rules, and there is no statewide rule, and we have a fair
15 number of cases from time to time where the media wants to
16 come in with cameras, and we have no guidelines in
17 essence. So we're in the same boat as some of the other
18 counties that would not have a local rule, but whatever we
19 do, we need to make it clear that it would apply -- if
20 it's going to be statewide and it would trump the local
21 rules then it would need to apply to the JP courts.
22 CHAIRMAN BABCOCK: Right. Buddy.
23 MR. LOW: Chip, has any state taken the
24 position that there's a constitutional right of the media
25 to do that and say -- you know, where, yes, you can do

1 this if you follow these guidelines, unless the trial
2 judge finds such and such, in which event he can exclude
3 or modify the means? In other words, I think there might
4 be a constitutional right to that.
5 CHAIRMAN BABCOCK: Well, here's my
6 understanding of where the jurisprudence is on that. For
7 a long time there was a debate about whether or not trial
8 judges could exclude citizens from a trial that
9 historically has been public, and "citizens" including the
10 media; and there was a series of cases that the United
11 States Supreme Court decided that pushed the right of the
12 media to attend trials further and further and further to
13 the point where the Court finally held that there was a
14 First Amendment right for the media to attend a trial.
15 Now, that's just bringing their bodies in
16 there with their sketch artists and their pens and their
17 paper.
18 MR. LOW: I understand.
19 CHAIRMAN BABCOCK: The next argument, of
20 course, is "Well, if I can bring a pen and paper in,
21 that's the tool of the print journalist's trade, but the
22 tool of my trade as a broadcast representive is a camera,
23 and so I ought to be able to bring that in." To my
24 knowledge -- well, I know the U.S. Supreme Court has never
25 decided that issue.

1 In other words, to the contrary, the
2 jurisprudence on that has been whether or not the mere
3 fact that a camera is in the courtroom is a per se
4 violation of the defendant's right to a fair trial, and
5 there is the Shepherd case where they reversed a -- they
6 reversed a conviction and the Billy Solestes case in Texas
7 where they reversed a conviction because there was a
8 circus-like atmosphere.
9 That progressed along time along a continuum
10 until the Chandler case in Florida where Chandler was
11 tried and convicted in a televised proceeding over his
12 protest that there were cameras in the courtroom, and the
13 U.S. Supreme Court said, "No, it is not a per se due
14 process or violation of a right to fair trial to have
15 cameras in the courtroom. You'll have to decide that on a
16 case-by-case basis, but in this case there was no
17 violation of the right to fair trial, and the cameras were
18 okay." So you have these two lines of authority that some
19 day may merge.
20 MR. LOW: But has any state just taken the
21 the affirmative position to say, yes, they are permitted
22 and you can do this unless the court finds certain things,
23 just come out and say it; and that way then they come in,
24 they have to give you notice, and if you can show they're
25 not, then you deal with it.

1 CHAIRMAN BABCOCK: I'm not aware of a
2 holding in a court that says that. There may be one.
3 MR. LOW: I'm talking about a rule, a state
4 rule. Florida, New York.
5 CHAIRMAN BABCOCK: Well, the local rules in
6 most of the counties -- Travis County would be an
7 exception, but in Dallas County, for example, there is a
8 presumption that there will be access for the electronic
9 media unless --
10 MR. LOW: That's --
11 CHAIRMAN BABCOCK: -- X, Y, and Z, and that
12 was the case in Harris County. I'm not sure if they
13 changed that or not. And, frankly, in the practical
14 application of that, in the Turner vs. Dolcefino case
15 Turner didn't want electronic coverage of the trial, and
16 Court TV came in and asked for it, and the judge said,
17 "Look, there is a presumption in favor in our county, and
18 so unless you come up with a good big old reason then
19 we're going to have it."
20 MR. LOW: This way you wouldn't have to have
21 each county having its own rules. It's there and if
22 somebody wants to deal with it otherwise then they do
23 that.
24 CHAIRMAN BABCOCK: Judge Brown.
25 HONORABLE HARVEY BROWN: I think it would be

1 nice to have a rule that's statewide that gives guidance,
2 and I think the keyword there is "guidance," because when
3 it comes to the trial judge it's nice, frankly, to have
4 the benefit of a rule that sets out all the things you
5 should think about. I mean, you may think you have
6 thought about every factor, but until you sit down and
7 read the rule, you don't know that you have, and having a
8 group like this put together a list of things to think
9 about I think is very helpful. I know when it's come to
10 me, what I do is I get out the rule and I try to think
11 about what are all of the things that should go into my
12 thought process.
13 CHAIRMAN BABCOCK: And until you've been
14 through it it's hard to know all the issues that may come
15 about. Yeah, Frank.
16 MR. GILSTRAP: There is a huge difference
17 between the rules that have been adopted locally and
18 18c(b) where we have party and witness veto, and it seems
19 to me where we are is we have to decide should we have a
20 statewide rule that basically gets rid of party and
21 witness veto. That's the first step.
22 The second step -- and this is the one I
23 think where the fireworks start, and that is should we go
24 beyond giving the judge absolute discretion? Because --
25 and, candidly, I think the rule that's been put out before

1 us is a tilt. Any time you start telling the judge, "Here
2 is how you can do it, and, by the way, in this situation
3 you might want to think about using this less intrusive
4 method," you're creating pressure for the judge to do
5 that, and so are we creating -- even though we may give
6 the judge absolute discretion, are we really creating --
7 due to the fact that we have elected judges and, you know,
8 TV in the courtrooms and TV news, are we creating some
9 type of subtle tilt that's going to pressure the judge to
10 exercise discretion.
11 I think that's where we are. I think that's
12 the bridge we've got to cross. First, you know, do we
13 have a statewide rule, then do we go beyond anything other
14 than absolute discretion.
15 HONORABLE SARAH DUNCAN: When you first
16 stated it you also had a step in there of witness or party
17 consent, too.
18 MR. GILSTRAP: Well, yeah. The statewide
19 rule -- okay. Yes. Do we have a statewide rule that
20 effectively gets rid of witness and party veto. That's
21 where we are, because now we've got witness and party veto
22 absent a local rule.
23 CHAIRMAN BABCOCK: Yeah. I think the only
24 thing -- the issue with witness and party veto is such
25 that we've got a third player here, and that's the media

