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7 **MEETING OF THE SUPREME COURT ADVISORY COMMITTEE**
8 April 11, 2003
9 (MORNING SESSION)
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14 **ORIGINAL**
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19 Taken before *D'Lois L. Jones*, Certified
20 Shorthand Reporter in Travis County for the State of Texas,
21 reported by machine shorthand method, on the 11th day of
22 April, 2003, between the hours of 9:01 a.m. and 12:15 p.m.,
23 at the Texas Law Center, 1414 Colorado, Room 101, Austin,
24 Texas 78701.
25

1 **INDEX OF VOTES**

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

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2 CHAIRMAN BABCOCK: We're on the record.

3 Welcome, everybody, to the first session of our new

4 three-year term of the Supreme Court Advisory Committee.

5 Justice Hecht, as you know, is the liaison to this group

6 from the Court, and Justice Jefferson is -- what do you

7 call him, the vice-liaison?

8 JUSTICE HECHT: The liaison of vice.

9 CHAIRMAN BABCOCK: The liaison in charge of

10 vice.

11 JUSTICE JEFFERSON: The mind behind the --

12 CHAIRMAN BABCOCK: Since we have so many new

13 members, Justice Hecht and I thought it might be

14 appropriate if we just go around the table and introduce

15 ourselves, and I'm Chip Babcock from Jackson Walker in

16 Dallas and Houston, and I was the Chair of this committee

17 for the last three years and somehow got through it so that

18 the Court reappointed me for this term, which I am greatly

19 honored, and from there I guess just go around this way.

20 You probably know the next two guys.

21 JUSTICE HECHT: I'm Nathan Hecht, on the

22 Supreme Court.

23 JUSTICE JEFFERSON: Wallace Jefferson, on the

24 Supreme Court.

25 MR. ORSINGER: Richard Orsinger; San Antonio,

1 Texas.

2 PROFESSOR DORSANEO: Bill Dorsaneo; Dallas,

3 Texas.

4 MR. HAMILTON: Carl Hamilton; McAllen, Texas.

5 MR. BOYD: Jeff Boyd. I'm at the AG's office

6 here in Austin.

7 MR. LOW: Buddy Low from Beaumont.

8 MR. GRAY: Tom Gray, Waco Court of Appeals.

9 HONORABLE JAN PATTERSON: Jan Patterson,

10 Austin Court of Appeals.

11 MR. DAWSON: Alistair Dawson from Houston,

12 Texas.

13 MR. WATSON: Skip Watson, Amarillo.

14 MR. HALL: Wendell Hall, San Antonio.

15 MR. SOULES: Luke Soules, San Antonio.

16 HONORABLE SCOTT BRISTER: Scott Brister, 14th

17 Court.

18 HONORABLE SARAH DUNCAN: Sarah Duncan, San

19 Antonio Court of Appeals.

20 MS. CORTELL: Nina Cortell with Haynes &

21 Boone in Dallas.

22 PROFESSOR ALBRIGHT: Alex Albright,

23 University of Texas Law School.

24 MR. YELENOSKY: Stephen Yelenosky; Advocacy,

25 Inc.

1 MS. WOLBRUECK: Bonnie Wolbrueck, District
2 Clerk in Georgetown.
3 MS. BARON: Pam Baron. I'm a sole
4 practitioner here in Austin.
5 MR. PEMBERTON: Bob Pemberton; Akin, Gump
6 Austin.
7 HONORABLE TRACY CHRISTOPHER: Tracy
8 Christopher, District Court in Harris County.
9 HONORABLE JANE BLAND: Jane Bland; District
10 Court, Harris County.
11 HONORABLE DAVID GAULTNEY: David Gaultney,
12 Beaumont Court of Appeals.
13 HONORABLE TERRY JENNINGS: Terry Jennings,
14 First Court of Appeals.
15 MR. SULLIVAN: Kent Sullivan; Houston, Texas.
16 MR. MARTIN: John Martin from Dallas.
17 MR. SCHENKKAN: Pete Schenkkan; Graves,
18 Dougherty Austin.
19 HONORABLE DAVID PEEPLES: David Peeples,
20 District judge in San Antonio.
21 MR. JEFFERSON: Lamont Jefferson with Haynes
22 & Boone in San Antonio.
23 MR. DUGGINS: Ralph Duggins, Fort Worth.
24 PROFESSOR CARLSON: Elaine Carlson from
25 Houston, Texas.

1 MR. MUNZINGER: Richard Munzinger, El Paso.
2 CHAIRMAN BABCOCK: How about you?
3 MS. LEE: I'm Debra Lee, Chip's assistant,
4 from Houston.
5 CHAIRMAN BABCOCK: Debra is the one that
6 makes this thing all tick, so if you have any complaints,
7 go right to her.
8 Justice Hecht is going to talk a little bit
9 about the history of this committee and how we got to where
10 we are today; and when he's done with that, I'm going to
11 just read out the subcommittee assignments. They haven't
12 changed much from last term, and I'll talk a little bit
13 about the subcommittees, but Justice Hecht will talk about
14 our big committee.
15 JUSTICE HECHT: Well, welcome to the meeting.
16 I was looking back over the history of the committee a
17 little bit when the Court reappointed it this last couple
18 months. It was first formed in 1940 to write the Rules of
19 Civil Procedure, which was -- and also to sell the Rules of
20 Civil Procedure, both of which were daunting tasks. If you
21 go back in Volume 136 of the Texas reports and look at who
22 was on that committee, it really was the giants of the Bar
23 back in that time who came together to give us the Rules of
24 Civil Procedure.
25 Since then, of course, a lot has happened,

1 and this committee in some form has remained in existence
2 over the decades. Sometimes more active than others, but
3 in the last I guess about 30 years or more, 35 years, very
4 active, meeting regularly, looking at all of the procedural
5 rules that affect the civil justice system in Texas. When
6 the Court sits down to pick the members of the committee we
7 really do try and keep in mind different areas of practice
8 and different areas of the state because, as you know or
9 will learn, this is not a homogeneous state by any means
10 and the practice is not uniform throughout the state, and
11 so we really need input from various areas of practice and
12 various areas of the state into our work.
13 I'm not just saying this to flatter you, but
14 two things, the Court really does regard you as among the
15 very best lawyers and judges that Texas has, and that's why
16 we employ you in this process; and, secondly, we very much
17 need your input on the kinds of issues that are before us
18 now and will come before us as we -- as the litigation
19 system evolves. So we thank you very much for your service
20 here, and we hope that it will be rewarding to you as it is
21 to the Court.
22 Let me just give you a word of update. Since
23 the last meeting the Court is at full strength now for at
24 least a few minutes, and unless the U.S. Senate comes to
25 its senses maybe for a few days, so we're glad to have all

1 the new people on board and working, and I think the Court
2 is doing very well. We -- you may have noticed that the
3 Legislature is in session, and that is a huge distraction
4 to us, I think it's fair to say, and to a lot of the other
5 judges here in the room as we deal not only with budgetary
6 but operational issues with the Legislature, and budget
7 times are very tough, and they will impact the Court and
8 its work, but we are trying to do the best we can to
9 fund -- to be sure the judiciary has enough funding to
10 perform its mission, and so I hope that's going to come out
11 of the session, but it's tough times across the street.
12 I can report to you that the Court's
13 relationship with the Legislature, with the second branch,
14 is better than its ever been, and that's good news for
15 those of you who lived through a period of time when that
16 was not the case, and so I think they and we are very
17 amenable to working together to try to solve problems that
18 are of concern to both of us.
19 There are a number of bills pending that
20 affect procedural rules. House Bill 4, of course, but then
21 a lot of others as well. We'll talk about some of those as
22 we go through today, and then we have a number of other
23 issues that when we get to the substance of our work I'll
24 try to visit with you about them.
25 For the new people, this is an advisory

1 committee, as the order that appoints you says, and we will
2 take votes on the committee because at some point there has
3 to be closure and we need to go onto some other issue, but
4 it is very important to the Court that it have your full
5 advice, and so dissenting views in this group are not lost.
6 The Court -- it is not unusual for members of the Court to
7 read portions of the transcript that they're interested in.
8 A record is being made, and so the -- it is very important
9 that during the deliberations not just that the meeting
10 reach some sort of conclusion, but we have fully
11 deliberated the issues, people have their thoughts on the
12 record, so that when we come back to them we can be sure
13 that we have your best advice on all of those -- on all of
14 those issues.
15 Judge Jefferson, you want to add anything?
16 JUSTICE JEFFERSON: Well, I'll just say for
17 the new members, one of the great benefits I think to the
18 Court is the perspective you bring. There are trial judges
19 here. There are practitioners. There are appellate
20 lawyers, and one thing that the Court benefits from is your
21 bringing to the table your experiences, but in a way -- and
22 this was told to me I think at the first meeting I ever
23 came to, in a way not necessarily as an advocate for your
24 position or for the clients that you represent. You are
25 really benefiting the jurisprudence as a whole in the state

1 of Texas, so to the extent you can leave behind that hat,
2 the pure advocacy hat, but bring to the table your
3 experiences, it really does help the process very much, and
4 the Court appreciates it.
5 And I just want to reiterate, now that I'm on
6 the other side, what Justice Hecht just said. If there are
7 dissenting comments or concurring positions, we bring those
8 to the conference table and air them out there just across
9 the street, just as it does I think for the jurisprudence
10 as a whole, when you've got different ideas coming into
11 play, it improves the process, and so we really appreciate
12 your lending your hand in that respect, and I'm glad to see
13 all of you here and look forward to a productive session.
14 JUSTICE HECHT: Let me add one thing. For
15 the last couple of years I have served on the Federal
16 Advisory Committee on the civil rules, and the unvarnished
17 truth is that this -- Texas has the best rules process of
18 any state in the country, and I think -- we can go off the
19 record now. No, I'm just kidding. It certainly rivals, if
20 does not exceed, the Federal committee process; and the
21 rules that this committee helped write on discovery,
22 particularly the electronic discovery rule, are models for
23 the rest of the United States; and when -- it has come to
24 be that when people are saying, "Well, what should we do
25 about this kind of issue," people say, "Well, what does the

1 Texas rule say?" So that's a great compliment to this body
2 and this process.
3 CHAIRMAN BABCOCK: So after having patted
4 ourselves on the back, a couple of things about our
5 processes. We here are to give advice to the Court, and as
6 with many of our clients, sometimes the client doesn't take
7 our advice, and that's fine. The only thing we can do is
8 give them the best read that we can on the issues, and
9 nobody ought to be offended if sometime later the Court
10 decides to either disregard or ignore our advice, such is
11 part of the process.
12 The other thing that I think is important is
13 that over the years we have tried to take direction from
14 the Court. In other words, if they want an issue studied,
15 we'll study it. If they don't want an issue studied then
16 we're not going to study it, unless somebody just wants to
17 get together after our meeting is over and talk about the
18 law, which is fine.
19 All our proceedings are on the record, as you
20 can see. This transcript is posted on our website, which
21 is --
22 MS. LEE: www.jw.com/scac.
23 CHAIRMAN BABCOCK: So you can -- after the
24 record is transcribed you can go back and look at it, if
25 you are easily amused, and our agenda is posted on the

1 website, and then other materials that relate to our work
2 is posted on the website. I think that we are probably
3 subject to the Open Records Act such that any of our
4 records are open to the public, subject to whatever
5 exceptions there may be. I don't think, curiously enough,
6 that we're subject to the Open Meetings Act, but we've got
7 nothing to hide. Everything that we do is open to the
8 public.
9 We occasionally will ask for knowledgeable
10 people in a particular area to come and talk to us about
11 that. When we redid the FED rules, we had a number of
12 people from the different constituencies come and talk to
13 us about the FED rules, which was very helpful. The
14 Legislature over the years has given us advice about how to
15 perhaps improve our processes in the view of some of the
16 members of the Legislature, I think, but for the past
17 several sessions we have had no substantial complaints from
18 the Legislature about how we've treated matters that the
19 Court has brought to us, which is good news.
20 We are organized by subcommittees, and the
21 subcommittees by and large go by the rules of procedure, so
22 that the subcommittee on Texas Rule of Civil Procedures 1
23 through 14c, for example, is chaired by Pam Baron, and
24 Stephen Yelenosky is the subcommittee vice-chair, and
25 Bonnie Wolbrueck and Robert Valadez?

1 MR. VALADEZ: Valadez.
2 CHAIRMAN BABCOCK: Valadez. Thanks, Robert.
3 And Bob Pemberton are on that subcommittee. And I should
4 say that there's no magic to this, so that if we have
5 placed you on a subcommittee that is completely
6 inappropriate for your practice area or your interests,
7 just come to me and we'll see if we can rearrange things a
8 little bit. You'll notice that some of the newer members,
9 not all of you, but some of you, have gotten on the hated
10 JP rules subcommittee. When I was first on this group I
11 started out that way, so everybody has got to --
12 PROFESSOR CARLSON: What does it mean if you
13 never get off of it?
14 CHAIRMAN BABCOCK: Elaine has been on this
15 committee for about 15, 20 years, and she's never
16 gotten off of it.
17 PROFESSOR DORSANEO: Roy McDonald was on
18 extraordinary remedies when he joined the committee in
19 1940, so it wasn't a very good place for him to start.
20 CHAIRMAN BABCOCK: Uh-huh. Subcommittee on
21 Rules 15 through 165a is chaired by Richard Orsinger. The
22 vice-chair is Frank Gilstrap. Professor Carlson, Professor
23 Albright, Nina Cortell, Professor Dorsaneo, Carl Hamilton,
24 Hartley Hampton, Tommy Jacks, Paula Sweeney, and Bonnie
25 Wolbrueck are on that subcommittee.

1 Rules 166 through 166a is chaired by David
2 Peeples. Judge Brister is the subcommittee vice-chair.
3 Professor Carlson, Nina Cortell, Bill Edwards, Jeff Boyd,
4 and Richard -- should be Richard Munzinger, not Robert,
5 are on that subcommittee.
6 The committee Rules 171 through 205, chaired
7 by Bobby Meadows. Subcommittee vice-chair is Bill Edwards.
8 Steve Susman, Professor Albright, Harvey Brown, David
9 Jackson, John Martin, Judge Bland, Judge Christopher are on
10 that subcommittee.
11 Subcommittee Rule 215 chaired by Ralph
12 Duggins. The vice-chair is Judge Brister, with
13 subcommittee members Pam Baron, Bobby Meadows, Judge
14 Benton, Judge Christopher, I guess former judge now Lopez,
15 and Pete Schenkkan are on that subcommittee.
16 Rules 216 through 299a, chaired by Paula
17 Sweeney. Subcommittee chair David Peeples. Members,
18 John -- Judge Brister, Bill Edwards, Wendell Hall, Carl
19 Hamilton, Tommy Jacks, Bobby Meadows, Alistair Dawson, and
20 Kent Sullivan.
21 The subcommittee on Rules 300 through 330,
22 chaired by Justice Duncan. Subcommittee vice-chair, Ralph
23 Duggins. Subcommittee members, Wendell Hall, Michael
24 Hatchell, Frank Gilstrap, Stephen Tipps, and Lamont
25 Jefferson.

1 Subcommittee Rule 523 through 734,
2 subcommittee chair, Judge Lawrence. Subcommittee
3 vice-chair, Skip Watson; and subcommittee members, Jeff
4 Boyd.
5 Subcommittee Rule 735 through 822, the chair
6 is Professor Carlson. The subcommittee members consist of
7 Justice Jefferson, Andy Harwell, Frank Gilstrap, Judge
8 Lawrence, and Pete Schenkkan.
9 The Texas Rules of Evidence, chaired by Buddy
10 Low. Subcommittee vice-chair, Judge Brister; and members,
11 Judge Brown, Professor Carlson, Tommy Jacks, Stephen Tipps,
12 and Judge Benton.
13 The Texas Rules of Appellate Procedure,
14 Professor Dorsaneo is the chair. Justice Duncan is the
15 vice-chair. The members are Pam Baron, Frank Gilstrap,
16 Mike Hatchell, Justice Jefferson, Richard Orsinger, Justice
17 Patterson, Luke Soules, Skip Watson, and Justice Gaultney.
18 The offer of judgment subcommittee, which
19 we're going to get to in a second here, is a special
20 committee that we formed with the chair of Professor
21 Carlson. Subcommittee members, John Martin, Tommy Jacks,
22 Justice Peeples; and the last subcommittee is judicial
23 administration, chaired by Michael Hatchell, with Ralph
24 Duggins, Stephen Tipps, Judge Brister, Justice Duncan, and
25 Justice Gray.

1 There may be some glitches in what I just
2 read. I noticed a couple of names were misspelled, but
3 that's generally what it is. Again, if anybody doesn't
4 have a subcommittee, I think everybody should, but if
5 anybody doesn't, let me know. If anybody wants to jump
6 onto a different subcommittee because of an interest you
7 have, let me know that.
8 We're going to jump now into the Jamail
9 committee, which was appointed by the Court, and talk about
10 the recommendations that the Jamail committee has made to
11 the Court, and the Court has asked us to look it over, and
12 Justice Hecht is going to tell us a little bit about how
13 the Jamail committee was formed.
14 JUSTICE HECHT: A couple of years ago,
15 coincidentally, Joe Jamail called and said he was
16 interested in two areas of practice that he would like to
17 have some input on. One was referral fees or fee-splitting
18 among lawyers, and the other one was ad litem appointments
19 and paying for compensation for ad litems. About the same
20 time governor -- then Governor Ratliff called and asked the
21 Court to look at an offer of judgment rule. He had
22 introduced legislation in the Legislature, I think since
23 the year he joined the Senate, 1989, but certainly a year
24 or two after that and wanted to have the Court's thoughts
25 on the subject and whether it should be a rule or a

1 statute.

2 So the Court told Joe that he could work on
3 his issues if he would work on the Governor's issue, and so
4 he agreed to do that, and also we asked him and his group
5 to take a look at class actions and mass or multiple
6 litigation and see whether our procedures were adequate to
7 handle those cases that seem to keep coming to our system.
8 So we appointed a task force that Joe chaired, and on the
9 task force was Chip Babcock, Elaine Carlson, Richard
10 Cedillo, Jimmy Coleman, Tommy Jacks, Dee Kelly, Harry
11 Reasoner, and Steve Susman. Did I leave anybody -- I think
12 that's it. I'm trying to recall from memory.

13 And they met several times and now have
14 produced the report that you have in front of you that
15 contains an offer of judgment rule, an offer of settlement,
16 a rule regarding fee-splitting or referral fees, some
17 changes to the class action rule, an elaboration and
18 extension of the complex litigation rule, which is our Rule
19 of Judicial Administration 11, and a rule regarding ad
20 litem appointments.

