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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

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ORIGINAL

Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 11th day of April, 2003, between the hours of 1:05 p.m. and 5:20 o'clock p.m. at the Texas Law Center, 1414 Colorado, Suite 101, Austin, Texas 78701.

CHAIRMAN BABCOCK: All right. We're back on the record. The Chair recognizes the Chief Judge of the Fourteenth District Court of Appeals who has a personal plea which will be rejected after a brief period of time.

(Laughter.)

HONORABLE SCOTT A. BRISTER: That's all right. I'm used to that. I in just talking with people wanted to get a brief feel for whether it might be possible at some point to shift our Saturday morning meetings to Thursday afternoon meetings. The Brister household with four kids and a stay-at-home mom who homes schools them five days in a row is enough. And when I tell her I'd like Saturday basically all day by the time you travel there's some problem with it for some reason. And I know our attendance tends to drop off substantially on Saturday morning. I just wondered if there were other people in my situation that might be more interested in coming up for Thursday afternoon and Friday, leaving Friday evening rather than all day Friday and then half of Saturday.

MS. SWEENEY: I'm with Scott.

PROFESSOR DORSANEO: Me too for the same reason.

MS. SWEENEY: Different reasons.

(Laughter.)

HONORABLE SARAH B. DUNCAN: I think I ought to put them on the record.

(Laughter.)

HONORABLE SCOTT A. BRISTER: Paula and I agree. Don't go into any details.

CHAIRMAN BABCOCK: I asked Judge Brister if this was one of those things where he just wanted to say "I asked"; but there is a short-term issue and then a longer-term issue. The short-term issue is for the next few meetings anyway we have got the hotel locked in, and that's a big complicated negotiation. So we couldn't change it in the short term; but we certainly could in the long term.

What I mentioned to Scott was from a practitioner's standpoint I sometimes run into situations where I may be in trial or there may be a hearing set or something on a Friday and I have to beg to get out of that; and almost almost always judges here across the state have been very lenient about that, not as tolerant in the federal system or outside the state; but if you start adding another work day, then that starts to impact some of the

practicing lawyers, but maybe that's just me. Maybe nobody else has got that situation. So that's the only counterbalancing thing; and I'm completely sympathetic with the Saturday thing. My kids are just now in college; but I had lots of those conflicts. And you don't want to miss your kids' activities on the weekends. So Elaine, who has a college age child, I might add.

PROFESSOR CARLSON: Yes. I'm an empty nester. My husband embraces the Saturday meetings for golf reasons.

(Laughter.)

PROFESSOR CARLSON: But I almost always have a class on Thursday, which means I would have to try and record or something; and it would be difficult unless I can get them to switch my entire teaching schedule. I don't know how everybody else feels.

CHAIRMAN BABCOCK: What does everybody else think?

PROFESSOR ALBRIGHT: How do you get students to go to class on Thursday afternoon?

PROFESSOR CARLSON: It is not a problem.

MR. ORSINGER: They're motivated at

her law school.

(Laughter.)

CHAIRMAN BABCOCK: Richard awakes. Does anybody else have any thoughts or comments?

MR. ORSINGER: I have a problem similar to yours. I think there would be a lot of Thursdays I couldn't come. Fridays is an easier day to get off in my law practice. Thursday is harder and both of them even harder.

CHAIRMAN BABCOCK: Okay. What else? Alex.

PROFESSOR ALBRIGHT: What if we did a little bit of both? Because I think there are a lot of people who can't come on Saturdays because Saturdays are pretty low attendance; and we could do some of both. Then we could catch both people.

CHAIRMAN BABCOCK: Yes. Try to maybe, we have six meetings a year; and maybe have three of them where we, you know, where we have them on Friday/Saturday and then three that have Thursday/Friday. Is that your suggestion?

MR. LOW: Alternate.

PROFESSOR CARLSON: That would work.

CHAIRMAN BABCOCK: Would it matter which months those were either from a child

standpoint or from a practitioner's standpoint?

MR. LOW: Probably summer months while the kids are in school. I don't know

CHAIRMAN BABCOCK: Justice Hecht, Justice Jefferson, what are you are thinking about this?

JUSTICE HECHT: We're easy.

CHAIRMAN BABCOCK: Did you get that?

COURT REPORTER: Yes.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN P. PATTERSON: I think it's always hard to know if we're going to have a Saturday session or not. I recognize that problem; but it does seem that attendance falls off; and its hard to know what is cause and effect, but sometimes we have it's issues that are of less interest to people on Saturday, so that those of us who are willing to stay or have a high level of guilt tend to be here.

(Laughter.)

HONORABLE JAN P. PATTERSON: And so it kind of feeds on itself. So it seems to me that we need to have important issues at that time if we're going to have the full committee meet. Another possibility it would seem to start Thursday

night like 7:00 to 10:00. Well, we might have efficient meetings. Not that they're not.

MR. ORSINGER: Can we have an open bar?

CHAIRMAN BABCOCK: Then we'd get some work done. You might have a committee of one from 7:00 to 10:00.

HONORABLE JAN P. PATTERSON: But it does seem that we tailor the meeting on Saturday to knowing that there may not be a lot of people; and it feeds on itself in that respect. So I just throw that out.

CHAIRMAN BABCOCK: Okay. Any other thoughts about it? Is there -- there seemed to be great enthusiasm for the Thursday versus Saturday when it was first proposed. Is that a fair read from everybody?

MS. SWEENEY: Do up want a straw poll?

CHAIRMAN BABCOCK: Huh?

MS. SWEENEY: Do you want a straw poll?

CHAIRMAN BABCOCK: Okay. Who wants Thursday as opposed to Saturday? Who wants to keep it the way it is? It's 16 want to change it and

eight want to keep it the same. Actually nine. The Chair voted on this.

MR. JACKS: Since it was so close.

PROFESSOR DORSANEO: People in Austin should not get to vote.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: I want to second what Jan Patterson said about the Saturday meetings. It is frustrating to be here and have very low attendance and less sexy issues. Okay. And I think that has happened. And I don't know which is cause and effect. I voted for Thursday; but I can do either way. I mean, I'd be in favor of compressing it all into an intensive Friday or maybe coming more often and doing it only on Friday.

CHAIRMAN BABCOCK: That's what I have tried to do, David, is try to compress it into Fridays when I can; but we're not going to make it this time. And there's going to be plenty of sexy issues tomorrow, by the way.

Why don't we do this if it's all right with everybody: Why don't Lee and I see if there are some months where we can do the Thursday/Friday and see how it works and see what our attendance is and what problems it creates for us. And we'll do

that as soon as we're out of this cycle with the hotel, which I don't know when it is; but and we'll take a shot at it and see how it works. Is that, Judge Brister, does that work all right for you if we do it that way?

HONORABLE SCOTT A. BRISTER: Sure.

CHAIRMAN BABCOCK: Okay. All right. So we're back to -- is this sexy or not, Judge Peeples, what we're doing now?

(Laughter.)

HONORABLE DAVID PEEPLES: Everything. Everything.

CHAIRMAN BABCOCK: I think we're going to have to get you to rate these projects every time on the Peeples sexy requirement. Okay. Elaine, where are we?

PROFESSOR CARLSON: Let's see.

CHAIRMAN BABCOCK: We left off at successive offers and we're going to take it only from the best offer. You can make them, but only from the best; but you're subject to sanctions only from the time your best offer is rejected.

PROFESSOR CARLSON: Okay. So we're ready to move on?

CHAIRMAN BABCOCK: We're ready to move

on.

PROFESSOR CARLSON: If we could, if we could go back to page three and maybe address this.

CHAIRMAN BABCOCK: That's not the way we...

PROFESSOR CARLSON: This could be quick, it could be long. 167.2(a)(5) which says that an offer needs to be the offer to settle all the claims, Paula raised the issue of whether it should include all parties. There were some cases where that might be appropriate and a lot of cases that it probably wouldn't be appropriate. I don't know if we want to discuss that or leave it the way it is or not.

CHAIRMAN BABCOCK: Well, it should at least do this. The question is whether it should be more.

PROFESSOR CARLSON: Right. Should it be "as to all parties," or just can you offer to settle "as to a party?"

MR. ORSINGER: I mean, the problem I have with "all parties" is that there may be somebody that is willing to do their share and someone who is not, and the one who is willing to do

their share then gets to suffer the sanction. Doesn't that go with that territory? It seems to me like if you're going to be punished, you ought to be punished for what you do wrong and not what somebody else does wrong.

CHAIRMAN BABCOCK: Tommy, I know you've thought about this.

MR. JACKS: Well, I have. I mean, if one of the terms of the offer though is that it is conditioned upon acceptance by other parties, I don't see that you're not in the same boat under the rule as written.

PROFESSOR CARLSON: Paula gave an example on a multi-defendants case where one defendant, the defendants. I think under your hypothetical, Paula, I don't want to put words in your mouth.

MS. SWEENEY: I'll let you know.

PROFESSOR CARLSON: If there were multiple defendants, that there might be some agreement, that the defendant with the least means might trigger an offer and not have it conditioned. And there's really, the only thing the plaintiff, I guess, could do is come up with a counter offer or risk the --

MR. JACKS: By way of information, there was an ABA offer of judgment rule proposed in '95; and they had a special provision for multi-party cases that basically in the case of multiple plaintiffs the rule applied only if the right of each plaintiff to recover is identical to the right of other plaintiffs and only one award of damages could be made in the case, and as to multiple defendants only applied if the liability of each defendant is joint and several.

I've also seen a provision that had to do with the multiple parties where one is vicariously liable for the other. I don't remember which provision that was; but I've seen at least a couple of versions where there are special rules. I think it's Nevada that has a special provision in their statutes for multi-party cases.

And I do see more, certainly more complexity in the multi-party case; and I think there probably are more opportunities for gamesmanship. I just can't imagine what they all are; and it's another one of the parts of this rule that makes my head hurt every time I start thinking about it. So...

CHAIRMAN BABCOCK: Did House Bill 4

deal with that?

MR. JACKS: Well, let me look.

CHAIRMAN BABCOCK: They talk about a defendant or group of defendants.

MR. JACKS: I think under House Bill 4 they don't. I don't recall their limiting offers by multiple defendants. Under House Bill 4 only defendants can make an offer.

CHAIRMAN BABCOCK: Right.

MR. JACKS: Not the plaintiffs. And they speak in terms of a defendant or group of defendants being able to do that. I don't remember any limits on the multi-party offer.

CHAIRMAN BABCOCK: It doesn't look like there is. Okay. Richard Orsinger.

MR. ORSINGER: I guess Tommy's explanation didn't help me very much. I can see a situation, say, involving a family automobile collision where you have a husband, a wife and a child that are all plaintiffs, and you might have several defendants on the other side and then a negligence allocation. And so are we envisioning that all the plaintiffs would have to make one consolidated offer to all the defendants who would be consolidated for purposes of the offer? And are

the defendants if it is a consolidated offer, are all the defendants bound if the collective liability of the defendants is within 70 percent? Or what if somebody's allocation is only 25 percent? Are they out of the sanction range? I mean, are these sensible questions?

PROFESSOR CARLSON: Yes.

MR. ORSINGER: Okay. Then how do you make that work?

PROFESSOR CARLSON: That's why we didn't do it. It's very difficult, and we probably could think it through; but Tommy is right. The only one I guess it is Nevada; and it limited the requirement of the joint offer when there was a common theory of liability and a liability the defendants were entirely derivative of the liability of the remaining defendants to whom an offer was made or the liability of all the defendants to whom the offer made was entirely derivative of the liability of the remaining defendants when the offer was made.

PROFESSOR DORSANEO: I bet that took a long time.

PROFESSOR CARLSON: So it was limited in the situation where you could really show that

there was a reason why the offer should be joint because of the derivative liability; but I don't know if we want to go there or not. You know, it was just a factor we leave to the judge under the discretion to award. How are we referring to this now? I don't want to use the word "sanctions." Fee shifting costs under the trial Court's discretion as proposed under 167.6(d).

CHAIRMAN BABCOCK: (b) is mandatory on one. 167.6(b) is mandatory, isn't it?

PROFESSOR CARLSON: (d).

MR. DUGGINS: (d)(3).

MS. SWEENEY: "Must."

MR. SHENKKAN: It's mandatory; but it's subject to (d)(3; and the limitations and the exceptions in (d)(3) is the one that the Professor was alluding to, and that is the basic kick-out if the judge says it's gamesmanship. So the argument would be in such a case "that's gamesmanship because"; and then you'd have to fill in the blank why that was gamesmanship.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: As I understood Tommy, if the condition of the offer is that all defendants accept and then one doesn't, so therefore the offer

gets rejected, I don't think those that accept it ought to be penalized, if that's the way it is now worded.

CHAIRMAN BABCOCK: Yes. Good point. Skip.

MR. WATSON: Just to clarify, as I read (a)(3) and (5) together I'm assuming that because you have to identify the party making the offer and the party or parties to whom it is made that for example a plaintiff could pick off the one recalcitrant defendant among many defendants who is holding things up by putting the penalty and the onus on them and making an offer only to that defendant. Is that incorrect?

PROFESSOR CARLSON: No. I think that's correct. Because as this rule is proposed it can be between a single plaintiff and an single defendant regardless of the multiple party posture of the case.

MR. WATKINS: Okay. I just wanted to be clear.

MR. ORSINGER: The problem is created if you change the rule to "parties" rather than "offeror" and "offeree" and that's when you walk into the complexities.

CHAIRMAN BABCOCK: (3) says "identify the party or parties making the offer."

MR. ORSINGER: But it's voluntary. Right? I think as I understood --

CHAIRMAN BABCOCK: It's all voluntary.

MR. ORSINGER: No.

PROFESSOR CARLSON: No. What Paula was -- and again Paula, if I'm putting words in your mouth, tell me. But I think what Paula's consideration was that should we require in a multiple party case that for the offer of judgment rule to be triggered that is mandatory as to all parties.

MR. ORSINGER: Right. If you do that, then you have these difficulties that no one has seen their way through apparently.

PROFESSOR CARLSON: So are we of the mind that that is better dealt with with the trial Court discretion in 167.6?

CHAIRMAN BABCOCK: That's what I think.

HONORABLE CARLOS LOPEZ: If we're going to leave that up, quote, "up to the judge," that's fine; but I think there ought to be an

asterisk or something that says one of the factors to consider is the extent to which and then talk about this whole scenario of not punishing the guy who didn't do anything wrong. And that is not artful language; but we all know why we're leaving it up to the judge. Let's make sure the judges know.

PROFESSOR CARLSON: Okay. I'll make a note.

MR. BOYD: Clarification. Leaving it the way it is where it's "offeror" and "offeree," but you're in a multi-party case, is the intent that the party who receives the sanction receives all of the attorney's fees they expend after the rejection, or do they have a duty to segregate which time was spent as to that particular defendant?

PROFESSOR CARLSON: We did not discuss that. That's a valid concern.

MR. BOYD: Yes. I mean, any of us who have ever had to litigate how to make the other side segregate their fees between those causes of action they prevailed on and didn't, it's almost impossible. And yet if you have a situation where one defendant ought to have to pay sanctions and the other shouldn't, does that defendant pay the full

hourly fee or some portion of it?

PROFESSOR CARLSON: You know, and I guess Jeff, to some extent it goes to the reasonableness of the fees, which isn't a very satisfactory response to you.

CHAIRMAN BABCOCK: There is jurisprudence on whether or not claims are inextricably entwined --

MR. BOYD: Right.

CHAIRMAN BABCOCK: -- such that you get the whole ball of wax and you have got to segregate. I suppose you could draw on that jurisprudence in this instance.

MR. BOYD: If you spend time taking depositions to prove my co-defendant who is not being sanctioned is liable --

CHAIRMAN BABCOCK: Right.

MR. BOYD: -- do I have to pay for that as part of the sanction? And maybe the "reasonableness" language gets there; but I bet we'll be litigating that.

CHAIRMAN BABCOCK: Yes.

MR. JACKS: You get the same problem in that we've excluded from the rule certain classes of cases, for example DTPA cases, which because the

DTPA has its own offer of settlement mechanisms. And in a case where you have mixed causes of action, DTPA plus fraud plus contract, for example, you have a similar problem. Is the offer only to cover the DTPA claim? And then when you get to the outcome what are you comparing with the offer? And then what fees are you imposing sanctions if you're imposing sanctions? And if you superimpose that over the multi-party situation, then you really get a headache.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Tommy, does that mean? I thought under 167.1 if it's a DTPA claim, it didn't cover it.

MR. JACKS: Well, except that it's common that DTPA claims appear in cases that also have other claims in them.

MR. HAMILTON: I know. But if it had a DTPA claim, doesn't it mean the whole case is covered?

MR. JACKS: The rule doesn't say that, or I don't think it makes that clear. And so there we are. It seems to be an open question, Carl, in the rule as it's written.

HONORABLE CARLOS LOPEZ: What instead

of trying to identify this myriad of everything that is going to come up plus the ones we haven't thought of let's just put some, we're going to put some broad language in, Transamerica language that "the punishment has got to fit the crime" kind of language that allows the parties to tailor their arguments to the judge based on exactly what has happened here. Like you can make the argument "Judge, why should I have to pay for that" and just and leave it very open ended. Because if not, I don't see how we're ever going to get there. There are just too many possibilities.

CHAIRMAN BABCOCK: Is the language we already have in the rule sufficient to allow that, "the punishment fits the crime?"

MR. ORSINGER: Well, it depends on whether the offeror who makes the offer to more than one defendant stipulates that all defendants have to agree, and all defendants do agree but one. What happens then?

CHAIRMAN BABCOCK: Well, you know, the language says that if the Court finds that it would unjustly punish a party or unjustly reward unfair strategic conduct rather than a good faith attempt to reach a settlement, that's pretty broad.

Judge Patterson and then Paula.

HONORABLE JAN P. PATTERSON: Along the same lines, I've been wondering whether any thought was given to some statement or purpose at the beginning. I know we rejected that in some context; but I wonder if it might not be suitable here to state what the objective of the statute (SIC) rule is so that the interstices issues can be read in the context of the general purposes. If it is to promote settlement early in the litigation, if it is whatever those two or three things are, if we could come up with those for a statement of ideals.

CHAIRMAN BABCOCK: Statements of ideals for the "rule" as opposed to "statute" since we're just doing rulemaking here?

HONORABLE JAN P. PATTERSON: Yes.

CHAIRMAN BABCOCK: Yes, Paula.

MS. SWEENEY: Which dovetails with what I was going to say. Looking at this language that you just keyed on about "punish a party or unjustly reward, unfair strategic conduct rather than a good faith attempt to reach a settlement" --

CHAIRMAN BABCOCK: Right.

MR. SWEENEY: -- you know, the implication if you look at what that sentence says,

is that there is something unfair about having strategy considerations in this and that the implication of this whole rule and what I'd like to see somewhere in the preface or where ever it would be is that we do not wish to penalize parties for submitting bona fide disputes to juries in the State of Texas, because implicit in a lot of this rule is a punitive sense that if you go to trial, 50 percent of the litigants are frivolous or in some way taking advantage of the existence of the system by using it. And I don't think certainly that this committee or the Court if it writes a rule, should by implication allow that inference to be drawn from the use of the jury system. So I would very much want that to be reflected somewhere that simply going to trial and losing does not mean you were wrong for being there in the first place on either side of the docket.

And then the other part of it, and that goes back to this multi-party situation, I don't know how you write it to solve the problem; but rejecting an offer from one defendant when that offer will unfairly prejudice your rights against other defendants may be the key, that if that the Court must take into account other parties, not just

the offeror and offeree in evaluating the merit of the parties' conduct. And I think that gets you to that place, because I don't think we can draft in a way that says "In this type of case where it's an agency relationship you have one set of rules; and where it's multi-party but not agency you have got another." And but if there were a comment about taking into account the relative positions of the other non-offering parties, then that would be another indication to the Court of what factors to take into account in deciding whether the strategy is I guess a fair versus unfair strategy.

PROFESSOR CARLSON: Uh-huh (yes).

MR. SOULES: The effects on the claims of the defenses of the other parties.

MS. SWEENEY: Yes, exactly.

CHAIRMAN BABCOCK: Any other comments?

HONORABLE DAVID B. GAULTNEY: If I could just mention this, because Buddy Low asked me to, and he's not here. And he mentioned the situation where you have multiple claimants to a limited fund. I think this is the reverse of what Paula was saying. For example, this sanction is a carrier. Let's say there is a policy with three

claimants, there is a lack of willingness of any claimant to accept, and they all think they're entitled to the same fund. The carrier can't get rid of the money, can't settle any of the claims. Would this be taken into account in terms of they get multi access in the policy, whether that was a reasonable effort? I hadn't really thought through that issue. Buddy mentioned it just at lunch; and so I wanted to throw it out.

CHAIRMAN BABCOCK: Elaine, did you-all think about that at the time or Tommy?

PROFESSOR CARLSON: I think we did think of that when we tried to draft fairly broad language in the trial Court discretion; but what I'm hearing and I kind of would like a little more input from the full committee is is there a need for more definitive factors in 167.6(d), (e), (a) and (b)?

MR. JACKS: There are models for that --

PROFESSOR CARLSON: Uh-huh (yes).

MR. JACKS: -- in I think in the proposed Federal Rule which has been picked up in some other, well, in the Florida statute; and I think in the ABA proposal there was a list of a half a dozen or so factors that the Court should

consider. I've got those here if you care to hear them.

CHAIRMAN BABCOCK: Yes. I think my recollection is that in the past we have shied away from factors all the way from the parental notification rules to the Daubert rules.

MR. JACKS: I suppose you could also do it in a comment; but there's quite a lot of precedent for factors, and some of the things we talked about could be there. It's the language that we've got gives a fair amount of discretion, but little guidance.

CHAIRMAN BABCOCK: Uh-huh (yes).