1 that will devote certain resources to newsworthy cases,
2 but I am not aware of any case that has been televised
3 under subsection (b). In other words, I'm not aware of
4 any case where they've gone around and said, "Okay, let's
5 get the witness list here and let's ask, you know, 16
6 people whether it's okay and then let's get the parties'
7 consent." I mean, Judge Brown, maybe you're aware, but --
8 HONORABLE HARVEY BROWN: I haven't seen one.
9 CHAIRMAN BABCOCK: They just -- as a
10 practical matter they just don't do that, because they
11 just for whatever reason, they don't take the time or
12 don't invest the resources.
13 HONORABLE SARAH DUNCAN: They don't want to
14 hear a "no."
15 CHAIRMAN BABCOCK: Huh?
16 HONORABLE SARAH DUNCAN: They don't want to
17 hear a "No, I don't consent."
18 CHAIRMAN BABCOCK: Yeah, because then that's
19 -- you know, if they hear a "no" then they're out of luck,
20 and maybe there would be a so extraordinarily newsworthy
21 case that the media would take the time, or the party or
22 somebody would take the time to go do that, but I'm not
23 aware of one where that's happened.
24 MR. GILSTRAP: Witness veto just means the
25 witness can veto his own testimony. He can't veto the

1 whole thing.

2 CHAIRMAN BABCOCK: Well, that's the Orsinger

3 spin on the rule. That's never been tested, but I think

4 that makes sense. If the parties agree and the judge

5 agrees and all the other witnesses agree, that makes some

6 sense to me, but I don't know that it's ever been tested.

7 HONORABLE SARAH DUNCAN: Richard, you

8 mentioned studies that have been done on whether cameras

9 in the courtroom impacts -- I thought.

10 MR. ORSINGER: No, I'm not aware of the

11 studies. In fact, reviewing our debate, it seems like we

12 are woefully in need of some scientific evidence, because

13 we're all operating on the basis of our own intuitive

14 reaction to the proposition and perhaps to some extent

15 some limited experience. Various members of the committee

16 have had trials that have been either partially or

17 entirely broadcast, but, you know, the idea that judges

18 act differently, lawyers act differently, witnesses act

19 differently and juries act differently, nobody has come

20 forward with any scientific studies, which I would think a

21 psychologist could if they wanted to; and, Chip, I don't

22 know if there are any out there or not. But, I mean, it's

23 almost like we're -- if you read the committee debate,

24 it's almost like we're operating based on philosophy and

25 not analysis.

1 CHAIRMAN BABCOCK: Yeah. There's a lot of
2 literature on this, and there may be a -- there may be a
3 study, but, boy, that's a hard study to have confidence in
4 because, you know, "Were you influenced in your verdict by
5 having a camera in there?"
6 "No, I wasn't."
7 MR. ORSINGER: You would probably have to do
8 a controlled experiment where you have pseudo-trials and
9 tried something one way and tried it another, and it's
10 probably pretty damn difficult.
11 CHAIRMAN BABCOCK: Yeah. And I -- you know,
12 of course, everybody's experience is anecdotal and is
13 peculiar to them, but I have been involved in several
14 actual trials that have been televised gavel-to-gavel that
15 have been lengthy, and I also do, you know, lots of mock
16 trials. I've probably done this year 14 mock trials; and,
17 of course, all of those people are reported; and one, one
18 case I did, we put it on. It was a hypothetical case
19 before a mock jury, and CNN was doing a piece on it, and
20 so they had guys with, you know, boom mikes and cameras
21 going into the jury room; and, you know, moving around and
22 putting mikes over; and I just watched the tape of this
23 yesterday. These people were -- it didn't slow them down
24 for an intersection. "I think this guy is guilty," and
25 everything, but it's all anecdotal.

1 Yeah, Carl.
2 MR. HAMILTON: What are the constitutionally
3 protected rights of the litigants or participants who
4 might be infringed upon by this?
5 CHAIRMAN BABCOCK: Well, I think that the
6 Chandler case is the only U.S. Supreme Court or the most
7 recent U.S. Supreme Court decision, and the presence of a
8 camera in the courtroom does not per se implicate a
9 criminal defendant's right to a fair trial.
10 So the mere presence of a camera is not
11 enough. It's got to be something like the Billy Solestes
12 case where -- and it was many years ago, but they had, you
13 know, cables snaking through the courtroom, and they had
14 cameras all over. But really what was most intrusive
15 about that trial was they had still photographers, and
16 they were treating it like it was a football game, going
17 right up to the witness stand with these big old
18 flashbulbs and snapping it in front of their faces. You
19 watch the tape of that trial, it's unbelievable, and the
20 Court -- and I think properly so -- said it was a
21 circus-like atmosphere and it impacted the defendant's
22 right to a fair trial, and they reversed it on that basis.
23 You know, times and technology have changed quite a bit
24 since then.
25 MR. ORSINGER: You know, also, you're

1 focusing on the intrusiveness of the media and its impact
2 on the trial when you're talking about Billy Solestes.
3 With the technology now with the quiet stuff, with
4 recessed cameras, with the pooling requirements that seem
5 to be fairly universal, it's not as intrusive in a
6 physical sense, so we're now talking about more like
7 psychologically intrusive. Are people self-conciously
8 acting different because they know there's a camera
9 somewhere rather than having the reporters jumping in
10 their face.
11 CHAIRMAN BABCOCK: It's all what we're used
12 to. You know, you've got sketch artists in the courtroom,
13 and we're used to that. There's even a Fifth Circuit case
14 that says you've got to have a darn good reason before you
15 can exclude sketch artists; and, I tell you what, six
16 sketch artists -- and I've been there on this, done this.
17 Six sketch artists on the front row, scratching away, is
18 way more intrusive than a camera in the back of the
19 courtroom that you never think about. Sometimes during
20 the Oprah case you couldn't hear yourself for these guys
21 scratching away on their little sketch artist pads.
22 Yeah, Frank.
23 MR. GILSTRAP: I think we tend to focus a
24 little too much on the intrusiveness nature. I mean, more
25 and more I think they could probably set it up where it