21 We told Joe that his report would be given to
22 the Court, and we have it, and would be sent to this
23 committee for its input on it, which we are about to get;
24 and in the process of their meeting on these various issues
25 -- and they met maybe six or seven times. In the process

1 of that the offer of judgment rule was brought up in this
2 committee, and so this committee has discussed that rule at
3 some length as well as his group independently. I say
4 independently, but Tommy Jacks and I worked on the
5 drafting, and he and I were in that group and we're in this
6 group, so -- Professor Carlson did much of the research and
7 much of the drafting and served on both groups as well. So
8 there's been some overlap in the membership, but this group
9 has already talked at some length about the offer of
10 judgment proposal.
11 As you know, House Bill 4 that has passed the
12 House and is pending in the Senate has an offer of judgment
13 -- has offer of judgment provisions that are very different
14 from the ones that are in our proposed rule. The
15 Legislature is fully aware of the work this committee has
16 done. They have a copy of our draft, and we -- there have
17 been some discussions with members of the Legislature, and
18 our position at this point has been that we were asked to
19 do work on the rule, and we have done it and probably will,
20 I hope, complete it today, and it -- if the Legislature
21 wants to go forward with a statute, that's their business,
22 and we make our work available to them. If they don't want
23 to go forward with a statute then we'll decide, as we
24 always do, whether to go forward with the rule or not, but
25 there's no competition, and there's no friction involved in

1 this process. We're just proceeding independently.
2 And so I think as to the other issues that
3 the task force has worked on, there's nothing in the
4 legislation, in any of the legislation that I'm aware of,
5 that directly impacts any of those issues. There are some
6 multiple litigation provisions in -- I think it was the
7 medical malpractice area, but there aren't any general
8 provisions that I know of in the statute that are the same
9 as these that we are working on.
10 So that's kind of a history of the Jamail
11 group. It was not in competition with this group, but from
12 time to time over the years we have asked special groups
13 who were willing to do it to look at particular areas of
14 procedure and report back and that's what they have done.
15 CHAIRMAN BABCOCK: With that preface, as you
16 all may know, House Bill 4 has passed the House and gone to
17 the Senate, and it does have an offer of judgment rule that
18 differs in many material respects from both the one that
19 the Jamail committee and this committee have been talking
20 about, and I don't know if Elaine or Tommy -- who wants to
21 kick off this discussion?
22 PROFESSOR CARLSON: I guess I will.
23 CHAIRMAN BABCOCK: Elaine Carlson.
24 PROFESSOR CARLSON: Okay. By way of
25 background -- point of clarification, Mr. Chairman. Do you

1 want me to revisit some of the underlying pros and cons, or
2 do you want us to focus on the mechanics of the proposed
3 Jamail rule?
4 CHAIRMAN BABCOCK: Well, I think a short
5 revisiting for the new members of the pros and cons would
6 be helpful.
7 PROFESSOR CARLSON: Would that be a law
8 professor short or --
9 CHAIRMAN BABCOCK: That would be a Gong Show
10 short. When it gets too long, we'll ring the gong.
11 PROFESSOR CARLSON: Okay. As many of you are
12 aware, offer of judgment rules exist in most jurisdictions
13 in the United States and has been in the Federal rules for
14 many, many years. The offer of judgment rule in Federal
15 court provides for a defendant to obtain post-offer of
16 settlement costs, not attorneys' fees, but costs when the
17 defendant offers to settle, the plaintiff declines, and
18 ultimately the judgment is less favorable to the plaintiff.
19 Many, many other states have offer of
20 judgment rules and statutes, which is reflective, I
21 suppose, of a bona fide academic argument of whether this
22 is appropriate for a rule or a statute, but most other
23 states have rules or statutes on offer of judgments with a
24 variety of provisions. Many track the Federal courts, but
25 many also provide for shifting of other costs beyond

1 taxable court costs, including attorneys' fees. Some
2 provide for the shifting of expert fees, etc. Most offer
3 of judgment rules provide for both the plaintiff and the
4 defendant to obtain post-offer costs and is not limited to
5 the defendant, like the Federal rule.
6 The purpose, of course, of any post-offer --
7 any offer of judgment rule is an attempt to promote the
8 parties to settlement at an earlier stage in the litigation
9 before the bulk of expenses are incurred, and so by upping
10 the ante through the offer of judgment mechanism, that is
11 hoped to have been achieved. There is a lot of *Law Review*
12 articles out there debating and including empirical
13 research through Notre Dame on whether that's been
14 effective or not, but, be that as it may, they remain on
15 the books.
16 There's a fair amount of controversy as to
17 whether offer of judgment rule would be -- offer of
18 judgment would be appropriate as a rule or appropriate as a
19 statute. Because the Federal rule doesn't shift attorneys'
20 fees, the Federal courts really have not looked at that
21 question explicitly, but the United States Supreme Court
22 has looked at some cases that deal with shifting attorneys'
23 fees, and the way that -- the way that I understand those
24 decisions is that if you create a new cause of action for
25 attorneys' fees that that is a substantive matter that is

1 outside the rule-making power of the Court; and as you
2 know, our Rules Enabling Act which mirrors the Federal
3 Rules Enabling Act limits the Supreme Court to enact Rules
4 of Procedure that don't enlarge, abridge, or modify
5 substantive rights.
6 However, the United States Supreme Court
7 decisions suggest to me that if an offer of judgment rule
8 is designed to address behavior during the litigation
9 process, such as a sanction mechanism, then it does qualify
10 as being procedural in nature and would be something that
11 would be appropriate to be promulgated through a rule of
12 procedure mechanism. Our committee, our subcommittee,
13 drafted a fairly extensive memo on this subject that's on
14 the website. It's dated March 1 of 2002, and in it we
15 tried to set forth not only the background of the rules and
16 statutes but also what we perceived to be some pros and
17 cons of offer of judgment rules. I don't know that it
18 would be fruitful to revisit that because that has been
19 extensively debated over the last year or year and a half,
20 but I would point you in that direction if you are so
21 inclined.
22 What our committee, the full Supreme Court
23 Advisory Committee voted on -- and, of course, I don't
24 believe it's binding on a new term, but I'm not sure what
25 our rules are on that -- is that if we had a physical offer

1 of judgment rule -- and the full committee was not in favor
2 of that, but if we were to have an offer of judgment rule,
3 that it should extend to both plaintiffs and defendants,
4 that it should extend to all claims, the offer must be to
5 the entire case, monetary and nonmonetary; that any offer
6 of judgment rule should include some type of buffer,
7 recognizing that it is sometimes very difficult to estimate
8 the value of a case and that we did not want to be overly
9 punitive in shifting costs when a party was off by some
10 margin, and "some margin" is a matter of some debate, but
11 there should be an outside cap, that litigants should know
12 what the outside exposure could be if the offer of judgment
13 rule is triggered by the failure to accept a settlement
14 offer; that there should be an ability on the parties to
15 make a joint offer to multiple defendants or multiple
16 plaintiffs; that any offer of judgment rule should be kept
17 open, the offer should be kept open, for a sufficient
18 realistic period of time to be effective. The Federal rule
19 is 10 days, and it's been criticized as being ineffective
20 for that reason and others.
21 That any offer of judgment would have to be
22 unconditional to trigger the operation of the rule; that
23 parties should be able to opt out of the offer of judgment.
24 If they wish to, they should be able to make an offer
25 settlement choosing not to go under an offer of judgment

1 rule and trigger the cost mechanism, but they would have
2 the option, of course, of going under the offer of judgment
3 rule if that's how they wanted to structure their offer.
4 We voted that any offer of judgment rule
5 should be able to be withdrawn at any time before
6 acceptance and that once it was withdrawn it could not
7 serve as a basis for shifting expenses; that a final
8 judgment for purposes of figuring out whether you have a
9 more favorable judgment than the offer that would trigger
10 the fee shifting should be a final judgment after
11 consideration of remittitur and set-offs and counterclaims;
12 and that the offer of judgment rule could be triggered
13 through any final judgment on the merits, including summary
14 judgment and the like.
15 We noted that statutory cap cases presented a
16 unique problem. We also voted that an offer of judgment
17 rule should not extend to attorneys' fees or expert fees or
18 other litigation preparation costs, and we also voted that
19 we should have an offer of judgment rule that had a cost
20 shifting measure that would provide some certainty and be
21 somewhat mechanical on its application so that the parties
22 could definitively figure their outside risk if they chose
23 not to accept an offer of settlement.
24 I think the proposed Rule 167 meets 90
25 percent of the votes that this committee as a whole reached

1 last year with some important deviations, but some
2 deviations. I will say that I was not the scrivener of
3 Rule 167, and having said that, I would say I think that it
4 is from a procedural aspect very well drafted. I'd like to
5 go through the different factors and perhaps take -- do you
6 want me to go through the rule in its entirety or bit by
7 bit? I'm not sure.
8 CHAIRMAN BABCOCK: Let's go bit by bit.
9 PROFESSOR CARLSON: Okay. Of course, one of
10 the initial considerations is the timing of the offer. At
11 what point in the litigation do we allow a party to make an
12 offer of judgment so as to potentially trigger shifting of
13 post-offer costs? How close to the beginning of the
14 litigation do you do it, mindful that the parties need to
15 perhaps conduct discovery? How far close to the trial date
16 do you allow the shifting? The proposed Rule 167.2(a) on
17 page -- bottom of page two and page three, suggests that
18 the offer of judgment needs to be made or must be made more
19 than 30 days after the appearance in the case or of the
20 offeror or offeree, whichever is later; and typically, of
21 course, the appearance date is the answer date for -- from
22 a defense perspective, so that's pretty early on in the
23 litigation, but in any event not less than 10 days before
24 the case is set for trial, or if in response to a prior
25 offer, within three days of the prior offer, whichever is

1 later.

2 So this proposed time period for when a party
3 can make an offer to trigger the fee shifting mechanism is
4 fairly broad; and it recognizes, I suppose, that in some
5 cases, early on offers are appropriate, in some cases we
6 ought to allow the parties to try and settle if they can
7 before they go to trial by using the fee shifting
8 mechanism.

9 CHAIRMAN BABCOCK: You want to talk about
10 that issue, I think?

11 PROFESSOR CARLSON: If there is sentiment to
12 do so.

13 CHAIRMAN BABCOCK: Yeah. Who's got any
14 thoughts about -- Carl.

15 MR. HAMILTON: It occurs to me that 30 days
16 is a little bit early. Did you have any discussion about
17 tying it to the end of the discovery period?

18 PROFESSOR CARLSON: Yeah. This committee,
19 the full committee, the Supreme Court Advisory Committee,
20 had at some point talked about a reasonable time after
21 discovery, but that was not the -- the sense of the Jamail
22 subcommittee was that some cases were appropriate before
23 you incurred those expenses.

24 CHAIRMAN BABCOCK: Yes, sir. Judge Gray.

25 HONORABLE TOM GRAY: It seems that any time

1 we plug a date to a trial date we subsequently run into the
2 problem that the first setting, the final setting, and so
3 there needs to be some -- would seem to need to be some
4 definition of what we mean by "trial date."
5 PROFESSOR CARLSON: Would you favor initial
6 or ultimate?
7 HONORABLE TOM GRAY: Probably ultimate.
8 CHAIRMAN BABCOCK: What does everybody think
9 about that? Seems like a reasonable suggestion to me. And
10 where would you put the word?
11 PROFESSOR CARLSON: That might be something
12 that would be appropriate for a comment.
13 CHAIRMAN BABCOCK: Okay. Anybody got any
14 thoughts on that? Okay.
15 HONORABLE TRACY CHRISTOPHER: My only thought
16 was if you put "ultimate trial date" in there then you're
17 going to have games playing with respect to the first trial
18 date versus the ultimate trial date, and if you want people
19 to make an offer at the first trial date to avoid the whole
20 continuance or more expenses or whatever, that's important,
21 but I can also understand the need for the -- to be able to
22 continue to make an offer at the ultimate trial date.
23 CHAIRMAN BABCOCK: Yeah. I think, it seems
24 to me, Judge Christopher, that what you were talking about
25 is that in some counties there's an automatic

1 computer-generated order that has a very quick trial
2 setting and everybody knows it's very unlikely it's going
3 to go on that setting. If we say that that's your window
4 and that that's the last time you can make an offer of
5 judgment, in some counties, not necessarily all counties,
6 but in Harris County that might not necessarily work, and
7 you want to have the window open farther than that so that
8 if the first trial setting was early and maybe a little bit
9 of discovery had been done but not much and there was going
10 to be another trial setting and then they really got
11 serious about it, evaluated the case, you wouldn't want to
12 preclude them from making an offer of judgment between the
13 time of the first trial setting and the second trial
14 setting. It seems to me. I don't know.
15 Yeah, Judge Gray.
16 HONORABLE TOM GRAY: Expanding on it, also,
17 since this applies to judgments resulting from summary
18 judgments, pegging it to a trial date may also be a
19 problem. If you change the word "set for trial" to "the
20 proceeding resulting in the judgment" that would give you a
21 very flexible date and would be in effect what the rule is
22 directed towards, an offer of judgment, and you're
23 comparing the offer to the actual judgment, what proceeding
24 resulted in the judgment, and that would be you would have
25 had to have made the offer 10 days prior to that event.

1 CHAIRMAN BABCOCK: Okay. Tommy.
2 MR. JACKS: Actually, until that comment I
3 didn't think we had a problem, and it seemed to me that you
4 could take care of it simply with a comment, the comment
5 saying that if it's within no later than 10 days before
6 really any trial date. I mean, at the time you get the
7 first trial date in some counties you don't know whether
8 that's the ultimate trial date or not, and it seems to me
9 that the more -- to ask a more significant question is how
10 you treat successive offers; that is, whether every offer
11 can be a triggering offer that will trigger things, as this
12 rule contemplates, or whether subsequent offers supersede
13 prior offers so that only one's last offer before the
14 ultimate disposition of the case can count for sanctions.
15 CHAIRMAN BABCOCK: Yeah. Yeah. That's a
16 good point.
17 MR. JACKS: I mean, I guess the other thing,
18 I think Carl is right. There are certainly cases where 30
19 days into the case it is too early, and I wonder, I mean,
20 if it would make sense to have a provision that the court
21 can modify those time limits to suit particular cases if
22 asked. There is such a provision in House Bill 4. I
23 don't -- I'm not a fan of much of anything in this regard
24 in House Bill 4, but that single provision was a pretty
25 good idea, I thought, to give the court some flexibility.

1 CHAIRMAN BABCOCK: Yeah. I viewed this
2 provision -- I viewed subpart (a) as opening the window and
3 subpart (b) as closing the window and that in between --
4 between those two dates, that's when you can do it.
5 MR. JACKS: Yeah. And I think that's the
6 correct reading, but I think Carl's point is correct. I
7 think particularly in some complex cases 30 days into the
8 case is probably too early for somebody. Maybe not for all
9 parties.
10 CHAIRMAN BABCOCK: Maybe the window shouldn't
11 be open that soon.
12 MR. JACKS: Yeah. And so I think the bill
13 has a 90-day opening, 90 days, and that's too late for
14 Level 1 cases that are moving along briskly.
15 CHAIRMAN BABCOCK: Bill and then Wendell.
16 PROFESSOR DORSANEO: Picking up on a
17 suggestion made a minute ago about whether we use the date
18 set for trial, the day of trial, or some other formulation,
19 once upon a time when we had writ of error appeals we used
20 to speak of persons being able to take those appeals if
21 they didn't participate in the actual trial; and Appellate
22 Rule 30, as rewritten, we now use the language "in the
23 hearing that resulted in a judgment"; and that language,
24 analogous language to what was suggested here, might be --
25 might be taken into account as an appropriate substitute.

1 I personally think, without having thought about it very
2 much, just for the last minute or so, that that seems like
3 a pretty good idea.
4 CHAIRMAN BABCOCK: Wendell.
5 MR. HALL: The only other thought I had was
6 just eliminating a few of the words and just saying "before
7 the date of trial" instead of "the date set for trial."
8 CHAIRMAN BABCOCK: Yeah. What do you think
9 about that, Bill? "Before the date of trial"?
10 PROFESSOR DORSANEO: I like "of trial," but I
11 also like the idea that "trial" doesn't capture what we're
12 really talking about almost all the time. So I wonder
13 whether we ought to use the word "trial" since almost all
14 cases are disposed of, and increasingly so, in some other
15 way.
16 MR. LOPEZ: Can we just insert "or
17 dispositive proceeding"?
18 CHAIRMAN BABCOCK: "No less than 10 days
19 before the date of trial or dispositive proceeding"? Is
20 that what you're thinking, Judge Lopez?
21 MR. LOPEZ: That's really what we're talking
22 about.
23 CHAIRMAN BABCOCK: Justice Duncan.
24 HONORABLE SARAH DUNCAN: What are you
25 intending to capture by "other proceeding"? I mean,

1 summary judgment hearing is a trial.
2 CHAIRMAN BABCOCK: Right.
3 HONORABLE SARAH DUNCAN: And do we really
4 care when a case is set for trial? What we care about is
5 the trial begins, and the parties can best figure out when
6 trial is going to begin based on the setting notices
7 they've gotten. Why wouldn't we just say "10 days before
8 trial begins" or "day of trial"? I mean, I think that's
9 what Wendell was getting to.
10 CHAIRMAN BABCOCK: Bill, are you all right
11 with that?
12 PROFESSOR DORSANEO: I'm all right with that,
13 but I think it's certainly better than "the date set for
14 trial."
15 CHAIRMAN BABCOCK: "No less than 10 days
16 before" -- Justice Duncan, what was your proposal?
17 HONORABLE SARAH DUNCAN: "Trial begins."
18 CHAIRMAN BABCOCK: "Before the date trial
19 begins."
20 MR. HAMILTON: "Date of trial."
21 HONORABLE SARAH DUNCAN: "Day of trial."
22 MR. HALL: "The date of trial."
23 CHAIRMAN BABCOCK: Yeah. The "date of
24 trial," that was Justice Lopez' idea. "No less than 10
25 days before the date of trial."

1 HONORABLE TRACY CHRISTOPHER: I know this
2 sounds really silly, but there will be a dispute as to when
3 the trial actually began. Because --
4 CHAIRMAN BABCOCK: That doesn't -- that's not
5 silly at all.
6 HONORABLE TRACY CHRISTOPHER: Because is it
7 jury selection, is it the first pretrial motion that
8 excludes an expert witness?
9 PROFESSOR DORSANEO: Well, the law is the
10 date the first the witness starts. That's really what the
11 trial is.
12 HONORABLE TRACY CHRISTOPHER: If we could add
13 a little comment to that effect, that would be great, but
14 that wouldn't apply to summary judgment, no witnesses
15 called.
16 HONORABLE SARAH DUNCAN: Well, true.
17 CHAIRMAN BABCOCK: Yeah. That's right.
18 MR. LOPEZ: I mean, we could say --
19 CHAIRMAN BABCOCK: You get this many lawyers
20 in a room, you get the --
21 HONORABLE TRACY CHRISTOPHER: And we will see
22 it.
23 CHAIRMAN BABCOCK: Yeah. You're exactly
24 right. You will have a complaint about that. Yeah, Skip.
25 MR. WATSON: Just say "day of trial" and drop

1 a short comment that says, you know, the things that some
2 of the people in this room know but others may not, that
3 the day of trial begins with the presentation of the first
4 evidence, includes the day of a summary judgment hearing,
5 period, paragraph, go on.
6 MS. SWEENEY: Well, no. I'm sorry. Sorry to
7 just "no" you. I didn't mean it that way. No, no, no.
8 MR. WATSON: I get this all the time. I'm
9 used to it, Paula.
10 CHAIRMAN BABCOCK: And that will not be the
11 last time Paula will do that.
12 MS. SWEENEY: I'm just thinking about
13 successive summary judgment motions, and you don't have
14 successive trials, but you could have five or six summary
15 judgment motions from the same defendant, if you practice
16 in Dallas, and --
17 MR. WATSON: You know how to solve that
18 problem?
19 MS. SWEENEY: I have some ideas, but are
20 those all going to be the day trial starts or --
21 MR. WATSON: Well, that's what Tommy was
22 worried about, the successive problem is what Tommy was
23 worried about.
24 CHAIRMAN BABCOCK: Well, if you think about
25 it, you're just talking about the window, though, because

1 if -- if there's a summary judgment motion that's granted
2 and there has been no offer of settlement then this rule is
3 not applicable. If the summary judgment is granted then
4 the offer of settlement has got to precede it by some
5 period of time.
6 MR. LOPEZ: The granting or the hearing date?
7 Because that's another issue.
8 CHAIRMAN BABCOCK: The hearing date.
9 Because, I mean, you're not going to incur much in terms of
10 fees, and it's not going to be a very serious thing if 10
11 days before summary judgment that's granted you've made an
12 offer of settlement.
13 MS. SWEENEY: But the way this is written, if
14 you had one set in a certain time and it's denied, I don't
15 know if they could make another one. I'd certainly argue
16 they couldn't.
17 MR. DAWSON: Couldn't you just address the
18 summary judgment by modifying what Skip said, "summary
19 judgment from which a final judgment is issued by the
20 court" and if you got partial then there's no final
21 judgment?
22 PROFESSOR DORSANEO: That would work.
23 CHAIRMAN BABCOCK: Go ahead, Bill.
24 PROFESSOR DORSANEO: I mean, the same problem
25 actually works for trial, is for trials, because every time

1 you go to court to litigate something that's kind of a
2 separate trial, a part of the proceeding, maybe not with
3 respect to discovery motions, but we tend to think that
4 there's one trial, and I don't think that that's really
5 right here.
6 CHAIRMAN BABCOCK: Well, since we're just
7 opening a window, maybe we should say --
8 PROFESSOR DORSANEO: You're closing it, too.
9 CHAIRMAN BABCOCK: Yeah, opening a window and
10 then this is the closing part, that the window is open
11 until 10 days before the first witness is called and
12 that -- and, Paula, if there are multiple summary judgment
13 motions then the window is open, so whatever the offer has
14 been made in that time period is okay.
15 MS. SWEENEY: Well, but if you're closing it,
16 you closed it under part (b) at the time of the first
17 summary judgment hearing. What is the mechanism by which
18 it's reopened?
19 CHAIRMAN BABCOCK: Well, yeah. I don't think
20 that was the intent of this rule.
21 MS. SWEENEY: I don't either, but I think
22 that's what it does.
23 MR. WATSON: Yeah, but she's saying how to
24 fix it.
25 MS. SWEENEY: How do you -- yeah.