MR. JACKS: And so the question is do we want to offer more guidance; and that might or might not be more or less discretion.

CHAIRMAN BABCOCK: Yes. What does everybody think about that, factors, guidance, whatever you want to call it? Richard Orsinger.

MR. ORSINGER: I favor us articulating the important factors for the Courts, because I think there is a habit either among judges or among people opposing to say that if it's not listed, it's not a legitimate consideration. There is a concommon danger that if we start listing and

we are not --

CHAIRMAN BABCOCK: What kind of danger?

MR. ORSINGER: There is a danger that goes along with that --

(Laughter.)

MR. ORSINGER: -- that if you start listing and you're not complete, then you have created an exclusion; but these are very general. And I'm thinking, for example, in the situation Buddy Low raised if you have an insurance policy that maxed out and the damages are legitimately well above that and the insurance company or the defender can't give it to any one plaintiff and the measure not on what you collect, it's on what the judgment is, it's impossible for the defendant to accept a reasonable offer in that situation. So that means we have fee shifting even though it's deserved, if I understand the operation of the rule. And so it seems to me like we ought to put some serious thought into the kind of situations where we think someone should not be punished or factors to be considered and we ought to list them.

HONORABLE CARLOS LOPEZ: In the inter pleading.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: I have got the Florida factors, if that's helpful.

CHAIRMAN BABCOCK: Uh-huh (yes).

MR. JACKS: There are six of them. The first is "the then apparent merit or lack of merit in the claim" meaning at the time the offer was rejected, "the number and nature of the proposals made by the parties, the closeness of questions of fact and law at issue, whether the party making the proposal has unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal, whether the suit was in the nature of a test case presenting questions of far reaching importance affecting the non-parties," and the last is "the amount of judicial delay, cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged." So those are...

MR. ORSINGER: Could I ask, please?

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Is that rule where the Court has complete discretion to impose sanctions that the Court measures, or is there some kind of automatic sanction like ours and that is when the

Court can reduce the sanctions?

MR. JACKS: It's actually the Court under the Florida statute has discretion to determine the reasonableness of the, in that case, the fee speaking in terms of sanctions since it's done by statute rather than by Court rule, and says the Court shall consider these factors in making that. It sounds to me like the Court has fairly complete discretion in terms of how much or how little of the fees incurred to assess as a cost. The Court also may in its discretion determine that a proposal was not made in good faith, in which case the Court may disallow the award entirely.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: How does that work in Florida? Do they have another bench trial after the trial in order to figure out liability for attorney's fees? Because in a lot of cases you're going to have --

MR. JACKS: Yes.

CHAIRMAN BABCOCK: Yes. We talked a lot about that, you know, as a reason not to do this because of satellite litigation. But yes.

PROFESSOR DORSANEO: Hmm.

MR. JACKS: You know, there's even a

question whether you're entitled to a jury trial on the issues of sanctions.

CHAIRMAN BABCOCK: Yes. We talked about that.

MR. JACKS: Yes.

CHAIRMAN BABCOCK: Okay. What do we want to do? Benton has arrived.

HONORABLE LEVI BENTON: How are you, sir? Excuse me for being late.

CHAIRMAN BABCOCK: That's quite all right. I'm glad to have you with us. Skip.

MR. WATSON: Chip, my problem with the broadening of factors, the factors as they are in broad numbers, is that it doesn't address I guess I would say who is ultimately going to pay the sanctions that are presumeD unless the Court intervenes to reduce them. And it seems to me that as it's now written in response to what Buddy had raised is that it looks like this is a way that the Court is creating a situation where an insurance carrier with policy limits in a multi-plaintiff case is going to be placed in an intolerable Stowers situation. It's a way to raise the limits unless something is affirmatively said that makes that not happen; and none of the six factors in Florida keep

that from happening. That would be the argument made, there is nothing in print that says that will happen.

More important to me frankly is the ethical dilemma that the lawyer receiving such an offer is in whether it's whether he has a cap in terms of insurance or worse yet a recalcitrant multi-defendant or multi-plaintiff bunch of parties where for economy of scale, aligned interests, et cetera everyone has hired the same counsel. In oil and gas cases the operators, the attorney general represents the non-operators. In mass tort the same lawyer is representing all of the plaintiffs. Where one or more recalcitrant parties represented by that attorney refuses the offer it's not just that that party is going to get tagged with costs and expenses. It means the others who want to settle are prevented from doing it. And it appears that to keep the ultimate charge for either malpractice or worse yet breach of fiduciary duty for not giving the clients all of the information they need to keep them from getting sanctioned, which will be the charge that there wasn't full disclosure of everything we needed when you gave that advice, that we're going to have to bail, and

we may have to bail on all of them once that occurs and get new counsel in there to represent these conflicting interests of previously aligned parties in a joint defense.

And I just don't see how -- I don't want to make too big a deal out of it; but I'm not sure you can make too big a deal out of it. Those two problems cannot be finessed, and they've got to be dealt with specific language that sets forth what is going to happen in at least those two instances, limited insurance multiple claims and one attorney representing multiple parties one of whom wants not to accept an offer that is made on all of them.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I'm not sure that at least the first one is a problem. I mean, I assume you're talking liability insurance. You can settle with whomever, and you use up your limits, and that's the end of it. That's current law, I believe, Soriana and Deere.

CHAIRMAN BABCOCK: What about Skip's second point?

PROFESSOR DORSANEO: I'm not sure I'm following all this when I'm listening, so I can't address that.

CHAIRMAN BABCOCK: Okay. Skip, really your comments sort of argue against having a rule at all.

MR. WATSON: That's not my intent; but I don't want a rule that is going to come around and bite me in the back side. That's where my comments are going.

CHAIRMAN BABCOCK: I think all through these discussions there has been that strain among the practicing lawyers that this is a rule that has implications for how you advise your clients and, you know, whether or not somebody later can question your judgment on it and claim malpractice. So I think the Court has been made well aware of all our concerns in that regard. So do we have the Florida laundry list or not?

MR. SCHENKKAN: Well, maybe this is a more general procedural question and maybe it only applies to those of us who are new; but it's helpful on something like the Florida information if we had the full text including the context, because it sounds like that language is put in the middle of a statute that is designed in a different way than the rule we're working on. And I'd kind of like to see the interplay.

I'm wondering if, I don't know whether the schedule is that some final advice to our client the Court must be rendered on this particular rule at this meeting, or if this is something we're going to be taking up further. I for one would very much like to have the benefit of an e-mail version, if Tommy's people are able to do that, of the Florida statute and the Nevada one as well and perhaps let those who are more familiar with some of these dilemmas call our attention to a case if there's a case that illustrates the problem so I can think about it better.

I'm having a little difficulty deciding whether these instances are likely to be common enough and hard enough for the trial Court to recognize as falling under the discretionary out to warrant fixing in the rule and perhaps messing up a rule that has worked perfectly well in the middle of the run cases. I just don't feel like I have got enough information.

CHAIRMAN BABCOCK: Yes. Pete, I think the Court is desirous of us getting through this rule at this meeting and giving its best counsel we can recognizing that we've spent three or four prior SCAC meetings and the Jamail process. And a lot of

the things you're hearing today are not being raised for the first time. They are for you, I know; but they're not for this committee and not for the record and not for the Court. Carlos.

HONORABLE CARLOS LOPEZ: Normally I argue the other way; but in this particular situation with this many variables I think we should, the language about justice and all the rest of it I think it's then up to the parties to flesh out what that is for the Court. And if they can say "Well, here is what they do in Florida with a very similar situation, not identical, but similar" and just let that go. If not, we risk doing what happens with Daubert, for example, where they listed the factors and now all the lawyers think that that's, it's limited to that, and it's not.

CHAIRMAN BABCOCK: Yes. And we have had many discussions about factors and whether just what you say. But Alistair.

MR. DAWSON: When I heard the Florida factors it sounded to me like it gave the trial Court broad discretion; and as I read the rule as proposed it's mandatory with some limited exceptions, so there seems to be a fundamental difference of approach. And I can certainly see in

Florida you're going to have a lot of satellite litigation, post judgment litigation about all kinds of excuses of why you did or didn't accept settlement offers; and it seems to me by reading what the committee came up with they wanted to avoid that by having sort of mandatory limited exceptions. And that was my comment about the Florida factor. It seems to change the whole philosophical approach of the rule.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just had a question on the multi-plaintiff situation. From a plaintiff's attorney point of view are you worried the plaintiffs will say "I offered $10,000,000 to settle with 10 plaintiffs" and then that somehow will trigger this rule?

My reading of the rule would be the defendant would have to say "I'm offering $200,000 to Plaintiff A and one million to plaintiff B," and that a defendant couldn't say they all have to settle. Now and maybe if I'm reading it that way, it needs to be cleared up. I mean, I was anticipating specific offers from specific defendants to specific plaintiffs so that we could understand what was being offered. Is that not

right?

CHAIRMAN BABCOCK: It sounds reasonable; but I don't know if it right.

PROFESSOR DORSANEO: In the aggregate. We have rules against making aggregate settlements.

MR. SOULES: No.

CHAIRMAN BABCOCK: If we can get on to Bill here.

MR. SOULES: You have to be damn careful how you do it.

HONORABLE CARLOS LOPEZ: Wouldn't we define what an unconditional unqualified offer is? And one, it says it's got to be, it only works if X, Y or Z. Maybe it shouldn't trigger the rule at all. That's one way.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Back to the factors, I personally like having factors because I think that it helps define the parameters of our discretion. And, you know, I'd rather have the factors here either in a comment or in the rule than, you know, try the case, the case goes up on appeal and then we get the factors, which is okay too; but it just seems more sense to have the

factors ahead of time.

(Laughter.)

HONORABLE JANE BLAND: Factors seem to just be generated and, you know, the factors appear; and it seems to me like if we have an idea and if we have to go by some factors, they need to be tailored to, you know, our needs here in Texas; but I don't think -- I think that's a good idea and it would give the lawyers some guidance about when would you be able to seek a trial judge's, you know, intervention to get us to I guess opt out of the rule or the rule not apply or something like that.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: But several of these last comments go back to something that is unclear in the way this rule is written. And Elaine and Tommy, I don't know what you-all's decision was in your committee. But is it the intent that the default mode is that this rule does apply and there will be fee shifting in every case where an offer has been made and rejected, or is it that this rule only applies in cases where there has been unreasonable conduct? Because I think that is a fundamental issue that needs to be clear. And are we going to in every case are we doing to do this?

Are we going to have this kind of a hearing after every verdict and presuppose that somebody was frivolous for being down there?

I agree with you the way this is written we are going to have this in every case; and I don't -- that to me seems a bizarre thing for the Supreme Court of the state to say to the litigants of the state, "one of you is frivolous for being here" in every case. And I wonder what you-all thought in your committee and whether the intent of the rule is for the default to be this won't come up or the default to be this will come up.

CHAIRMAN BABCOCK: Do you want me to respond to that? I think the intent was that it will come up, not that it won't come up.

MS. SWEENEY: In every case?

CHAIRMAN BABCOCK: In every case. And that if there had been an offer that was rejected and it fell outside that parameter, that safety zone, "safety net" as Tommy called it, then yes, sanctions will be awarded subject to the discretion of the Court bounded by what is said in the rule. I think that was the intent. Now whether that is a good idea or not is something else. But Judge Brister and then you, Bill.

HONORABLE SCOTT A. BRISTER: And again, I think the reason for that is, as I explained, I don't -- my interest in this rule is for the small case taken on a contingency fee with the client which my friends in the plaintiff's bar say they at least in their younger years tend to have lots of who have a fabulous idea of what this case is worth because they've watched too much Court TV. And so they want, they tell me there is no problem getting their client to turn down offers from the defendant because they think everybody gets lots of money.

And in that case the plaintiff's attorney is stuck. You have to try that. If it's a small personal injury case, car wreck, fender bender in Harris county, the defense attorney is not -- the insurance is not going to pay, because they win most of them. The plaintiff's attorney likes to withdraw, and I won't give you my story about that again; but the judge is out of their mind if you let the plaintiff's attorney withdraw, because then you're stuck with this nut trying it pro se. And the plaintiff's attorney ends up having to try a case they know they're going to lose because there is no leverage with those plaintiffs. They have

nothing to lose. Their agreement says they get a free trial.

So if you treat this as a sanction, that assumes that there is some bad faith on the plaintiff's part. No. They're just wrong. They have a wrong idea about the way the justice system works because they've watched too much TV. It's not that they're bad people or they're doing this to harm. They're just misinformed.

And the idea of this rule as I understand it was to put a cost at least on those cases so that a plaintiff's attorney could explain to your own client, "yes, we can go all the way to trial; but given the offer they have made you will end up losing money if we go all the way to trial" so that there will be a down side on small personal injury cases. And that's why it shouldn't be tied to a post hearing inquiry about whether they acted reasonably and stuff because that is going to be a waste of time. They were just wrong.

And the question, if a defendant is wrong on a breach of contract case, they pay the attorney's fees. Nobody seems to think there is a problem with that. You were just wrong. And whether you were unreasonable defending the contract

or not is irrelevant. On DTPA whether you were unreasonable in defending your deceptive practice is irrelevant. You were wrong. You pay. So it's not that unreasonable a rule in large areas of the law today.

CHAIRMAN BABCOCK: Carlos, did you want to say something?

HONORABLE CARLOS LOPEZ: Well, we get a lot of the cases that the judge is talking about; and it makes sense in the cases he's talking about, which is a bunch of them; but there is a whole bunch of them that aren't like that. And I think a lot of people are concerned. Like for example, Paula, was it meant to just, was it meant to penalize if they were just wrong, or was it meant to penalize them if they are unreasonably wrong or intentionally wrong or, you know, something more culpable than just being wrong?

CHAIRMAN BABCOCK: Yes. I don't think intent had anything to do with it. I think it was meant to shift fee sanctions, whatever you want to call it; but if you're not right about your case within certain parameters, then you pay.

MR. SWEENEY: Judge Brister says it's just for crummy little car wrecks. Can we put that

in?

CHAIRMAN BABCOCK: Huh?

MS. SWEENEY: If this is only meant to apply to crummy little car wrecks, let's say so.

CHAIRMAN BABCOCK: Well, I don't --

MS. SWEENEY: But it's not written that way. It's applies. And I'm not meaning to be that facetious. There are a host of cases where litigants are entitled to go to the courthouse and have a jury resolve their claims. And if we're going to have a rule like this, I think it needs to specify a reasonableness standard. If there is some yahoo who has watched too much TV who won't listen to his lawyer and gets stuck with a judge who won't let the lawyer withdraw, then you've got a situation where they're being unreasonable, the lawyer is stuck going to trial and doesn't have a choice. Fine. Make it clear it's a reasonableness standard which is what you're describing. But to have it be a strict liability type standard where every time you lose then you have to have a whole nother trial over this stuff is going to clog the courts, because there is a loser in every case.

CHAIRMAN BABCOCK: Ladies first.

PROFESSOR CARLSON: Paula, it is

"unreasonable."

MS. SWEENEY: To go to trial?

(Laughter.)

PROFESSOR CARLSON: No. No. It is based on an unreasonable rejection; but it was per se in that we by the end of the meeting hopefully agree on a buffer and say "Outside that buffer you're unreasonable presumptively and then you've got to come into the exception.

HONORABLE CARLOS LOPES: So you would address Paula's concern by saying the buffer might be bigger?

PROFESSOR CARLSON: That's a possibility.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE DAVID B. GAULTNEY: She addressed my question, because the title of the rule says "Unreasonable."

CHAIRMAN BABCOCK: He was first. Yes, go ahead, Carl.

MR. HAMILTON: As I understand one of the reasons we used the word "sanctions" is because that's been used and upheld in other places; but in the other places where it's been upheld it's because of misconduct, but this is clearly not misconduct if

someone just guesses wrong about what the value of the case is. And I'm not certain that we ought not to have some hearing about whenever it amounts to such misconduct as to be sanctions.

CHAIRMAN BABCOCK: Well, it's unreasonable conduct. It's more blatant.

PROFESSOR DORSANEO: Maybe we're getting back to the beginning of what Tommy was talking about with these factors; but I don't like to put factors in generally, but this last part is seeming to be considerably more important. The 167.6(d) in (3) does say, has this, "If you do this, judge, you have to have detailed written findings" is kind of a barrier to the judge saying that imposition of sanctions would unjustly punish the party. But it would seem to me that if you take away all of somebody's recovery that they were otherwise entitled to because they went to trial, that looks like it is punishment and arguably it's unjust. Maybe you say they were unreasonable, so it wasn't unjust; but that's, if this is not just some little tiny extra afterthought to save people in rare cases, if it's a principal part of the architecture of this rule, it needs more work.

MR. SOULES: If we think we're going

to have, unless we're just going to have "plaintiff pays and nobody else," then we need to get down to business, because that is what is happening in some pink building nearby. And we can debate this until we're blue in the face; but you know, that's very, it's not a low probability problem.

JUSTICE NATHAN HECHT: Or we can report back to Senator Ratliff that we just failed.

MR. SOULES: Yes, sir. And "the plaintiff pays" and so be it. That's the way it's written over there. We need to get this balanced. We need to do the best job we can. We need to get down the trail today and get this over with. We've got to make some sense. It won't be perfect; but it will be probably better than some that's over in some pink building somewhere nearby.

(Laughter.)

MR. SOULES: And we'll have a better chance of maybe doing something about it later after we have a little experience with it. And we've just got to get moving. We can wring our hands and emote all we want; but things are moving, man. The train is moving, and you ain't stopping the train.

PROFESSOR DORSANEO: We'll just do it piece by piece and do it.

MR. SOULES: Okay?

CHAIRMAN BABCOCK: "Light tan building" I think is a better description. All right. So Tommy, do we put these Florida factors in here or not?

MR. SOULES: I think we put the factors in. We have got Kraus factors. We've got 104 factors, attorney's fees. We've got factors for gross negligence. We've got all kind of factors.

CHAIRMAN BABCOCK: So you're a "factor" guy?

MR. SOULES: Let's give them some factors. Okay? Including the ability, including I don't remember whether one of them is the ability of the guy who makes the offer to pay. That ought to be one factor. Huh? And just; but you know, some reasonable factors, some standards for these trial judges to think about. Otherwise nobody knew what the Kraus factors were, remember, until Kraus was written?

(Laughter.)

MR. SOULES: We didn't have a standard for punitive damages. Chip, why wait?

CHAIRMAN BABCOCK: Well, I think --

MR. SOULES: And you can submit all

this in one jury trial, in one verdict. I had a case both sides said breach of contract. Okay? The judge came and gave my client nothing, gave Carlos Sedillo's client nothing, gave me $75,000 attorney's fees and gave Carlos $75,0000 attorney's fees, the same verdict. It's not that complicated. It doesn't take that many trials.

CHAIRMAN BABCOCK: If you're not careful, we're going to call these the "Soules factors."

(Laughter.)

PROFESSOR DORSANEO: The "Soules train."

CHAIRMAN BABCOCK: The "Soules train." The Soules train is leaving the station here. Yes, Judge Peeples.

MR. SOULES: I vote we have factors.

HONORABLE DAVID PEEPLES: It's beguiling to say we ought to have factors, because as Alistair Dawson pointed out, the Florida factors will generate satellite litigation because they're so expansive just any old reason will get litigated whereas the way it's written right now it is basically you've got the buffer which defines the playing field, and then there will be the sanctions

or fee shifting except in these exceptional cases; but the Florida factors change the whole approach of this. And so it's not just a matter of let's help our poor judges know what to look at. The factors from Florida will expand the whole reach of this and change the shift of it.

MR. SOULES: How about picking some factors out of 104?

HONORABLE DAVID PEEPLES: What I'm saying, Luke, is that by giving factors you change the whole nature of the rule.

MR. SOULES: Well, are we going to use the 104 factors for fee shifting?

MR. DAWSON: Not under this rule as written.

HONORABLE DAVID PEEPLES: I'm in favor of leaving what is on page seven in there.

MR. SOULES: You're not even going to use the 104 factors? When somebody takes 10 lawyers to one deposition you've got to pay every dollar.

MR. SCHENKKAN: We are going to use the factors because it says "reasonableness." But I'm in favor of leaving it the way it is. And the argument for leaving it the way it is is that it is designed to be a system that is self administrating

as much as possible and to create an incentive to settle in the cases to which it applies, and then there is a separate debate about which cases it ought to apply to. But as drafted it's only going to set up the $50,000 fee maximum and less than that if the amount recovered is less than that, because you can only zero a plaintiff out with these fees. You can't make a plaintiff pay out of pocket.

So we're talking about cases in which $50,000 in fees are a big portion of what is potentially at stake, relatively smaller cases. You don't want satellite litigation in such cases. You don't want it in general; but especially you don't want it in these cases. So the system you have here where you only get out of that relatively modest amount of fee shifting if you can make a really strong showing that it is really unjust is a good rule. It is going to dispose of the enormous middle run of these cases and not cause a problem.

I'm starting from your fundamental premise that we get on down the road; but I reach exactly the opposite result.

MR. SOULES: Are you going to submit attorney's fees in every case? And if the liability doesn't meet what the judge has got in the envelope

over there as a settlement offer, then you judgment, award the attorney's fees, and if it doesn't, it doesn't.

CHAIRMAN BABCOCK: Okay. One more comment, and then we're going to vote on the Soules factors or not. Judge Patterson, you get the final say on this debate.

HONORABLE JAN P. PATTERSON: What a responsibility. I think we ought to hear them again though, because two of them, one is lack of merit of claim and the other one is closeness of question. We've just had a jury verdict.

CHAIRMAN BABCOCK: Right.

HONORABLE JAN P. PATTERSON: And I mean, whatever the factor should be, I don't think these can be the factors; and so I agree with David, well said that it's beguiling and tempting and factors sometimes are irresistible; but they should be left to judges. I'm just kidding about the last part.