1 would be -- you would hardly notice it's there.
2 The real question, though, is what do they
3 do with the tape? How is it used on TV? What does it
4 show about the litigative process? How does it affect the
5 litigants and the witnesses to be put on TV? You know,
6 and we don't need studies on that. You know, everybody
7 who lived through O. J. Simpson has a spin on how it
8 works, and that's the larger question, and we really do
9 get into some philosophical issues there, but I think we
10 make a mistake if we say it's got to stand or fall on
11 whether it's intrusive.
12 CHAIRMAN BABCOCK: That's probably right.
13 HONORABLE HARVEY BROWN: And another group
14 that's easy to ignore in this is the jurors. I don't know
15 of any case on this with cameras, but I do know there's
16 cases about voir dire intruding on jurors' privacy rights,
17 and I could see an argument for jurors if the camera is
18 picking up the jurors and their reactions to evidence,
19 etc.
20 CHAIRMAN BABCOCK: It's interesting how the
21 practice on jurors has developed over the last 15 years,
22 because one of the things that we struggled with with the
23 Dallas County rules was whether or not we would prohibit
24 taking pictures of jurors in the courtroom; and over time
25 the practice has developed, and it finds expression in

1 many of the local rules, that if you're going to bring a
2 camera into the courtroom you cannot show the jurors. You
3 just can't show them.
4 And although it's not in the rules, the
5 practice has developed that the cameras don't go in there
6 during voir dire. And, in fact, many of the local rules I
7 think are silent on that, but that's a worthy issue
8 because, you know, the litigants are there because they've
9 got a fight going. The jurors are there because they're
10 getting paid five bucks a day to come decide that stuff,
11 and the interests are very different.
12 HONORABLE HARVEY BROWN: That's why I think
13 we need a statewide rule. Some judges in some counties
14 who have never had this and doesn't have you there might
15 not even think about that issue until it's already
16 happened.
17 CHAIRMAN BABCOCK: Yeah. And we've got to
18 be very careful about, if we're going to say that, that
19 the press, as a condition of your coming into the
20 courtroom with a camera you can't take a photograph of a
21 juror, we've got to be very careful about that because I
22 think you can do that by rule, but you start to have
23 issues of prior restraint when you do that.
24 And so I think it is constitutional to make
25 such a rule inside the courtroom. It is less clear

1 whether you can do that -- impose that on the press
2 outside the courtroom, and there are some criminal judges
3 in Harris County who are pushing the edge of the envelope
4 on that now because they're talking now -- they've started
5 with the environs of the courtroom, which is just
6 immediate area outside, and now they have extended it to
7 the entire building, and I think there was one suggestion,
8 although I don't think it found expression in an order,
9 that maybe even the street outside the building. I think
10 once you get outside the building you're clearly in a
11 prior restraint area. Probably beyond the environs you've
12 got a darn good issue of prior restraint. So we have to
13 be careful about that, but inside the courtroom I think
14 we're okay.
15 MR. ORSINGER: You know, it seems to me that
16 there may be a consensus we should have uniform rules
17 statewide even if they're fairly consistent with the
18 existing local rules just so those communities without
19 local rules have some guidelines to go by and for the JPs
20 that can't protect themselves, we would actually be
21 assisting them; and perhaps before we even decide what
22 they ultimately will say we decide whether we're fairly
23 unanimous on having a uniform rule promulgated by the
24 Texas Supreme Court.
25 MR. GILSTRAP: Could we have a corollary on

1 that? If we promulgate statewide rules, are we going to
2 allow the local communities to promulgate their own, or
3 are we going to preempt them?
4 MR. ORSINGER: That's an important question,
5 but, you know, you can still get a lot of value out of the
6 uniform rule even if you allow a local opt out, because I
7 bet that if they are well-crafted and well-thought out,
8 most communities will not opt out; and the ones who have a
9 really strong feeling, maybe they would.
10 CHAIRMAN BABCOCK: Yeah. I think the law
11 has developed -- and there are some appellate cases on
12 this -- where the trial judge does have and has to have
13 considerable discretion because every case presents
14 different challenges. Absolute discretion, I don't know
15 if that's a concept that we ought to impose on our rules;
16 but if, as Judge Brown says, we have a statewide rule that
17 would be sort of a checklist of, "Okay, I'm in a rural
18 county, and for some reason the press wants to have a
19 camera in here. Here are some of the things I need to
20 think about and make decisions about," I think that's a
21 good thing.
22 Whether or not we want to trump statewide
23 rule -- I mean, the local rules, I don't know, because,
24 for example, in Travis County there is a presumption that
25 disfavors electronic media coverage. In Dallas and Harris

1 County there is a presumption that favors it. I mean,
2 there is an express presumption that favors it. So I
3 don't know if we want to change that or not.
4 Yeah, Sarah.
5 HONORABLE SARAH DUNCAN: The reason I would
6 want to change it, what is different about this type of
7 rule from any other type of local rule? If a local rule
8 conflicts with a rule promulgated by the Supreme Court,
9 it's void to that extent.
10 CHAIRMAN BABCOCK: Yeah.
11 HONORABLE SARAH DUNCAN: And I don't -- I
12 can't see a legitimate reason that if the Supreme Court
13 passes a statewide rule that a county or a local judge
14 should be able to deviate from it.
15 CHAIRMAN BABCOCK: Well, it wouldn't except
16 -- unless they're filling in gaps that the statewide rule
17 doesn't have. There are some --
18 HONORABLE SARAH DUNCAN: That's treating it
19 the same as any other local rule, and all I'm making a
20 pitch for is that we treat it like any other local rule.
21 CHAIRMAN BABCOCK: Yeah. I think that's a
22 fair statement.
23 MR. LOW: A statewide rule could include for
24 good cause or something a trial judge -- and then they
25 could -- the judges could get together and exclude it, but

1 you wouldn't want it to say "unless a local rule," you
2 know, that the judge would have some discretion to deviate
3 from it in the statewide rule.
4 MR. GILSTRAP: Chip, we would have a little
5 more discretion here because we could do it in the form of
6 a guideline. In other words, we wouldn't change the rule
7 at all, and we could just say, "We are now going to
8 recommend a guideline under 18c(a)," and then the question
9 is, does that guideline allow local opt out? It seems to
10 me that's a little easier than promulgating a rule that
11 allows a local opt out.
12 CHAIRMAN BABCOCK: Richard, what do you
13 think about that?
14 MR. ORSINGER: Well, I think that that's
15 worth mentioning.
16 CHAIRMAN BABCOCK: Well, he did just mention
17 it, so....
18 MR. ORSINGER: Rule 226a which governs the
19 instructions you give to a venire and to the jury is
20 promulgated by the Supreme Court as an order rather than
21 as a rule, even though it's under the authority of a rule
22 and it's printed in the rule, most lawyers probably don't
23 know it's not a rule, but the advantage of that is that
24 those guidelines are issued by a majority vote and usually
25 a unanimous vote of the Texas Supreme Court are easily