1 MR. WATSON: And I think his idea was a good
2 one.
3 CHAIRMAN BABCOCK: Repeat that again.
4 MR. DAWSON: Skip's -- his comment was that
5 the trial begins on the day the first evidence commences or
6 the date of the summary judgment hearing, and in response
7 to Paula's I would modify that to say "a summary judgment
8 hearing from which a final judgment was taken or issued."
9 MR. WATSON: I would just say "the last
10 summary judgment hearing."
11 MR. DAWSON: No. I don't think that would
12 cure Paula's issue because that might arguably be a trigger
13 to close the window depending on what the court -- if final
14 judgment comes out of a summary judgment that closes the
15 window, I think.
16 CHAIRMAN BABCOCK: Carl and then Richard.
17 MR. HAMILTON: I'm not sure what the
18 committee's philosophy is about when you want to close a
19 window or necessarily why, but rather than measuring it
20 from the trial date backwards, why not measure it from
21 something else forward, like the discovery cutoff date, so
22 many days after the discovery cutoff date is your final day
23 for -- so then it doesn't matter if the trial date moves or
24 summary judgments or trials or anything else.
25 CHAIRMAN BABCOCK: Okay. Richard.

1 MR. MUNZINGER: One, I agree with
2 Mr. Hamilton's comment about settlement being tied to
3 discovery because it's so difficult to evaluate cases
4 within the 30 days of the time they're filed, but if that
5 issue has been foreclosed by prior discussion of the
6 committee, it seems to me that the language could be "day
7 of trial or other proceeding that may result in a final
8 judgment" because you have partial summary judgments that
9 dispose of issues, but they don't dispose of all parties
10 and all issues, but there may be a partial summary judgment
11 that is preclusive of other issues.
12 And if you say "that may result in a final
13 judgment," obviously the object of the rule is to put
14 pressure on litigants to dispose of cases, and that
15 language, it seems to me, would be helpful; but, again, I
16 agree with Mr. Hamilton. I don't know that I've tried too
17 many lawsuits or been in too many lawsuits that I could
18 intelligently inform a client as to its value or risk
19 within 30 days of the time of filing. All litigation is
20 not personal injury litigation and all litigation has
21 features to it that include money and nonmonetary
22 considerations. Sometimes the principle -- a litigant is
23 fighting for the application of a principle within its
24 company; for example, labor cases within a hospital in
25 dealing with its medical staff. These are issues that

1 transcend dollars and cents that make it very difficult for
2 people to reach decisions.
3 Assuming that the committee has foreclosed a
4 time limit based on something other than trial, then I
5 think the language that I have, "day of trial or other
6 proceeding that may result in the final judgment" would be
7 helpful, but in saying that, I agree with Mr. Hamilton. I
8 think it's not a good idea to allow someone to put this
9 kind of pressure on a litigant within 30 days of the time
10 of the suit being filed.
11 CHAIRMAN BABCOCK: Lamont.
12 MR. JEFFERSON: Well, I would disagree with
13 that a little bit. In my opinion -- and I don't know if
14 this has already been philosophically sort of hashed out,
15 but it seems to me that the window ought to be closed
16 earlier, and the aim of a rule, of an offer of judgment
17 rule, ought to be to dispose of those cases where everybody
18 with very little discovery ought to be able to tell
19 shouldn't be in court either because the parties are too
20 close to settlement or because the issues really are --
21 there's really no factual dispute. If you get to the point
22 where you have to get involved in lengthy discovery in
23 order to determine whether or not you ought to settle the
24 case, it seems to me that at that point there is a
25 legitimate dispute that rightfully ought to be in court and

1 ought to be decided by the fact finder, whoever that is.
2 So it doesn't offend me to have an early
3 offer of judgment -- offer of settlement deadline because
4 that's what the rule is intended to address, is those
5 situations where case gets filed and any reasonable lawyer
6 ought to know either that the case shouldn't have been
7 filed or that the case was rightfully brought and ought to
8 be settled.
9 CHAIRMAN BABCOCK: Okay. Yes, sir.
10 MR. SCHENKKAN: Pete Schenkkan. I want to
11 kind of tie a couple of remarks together and follow up on
12 that one. The purpose of an offer of settlement rule is to
13 encourage the parties to settle by encouraging them --
14 giving them an economic incentive to look more closely at
15 the value of the case as quickly as possible and continue
16 to re-evaluate it as long as the offer is open. It's a
17 mistake to think that saying you can make an offer as early
18 as 30 days after the case starts means that that's the only
19 time the party who receives the offer can decide whether to
20 take it. The party has the right to continue to take it as
21 they move into discovery.
22 Maybe they don't have enough information on
23 the first day after they receive the offer to say, "Yeah, I
24 better take this offer. It's a reasonable offer." Maybe
25 they need to take the first deposition or something to feel

1 more comfortable about it. They are then exposed after
2 they take that first deposition, if they still don't take
3 the offer, to the other side's cost for that first
4 deposition, but if they then say, "Okay, I'll take that
5 offer," they're not exposed. So it's not an all or nothing
6 decision.
7 The second point is if with this rule,
8 drafted the way it is with a 50,000-dollar cap, we're not
9 talking about the large, complex cases that are going to
10 have $2 million worth of discovery being significantly
11 influenced.
12 CHAIRMAN BABCOCK: Yeah.
13 MR. SCHENKKAN: This offer of settlement
14 rule, unlike some others, including the House Bill 4, is
15 capped at $50,000 on the fees. So if you've got a giant
16 case where you know that not only the exposure is 10
17 million or a hundred million but the discovery costs are
18 going to be 250,000 or a million, you're not going to be
19 driven by the possibility that if you don't accept the
20 offer on the first day it is made and you wait all the
21 way to trial you might have to pay $50,000 in attorneys'
22 fees. That's not going to drive the train.
23 CHAIRMAN BABCOCK: Ralph and then Judge
24 Gaultney.
25 MR. DUGGINS: Is the rule intended to apply

1 to temporary injunctions, and if so, how do these windows
2 work in that context?
3 CHAIRMAN BABCOCK: Elaine, you got the answer
4 to that?
5 PROFESSOR CARLSON: Well, one of the matters
6 we discussed is whether an offer of judgment rule should
7 extend to monetary claims as well as nonmonetary claims,
8 and it was the sense of the full Supreme Court Advisory
9 Committee that it should extend to all claims, at least in
10 theory, but the application of that is very, very difficult
11 to apply and would necessarily, I think, require individual
12 trial judge consideration. It's not something that can be
13 mechanically written.
14 The way that this proposal is structured is
15 that if a party is successful on both their monetary claims
16 and their nonmonetary claims to the margin of error we
17 haven't gotten to yet, there will be a fee shifting, but
18 success on nonmonetary claims is defined as -- "a
19 nonmonetary award is at least substantially all of the
20 nonmonetary relief sought." It's a very vague, but maybe
21 necessarily vague, standard on page five.
22 CHAIRMAN BABCOCK: Judge Gaultney, did you
23 have a comment?
24 HONORABLE DAVID GAULTNEY: Yeah. I guess I
25 just wanted to express my thoughts and my philosophy

1 towards this, and that is that I understand that there are
2 benefits to making the window close early because of all
3 your expenses occur early, but if the purpose is to apply
4 to as many cases as possible and if we have an exception,
5 as I see there is later in the rule, that the judge may
6 accept cases where there's unfairness or games playing
7 involved, then why don't we have as large a window as
8 possible available so that you can tailor it to the
9 specific case?
10 Now, as I understand it, the -- well, I'm not
11 sure I understand. Let me just suggest. The reason for
12 closing the window is you want to maximize the pressure to
13 accept the settlement at a time where you can encourage
14 settlement because there's risk. There's risk that that
15 judgment is going to go against you, and whether that's
16 prior to summary judgment or prior to trial, that's what
17 you're trying to capitalize on, right? So my feeling on it
18 is keep it as broad as you can. Let the judge be able to
19 work the margins to eliminate the unfair cases, but keep it
20 as broad as you can and tie it to the -- I like the
21 language "the date of hearing disposing" or "on which
22 judgment is entered."
23 CHAIRMAN BABCOCK: Yeah. And I think that
24 that maybe solves Paula's situation because, Paula, if the
25 window is open until 10 days before you actually go to

1 trial then your summary judgment stuff doesn't matter.
2 Because, you know, if it's been denied, if the summary
3 judgment has been denied, then you're going to go forward
4 in the case anyway; and if the summary judgment is granted,
5 then, you know, if they made the offer a day before the
6 summary judgment hearing, so you get a day of attorneys'
7 fees. So it really doesn't matter, it seems to me, and I
8 think it was probably the philosophy of the Jamail
9 committee that the window be open longer than most people
10 thought in the Legislature anyway and on this committee
11 thought was appropriate, but certainly they want to keep it
12 open at the back end, right?
13 PROFESSOR CARLSON: Right.
14 CHAIRMAN BABCOCK: Isn't that right, Tommy?
15 Wouldn't you agree?
16 Talking about the back end now, not the front
17 end.
18 MR. JACKS: Yeah. I would -- well, the
19 answer is "yes," and the language I like best to do that is
20 "date of trial or other proceeding resulting in final
21 judgment" and --
22 CHAIRMAN BABCOCK: But why would you
23 complicate it that way by adding "or other proceeding"?
24 Because that doesn't matter, because a preliminary ruling
25 doesn't matter.

1 MR. JACKS: Well, a summary judgment that is
2 final.
3 CHAIRMAN BABCOCK: Yeah, but why does that
4 matter? I mean, if you make an offer of judgment the day
5 before your summary judgment hearing, why do you care?
6 MR. JACKS: Well, I mean, one of the purposes
7 of this rule is to take costs out of the system.
8 CHAIRMAN BABCOCK: Right.
9 MR. JACKS: And that's been one of the -- and
10 to the extent you allow offers up to the day of trial --
11 CHAIRMAN BABCOCK: 10 days.
12 MR. JACKS: -- you're not accomplishing that.
13 CHAIRMAN BABCOCK: You're going to save the
14 cost of the trial, maybe.
15 MR. JACKS: You do. And, you know, and I've
16 been involved in summary judgment hearings that go for days
17 in complex cases and so -- but I don't -- I mean --
18 CHAIRMAN BABCOCK: See, but what are you
19 accomplishing by adding that? I mean, you say, okay, 10
20 days before, if I get lucky and summary judgment is
21 granted, then an offer of judgment that is inside 10 days
22 or if the summary judgment proceeding is not effective.
23 That's what you're saying. If it's denied then it doesn't
24 matter.
25 MR. JACKS: True.

1 CHAIRMAN BABCOCK: You're creating an
2 artificial window that makes it more complicated, it seems
3 to me.
4 Luke, get us out of this.
5 MR. LOPEZ: Mr. Jacks' proposal would make
6 sense if there was some way to obligate the parties to make
7 those settlement offers in the first place, but there's no
8 downside. If it happens a year before trial, that's much
9 better than the day before trial, but the day before trial
10 -- or two days before trial is better than one day before
11 trial. So, I mean, there's no downside to having the
12 window open.
13 CHAIRMAN BABCOCK: Luke, you got any ideas
14 about this?
15 MR. SOULES: I think Bill and some other
16 people have had this idea that it would be the commencement
17 of a hearing, proceeding, whatever word you want to use.
18 I'm not trying to use specific words here. The
19 commencement of a proceeding that could result in a final
20 judgment. That's where you invest in bedrock and you're
21 fixing to have your case decided and people can settle or
22 not settle. Now, a trial is going to go on for a few days
23 after commencement. Usually summary judgment -- well,
24 depends on what court you're in, summary judgment rulings
25 are sometimes delayed. So there's going to be some time

1 for both sides to think about where they are, but -- I'd
2 like to hear the question.
3 CHAIRMAN BABCOCK: Justice Duncan.
4 MR. SOULES: What was the question?
5 HONORABLE SARAH DUNCAN: What do you do --
6 I'm not sure I understand any of this well enough to make
7 any intelligent comment.
8 CHAIRMAN BABCOCK: Did you get that?
9 HONORABLE SARAH DUNCAN: But it just occurs
10 to me, what do you do if you go in for a summary judgment
11 hearing that's supposed to be partial and the trial court
12 grants more relief than was requested and it ends up being
13 final? You could not possibly have known you were headed
14 into a proceeding that was going to result in a final
15 judgment.
16 CHAIRMAN BABCOCK: Alistair.
17 MR. DAWSON: If the goal is to keep the
18 window open as long as possible then you ought to set it in
19 relation to the real trial setting. The window ought to
20 close a certain number of days before a trial setting where
21 there's going to be witnesses brought in or and a jury in
22 the box or trial to the bench and don't worry about summary
23 judgment or any other proceeding that might result in a
24 partial or final judgment because if it's a partial summary
25 judgment then you're going to proceed towards trial. If

1 it's a final summary judgment then as a practical matter
2 the case is over, either goes up or doesn't go up, and
3 there's no need to keep the window open any longer because
4 the case has been disposed of, and for trial purposes,
5 there are no more costs.
6 So I wouldn't worry, if it were me, about
7 summary judgments or any other hearing that might result in
8 a judgment. I would just worry about the trial date, if
9 the goal is to keep it open as long as possible.
10 CHAIRMAN BABCOCK: What if you said -- yeah.
11 I think I agree with that. What if you said "no less than
12 10 days before the date the first witness is called at
13 trial that results in a final disposition of the case,"
14 something like that? No? Elaine.
15 PROFESSOR CARLSON: If you want to go in that
16 direction, why not just use "a conventional trial on the
17 merits" since --
18 MR. SOULES: That's it.
19 PROFESSOR CARLSON: -- that has some meaning
20 in our jurisprudence.
21 MR. SOULES: That's the way you're going.
22 MR. DAWSON: Then I think as a comment, as
23 Judge Christopher suggested, explain when that commences so
24 we won't be fighting about when it commences.
25 MR. JEFFERSON: Chip, it sounds like this is

1 already decided, but one last point about the window --
2 CHAIRMAN BABCOCK: Nothing is ever decided in
3 this committee.
4 MR. JEFFERSON: Or at least that there's a
5 consensus, and maybe I'm swimming upstream here, but,
6 again, to me it seems like that the window should be
7 earlier, and the reason is -- and I appreciate the comment
8 that the philosophy is to expand this to all -- to as many
9 cases as possible, and I'm not -- that's, I guess, the
10 point that I don't agree with. It doesn't seem to me like
11 this rule ought to apply to every case. It's a sanctions
12 rule, and a sanctions rule should only apply to those
13 egregious circumstances where sanctions are warranted.
14 So to me that would justify an earlier
15 closing of the window before a bunch of expenses have been
16 incurred so that one party can't use just the cost of
17 litigation itself as the hammer to force a settlement early
18 in litigation, and that would argue to me against being
19 able to make an offer just before trial that that's going
20 to shift costs.
21 CHAIRMAN BABCOCK: Nina.
22 MS. CORTELL: Lamont's comment did trigger
23 one thought, and I haven't heard anyone else say this. I
24 don't like the concept of sanctions. I don't like the word
25 being used that way here, but maybe that's for another

1 moment. In terms of the window, it makes sense to me to
2 tie it to trial. To take Lamont's point, you might take it
3 30 days before trial, but I wouldn't worry about the
4 summary judgment part at all. I'd widen it to trial, and
5 maybe 10 days is a bit close, and I would use the
6 conventional trial language that Elaine proposes.
7 CHAIRMAN BABCOCK: Judge Bland.
8 HONORABLE JANE BLAND: The only date that I
9 could see that won't present confusion about when the
10 stopping point is is the final judgment; and so if the idea
11 is, you know, when is this closing date going to be, why
12 don't we -- why don't we use the final judgment as the
13 closing date and then back up, you know, change 10 days to
14 30 days or whatever, do the window that way so that nobody
15 will have an argument about when the window closed because
16 of when the trial began or when the hearing began. I mean,
17 if you describe it in terms of hearing some people will
18 argue that the hearing on entry of judgment was the
19 hearing, and if you do trial, well, obviously there's
20 post-trial work that may or may not be expensive.
21 MR. YELENOSKY: We had a case that went to
22 trial two years ago and we still don't have a judgment, so
23 can they still make an offer?
24 HONORABLE JANE BLAND: Well, you wouldn't get
25 very much money unless you're still spending a lot of

1 money. I'm not saying that -- you could just say, you
2 know, one year prior to the entry of final judgment. I'm
3 just saying that, what I'm hearing, it's going to be a lot
4 of problems from practitioners who disagree about whether
5 or not this hearing or trial commenced because of the way
6 it's defined.
7 CHAIRMAN BABCOCK: Yeah.
8 HONORABLE JANE BLAND: And nobody can
9 disagree about final judgment.
10 PROFESSOR DORSANEO: Final judgment is not a
11 good term.
12 HONORABLE JANE BLAND: Well, they can, but --
13 MR. HALL: Less likely.
14 HONORABLE JANE BLAND: It's less likely.
15 CHAIRMAN BABCOCK: Yeah, Skip.
16 MR. WATSON: I know we're going to cover a
17 lot of issues and, Elaine, just for what it's worth, you
18 need to take us through this at your pace, but my sense is
19 there are a lot of us who are holding our tongues on the
20 issue of whether sanctions is the appropriate mechanism for
21 this. I know that's the Supreme Court's jurisdictional way
22 of getting the foot in the door, but just tell us when we
23 get to that point so we don't hold our tongues too long.
24 CHAIRMAN BABCOCK: Yeah. We're not going to
25 flip over that. Buddy.

1 MR. LOW: We're trying to like one size fits
2 all. Every court -- I mean, a lot of the little courts in
3 East Texas, they set their cases differently. I mean, I've
4 gone up there and the case will be set, and I say, "Well,
5 the defendant hasn't answered yet. I think he's fixing to
6 answer," and so, I mean, then you've got the automobile
7 cases. They're not all personal injury cases and so forth.
8 So what Judge Gaultney says makes sense, that you make it
9 as broad on each end as you can and then you have the judge
10 have -- if anybody realizes -- you know, they do that in
11 Federal court. If they set a certain level, then you ask
12 it be a different level, and the parties should know more
13 about how long it's going to take them to get ready or
14 discovery.
15 And the idea is to save as much money as you
16 can, so, therefore, the judge then -- give the judge the
17 chance to specifically set other dates within that group.
18 You could have -- it's not unreasonable to -- if I'm
19 answering a case and I say, "Well, you know, I think it
20 should be this date," get together, get the judge to set
21 those dates, but make it as broad on both ends as you can
22 with a chance for the judge to modify so that that size
23 fits that case.
24 CHAIRMAN BABCOCK: Okay. So -- yeah, Luke.
25 MR. SOULES: It seems to me like the rules

1 that we've worked on over the past, whatever, 15 years or
2 so, have done a couple of things. They have reduced
3 significantly discovery abuse where -- and I know that it
4 still goes on and we can debate that, but discovery is more
5 focused now, I think, on getting informed and maybe getting
6 some preparation for trial done as well, but really it's
7 both of those things. Also, rules have been passed to make
8 it easier to get rid of unmeritorious claims as a matter of
9 law in the summary judgment practice, and where I think we
10 really run into problems is when we get down to final trial
11 prep because it doesn't make any difference whether the
12 case is large or small.
13 The piece of work that goes into final trial
14 prep in relationship to the size of the claim is a big
15 amount of money, relatively a big amount of money. We've
16 got to get witnesses ready, we've got to call our people,
17 we've got to get our experts tuned up one more time, we've
18 got to check our pleadings, we've got to go over to court
19 and have a motion in limine and all that sort of thing; and
20 if this -- if this rule worked somehow to stimulate
21 settlement someplace ahead of having to start that work,
22 you know, in a serious way to get ready to commence a trial
23 then it's going to really solve, I think, its major purpose
24 now, given what's been accomplished already in other pieces
25 of the rules.