(Laughter.)

CHAIRMAN BABCOCK: Let's let Tommy read it one more time; and then we're going to vote do we want these factors.

MR. JACKS: Okay. They are "the then

apparent merit or lack of merit of the claim, the number and nature of proposal made by the parties, the closeness of questions of fact and law at issue, whether the party making the proposal had unreasonably refused to furnish information necessary to evaluate the reasonableness of the proposal, whether the suit was in the nature of a test case with questions of far reaching importance affecting non-parties, the amount of the additional delay, cost and expense that the party making the proposal reasonably would be expected to incur if the litigation were to be prolonged," and then there is another I guess factor in this sense in that in Florida "the Court may in its discretion determine that a proposal is not made in good faith. In such case the Court may disallow and award costs and attorney's fees."

CHAIRMAN BABCOCK: Okay. Everybody in favor of those factors by adding it to our rule raise your hand.

MS. SWEENEY: Should the first factor be "claims or defenses?"

CHAIRMAN BABCOCK: No. Everybody who is in favor of those factors raise your hand.

PROFESSOR CARLSON: In the rule.

CHAIRMAN BABCOCK: In the rule.

PROFESSOR CARLSON: Not the comment.

CHAIRMAN BABCOCK: Not the comment.

MR. HAMILTON: Are we going to vote on the comment too?

CHAIRMAN BABCOCK: Probably not. One, two, three. Luke, are you up or down?

MR. SOULES: I'm for it.

CHAIRMAN BABCOCK: Everybody who is opposed to that, having that in the rule? By a vote of 16 to seven, the Chair not voting, the factors will not be in the rule. Any appetite for a comment?

HONORABLE DAVID B. GAULTNEY: I propose it be in a comment.

CHAIRMAN BABCOCK: All right. Everybody who wants it in a comment raise your hand.

MR. BOYD: Clarification: As an exclusive list or an example of factors?

CHAIRMAN BABCOCK: Example. We never have exclusive lists. Everybody who is against having it in a comment?

PROFESSOR DORSANEO: Point of information: Can I ask one question? The financial situation of the claimant --

CHAIRMAN BABCOCK: Out of order. Out of order. Out of order. Raise your hand if you're against this in the comment.

PROFESSOR CARLSON: It is not in the comment?

CHAIRMAN BABCOCK: Are you against it in the comment or not?

PROFESSOR DORSANEO: I'm against it.

CHAIRMAN BABCOCK: By a vote of 14 to 11, the Chair not voting, it is to be in a comment, that list in a comment.

MS. SWEENEY: Mr. Chairman, I move that the first clause be amended to read "claims or defenses."

MR. SOULES: Second.

CHAIRMAN BABCOCK: Yes. We're going to have to adopt it to harmonize it to our rule, because the Florida rule as pointed out is not the same. Okay. Elaine, what is next?

MS. SWEENEY: Can we take a vote on that, please?

MR. YELENOSKY: You got it. You got it.

CHAIRMAN BABCOCK: And Paula, do you want to vote on whether we are going to harmonize it

into the rule or not?

MS. SWEENEY: No. Whether the "claims or defenses" whether it be two ways, in other words.

MR. YELENOSKY: I thought Chip already said that.

MR. ORSINGER: I think we have that by consensus.

MS. SWEENEY: Okay. If it's no dissent, by consensus, that's great.

CHAIRMAN BABCOCK: Okay. What is next, Elaine?

PROFESSOR DORSANEO: Mr. Chairman, are we still on that (d) part, 167.6(d, which is what I think we just voted to amend?

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: No. We are if Elaine says we are.

PROFESSOR CARLSON: Do you think we should stay there?

MR. JACKS: You're running the show.

CHAIRMAN BABCOCK: You're running the show, Elaine.

PROFESSOR CARLSON: Do you mind if we come back to that, Bill?

PROFESSOR DORSANEO: No, I don't mind.

PROFESSOR CARLSON: All right. I don't think, these are fatal words, I don't think 167.3 is controversial on the ability to withdraw an offer, 167.3 on page four.

CHAIRMAN BABCOCK: Has anybody got comments on 167.3?

MR. ORSINGER: I would just suggest that the last sentence say "once an unaccepted offer has been withdrawn," so no one considered that. I don't -- contractually you're not supposed to withdraw an offer after it has been accepted.

PROFESSOR CARLSON: You are correct.

MR. HAMILTON: If you make the offer to extend to the time of trial, can you withdraw it before trial?

CHAIRMAN BABCOCK: Sure.

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: That's the whole point of this rule.

MR. ORSINGER: You can withdraw it any time up to the time it's accepted.

MR. YELENOSKY: The first sentence covers that.

MR. SCHENKKAN: Once it's accepted it's not an offer. It's a contract.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: So I don't know that you need this modification.

CHAIRMAN BABCOCK: Okay. Anything else on this one? All right. The next section.

PROFESSOR CARLSON: 167.4 I spoke to Tommy, and Tommy, make sure I've got this right, I think we're missing the word "not."

MR. ORSINGER: Yes, you are.

PROFESSOR CARLSON: "An offer that has not been addressed." Otherwise is there any comments on that?

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: Yes. I have some extended comments to make on --

CHAIRMAN BABCOCK: Hang on guys. The court reporter can't hear. Go ahead, Richard.

MR. ORSINGER: If the case is simple and you can settle with an offer of $100,000, this is not a problem; but in the area of law I practice which is family law where your offers have many, many features to it you can draft a comprehensive settlement agreement and still have modified

disputes over what your settlement was; and particularly in commercial litigation where you may have money exchanges hands or assignment of licensing rights or any number of complex issues there can be a bona fide dispute as to what the settlement is even though you have a settlement document.

And what has happened traditionally in Texas is if you had a settlement agreement and then a disagreement about your settlement agreement, the Court could no longer enter a judgment by consent because the consent doesn't exist at the time of rendition. And in Padilla vs. LaFrance the Supreme Court said in the event of a dispute over a settlement agreement somebody needs to drop back, amend their pleadings, seek specific performance of the settlement and file a motion for summary judgment. And if you can't win summary judgment, then you have got to try your contract case on the settlement in connection with your trying the underlying liability.

The legislature did not like that in family law because it so often happened that mediated settlement agreements would fall apart after they were signed. So they amended the Family

Code to provide that as long as it's in bold face or all caps that the consent cannot be withdrawn if you enter into a settlement in a family law case that is signed by the parties and signed by the lawyers, then they can no longer withdraw consent and the Court can enter a judgment based on a motion, not an amended pleading and a suit for specific performance, but based on a motion.

Now this particular rule jumps over all of the wisdom that we've learned in civil litigation and even jumps over the Family Code provisions and said basically when an offer is accepted you can get a judgment on the basis of a motion. And that's maybe not so dangerous if it is just somebody who pays $100,000 and gets a release; but there might even be an argument over what the release says.

And I would question the wisdom of us saying that if there is bona fide dispute over the nature of the settlement, that you can get a judgment on a motion without a trial and without a jury. So I'm just warning everybody about that, because we've had a lot of problems with it in family law.

CHAIRMAN BABCOCK: Does this rule apply to family law cases?

MR. ORSINGER: No. But what I'm telling you is that if you write this rule this way, you're going to run, you're going to collide with Padilla vs. LaFrance which says that if there is a dispute over the settlement, you can't enter a quote, "consent judgment." You have to go litigate your specific performance case.

CHAIRMAN BABCOCK: Are you talking about 167.4?

MR. ORSINGER. Yes. Because the last sentence says "when an offer is accepted the offeror or offeree may file the offer and acceptance along with a motion for judgment." And that implies that the Court can grant a judgment on motion. Now granted it doesn't say that; but I think we can infer that if you can -- if we provide that you can file a motion for judgment, that means you can have a judgment entered even if somebody is saying "Wait a minute. The judgment they are asking for is not the judgment we agreed to give them." Do you see what I'm saying?

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: The dispute over what the settlement is. And I can imagine even in a fairly straight forward case where somebody says

"I'll pay you $100,000 and we'll exchange full and complete releases" what is full and complete in a release may be a dispute as to whose release and what they are released of. And if it is a commercial lawsuit where you're talking about providing additional material at a reduced rate or assignment of licensing rights in connection with the settlement or if it is a suit involving the scope of competition on a non compete clause and the question is, I just I promise you that we should not say that you can get a judgment on a motion when there is a bona fide dispute over what the settlement is without overturning Padilla vs. LaFrance, and we don't even have the safeguards built in that the legislature requires in the family law that there be a disclosure to the settling parties that offer is non revocable.

PROFESSOR DORSANEO: Be that as it may, let's go to the next section.

(Laughter.)

CHAIRMAN BABCOCK: Alex is going to say one thing, and then we'll do that.

PROFESSOR ALBRIGHT: I think Richard's point about Padilla vs. LaFrance is correct; but I think this says you can file a

motion. I think if somebody withdraws consent, the judge can deny their motion under Padilla vs. LaFrance, so I don't think this changes it at all.

CHAIRMAN BABCOCK: Any views on this rule?

JUSTICE NATHAN HECHT: No.

JUSTICE WALLACE B. JEFFERSON: No.

HONORABLE LEVI BENTON: We couldn't hear your question, Chip.

CHAIRMAN BABCOCK: I asked the Justices if they had any views on 167.4, and they said "No." Ralph.

MR. DUGGINS: Should we insert the word "only" after the word "accepted" in the first line to avoid some contention that it has been accepted orally?

MR. BOYD: Which rule?

MR. DUGGINS: 167.4.

MR. JACKS: Yes. I think that's good.

CHAIRMAN BABCOCK: "Only," okay. What other comments?

MR. BOYD: Are we on 3.4 now?

CHAIRMAN BABCOCK: We're on 167.4.

MR. BOYD: Because we were on 1.3.

PROFESSOR CARLSON: 167.3.

MR. BOYD: 3. And I have a question on .3. But as to .4 am I reading this wrong or should the word "not" be before.

PROFESSOR DORSANEO: "Not" is in there. When we were worrying about 3 it got in there.

MR. BOYD: Okay.

CHAIRMAN BABCOCK: We added it it seems like an hour ago.

MR. BOYD: And then on three, this goes back to first year contracts, and I forgot a long time ago. But if I made an offer to you and I say I offer to settle this case and I expressly by the terms of my offer leave it open for X number of days, can I withdraw it before those days pass as a matter of contract law?

CHAIRMAN BABCOCK: According to this rule we can. I think we mentioned that. Okay. What else?

MR. ORSINGER: Before we go on I'd like to get a clarification. Do people agree with Alex that if this rule is adopted, it doesn't change Padilla vs. LaFrance? Everyone agrees with Alex? Okay. Let's write this down.

MR. SCHENKKAN: Some of us don't know Padilla vs. LaFrance.

MR. ORSINGER: It will be litigated.

PROFESSOR ALBRIGHT: I taught this on Wednesday.

MR. SWEENEY: We go with Alex.

CHAIRMAN BABCOCK: There are some affirmative nods of the head down there at the other end of the table. So, okay, what is next, Elaine?

PROFESSOR CARLSON: All right. 167.5, again I think is fairly straight forward; but I would like to see if there is any comment.

PROFESSOR DORSANEO: I don't know why it needs to say that. It's not withdrawn; but or not withdrawn. Okay. Or withdrawn or an offer that is not accepted seems to be --

CHAIRMAN BABCOCK: It's not necessarily.

MS. SWEENEY: Do we need this section?

MR. ORSINGER: Well, you're worried about the fact that somebody doesn't reply and then you're really deeming it as a rejection. Right?

HONORABLE CARLOS LOPEZ: Right. It's got to be accepted or else.

MR. YELENOSKY: Let's use the word "deem."

HONORABLE DAVID B. GAULTNEY: I'm having trouble with the phrasing "not withdrawn or rejected."

MR. YELENOSKY: Why don't we just have a section that says "deemed a rejection" and that it says that it is "deemed rejected if not accepted. "

MS. SWEENEY: Better.

PROFESSOR ALBRIGHT: It's rejected when it expires. Right?

MR. JACKS: Yes.

PROFESSOR ALBRIGHT: Like this says, "An offer that is not withdrawn is rejected." That's not right. It's not rejected until it expires. Right?

CHAIRMAN BABCOCK: Unless it's withdrawn.

PROFESSOR ALBRIGHT: Unless it's withdrawn.

MR. ORSINGER: Well, my drafting suggestion was you say "An offer that is not withdrawn or accepted prior to expiration is deemed rejected." And you need to have a deemed rejection

because your rule is driven on the basis of rejection, not just a failure to accept.

MR. YELENOSKY: You want to say "Is not withdrawn and is not accepted."

CHAIRMAN BABCOCK: Yes. I agree with Richard on that. Elaine, is this language okay with you?

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: Has anybody got a problem with Richard's language? Read it again.

MR. ORSINGER: "An offer that is not withdrawn or accepted prior to expiration is deemed rejected."

CHAIRMAN BABCOCK: Stephen, is that okay?

MR. YELENOSKY: Well, I don't know. It doesn't sound right to me. "Not withdrawn or accepted," and literally if it is not withdrawn.

MR. SCHENKKAN: "And is not accepted."

MR. YELENOSKY. "And." That's what I'm saying. It has to be "and is not accepted."

HONORABLE TERRY E. CHRISTOPHER: Why do you have "not withdrawn" in there?

MR. YELENOSKY: It may not. But if

you're going to put it in there, you don't want to put in an "or."

MR. SCHENKKAN: "An offer that is not accepted by the date is deemed rejected."

MR. YELENOSKY: Right.

HONORABLE CARLOS LOPEZ: How about let's say what we're saying, which is failure to respond is deemed rejection. That's what we're really saying, so let's just say it.

CHAIRMAN BABCOCK: That's a good point. That fits with the second sentence. Yes. Okay. The wise guy came up with some language here.

PROFESSOR DORSANEO: I would say the sentence ought to come first and then the next concept second.

CHAIRMAN BABCOCK: Yes. I think that makes sense. "An offer may be rejected by written notice served on the offeror by the acceptance date."

HONORABLE CARLOS LOPEZ: "Or by failure to respond," put it right there.

CHAIRMAN BABCOCK: "Or by failure to respond in which case it is deemed rejected."

MR. ORSINGER: Take the word "also" out of there. Move that sentence first.

HONORABLE CARLOS LOPEZ: Yes. Instead of "failure to respond," he is pointing out maybe it should say "failure to accept."

CHAIRMAN BABCOCK: "Failure to accept in which case it is deemed rejected." Okay. How does that sound? It is going to say "An offer may be rejected by written notice served on the offeror by the acceptance date or by failure to accept in which case it is deemed rejected." Any problems with that language?

PROFESSOR DORSANEO: Too many words; but I'm happy with it.

CHAIRMAN BABCOCK: Okay. All right. What is next? "Sanctoins"?

PROFESSOR CARLSON: "Sanctoins."

MR. SCHENKKAN: Is this the time when we take up the question of whether these have to be called sanctions?

PROFESSOR CARLSON: This would be a good time.

CHAIRMAN BABCOCK: This would be a great time. The thinking behind it, Tommy and Elaine, I think was that there was an issue that was debated with some degree of passion by some of our legislative members of the committee some time ago

that this was beyond the Court's rulemaking authority. And the research indicated that if it was in the nature of sanctions, it would be within the Court's rulemaking, and if it was wasn't, then there was an issue on that.

The Florida rule as I recall is both statutory and by rule.

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: But the rule that was passed was as a result of a statute. And this and our rule of all the rules out there, and I think we're one of only like five or six states that doesn't have an offer of settlement rule, our rule is closest to the Florida rule. So that's what is behind the word "sanctions." Yes, Bill.

PROFESSOR DORSANEO: Well, having it called "sanctions" does have other implications, like whether it's unjust to impose it just being one of them. In the more than 20 years that I've been on this committee we have occasionally worried about this issue; and usually it has --

CHAIRMAN BABCOCK: You lost your hair.

PROFESSOR DORSANEO: Among other things.

(Laughter.)

PROFESSOR DORSANEO: But it's never seemed to me to be very important. If the legislature wants to have a different statute that does something different from this, that's what is going to happen. If they don't, there's not going to be a problem.

MR. ORSINGER: I'd like to follow up on that, that the people who decide whether this rule is beyond the Court's rulemaking authority is of course who promulgated the rule. And if the legislature doesn't like the rule, they're going to adopt a statute regardless of whether it's beyond or within the Court's ability.

CHAIRMAN BABCOCK: It's kind of what Bill just said.

MR. ORSINGER: Right. So I really feel like that's not a legitimate rationale for using the word "sanctions" since the word "sanctions" carries so much negative baggage including when you renew for your specialization they want to know if you've been sanctioned. When they file a malpractice case against you they'll argue to the jury that it was a sanction, et cetera, et cetera.

CHAIRMAN BABCOCK: Yes. Good point. Elaine, then Alistair.

PROFESSOR CARLSON: I don't think you have to use the word "sanctions" to have a legitimate fee shifting rule; but I think what the cases are telling us is that the content, the substance of the fee shifting rule has to relate to conduct during the litigation and cannot create automatically a cause of action for attorney's fees under the British system in every case.

So I don't think we have to use the word "sanctions;" but it's the substance of the rule that goes to punishment based on unreasonable conduct.

CHAIRMAN BABCOCK: What is our alternative wording?

MR. DAWSON: I was going to suggest "imposition of costs."

PROFESSOR CARLSON: "Taxation of post offer costs."

PROFESSOR DORSANEO: Well, if we call it "costs," then we're buying into the case law that says that if you're -- it doesn't matter whether it's tough on you because of your economic circumstances. If we call it sanctions, I think a good argument could be made that once -- we sanction

people who are cheats and who are dopes in the sense of being grossly professionally stupid, but not because somebody is just occasionally stupid. And gross cheats and really bad dopes. And I think it depends upon who you want to get.

PROFESSOR CARLSON: So Bill, you're saying you think that using the word "sanctions" you're going to pull in the Transamerica checks and balances from a due process point of view?

PROFESSOR DORSANEO: And due process principles, yes.

CHAIRMAN BABCOCK: Okay. Tommy.

MR. JACKS: I think a reason for using "cost" is that it may make, may trigger coverage under certain policies. I know John Martin last year looked at some policies of his clients; and I don't know whether that mattered under those policies or not, but I think it should be a goal of ours to have insurers who have the right to controlled settlements be the ones who are responsible for paying any costs for their judgements.

CHAIRMAN BABCOCK: What would you call it?

MR. JACKS: I would lean towards

"costs" on that account; and I think it gives you a better. And we get to this over on the next page under "Persons Liable, subsection (c)" of this section.

MR. MUNZINGER: That subsection (c) sounds good to me. I'm not an expert on sanctions. But I'm wondering can you sanction a non-party because the insurance carrier is not a party?

MR. JACKS: Well, I guess that supports my argument to use the word "costs" rather than "sanctions." I think for a carrier who contractually is committed to pay costs if costs are imposed, there is a better argument that the carrier is responsible and not the insured.

CHAIRMAN BABCOCK: Can we call it "costs and attorney's fees"?

MR. JACKS: I think you can call it "costs including attorney's fees."

MR. SOULES: There are three things: Costs, expense of litigation and attorney's fees.

MR. SCHENKKAN: And "costs" can be defined to include attorney's fees or not include attorney's fees. It just depends on how you set the definition up and define in that way for purposes of the rule.

MR. JACKS: In fact we'd have to call it "costs including certain fees or including attorney's fees and certain expenses" because we're also incorporating expert witnesses for two experts here.

MR. SCHENKKAN: But in the title if "Costs" was in it, the rule itself is a defined term which includes each of these components that is already in here.

MR. JACKS: Right.

HONORABLE CARLOS LOPEZ: If we do call it "costs," is there a need to analyze and see whether it harmonizes with the rule on costs?

PROFESSOR CARLSON: It depends if we sufficiently define what is included as "costs."

HONORABLE CARLOS LOPEZ: The rules says "shall, but for good cause."

CHAIRMAN BABCOCK: What if we just call it 167.6, "Costs Including Certain Fees and Expenses"?

MR. ORSINGER: Well, we better limit the term "costs" to this rule --

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: -- so we don't collide with Rule 131 and 143.

PROFESSOR CARLSON: How about "post offer costs"?

CHAIRMAN BABCOCK: "Post offer costs," how about that?

MR. ORSINGER: 131 and 143.

MR. JACKS: You're only asking for post rejection costs, because it doesn't start with the offer, if we're going to get into that.

CHAIRMAN BABCOCK: Okay.

HONORABLE CARLOS LOPEZ: If not, the trial Court is bound by the other rule as well.

CHAIRMAN BABCOCK: "Post rejection costs including certain fees and expenses," does that work for you, Elaine?

PROFESSOR CARLSON: It's a little long, but okay.

COMMITTEE MEMBER: Are some of those fees going to be attorney's fees?

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: And expert witness costs, whatever that may be.

PROFESSOR CARLSON: That's why it is better.

CHAIRMAN BABCOCK: "Certain fees and expenses." Okay. Luke, are you okay with that?

MR. SOULES: (Nods affirmatively.)

MR. ORSINGER: As long as we do that we need to note for purposes of this record or in a comment that Rule 131 doesn't apply to this component of the costs, because 131 requires you to assess costs to the winner except for good cause stated on the record, I think.

PROFESSOR CARLSON: We need a comment.

CHAIRMAN BABCOCK: Okay. All right. Subpart (a).

PROFESSOR CARLSON: Tommy, would you be willing to take this next section?

MR. JACKS: Oh.

PROFESSOR CARLSON: 167.6(a).