1 changed; whereas, a formal rule change historically has
2 been a cumbersome process, and it would certainly be my
3 personal preference that at least initially the Supreme
4 Court would promulgate guidelines pursuant to their
5 authority to issue an order on their miscellaneous docket
6 rather than to make the whole five-page pooling rule part
7 of Rule 18c.
8 HONORABLE SARAH DUNCAN: I hate to disagree
9 with Richard.
10 CHAIRMAN BABCOCK: Sarah.
11 HONORABLE SARAH DUNCAN: There was a
12 "laughter" in there. I think that is exactly --
13 CHAIRMAN BABCOCK: If the court reporter
14 will note the people laughter.
15 HONORABLE SARAH DUNCAN: -- the opposite of
16 what the Supreme Court did with 18c. I don't think the
17 Supreme Court -- and this is speculation on my part
18 because I have not been privy to any discussions, but a
19 guideline promulgated by the Supreme Court in my view is
20 completely different than a local rule approved by the
21 Supreme Court; and as I have always read 18c, and I guess
22 I have been reading it differently from a lot of presiding
23 judges, the district, whatever, the local judge can get
24 local rules approved under the authority of the local
25 rules rule, but in the absence of Supreme Court

1 promulgated guidelines there is a consent requirement; and
2 if you don't meet that consent requirement, you don't get
3 in; and that's the way I think the rule should be --
4 should stay.
5 But I don't think the ability to change or
6 not change guidelines quickly as opposed to rules is a
7 good reason for doing one or the other. I think we need a
8 statewide rule. I'm sure I'm in favor of a much more
9 conservative rule than you or Chip, but I don't see the
10 point of having statewide guidelines if they're not going
11 to mandate a statewide procedure. I mean, if the Supreme
12 Court decides that the Travis County presumption against
13 media coverage is the way it ought to be then it ought to
14 be that way everywhere. You shouldn't be subjected to
15 media coverage because you're unlucky enough to be a
16 witness in Harris County when you wouldn't be subjected to
17 that media coverage if you were a witness in Travis
18 County, in my opinion.
19 CHAIRMAN BABCOCK: Well, having been there
20 at the time, I do think that it was the intent of the
21 Court to experiment in this area and to have the counties
22 come up with their different ideas and then submit it to
23 them so the Court could make sure that something wasn't
24 way out of whack and so they would look at the local
25 county rules and then approve them or not, but in practice

1 they have approved all of them. Have a period of
2 experimentation so we can see how it works county to
3 county and then at some later date, which is now, come up
4 with a statewide rule.
5 HONORABLE SARAH DUNCAN: Are you saying that
6 the Court viewed local rules promulgated by a county to be
7 the same as guidelines promulgated by the Supreme Court?
8 CHAIRMAN BABCOCK: I think that was what the
9 intent of 18c was when they did it. I understand the
10 intellectual impurity of what I'm saying, but I think in
11 terms of what they were thinking, because I was there at
12 the time, that was the concept that was being advanced.
13 MR. ORSINGER: But, see, I would argue that
14 what the Supreme Court really had in mind was, is that
15 ultimately they did want to have uniform rules they would
16 promulgate under their authority --
17 CHAIRMAN BABCOCK: Yeah.
18 MR. ORSINGER: -- but in the meantime they
19 wanted the locales to operate under local rules and so I
20 feel like --
21 CHAIRMAN BABCOCK: That's what I was saying.
22 MR. ORSINGER: -- 18c(a) is just like, "We
23 will get to this eventually, but we're going to have a
24 period of time where we operate under local rules and then
25 once we're satisfied we've found out where all the

1 frightening things are then we're going to promulgate a
2 uniform guideline that applies statewide," and I agree
3 with Chip, I think the time has come. We have broad
4 experience in the large communities. It doesn't appear to
5 be any more activity at the local level in terms of
6 counties changing rules or adding rules, and so, you know,
7 now's the time.
8 CHAIRMAN BABCOCK: I was trying to sort of
9 say that, but I understand I may not be as precise or
10 impure as I should be. But there's another thing to think
11 about, which is the principle that Judge Peeples always
12 advances, which I prescribe to, and that is if it's not
13 broke don't fix it, and there seems to be a good
14 accommodation between the courts, the parties, and the
15 media with the way it's working right now. You don't see,
16 I don't think -- Sarah, you haven't been flooded with
17 cases, mandamus or otherwise, in your court, that are
18 complaining about electronic coverage. I don't even hear
19 about other than this thing in Harris County with the
20 criminal judges trying to extend the bredth of their
21 restrictions on the media, I don't see much --
22 HONORABLE SARAH DUNCAN: I'm not going to
23 let that go unreputed on the record. There's no basis for
24 complaint at this point.
25 CHAIRMAN BABCOCK: Well, sure. I mean, you

1 can have electronic --

2 HONORABLE JAN PATTERSON: There may be in

3 Travis County, and we don't get them.

4 CHAIRMAN BABCOCK: You can have electronic

5 coverage in Bexar County.

6 HONORABLE SARAH DUNCAN: I know. But as

7 long as you've got local rules that say "You can do this"

8 or "You can't do this," what realistic basis is there for

9 a party -- I mean, if I were in Harris County and there is

10 a presumption in favor of coverage --

11 CHAIRMAN BABCOCK: Right.

12 HONORABLE SARAH DUNCAN: -- but in Travis

13 County there isn't, what basis do I have to complain? If

14 I'm in Harris County and there is a local rule and it says

15 there is a presumption, what basis do I have to complain?

16 It may not be good policy, but how do -- I don't see where

17 there's a legitimate legal basis to complain.