1 So if we could just back it up from -- and,
2 again, I don't know what the magic words are, from the
3 commencement of a trial on the merits or of a conventional
4 trial on the merits, and I think it should apply to all
5 cases, but that's a side issue. Back it up from the
6 commencement of a conventional trial on the merits to the
7 point -- to a point where the lawyers are not in a pretrial
8 frenzy that we all know we must roll into in order to get
9 ready to actually try a case.
10 CHAIRMAN BABCOCK: So would that be --
11 MR. SOULES: The major function of this rule
12 is going to be settlement.
13 CHAIRMAN BABCOCK: Should that be 30 days,
14 Luke, or 45 days?
15 MR. SOULES: I think probably 30 is okay. I
16 mean, bigger cases are going to start 90, 60. You know,
17 cases against insurance companies that won't fix cars down
18 in D'Hanis after the cyclones and tornadoes, we're not
19 going to start much before 30 days, but we're still going
20 to have to start getting on the phone to find out whether
21 everybody is going to be there and get our auto mechanic
22 scheduled for the day, and so 30 -- I would say somewhere
23 between 30 and 60 days, and 30 is okay with me, but at that
24 point we start doing, you know, Power Point -- at some
25 point we start doing Power Point. We start maybe even

1 doing jury consultants. We roll into some pretty expensive
2 undertakings that -- clients sophisticated in litigation
3 delay as long as they can because it's costly and clients
4 that are not sophisticated in litigation for the most part
5 can't afford anyway and you can't do it, so at least 30.
6 If somebody wants to pick another number that's okay with
7 me.
8 CHAIRMAN BABCOCK: Tommy, the provision of
9 House Bill 4 that you like --
10 MR. JACKS: Yeah.
11 CHAIRMAN BABCOCK: The one provision that you
12 like --
13 MR. JACKS: Right.
14 CHAIRMAN BABCOCK: -- says, "A court may
15 modify the time limit specified in this chapter by order
16 resulting from a pretrial conference conducted under Rule
17 166 TRCP."
18 MR. JACKS: Yeah. I've actually rewritten
19 that a little bit just to say, "The court may modify these
20 time limits by written order upon the motion of any party."
21 I don't know that it has to be in a Rule 166 pretrial
22 conference.
23 CHAIRMAN BABCOCK: Yeah. That makes -- I
24 wondered about that.
25 MR. SOULES: I don't have a problem with that

1 either, fixing a date and allowing the trial judge to move
2 it.
3 CHAIRMAN BABCOCK: Does anybody think that
4 that is a bad idea to give the trial judge that
5 flexibility?
6 MR. MUNZINGER: Why wouldn't you include sua
7 sponte in that?
8 MR. JACKS: You could say "or on its own
9 motion."
10 PROFESSOR DORSANEO: Initiative.
11 MR. JACKS: Or "its own initiative."
12 CHAIRMAN BABCOCK: Okay. Anybody think that
13 that's a bad idea? Judge Christopher, you think that's
14 okay? Judge Bland, is that okay?
15 HONORABLE JANE BLAND: I think it's a great
16 idea.
17 HONORABLE TRACY CHRISTOPHER: I like the idea
18 of having an opening date with no ending date at all.
19 CHAIRMAN BABCOCK: Whoa.
20 HONORABLE TRACY CHRISTOPHER: Because, I
21 mean, if you make an offer of settlement the day before
22 trial and sanctions are only after you have made the
23 offer --
24 CHAIRMAN BABCOCK: Right.
25 HONORABLE TRACY CHRISTOPHER: Or actually

1 after the 14 days have lapsed.
2 CHAIRMAN BABCOCK: After it's been rejected.
3 HONORABLE TRACY CHRISTOPHER: All right.
4 There's not really any costs or sanctions in the vast
5 majority of our little tiny cases, and if you leave it up
6 to the lawyers to decide how far back they're going to make
7 it, you know, to make this rule work at all, you know, they
8 will be coming up with something 30 days or 45 days because
9 they know that's when they're going to do all their work,
10 and if I make a serious offer at this point, after that I'm
11 going to start incurring costs, but I wouldn't have an
12 ending date.
13 CHAIRMAN BABCOCK: Good point. Luke, why not
14 just leave to it the lawyers, make it whenever you and your
15 client want to make it?
16 MR. SOULES: Well, as the chair of a very
17 large Wall Street conglomerate said, "We will pay no claim
18 before it's time." It just doesn't stimulate getting the
19 offers made early enough to get things done.
20 CHAIRMAN BABCOCK: Well, maybe not.
21 MR. SOULES: If they haven't made an offer 30
22 days before trial, they can't work the rule. They're out,
23 and I think that's better. They ought to be getting their
24 money on the table at some point.
25 CHAIRMAN BABCOCK: So you're sticking to your

1 30 days?

2 MR. SOULES: How about 180?

3 HONORABLE TRACY CHRISTOPHER: Isn't the way

4 the rule works is if the plaintiff makes the offer it

5 starts the trigger, too?

6 CHAIRMAN BABCOCK: Right.

7 HONORABLE TRACY CHRISTOPHER: I mean, you're

8 not waiting on the defendant to make an offer.

9 CHAIRMAN BABCOCK: Yeah. This runs both

10 ways.

11 MR. SOULES: Both ways.

12 HONORABLE TRACY CHRISTOPHER: SO you can make

13 the offer and then if the defendant rejects it, you win

14 under the rule and you get your costs. You don't have to

15 worry about whether they're going to make an offer or not.

16 CHAIRMAN BABCOCK: Tommy, what do you think

17 about that, not having any -- the window doesn't open until

18 some point in time, but it never closes unless the trial

19 judge modifies it?

20 MR. JACKS: Well, I don't know. I mean,

21 there's a part of me that really goes with the Luke Soules

22 approach of trying to encourage earlier settlement, which,

23 I mean, 95 percent of the cases settle anyhow, so what are

24 we trying to do here? Are we trying to get, you know,

25 another two or three percent of the remaining five percent

1 to settle, or are we trying to get more of the 95 percent
2 to settle earlier? I think we're trying to get more of the
3 95 percent to settle earlier.
4 If that's what we're trying to do, I guess I
5 really side more with Luke's idea. Let's fix a date -- if
6 you want to abate yourself of this rule, you've got to do
7 so at a time -- I'd go with the 30 days before trial.
8 Otherwise you're not accomplishing much. So what, you make
9 an offer, you know, during trial. Well, unless it's at
10 least a 14-day trial, you know, you have accomplished
11 nothing. And so, I mean, I think there's a point at which
12 it doesn't -- we're not accomplishing the purpose of the
13 rule to let it just go on forever, in my opinion.
14 CHAIRMAN BABCOCK: Judge Patterson.
15 HONORABLE JAN PATTERSON: I agree with Tommy
16 and Luke on that. The other thing it does is it attempts
17 to remove some of the gamesmanship that occurs at the last
18 minute, and I think that's the danger of the 10 days before
19 trial, and that's why I like it at 30 days. I think you
20 need a closing window to avoid gamesmanship at that point
21 and to accomplish the objectives of the rule.
22 CHAIRMAN BABCOCK: Luke.
23 MR. SOULES: To start the -- to respond to
24 the fact that the plaintiff can trigger the rule, I think
25 we need to grasp a big piece of realism here, and that is

1 that the plaintiff is going to initially -- most
2 plaintiffs, I would, try to -- they're going to pitch an
3 offer that's probably going to exceed the value of their --
4 what they really think the value of the case is, because
5 they probably know that they're going to get a response, if
6 they get anything at all, that's a lot less than what the
7 value of their case is; and they're going to be working
8 towards the real value of this case; and for the defendant
9 to say, "Na, I'm not going to do that," doesn't really
10 start the process, I think, that we are trying to start
11 here because the plaintiff probably can't win more than
12 that first opening offer in most cases.
13 So we've got to -- we've got to try to
14 trigger a process -- set up a process that's going to
15 trigger activity from both sides if this rule is going to
16 work, settlement activity from both sides, that if the rule
17 is going to have an effect stops at some point where both
18 sides throw up their hands and say, "We're going to pick a
19 jury."
20 CHAIRMAN BABCOCK: Stephen and then Bill.
21 MR. YELENOSKY: Well, I don't know if you've
22 read, but there have been some allusions to the next
23 section which we haven't gotten to yet, but I don't even
24 see where the next section, which is the availability
25 section, even provides a definition that would allow a

1 plaintiff to win, and I think the nonmonetary definition is
2 backwards in that section. So I don't know. We'll get to
3 that at some point, but was the intent to write it as it
4 appears, because it doesn't seem to apply to plaintiffs?
5 PROFESSOR CARLSON: I understand what you're
6 saying, Steve. It starts out with 167.1 applying to all
7 parties, but when you get to the more favorable judgment
8 and what you recover it speaks in terms of a party making a
9 claim and doesn't speak to a party resisting a claim. We
10 did discuss that in our subcommittee and felt that was just
11 an oversight.
12 MR. YELENOSKY: And then when you get to
13 nonmonetary, the language actually seems backwards to me.
14 It defines what it would be if the plaintiff won; whereas,
15 the predicate is this is what happens when the plaintiff
16 loses.
17 CHAIRMAN BABCOCK: Let's stick to our time
18 limits first, but that's --
19 PROFESSOR DORSANEO: Something I need to know
20 about, what "after" means, though. I mean, after -- when
21 does "after" end? "After the offer," is that before
22 judgment, before the trial court loses jurisdiction over
23 the case, before Christmas, or what?
24 CHAIRMAN BABCOCK: You're talking about
25 subpart (a)?

1 PROFESSOR DORSANEO: Yeah.
2 CHAIRMAN BABCOCK: "More than 30 days after
3 the appearance" --
4 PROFESSOR DORSANEO: No, I don't mean -- I
5 meant, Chip, in the -- we're talking about how much is
6 going to be involved when we're talking about when the
7 ending point for making the offer ends, and I don't know
8 how long it goes into -- you know, the after part, I don't
9 know how long that goes into the future.
10 CHAIRMAN BABCOCK: Okay. Are you talking
11 about the opening and shutting of the window, or are you
12 talking about something else?
13 PROFESSOR DORSANEO: For me to know what the
14 effect of shutting the window is, I need to know for during
15 what period after you calculate the sanctions.
16 PROFESSOR CARLSON: The post -- oh, I see.
17 PROFESSOR DORSANEO: I don't know how -- I
18 don't know what -- I need to know what the penalty is and
19 for what period before I can really address the timing, I
20 think.
21 PROFESSOR CARLSON: Yeah. Bill, are you
22 thinking of 167.6(a)(1)(a) on page five, the monetary
23 award? Is that your question?
24 PROFESSOR DORSANEO: I was thinking about
25 167.6(b), "The court after hearing must award the offer as

1 sanctions those amounts incurred after the offer was
2 rejected," but after for how long? Until the date of
3 judgment? Until the post-judgment activity in the trial
4 court? Until --
5 PROFESSOR CARLSON: Yeah.
6 PROFESSOR DORSANEO: -- the Supreme Court
7 ultimately resolves the case or what?
8 PROFESSOR CARLSON: Yeah. That's a valid
9 criticism, and that needs to be defined more clearly.
10 PROFESSOR DORSANEO: It's very vague because
11 you could think of this as just going back to the trial for
12 the purpose of this proceeding --
13 PROFESSOR CARLSON: Right.
14 PROFESSOR DORSANEO: -- even if there wasn't
15 any other case there.
16 PROFESSOR CARLSON: So your question is does
17 it go up to the time of the order of the court imposing the
18 fee shifting or can you -- can a litigant shift expenses to
19 post-judgment activity and collect them in maybe an appeal,
20 and I don't think the intent was to extend it to that
21 period.
22 CHAIRMAN BABCOCK: To do that, yeah.
23 PROFESSOR CARLSON: But you're right. That
24 needs to be clarified.
25 MR. YELENOSKY: Shouldn't it be between offer

1 and judgment?

2 CHAIRMAN BABCOCK: But let's stick on this

3 issue of opening and shutting the window. The window opens

4 30 days after the appearance. Have we got significant

5 complaints about that, 30 days? I mean, it doesn't mean

6 you have to do it. It just means you can.

7 MR. LOPEZ: There's no course of effect, so

8 it doesn't make any difference.

9 CHAIRMAN BABCOCK: So now subpart (b),

10 there's a -- there are three competing strains here. One

11 is as it's written, 10 days; two, as Luke says, 30 days;

12 and, three, as Judge Christopher says, you know, why even

13 have ending date, why not let you do it any time,

14 recognizing if you do it real late you're not going to get

15 much money.

16 PROFESSOR DORSANEO: Well, that's my point.

17 CHAIRMAN BABCOCK: Oh, so now you're taking

18 credit for Judge Christopher's point?

19 PROFESSOR DORSANEO: No. If you don't have

20 an end then -- if you don't have an end then the thing

21 could be endless with respect to when you can do this and

22 what you get.

23 PROFESSOR CARLSON: There's got to be an end.

24 There's going to be an end.

25 CHAIRMAN BABCOCK: Got to be an end. There

1 will be an end. Paula.
2 MS. SWEENEY: I need to go back to (a)
3 briefly, to starting point, because there are right now
4 provisions in the Legislature that in certain types of
5 cases would ban discovery until X things have occurred.
6 For instance, in med mal cases right now there's a proposal
7 that the plaintiff could take no discovery until after
8 their 1301 180-day report is filed. So if you're estopped
9 from doing discovery, but at the same time 30 days after
10 answer can slap an offer on you that triggers financial
11 exposure for a client who cannot investigate their claim by
12 law, there needs to be some exception provided for cases
13 like that.
14 CHAIRMAN BABCOCK: Would that be covered by
15 the subdivision (c) that Tommy drafted saying the judge can
16 modify?
17 MS. SWEENEY: No, because a judge doesn't
18 have to modify it, and some of these cases are filed in
19 Dallas.
20 CHAIRMAN BABCOCK: Like yours. Steve.
21 MR. YELENOSKY: Well, why not trigger it from
22 the beginning of discovery, say 30 days after discovery
23 begins?
24 MS. SWEENEY: I think that -- when does
25 discovery begin? But, I mean, something like that would

1 work.
2 MR. YELENOSKY: That's better than
3 appearance, though.
4 MS. SWEENEY: Yeah. It's better than
5 appearance. That would be one way to go about it, but even
6 so, I've got to say 30 days after discovery begins you may
7 only still be fighting over who's going first.
8 CHAIRMAN BABCOCK: Or documents. Well,
9 that's good. We shouldn't have skipped over (a). We'll go
10 back to that in a second, but let's stick on (b) right now.
11 You've got 30 days, you've got 10 days, you've got we don't
12 need this subpart (b) at all. How does everybody feel
13 about those three options?
14 MR. HAMILTON: On (a)?
15 CHAIRMAN BABCOCK: No. We're on (b). We're
16 on (b). We're closing the window now.
17 CHAIRMAN BABCOCK: Buddy.
18 MR. LOW: Let me ask you, I mean, a lot of
19 times some of these trials -- the longest I ever had was
20 three months. Well, a little over three months.
21 CHAIRMAN BABCOCK: So long you can't
22 remember.
23 MR. LOW: Well, that's been a problem, but --
24 and so, but offers were made like, you know, after a key
25 witness would testify and then you've got other parts of

1 the case where you've got a lot of expense getting people
2 in and so forth, and why not be able to make an offer at
3 that point and save three months of trial? The trial
4 started, why not be able to do that?
5 MR. SOULES: And shift fees?
6 MR. LOPEZ: But you can.
7 MR. SCHENKKAN: Well, you can still do it.
8 You just can't shift the fees.
9 MR. LOPEZ: That's what Judge Christopher was
10 saying.
11 MR. LOW: No, the case is -- I wouldn't talk
12 about when one -- you've got a verdict. The case was not
13 settled. It was that pipeline case, and isn't that what
14 you asked me, did we settle?
15 MR. SOULES: No. I mean, should you be able
16 to make those offers along the way through the trial and
17 still shift fees?
18 MR. LOW: Well, Luke, I mean, we had the case
19 divided into parts, and there was a lot of money spent
20 after we made the -- and right at the trial, after about
21 two days of trial, there were serious settlement
22 negotiations, and a lot of money was spent after that. A
23 three-month trial can cost a lot.
24 MR. SOULES: Right.
25 CHAIRMAN BABCOCK: Alex.

1 PROFESSOR ALBRIGHT: But isn't that a
2 situation where the trial judge could say, "This is a
3 really complicated case, and I understand there's going to
4 be different points" --
5 MR. LOW: Absolutely.
6 PROFESSOR ALBRIGHT: -- and the trial judge
7 can order -- push it in a case like that.
8 MR. LOW: I agree with that.
9 PROFESSOR ALBRIGHT: And wouldn't the parties
10 be thinking about that more likely than if we're talking
11 about these little cases we want to settle early, that you
12 had that 30-day deadline then that would occur to them to
13 settle early and then the other cases can be handled
14 individually?
15 MR. LOW: You might be correct. I'm just
16 saying I think there ought to be some room to save because
17 you can save money after the trial starts.
18 CHAIRMAN BABCOCK: We have two more comments
19 and then we're going to vote probably -- it seems to me to
20 make the most sense to vote on Judge Christopher's idea
21 that we not have any subpart (b) at all and then if that
22 fails then we'll vote on the difference between 30 days and
23 10 days. Alistair.
24 MR. DAWSON: You know, it just seems to me
25 for bigger cases if you had -- somebody suggested a court

1 provision or where parties could move or the court could
2 make it earlier, that would address the bigger cases. I
3 think a lot of the cases are smaller cases where parties
4 may not put as much attention to it until right before
5 trial.
6 One -- just as a practical issue, if you've
7 got 10 days before trial to make the offer but you've got
8 14 days to accept it, you started trial, I could see where
9 that could be problematic, and my vote would be to have
10 those dates coincide, 14 days before trial and you've got
11 14 days to accept it, so you've got to accept it before the
12 commencement of evidence. I think that might solve some
13 practical problems and then have the parties have the
14 ability to move it earlier if they think it or the court
15 thinks it's appropriate.
16 CHAIRMAN BABCOCK: Okay. Let's vote on Judge
17 Christopher's proposal. How many people favor eliminating
18 subpart (b) so that the window never closes by rule?
19 Everybody in favor of that raise your hand.
20 All opposed? That fails by a vote of 24 to
21 6, the Chair not voting.
22 Okay. Now, everybody that thinks it ought to
23 be 30 days, like Luke says, raise your hand.
24 Everybody opposed to having it 30 days raise
25 your hand. That carries by a vote of 22 to 4, the Chair

1 not voting. So it's going to be 30 days. I think we're
2 agreed that it's going to be before the date of trial with
3 a footnote saying that means when the first witness is
4 called.
5 Is there any opposition to adding a subpart
6 (c), which Tommy is going to draft, modeled after the
7 provision in the House Bill 4 that says the judge has
8 discretion? Anybody opposed to that? Alex.
9 PROFESSOR ALBRIGHT: No, I just have a
10 question.
11 CHAIRMAN BABCOCK: Yeah.
12 PROFESSOR ALBRIGHT: Are we going to let the
13 judge change the 14-day period, too, for acceptance, or is
14 that going to be required?
15 PROFESSOR CARLSON: We haven't gotten to that
16 yet.
17 CHAIRMAN BABCOCK: We haven't gotten to that
18 yet. This is only subpart (c).
19 MR. SOULES: It's 30 days before the
20 commencement of conventional trial, right?
21 PROFESSOR CARLSON: Right.
22 MR. SOULES: My question is can a judge
23 decide to extend the time after judgment or after verdict,
24 or does the judge need to do that at some time so the
25 parties know that they're stepping into a hole?