MR. JACKS: Okay. There is a part that is missing. It's simply a clerical error. I mean, the thrust of this is to apply as a trigger whether in the case of the claimant they get less than 70 percent of the offer; and then there is a corresponding subpart (2) which is missing in the draft we've got, but which is the mirror image of it and says that as for a party against whom a claim is made the cost shifting is triggered if the offer was, if the outcome was more than 130 percent of the

amount that was offered. And the nonmonetary language doesn't change between the two. And so there is a 30-percent buffer zone for each side. And that is the trigger. Or I'll put it another way: That is what is deemed to be an unreasonable litigation conduct and rejecting an offer.

And I guess there's a couple of questions that are implicit in this. One is whether the 30 percent buffer zone is appropriate or not. And then a separate issue is and I think is raised at this point is whether A, the rules should apply to cases for nonmonetary release; and B, if it does, what is the standard? Is the standard substantially all the nonmonetary relief sought or not? The footnote suggests that in choosing that language the effort was to allow about as much margin for error in cases for nonmonetary relief as you do in cases for money damages; and but clearly you don't have the ability to quantify it as you do in the case of monetary damages.

CHAIRMAN BABCOCK: So if you're seeking to restrain a guy from competing in employment in a 100-mile radius, if you get him for 72 miles, then you're okay.

(Laughter.)

MR. JACKS: That's true.

MR. YELENOSKY: To clarify part (b), isn't the part (b) that is written here actually doesn't that actually belong in the mirror image?

MR. JACKS: It is in the mirror image.

MR. YELENOSKY: Well, no. But I mean, the way it's written here it says "A judgment is less favorable than an offer to a party making a claim if the nonmonetary award is at least substantially all of the nonmonetary relief sought." That says the plaintiff won. So that belongs in (2) in the mirror image. And then I'll withhold for this moment my attack on that whole notion.

MR. JACKS: Right.

MR. YELENOSKY: But isn't that right?

MR. JACKS: Yes. So I guess the word "not?"

MR. SCHENKKAN: Well, or "substantially less," if you're doing the (1)(b) to a party making a claim, it would be "if the nonmonetary award is substantially less than all of the monetary."

MR. JACKS: Yes, "less than substantially all" is the correct language.

MR. YELENOSKY: "Less than substantially all" is not. Is that the right standard, or is it "substantially less," because those are two different things? And if we are going to have this provision, then I think it should be "substantially less."

MR. JACKS: All I can tell you is that the language that was meant to be there right or wrong is "less than substantially all."

MR. YELENOSKY: Okay.

PROFESSOR DORSANEO: "Less than substantially all."

MR. ORSINGER: Why wouldn't we just say "substantially?"

MR. YELENOSKY: And that means that the way that is you decipher whether it should happen at all is that if I ask for injunctive relief, can I get anything less than --

MR. JACKS: 99.9 percent would be less.

MR. YELENOSKY: Yes. Yes. Than, you know, fee shifting time.

MR. JACKS: I'm not saying it's good language. I'm just saying that is what the language was meant to be.

MR. YELENOSKY: Right.

MR. ORSINGER: Can't we say "substantially less than?"

PROFESSOR DORSANEO: "Less than substantial" might make sense; but it's at least harder to understand than "substantially less."

HONORABLE DAVID GAULTNEY: How is "substantially less" different than "significantly less" which is the availability initial clause? It says "if a judgment is rendered and is insignificantly less." Should we use the same language and repeat it "significantly less" in the nonmonetary instead of shifting it to "substantially"?

CHAIRMAN BABCOCK: It makes sense.

MR. JACKS: I think there is a question whether, and the committee has debated this before; but I think when you really try to write it it shows the difficulty of applying this rule to cases of nonmonetary relief, because however you write it you can't have the precision that you have in cases of money damages. So the question is what words? I mean, if your goal, as the footnote says, is to convey the same degree of laxity, that is, something that corresponds to 70 percent and 130

percent, what words best do that?

I personally questioned whether, I think you could fall short of -- well, I think at least "substantially all" doesn't capture it to me, because to me "substantially all" sounds more like 90 percent than it does 70 percent.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm in favor of taking nonmonetary relief out. And if you have a case that is combined money and nonmoney and you're on the money in the money, but not on the money in the nonmoney, you're never going to figure that out. If you're within 30 percent of the jury verdict on cash, but you don't get your other nonmonetary relief, then you're both in and outside the rule. Under subdivision (a) I think you've gotten this backwards. It should be "Costs, attorney's fees and interest incurred after the date the offer was subjected" rather than "as of the date."

MS. SWEENEY: Yes. It's backwards.

MR. ORSINGER: And I would favor removing "nonmonetary," because we're defining it by using the same terms that sets it out. I mean, we're not giving anybody any help. It's not anything that can be measured. Apparently there is

no effort to let a jury decide this even though there is probably a Constitutional right to it; and it's just I would vote taking it out.

MR. SCHENKKAN: Can I before you? There were several things said and talking about which ones we want to take up in which order, one of them essentially I want to take up. And the "changes as of" I don't think that's an error. I think that's correct.

MR. ORSINGER: You do?

MR. SCHENKKAN: Yes, because what we're talking about is what costs have been incurred as of the first time you invoke this statute that might be recoverable under your plaintiff's theory.

MR. ORSINGER: You're trying to punish somebody for not settling by making them pay the cost of litigating out the rest of the case. So I spend $100,000 getting to where I make you an offer and you decline it, and I spend $50,00 more.

MR. SCHENKKAN: No. We're defining what counts as more favored as an offer by a defendant, that is more favorable to the plaintiff than the plaintiff's recovery, and the plaintiff's recovery in a cause of action in which the plaintiff can recover attorney's fees.

MR. ORSINGER: Okay.

MR. SCHENKKAN: And they have, has approved some attorney's fees before the defendant makes an offer. What we're doing, I think -- somebody who knows more about this can check me -- I believe we're incorporating by reference the federal case law which says that when you have a fee shifting deal like this and the defendant does whatever is required to trigger it, it varies from situation to situation, that cuts off an otherwise applicable plaintiff's right to fees. And this says "Well, it may cut it off; but it preserves it as to those fees that had been accrued before it was cut off." So if you're a plaintiff who is going under a statute that has a fee shifting right and it is not accepted at the beginning of this rule from the whole thing like the DTPA, you wouldn't have unreasonably rejected the settlement unless the offer was, unless the judgment including for your attorney's fees before they made an offer was at least --

MS. SWEENEY: He's right.

MR. SCHENKKAN: -- 70 percent.

MS. SWEENEY: I've gone from Richard is right to you're right.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Are you going to have to have a jury issue as to what the attorney's fee were on the date the settlement offer was rejected? How are you going to determine that?

CHAIRMAN BABCOCK: Yes. I don't think we've resolved the issue about whether you're entitled to the jury. We've talked about it a lot.

MR. HAMILTON: I'm talking about in the main judgment. In the main judgment here you're testing whether or not you got to this 70 percent by the amount of the award including the attorney's fees as of the date the offer was rejected, so you would have to have your jury issues divided up.

MS. SWEENEY: You'd have to split your jury issue into up to the date of the rejection and after.

MR. HAMILTON: Yes.

MR. JACKS: Well, there are other statutes or rules which exclude attorney's fees and costs for the purposes of making the comparison; and that may be one of the reasons they do that. So you just compare the damages that weren't covered by the offer and the damages awarded in the judgment. I don't think this draft speaks specifically to

whether you do or don't include attorney's fees --

CHAIRMAN BABCOCK: Yes. I misunderstood you.

MR. JACKS: -- and costs in the offer. It certainly doesn't say you can't do that, nor does it say you must if you're entitled to, and nor does -- this paragraph it says if awarded, you consider them; but it doesn't. I mean, the possibility exists that they weren't included in the offer; but are awarded in the judgment. And to be comparing apples and apples you should only consider them if they were a part of the offer. So it seems to me you need to go one of two directions. Either whether included in the offer or not, just exclude them for purposes of the comparison and just compare the apples to apples part, or if you do this, then I think the point is probably right that you may have to have a jury finding of what they were at a certain date, which clutters up your charge.

MR. HAMILTON: And which may give the jury something to handle the rejected settlement.

MR. JACKS: Well, certainly they'll come up with their ideas about why it's in there, right or wrong.

CHAIRMAN BABCOCK: Yes, Bill.

PROFESSOR DORSANEO: Tommy, do you think it's necessary to have this whole, this "including" thing in it? Why don't we just do the amount of the judgment unless.

MR. JACKS: Well, except that if they were included in the offer, you've got one part of the offer that has grown; and so you can only get an apples to apples comparison by knowing what the reasonable fees were at the time of the offer. So to make the comparison, which is why it's written this way, I think the cleaner way to do it is to say that what you compare is exclusive of fees and costs even if they were included in the offer, and so you don't have to get into this. Do you follow me?

PROFESSOR DORSANEO: Uh-huh (yes).

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Just from a trial judge point of view, I would prefer to have attorney's fees included both times if a cause of action allows for money award of attorney's fee, because I have seen a lot of litigation essentially over the amount of the attorney's fees rather than the amount of what to do under the contract. So from my point of view I'd rather have them both in there; and I know it's heresy to suggest to you, but

we trial judges could make that distinction as to the amount of fees at the time of the offer versus the jury.

(Laughter.)

HONORABLE TRACY CHRISTOPHER: We could do it. We promise.

CHAIRMAN BABCOCK: Robert.

MR. VALADEZ: I don't know if this is the right time. My question really totally shifts gears, but it pertains to the issue of judgment. And I know you have the comment we've seen that judgments means summary judgment, judgment after DB or judgment NOV. My question is when I read this rule in its entirety it looks like it's putting everything in a picture that the trial judge is making a decision on when, you know, after a verdict or after the judgment.

Nowhere in the rule do I see any addressing of the issue of post judgment after an appeal. For example, you have a company goes in. They're in Duval county, let's say. They get a five million dollar demand on a case that they feel that they have a really rock solid appellate point. They go try the case. They get hit for $15,000,000 or, you know, $20,000,000, something to get the

percentages right. The trial judge sees that written offer, says you're sanctioned. Say it was a big case, 100 depositions and they get hit for the $50,000.

The way the rule is written right now it seems to me, and I may be missing something, but that defendant could have sanctions and there is nothing in the rule like in Rule 215, you know, that kind of piggybacks it up with the judgment. You could arguably have an independent sanctions order. The trial judge orders it paid. It goes up, and there's a reverse and rendition; but the way the rule is written right now it doesn't take into account appellate review in any way, shape or form.

PROFESSOR DORSANEO: It does look like it's going to be a separate judgment which I guess in Lane Bank where the opinion should have said something else.

MR. VALADEZ: Yes. So you could get hit for unreasonably severing a case that you win.

MR. PROFESSOR DORSANEO: That you win.

MR. VALADEZ: And it's just it happens unfortunately more often that not in the areas I practice in. But I would like to have

something. I don't know if that is an issue in anybody's mind.

MR. ORSINGER: Couldn't you address that by just appealing the sanction order with the judgment at the same time; and if you get the reversal of one, you get the other one?

MR. VALADEZ: Sure. Like 215, you know, everywhere where it talks about the sanction it says, you know, the sanction order is appealable with the final judgment. And nowhere in this rule does it say that. We could maybe perhaps resolve it that way to make sure that the defendant or vice versa, the plaintiff doesn't lose a case that they should have won after appeal.

CHAIRMAN BABCOCK: Got you. Yes, Carl.

MR. HAMILTON: This Elaine, this first sentence here says "if the judgment is rendered." Does that contemplate that before a final judgment is ever signed that you have these hearings so that everything gets put into one judgment then later, or does that word have any significance, "rendered?"

PROFESSOR CARLSON: I'm going to defer to Tommy on that. I don't know.

CHAIRMAN BABCOCK: Tommy, is "rendered" significant?

MR. JACKS: If it is, I missed it.

CHAIRMAN BABCOCK: Yes, Bill.

PROFESSOR DORSANEO: The rule is written as if these things happen in sequence.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: I don't know whether they need to or should. And that's what I was talking about earlier about what are we talking about when we say "after," because it makes sense to me to have this all be done as part of the judgment making process. It makes sense to me to do it like that, and it could be written that way.

MR. VALADEZ: That's exactly my concern, because Rule 215 the way it's written there is an actual provision in the rule that allows the trial Court to order when the sanctions must be paid. That's given, the Court is given discretion; and it's not treated here.

CHAIRMAN BABCOCK: This word "rendered," are we, Tommy are you trying, are you suggesting that let's say the settlement, the settlement, the offer of judgment is $100,000, the jury comes back at $100,000; but there is a JNOV filed and the Court

takes it away? So now you've got a zero award, $100,000 offer. The judgment that is rendered is going to be for zero. So the rules trigger it. Is that what you're trying to get at there?

MR. JACKS: Well, I don't think so, because I mean the footnote obviously contemplates judgments NOV which would be the last judgment in the case.

CHAIRMAN BABCOCK: Right. Yes.

MR. JACKS: And credit sequentially.

HONORABLE CARLOS LOPEZ: Why don't we just direct the trial Court to make it part of the final judgment like other costs.

MR. JACKS: I think the intent was it was part of the final judgment. I don't know.

JUSTICE NATHAN HECHT: Well, I think part of it is that if the plaintiff just nonsuits, for example, you wouldn't be able to come in and get fees because you have made an offer earlier that didn't get accepted and arguably while the nonsuit which means they got zero. This is only going to work if people go to a decision rather than somebody gives up --

CHAIRMAN BABCOCK: So you can give up and --

JUSTICE NATHAN HECHT: -- I think is the idea

CHAIRMAN BABCOCK: -- and escape the rule.

JUSTICE NATHAN HECHT: (Nods affirmatively.)

MR. ORSINGER: But you can't nonsuit after a certain point of the trial.

MS. SWEENEY: "Call your first witness."

MR. ORSINGER: Is that what it is?

MR. VALADEZ: I don't think that's right.

PROFESSOR CARLSON: I thought it was after the plaintiff completes their direct proof.

MR. JACKS: After the plaintiff rests. But in any case it's before you know what the outcome is.

CHAIRMAN BABCOCK: Okay. Yes, Bill.

PROFESSOR DORSANEO: I think instead of putting this timing in there and say if the judgment is rendered, we can just talk about the amount of the judgment would be significantly less, some wording like that and have this be done, have this be done as part of the judgment making process

rather than as a separate proceeding after. Now the problem with that is you slow it down.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: You slow the judgment making process down. But maybe slowing things down would speed some other things up.

JUSTICE NATHAN HECHT: I don't recall a discussion in our group, in the task force group about the timing issue --

MR. JACKS: There was none.

JUSTICE NATHAN HECHT: -- that you have just raised. But the idea of whether it's a good idea or a bad idea here is if there is not a judgment, if it's just a dismissal, the rule doesn't apply.

MR. VALADEZ: Right.

JUSTICE NATHAN HECHT: There is no piling on.

(Laughter.)

CHAIRMAN BABCOCK: You're going to nonsuit and we're going to stick you. Who is that? Paula?

MS. SWEENEY: Yes, sir. Is this where you want to talk about capped cases?

CHAIRMAN BABCOCK: Do we want to talk

about caps yet? No. We talk about caps on the next page.

MR. SCHENKKAN: And the nonmonetary issue, I'm not sure if it got decided. I must have nodded off or turned over.

CHAIRMAN BABCOCK: Well, we did not decide.

MR. SCHENKKAN: Yes. So before we move to caps can we resolve nonmonetary?

CHAIRMAN BABCOCK: Yes. We're still on this page.

HONORABLE SARAH B. DUNCAN: The timing issue is pretty significant. The JNOV is a good example. How do you assess whether you're within the buffer zone until you know you have got a final judgment?

CHAIRMAN BABCOCK: That's the thing about doing it all at one time, because then the judge is going to have to say "Okay. I know; but they don't, that I'm going to JNOV this." And "I know, but they don't know that they are going to be eligible for this." You might not even have I guess maybe if you say it's got to be all at one time, you have to move; but that's unnecessary. I mean, why should you have to move when there's been $100,000

verdict? You've got a pending motion; but you don't know if it's going to be granted; and to cover yourself if you make it all at one time, then you're also going to have to move for these fees. Yes, Sarah.

HONORABLE SARAH B. DUNCAN: I would also question, and this might be a very unpopular viewpoint around the table; but I would also question the advisability of saying as long as the plaintiff nonsuits or let's say the defendant emits a frivolous affirmative defense with answer. Then this rule doesn't apply. That's to me part of where you really need this rule.

CHAIRMAN BABCOCK: To not give them the escape hatch.

HONORABLE SARAH B. DUNCAN: I file a frivolous claim and you incur $100,000 worth of attorney's fee and I nonsuit; and so this rule doesn't apply, so you're not going to get anything out of me. And then I wait a month and it's refiled. That to me is precisely --

MR. SCHENKKAN: You wouldn't get anything anyway. Again, it's capped against plaintiffs at the amount of plaintiff's recovery in a suit in which a plaintiff --

HONORABLE SARAH B. DUNCAN: I'm not sure where it would apply. When you say the plaintiff is capped at the amount of judgment I'm not sure where it would apply; but it just seems to me that to let somebody opt out of this rule by nonsuiting a claim or defense.

MR. SCHENKKAN: I think it's a discussion that leaps ahead to the cap; but I understand the purpose of the cap to be able to recognize the reality that the enormous majority of plaintiffs are judgment proof and it is neither politically acceptable to say they're going to have to pay out of their pockets for guessing wrong about this nor as a practical matter will actually lead to any actual payments out of their pockets. And thus we're capping that side of it at the amount of recovery for the plaintiff. It's one of the respects in which this is not really two-way. The defendant is capped only at fifty and the plaintiff is capped at the lesser of fifty and the plaintiff's recovery.

But if you accept that premise which maybe we will debate in a moment when we get to the subject, if you accept that premise, it doesn't change it to allow the plaintiff to nonsuit. That's

just another way of setting the recovery limits.

CHAIRMAN BABCOCK: Yes.

MR. BOYD: Justice Duncan raises a good point. What if there are multiple defendants? They keep -- it is five defendants. The plaintiff drags four of them along; and then right before trial drops those four, but gets a big judgment against the fifth.

MR. SCHENKKAN: Well, I assume the four are -- that's back to our earlier issue, can an individual defendant make an offer to an individual plaintiff? I think the answer is yes under the rule as drafted. I think it should be; and I think it solves that problem.

MR. BOYD: Now the plaintiff has recovered money as a result of the claim.

MR. SCHENKKAN: That's true. That is the scenario that is addressed in the statute version in House Bill 4. It's not addressed in here.

MR. BOYD: Right.

CHAIRMAN BABCOCK: Let's go back to the timing thing, Elaine.

PROFESSOR CARLSON: Rule 162 on dismissal or nonsuit currently reads "Any dismissal

pursuant to this rule shall not prejudice the right of an adverse party to be heard on a pending claim for affirmative relief or excuse the payment of all costs taxed by the clerk. A dismissal can have no effect on any motion for sanctions, attorney's fees or other costs pending at the time of dismissal." And if we're going "costy," I just point that out.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: Back on the timing in 167.4 we say that the offeror or offeree may file the offer and acceptance along with a motion for judgment. So that that would contemplate that we were going to incorporate a hearing on this issue together with I suppose all of our other judgment related issues.

PROFESSOR DORSANEO: More than one judgment.

CHAIRMAN BABCOCK: Well, but would we? Because if the offer is accepted, then there is no issue of attorney's fees.

HONORABLE JANE BLAND: Oh, you're right. Okay. Then we could hear it afterward, and we do do that; but then we run into deadline problems for our plenary power.

MR. ORSINGER: Well, it's probably --

PROFESSOR DORSANEO: Assuming they apply.

MR. ORSINGER: I think if there is unresolved pending relief, everything is --

PROFESSOR DORSANEO: Lane Bank is wrong.

MR. ORSINGER: -- in the judgment. In Texas we traditionally had a one judgment rule where we only have one judgment at the conclusion of the case. If you have --

CHAIRMAN BABCOCK: What if they enter Sarah's, you know, "This is a final, no kidding judgment"?

HONORABLE CARLOS LOPEZ: In spite of this issue outstanding.

MR. ORSINGER: I mean, my preference would be to fold this into the final judgment. But if we don't and there's a pending motion to assess fees under this rule, but we haven't otherwise rendered judgment on the jury verdict, doesn't that keep the otherwise rendered judgment on the jury verdict interlocutory while this motion is unresolved? And if so, then ultimately aren't we going to end up with a non interlocutory judgment at the end when the judge says? And what I think is

going to happen is people are going to file them after the verdict comes in. People are going to file a motion for judgment; and they'll know at that time whether they're going to have a shot at these fees or not; and if they do have a shot at these fees, they'll ask for a post trial hearing on the assessment of the fees.

HONORABLE SARAH B. DUNCAN: Richard, what are you going to do if on the last day of plenary power the judge signs what is basically a JNOV?

MR. ORSINGER: I don't see how you're going to lose plenary power if someone has filed a motion like this. Now if they haven't filed a motion like this and the judgment goes final, then it's too late to file a motion like this. But if they have a judgment on the verdict and then they file a motion to assess fees under this rule and that's pending, does that or does that not keep the judgment on the verdict from going final? I mean, to me it doesn't. It keeps it from going final. It remains interlocutory.

HONORABLE SARAH B. DUNCAN: But only if you've got to have the judge signed the JNOV 459 so that you can get your motion for sanctions under

this rule filed.

MR. SCHENKKAN: You've still got 30 days from --

HONORABLE JANE BLAND: You can't --

COURT REPORTER: I can't hear you. I'm sorry.

CHAIRMAN BABCOCK: Hang on. Don't do that. Alistair.