18 CHAIRMAN BABCOCK: Yeah, Judge Patterson.

19 HONORABLE JAN PATTERSON: I suppose it could

20 possibly be helpful to set forth factors as a couple of

21 people have mentioned, but I do go back to your point that

22 it's just not clear to me what evil there is to be

23 remedied here or what complaints that we've received in

24 the past, and I throw out just for an example, and I

25 can't -- I don't know the rule mechanism, but we've left

1 it to the counties' discretion to deal with questions of
2 juror management and summonsing of the juries and all of
3 those logistical things, and I just don't know that we had
4 a problem dealing with the press such that we should come
5 up with some dispositive rule, either tilting in favor or
6 against.
7 CHAIRMAN BABCOCK: Yeah. Well, the only
8 answer to that, Judge, is that let's say that all of the
9 sudden there is a newsworthy case in --
10 HONORABLE SARAH DUNCAN: Cotulla.
11 CHAIRMAN BABCOCK: -- Midland County, let's
12 say, because I don't think they have local rules, and the
13 press wants to go in there and they petition the judge and
14 the judge says, "Yeah, that would be a good idea."
15 Technically, under 18c the judge doesn't have authority
16 unless he goes out and gets consent of everybody, and
17 that's not going to happen. So a statewide rule would
18 cure that problem, if that's a problem.
19 Ralph.
20 MR. DUGGINS: I agree with you. I was just
21 going to say the same thing. I don't think we have one in
22 Tarrant County, so there's no way -- even though we
23 occasionally have some cases where I think the press would
24 like to --
25 CHAIRMAN BABCOCK: Ralph, you've got one in

1 Tarrant County, so if you want it.
2 MR. DUGGINS: I know, and we're thinking
3 about the same one. But I'm serious. I agree with you,
4 and because of that I think we ought to have some way to
5 get around 18c(b), which requires this unanimous consent,
6 which I think is unreasonable.
7 CHAIRMAN BABCOCK: Okay. Any other general
8 comments? Do we want to talk about the proposal before
9 us, or how do we want to proceed? Judge Peeples.
10 HONORABLE DAVID PEEPLES: I'd like to make
11 some general comments, if I could.
12 CHAIRMAN BABCOCK: Sure.
13 HONORABLE DAVID PEEPLES: I've had a lot of
14 experience with -- never with the gavel-to-gavel coverage,
15 but a lot of injunctions and pretrial matters where
16 they've been there, and one point I would make is that if
17 you think about what you see on your network TV, it's
18 always some little matter where they showed up and they
19 weren't interested in being there gavel-to-gavel. I would
20 venture to guess that in every courthouse in the state the
21 cases that the TV people are wanting to go report, that
22 would be 99 percent of them would be little things where
23 they just want to go and be there and get a brief thing on
24 the news, and they are not interested in gavel-to-gavel.
25 Gavel-to-gavel would be less than one percent.

1 So really what we're talking about is the 99
2 percent which is in the cases like I've had, a kid gets
3 kicked out of school or can't play on a basketball team or
4 some policeman has done some misdeed. There's been a
5 whistleblower situation. I had a public official who
6 wouldn't pay his child support and got put in jail. Those
7 are public interest, but they are not interested in being
8 there for the whole thing. They want to record it, they
9 want to give a 30-second, 45-second report on TV, and get
10 just a little bit of background; and that's what they're
11 interested in; and I think we need to be -- remember that
12 that is the reality that we're dealing with here. We're
13 not dealing with the O.J. Simpson cases by and large.
14 Those are important, but the day-to-day is what I'm
15 describing, the little matters.
16 Second point. It's in the context of
17 elected judges, and I think it is realistic and accurate
18 to say that those of us who -- I am not talking about
19 everybody, not just me, run for election would love to be
20 on TV in a favorable light. You know, the old saying
21 goes --
22 CHAIRMAN BABCOCK: Which you can generally
23 control yourself.
24 HONORABLE DAVID PEEPLES: -- "Just spell my
25 name right." But I do think that people who run for

1 election generally are going to want publicity, unless
2 it's bad publicity, and so judges are going to want to let
3 the TV cameras come in and cover their story. And a
4 related point is that for an elected person to say "no" to
5 the TV stations takes backbone. I mean, for a judge to
6 say, "I'm sorry, you cannot televise in my courtroom," a
7 judge who runs for election, that takes some real spine to
8 say that; and so those are some realities that we are
9 dealing with here.
10 On the subject of does it affect the
11 participants, the times I've had TV cameras show up -- and
12 maybe 30 times, I don't know, in my 21 years. It's been a
13 good many times. Just a small portion of them were jury
14 cases. Most of them were these pretrial injunctions or
15 some kind of pretrial matter. I will say that the
16 knowledge -- let's say I'm going to have a two-hour
17 hearing. I know that what's going to be on TV is maybe 15
18 seconds of a witness, somebody crying, somebody shaking
19 their fist at the other side. You know, something
20 sensational. I know that. The most sensational part of
21 the case is what's going to be on the evening news, but I
22 know also that I've got to make my decision based upon all
23 two hours of that case; and for me to make a decision that
24 seems unreasonable in light of what's going to be on TV,
25 that takes some backbone, too.

1 I think we want our judges to make their
2 decision based on the whole trial or the whole hearing,
3 and if you let them in to run the cameras for every
4 witness and for you and the lawyers and all the rest of it
5 knowing that only a little bit is going to be on TV, which
6 may be out of context and which may, considered by itself,
7 cry out for one decision, but the -- everything that I've
8 heard calls for another decision, that takes real backbone
9 for an elected judge to do that.
10 So these are some of the realities that I --
11 where I'm coming from. And I think Richard and Ralph make
12 a good point that the real issue here is, number one, do
13 we get rid of 18c(b), the witness and party veto; and if
14 we do that, do we try to tilt it. If we give the judge
15 the discretion, do we try to tilt it, and the decision --
16 where the decision will usually be coverage or usually not
17 be coverage. In other words, do we say, "There shall be
18 no coverage unless you state your reasons" or "We want you
19 to allow coverage unless you state your reasons."
20 I think the default rule will make a big
21 difference when the judge has to say, "I don't think you
22 ought to be able to come in." To be able to rely on the
23 rule and say, "The rule says generally we don't have
24 coverage." That makes a big difference, the tilt that we
25 have.