1 CHAIRMAN BABCOCK: Good point. Tommy, we
2 probably ought to take that -- the way that House Bill 4 is
3 written it's got to be at a pretrial conference.
4 MR. SOULES: Fine with me.
5 CHAIRMAN BABCOCK: It's got to be pretrial.
6 MR. SOULES: I've got no problem with that.
7 MR. JACKS: True.
8 CHAIRMAN BABCOCK: But Luke's suggestion is
9 if you take pretrial conference out of there --
10 MR. SOULES: No. Leave it in.
11 CHAIRMAN BABCOCK: Luke says pretrial
12 conference.
13 MR. JACKS: Well, you could accomplish the
14 same thing by saying "The court may modify these time
15 limits by written order entered before trial upon the
16 motion of any party or its own initiative."
17 CHAIRMAN BABCOCK: Well, you understand the
18 -- Tommy, you understand the problem that Luke is raising?
19 MR. JACKS: I do.
20 CHAIRMAN BABCOCK: So why don't you just
21 draft something and then we'll either take it up later
22 today --
23 MR. JACKS: Okay.
24 CHAIRMAN BABCOCK: -- or in the morning.
25 Okay. Now, Paula's point on subpart (a), she says, "Look,

1 you can't have it 30 days because there are cases where I
2 can't even get into discovery within 30 days, and now I get
3 an offer of settlement." That's not hardly fair, and we
4 ought to deal with that. Carl.
5 MR. HAMILTON: I think we should have a
6 provision that if the offer is made and the offeree feels
7 like it's untimely, he can ask the court to not allow
8 sanctions to be based on that offer until there's more time
9 for evaluation of the case through discovery or otherwise.
10 CHAIRMAN BABCOCK: Yeah. Paula's response to
11 that, though, is, sure, but, you know, there are cases in
12 Dallas, and the judge is never going to let you do that.
13 Right?
14 MS. SWEENEY: Yeah. And not to just malign
15 Dallas, but there are obviously an awful lot of --
16 CHAIRMAN BABCOCK: There are other counties
17 that that might happen.
18 MS. SWEENEY: There are also a lot political
19 decisions that go into rulings, and you don't want to be
20 held hostage in a situation where there is nothing you can
21 do and the other side makes an offer and then precludes you
22 from getting discovery and you have a strict liability
23 rule.
24 MR. VALADEZ: That same problem also applies
25 then by just putting in court discretion into it. Giving

1 the court discretion to change or modify the time period,
2 to use the opposite end of the spectrum, both
3 geographically and just from the perspective of leanings of
4 courts, but if you go in certain areas of the state, I
5 mean, you really -- putting that provision in gives the
6 court a lot of leeway to put the hurt on either party.
7 MS. SWEENEY: That's right.
8 MR. VALADEZ: And so there's got to naturally
9 be either you're going to give the court discretion or
10 you're going to take it away and have a strict, strict
11 rule.
12 MS. SWEENEY: And I think we're better with
13 court discretion --
14 MR. VALADEZ: Right.
15 MS. SWEENEY: -- but to me it would seem that
16 we should have the type of phrasing that we have in some
17 statutes that the court must where justice requires modify
18 either these deadlines or the sanctions or what have you.
19 CHAIRMAN BABCOCK: Paula, what if you had
20 more than 30 days after the first date that discovery may
21 commence or can commence? In other words, 30 days after
22 the first date you can do discovery?
23 MS. SWEENEY: That would solve the statutory
24 problem that I alluded to. I still have a problem with it
25 being this early in the case, and I think from both sides.

1 CHAIRMAN BABCOCK: Yeah, but that doesn't
2 mean that you've got to make the offer.
3 MS. SWEENEY: No. But it's the other way.
4 If it is made, just because discovery hypothetically
5 legally may commence, doesn't mean you're getting any.
6 CHAIRMAN BABCOCK: Yeah. Yeah. That's good.
7 MR. BOYD: I'm trying to figure out how this
8 works still, but if as a defense lawyer 30 days or right
9 after I answer -- you've appeared as the plaintiff 30 days
10 earlier. I answer. I send you an offer, "I'll pay you a
11 thousand dollars to settle the case," haven't even started
12 discovery. You think it's worth much more than that. You
13 reject the offer. We go through discovery and lo and
14 behold you think, you know what, it's probably only worth a
15 thousand dollars, this may get back to the problem of it
16 not applying equally to both parties when it comes to time
17 availability, but what's to prevent you then from making an
18 offer for $999 to settle the case and protect yourself
19 then? Because there's successive offers allowed.
20 MS. SWEENEY: Because you -- if I'm
21 understanding you, I would by rejecting your thousand early
22 on and then I piddle along and realize, "Oh, he was right,"
23 me countering back to you, then I've got that whole window
24 of expenses and costs that I'm already liable for, so,
25 yeah, I could turn around and make you back an offer,

1 but --

2 MR. BOYD: So you could cut off your

3 liability at some point by making a new offer? Is that the

4 way this works? You come back three months later after

5 discovery and offer $999 and I say, "No, I think you're

6 going to lose outright" and I don't take it. Sure enough

7 you lose outright. You've cut off your liability under

8 this rule as of the date you made your 999-dollar offer?

9 MS. SWEENEY: No, because if I lose outright

10 then I'm a hundred percent off on my offer, and if this

11 gets redrafted to have the second part in it that it's

12 supposed to have under 167.6(a)(1), if it has an (a)(2), if

13 I get zero, I'm much more than whatever percent, 25

14 percent, off from my 999 offer.

15 MR. SCHENKKAN: But I'm confused. Aren't you

16 protected by the other cap? We've got two caps in here, a

17 50,000-dollar cap and the cap of the amount of recovery.

18 So if you're zeroed out, your sanctions are zero, and I

19 think Jeff is right. I think Jeff is right. Not only are

20 your sanctions zero, but you now have sanctions against the

21 defendant for not taking your 999 offer as of the date of

22 that offer.

23 MR. LOPEZ: If it's higher. If you win. If

24 she wins, not if she loses.

25 MS. SWEENEY: Okay. I'll withdraw objection.

1 MR. SCHENKKAN: No, you're just capped out,
2 but that takes care of the other case.
3 CHAIRMAN BABCOCK: Hold on. The court
4 reporter can't get this down if you guys just have a
5 discussion amongst yourselves.
6 MR. SCHENKKAN: You're protected in either
7 direction. If you zero out in a case, you're protected by
8 the zero out floor. In the case in which the case does
9 turn out to be worth something you've learned through
10 discovery it's slightly more than the thousand dollars
11 which the defendant had offered early on and you make an
12 offer based on that, and the defendant doesn't take it, you
13 make a 1,500-dollar offer, he doesn't take it, you recover
14 $1,800, then you've got his sanctions.
15 CHAIRMAN BABCOCK: Is there any enthusiasm
16 for the proposition that subpart (a) should say "more than
17 30 days after the date discovery may commence" as opposed
18 to the appearance?
19 MS. SWEENEY: We used to have reasonableness
20 language in here, didn't we? In the original draft of this
21 committee didn't we have a --
22 CHAIRMAN BABCOCK: Paula, you're winning.
23 MS. SWEENEY: Huh?
24 CHAIRMAN BABCOCK: You're winning, Paula.
25 MS. SWEENEY: Okay. Shut up.

1 CHAIRMAN BABCOCK: Judge Peeples.
2 HONORABLE DAVID PEEPLES: I recognize the
3 force of what Paula says in her cases, but there are cases,
4 you see them where the defendant side of the pleading goes
5 on for several inches, you know, officers and directors and
6 stockholders are sued, and they really -- when all is said
7 and done they don't deserve to be in the lawsuit, and I
8 kind of think that kind of defendant ought to be able to
9 put the plaintiff -- to put an offer out there before
10 they've gone through a lot of discovery.
11 CHAIRMAN BABCOCK: Yeah.
12 HONORABLE DAVID PEEPLES: I mean, there are
13 going to be cases like that where they shouldn't have to go
14 through a lot of discovery.
15 CHAIRMAN BABCOCK: How do you solve Paula's
16 problem? Or you just ignore it and rely on the discretion
17 of the judges in Bexar County?
18 HONORABLE DAVID PEEPLES: If there's a
19 statutory discovery stay, why couldn't we draft for that?
20 HONORABLE SARAH DUNCAN: Or, or a stay by
21 order.
22 MR. LOPEZ: Or for any other reason. I mean,
23 bankruptcy, whatever.
24 MS. SWEENEY: Or bankruptcy.
25 HONORABLE DAVID PEEPLES: Yeah.

1 CHAIRMAN BABCOCK: So you would say "more
2 than 30 days after the appearance unless discovery is
3 stayed by statute or court order, in which case 30 days
4 after discovery may commence"? Is that how would do it?
5 HONORABLE DAVID PEEPLES: It sounded okay.
6 PROFESSOR DORSANEO: We could do the
7 calculation like we do in the appellate rule on effective
8 bankruptcy.
9 CHAIRMAN BABCOCK: Which I'm sure everybody
10 could just spit out. What is that, Bill?
11 PROFESSOR DORSANEO: Well, it runs until
12 you're stayed and then when the stay is eliminated it runs
13 for the amount of time left, begins to run again.
14 CHAIRMAN BABCOCK: Judge Patterson.
15 HONORABLE JAN PATTERSON: "Unless discovery
16 is stayed for any reason," which would cover any statute or
17 order, and there would be no other reason.
18 MR. LOPEZ: What if discovery is unavailable?
19 It's not stayed. There may be technical matters.
20 CHAIRMAN BABCOCK: How about that, Paula?
21 Does that work?
22 MS. SWEENEY: I like Judge Lopez' last
23 comment that it's unavailable because that solves the stay,
24 but it also solves the fact that they just won't give you
25 depositions and you haven't been able to get to the court

1 yet.

2 MR. LOPEZ: I'm not sure I want that.

3 MR. SOULES: Maybe we ought to just make you

4 an exception to Joe's 167.1. We've already put 4590i in

5 there along with the Family Code and these others.

6 MS. SWEENEY: I'm good with that.

7 MR. SOULES: That would be all right?

8 CHAIRMAN BABCOCK: Yeah. Paula would like

9 that.

10 PROFESSOR DORSANEO: I mean, that has an old,

11 complicated structure to it that's apparently becoming more

12 complicated. I don't know whether this is a good idea.

13 That really is almost totally regulated, preempted, if you

14 like, because if they want to do something with that, why

15 don't they do something with that?

16 CHAIRMAN BABCOCK: Carl.

17 MR. HAMILTON: This whole idea of sanctioning

18 people when they guess wrong about the value of their case,

19 you know, it rubs me the wrong way. You can always make

20 settlement offers at any time not under the rule, and there

21 are no sanctions. And so what's going to happen here is

22 every time a plaintiff files a lawsuit, plaintiff always

23 thinks his lawsuit is worth something or he wouldn't file

24 it. The defendant doesn't know yet, and he may not know

25 for a long time, so the plaintiff is always going to file

1 an offer of settlement probably as soon as he can for
2 whatever he thinks his case is worth and then that, of
3 course, puts the defendant at a disadvantage because he has
4 to then figure the sanctions that are going to apply to him
5 if he guesses wrong, and I just think that it ought to be
6 geared to the end of discovery. There ought not to be any
7 such sanctions until discovery is complete.
8 CHAIRMAN BABCOCK: Okay.
9 MR. JEFFERSON: As far as the opening date,
10 (a), the question is either it's appearance or what, and I
11 don't think -- I have a hard time figuring out how you
12 could combine the appearance day and the opening day of
13 discovery as an either-or proposition. I think it has to
14 be one or the other as opposed to trying to meld the two
15 together, so I think as a rule it should either be the 30
16 days from the date of appearance or 30 days from the date
17 discovery opens --
18 CHAIRMAN BABCOCK: Yeah.
19 MR. JEFFERSON: -- and that would address
20 the --
21 CHAIRMAN BABCOCK: Yeah, Judge Peeples, your
22 concern about the director who's been sued when really
23 there's no basis is probably -- although weighty, maybe the
24 impact of that is not as great if there's not any
25 discovery. I mean, we're just talking about 30 days here,

1 and, you know, maybe they will get a document request or
2 maybe there will be a quick deposition or something. It
3 can't last more than six hours, so measured against the
4 harm that Paula's worried about, which seems to me is a
5 weightier concern.
6 HONORABLE DAVID PEEPLES: Well, it may be,
7 but if you were to total up the number of 4590i cases and
8 the number of other cases where people are just dragged in,
9 I bet the latter category dwarfs the former, so I'm not
10 sure about the weight.
11 CHAIRMAN BABCOCK: You may be right. Paula.
12 MS. SWEENEY: Could you tie it in some way
13 the way we did on 166a(1) motions to some sort of
14 reasonably sufficient basis for making the decision, which
15 would by definition involve court discretion, but in the
16 case that Judge Peeples is talking about, your director's
17 got enough information presumably early on to file a motion
18 for summary judgment saying, "I don't belong here. As a
19 matter of law I shouldn't be here. Let me out of here."
20 And if there's enough basis for summary judgment then there
21 should be enough basis for the reasonable exercise of the
22 provisions of this rule.
23 On the other hand, in a more complicated
24 case, a med mal case or any kind of complex litigation,
25 you're not going to be able to file the 166a(i) until

1 you've come on down the road to where there's adequate
2 discovery been done. So if it could be tied in some way to
3 adequate discovery under the circumstances of the case, you
4 -- instead of trying to have these mechanical -- I mean, I
5 know it sounds nice to be able to have a mechanical at X
6 days, but we've had dozens of examples of where that
7 wouldn't work.
8 CHAIRMAN BABCOCK: We're going to vote on
9 this because we need to get done with this rule this year,
10 and so we're going to vote on this, and the first vote is
11 going to be whether you like it as it is, more than 30 days
12 after the appearance in the case of the offeror or offeree,
13 whichever is later, which means you're going to have to
14 rely for Paula's situation on the discretion of the judge;
15 and the next vote, if that one fails, will be to have some
16 language to allay Paula's concerns.
17 PROFESSOR DORSANEO: It's Carl's, too.
18 Carl's concern is a very legitimate one, too.
19 CHAIRMAN BABCOCK: I'm sorry. I didn't mean
20 to just make it run one way. The defendants have concerns
21 about this as well.
22 MS. SWEENEY: So Paula and Carl agree?
23 CHAIRMAN BABCOCK: So Paula and Carl have
24 said -- a historic moment, by the way. For the first time
25 they may ever agree on anything. So we're going to vote on

1 the rule as it is. So all in favor of the rule as it is
2 raise your hand.
3 MR. LOPEZ: As opposed to Paula's
4 modification?
5 CHAIRMAN BABCOCK: Yeah. All against?
6 By a vote of 27 to 3, the Chair not voting,
7 we don't like it the way it is, so we're going to fix it
8 along the lines that Paula and Carl are going to agree on
9 during our 10-minute break, which we're in right now.
10 (Recess from 10:50 a.m. to 11:10 a.m.)
11 CHAIRMAN BABCOCK: Okay, Elaine. We solved
12 this problem in two hours. What's the next?
13 MR. HAMILTON: Wait a minute. We're still on
14 (a).
15 MR. ORSINGER: We have one more vote, don't
16 we?
17 CHAIRMAN BABCOCK: Oh, we have one more vote,
18 which is how are we going to say it? More than 30 days?
19 MR. HAMILTON: We have a motion. I have a
20 motion to make.
21 CHAIRMAN BABCOCK: Okay.
22 MR. HAMILTON: We've talked about it, and we
23 want to move that it read "no sooner than completion of
24 discovery."
25 CHAIRMAN BABCOCK: Paula, you support that?

1 MS. SWEENEY: (Nods head.)
2 MR. SOULES: No second.
3 MR. YELENOSKY: Couldn't hear it.
4 CHAIRMAN BABCOCK: All right. Say it a
5 little bit louder, Carl.
6 MR. HAMILTON: "No sooner than completion of
7 discovery." "Must be made no sooner than completion of
8 discovery."
9 HONORABLE DAVID PEEPLES: Chip, that just
10 drains every bit of --
11 MR. SOULES: I didn't hear a second. All
12 right. Let's move on.
13 MS. SWEENEY: I'll second it.
14 MR. LOW: Is Luke still the Chair?
15 CHAIRMAN BABCOCK: Yeah. Luke's just --
16 MR. SOULES: It's been seconded. Let's
17 debate it.
18 CHAIRMAN BABCOCK: Well, I think probably if
19 Carl makes the motion with Paula at least he's got one vote
20 to second it.
21 MR. YELENOSKY: Yeah, she seconded it.
22 MS. SWEENEY: The system that is written here
23 is so arbitrary and so unfair that I would rather tie it to
24 the conclusion of discovery where at least the parties have
25 had a chance to get their discovery. The way this is

1 written, you're asking people to shoot completely in the
2 dark and putting severe financial consequences on them, and
3 there's not a way out of it the way it's written. So, you
4 know, I think we're foolish to embrace something that has
5 these kinds of hazards without some sort of safeguards.
6 CHAIRMAN BABCOCK: Buddy.
7 MR. LOW: There is a way out. The judge. I
8 mean, if it's that kind of case and that applies, but if
9 you wait 'til every case after discovery is completed,
10 there's been just a lot of money spent on discovery, I've
11 heard.
12 CHAIRMAN BABCOCK: Richard.
13 MR. ORSINGER: I understand Paula's
14 perspective, but I'm also concerned --
15 CHAIRMAN BABCOCK: It's Carl's perspective,
16 too.
17 MR. ORSINGER: I'm concerned about the fact
18 that some litigants choose to take every conceivable
19 deposition with three lawyers present before they'll even
20 get serious about settlement, and I hate to wait until -- I
21 feel like people should understand their case before their
22 clock is running, but I don't think they should be able to
23 just beat you to death with unnecessary discovery before
24 their clock is running.
25 CHAIRMAN BABCOCK: Richard Munzinger.

1 MR. MUNZINGER: Well, the way it's written
2 now it's clearly tilted in favor of the plaintiff in most
3 litigation. If it's to have teeth, maybe it ought to be
4 something like 60 days after the date on which discovery
5 may commence, which would allow a defendant to do some
6 judicious, targeted written discovery and take some
7 necessary depositions to at least come to some conclusion
8 on the initial evaluation of the case.
9 I understand that waiting until all discovery
10 is concluded takes the teeth out of the rule. The other
11 side of the coin is Paula's comment is correct. I mean,
12 this is so ludicrously unfair to lawyers to force them to
13 make a judgment to a client totally in the dark. Are they
14 going to be liable for malpractice? Will they be liable
15 when they're sued for malpractice because they didn't tell
16 somebody to settle? How can a lawyer make a judgment in
17 good faith and advise a client without information? I
18 don't believe it can be done, not honestly.
19 CHAIRMAN BABCOCK: By the way, the answer to
20 that malpractice thing is "no."
21 MR. LOPEZ: Are we going to write that in the
22 rule?
23 CHAIRMAN BABCOCK: But, nevertheless, a good
24 point.
25 MR. MUNZINGER: A last comment, if I may.