MR. DAWSON: I don't know procedurally how this works. But in the courts whether it's the trial court or the appellate court that assessed court costs and nobody pays anything for a while, and the case goes up on appeal and the appellate court decides it, and at some point way down the line I get a call from some clerk that says "You owe or your client owes $2,000 because we've now assessed. We've gone back and counted up all the depositions and all this stuff and that's your courts costs so you need to pay us," why can't we treat these in the vein as court costs to be assessed at the conclusion of the case? After the file judgment is entered and it's gone up on appeal; and then procedurally I don't know how to do it, but conceptually treat it the same way we do the other

court costs so we don't run into issues of finding of the final judgment and what happens if the jury does this and then the judge does this on NOV and then it goes up on appeal. You know what the case is or the conclusion and you can assess what the offer was, the reasonableness of the offer against the final disposition of the case.

MR. HALL: You have to supercede the court costs.

MR. JEFFERSON: And that's a liquidated amount. You know what the court costs are.

CHAIRMAN BABCOCK: Right. Yes. And if it goes all the way up on appeal and judgment is reversed and rendered or affirmed or whatever it is, can you then go back to the trial court and resolve the disputed issue of fact, because there's going to be a dispute about how much money?

MR. ORSINGER: Well, wait a minute. The sanction is going to run the opposite way after the reversal probably.

CHAIRMAN BABCOCK: However it does, I mean, you're going to have to go back to the trial court and have the trial judge do something. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just think it needs to be in one instrument. I mean, if we have an example of plaintiff got an award of $50,000 and the defendant is going to get $50,000 in costs back so the net affect is zero, that ought to be in the judgment. There ought to be just one judgment to that effect.

CHAIRMAN BABCOCK: That's make some sense.

HONORABLE TRACY CHRISTOPHER: I don't know how we want to do it; but it needs to be in one.

CHAIRMAN BABCOCK: Oh, yes. You're fine with ideas. No solutions.

(Laughter.)

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Why don't we just put a time period for that motion to be filed after the rendition, but before the signing of the final judgment.

MR. JEFFERSON: Is there a difference?

MR. HAMILTON: Yes.

MR. ORSINGER: Sometimes they're simultaneous; but there is a difference between

rendition and signing, but they may occur simultaneously.

MR. JEFFERSON: How could you render judgment without knowing? You just award an amount without the number? I award the side without awarding a number?

MR. ORSINGER: No. The judgment that is rendered is the judgment on the verdict; and that's rendered. Typically that would be rendered orally; and then you would know what the rendition is, so it's time to hurry up and file your motion. But sometimes the judge renders at the time you decide which party's judgment to sign in which event there are simultaneous events.

MR. JEFFERSON: But you don't have to.

HONORABLE JANE BLAND: Why don't we say "recovery" instead of "judgment?" If the recovery is significantly less favorable to a party, a recovery" --

MR. SCHENKKAN: Because the recovery then gets you into collection issues, collection and judgment. I think that's an additional layer of complexity.

MR. ORSINGER: We have got to

distinguish between the verdict, the judgment and the collectability; and this is trying to just go with the judgment, not the verdict and not the collectability.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think we would want; and Elaine, see what you think about it, because I think we want to do this in effect like a motion to modify the judgment because that gets it to be the same judgment and it wouldn't require it to be done kind of ahead of schedule, but it does need to be addressed in terms of timetable.

We had the Marshall, John Marshall case for the 306(a) that caused a lot of trouble. Like what is the time frame for this if the rule doesn't say a time frame?

HONORABLE CARLOS LOPEZ: You could make it like the findings of fact.

CHAIRMAN BABCOCK: Yes, Tommy.

MR. JACKS: As a practical matter aren't you going to go down to the courthouse and have a hearing about all this and thrash it out? I mean, people are going to file their motion for judgment NOV, motion for judgment, motion for these costs and you go down and have a hearing, and at the

end of the hearing the judge says "All right. Here is what we're going to do. And winning party draw me up a judgment that says all of this."

PROFESSOR DORSANEO: That's all true; but you have to get the idea when is the last time that you can wait to file this. And it probably makes sense to do it. It probably does make sense to do it as part of the judgment, the one judgment making process, but don't require it to be loaded into the first step. What Chip said made sense to me about that earlier.

CHAIRMAN BABCOCK: Okay. Well, I think we pretty much have an idea what we want to do. Now it's a matter of writing it. Do you agree, David?

HONORABLE DAVID PEEPLES: Uh-huh (yes).

CHAIRMAN BABCOCK: So we'll take a break.

(Recess 3:00 p.m. to 3:30 p.m.)

CHAIRMAN BABCOCK: All right. We're back on the record pushing forward. We are on the record. All right. I think Elaine, your charge is that we're going to try to have one document that is going to include the judgment, whatever it is, and

the fee award, whatever it is; and the timing of that is going to have to work out so that happens at the same time.

So then we have two other issues, one, whether we're going to have nonmonetary relief included in this rule or not and second, whether the monetary award that is specified in subsection (a)(1)(A) is going to include attorney's fees and interest incurred, et cetera, et cetera. Judge Christopher says yes, it should include that. Others like Tommy say maybe is shouldn't. And so we've got to decide that. So why don't we take up the first issue of nonmonetary? Should that be in the rule or not?

HONORABLE SARAH B. DUNCAN: Haven't we already voted on this?

CHAIRMAN BABCOCK: Nonmonetary? Have we? No, we haven't.

MR. YELENOSKY: Not on the Jamail report. I think when we discussed it perhaps before in 1993.

HONORABLE JAN P. PATTERSON: Not this year.

(Laughter.)

MR. YELENOSKY: I think in 1993.

(Laughter.)

CHAIRMAN BABCOCK: At some point we; but not now. Okay. So nonmonetary, anybody want to talk any more about that?

HONORABLE DAVID PEEPLES: What is an example of nonmonetary claims in a garden variety personal injury or any kind of damage case that is legitimately there?

CHAIRMAN BABCOCK: Well, you say I've got a covenant not to compete and you, employee breached it and you, you this new employer conspired with him on that and interfered with our contract, and at the same time you used confidential information that you got while you're at my company, the plaintiff company. And so now I want to restrain you from working for the second defendant, the second corporate defendant and I want to restrain him from using you plus for the month that he was working there before I could get my injunction granted you took away six customers from me that you shouldn't have taken away, and that's cost me a million dollars in damages.

HONORABLE DAVID PEEPLES: I understand that, Chip. I'm asking in most of the cases in Texas that are about damages is there a

legitimate nonmonetary claim?

MR. ORSINGER: No.

HONORABLE DAVID PEEPLES: So why don't we throw this overboard?

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID PEEPLES: But we need to be sure that somebody with a case we want to cover, that is, a damage case can't get out of this thing by adding on a claim for an apology or something nonmonetary.

CHAIRMAN BABCOCK: Judge Bland and Judge Christopher simultaneously put their hands up. So whichever one wans to go first.

HONORABLE JANE BLAND: Deed restrictions cases, you know, "I think my stairwell complies." "No, it doesn't comply. You need to take it down." You know, the nonmonetary I understand the problems associated with the matters of interpretation; but I'd be willing to take a crack at it because I think those cases in particular are cases where lawyers have difficulty framing for their client what a realistic position at trial will be. And often it is either the stairwell is okay or the stairwell is not okay. So you're really often dealing with degrees of

substantially all or all. It's usually all or nothing. And for those few cases I think a provision like this would be helpful.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: It is the same thing, deed restrictions. We have a lot of them.

CHAIRMAN BABCOCK: Deed restrictions, a lot of them. Okay. That's right. No zoning deed restrictions. Stephen.

MR. YELENOSKY: Well, I alluded to this point earlier. But to the extent we're going to keep the zero out there for the plaintiff that has no responsibility either because Pete Schenkkan said societally we definitely don't think that's a good idea and/or they're judgment proof anyway, what would be the justification for having somebody who is probably judgment proof ending up with a judgment against them on a nonmonetary claim as this rule appears to allow? Isn't that correct, Elaine and Tommy, that this rule would allow a judgment up to $50,000 against a judgment proof plaintiff on the nonmonetary claim?

And I can think of lots of examples where Advocacy, Inc. or Legal Aid is representing a parent

let's say who has a claim and it's only an injunctive claim. They are judgment proof; but you are going to have to advise them you could end up with a judgment against you for $50,000; and that's going to matter to them. And I think it's going to matter to them not only in the garden variety cases; but it's going to matter in the cases where there is an important issue of law to be decided, perhaps a rights issue where it's going to be either/or. And if the "or" is you lost, the advice you have to give that person is you're subject to a $50,000 judgment.

CHAIRMAN BABCOCK: The issue is whether or not we throw this nonmonetary award thing overboard, as Judge Peeples says, or keep it and refine it in some way. Bill had his hand up first, Sarah and then Justice Duncan.

PROFESSOR DORSANEO: It seems odd for cases where somebody seeking injunctive relief that if they don't get substantially all of it or if they don't get any of it, then the ceiling is $50,000. It just seems odd to me.

JUSTICE NATHAN HECHT: Ceiling? I don't understand that.

MR. ORSINGER: Since there is no monetary recovery the plaintiff can't be cut off at

zero. If you're seeking an injunction and you fail, since your recovery doesn't, you don't have a dollar recovery, you might have to pay up to $50,000 just because you didn't get an injunction. But if you were suing for $50, you'd never have to pay that.

JUSTICE NATHAN HECHT: But you could fix that without taking it out. (a)(1)(B), (a)(2)(B), I guess.

MR. ORSINGER: Yes. That's right.

MR. YELENOSKY: I'm sorry. I couldn't hear you.

JUSTICE NATHAN HECHT: Well, you don't have to take subsection (B) on page five, you don't have to take that out, capital (B), to fix that problem. Right? Well, you just say well, if all he gets, fix that over in (d) and say "If all you get is nonmonetary relief, you can't be sanctioned a dollar amount." I see your point. You're saying if you get substantially less, you might be okay.

MR. YELENOSKY: Right. And then that doesn't even get to the point of how you judge that. And I just don't think --

CHAIRMAN BABCOCK: You're a "throw it overboard" guy.

MR. YELENOSKY: Huh?

CHAIRMAN BABCOCK: You want to throw it overboard.

MR. YELENOSKY: Yes.

CHAIRMAN BABCOCK: Okay.

MR. YELENOSKY: Particularly since we don't have the exception here for suits against governmental entities. And a lot of those suits for injunctive relief against governmental entities are not going to involve money and they're going to involve rights issues; and I think a lot of times those things are appropriate to be in court.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE JAN P. PATTERSON: Well, this is going to jibe into the question of attorney's fees too, because a lot of times what we are really arguing about are the attorney's fees in a case or the declaratory judgment about a particular statute or something like that. So if you did recover relief and you got attorney's fees and had rejected a previous offer, then there would be something to offer if we included attorney's fees as part of the amount to look at.

CHAIRMAN BABCOCK: What would you offset it against?

HONORABLE TRACY CHRISTOPHER: What I mean is if one side recovered attorney's fees, but had rejected an offer previously, then the defense say would be able to, you know, get their $50,000 against the attorney's fees.

CHAIRMAN BABCOCK: And they would get their attorney's fees in the deed restriction cases on the ground that it's a breach of contract and that you're entitled to attorney's fees?

HONORABLE TRACY CHRISTOPHER: Yes.

HONORABLE JANE BLAND: As declaratory judgment.

CHAIRMAN BABCOCK: As a declaratory judgment.

HONORABLE JANE BLAND: I don't think we contemplate their fees against the nonmonetary. I think it has to come to zero. But if there was a monetary award connected to recovery, then that could be offset.

CHAIRMAN BABCOCK: Okay. So two circumstances: One where there was a monetary component to it and one where attorney's fees was an issue as in a DEC action or in a contract action. Yes, Jeff.

MR. BOYD: I'm trying to think both

DEC action and injunction relief, those being the most common forms of nonmonetary. And in the DEC action I'm trying to figure out how all this relates to the standard for attorney's fees under Chapter 37 which is "as are equitable and just" to begin with, so you don't even have to be the prevailing party by any standard in a DEC action to get the Court to award attorney's fees. So which trumps which? I would assume 37009 trumps Supreme Court rule. And judge could say "I don't care what this new rule says. This is a DEC action, and I don't' think it's equitable and just to give to you. It's better to give them to you."

CHAIRMAN BABCOCK: I don't think it would trump it.

MR. BOYD: One option is to put Chapter 37 in the list of things that are not -- are exempted at the very beginning of this rule and not have it apply to DEC actions.

HONORABLE TRACY CHRISTOPHER: We get briefs in contract cases that are filed as DEC actions.

MR. BOYD: Yes. But that's a whole nother issue.

HONORABLE TRACY CHRISTOPHER: Yes.

You can't exempt that.

CHAIRMAN BABCOCK: Bill, then Richard.

PROFESSOR DORSANEO: We can fix this $50,000 problem when we get to (d) based on what people have said.

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: The comment on the last issue, it seems to me that if you're entitled to recover fees either under declaratory judgment or because it is a suit on a contract and if you've got even $5 on your affirmative claim, you're entitled to recover the fees that the jury finds on a contract claim for the amount of the Court awards on a DEC action; but this would operate as an offset going the opposite direction, so I don't think that one trumps the other. I feel like you may be successful as a contract plaintiff. You may recover your attorney's fees; but if your recovery is more than 30 percent over the offer, the other side may have an offset against your attorney's fee judgment for their attorney's fee, if you see what I'm saying. So I don't think they're mutually exclusive. I think that they may balance each other out to some extent.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: I really think we voted on this before, because I remember hearing some very persuasive arguments about why nonmonetary relief should be in here. But even if I'm just imagining all this, one of the most persuasive arguments to me was Judge Peeples' point which Judge Christopher indirectly alluded to. People around the table were saying "Okay. Fine. If nonmonetary relief isn't included, all I have got to do is add a nonmonetary claim to my lawsuit to get out of this." And we couldn't figure out a way to write it to prevent that from happening.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Well, I think we, if I remember right and this didn't happen, I guess it could happen now. I thought we had drafted something that referred to if the primary relief sought was nonmonetary and granted, that required some kind of qualitative judgment; but so does everything else in here.

PROFESSOR DORSANEO: We can fix it when we get to (d).

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I'm wondering also

how big a problem it is. I think I may have been the one who said that the plaintiff just adds the nonmonetary claim in; but I'm wondering how big that is if that is truly, pardon the expression, in the context of a frivolous claim or even simply a non meritorious claim, that it may get bounced out pretty fast on some other basis of the special exceptions jurisdiction, summary judgment, I don't know what. And then at that point we are back under the statute and an offer is made and the rule applies. So I'm in, because of that I'm in favor in spite this possibility of throwing this nonmonetary thing out.

CHAIRMAN BABCOCK: Yes. I think we need to have a vote on whether we throw it overboard or whether we keep it. Elaine, just because you're you.

PROFESSOR CARLSON: Thank you, Mr. Chairman. Sarah and Steve, you are not delusional.

MR. YELENOSKY: At least on this point.

(Laughter.)

PROFESSOR CARLSON: At least on this point. At the June meeting last year in Dallas at Phil's place at SMU we did discuss excluding from

the offer of judgment rule nonmonetary claims. Concern was expressed that, as Sarah suggested, that if the case involved a nonmonetary claim to opt out, everybody would opt out. And so we recommended by oh, I think it was maybe a vote of 10 to two or something, because we were pretty sparse, we recommended that a claim for declaratory injunctive or other nonmonetary is excluded, but that this rule does not apply to a claim that is primarily for damages and only incidental for nonmonetary relief. That was our Supreme Court Advisory Committee suggestion.

CHAIRMAN BABCOCK: Tommy, why did you and the Jamail people reject that sound advice?

MR. YELENOSKY: Not to ask a loaded question.

MR. JACKS: Actually I wrote the language that Elaine just read and preferred it. My view didn't prevail; but I think it should prevail here.

CHAIRMAN BABCOCK: All right. The last comment from Bill. You get the last word on this one.

PROFESSOR DORSANEO: I was going to wait to talk about (d).

CHAIRMAN BABCOCK: No. Don't wait and talk about (d).

PROFESSOR DORSANEO: Do you want me to do it?

CHAIRMAN BABCOCK: Yes. How about we move the language Elaine just read, substitute that for the language here in (a)(1)(B).

MR. YELENOSKY: Or actually the language she suggested, wouldn't that come up really among the exceptions at the very beginning?

CHAIRMAN BABCOCK: Yes. Right. You're right. Yes. Okay. So the vote would be to throw (a)(1)(B) overboard and to include in the exceptions what Elaine just read. So that's the vote.

HONORABLE TRACY CHRISTOPHER: Could you read the exception?

PROFESSOR CARLSON: This is what we voted at the June meeting last year. "A claim for declaratory injunctive or other nonmonetary relief is excluded; but the exclusion does not apply for a claim that is primarily for damages and only incidental for nonmonetary relief" thereby burdening the trial Court with that determination.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: We may have voted that; but an antitrust case seeking treble damages and seeking to enjoin your behavior for the rest of the time is impossible to analyze under that formula.

HONORABLE TRACY CHRISTOPHER: And what about when you have a breach of contract case and you filed a declaratory judgment to declare that you haven't broken the contract and the defense has got the counterclaim for damages? Is that an exception or not?

CHAIRMAN BABCOCK: Let Elaine answer that question.

PROFESSOR CARLSON: Well, here is what we came up with. "While this lacks definitiveness, we felt is best to leave to case law development of the definition of incidental"; and then we moved on at our meeting.

(Laughter.)

PROFESSOR DORSANEO: I would rather just eliminate an affirmative recovery by changing the language in (d) to say that "sanctions imposed on a claimant generally, not just with respect to claims for monetary relief may not exceed the amount of award of the claimant by the judgment." That

takes care of this attorney's fees thing that the judges were talking about down there; but it takes away my worry and Steve's worry about somebody getting tagged for $50,000 when they don't get any relief.

CHAIRMAN BABCOCK: Yes. Okay. Does that speak to the issue of whether we're going to delete (a)(1)(B)?

PROFESSOR DORSANEO: We don't have to delete it if we do that, if we do the what I just said.

CHAIRMAN BABCOCK: Okay. All right. So you would be against deleting it?

PROFESSOR DORSANEO: I would be against deleting it by doing something that I can't tell how, what it means.

PROFESSOR CARLSON: Which conceptually, I mean, the conceptual argument for including nonmonetary relief goes back to the purpose of rule, the complete disposition of the case, so your offer of judgment has to extend to everyone. The problem is in the application.

MR. YELENOSKY: I think, I mean, I think you're right, Bill, and I agree with you on the point that it does solve the problem of the

$50,000 judgment. And last summer when we were talking about this we didn't have that cap, as I remember, so this exclusion was important. It may not be important if we change it as you said; but it doesn't address the other problem which is how do you judge whether somebody got substantially less, substantially more, whether an offer that was mixed with damages and equitable relief and then they adjust the two of those to a better offer than the other one? So I think that point still would be one arguing for an exclusion; but I do agree if we're not going to, I mean, I'm much happier with one or the other.

PROFESSOR DORSANEO: We could do both.

MR. YELENOSKY: Right.

CHAIRMAN BABCOCK: The Florida rule, Tommy, has nonmonetary in it, doesn't it? It's got both monetary and nonmonetary.

MR. JACKS: I think so. I have to check.

CHAIRMAN BABCOCK: My recollection is it does. Judge Peeples.

HONORABLE DAVID PEEPLES: My concern here is that we have said earlier in this rule that

your offer has to include all claims. Okay. And now we're saying here on page five that if you've got something that everybody would agree is about damages but also some nonmonetary claims were thrown in, the offer has to include those. And that's going to gum up. I mean people, it seems to me, who don't want this to apply to them will be creative in coming up with nonmonetary claims to make just so it will gum up this and make it hard to work, and I think that is a real danger here.

CHAIRMAN BABCOCK: Well, what if there is a claim for declaratory relief and there is a claim for damages? We say the requirements of the offer are to offer to settle all the claims.

HONORABLE DAVID PEEPLES: Let me ask this: The way it works right now without this rule if I've got a -- I'm a lawyer and I've got a case that's got a lot of claims in it, I can settle some of those claims with the other side. I can say "Look. We'll settle this aspect of the case and try the rest of it."

Maybe we made a mistake when we said back on page three the offer has to settle all claims. Maybe we ought to let this apply when someone says "Look. I want to settle the damage aspect of this

case and I'll try injunction," because I think there is a real risk that people who don't want this to apply to their case will be creative in coming up with nonmonetary causes of action to just foul it up.

CHAIRMAN BABCOCK: So you would say this ought to be changed to say "Offer to settle all claim for damages"?

HONORABLE DAVID PEEPLES: Maybe so.

MR. SCHENKKAN: For monetary relief.

MR. JACKS: Monetary relief.

MR. ORSINGER: Would include attorney's fees, damages would.

CHAIRMAN BABCOCK: Yes, John Martin.

MR. MARTIN: I agree pretty strongly with Judge Peeples on that. But another thing just occurred to me, Chip. There are situations where the lawsuit is only for money damages; but the settlement negotiations include things like "I want lifetime air travel on your airline," or "I want your company to chance their policies," or one I settled was for free lifetime wheel chairs every time an individual needed a wheel chair for the rest of their life. How are you going to measure those sorts of things in here? I really think this whole

thing ought to be limited to dollars against dollars.

At some point we have got to simplify this. It's complicated enough as it is.

CHAIRMAN BABCOCK: Right. By the way, I want to talk to you about settling for lifetime air mileage.

(Laughter.)

MR. MARTIN: I haven't ever done that; but everybody asks.

MS. SWEENEY: I tried to get him to do that; and he wouldn't.

CHAIRMAN BABCOCK: He wouldn't do it?

MS. SWEENEY: No.

MR. JACKS: Keep him here a little longer and he might.

CHAIRMAN BABCOCK: Yes. We're going to 10:00 tonight.

(Laughter.)

CHAIRMAN BABCOCK: Okay. Carl.