1 CHAIRMAN BABCOCK: I have been in lots of
2 discussions on this topic, and one thing that I think
3 we've got to be careful about, and it finds expression all
4 the time, but we've got to be careful about that we don't
5 by rule start trying to say -- trying to affect the
6 content of what the media does or does not report, because
7 that's plainly unconstitutional. As a government you
8 can't tell the media what they report and don't report.
9 HONORABLE JAN PATTERSON: I don't think
10 anyone has suggested that, have they? I'm not aware of
11 any conversation, any dialogue we've had in this group, on
12 that topic.
13 CHAIRMAN BABCOCK: Well, what Judge Peeples
14 just said starts you down the path for that because there
15 is a great frustration with so-called "sound bite
16 journalism," and you say -- and Judge Peeples certainly
17 wasn't suggesting prior restraints. I'm not saying that
18 at all.
19 HONORABLE JAN PATTERSON: I didn't think so.
20 CHAIRMAN BABCOCK: But in the context of
21 this debate you say, "I'm all for the cameras if they're
22 in there gavel-to-gavel, but what I don't like is these
23 guys who show up for five minutes of testimony and they
24 get the witness crying and then it's on the evening news,
25 and, therefore, because I don't like that, I'm going to

1 keep them from coming in at all, because I don't like this
2 sound bite journalism because they edit and they change
3 the reality of what the courtroom is, and if they just sat
4 through the whole thing like I've got to sit through it
5 then they would realize what's going on and they would
6 accurately report what is going on in the proceedings."
7 And all I want to suggest is two realities.
8 One, we can't -- we can't let our rules slip into either
9 explicitly or implicitly telling the media what they can
10 or cannot publish as a matter of content; but, secondly,
11 we can't forget the reality that what Judge Peeples is
12 describing is what the print guys do from time in
13 memorial. You know, how much gavel-to-gavel coverage does
14 the *San Antonio Express-News* provide to any trial? I
15 would guarantee you it is zero, because they have
16 reporters who are trying to cover the whole court. They
17 have got one beat writer or two beat writers who are
18 trying to cover the whole courthouse, and they will slip
19 into a hearing for 10 or 15 minutes and they'll interview
20 the lawyers maybe afterwards, and the lawyers will be
21 spinning the thing, and you'll see a quote from the
22 testimony. You'll see a description of an emotional
23 witness. You'll see a series of articles.
24 Turner case is a great example. I thought
25 that the print coverage -- that was a gavel-to-gavel case,

1 but the print coverage I thought was very favorable to
2 Turner and the judge would have had to have a lot of
3 backbone to throw that jury verdict out in light of all
4 the coverage. Now, should she have been influenced by
5 that? No. Was she? I don't think she was. I think she
6 called it down the middle, and in fact, knocked out part
7 of the verdict, but let the other part stand.
8 So when we're talking about the camera, the
9 point I'm trying to make in a too long-winded way is
10 you've got to -- you've got to not be frightened of the
11 fact that this tool that's being used by one segment of
12 the media is different on the issue of sound bites and
13 editing and only showing an inaccurate portion of the --
14 perhaps inaccurate portion of the trial just because they
15 don't cover it gavel-to-gavel. I don't say for a minute
16 that the tool is not powerful and pictures are more
17 powerful than written words. That is a reality, but it
18 always has struck me that it is a good thing in this -- in
19 a democracy for citizens to be able to see how their
20 courts are working.
21 I think it was a good thing that citizens
22 saw how the O. J. Simpson case was tried, even though most
23 of us in this room would say that that case was not
24 conducted in a very proper or judicious manner, but I
25 think it's a good thing that the citizenry saw that; so I

1 have a very strong bias, as you all know, that having a
2 powerful tool in there is a good thing, not a bad thing.
3 But again, I'm trying -- I guess I'm trying to say in
4 reaction to what Judge Peeples says is that don't think
5 that it's all that different, because the print guys are
6 doing exactly what you're worried about this camera thing.
7 Buddy had his hand up first, Carl, and then
8 you.
9 MR. LOW: Chip, we had the dragging case and
10 about all we saw was when court was over -- and I'm not
11 critical of the way the judge controlled cameras, and
12 somebody would be waving before his fingers were folded
13 and one was up and things like that, and they were real
14 deep social issues involved in that case about our
15 prisons, how people become oriented to this gang or that
16 gang, and the local people as well as people all in that
17 area wanted to see that and know more about the social
18 issues. And so does the public itself, if the media
19 chooses, do they have some right, not just the media right
20 to cover it. It's their court, and there are social
21 issues that are involved there with the people, and are we
22 overlooking the right of the public? That's all I ask.
23 CHAIRMAN BABCOCK: Well, the U.S. Supreme
24 Court in the Richmond Newspapers case addressed that
25 directly and said that it used to be, you know, in a long

1 ago time, that everybody went down to the courthouse to
2 watch what was going on, and now we can't do that because
3 there's too many people and we're too busy, but that the
4 press is the surrogate of the people, so that's why they
5 have that First Amendment right to be there.
6 MR. LOW: You had to get passes. There were
7 only so many seats you could have in the courtroom, and
8 the judge had control, and again, I'm not saying that
9 cameras would have been the right thing. Maybe he had
10 reasons. I wasn't a part of that case, but I can say
11 many, many people were interested in the social issues
12 involved in that case.
13 CHAIRMAN BABCOCK: Yeah. Carl had his hand
14 up and then Frank.
15 MR. HAMILTON: In our part of the country,
16 Skip, very few people read the newspapers. They get
17 practically all of their information from the television,
18 and we've had some trials that I have been involved in
19 where there has been a lot of stuff written in the
20 newspapers and some on the TV, and I've asked people time
21 and time again, "Oh, we don't read the newspapers."
22 "Did you see it on TV?"
23 "Yeah, I saw it on TV."
24 CHAIRMAN BABCOCK: Yeah.
25 MR. HAMILTON: So there's a difference.

1 CHAIRMAN BABCOCK: No question about it.
2 And but which way does that cut?
3 Frank.
4 MR. GILSTRAP: Chip, you know, we're getting
5 now into the philosophical issues, and I want to respond
6 to you and say things like, well, that the point is -- you
7 say that the people need to see how the system is working,
8 and I think Judge Peeples' point is the TV doesn't show
9 how it works. It shows completely the opposite of how it
10 works, but the point is I think we need to get the sense
11 of the committee. Are we going to change anybody's mind
12 by going back and rehashing the debate in March? If we
13 want to, that's fine. It was fun to do it. I think we
14 had a good airing. I don't know how many people's minds
15 were changed. Maybe this is helpful, maybe it's not, but
16 I think where we are, we either go on and we debate
17 philosophically for a while or we go on and try to craft a
18 rule.
19 CHAIRMAN BABCOCK: Yeah. And Skip.
20 MR. WATSON: I appreciated what Frank just
21 said and I also appreciated what Judge Peeples said in
22 terms of the practical aspects of how it works, and that
23 made me see some things I hadn't thought about. But back
24 to what Frank was saying, I would be curious of what as a
25 trial judge Judge Peeples thinks specifically should be