1 The safety valve about the judge is only as good as the
2 judge is honest and fair.
3 MR. LOW: That's true in most courts.
4 MR. MUNZINGER: And not all trial judges are
5 honest and fair.
6 CHAIRMAN BABCOCK: I sense that, with all
7 deference to Carl and Paula, that maybe there's not a
8 majority supporting this, so let's bring it to a vote and
9 see if there is. All in favor of Carl's motion raise your
10 hand.
11 MS. CORTELL: Will you restate the motion?
12 CHAIRMAN BABCOCK: All against?
13 It fails by a vote of 18 to 2. So let's go
14 on to now determine whether or not in light of our other
15 vote it should be more than 30 or 60 days after the date
16 discovery may commence, as Richard suggests. Bill.
17 PROFESSOR DORSANEO: Discovery may commence
18 when the case is filed.
19 CHAIRMAN BABCOCK: Well, not in Paula's
20 statutory situation, not if there's a stay by the judge.
21 PROFESSOR DORSANEO: Okay.
22 MS. SWEENEY: Removal, bankruptcy.
23 CHAIRMAN BABCOCK: Yeah, bankruptcy. I mean,
24 there are other reasons why it may not. Ralph.
25 MR. DUGGINS: Could you exclude Level 1 cases

1 and then do 60 or 90 days after the commencement of
2 discovery?
3 CHAIRMAN BABCOCK: Except in Level 1 cases,
4 and what in Level 1 cases?
5 MR. DUGGINS: Hadn't thought about it.
6 CHAIRMAN BABCOCK: Okay. Alex.
7 PROFESSOR ALBRIGHT: Could you use the
8 commencement of the discovery period? We have rules that
9 talk about when the discovery period begins.
10 MR. BOYD: Well, it begins when suit is
11 filed.
12 PROFESSOR ALBRIGHT: It begins -- or when the
13 first deposition is taken or when --
14 MR. YELENOSKY: First response.
15 PROFESSOR ALBRIGHT: -- first response is
16 given.
17 CHAIRMAN BABCOCK: That's why Richard says it
18 ought to say "may commence," not that it has to but that it
19 may. What about Ralph's Level 1 exception? Paula, what do
20 you think about that?
21 MS. SWEENEY: Would you -- on the Level 1
22 cases you'd just have it at answer date or leave this
23 language and then allow more time in the other cases? Is
24 that what you're getting at?
25 MR. DUGGINS: All I'm trying to do is I agree

1 that there needs to be more time. I think that's a good
2 point. I was trying to exclude the simpler cases and give
3 or suggest we give more time on the Level 2, Level 3 cases.
4 CHAIRMAN BABCOCK: Okay.
5 MS. SWEENEY: Sure.
6 CHAIRMAN BABCOCK: How about if we keep this
7 language that we have here in Level 1 cases and then say,
8 "and more than 60 days after the date discovery may
9 commence in all other cases"? How does that sound?
10 Richard, does that sit with you?
11 MR. MUNZINGER: I could move that. If you
12 want a motion, I so move.
13 CHAIRMAN BABCOCK: Okay. Anybody second
14 that?
15 MR. ORSINGER: Let me ask you this. When you
16 say more than 60 days after discovery may be done -- may
17 commence, that means maybe 45 to 30 days after the answer
18 is filed? Or should we be talking about 60 days after
19 appearance date, because we're not giving them 60 days if
20 we do 60 days from the petition being filed, depending on
21 how long before the petition is served and how long before
22 they file an answer.
23 CHAIRMAN BABCOCK: Good point. Good point.
24 The plaintiff could start doing discovery right away and
25 the defendant doesn't have a lawyer or --

1 MS. SWEENEY: How can you do discovery if the
2 other side hasn't answered yet? I like it.
3 MR. ORSINGER: We could do 90 days after
4 discovery may commence or 60 days after appearance date.
5 CHAIRMAN BABCOCK: Excuse me?
6 MR. ORSINGER: 90 days after discovery may
7 commence or 60 days after appearance date. It may be
8 approximately the same thing.
9 MR. MUNZINGER: It would be within 10 days of
10 the same thing.
11 MR. ORSINGER: Yeah. But at least you've got
12 two months to get some depositions taken. Of course, you
13 don't know who the experts are at that point because we
14 designate our experts back from the trial date, but at
15 least you can get your fact witnesses identified.
16 CHAIRMAN BABCOCK: Okay.
17 MR. LOPEZ: I was going to suggest that
18 earlier. I think it makes sense in the bigger cases to
19 take advantage of the structure that's already in place
20 with regard to these discovery rules and tie the bigger
21 cases to the discovery period the way it's defined in those
22 bigger cases, which then takes care of that problem; and
23 then on the smaller cases that we all know are 97 percent
24 of the cases that actually, you know, take up the system,
25 Level 1 it's called, have it be a much simpler situation.

1 That's awful amorphous I realize, but --
2 CHAIRMAN BABCOCK: Okay. What other
3 comments?
4 MR. SOULES: Well, it's not true that
5 discovery begins at different times. Discovery begins when
6 the suit is filed. It just ends later or at different
7 times --
8 CHAIRMAN BABCOCK: Right.
9 MR. SOULES: -- depending on what is done
10 after suit is filed.
11 CHAIRMAN BABCOCK: But Orsinger's point,
12 Luke, was that if you say "60 days after the date discovery
13 may commence" then if it starts when the suit is filed,
14 that the -- the defendant doesn't get served for some
15 period of time. It takes a while for him to get a lawyer.
16 He may only have 10 days to do discovery.
17 MR. SOULES: And the discovery answers may
18 already be past due before he's served. I wrote you a
19 letter about that. He's never been served and his
20 discovery responses are past due.
21 CHAIRMAN BABCOCK: So how do you fix that,
22 Richard Orsinger?
23 MR. ORSINGER: I think you just -- I think
24 you ought to drive it from the defendant's appearance, if
25 that's what you're -- I wouldn't want plaintiffs to be able

1 to wait a month before they serve somebody and crowd the
2 defendant on the rule.
3 MR. YELENOSKY: So then don't we have to have
4 an "unless" clause, "unless discovery is stayed by statute
5 or judicial order" or something?
6 MR. ORSINGER: Why don't we decide on what's
7 a reasonable time for a defense lawyer to get his case
8 together enough to assess the value? I can't imagine it
9 would be less than 60 days between the date of the
10 appearance and the date of the deadline. You know, if you
11 send your request for disclosure on the day you make your
12 appearance, you don't even get back a list of potential
13 witnesses from the plaintiff until half of that 60 days is
14 gone. So you've got 30 days to schedule whatever
15 depositions you want. That's pretty rough. You know, I
16 mean, it seems to me like a defense lawyer ought to have 60
17 days at least or maybe 90 days after they make an
18 appearance to evaluate their case.
19 MR. DUGGINS: How about 90?
20 MR. MUNZINGER: Yeah. 90 is better than 60
21 obviously.
22 MR. JEFFERSON: 90 from appearance date?
23 MR. DUGGINS: Yes, for that part of it.
24 CHAIRMAN BABCOCK: What about the issue of
25 discovery being stayed either by court order or by statute?

1 MR. ORSINGER: That's a real problem.
2 MR. SCHENKKAN: Is that a real problem,
3 because isn't that the class of case in which the judge
4 would exercise the power to change the time deadlines?
5 CHAIRMAN BABCOCK: Well, but Paula is
6 uncomfortable with that.
7 MR. SCHENKKAN: Well, but, I mean, see, we
8 can't have it both ways on judicial discretion. Either
9 judicial discretion is a good solution or it's not a good
10 solution, and if she's saying we're going to put all this
11 judicial discretion in then you have to operate on the
12 theory that the system is going to let that discretion be
13 effective.
14 CHAIRMAN BABCOCK: Stephen.
15 MR. YELENOSKY: But one might think that
16 judicial discretion is a good thing beyond a certain point
17 and not a good thing before that, and I know Paula thinks
18 that. And why couldn't you say run it from appearance
19 unless discovery has been stayed by whatever means, in
20 which case it runs from the date at which discovery can
21 begin?
22 MR. LOPEZ: Discretion for discretion's sake
23 just means lack of guidance. I mean, if there's a good
24 reason to do it, I think everybody agrees, if it's stayed
25 by bankruptcy, this, that, or the other, let's put it in

1 there. But, you know, what's discretionary about it?
2 CHAIRMAN BABCOCK: Okay.
3 MS. SWEENEY: So you're suggesting a
4 mechanism where the deadlines would not commence to run in
5 certain instances where there is a preclusion to discovery
6 and also under circumstances where the court exercises
7 discretion, so that there's some where the court has no
8 discretion and then some where the -- others that we are
9 not thinking of that may come up where the court ordered.
10 MR. LOPEZ: I think that everybody seems to
11 sort of agree on the 90 days. Everybody seems to sort of
12 agree there's some situations where it's obvious that
13 doesn't work, like his "unless" situation, and then maybe
14 there's others that aren't quite as clear where we give the
15 judge discretion.
16 MS. SWEENEY: I like that.
17 CHAIRMAN BABCOCK: So you say more than 30
18 days after the appearance in the case of the offeror or
19 offeree, whichever is later, in Level 1 cases and more than
20 90 days after appearance in all other cases -- more than 90
21 days after appearance in the case of the offeror or
22 offeree, whichever is later, in all other cases, unless
23 discovery is stayed, in which case 90 days after discovery
24 may commence? Stephen.
25 MR. YELENOSKY: And the -- subsequently when

1 we talk about judge's discretion, my intent was that the
2 judge's discretion would not extend to shortening the time
3 period below that.
4 CHAIRMAN BABCOCK: Well, but if Judge Peeples
5 has got a case where he says, look, there are, you know,
6 2,000 defendants and we all know that 1,999 of them ought
7 not to be here, I mean, I think he ought to have discretion
8 if he wants to shorten.
9 MR. LOW: He has discretion to grant summary
10 judgment.
11 MR. YELENOSKY: Well, okay. But then that
12 doesn't deal with Paula's problem, because that discretion
13 could then be exercised to shorten the time period even to
14 make it arrive before discovery has begun.
15 CHAIRMAN BABCOCK: But Judge Peeples would
16 say that that statutory prohibition is a very small number
17 of cases that is probably not going to raise the issue he's
18 concerned about. Carl.
19 MR. HAMILTON: Why don't we use your language
20 for the Level 1 and the 90 days for the Level 2, but then
21 have a provision that in any Level 3 case this timetable
22 has to be stated in the scheduling order. It has to be
23 done by the trial court, because in most of these Level 3
24 cases the lawyers agree upon that scheduling order anyway.
25 CHAIRMAN BABCOCK: What does everybody think

1 about that?
2 PROFESSOR DORSANEO: I think that's a good
3 idea.
4 MR. MUNZINGER: I do, too.
5 CHAIRMAN BABCOCK: Elaine?
6 PROFESSOR CARLSON: I think it's a good idea.
7 CHAIRMAN BABCOCK: Judge Bland.
8 HONORABLE JANE BLAND: I think segregating
9 this rule into Level 1, Level 2, and Level 3 cases makes an
10 already complicated rule far too complicated. Most cases
11 that get filed get filed as Level 2. Very few opt for
12 Level 1, and the Level 3 people, like you said, come up
13 with agreements that could be covered under an agreed order
14 that the trial judge can sign in his or her discretion.
15 So my view on it would -- we already have a
16 very wordy rule. My view on it would be 90 days after the
17 appearance and maybe a sentence about except where
18 discovery has been stayed by the trial court or by other
19 order, at which point it would be 90 days after discovery
20 revives or something like that. But I think if we start
21 trying to divide it between the kinds of cases that we see,
22 it's just another difficulty in interpreting the rule that
23 we're going to encounter.
24 CHAIRMAN BABCOCK: Okay. Good point.
25 Elaine.

1 PROFESSOR CARLSON: Well, I guess I would
2 disagree with that because I think the reason for the
3 different levels is the recognition that different kinds of
4 cases require different considerations, and to me it does
5 make some sense to tie it to the discovery levels.
6 CHAIRMAN BABCOCK: Yeah, Bob.
7 MR. PEMBERTON: I was going to echo what
8 Professor Carlson said. Yeah, I mean, it may be a -- if
9 our policy is to help sort out all these different types of
10 cases, small ones, complex ones that need judicial
11 supervision, and the routine ones, this might be yet
12 another way to nudge litigants in that direction. If
13 litigants have a complex case, the presumptive rules
14 governing the offer of settlement period are inappropriate,
15 then they will run to the court and get an order addressing
16 that issue along with other issues.
17 CHAIRMAN BABCOCK: Judge Christopher.
18 HONORABLE TRACY CHRISTOPHER: If we're going
19 to maintain a 50,000-dollar cap on the sanctions then as a
20 practical matter it will make no difference in a Level 3
21 case, because $50,000 is not going to be the big deciding
22 factor for any person in a Level 3 case.
23 CHAIRMAN BABCOCK: Yeah. We're going to get
24 to that.
25 HONORABLE TRACY CHRISTOPHER: So there is no

1 reason to have this whole artificial distinction with
2 respect to Level 3 cases if we stick with 50,000. I mean,
3 no offense, but when we piecemeal each thing we talk about,
4 you can't get sort of a cohesive picture of how it's going
5 to end up.
6 CHAIRMAN BABCOCK: Yeah. That is a necessary
7 evil of this, but a lot of times if we do change something
8 major later in a rule we'll go back and revisit it.
9 MR. MUNZINGER: Just by way of response, I'm
10 not sure that $50,000 is meaningless in a Level 3 case. I
11 have represented public entities that do not want to have
12 it on their record that they have been sanctioned by a
13 court. Do you want the hospital district of Odessa County,
14 Texas, or El Paso County, Texas, to say, "We were
15 sanctioned by a court"? That's not something that lay
16 people take easily, nor should they. "Sanctions" is a very
17 serious word, and I don't believe that $50,000 -- it may be
18 meaningless in Dallas. It dang sure isn't in El Paso and
19 Laredo.
20 I don't mean that in a disrespectful sense.
21 I'm trying to be constructive. I don't mean to be
22 disrespectful to you at all, but 50 thou is 50 thou and
23 public entities have reputations to be concerned about.
24 CHAIRMAN BABCOCK: Justice Duncan.
25 HONORABLE SARAH DUNCAN: I like the

1 recognition that different cases are different, but if
2 we're going to do it in (a), the reason I didn't vote for
3 any of the alternatives in (b) is that I think it needs to
4 be done in (b) as well. When you're talking 30 days before
5 trial in a very simple auto accident case, the defense
6 lawyer probably is not going to pick up that file until the
7 week before trial. So if the window closes at 30 days
8 before trial, it's not going to spur the kind of activity
9 we want because their client can afford for them to pick up
10 that file until he settlement opportunity has been
11 exhausted.
12 CHAIRMAN BABCOCK: Well, in response to that,
13 the Florida experience is that the offer of judgment or
14 offer of settlement rule most comes into play at the time
15 of mediation, and so there is a kind of self-enforcing
16 mechanism for people to -- for it to get on their radar
17 screen, and now there are very few cases that don't get
18 sent to mediation, and that's when it's going to -- that's
19 when the lawyers are going to start thinking about it
20 probably, but at least if the Florida experience is
21 followed.
22 What else? Anybody else? Well, as I
23 understand it, we're sort of thinking about 30 days for
24 Level 1 cases. 90 days for two only?
25 MR. DUGGINS: Or three.

1 CHAIRMAN BABCOCK: Where are we on that?
2 Twos only, Elaine?
3 PROFESSOR CARLSON: Yeah, two only.
4 CHAIRMAN BABCOCK: 90 days for twos,
5 agreement of the parties for three?
6 PROFESSOR CARLSON: No. Court order.
7 CHAIRMAN BABCOCK: Court orders for threes.
8 PROFESSOR CARLSON: When they make the Level
9 3 order.
10 CHAIRMAN BABCOCK: And unless there's a stay
11 in discovery, in which case 90 days after discovery may
12 commence. Is that pretty much where we are?
13 Okay. Elaine, you're going to have to -- if
14 we vote for this you'll have to draft it.
15 MR. SOULES: Are you going to put a --
16 PROFESSOR CARLSON: Can I do it with the aid
17 of the court reporter's record?
18 CHAIRMAN BABCOCK: Yeah.
19 MR. SOULES: Is this going to be one of the
20 requirements of a Level 3 order?
21 CHAIRMAN BABCOCK: Is it going to be a
22 required part of the Level 3 order?
23 MR. SOULES: There are some things that Level
24 3 orders require.
25 CHAIRMAN BABCOCK: Right.

1 MR. SOULES: And then other things that you
2 can do or not do. Are you going to make this a required
3 piece of a Level 3 order?
4 MR. LOPEZ: Is it a totally open-ended
5 agreement or is there a default, if the parties don't agree
6 then X? Because what guidance are we giving the trial
7 court in terms of if the parties don't agree and it's a
8 Level 3 how does the trial court know what to do? There
9 ought to be a default that says it's X. It could be 90
10 days, like you said, or it could be 120 days.
11 CHAIRMAN BABCOCK: Yeah. Carl.
12 MR. HAMILTON: I think it ought to be a
13 requirement just like it is under 190 -- whatever the rule
14 is on Level 3 where it says what has to be in that order.
15 I think that ought to be one of the requirements, and the
16 default is if the lawyers don't agree on it, the judge has
17 to enter it anyway.
18 CHAIRMAN BABCOCK: Bill.
19 PROFESSOR DORSANEO: I have a question. How
20 is that Level 3 order working around the state? I mean,
21 I've seen a lot of these orders that don't match what the
22 rule says. I mean, is the preorder suggesting something
23 that's not really likely to happen in the foreseeable
24 future in some places?
25 Docket control orders, you can look at them

1 and they're doing them the way they did them back before
2 without regard to what the rule says.
3 CHAIRMAN BABCOCK: Yeah. That happens.
4 PROFESSOR DORSANEO: But I think it happens a
5 lot.
6 PROFESSOR CARLSON: Insofar as discovery?
7 PROFESSOR DORSANEO: Yes.
8 CHAIRMAN BABCOCK: Yeah. I think that's
9 probably right. Alex.
10 PROFESSOR ALBRIGHT: Is the question what
11 happens if this is not included in the Level 3 order? I
12 think the discovery rules say anything that's not
13 specifically put in that order reverts to the Level 2, so
14 presumably we would do the same thing with this.
15 CHAIRMAN BABCOCK: Judge Christopher.
16 HONORABLE TRACY CHRISTOPHER: Well, I mean,
17 that's the problem. You don't become a Level 3 until you
18 file a motion asking to be a Level 3. You're going to have
19 this 90 days that everybody is a Level 2 when they get
20 filed. You're going to have this 90-day deadline in Level
21 2, so somebody is going to have to be paying attention,
22 getting in there, filing a motion to convert it to a Level
23 3, and getting some new date in it. You know, the 90 days
24 is simple, and leaving discretion on a motion by the
25 parties is the way to cure problems.

1 PROFESSOR DORSANEO: Well, I think I've been
2 misled.
3 CHAIRMAN BABCOCK: Okay. So how should that
4 read now?
5 HONORABLE TRACY CHRISTOPHER: Well, I'd stick
6 with the 90 days and then put something in there with
7 "unless discovery is stayed" and then leave the judge
8 discretion to change the dates. I mean, you could
9 specifically say "judge can change it in Level 3s" or "in
10 any case," or, you know --
11 CHAIRMAN BABCOCK: Well, we've already given
12 them discretion to change it, so 30 days in Level 1 cases,
13 90 days in all other cases unless there's a stay. Is that
14 where you're going, Judge Christopher?
15 HONORABLE TRACY CHRISTOPHER: You know, we
16 don't have a county court judge here, do we? And I have no
17 Level 1 cases. No one says, "I'm a Level 1 case," so even
18 though quite a few of them are, but they refuse to identify
19 themselves as a Level 1 case.
20 CHAIRMAN BABCOCK: Yeah. No self-respecting
21 lawyer.
22 HONORABLE TRACY CHRISTOPHER: Right. So I
23 think the distinction for a Level 1 case is unnecessary,
24 but I don't think anyone here does a Level 1 case either,
25 so I'm not really sure we're getting a full impact.