MR. HAMILTON: Well, I have a problem with Bill's suggestion that (d)(2) will solve the problem if you change the wording, because there may be some problems with (d)(2) in letting the claimant off without having to pay anything, but not letting

the defendant off equally as well.

CHAIRMAN BABCOCK: Yes.

MR. HAMILTON: So that may or may not work depending on what we do with that.

CHAIRMAN BABCOCK: We need to bring some closure on this issue about whether or not we are going to throw the nonmonetary thing over the side. And we've talked about this a lot. Why don't we vote on this. How many people think we should discard the nonmonetary aspects of this rule? Raise your hand. How many are against that? The vote is 23 to six, the Chair not voting, in favor of throwing it over the side. So nonmonetary is out. Now do we want to include the stuff at the beginning?

MS. SWEENEY: What stuff?

MR. ORSINGER: I don't think we should. If you include it as an exclusion on the statute, then somebody could try to plead themselves into the exclusion. If you just exclude them from the sanction part of it, then they are still in the game. It's just that we ignore the nonmonetary part for sanction purposes.

CHAIRMAN BABCOCK: Good with you, Elaine?

PROFESSOR CARLSON: So the offer has to go to everybody.

CHAIRMAN BABCOCK: No. You're going to change 167.2(a)(5) to say "offer to settle all claims for monetary relief."

PROFESSOR CARLSON: Got it.

CHAIRMAN BABCOCK: Okay? Are we all right with that? All right.

HONORABLE TRACY CHRISTOPHER: Does that include attorney's fees, or we haven't decided that yet?

CHAIRMAN BABCOCK: That's the next, what we're going through right now. So (a)(1)(A) now defines monetary award as including costs, attorney's fees and interest incurred. Do we want to keep that in there, or do we want to just make it damages exclusive of those costs and attorney's fees? Not all at once? Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I'll just repeat myself. In the small contract cases the dispute becomes attorney's fees.

CHAIRMAN BABCOCK: I agree.

HONORABLE TRACY CHRISTOPHER: And we need to keep attorney's fees in there.

HONORABLE CARLOS LOPEZ: I second

that. I have had a ton of cases where the contract controversy was $10,000 and the attorney's fees were forty on each side.

CHAIRMAN BABCOCK: Anybody disagree with that? Jeff.

MR. BOYD: The problem is the problem with the way it's written is that how much it complicates it to have to in essence litigate what the amount of attorney's fees was as of the time of the offer as opposed to fees where they're at. And there is some question about whether that is a jury issue or a bench issue, whether a judge can determine that. Do we have a sense of?

CHAIRMAN BABCOCK: Well, I think we're taking the position it's a judge issue, aren't we? Yes.

MR. BOYD: Because it does seem to me that if you either include all of the fees both pre and post rejection or exclude all of the fee pre and post, there will be a significant number of cases in which it will be an unfair result. Either way you do it it's unfair.

JUSTICE NATHAN HECHT: But in this paragraph all the inclusion of attorney fees, costs and so on impacts is the 70 percent, because if you

exclude them, then all you're looking at is the number that was recovered exclusive of all of those things that was at 70 percent. If you put them in, then it means you have a better chance of getting closer to 70 percent. If you take them out, then you have a less chance getting closer to the 70 percent. I think all the inclusion does in this particular paragraph is help the party; and also be the same in (a)(2)(A), it would help the party get closer or further away from 70 or 130 percent.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Tracy, isn't your situation where there is an affirmative claim for attorney's fees?

HONORABLE TRACY CHRISTOPHER: Yes.

PROFESSOR ALBRIGHT: So you're talking settling. In your settlement offer you're settling the underlying claim. For the attorney's fees between the dashes here are not, don't appear to be settling the underlying claim. These are the attorney's fees that you might get as a sanction. Right?

CHAIRMAN BABCOCK: No.

HONORABLE TRACY CHRISTOPHER: Awarded.

MR. YELENOSKY: On the contract.

JUSTICE NATHAN HECHT: You make an offer and you say "I'll settle your principal claim for $50 plus and I'll settle your attorney fee claims for $20; and they say "no." So then you go to trial and they only get $10 which is way lower than $50. But they get $40 in attorney fees, so that is $50. So now the question is are you within 70 percent of the offer or not? If you exclude the attorney fees, there is no way in the world you're going to get close to the 70 percent. If you put them in, you have a better chance of getting there.

MR. BOYD: And what I'm saying is you should not be allowed to get them there because your original offer was not adequate even considering the fees that you would incur to get to that point.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Here's what happens in a contract case. Somebody will spend $5,000 in attorney's fees. The underlying amount owed is $5,0000. And then for a defendant to come in and offer to pay $5,000 and it's not fair and somehow fee shift after that; and the jury is going to award $5,000 at trial because that's what is owed; but the defense is going to say "I get to

fee shift, because you didn't accept my $5,000" where all the fee is after that.

MR. BOYD: Okay. Let me see if I can explain what I'm trying to say. If let's say you have got a plaintiff contract claim that I believe is worth $100,000, and at this point in the game I've got $20,000 of fees in it. So I make a demand for $100,000. I cut it. I have got $120,000 in the case; but I make a demand for $100,000. It's rejected. I go to trial and the jury says your contract claims were $20,000; but you have got $80,000 in fees in it. And that $80,0000 sixty of it came after I made my offer. If you include the total of it --

HONORABLE TRACY CHRISTOPHER: No. But it is as of the date of the offer.

MR. YELENOSKY: It's as of the date of the offer.

MR. BOYD: Well, yes. That's my point. If you've got a -- well, the date of rejection.

HONORABLE TRACY CHRISTOPHER: Your attorney's fees were twenty at the time of the offer.

MR. YELENOSKY: That's the whole part

about the jury has to figure out how much fees.

CHAIRMAN BABCOCK: Right.

MR. BOYD: Okay. So --

HONORABLE TRACY CHRISTOPHER: So you would only have a total of $40,000. You would be a loser.

PROFESSOR ALBRIGHT: But then you're having to every time there is an offer here you're going to have to distinguish what is attorney's fee and what is the underlying claim, which what most people do is say "I'll pay you this much to get rid of the whole thing." Right?

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: If I'm representing a defendant, I think I can sometimes try to guess at what the value of the claim is for actual damages; but I don't have a clue as to how much time that lawyer is going to spend on the case, how much he's going to claim as attorney's fees. So I think it ought to be the offer ought to be limited to the actual damages amount. That's what we ought to judge as to whether it comes within the 70 percent. Leave all the attorney's fees and everything out. They can be part of the offer; but that's not what we base the 70 percent on.

CHAIRMAN BABCOCK: So you're in the camp that says knock out the attorney's fees and costs. Judge Christopher and others are in the camp that say "No. You have got to include them, the attorney's fees and interest incurred as of the date the offer was rejected, not the million dollars you're going to spend after that, but as of the date the offer was rejected." Alex says "That's a problem because how are you ever going to know? You know, you're going to have to keep track of that in points of time." So that's she has got concern about that. Richard, last comment, and then we're going to vote.

MR. ORSINGER: It seems to me that the offers that count are the offers to settle all claims for a stated dollar amount; and if I'm on the plaintiff's side, my offer is going to include the value of my underlying claim and the amount of fees I have in the case. And if I'm on the defense side, it's going to be what I think they could recover plus what the fees will be plus what my defensive fees will be. And to say we're only going to consider an arbitrarily small part of what everyone's real economic discussion of settlement doesn't make sense. If the plaintiff says "I'll

settle all my claims underlying and attorney's fees for a hundred," or if the defendant says "I'll settle all of your claims, underlying fees and attorney's fees for seventy-five," why wouldn't we measure the sanction against the real offer?

HONORABLE DAVID PEEPLES: We would.

MR. ORSINGER: To me to segregate out --

CHAIRMAN BABCOCK: We did.

MR. ORSINGER: No. If we segregate out and say the only thing that counts for sanction purposes is the underlying claim, means we're ignoring the economic reality of the cost of attorney's fees and the right to recover against the other side.

CHAIRMAN BABCOCK: We're not saying that.

MR. ORSINGER: No. The proposal around here is or some people are proposing that we only look at the settlement offer on the quote, "underlying claim" without regard to your attendant recovery of fees.

CHAIRMAN BABCOCK: I thought that you've got one number which is your settlement number, and that's one measure; and then the second,

and that's going to be for damages plus attorney"s fees in a contract case, for example. And then you've got another measure that you have to have which is the amount of money you can recover at trial plus the amount of attorney's fees you incurred as of the date you rejected the offer. And that's so you measure those two and see if they're within 70 percent; and if they are, you have one result. And if they're not, you have another. Am I right on that?

JUSTICE NATHAN HECHT: Yes. Let me, if I can try it another way too. What the problem in A is that what you cannot do is compare the recovery after the trial against the offer if it includes post offer attorney fees and expenses because that gives the rejected party an incentive to multiply those so he'll get closer to 70 percent. So you have got to take those out somewhat. You can either take them out the way this does, which is after the judgment is, after the verdict or findings are made and before the judgment is rendered the trier of fact or the judge separates them out, or you can go back to the offer and say when you make the offer you've got to separate them out and say "I'll offer you this for your claim and this for

your attorney fees" so that you'll have something to compare six months from now when you get a judgment, or you can leave it out all together in which case you'll just be making an imperfect comparison; but you'll still be looking at what you were trying to settle versus whether you got 70 percent.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: See, what do you do if the parties have the same assessment of what the underlying recovery is, but differing assessments of what the reasonable fee is? You might be defeating settlements that you could reach when the dispute is just over the fees. To me either get the money and you go, or you don't. And to me you ought to just combine all of your affirmative claims and fees you're entitled to recover and that's your offer; and then when the case is tried you calculate what the jury or the judge finds is the underlying claim of the fees to that date and match those two.

CHAIRMAN BABCOCK: Isn't what you're going to do when you make your offer, Richard, you're going to let's say I know you're my opponent, and I know you have got $100,000 in attorney's fees as of the date we're trying to settle this thing, and I think that my exposure on your damages is

$100,000. So what I'm going to offer you is $100,000 on the damage claim, and I'm going to offer you $71,000 on your attorney's fees. Right? And if I'm right on my damage claim, then I'm going to win at the when you reject and we go to the end of the case.

JUSTICE NATHAN HECHT: If you don't do it as written, one possibility is that the offer will break out your claim in attorney fees and low ball the attorney fees to force you into a conflict with your client so you'll say because "I think my claim is worth $100,000. He's offering $85,000. That's well within $70,000. It might not be worth that much. You know, I can make that decision; but he's only going to offer me three in attorney fees and then force me to decide is that close enough that I want to risk this rule and not get any attorney fees, or do I want to be put in a conflict with my client and say 'No, I've got to hold out for more attorney fees?'"

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Well, I guess there is a question of whether the offering party's labeling or division of what they are paying you has any real legal significance anyway. At Legal

Services we're trying to figure out how to deal with low ball offers on attorney's fees where the client doesn't owe us any money. I worked with Professor Silver at UT; and we came around to conclude that there wasn't anything that bound a receiving party of an offer to treat the offering party's division of the money as sacrosanct in any way and you could have an agreement with your client that whatever the offering party calls it it's a lump sum what we'll figure out based on our agreement in the attorney/client how that is divided. So I'm not sure how that all plays into this; but I guess it raised in my mind whether or not the labeling by the offering party is determinative.

MR. SCHENKKAN: Surely it's not determinative; and I doubt if it even matters in many cases, because in most cases where the monetary award of awarded could include attorney's fees at least as of the date the offer is rejected it's because some other statute makes that a part of what the plaintiff client, not the lawyer --

MR. YELENOSKY: Right.

MR. SCHENKKAN: -- gets out of the case. So those attorney's fees awarded are not the plaintiff attorney's fees. They're the plaintiff's.

They're part of the plaintiff's award.

MR. YELENOSKY: Right.

MR. SCHENKKAN: I think then it is entirely a separate question of contract subject to judicial review and regulation.

CHAIRMAN BABCOCK: Okay. We're going to vote on whether we're going to include the language in (a)(1)(A) as written. And all those who are in favor of that raise your hand. All those opposed? It carries by a vote 24 to one, the Chair not voting.

MR. GILSTRAP: Chip.

CHAIRMAN BABCOCK: Yes, sir.

MR. GILSTRAP: I have a comment about how it works because I don't understand it that well. But as I understand it a monetary award includes damages. Right?

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Don't we still have the rule inclusion of one is exclusion of the others? And this is even worse. It says a monetary award including only costs, attorney's fees and interest." I think you could probably construe this some other way; and if we're going to redraw, maybe this needs to be drawn up, clean that up by someone

who understands it. I'm not going to volunteer to fix it.

CHAIRMAN BABCOCK: Is that you? Okay. Get with Elaine about that.

MR. GILSTRAP: All right. Subpart (b).

MR. JACKS: Chip.

CHAIRMAN BABCOCK: Yes, Tommy.

MR. JACKS: I voted yes because I agree with the sprit of this; but I think it still needs a tweak. And what I would suggest is that where we're putting what has been in the offer that would say if there is a claim for attorney's fees and you want to ask for that in your offer, you have got to put it in your offer.

CHAIRMAN BABCOCK: I think that's good.

MR. JACKS: And then in this paragraph we just voted on instead of saying if award, just if awarded; but if included in the offer and award. That is --

CHAIRMAN BABCOCK: Yes.

MR. JACKS: -- it has to be both places.

CHAIRMAN BABCOCK: Yes, I think so.

I think so.

MR. JACKS: Does that make sense?

CHAIRMAN BABCOCK: Yes. Okay. Now by the way, we are doing a lot of tweaking of language; and what we're going to do, which we've done before, we did most notably with the parental notification rules because of the timing, Elaine and Tommy are going to take all our comments and put them into a redraft and then e-mail that to everybody and you send back whatever written comments that you want and the Court will take those into account. So that's how we're going to do that.

Subpart (b), the amount, Elaine.

MR. HAMILTON: Chip, can I ask one question?

CHAIRMAN BABCOCK: Yes, Carl.

MR. HAMILTON: If you get a monetary award and attorney's fees, two different numbers, do you add those two numbers together and both the offer and then the judgment and determines if you reached the 70 percent?

CHAIRMAN BABCOCK: No. It's only the attorney's fees that were incurred as of the date the offer was rejected.

MR. HAMILTON: Do you add those two

together?

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Yes.

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: You add the monetary amount and the attorney's fees?

CHAIRMAN BABCOCK: As of the date the offer was refused.

MR. HAMILTON: As one figure?

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Compared to the judgment?

CHAIRMAN BABCOCK: Right.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Well, compared, now wait a minute. That's not right. The judgment is the amount of money that was awarded as damages plus the amount of attorney's fees incurred as of the date the offer was rejected which may not be in the judgment. It may be a bigger number.

MR. ORSINGER: It may not be in the verdict either.

CHAIRMAN BABCOCK: It may not be in the verdict either.

MR. ORSINGER: Because the verdict

will be your entire fees for the whole case, not just up to the date of the offer.

CHAIRMAN BABCOCK: That's right.

MR. ORSINGER: So the trial judge may have to come in after the verdict and decide what portion.

MR. HAMILTON: Yes. I understand that. But all I'm saying is let's say that the monetary award is $100,000, and the judge figures out that there was $20,000 worth of attorney's fees incurred right up to the time of the offer.

CHAIRMAN BABCOCK: The offer was rejected. Okay.

MR. HAMILTON: The offer was rejected. So the verdict comes in -- or the judge comes in and he finds that the attorney's fee offer was okay, that you know, hit it right on the money; but the monetary amount was too low or vice versa.

JUSTICE NATHAN HECHT: You add them together.

MR. HAMILTON: That's what I'm saying. You add them together.

CHAIRMAN BABCOCK: Right.

MR. BOYD: So for clarification then, I think we just voted to include, to keep this

language the way it is; but now I'm hearing conversations about whether we would also require the offeror to separate the amounts at the time of the offer. And that's a whole different issue. And from the perspective of my position it is because whether something is designated attorney's fees as opposed to damages is important and is binding; and under Rider 11 of the Appropriations Act a state agency, the money will go to GR, but a certain amount will go to the Attorney General. And that's not something we can work out by agreement with the client; but it's by legislative enactment.

CHAIRMAN BABCOCK: Right.

MR. BOYD: So I want to make sure we're not deciding to put some requirement in there that the offeror separate the two and then the offeree is bound by that when the decision is made at the end.

JUSTICE NATHAN HECHT: We're not. We're not doing that.

CHAIRMAN BABCOCK: All right. Elaine, amount, have we gone through that yet?

PROFESSOR CARLSON: No.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: Bill pointed out

a problem in this section that is valid. It says "The court after a hearing in which the parties may present evidence must award the offeror as" sanctions costs, whatever "those amounts reasonably and necessarily incurred by the offeror after the offer was rejected." "Until when" Bill asked.

MR. YELENOSKY: Isn't that between the offer and the judgment?

PROFESSOR CARLSON: Until the signing of the final judgment, the rendition of final judgment?

JUSTICE NATHAN HECHT: Signing.

CHAIRMAN BABCOCK: Signing. Signing the final judgment, because you're going to deal with the timing issue, because so that the number that gets put in there as post rejection costs including certain fees and expenses is in the same document as the final judgment.

PROFESSOR CARLSON: And in those cases that probably would work I guess if the JNOV is actually granted after the signing of the judgment, a written judgment.

CHAIRMAN BABCOCK: No. That wouldn't be a JNOV. That would be an offer to recover.

MR. ORSINGER: You can file a JNOV

after judgment.

PROFESSOR DORSANEO: Well, it's called a motion to modify probably.

MR. ORSINGER: That's pretty rare. That's when they hire a good appellate lawyer after the judgment has been signed.

CHAIRMAN BABCOCK: That's when they hire you. Shameless self promotion.

(Laughter.)

CHAIRMAN BABCOCK: Those of you new on the committee will not see that for the last time.

PROFESSOR DORSANEO: I've seen worse. They shall remain nameless.

(Laughter.)

MR. ORSINGER: I think that it might clarify if in (a) we said: If the judgment to be rendered is significantly less" so that we don't force the court to go through a rendition. If you say "the judgment to be rendered," then someone could file a motion to render judgment. Someone could file a motion to render the opposite judgment and the judge says "I'm going to go with the plaintiff on the case, so I want to hear evidence on the plaintiff attorney's fees." They aren't going

to go with the defendant. We don't actually have to make them render and then come back in and unrender.

CHAIRMAN BABCOCK: We talked about that.

MR. ORSINGER: Are we going to make that "to be rendered"?

CHAIRMAN BABCOCK: Something similar to that, yes.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Let's get back to this amount thing. Bill and Elaine's point is valid. So should it be after the appeal, you know, appealable judgment, final judgment? What do you?

MR. SCHENKKAN: Do you mean to exclude the practice in other attorney's fee cases of specifying the amounts of attorney's fees that would be applicable in the event of appeal to the Court of Appeals and a further amount --

CHAIRMAN BABCOCK: Yes.

MR. SCHENKKAN: -- that would be applicable in the event of an appeal or not? It seems it's a clear policy choice. I don't think there is any intrinsic right answer or wrong answer. Just what is the intent?

CHAIRMAN BABCOCK: Well, if you limit it

to the fees incurred up through the final judgment, then you're necessarily going to exclude appellate fees.

MR. ORSINGER: Yes. Peter is saying do we necessarily have to cut it off at judgment, or do you want to include it all the way to the Texas Supreme Court?

MR. SCHENKKAN: Which do you want to do is what I'm asking.

CHAIRMAN BABCOCK: Yes. What the committee wanted to do is only dealing with trial court level and not try to deal with the appellate level.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Unless we change the cap, because we're only dealing with $50,000 here. Maybe that not even that much depending on the size of the verdict. Okay. What else, Elaine?

PROFESSOR CARLSON: Okay. Then we get to what are the fee shifting --

MR. ORSINGER: Well, no. We just skipped over a Constitutional issue there. Maybe nobody cares about it; but I think we at least should note that we are providing for --

MR. SCHENKKAN: We don't know what

the Constitution is going to look like.

MR. ORSINGER: Good point. So maybe it's a moot discussion.

CHAIRMAN BABCOCK: What Constitutional issue?

MR. ORSINGER: Well, I mean, someone might argue that having to pay a reasonable fee is a jury issue. It is in all other parts of Texas law except for this rule. So, you know, are we going to by this rule provide that there is no right to a jury and everybody is comfortable with that?

MR. CHAIRMAN: We decided a long time ago we would be silent on that.

MR. ORSINGER: Oh, excuse me. I am sorry. I missed part of that off the record discussion.

CHAIRMAN BABCOCK: It was not off the record. It was totally on the record.

MR. JACKS: He's back.

CHAIRMAN BABCOCK: He must have been hung over this morning.

HONORABLE TRACY CHRISTOPHER: Maybe we should go back to calling them sanctions again.

CHAIRMAN BABCOCK: That's right.

MR. SCHENKKAN: And also for purposes

of skipping over and moving on, I hope silence will not be taken as acquiescence in any particular unwritten comment that as indicated might later be supplied at footnote marker 24, because I think there is a substantial difference of opinion under existing law as to when and how contingent fee agreements can be taken into account for purposes of determining reasonable and necessary fees. And it would be a further question as to whether that existing law, whatever the reference may be, should be taken exactly as is for this new and different context or will be different here. So I assume for purposes of having something that the legislature can know we adopted the legislature doesn't have to see the comment; but I'd sure like to talk about the comments when that later time comes.

CHAIRMAN BABCOCK: But we're on the part, that section, that footnote 24 relates to.

MR. SCHENKKAN: That's the only reason I say it now. I don't want to be stopping and complaining about the footnote.

CHAIRMAN BABCOCK: One of the prior versions specifically mentioned contingent fees; and I think Senator Ratliff one of his early bills had that language in there. I don't think it's in House

Bill 4. Am I right about that?