1 changed or not changed about 18c, because I'm a little
2 murky on that, and I'm open on this issue. I'm just
3 listening.
4 CHAIRMAN BABCOCK: Judge Peeples, do you
5 want to pick up the gauntlet?
6 MR. WATSON: It's not a gauntlet. I just
7 want to be educated.
8 CHAIRMAN BABCOCK: Do you want to accept the
9 challenge?
10 HONORABLE DAVID PEEPLES: I'm not sure I
11 understand what you're asking.
12 MR. WATSON: What would you change or not
13 change about 18c in view of the heartfelt concerns you
14 expressed about the sound bites and the pressure on the
15 judges that come from ruling against having the cameras in
16 the courtroom or, you know, etc.? I mean, should I take
17 from that that you believe that the provision permitting
18 the parties themselves to veto it should remain in there
19 so that pressure doesn't fall all the time to the judge?
20 Or I'm just not sure what your true feelings on the
21 specifics are.
22 HONORABLE DAVID PEEPLES: Well, I'm not
23 necessarily in favor of keeping subsection (b), you know,
24 witness veto and/or party veto. I do think that if we go
25 to this proposal I would want the -- I think I would want

1 to tilt against coverage. In other words, make that
2 the -- just give judges a little bit more basis in the law
3 for saying, "I don't think this is a case in which you
4 ought to come in here and cover everything as a matter of
5 right." As it's written a judge who wants to do that
6 could certainly do it.
7 I don't know, beyond what I said -- Skip, I
8 tell you, one thing that concerns me and it's not in this
9 list of reasons here, I mean, one interest I think is at
10 stake is this: It seems to me that -- and Chip is right
11 in saying that a print journalist can go in there and
12 quote things out of context and say, "The case was about
13 so-and-so" and not give the whole picture, and that does
14 happen, and there's nothing that can be done about it. TV
15 is much more powerful.
16 But I'm concerned at the potential for
17 selective -- and I'm just going to say irresponsible TV
18 coverage. I think there's a potential for that to
19 undermine faith in the legal system for this reason. If I
20 see on TV some bits of testimony that cry out for one
21 decision and the judge did something else because the
22 judge heard five witnesses and three hours of testimony,
23 "The judge did something stupid. What's this country
24 coming to," and we lose -- we start to lose faith in our
25 decisionmakers and our institutions over the long haul. I

1 mean, I think that is one of the things that is at stake
2 here.
3 I'm not saying -- I certainly don't want to
4 keep cases from being covered. I agree with Buddy. There
5 are lots of cases that it's in the public interest to see
6 what happens, but as Frank pointed out, it's very rare for
7 the evening news to give an accurate view of what we do.
8 And I'm concerned that the net long-term impact of
9 irresponsible TV coverage is to chip away at the respect
10 that we have for our institutions, and that's something
11 that I think is at issue here.
12 CHAIRMAN BABCOCK: Yeah, Sarah.
13 HONORABLE SARAH DUNCAN: I would go one step
14 further, and David may or may not agree with it, but I've
15 agreed with everything you've said so far. I think we
16 will chip away at a judiciary that has the courage to make
17 some of the hard decisions. I mean, I can remember a case
18 in Bexar County where it was exactly that situation. The
19 judge heard all of the testimony and looked at all of the
20 documents and was vilified in the TV reporting of it. I
21 could easily understand, one, if that judge lost his next
22 bid for election and, two, why somebody wouldn't vote for
23 him and, three, why the next judge down the pike wouldn't
24 make that decision; and that's not, to me, a system of
25 justice. That's a system of public opinion polls on

1 limited information.
2 CHAIRMAN BABCOCK: The same argument was
3 made in the U.S. Supreme Court on the challenge to the
4 canons that preclude judicial candidates from making
5 comments about their statement or position that it would
6 undermine the integrity of the judiciary if candidates
7 were free to talk about, you know, what they thought about
8 the great social issues of our time; and, as everybody
9 knows, the Supreme Court in a narrow vote, five to four,
10 struck down that provision and we have now abrogated our
11 comparable position of Canon 5, subsection 1 in reaction
12 to that decision; and we've rewritten subsection 2, Canon
13 5, subsection 2, in response and reaction to that
14 decision.
15 But Justice O'Connor noted, and I think
16 properly so, that it is a function -- the evil that you're
17 worried about is a function of electing judges when judges
18 are different than legislators and executives, and that's
19 a different question.
20 HONORABLE SARAH DUNCAN: I understand that,
21 and I read the Supreme Court's opinion in White to -- and
22 particularly Justice O'Connor's concurring opinion to try
23 to put pressure on those states that have elected judges
24 not to have elected judges, and I am in complete agreement
25 with that pressure, but the reality and what I appreciate

1 about David's comments today is that he's speaking about
2 the reality, and I don't glean from anything he said any
3 movement towards any types of prior restraint.
4 What I hear him saying is if you people are
5 going to craft a rule, at least be aware of the realities
6 while you're crafting it and consider what those realities
7 may do to the rule that you're crafting and the peoples'
8 lives that you're affecting.
9 CHAIRMAN BABCOCK: And the point I was
10 trying to make about the White decision was when you're
11 talking about the inevitable inaccuracies that the press
12 engage in by their very nature in covering judicial
13 proceedings undermining the independence of the judiciary,
14 it is because, as you note, there is a linkage to the
15 electorate and to elections; and the question is, is the
16 evil the elections or is the evil the fact that people are
17 watching and perhaps drawing improper, unfair conclusions
18 about what's going on in the courthouse? To me it is a
19 greater evil not to watch what's going on than the
20 potential for on a case, a specific case, have an
21 inaccurate report that might undermine public confidence
22 in a particular judge and a particular decision.
23 MR. GILSTRAP: And that's where we disagree
24 on that point. I think that's where everybody in this
25 room probably disagrees, how you draw that balance.