1 PROFESSOR DORSANEO: Only for your friends.
2 CHAIRMAN BABCOCK: Hang on. Justice Hecht.
3 JUSTICE HECHT: Is that your experience,
4 David? Do you have Level 1 cases?
5 HONORABLE JANE BLAND: Me?
6 CHAIRMAN BABCOCK: No. David Peeples.
7 HONORABLE DAVID PEEPLES: I haven't had any
8 disputes about those. By the time you go to trial --
9 JUSTICE HECHT: No, do you have any?
10 HONORABLE DAVID PEEPLES: Not to my
11 knowledge. You know, they don't show up for trial and
12 saying, "By the way, we're ready to try this case and it's
13 a Level 1 case." They just --
14 JUSTICE HECHT: Did you have any problems?
15 MR. LOPEZ: Well, the county courts did.
16 Credit card collection, all those debt cases, a lot of them
17 were Level 1, but those are pretty simple -- well, they're
18 chasing somebody that just doesn't want to pay. It's
19 pretty simple.
20 CHAIRMAN BABCOCK: Well, I think we ought to
21 leave it at 30 days for Level 1, to the extent there are
22 any, and then goes 90 days on everything else and then have
23 the stay of discovery thing. Is everybody pretty cool with
24 that? Okay. Elaine, you can draft that?
25 PROFESSOR CARLSON: I think Ralph just did.

1 Yes.

2 CHAIRMAN BABCOCK: It's drafted? You want to

3 share it with us?

4 MR. DUGGINS: I would suggest we insert in

5 front of "more," the phrase "for cases governed by Rule

6 190.2," comma, and then after the semicolon behind "later"

7 you'd insert "for cases governed by Rule 190.3 or Rule

8 190.4, more than 90 days after the appearance in the case

9 of the offeror or offeree, whichever is later," and then

10 the court would still have the discretion under the

11 provision Tommy is working on to modify it in cases of

12 Level 3 or otherwise, for good cause shown. I think it

13 ought to state that.

14 CHAIRMAN BABCOCK: Is everybody okay with

15 that? Bill.

16 PROFESSOR DORSANEO: The tricky part to draft

17 is if there's a statutory stay. That's the tricky thing

18 because then you have to deal with the stay when the stay

19 is lifted, not just on the front part of it.

20 CHAIRMAN BABCOCK: Yeah. I thought we were

21 going to add a phrase that said --

22 MR. DUGGINS: I just left that out. I agree

23 we need to add something to deal with it.

24 CHAIRMAN BABCOCK: Yeah. "Unless discovery

25 is stayed, in which case 90 days after discovery may

1 commence."

2 MR. DUGGINS: Right.

3 CHAIRMAN BABCOCK: Okay. Is everybody okay

4 with that? Any dissenters to that approach, what Ralph and

5 I just read?

6 Okay. I don't see anybody dissenting, so

7 we're done with that. What's our next issue, Elaine?

8 PROFESSOR CARLSON: Okay. I think the next

9 significant issue that we should address is the deadline

10 for accepting the offer.

11 CHAIRMAN BABCOCK: Okay.

12 PROFESSOR CARLSON: Which is on page three,

13 No. (7), 167.2(a)(7). The proposal is that the offer

14 specify a deadline by which it must be accepted. The

15 acceptance date must be either dated at least 14 days after

16 the offer is served or the date set for trial, whichever is

17 earlier.

18 CHAIRMAN BABCOCK: Shouldn't it be changed to

19 say "the date of trial" to be consistent?

20 PROFESSOR CARLSON: Okay.

21 PROFESSOR DORSANEO: What's the logic behind

22 all that?

23 PROFESSOR CARLSON: Of the 14-day time period

24 to accept? You know, to some -- I think the logic behind

25 that, Bill, is that you shouldn't be able to hold -- the

1 parties want to know whether the rule's mechanism is
2 triggered or not, and it's -- you need to hold an offer
3 open for a reasonable time for the counsel to confer with
4 the client. Whether 14 days is the right day or not is
5 debatable, and it gives some flexibility to the offeror in
6 setting the terms.
7 MR. SCHENKKAN: But why shouldn't you be able
8 to leave it in effect? Why shouldn't it be -- I agree
9 there should be a minimum amount of time. You can't force
10 somebody to evaluate the settlement in 24 hours or
11 something like that, but why shouldn't it be a date at
12 least 14 days after the offer is served, but not later than
13 trial? Why can't you just leave it in effect, especially
14 if you then provide when you get to the withdrawal of offer
15 that the making of another offer, you know, counts as
16 withdrawal of a prior one, because then what you're doing
17 is leaving people with the continuous ability to take
18 advantage of new information and continually assess their
19 risk of the maximum 50,000 or offset of their recovery
20 against the settlement. I don't see what is gained by
21 saying that it's the earlier of 14 days or trial. That's
22 saying everybody has got to respond in 14 days. I don't
23 get that.
24 PROFESSOR DORSANEO: Me either.
25 JUSTICE HECHT: Well, it doesn't do that.

1 You could specify the date of trial.
2 MR. LOW: You could specify the trial.
3 CHAIRMAN BABCOCK: Sure.
4 JUSTICE HECHT: You could specify, "This
5 offer must be accepted by the date of trial."
6 MR. LOW: The trial.
7 JUSTICE HECHT: You just can't specify less
8 than 14 days.
9 MR. JACKS: True.
10 CHAIRMAN BABCOCK: You can't say, "Here's my
11 offer on Wednesday. I've got to hear by Friday." You
12 can't say that.
13 JUSTICE HECHT: But you could say 60 days.
14 MR. JACKS: Sure.
15 JUSTICE HECHT: Or you could just say "the
16 date of trial."
17 MR. BOYD: Can you leave it open through
18 trial, as written?
19 MR. ORSINGER: Well, then I would like to --
20 I mean, are we permitting people to give this 24 hours
21 before trial? I mean, is there a minimum of 14 days or can
22 someone give it to you a day before trial and, therefore,
23 it's automatically dismissed?
24 CHAIRMAN BABCOCK: No. The window -- we
25 voted on the window closing.

1 MR. ORSINGER: Okay.
2 MR. VALADEZ: 30 days.
3 CHAIRMAN BABCOCK: 30 days before the date of
4 trial.
5 MR. MUNZINGER: Prior to trial.
6 MR. ORSINGER: Well, then when would we ever
7 have -- well, somebody designates 45 --
8 CHAIRMAN BABCOCK: You can make a timely
9 offer and say, "By the way, it expires on the day of
10 trial," so if you go -- if you're picking a jury then
11 you've got a rejected offer in your hip pocket.
12 MR. BOYD: Well, I assume these alternatives
13 were in there originally because under subsection (1)(b) it
14 originally said "10 days," which would have left less than
15 14 days so you had to give some opportunity to make the
16 offer period -- the acceptance period less than 14 days,
17 but now that we've expanded the 10 days to 30 days, you
18 don't need that alternative --
19 CHAIRMAN BABCOCK: Right.
20 MR. BOYD: -- at all. But then you're still
21 left with the question of will this rule permit an offeror
22 to keep the offer open beyond the commencement of the
23 trial.
24 PROFESSOR CARLSON: But if you don't have the
25 14 days, does that mean I can --

1 MR. BOYD: No, you still keep the 14 days,
2 but you don't need the second alternative anymore.
3 CHAIRMAN BABCOCK: "The acceptance date,
4 which must be at least 14 days after the offer is served,"
5 period.
6 MR. BOYD: And then the only question is do
7 you want to by rule make a no later than date such as the
8 commencement of trial?
9 CHAIRMAN BABCOCK: And why would you care
10 about that? Because --
11 MR. BOYD: I don't. I remember hearing
12 somebody talk about whether there was -- whether this
13 should allow for offers to remain open through trial, a
14 three-month trial or whatever.
15 PROFESSOR CARLSON: Yeah.
16 MR. BOYD: So I don't care to put a closing
17 date on it, but --
18 CHAIRMAN BABCOCK: Stephen.
19 MR. YELENOSKY: The rule requires you to
20 specify some deadline, and I'm wondering if there's
21 problems behind that, because you certainly could say that
22 it's possible to make an offer and that it would remain
23 open unless you specify a date or until it's retracted, and
24 there could be some strategic reasons why you would want
25 that offer to be sitting out there, but you wouldn't

1 necessarily want to say that it's good until the date of
2 trial. You want the other party to think that at any point
3 you might --
4 CHAIRMAN BABCOCK: You can leave it open
5 under this.
6 MR. YELENOSKY: Well, you have to specify a
7 deadline. That's how I read the rule.
8 CHAIRMAN BABCOCK: Well --
9 MR. YELENOSKY: So it would have to say, "You
10 may specify a deadline which can't be sooner than 14 days
11 and can't be longer than the trial," but that's not what
12 this says.
13 PROFESSOR DORSANEO: When we say "deadline,"
14 I'm not exactly sure how the deadline needs to be
15 described. Like "Tuesday" or "when the cows come home"?
16 MR. LOPEZ: There should be a way to rewrite
17 that that just makes it clear that it's got to be for a
18 minimum of 14 days, period, stop.
19 MR. BOYD: And then there's only one other
20 issue to deal with, which is what if under the new
21 subsection (1)(c) you get a court which reduces the 30 days
22 so that it's now less than 14 days, so you've got to throw
23 in some clause that says "unless by court order there's
24 less than 14 days available."
25 PROFESSOR DORSANEO: Can we change 14 days

1 and accomplish the same thing, because 14 days seems like
2 an odd number of days to me?
3 MR. BOYD: I mean, theoretically under the
4 new (1)(c) you could have a judge say that an offer made
5 two days before the commencement of trial is okay, and if
6 that's the case then there's no way that the offer could
7 specify a deadline that's at least 14 days unless we're
8 going to allow -- you know, now you've got 14 days and if
9 it's a two day trial you're --
10 CHAIRMAN BABCOCK: Well, in that case the
11 judge would change this deadline, too.
12 MR. BOYD: And that's all I'm saying, is you
13 need some clause in there that would tell some judge he can
14 do that.
15 CHAIRMAN BABCOCK: Isn't that right, Tommy?
16 MR. JACKS: Yeah.
17 CHAIRMAN BABCOCK: And Bill's point could be
18 remedied by changing "deadline" to "date."
19 PROFESSOR CARLSON: "A date certain."
20 PROFESSOR DORSANEO: Huh?
21 PROFESSOR CARLSON: How about "a date
22 certain"?
23 CHAIRMAN BABCOCK: "A date certain by which
24 the offer must be accepted, the acceptance date, which must
25 be a date at least 14 days after the offer is served."

1 PROFESSOR DORSANEO: Specific date, date
2 certain. I don't know who talks like that. I don't talk
3 like that.
4 CHAIRMAN BABCOCK: You do.
5 PROFESSOR DORSANEO: Try not to.
6 MR. LOPEZ: But he writes like that.
7 CHAIRMAN BABCOCK: "Specifies a specific
8 date?" "Specify a date"?
9 PROFESSOR CARLSON: You need to read more.
10 CHAIRMAN BABCOCK: Alistair.
11 MR. DAWSON: If the sanctions don't kick in
12 until the offer is either rejected or expires then you have
13 no incentive to keep an offer open, either side, no
14 financial incentive, in which as a practical matter the way
15 it's written, I think virtually all attorneys are going to
16 put 14 days.
17 CHAIRMAN BABCOCK: That's right.
18 MR. DAWSON: There's no reason for them not
19 to, and they want to know that, you know -- they want the
20 certainty of knowing if the case settled or not or if they
21 evaluate it on how much future, so you might rethink --
22 there's a good reason to keep offers open, but then that
23 would require you to rethink the application of the
24 sanctions part of it if you want to encourage people to
25 keep offers open.

1 CHAIRMAN BABCOCK: Yeah. The thing is we
2 probably can't sit here and think of all the contingent
3 reasons why somebody might want to leave it open more than
4 14 days, but I think you're right. As a general
5 proposition people are probably going to put 14 days in it,
6 but should we take the flexibility away from that? For
7 whatever strategic reason they may say, "no, 21 days" or
8 "30 days" or forever.
9 MR. LOPEZ: Just if they say three days then
10 they don't trigger this rule.
11 CHAIRMAN BABCOCK: Yeah. They don't get it
12 if they do three days. Okay. What else? Buddy.
13 MR. LOW: No, I was agreeing.
14 CHAIRMAN BABCOCK: Oh, you agree?
15 MR. LOW: Yeah.
16 MR. DAWSON: You agree with me, Buddy?
17 MR. LOW: Yeah.
18 CHAIRMAN BABCOCK: Do we have any dissent on
19 that then if we say, "specifiy a date by which the offer
20 must be accepted, the acceptance date, which must be a date
21 at least 14 days after the offer is served," period? You
22 okay with that?
23 MR. JACKS: You don't need to say "a date."
24 Just "must be at least 14 days after the offer is"--
25 MR. LOPEZ: "A date which must be 14 days, no

1 less than."

2 CHAIRMAN BABCOCK: Which must be at least 14

3 days.

4 MR. JACKS: All I'm saying is you don't need

5 to repeat the words "a date."

6 MR. SOULES: Can I ask a question for

7 clarification? If this happens in Paula's case then there

8 can be a settlement offer made the moment discovery is

9 allowed and she -- and require her to reject it within 14

10 days.

11 PROFESSOR CARLSON: Well, don't you have 90

12 days from when discovery could commence before an offer

13 could be made?

14 MR. YELENOSKY: 14 days to reject it.

15 PROFESSOR CARLSON: Unless discovery is

16 stayed, in which case 90 days after discovery may commence.

17 MS. SWEENEY: So you would have had 90 days

18 of discovery in that scenario.

19 CHAIRMAN BABCOCK: You really have 104 days.

20 MR. SOULES: So everybody better saddle up

21 and get their discovery done in a hurry.

22 CHAIRMAN BABCOCK: That's the idea. Richard.

23 MR. MUNZINGER: If you serve by mail or by

24 fax, do you get the three-day extension? It's a serious

25 question because --

1 MR. SOULES: Yes. Yes.
2 MR. MUNZINGER: Somebody is going to have to
3 clear that question up in the comment.
4 MR. SOULES: Or 4.
5 MR. MUNZINGER: Or in the rule, whatever it
6 might be, but I've got 14 days from the day I was served.
7 "Yes, Judge, but the Rules of Procedure give
8 me three days because they sent it by mail. So I have 17
9 days."
10 MR. SOULES: The general rule takes care of
11 that.
12 PROFESSOR DORSANEO: The general rule takes
13 care of that.
14 MR. SOULES: And it's four days if you fax
15 it.
16 MR. MUNZINGER: My only point is that the
17 comment needs to address that uncertainty.
18 PROFESSOR DORSANEO: I don't think we need a
19 comment saying that the other rules apply to this case.
20 CHAIRMAN BABCOCK: Yeah, I don't think it is
21 uncertain.
22 PROFESSOR DORSANEO: Because then you would
23 have to be doing that all the time.
24 CHAIRMAN BABCOCK: All right.
25 MR. BOYD: So which only begs the last

1 question about whether to add a phrase that says "at least
2 14 days, unless the court by order reduces that period
3 of" -- "by order under subsection (1)(c) reduces that
4 period."
5 CHAIRMAN BABCOCK: We could put that,
6 although it seems like it may be unnecessarily complicated
7 to me.
8 MR. LOPEZ: "Unless modified by court order,"
9 period.
10 CHAIRMAN BABCOCK: It's always unless
11 modified by court order and you've got -- (1)(c) you've got
12 the ability to modify, so I'd rather deal with it in
13 (1)(c), if you're going to deal with it.
14 MR. BOYD: So long as (1)(c) is worded in a
15 way that makes clear that the court can modify this 14-day
16 period as well as the ones up above.
17 CHAIRMAN BABCOCK: Yeah. Tommy is doing
18 that. All right. We're okay on this then. Go.
19 PROFESSOR CARLSON: Justice Duncan I think
20 has a --
21 CHAIRMAN BABCOCK: Justice Duncan has --
22 MR. WATSON: Sarah is clucking down here.
23 HONORABLE SARAH DUNCAN: Luke's comment
24 caused me to go read Rule 21.
25 PROFESSOR DORSANEO: We maybe need to change

1 21. Because that's what I would change.
2 HONORABLE SARAH DUNCAN: Yeah, it is 4, but
3 the 21 -- I mean, 4 incorporates 21 and 21a, and 21 is only
4 applicable, it sort of looks like, to pleadings, pleas,
5 motions, and applications, which I don't think this would
6 be one; and then 21a, pleadings, plea, motions, or other
7 form of request. I think there might need to be a change
8 to 21 and 21a.
9 PROFESSOR ALBRIGHT: Couldn't you just say
10 "served according to Rule 21," "pursuant to Rule 21"?
11 HONORABLE SARAH DUNCAN: Yeah. Something
12 like that, but don't assume you've got your three days just
13 based on the rules the way they are.
14 PROFESSOR DORSANEO: I would rather change 21
15 or 21a than have some little piece of machinery operating
16 separately.
17 CHAIRMAN BABCOCK: You don't think 21a
18 applies to this?
19 PROFESSOR DORSANEO: Well, if you look at --
20 Carl was telling me, "Bill, look at 21." 21 says it was
21 meant to cover everything, but we weren't thinking about
22 offers of settlement. 21a talks about notices and then
23 21 --
24 CHAIRMAN BABCOCK: Right.
25 MR. SOULES: Don't you have to give notice of

1 this offer?

2 HONORABLE SARAH DUNCAN: Paragraph (a) says

3 you do.

4 PROFESSOR DORSANEO: Well, it might be better

5 to make it clear.

6 MR. SOULES: It's every notice required by

7 these rules. Every notice.

8 CHAIRMAN BABCOCK: That certainly would be a

9 notice.

10 PROFESSOR DORSANEO: I would rather just put

11 it in there.

12 MR. JACKS: Yeah.

13 MR. LOPEZ: I think if we don't, right or

14 wrong, we will get litigation about whether it applies or

15 not.

16 MR. ORSINGER: We could call it "notice of

17 offer" or something.

18 HONORABLE SARAH DUNCAN: I'm not trying to

19 fix it right now. I'm just saying that I wouldn't assume

20 the three days is there until somebody makes sure it is

21 there under 21, and if it's not, something has got to give.