MR. JACKS: Yes.

CHAIRMAN BABCOCK: Okay. And it's not in this. And so that means that somebody took it out for some reason. Why did we take it out, talking about contingency fees?

JUSTICE NATHAN HECHT: Well, I'm struggling here; but I think Joe put this in or wanted this put in because he wanted to be sure that the contingent fee arrangement could be taken into account, just what it says. He raised a good point that maybe it can and maybe it can't and for what purposes and how. So I mean obviously we're not trying to resolve those kinds of substantive issues in a comment and should not. This was just to reference the problem.

MR. ORSINGER: I would argue that the use of the word "amounts reasonably and necessary" suggest to me that you're considering a fee based on services or time rather than a percentage recovery. And if you really, if you want the Court to be able to say 40 percent is a reasonable fee, maybe we shouldn't say "amounts." I don't know if anyone interprets it the same way I do.

CHAIRMAN BABCOCK: When you're

determining reasonableness and necessity one of the factors in the State Bar rule is, you know, how tough a case it was.

MR. JACKS: And whether the feature is contingent is in the rule.

CHAIRMAN BABCOCK: Yes. And whether the fees are contingent too. I mean, that laundry list in the State Bar rule has got contingent fee.

MR. ORSINGER: Why don't we just say "reasonable and necessary attorney's fees" rather than "the amounts reasonably and necessarily incurred"?

MR. BOYD: Because it includes expert fees and court costs on the next page.

MR. ORSINGER: Okay. So I guess what we're saying is a contingent fee is not, the Court is not bound by a contingent fee arrangement.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: But the Court can consider the fact that the fee is contingent in determining reasonable fees.

JUSTICE NATHAN HECHT: The rule doesn't say. And a comment is proposed that would say "We're not saying." But Peter raised the issue that even a comment as proposed may say something

too much or something wrong. And of course, we don't want to do that in a comment. We're not trying to affect the substantive law on the comments of the rule. So I think rather than -- well, the committee could take another view; but we might want to be silent on this subject.

CHAIRMAN BABCOCK: Yes. And you could fix it and tie in a whole bunch of well established law in (b)(3) by just adding the words "reasonable and necessary attorney's fees." And that's going to hook into the State Bar rule which contemplates contingent fees; and there's a whole bunch of case law that is developed under that. And then you can be silent about it otherwise. Peter, does that satisfy you?

MR. SCHENKKAN: I think we are being silent about it now. I just want people to accept that that is what we're being. And if everybody is okay with that, that's just fine. Different people around the room may have different ideas in mind of what the existing law provides about when and how the contingency nature of one side's, I guess conceivably both sides', one side's arrangements might be taken into account. And you may wake up and be surprised --

CHAIRMAN BABCOCK: Well, that's --

MR. SCHENKKAN: -- some day later.

CHAIRMAN BABCOCK: -- an everyday. Carl.

MR. HAMILTON: I don't particularly like the word "incurred" because the Court might say "Well, I'm bound to follow the contingent fee because that's the fee that was incurred by the offeror."

PROFESSOR DORSANEO: Yes. I think that's right. I don't like the word "incur."

MR. SCHENKKAN: Just "award the offeror reasonable and necessary costs" since we will have defined "costs" for the purposes of this rule "including court costs, expert witness fees."

MR. BOYD: But you have to have something "incurred" in order to fix it in that time period, a verb.

PROFESSOR DORSANEO: Well, the problem you have all three categories. You want to say "earned."

HONORABLE CARLOS LOPEZ: Or fees related to work done during the time period.

MR. HAMILTON: Say "reasonable and necessary" --

PROFESSOR DORSANEO: "Reasonable and necessary attorney's fees earns.

MR. HAMILTON: "Reasonable and necessary costs including attorney's fees."

MR. ORSINGER: I would propose that we move "reasonable and necessary" into the subdivision because to me you don't have a reasonable and necessary test on court costs. If you used the Civil Practice & Remedies Code definition of court costs, court costs are what they are. You don't have to have the court reporters come in and testify that the charges per page were reasonable and stuff like that.

PROFESSOR DORSANEO: Where attorney's fees you could say, you could add more language and instead of just saying "attorney's fees" you could say "reasonable attorney fees earned."

MR. ORSINGER: And not say "necessary"?

PROFESSOR DORSANEO: "Necessary" doesn't. I kind of think attorney's fees are necessary; but I think that a lot of people don't know what they're talking about when they say "necessary."

HONORABLE CARLOS LOPEZ: "Reasonable

fee necessitated by."

PROFESSOR DORSANEO: Because you need an attorney to do this work.

HONORABLE CARLOS LOPEZ: "Fees related to, reasonable fees related to."

PROFESSOR DORSANEO: That will work.

MR. ORSINGER: I mean, I think there is a validity to the concept of "necessary," because someone who takes three lawyers to every deposition they may be charging reasonable rates; but it's not necessary for them to do that. They might file four sets of special exceptions, and it might have been a reasonable fee for it; but it might not have been necessary.

CHAIRMAN BABCOCK: How about this? "The Court after a hearing in which the parties may present evidence must award the offeror as post rejection costs including certain fees and expenses that were reasonable and necessary after the offer was rejected for costs, fees, reasonable and necessary attorney's fees."

MR. ORSINGER: Do you mean by that to be able to litigate the reasonableness of deposition charges?

CHAIRMAN BABCOCK: Well, I mean 99

times out of 100 you wouldn't, because I suppose you could, because -- is Jackson here? You know, if Jackson charges $50 a page.

MR. JACKSON: Wait a minute.

(Laughter.)

CHAIRMAN BABCOCK: Sorry. $45.

MR. ORSINGER: Let's take the word "Court" out of there. To me the court costs; and I don't agree that footnote 25 that they're defined only in case law. I don't have the Civil Practices & Remedies Code here; but I believe they're defined in the Civil Practices.

PROFESSOR CARLSON: Yes. I don't agree with that either.

MR. ORSINGER: So court costs to me have a -- go back 150 years when the legislature told us what they are. I don't see why we ought to be sitting around here talking about reasonableness and or court costs that are not defined by statute. Court costs are court costs. We all know what they are.

CHAIRMAN BABCOCK: But you could get into a fight about a court reporter fee. I never have.

MS. SWEENEY: Should we let the case

law handle that?

CHAIRMAN BABCOCK: Huh?

MS. SWEENEY: Shouldn't we let that develop in case law?

CHAIRMAN BABCOCK: Yes.

MS. SWEENEY: Thanks.

MR. MUNZINGER: What about distinguishing between fees and expenses? The way you have it written now fees for no more than two testifying expert witnesses. What if he charges you $15,000 for computer time? Is that a fee, or is that an expense? The same for the lawyer. You have got copying expenses. You have got all kinds of expenses; but the word "fee" implies for professional service rendered as distinct from the expense incurred.

CHAIRMAN BABCOCK: Good point. So do you want to expand it to expenses?

MR. JACKS: I would not.

CHAIRMAN BABCOCK: Huh?

MR. JACKS: I would not.

CHAIRMAN BABCOCK: Just "fees." What does everybody think? Do you want to expand it to "expenses" or keep it as "fees?" Skip, do you feel strongly both ways?

MR. WATSON: I'm just waiting for the vote up or down on the whole thing put together.

(Laughter.)

MR. MUNZINGER: Yes, but Skip, what if you lose the whole thing? It's better to get what you can while you can.

CHAIRMAN BABCOCK: Leave it at "fees?"

HONORABLE TRACY CHRISTOPHER: I would go with "expenses" because very often I think it is a big part of recovery. Someone, sometimes contingent fee expenses come off the top. I would include "expenses."

MR. BOYD: I agree.

CHAIRMAN BABCOCK: Okay. Two votes for "expenses." David Peeples is shaking his head "yes"?

HONORABLE DAVID PEEPLES: We're trying to compensate people for what they're out.

MR. YELENOSKY: Up to $50,000.

MR. JEFFERSON: More of a punitive thing.

CHAIRMAN BABCOCK: Is everybody in favor of "expenses" then? Actually not everybody is. How many people are in favor of adding

"expenses"? Raise your hand. How many against? By a vote of 15 to four that carries. "Expenses" will be included.

MR. MUNZINGER: Modified by "reasonable and necessary."

CHAIRMAN BABCOCK: Right. Modified by "reasonable and necessary."

CHAIRMAN BABCOCK: Okay. Any more on this part of the rule? Okay. Subsection (c), Persons Liable, we're going to change "sanctions" everywhere we see it.

MS. SWEENEY: When do I get to talk about caps?

CHAIRMAN BABCOCK: Very soon.

MS. SWEENEY: Okay. All right.

MR. SCHENKKAN: It seems to me this ought to be on the party or actually on the offeree. Right? It's the offeree to whom you make the offer. The definition is the offeree is a party. The offeree has the right to accept. If the offeree has the right to accept in the first place, then the whole thing would fall out under (d). It would be very unfair to sanction somebody for turning down an offer they didn't have the power to accept. I think that probably would come out. It seems to me this

ought to be imposed on the offeree; and therefore that leads me to wonder why we need it at all.

CHAIRMAN BABCOCK: I think it's an insurance issue.

MR. SCHENKKAN: But how does it change the insurance issue? If the award is against the offeree, then there is a separate insurance law issue of coverage; and I don't think we mean to rewrite the law of insurance coverage.

MR. BOYD: Is there an issue about whether policies cover sanctions?

MR. SCHENKKAN: Yes.

MR. BOYD: Right. But it's not sanctions then, because here is the reason because the insurance company says "No. I'm not going to pay that offer." And then at the end of it all the plaintiff wins and also recovers post rejection costs or sanctions and the insurance company who denied the offer says "No. That's not covered."

MR. MUNZINGER: That's right. And most policies give to the insurance carrier the power to decide to settle.

MR. BOYD: To decide to settle.

CHAIRMAN BABCOCK: Yes. But here is an interesting part of this: Let's say that I'm

defending a case and I'm the insured and I have got a policy. The policy is no reservation of rights, and this offer of settlement comes in. My insurance company says "huh-uh." Now under this language you're not going to stick me because I don't have the right to accept or reject the offer, so the insured is out of it. You know, when you come after me I say "Whoa, whoa, whoa. Hold it. Whoever you look to don't look to me because I did not have the power, the right to accept or reject the offer."

MR. JEFFERSON: I'm not sure about that. I think you do have the right to accept or reject; but you're risking insurance coverage. I mean, you're still the defendant in the lawsuit. That's a whole different issue whether you have got coverage or not. I don't know how you could bind the insurance carrier. Although if they're in control of the defense, they make the decisions about whether to make an offer or not and they're wrong, I don't see how they could deny coverage on the basis that their decision was wrong and therefore we're not going to protect our insured.

CHAIRMAN BABCOCK: It's almost like a Stowers type.

MR. ORSINGER: That's a tort claim

against your own insurance company.

MR. JEFFERSON: That's right.

MR. ORSINGER: And is that different from a rule imposing liability on an insurance company in a paragraph in a rule?

MR. JEFFERSON: Absolutely. Yes, that's different. I don't know how we bind an insurance carrier in a rule.

MR. MUNZINGER: I don't either. They are not parties to the lawsuit and you can't change their contract.

MR. JEFFERSON: But there are other. I mean, there are other aspects of the relationship that the rule will influence.

CHAIRMAN BABCOCK: What do you think about this, Justice Hecht?

JUSTICE NATHAN HECHT: Well, if you're being defended by your insurer without a reservation of rights and the lawyer abuses discovery and is sanctioned, surely the insurance company pays that.

CHAIRMAN BABCOCK: Or the lawyer does.

JUSTICE NATHAN HECHT: Or the lawyer. But not me.

Or if the adjuster doesn't show up for mediation, who gets sanctioned?

JUSTICE NATHAN HECHT: Well, if that is not imposing sanctions on an insurer by rule, I don't know what it is.

CHAIRMAN BABCOCK: Well, you may pay it if you're the one, you the client are the one saying "Hey, I want you to, you know, not turn over documents" even though we have no right to not turn them over. You say "You're my lawyer. You do that." So then they can get you to pay; but not if you're saying "Hey, I'm just being defended. You know, however you and the insurance company want to handle it is fine."

MR. SCHENKKAN: That's why I think it ought to be out of the rule all together. This is a rule about offerors and offerees, and let the insurance law take care of it, however it takes care of it.

MR. ORSINGER: I'm a little worried about how this is going to apply to corporations, because they're probably, you know, certainly the president is the person who has the right to accept or reject; but it's probably going to be a vice president or the head of the claims department or

somebody even lower down, arguably the entire board of directors, general counsel. How does this apply to a corporation? Who is the person who has the right to accept?

CHAIRMAN BABCOCK: The corporation is a person for that purpose.

MR. ORSINGER: It's not? Or it is.

CHAIRMAN BABCOCK: It is.

MR. ORSINGER: Let's be sure that this record here says that we're not talking about the people inside a corporation who make the call. We're talking about the corporation itself.

MR. YELENOSKY: Pete suggested --

MR. SCHENKKAN: Take it out. Either take it out all together or replace it with "party" or "offeree."

HONORABLE CARLOS LOPEZ: It's no more ambiguous.

CHAIRMAN BABCOCK: Okay. So there is movement afoot to take this out. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I had just one other question. Is it our intent to make this apply against minors? Guardian ad litems are the ones who have the right to accept unless we change the ad litem rule which is getting

proposed. They are the ones who have the right to ultimately to accept. And is that discussed at all in the various previous permutations?

CHAIRMAN BABCOCK: No. I don't think so.

MR. ORSINGER: No.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: There is another place you can take care of this. I think the sense is it's the height of unfairness to sanction or impose costs on an insured whose insurer has the right to control settlement. Now you could add that to the Florida factors as another factor for the Court to consider when it's unjust to punish a party if you're not going to say something about it here. But it seems to me that somewhere somehow the message needs to be conveyed that you don't want to put an insured in that position.

MR. YELENOSKY: Tommy, if that becomes a factor which would cause the Court not to award the cost shifting against the insured, but the Court has no ability or authority to award it against the insurance company, then is that fair?

MR. JACKS: Well, the judge has the ability to read the policy and figure out whether

the insurer is on the hook or not, and if they are, go a head and let her rip; and if they're not, I mean, if the facts that play out at that time of hearing are that it's the insurer who made the decision, but they're not on the hook for the penalty, then that's something the judge ought to take into account.

MR. YELENOSKY: Except that I guess insurance law might develop a pattern if this gets into place to where insurance companies would be liable for decisions that they made despite what is in the contract.

MR. JACKS: As the law develops that will affect how the judge decides things, I suppose.

MS. SWEENEY: This language just says "may be an insurer" which to go all the way back to what is already here on the page doesn't say "is going to be." It just says "can be," which if it's the insurer who is making the call, smack him; and if it's the insured who is making the call, smack the insured.

MR. MUNZINGER: How can a Court enter a judgment against a non-party insurance company requiring a non-party insurance company to pay money to a plaintiff and not violate due process?

CHAIRMAN BABCOCK: Can a Court make an adjuster go to mediation?

HONORABLE CARLOS LOPEZ: How does it violate due process? They've had notice, they've been involved, they've made decisions.

MR. MUNZINGER: They weren't joined in the case, they have a contract that there may not fly. I think you raise kinds of due process issues with it and procedural issues which I know Skip, and I have to agree with Skip, I think obviously this rule is designed to get rid of bad lawsuits; but one unintended consequence may be that it triggers a lot of lawsuits, and this may be one of them.

You've got a problem with your insurance policy. Does it or doesn't it cover? And if the insurance company is not, says "No, we're not going to pay that sum, they're liable," it seems to me the insured if the insured has a judgment entered against him or her, has a Stowers type claim now for $50,000 or whatever against the carrier. And if I know my carriers, and I do because I've worked for them, they are going to say "We're not paying."

MR. JEFFERSON: I can't imagine an insurer who is defending without a reservation of rights and they're controlling their defense

counsel, and the lawyer or the party gets sanctioned under this rule, I can't imagine an insurer saying "I'm not going to cover that." And if they did, I think they would be doing it at their peril.

MR. MUNZINGER: They have their risks; but --

HONORABLE CARLOS LOPEZ: Or that it goes against the coverage.

HONORABLE TRACY CHRISTOPHER: The case law says they're not accountable for malpractice.

CHAIRMAN BABCOCK: Okay. Should do we leave this in or take it out?

PROFESSOR DORSANEO: Take it out.

CHAIRMAN BABCOCK: Okay. Bill says take it out. Anybody for leaving it in?

MS. SWEENEY: Leave it in.

CHAIRMAN BABCOCK: Who said "leave it in?"

MS. SWEENEY: Me.

CHAIRMAN BABCOCK: All right. Paula said leave it in. Bill said leave it out. The vote will be everybody that wants to take it out raise your hand.

MR. JACKS: I want to take it out and

put it somewhere else.

CHAIRMAN BABCOCK: I wouldn't vote for this.

MS. CORTELL: Can you clarify the vote?

MR. YELENOSKY: I thought we were taking out all of it.

MR. MUNZINGER: They want you to clarify what we're voting on.

CHAIRMAN BABCOCK: Okay. Put your hands down and we'll clarify it. We're going to take out subsection "Person Liable."

MS. SWEENEY: (c).

CHAIRMAN BABCOCK: (c). Subsection (c), I'm sorry, "Person liable," we're voting to take that out. If you want to take it out, raise your hand. If you want to leave it in, raise your hand. 16 to 10 we take it out.

MR. ORSINGER: You may not allow this; but I'm wondering what if we just took out "which may be an insurer" and left it in? Would it change the vote? Are you willing to vote that?

CHAIRMAN BABCOCK: No, I don't. No. We've talked about this enough. Unless Justice Hecht, do you want to talk about it?

JUSTICE NATHAN HECHT: (Nods negatively.)

CHAIRMAN BABCOCK: Limitations and exceptions, now Paula.

MS. SWEENEY: This rule does not account for one of the problems that we discussed earlier; and Elaine and Tommy, I would like to know your thoughts on it. If you have a statutory cap, I'm not talking about insurance coverage, if you've got a statutory cap of $250,000 and you have a million dollars in damages and everybody knows you do, you can't ever get more than $250,000. It doesn't matter what you do. Why would the defense ever offer more than whatever percentage we put in here, 70 percent of $250,000? You've just lowered every cap in the state by 30 percent.

I would propose that in order to avail themselves of the caps under those circumstances the defendants would have had to have offered those caps. In other words, if you say "I've got a $250,000 cap, you know, forget it. I'm never going to offer it to you, because that's the most you can ever get. Go ahead and try me, and you're going to get whatever that is." 100 and -- I don't know. Someone tell me. $190,000. I think they ought to

lose the protection of the cap. Someone can put that in the rule.

(Laughter.)

MS. SWEENEY: But there needs to be -- you wanted to know what I wanted.

CHAIRMAN BABCOCK: If they don't like it, they can overturn the rule.

HONORABLE JAN P. PATTERSON: That should be in the notes.

MS. SWEENEY: Just abrogate sovereign immunity all together. There has to be some provision that this fee shifting cannot apply if the amount of the cap isn't offered and the judgment is greater than the cap. Otherwise you're just lowering the caps; and there is nothing the plaintiff can do, because they're going to spend that much money. They're going to go to trial. They're going to get a million dollar verdict which will be reduced to the $250,000 cap which will then be potentially reduced by costs and expenses.

MR. SCHENKKAN: I don't understand it. If you don't, if all you're going to get is the $250,000 anyway, that's all you're going to get. You're protected by the 70 percent. If they offer you --

MS. SWEENEY: 70 percent of $250,000. And I have to spend another $100,000 to get there. I'm going to outspend anything I could ever get by way of sanctions. I'm never going to get up to the cap. I don't have the numbers that I can march down the line.

But let's say in a malpractice death case there is approximately a 1.4 million cap per defendant for the next two weeks.

(Laughter.)

MS. SWEENEY: You make a demand of the cap because you have a big earnings loss and you can document it.

MR. SCHENKKAN: Okay.

MR. SWEENEY: They offer you 70 percent of it. Everybody knows early on it's a good case. You have got to spend $250,000, $300,000 on experts, litigation costs and so on to get to that place to get that verdict and you can't avail yourself of any of these provisions.

HONORABLE TRACY CHRISTOPHER: Are they currently offering you the cap?

MR. SCHENKKAN: Yes. I don't understand it. It seems to me you offer them a cap, 1.2 million, and if you're right.

MS. SWEENEY: 1.4.

MR. SCHENKKAN: 1.4 million. And if it comes in at 1.4 million, they now owe you 1.4 million plus fifty.

MR. YELENOSKY: No. Because their offer would have been just 70 percent. Right? And if you offer -- you're not offering. You're request is not more than 130 percent more, whatever the parallel. Right?

HONORABLE JAN P. PATTERSON: They have an additional buffer.

HONORABLE CARLOS LOPEZ: They have a buffer. They're protected.

MR. YELENOSKY: You can't math that.

MR. SCHENKKAN: Maybe now I need an Excedrin. I'm having trouble following you at this point.

CHAIRMAN BABCOCK: Well, yes. I don't understand. If they offer you 70 percent of 1.4, it is $980,000.

MS. SWEENEY: Okay.

CHAIRMAN BABCOCK: So they offer you $980,000 and you say "Huh-uh. I'm not going to take that because I think this is a heck of a case and I'm going to recover a million four." If you

recover a million four, you're going to get a million four, and they're not going to get their attorney's fees. Right?

JUSTICE NATHAN HECHT: They're going to get yours.

MR. YELENOSKY: But you're not going to be able to get, you're not going to be able to impose the sanctions on them.

CHAIRMAN BABCOCK: Right.

MS. SWEENEY: Because you can never beat that. All they have to do is hit 70 percent of the cap.