1 CHAIRMAN BABCOCK: Okay. Carlyle, then
2 Carl.
3 MR. CHAPMAN: I happen to disagree with the
4 conclusion reached with regard to whether it's proper to
5 elect judges or not, but I don't think that's the issue.
6 I think that the issue here is the proper administration
7 of justice in the courts; and I wonder whether the
8 committee could see a format of a local rule, such as I'm
9 starting to understand is in effect in Tarrant County and
10 perhaps Bexar County, and a format of a rule such as in
11 effect in Dallas County and Harris County so that we can
12 see whether or not the laudable goal, it seems to me, of
13 giving the judge the discretion to make a decision based
14 on the facts and in accord with justice as to what
15 limitations, if any, there ought to be on broadcast media.
16 I don't perceive any good reason to treat
17 broadcast media any different from print media at the
18 outset, and it seems to me that if the argument that has
19 been -- which has been advanced here, that there is some
20 judicial economy or judicial effectiveness that is to be
21 gained by starting from a disincentive to allow media and
22 then say, "Then these are the factors that would change
23 our decision" as opposed to an incentive to allow media in
24 and say, "These are the factors that would limit," then I
25 think that this committee would be -- that this committee

1 would have its work advanced if we could see those two
2 formats and have a discussion with regard to how justice
3 is prospered and how judicial effectiveness is prospered
4 in those contexts.
5 I agree with Frank we need to move forward
6 beyond the philosophical. I don't think any of us want to
7 be harbingers of prior restraint, nor do any of us believe
8 that there is something that is necessarily evil about
9 free press. That's un-American. I'm sure none of us are
10 there. But we do need to get on down the road with regard
11 to how to make this something that can apply statewide,
12 because I think that it is -- it is bad to allow one
13 person to say, "I don't want to be seen" and, therefore,
14 there is no coverage.
15 I also think that if you believe that in the
16 selection of jurors in the voir dire process you put a
17 camera on a prospective juror who's just hearing about the
18 case that it doesn't change that person's mindset or if
19 that person knows that as a prospective juror he or she is
20 going to be shown on the evening news and has not even
21 been sworn in yet, it doesn't change their mindset, you
22 are fooling yourself.
23 MR. LOW: Yeah.
24 MR. CHAPMAN: And the judge has to be able
25 to control that kind of thing, both on a case-by-case

1 basis and from a judicial philosophy basis, it seems to
2 me. So I think we just need to see the rules, put them
3 down, and make a decision as to whether or not the
4 assumption is in favor or the assumption is against, what
5 are realistic and reasonable limitations that the Court
6 can consider. This model probably sets them out as well
7 as any, and the question is should we have a leaning one
8 way or the other and how will it best promote our
9 judiciary.
10 CHAIRMAN BABCOCK: Let's have two more
11 comments before we break for lunch. Carl and then Skip.
12 MR. HAMILTON: The Federal courts don't
13 permit that in the courtrooms.
14 CHAIRMAN BABCOCK: Right.
15 MR. HAMILTON: Is there any movement under
16 way that you know of to change that in the Federal system?
17 CHAIRMAN BABCOCK: There was a pilot program
18 where they took specific districts and they allowed
19 cameras into the Federal courts in, I don't know, five or
20 six districts across the country. They issued a report.
21 It was favorable in favor of allowing cameras into the
22 Federal courts; and the Federal judiciary voted it down,
23 and said, "no"; and I think there's still some effort, but
24 not a concerted one, as far as I know, Carl.
25 MR. GILSTRAP: Ninth Circuit allows it.

1 CHAIRMAN BABCOCK: Excuse me?
2 MR. GILSTRAP: Ninth Circuit I think
3 regularly allows cameras in the courtroom.
4 CHAIRMAN BABCOCK: In the appellate court,
5 but not in the trial court.
6 MR. GILSTRAP: Yeah.
7 CHAIRMAN BABCOCK: Skip.
8 MR. WATSON: Well, I'm just trying to come
9 to grips with the problem as articulated by Judge Peeples
10 of when a case -- when a decision might be adversely
11 affected by cameras in the courtroom, and I believe that
12 in the balance that everyone has articulated and that
13 Frank put his finger on, in trying to draw that line that
14 many of us, if not most of us, if put to the test would
15 probably say we need to protect the integrity of the
16 judicial process; and what I'm coming to grips with is
17 Chip's argument that the free press is precisely what
18 protecting the integrity of the judicial process; and on
19 the other side of that line, as Frank and Judge Peeples
20 have pointed out, that sometimes the protecting of the
21 judicial process, in fact, adversely affects it.
22 And so I guess I'm wondering two things.
23 One, is anyone seriously arguing that 18c should be
24 changed to remove "a trial court may permit"? In other
25 words, to remove the discretion to decline the request to

1 come in? I mean, to make it where they can come in
2 regardless; and, second, I mean, that just -- to me that
3 discretion is always going to be there if any specific
4 judge feels like it may adversely affect the
5 administration of justice, then the trial judge should be
6 able to say, "No, you're not coming in."
7 But second, what I'm -- and, I'm sorry,
8 maybe I'm missing the point, but what I'm trying to come
9 to grips with is the part of Judge Peeples' comments that
10 really got my attention that the act of saying, "No, you
11 can't come in" takes guts; and if there is some argument
12 being made here that it should be tilted so that the trial
13 judge doesn't even have to say, ""No, you can't come in,"
14 in certain contexts and, if so, how the rule should be
15 changed to permit them to do that.
16 And, again, I'm not making an argument here.
17 I'm trying to understand how language can be crafted to
18 deal with the sheer point that Frank has identified. And
19 I'm sorry, I'm not there yet.
20 CHAIRMAN BABCOCK: This all reminds me of
21 the line from the Tom Stoppard play "Night and Day" where
22 it says, "I'm all for freedom of the press. It's
23 newspapers I don't like."
24 Let's take a lunch break and come back, and
25 we're going do go through this rule and take -- because,

1 same way with offer of judgment, okay, maybe we don't want
2 any rule, but if we're going to have one, let's see if we
3 can come up with something.
4 (A recess was taken at 12:09 p.m., after
5 which the meeting continued as reflected in
6 the next volume.)
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2 CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

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7 I, D'LOIS L. JONES, Certified Shorthand

8 Reporter, State of Texas, hereby certify that I reported

9 the above meeting of the Supreme Court Advisory Committee

10 on the 20th day of September, 2002, Morning Session, and

11 the same was thereafter reduced to computer transcription

12 by me.

13 I further certify that the costs for my

14 services in the matter are $901.00.

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

16 Given under my hand and seal of office on

17 this the 4th day of October, 2002.

18

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22 D'Lois L. Jones

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23 Certification No. 4546
Certificate Expires 12/31/2002

24

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