22 PROFESSOR DORSANEO: Sarah is right.

23 CHAIRMAN BABCOCK: She's always right.

24 MR. SOULES: Well, all you've got to do is

25 write notice above the -- "Notice of the offer must be

1 given to the other side."
2 CHAIRMAN BABCOCK: Sometimes misguided but
3 always right.
4 MR. SOULES: And not -- and "every notice
5 required by these rules" is intended to cover everything.
6 CHAIRMAN BABCOCK: Yeah, I'm with you on
7 that.
8 MR. SOULES: But, and then we -- it is a
9 notice if we say this -- that this offer must be -- the
10 other side has to have a notice of the offer.
11 PROFESSOR CARLSON: Well, 167.2(b) on page --
12 I'm sorry. 167.2(a)(8) on page four talks about serving
13 the notice, and then Footnote 16 was an attempt to deal
14 with that. I thought it was pretty clear. I didn't draft
15 it, but --
16 CHAIRMAN BABCOCK: What if we made that a
17 comment?
18 PROFESSOR CARLSON: Bill doesn't like that,
19 but I think it will work.
20 CHAIRMAN BABCOCK: Well, you know Bill.
21 Okay. Yes, sir.
22 MR. MUNZINGER: The rule does not at the
23 moment contemplate filing a copy of the offer with the
24 clerk, does it? What do you do when the parties claim they
25 didn't receive the offer? That happens more often than --

1 I mean, I've had that happen to me in my practice, people
2 claim they served something on me. I didn't get it. It
3 may have been served, might have been lost. I wonder --
4 the rule later says you can't mention this, but would there
5 not be some prophylactic effect in requiring that the offer
6 be filed with the clerk?
7 CHAIRMAN BABCOCK: The problem with that is
8 that oftentimes in litigation party -- the parties, more
9 often defendants than plaintiffs, don't want -- you know,
10 don't want a record of that.
11 MS. SWEENEY: But they could choose. If they
12 wanted the protection, they could maybe make it permissive.
13 MR. LOPEZ: Filing with the court still
14 doesn't prove the other guy got it.
15 CHAIRMAN BABCOCK: That's true.
16 MR. LOPEZ: I mean, I have that happen all
17 the time, I've got it, but the defense says they didn't get
18 it or the plaintiff says they didn't get it.
19 CHAIRMAN BABCOCK: Okay. Let's keep moving.
20 PROFESSOR CARLSON: 167.2(d) on page four,
21 successive offers. Do we want to discuss that?
22 CHAIRMAN BABCOCK: Yeah. We definitely want
23 to discuss this.
24 PROFESSOR CARLSON: Okay. Under this
25 proposal a party can make an offer after having made or

1 rejected a prior offer, but any offer that is made is
2 subject to -- I will call it fee shifting provisions under
3 this rule. Should it be any offer? Should it be only the
4 last offer? A Footnote 17 on page four discusses some of
5 the rationale for the proposal.
6 MR. PEMBERTON: I have a question.
7 CHAIRMAN BABCOCK: Tommy.
8 MR. JACKS: This one bothers me because it
9 permits the possibility of a party making -- a defendant
10 making a low or a plaintiff making a high offer, you know,
11 early in the case, but then their evaluation of the case
12 changes, and yet being able then where they, too, did not
13 foresee the outcome any better than the defense -- than the
14 other party did, but they get to rely on that early offer
15 which they've later reconsidered themselves. I mean, I'm
16 more comfortable with only allowing the last offer to be
17 the one that triggers the sanction. It just doesn't seem
18 fair to me to do it the way this rule does it.
19 CHAIRMAN BABCOCK: What if you get offer --
20 let's just take it from the defense perspective. Defendant
21 offers early in the case X amount of dollars, rejected.
22 Then he offers more than that, you know, by -- he starts
23 with a hundred thousand, he offers 150, and then he later
24 goes up to 200. The verdict comes in and it's $60,000. So
25 he's outside this 70 percent range. Is it good or bad that

1 you would measure -- you would measure the sanctions from
2 the date of the hundred thousand-dollar offer as opposed to
3 the later, higher one?
4 And you can flip that around. Let's say that
5 the verdict is 110,000, so you'd be more than the initial
6 offer but less than the 70 percent of the second offer. In
7 that event then you would measure it from the rejection of
8 the second offer.
9 MR. JACKS: True.
10 CHAIRMAN BABCOCK: I don't know if that's
11 good or bad, but that just seems to me like how it would
12 work, and tactically a defendant could kind of hedge their
13 bets along the way, recognizing you could always accept it,
14 of course.
15 Bob.
16 MR. PEMBERTON: I have got just a quick
17 question. In the footnote it refers to "sanctioning the
18 rejection of any offer is the," quote, "most common
19 proposal." Does that mean that most states have their
20 rules set up this way?
21 CHAIRMAN BABCOCK: Very few states have a
22 rule like this.
23 MR. PEMBERTON: Okay.
24 CHAIRMAN BABCOCK: But the states that do,
25 set it up this way.

1 MR. PEMBERTON: Okay. I just wondered what
2 "common proposal" meant.
3 Another question --
4 JUSTICE HECHT: The best answer to that I
5 think is that that was the Federal proposal when they were
6 talking about changing Rule 60a, and I think it was the
7 proposal of the Bar Association of the City of New York,
8 but I can't remember exactly, but there were two or three
9 that wanted it this way and one or so that criticized it.
10 MR. PEMBERTON: Another question, could a
11 party make a successive offer as part of their settlement
12 proposal to eliminate sanctions based on prior outstanding
13 offers? I mean, could that just be something the parties
14 bargain around?
15 CHAIRMAN BABCOCK: How would that work, Bob?
16 MR. PEMBERTON: Well, just if you're worried
17 about an outstanding offer -- and I'm still thinking this
18 through, but if you're worried about an outstanding offer
19 and sanctions resulting from say a lowball offer in the
20 case, you do not simply agree that no sanctions would be
21 applicable based on that prior offer as a condition of
22 later settlement offers and just leave it to the parties to
23 negotiate around it. That might be one way to fix the
24 problem.
25 CHAIRMAN BABCOCK: And that would be because

1 the offer that had a big long fuse, that wasn't one of
2 these short 14-day offers, so it's still out there, it's
3 not rejected?
4 MR. PEMBERTON: Right. Right.
5 MR. WATSON: The offer has to be
6 unconditional.
7 MR. JACKS: Okay. Right.
8 CHAIRMAN BABCOCK: This is too hard.
9 PROFESSOR DORSANEO: Uh-huh.
10 MR. JACKS: Yeah. It makes my head hurt.
11 PROFESSOR DORSANEO: I can't get my mind
12 around this.
13 CHAIRMAN BABCOCK: Yeah.
14 HONORABLE TOM GRAY: Maybe I'm overlooking
15 the obvious, but I would think that a subsequent offer
16 would have to contemplate settlement of all those offers if
17 we mean what we said up in No. (5) to offer to settle all
18 the claims in the action between the offeror and offeree.
19 That's going to include sanctions under this rule because
20 it's a claim at that point. Or it would seem to be.
21 CHAIRMAN BABCOCK: Paula.
22 MS. SWEENEY: Well, that brought me to the
23 issue of multiple parties. Is this the time to fold that
24 into the discussion?
25 CHAIRMAN BABCOCK: It may or may not be.

1 Elaine, is multiple parties -- I mean, that seems to be in
2 167.6(c), but --
3 PROFESSOR CARLSON: Yeah. I think it would
4 be appropriate.
5 MS. SWEENEY: Okay. Do you -- the concern
6 with multiple parties, obviously we've got the Utz case
7 evidencing that there's a lot of gamesmanship back and
8 forth on both sides of multi-party cases, either multiple
9 plaintiffs, multiple defendants, or both; and I think some
10 provision has to be this -- the way this is written, it's
11 all claims just between the party making the offer and the
12 party to whom it is made, but if you have a multi-defendant
13 case, there are many instances where you cannot settle with
14 one defendant even if they make you an offer because of the
15 effect that that will have on the rest of the case, and
16 defendants could very easily get together on that and
17 piecemeal try to dismantle a plaintiff's case by forcing
18 successive partial settlements that eviscerate the main
19 part of the case.
20 On the multi-plaintiff side you have to look
21 at the factors that defendants may have many more than one
22 claimant that they're dealing with; and if one set of
23 claimants makes a demand and the defendant has limited
24 resources, it would tend to put the defendant in a position
25 of having to potentially meet that demand when they know

1 there are other claimants out there that they also have to
2 satisfy; and I don't know the answer to that. It isn't
3 something that I've had to worry about, but others
4 certainly have.
5 And then you have the problem of one set of
6 plaintiffs taking a credit or taking a settlement and that
7 acting as a credit against the other plaintiffs in the
8 case, which is just a -- another factor to be taken into
9 consideration, but I'm most concerned about the cases where
10 you have multiple defendants, each of whom needs to stay in
11 the case relative to the other defendants and where
12 strategically defendants could force or try to force with
13 this a plaintiff to take a settlement that, while as to
14 that defendant might be reasonable here and now, as to the
15 case as a whole it is not; and this has sort of a myopic
16 focus on just one defendant and one plaintiff when you may
17 have eight defendants; and when you take the case as an
18 entity and you're -- if you're forced to settle with one
19 defendant or two defendants, you severely negatively affect
20 the rest of the case.
21 So I wonder, one, what you-all's committee
22 did -- talked about on that and, two, how we can fix it.
23 PROFESSOR CARLSON: We talked about that as a
24 full committee a little bit last year on whether an offer
25 should have to be a settle of claims as to all parties; and

1 my recollection, Paula, is that the sentiment was that
2 would not be appropriate in many cases; and so that's why I
3 think this proposal got structured the way it is.
4 CHAIRMAN BABCOCK: It's a little off point on
5 successive offers, though, isn't it?
6 MS. SWEENEY: Well, it is and it isn't.
7 That's why I asked because if you've got -- if you get
8 three defendants and they're sort of taking turns making
9 offers strategically to set you up, that's a factor, but
10 I'm more concerned about if you've got, you know, a
11 defendant with limited assets who offers it all to you, but
12 you don't want it, being put in the position or attempting
13 to put your client in the position of having to take it or
14 face sanctions, and I don't -- I don't think that that's
15 what we intend by this rule. Perhaps it is, but I don't
16 think it's the intent of the committee to allow this to be
17 used strategically to ruin people's lawsuits, but that
18 would be the effect of it, if it is allowed to go the way
19 it's written.
20 PROFESSOR CARLSON: And I guess 167.6 is
21 something the trial judge could consider, what you're
22 suggesting, Paula, but I guess not in Dallas.
23 MS. SWEENEY: Well, you know, I'm going to
24 take back that thing about Dallas because I may be in
25 trouble. Let's suit it Houston, because I don't go there.

1 CHAIRMAN BABCOCK: It seems to me on the
2 broad policy question of this successive offers you've got
3 to allow for successive offers because your evaluation of
4 the case changes and you want to be able to change with
5 your changing evaluation. So it doesn't seem to me to --
6 so the only question I would have is whether or not the
7 fact that you make a successive -- another offer wipes out
8 everything that came before it, and I could see arguments
9 both ways on that.
10 If you're trying to encourage -- if you're
11 trying to encourage settlements then you say, no, you
12 probably shouldn't. If you're trying to take kind of the
13 guesswork out of it then maybe you should. I mean, because
14 the early offer is just like a guess and I got lucky.
15 MS. SWEENEY: Doesn't that moot or as a
16 matter of contract law -- somebody who knows this stuff,
17 doesn't a new offer moot a prior offer or effectively
18 withdraw it and then this says that withdrawn offers don't
19 trigger the rule?
20 CHAIRMAN BABCOCK: No. The rejection of any
21 offer is subject to sanctions under this rule.
22 MS. SWEENEY: No, but if you -- no, I mean if
23 I make you an offer of a hundred thousand dollars. I'm the
24 defendant. I'm offering you a hundred. I realize later,
25 boy, was I low, and I raise it to 200. Then by doing that

1 I have effectively withdrawn my prior offer, have I not, as
2 a matter of contract law?
3 CHAIRMAN BABCOCK: I don't think it's
4 governed by contract law. I think it's going to be
5 governed by rule.
6 MS. SWEENEY: Okay. Well, shouldn't we write
7 that in the rule?
8 MR. HAMILTON: You would have withdrawn the
9 previous offer before it was accepted.
10 CHAIRMAN BABCOCK: No. It was rejected.
11 MR. HAMILTON: Huh?
12 CHAIRMAN BABCOCK: I make an offer, and I
13 say, "You've got 14 days, Carl," and on Day 14 you say,
14 "No, not interested." So now you have a thing that under
15 this rule is going to subject you potentially to sanctions,
16 and the question is, what happens to that thing if you make
17 another offer? You've got two choices. You can say the
18 thing goes away or you can say the thing never goes away.
19 MS. SWEENEY: Well, you've got three choices,
20 because if you make the offer bigger if you're offering --
21 CHAIRMAN BABCOCK: Right.
22 MS. SWEENEY: -- then you would be admitting
23 your prior offer was no good. If, on the other hand, you
24 make it smaller, you should be able to rely on the
25 provisions of the prior offer. I mean, if you say, "Boy, I

1 offered you a hundred. You should have taken it. Now you
2 can only have 80 because your expert just folded."
3 CHAIRMAN BABCOCK: You would never do that,
4 though, would you?
5 MS. SWEENEY: Huh?
6 CHAIRMAN BABCOCK: Why would you ever do
7 that, make a smaller offer?
8 MS. SWEENEY: If you're a defense lawyer and
9 the plaintiff's case goes south?
10 CHAIRMAN BABCOCK: Well, you might make an
11 offer to try to settle the case, but you keep your thing
12 and you keep your thing at the high level because that
13 gives you the best chance at the trial.
14 PROFESSOR CARLSON: You could make your
15 second offer outside this rule.
16 CHAIRMAN BABCOCK: Yeah. You would make your
17 second offer outside this rule.
18 MR. SCHENKKAN: So shouldn't the rule be that
19 the only successive offer that changes the applicability of
20 the -- we'll call it fee shifting rather than sanctions --
21 is an offer that is more favorable to the other side than
22 your prior; and if you do make an offer to the other side
23 that's more favorable then that ought to be the new
24 trigger, not the early one.
25 CHAIRMAN BABCOCK: Boy, that puts you to a

1 tough choice.

2 MR. SCHENKKAN: But it really encourages

3 settlement because it means that the person that made the

4 offer will say, "Well, that one wasn't good enough. They

5 didn't take it, and I've learned more about the case,"

6 actually, if I double my offer if I'm the defendant, that

7 now looks like the realistic value of the case. You're

8 really encouraging defendants to make such offers and

9 plaintiffs to look closely at each offer. I mean, it seems

10 to me if that's what you're trying to do, that's going to

11 drive it to that direction.

12 MS. SWEENEY: So the new higher -- the new,

13 better offer would obliterate the prior clock.

14 MR. SCHENKKAN: For purposes of the shifting.

15 MS. SWEENEY: Right.

16 CHAIRMAN BABCOCK: Tommy likes that.

17 MR. JACKS: I agree with that.

18 CHAIRMAN BABCOCK: Yeah. Justice Duncan.

19 HONORABLE SARAH DUNCAN: When Paula was

20 talking, the easiest example to me of what she's talking

21 about and I just started wondering what is this going to do

22 to governmental immunity cases when you really can't settle

23 with the employee without completely losing your claim

24 against the governmental entity by statute? There's

25 nothing anybody can do about it.

1 MS. SWEENEY: Exactly. Or in any case where
2 you've got an agent/principal situation. That's exactly
3 the kind of concern that I was worrying about.
4 CHAIRMAN BABCOCK: Yeah. Yeah, Tommy.
5 MR. JACKS: Generally speaking, you can
6 release the agent without releasing the principal, but you
7 cannot in cases of governmental immunities, and there
8 actually is a second provision in House Bill 4 that I
9 favor, which is --
10 CHAIRMAN BABCOCK: Has the media left?
11 MR. JACKS: They do exclude cases by or
12 against governmental entities. There are some issues about
13 whether you can even impose a sanction if it exceeded the
14 cap.
15 CHAIRMAN BABCOCK: Yeah. I thought we had
16 that in this rule at one point, Elaine.
17 PROFESSOR CARLSON: We did. I think at one
18 point we did exclude governmental entities, and I would
19 have to go back and check our votes on that.
20 CHAIRMAN BABCOCK: Insightful. Okay. Let's
21 get back to successive offers. Either we're going to
22 let -- either we're going to --
23 PROFESSOR CARLSON: Here, excuse me.
24 CHAIRMAN BABCOCK: -- rejection of any offer
25 subject or we're going to say if the successive offer is

1 better than the previous offer then it's only from the date
2 of the previous offer.
3 MS. SWEENEY: B.
4 MR. JACKSON: Chip, why couldn't you just say
5 "best offer"?
6 CHAIRMAN BABCOCK: "Only from the date of the
7 best offer."
8 MR. JACKSON: Tie it to successive.
9 HONORABLE TRACY CHRISTOPHER: If we do that,
10 doesn't that take away the incentive to make a second
11 offer? Especially in a small case when -- and, of course,
12 this is a problem I have with this rule to begin with. In
13 a small case if we're talking about an offer of $500 and
14 the judgment is zero or the offer is $500 and the judgment
15 is a thousand dollars, we're going to have a whole
16 satellite issue on these attorneys' fees.
17 And if your offer is 500 and you think, well,
18 you know, really I should settle for a thousand, but I've
19 got this case in a hole and if I can talk the jury into no
20 liability, I'm going to get attorneys' fees.
21 MR. SCHENKKAN: You're not going to get the
22 attorneys' fees because it's capped at the amount of
23 recovery. If you get zero amount, you've zeroed the other
24 party out, because your fees are capped at the amount of
25 recovery. At least if it's the defendant zeroing the

1 plaintiff out.
2 HONORABLE TRACY CHRISTOPHER: So the
3 defendant doesn't get anything for winning?
4 MR. SCHENKKAN: That's right.
5 MR. YELENOSKY: Well, just to bookmark that
6 point, because that's about the third or fourth problem I
7 have with this based on the nonmonetary relief, because the
8 way I read this rule you can zero them out, but if they had
9 a nonmonetary relief claim, you can still get your fee
10 shifting, and that just doesn't make any sense to me.
11 CHAIRMAN BABCOCK: Okay. Any more discussion
12 on the successive offer rule? Do we -- are we split on
13 this? Orsinger.
14 MR. ORSINGER: This is on the rule, but it's
15 not what we're saying, but have we agreed we're going to
16 quit using the word "sanctions" and find some better
17 phrase?
18 CHAIRMAN BABCOCK: We have not.
19 MR. ORSINGER: Okay. I have that comment to
20 make before we vote this in, but if it's premature -- we're
21 in the middle of another discussion, but I think we can
22 find a better phrase or word than "sanctions."
23 CHAIRMAN BABCOCK: Well, there's a reason for
24 "sanctions."
25 MR. ORSINGER: Well, let's debate that some

1 other time. I don't want to be cut off because I don't
2 speak now is what I'm saying.
3 CHAIRMAN BABCOCK: I would like to vote on
4 Richard's waiver right now. I think we can save a lot of
5 time.
6 MR. JACKS: He's been good today.
7 CHAIRMAN BABCOCK: He has been good today.
8 All right. Is there any -- do we have consensus or should
9 we vote on the issue that it's only measured from the --
10 you can make successive offers, but you only are subject to
11 whatever sanctions from the date of the best offer? Best
12 rejected offer.
13 MR. JEFFERSON: So that -- I'm just trying to
14 understand what that means. So three months into the case
15 you get a good offer, or the best offer, and then the case
16 proceeds along and you incur another $50,000 in attorneys'
17 fees and the offeree gets the second best offer and then
18 the case turns out in favor of the offeror. Then the
19 sanctions relate back to the very first offer?
20 CHAIRMAN BABCOCK: If I understand what
21 you're saying, no. If the first offer is a hundred
22 thousand and the second offer is 150,000 then it only
23 relates back to the 150,000.
24 MR. JEFFERSON: Yeah. I'm going the other
25 direction. First offer is a hundred. Second offer is 50.

1 CHAIRMAN BABCOCK: Right. No. It goes back
2 to the hundred.
3 MR. DUGGINS: Last in time.
4 MS. SWEENEY: But as somebody pointed out,
5 you wouldn't make the 50 as one of these. You would just
6 make it as an offer hoping they would take it, but not as
7 a --
8 CHAIRMAN BABCOCK: Yeah. That was my point.
9 MS. SWEENEY: Yeah. It would be an off the
10 books offer. It wouldn't count.
11 CHAIRMAN BABCOCK: Okay. Do we have
12 consensus on this or not? Do we take a vote?
13 MS. SWEENEY: Because there's a clause in
14 here that says you can make offers that don't trigger this.
15 CHAIRMAN BABCOCK: Buddy, do we have a
16 consensus on this?
17 MR. LOW: Yeah. We have a consensus.
18 CHAIRMAN BABCOCK: All right. We have a
19 consensus on that, which means it's lunchtime. We'll be
20 back at 1:00 o'clock.
21 (A recess was taken at 12:15 p.m., after
22 which the meeting continued as reflected in
23 the next volume.)
24
25

1 *

2 CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

3

4 *

5

6

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 11th day of April, 2003, Morning Session, and the

11 same was thereafter reduced to computer transcription by

12 me.

13 I further certify that the costs for my

14 services in the matter are $ 1225.00 .

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

16 Given under my hand and seal of office on

17 this the 15th day of April, 2003.

18

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23 Certification No. 4546
Certificate Expires 12/31/2004

24

25