CHAIRMAN BABCOCK: On the other hand you have enticed them to make a 70 percent offer in a case where there is going to be a contest. That's a benefit to you. Judge Benton.

HONORABLE LEVI BENTON: What about if we change the composition of the rule that says looking at the judgment in cases where there is a cap, we change it to say "the verdict?"

MR. YELENOSKY: Before the cap?

MR. BENTON: Right.

CHAIRMAN CARLOS LOPEZ: Ouch. Now we're talking. That's really that's intellectually honest.

CHAIRMAN BABCOCK: Well, let's never be honest.

MR. ORSINGER: I'm not sure we can handle that.

MS. SWEENEY: You're new, aren't you?

(Laughter.)

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: Well, Paula, we did discuss this within the other committee; and the way we came out of it is in the footnotes; and basically what the footnotes say is if it appears to the Court that that sort of game playing was going on, then the Court takes that into account in determining whether to impose a sanction or not. And that's the principal reason for the language "unfair competing conduct rather than a good faith attempt to reach a settlement" dropping to footnote 32 which gives the example. "For example, in a case in which damages are capped refusal of an offer that attempts to make strategic use of that cap should not be subject to sanctions."

It's also referred to in footnote 10 on page two where there is discussion of certain types of actions that weren't accepted, but again states that and gives the very example you gave although

with a $100,000 cap and says the better solution is to deal with strategic abuse rather than to except the entire category of the cases.

And so that's where the Jamail committee came down on it. I mean, there was agreement that you don't want to permit that kind of game playing to result in sanctions; but it was dealt with in this way rather than putting something explicit in the rule.

MS. SWEENEY: The other cap question that ties with that is if you have a statutory cap, tort claims cap, and the conduct is just egregious and they won't, you know, they won't do the right thing, they persist in offering you $240,000 until the day of trial. You get a $500,000 verdict. The cap would then be $250,000. What? Is it contemplated that this $50,000 sanction which would be appropriate under the facts, I'm hypothesizing, would be awarded or not awarded? Is there just immunity for cap defendants or anything that would go over their cap under this provision?

MR. JACKS: Not under this provision. In fact there is a footnote that expressly says that the penalty is in addition to and over and above any caps. There is some law, and I haven't briefed it

lately; but there is some law about governmental units as far as whether they are subject to anything over the cap, and there's some case law about it. And I don't think that this rule contemplates that.

MR. SCHENKKAN: Maybe I really am just completely stupid here, because it seems like everyone else here sees this a different way than me. I'd like to try it one more time because it really doesn't look like this is the case.

If the plaintiff's recovery is capped at $100,000, how does the defendant trigger the rule by a $70,000 offer when what the rule says is the offer has to be more than 30 percent more favorable to the claimant than the judgment? The judgment under a cap situation is going to be $100,000. The defendant can't trigger that except by making an offer that is $130,000. If the defendant makes that offer, you're going to take it --

MR. SWEENEY: Yes.

MR. SCHENKKAN: -- in a $100,00 cap case.

HONORABLE BABCOCK: Also in a heart beat.

MS. SWEENEY: I think you're backwards.

HONORABLE CARLOS LOPEZ: It says that. That's got to be fixed because it's the other way around.

MS. SCHENKKAN: The judgment is infinitely less favorable than an offer if --

HONORABLE CARLOS LOPEZ: Less favorable to the person.

MS. SCHENKKAN: To a party making a claim, to a plaintiff, if it's less than 70 percent of the amount offered. The amount offered in this hypothetical is 70. That means the judgment has to be 70 percent of $70,000.

HONORABLE CARLOS LOPEZ: That language needs to be changed to "favorable to the person making the offer." The judgment has got to be less than favorable to the person making the offer. They didn't offer enough. That's why they're getting penalized.

HONORABLE DAVID PEEPLES: Don't we need to be looking to the subsection (2) that is not in the printed materials?

CHAIRMAN BABCOCK: Yes.

HONORABLE DAVID PEEPLES: Which would have 130 percent instead of 70, or are we looking at (a)?

CHAIRMAN BABCOCK: Whatever end of the telescope you look at.

MR. WATSON: Do you guys really think the district from Lastbuddy is ever going to be able to implement this?

CHAIRMAN BABCOCK: Which district judge?

MR. WATSON: Lastbuddy, Fog Knott, anyplace other than the people sitting in this room.

CHAIRMAN BABCOCK: That was a good example, Skip.

MS. SWEENEY: Way to go.

(Laughter.)

HONORABLE TRACY CHRISTOPHER: That was nice of you.

MR. WATSON: I'm not as dumb as I look.

CHAIRMAN BABCOCK: Did you catch the numbers?

MR. JACKS: I did.

CHAIRMAN BABCOCK: Okay. Let's go back to Paula's caps. Do people favor trying to address the cap issue in the rule, or is it people's view that it's adequately dealt with in the comment that Tommy referred to, the issue of caps?

HONORABLE CARLOS LOPEZ: You mean as to whether or not he's above the cap?

CHAIRMAN BABCOCK: I'm sorry. Where damages are capped by statute, that's the issue Paula raises.

MS. SWEENEY: I'd just rather see it in the rule than in a comment, because you know, I wave comments at judges all the time; but they say "It's not -- that's nice; but it's not in the rule."

CHAIRMAN BABCOCK: Right. No question Paula wants it in the rule. Without knowing exactly how we'd put it in the rule, how many people want the rule to deal explicitly with damages which are capped by statute? Everybody that does raise your hand. All those who do not want it in the rule raise your hand, rather would have it dealt with by comment. Everybody listening?

HONORABLE DAVID PEEPLES: Chip, I think Tommy's point was it's already in the rule at the top of page seven. It's just that the comment makes it clear that sub (a) is talking about things like strategic use of the cap. So it's in the rule. Maybe it's not as explicit as you want to.

CHAIRMAN BABCOCK: Paula's point was she wants it more explicit. Right?

MS. SWEENEY: Yes.

HONORABLE LEVI BENTON: I agree that it ought to be more explicit.

CHAIRMAN BABCOCK: Judge Benton thinks it ought to be more explicit. Let's try it again.

HONORABLE JAN P. PATTERSON: Can I ask a question?

CHAIRMAN BABCOCK: Yes, Judge Patterson.

HONORABLE JAN P. PATTERSON: Is the intent of the note at 28 to say that it speaks to the verdict amount?

MR. JACKS: No.

JUSTICE NATHAN HECHT: The $50,000 is above.

HONORABLE JAN P. PATTERSON: Well, then what does the footnote mean, Tommy?

MR. JACKS: Well, the footnote 28 means that the Court is expressing the view that the sanctions can be imposed without regard to damage caps or coverage limitations. Now I don't. No offense; but the Court may be legislating a little bit there because I don't know that the Court can modify either insurance contracts or statutes.

HONORABLE JAN P. PATTERSON: All that says is the sanctions can be added to the cap amount?

MR. JACKS: But the idea is that even if you hit the cap, you can also get sanctions from the party who has the benefit of the cap.

HONORABLE JAN P. PATTERSON: Okay.

JUSTICE NATHAN HECHT: Okay. Well, again, maybe I don't understand the way it works out there. But if the assistant attorney general is defending the case and, God help us, commits discovery abuse and the plaintiff gets way over whatever of the cap is in damages, does that mean that the trial judge cannot sanction the attorney for discovery abuse? And it has never occurred to me that that would be the case; but I suppose the argument could be made that sanctions and everything are under the cap. So what that means is that if the attorney general is defending a case where there's pretty clear liability of a lot of damages and it may go over the cap, yes.

HONORABLE CARLOS LOPEZ: I think what this really does is it confirms your view that these are sanctions as opposed to something else.

JUSTICE NATHAN HECHT: Well, I mean,

we can call them something else, and that's fine. But it just seems to me it's in the nature of that as opposed to something else; but if that's not the way it works, then --

MR. JACKS: There is some law that, and I'm not well versed enough to know what it is; but I think that is a question that the Courts have come up with an answer for.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Only that raises the philosophical question of sanctioning an attorney who makes a bad guess. There is a distinction between discovery abuse and being wrong about a settlement evaluation; and that's the vice at the heart of this rule, which is another vote on other day which may be ignored; but that's the problem. It's one thing to say "Well, we can sanction you for discovery abuse." "Yes, sir. But I didn't commit discovery abuse. I just guessed wrong." "Well, you dumb bell."

CHAIRMAN BABCOCK: That view has been well articulated for several meetings. Okay. Getting back to Judge Peeples says "Really it's in the rule, so we shouldn't be voting on whether to put it in the rule. It's already there." So the

vote really is do we make more explicit the issue relating to damages which are capped by statute in the rule, more explicit language than currently is in the rule? Fair enough, Paula?

MS. SWEENEY: Yes.

CHAIRMAN BABCOCK: Okay. So that's what we're voting on. Everybody that wants to do that raise your hand.

MR. SCHENKKAN: Which direction? What is the "which?" Which direction?

MR. ORSINGER: We want to be more explicit in the rule.

CHAIRMAN BABCOCK: More explicit about saying. Everybody raise your hand. All right. All those opposed? By a vote of 17 to 11, the Chair not voting, that passes. So Paula, you're going to need to get with Elaine and Tommy and come up with some language that would accomplish that. We're not going to be able to do it sitting here drafting with 50 people. Richard.

MR. ORSINGER: As a parting shot on our discussion, and I could be wrong, Peter can correct me, I think the defendants would have to offer $77,000 to avoid a sanction on $100,000 cap, not $70,0000.

MR. SCHENKKAN: No. But again, that's half. We're now halfway there. It's right that that's what the defendant would have to be at for it not to apply; but it doesn't mean avoiding the sanction, because you're not sanctioned for not making an offer. You're sanctioned for turning down an offer. I'm saying there is no way that Paula can be sanctioned for turning down an offer under a cap situation if the offer is the cap, because it's definitely within the 30 percent of the judgment.

MS. SWEENEY: It's the other way around.

MR. SCHENKKAN: The only thing, the only effect that the combination of this rule plus the caps, putting these together, the rule we're talking about as presently drafted plus a situation where it's $100,000 cap, the only effect is Paula doesn't have the opportunity to move $50,000 worth of fees to the defendant that she would have if there weren't a cap by making an offer that was less. But her offer has to be --

MR. JACKS: She's got to go below $70,000 on her offer in order to --

MR. SCHENKKAN: But she has to go below $70,000 anyway.

CHAIRMAN BABCOCK: Yes, Kent.

MR. SULLIVAN: I actually agree with Paula and her comments; but I voted against this. The reason is I don't believe we can specifically by rule contemplate all the different ways you might manipulate this particular dynamic. It seems to me that very specific comments saying that it is this type of situation that is specifically contemplated to be excluded because it is strategic and manipulative would be a better way to go and I think would give greater breadth to this than by attempting to do it by rule in which case "I think the rule here while the rule didn't specifically touch on exactly what I have done here, so it doesn't apply at all."

CHAIRMAN BABCOCK: You guys get together on that. Okay? Here is a question. Is $50,000 enough?

MR. JACKS: Or too much?

CHAIRMAN BABCOCK: Or too much?

MR. SCHENKKAN: Well, in that connection where did the $50,000 come from? Is it based on any data at all about what the proportion is to judgment percentages?

CHAIRMAN BABCOCK: If it is based on

data, I didn't hear it. Where did it come from, Tommy?

JUSTICE NATHAN HECHT: (Indicating.)

MR. YELENOSKY: Footnote 29 says this ought to be at the 70- or 90-percentile level, whatever that means. I don't know if that is a normative statement.

CHAIRMAN BABCOCK: Well, is $50,000 the right number?

MR. JACKS: I don't know. I argued for a lower number.

MR. GILSTRAP: Isn't that really a political call? I mean, we have got to have a number that is big enough that maybe this will be the law instead of what the legislature passes. So how big has it got to be before the legislature says, or if it gets too small, the legislature is going to say "It's nothing. It's really not a sanction."

CHAIRMAN BABCOCK: Yes. It may or may not be a political call. But and we talked this morning a little bit about what the politics of all this is. But the Court is looking to us for advice, so the subcommittee and the Jamail committee has recommenced a number, and we need to discuss briefly

here whether that number is the right one.

MR. GILSTRAP: I'm not saying we shouldn't discuss. I'm just saying it has a political dimension.

CHAIRMAN BABCOCK: Yes. No question. This all does since there is a House Bill that has been passed. Richard.

MR. ORSINGER: I think that $50,000 is a heck of a lot of money for the lawsuits that ripple through our system and that this is somewhat experimental for us; and I would be frightened for us to increase this number higher before we have any idea how well it's going to work and might argue we ought to lower it other than the fact that we have the living, breathing legislature next door. So I would certainly not vote to increase it, and I'd be afraid to lower it.

CHAIRMAN BABCOCK: So you think it's "just right," like Goldy Locks.

MR. ORSINGER: Just like Goldy Locks.

CHAIRMAN BABCOCK: Just like Goldy Locks. Okay. Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I would prefer it to be lower because of the nature of the rule because it doesn't really require a bad

conduct, just kind of a bad guess, so I would prefer it be lower.

CHAIRMAN BABCOCK: Okay. And Paula.

MS. SWEENEY: I don't think the legislature is going to sneer at a number when the minimum automobile liability numbers are lower than this, and they seem to not have a problem with that and you can kill somebody for that. I think it should be lower than this.

JUSTICE NATHAN HECHT: House Bill 4 has no limits.

MS. SWEENEY: I didn't hear you.

JUSTICE NATHAN HECHT: House Bill 4 has no limit.

CHAIRMAN BABCOCK: And it's only got a 10 percent fudge factor.

MR. SCHENKKAN: And the House Bill 4 limit is, the real limit is the "may not exceed the amount awarded in the judgment." And thus I think $50,000 is the low number in this context. I think we're having to start to explain how come it's not higher, because there are cases in which the amount of the judgment is a heck of a lot more than $50,000; and in those cases you're saying $50,000 is the only incentive.

CHAIRMAN BABCOCK: "Don't even bother me about $50,000." Okay. Anybody else?

MR. VALADEZ: Is there any particular reason that it had to be a specific number? Do you know?

CHAIRMAN BABCOCK: I don't think so.

HONORABLE CARLOS LOPEZ: I was going to say can we index it to be somehow to the amount in controversy, amount awarded somehow so that it goes with the size of the case?

CHAIRMAN BABCOCK: You can do whatever you want. Sure. Tommy.

MR. JACKS: Well, I'll say a couple of the things. Last year when this committee voted on this we came up with 10 times the costs that were incurred post rejection. The one version of this rule that I drafted at some point, although I think not for either committee frankly, was 25 percent of the award, not of recovery not to exceed $25,000 was the number.

But having said all of that I think Richard Orsinger is right. I'm afraid if we send over a lower number than this, that it's going to be rejected out of hand; and I'm not talking about the House at this point. I'm really talking about the

Senate committee. I think it's important to note that the Chairman, Governor Ratliff has sponsored this bill every session since 1993 and in none of his prior bills has he ever had any cap other than the amount of the plaintiff's recovery. And if -- I'm afraid that if we send him anything lower than this number, and he already knows about this number because there has been testimony about it, that it might get a serious look from the Senate committee. And of course if it doesn't get a serious look from the Senate committee, it is not going to get a look by anybody over there. I mean, that's the place where the only alternative to the House version is going to be written at least until it gets to conference.

So even though I argued for a lower amount and I think the amount ought to be lower, for the audience that we're addressing now I think we probably ought to leave it as it is.

CHAIRMAN BABCOCK: All right. Everybody that wants to leave it at $50,000 raise your hand.

MS. SWEENEY: Is there a word besides "want" that we can use?

JUSTICE NATHAN HECHT: Take a picture

of Paula. I would never think Paula Sweeney voted "aye."

(Laughter.)

MS. SWEENEY: While holding my nose.

CHAIRMAN BABCOCK: Anybody against? All right. By a unanimous --

MR. VALADEZ: Hold on real quick. Did that include raising it? Against it would be if we wanted to raise it?

CHAIRMAN BABCOCK: Yes. All right. Pam, you're against it?

MS. BARON: Yes.

CHAIRMAN BABCOCK: By a vote of 20 to two, the Chair not voting, $50,000 is the number. We're going to do a little tweaking to the rest of subpart (d) to accommodate Paula's concern.

MR. SCHENKKAN: Can I ask one thing about (d)(2? I think it should be taken out of with respect to monetary relief. I ask that we take out "imposed on a claimant." Our rule is a two-way rule unlike House Bill 4. And if it's going to be a two-way rule and there is going to be a limited amount of judgment, I think that limit ought to be two ways.

CHAIRMAN BABCOCK: Yes. The intent

of the rule is to make it both ways.

MR. SCHENKKAN: It's no longer sanctions; but whatever you call them, "costs may not exceed the amount awarded claimant."

CHAIRMAN BABCOCK: "Party."

MR. JEFFERSON: "Party."

CHAIRMAN BABCOCK: "Party." Judge Peeples.

HONORABLE DAVID PEEPLES: I'd like to hear some discussion on why an utterly ridiculous case of no liability there is no sanction as opposed to as I understand this a little bitty case where you get a tiny, tiny judgment you'll get a little bit of sanctions. But a ridiculous, no liability case of which there are some there's no sanctions, not a nickle. Why?

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: We still have frivolous. We still have the Bill on frivolous lawsuits. We still have Rule 13.

HONORABLE DAVID PEEPLES: Yes. But those provisions were so gutted that they're just the most toothless provisions known to law. It never happens. I just cannot with a straight face defend something that just says a just totally,

nonsensical case or adding a party who has no business being there you're just home free on this law.

CHAIRMAN BABCOCK: So you want to take subpart (2) out of here?

HONORABLE DAVID PEEPLES: Well, I'm wondering if you could limit it to $50,000 max or maybe the last offer that was made or the last demand made or something like that.

CHAIRMAN BABCOCK: We've got $50,000.

HONORABLE DAVID PEEPLES: But to have zero is just crazy.

CHAIRMAN BABCOCK: We've got $50,000 in here.

HONORABLE DAVID PEEPLES: But if there's a no liability finding or no damages; am I right, there's no sanction?

MR. SCHENKKAN: Yes. It's the lesser of.

HONORABLE DAVID PEEPLES: Which is less than $50,000. It just is surreal.

CHAIRMAN BABCOCK: Surreal.

MR. VALADEZ: Right.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: It seems to me though

that the problem, David, is that you can't solve everything in any one rule; and this one operates within the limits of an offer of settlement. If the physical reason you're not settling with someone is because you think their claim is worth nothing, you're not in an offer of settlement posture, and then you would have the real reality which is in whatever the percentage is with all the exceptions we have at the front end this mainly applies to personal injury cases. I know it's not exclusive; but mainly personal injury cases. Mostly personal injury plaintiffs are judgment proof. It isn't going to amount to anything to put something in here that says they have to pay something out of pocket. All it's going to do is call the law into disgrace if anybody is foolish enough to try to collect a sanction award from.

CHAIRMAN BABCOCK: Yes. But the judge's point is that a nonfrivolous, but ridiculous case, a defendant may want to offer $5,000.

HONORABLE DAVID PEEPLES: Or $500.

CHAIRMAN BABCOCK: Or $500. And if he does, then how come if you get pushed all the way to summary judgment when presumably the case will be kicked out after they do discovery on you and you've

got to wait until all reasonable time to file your no evidence motion for discovery and it costs a lot of money, how come you don't get to recover some fees, and why wouldn't you want to encourage the nonfrivolous, but ridiculous case to accept the $500 to $5,000?

MR. SCHENKKAN: And the answer is because what happens if they turn it down? Do you collect from them? I think that's the answer. That's the problem.

HONORABLE DAVID PEEPLES: It doesn't have to be collected. There is some value in the symbolism of it. And let me say this: We're not talking only about low damage automobile cases. I'm telling you there are cases where it's corporation against corporation and they bring it, which is a fine lawsuit, and they bring in a bunch of individuals who just shouldn't be there, and they ought to be able to say "Look. Here is why I don't belong in this case. I'm having to pay a lawyer and take off time to be here. I'm offering you $500, $1000 or whatever to get out," and that ought to trigger this rule. And there ought to be some consequences when someone says "No. I've got the right to keep you in this case, and I'm going to do

it until you pay me a bunch of money." That is wrong.

MR. BOYD: The inability of a defendant to pay doesn't stop a judge from entering a judgment again the defendant. I don't see why it should stop a judge from entering a sanction against the plaintiff.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: The problem I see with pursuing this line is that it's going to be difficult to write it so that you punish the people who really should be punished under David Peeples' analysis, but don't punish the people who just lost a jury verdict. I mean, I see sometimes I see plaintiff's lawyers that invested $750,000 of their money in a products liability case that over in Mississippi garnered a nine million dollar judgment and then somewhere else they got zeroed out on basically the same products liability claim.

Those were good faith lawsuits. People invested real money. They hired real experts. The jury didn't go with them. So how do you distinguish the people who are zeroed out because the jury didn't go with them and the people who are abusing the legal system like David Peeples? The only way

to do that is --

(Laughter.)

HONORABLE DAVID PEEPLES: We all know what you meant.

MR. ORSINGER: In my view you can't have an automatic trigger that might sweep the honest litigants who lose in with the bad litigants. And if we're going to address David Peeples' concern, maybe we ought to do it through a proviso where the trial judge has the authority to provide or impose sanctions on frivolous litigants that has more teeth than the sanctions rule.

CHAIRMAN BABCOCK: The problem is it's not frivolous. I mean, it's ridiculous; but it's not frivolous,

MR. ORSINGER: Well, then maybe the standard ought to be ridiculous instead of frivolous. I don't think that there ought to be, you know, automatic liability that someone who has a good faith case has to go into their savings account or use up their college fund to pay just because the jury didn't go with them. I'm really troubled by that.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: Well, look. The reason

we were asked to consider this rule to begin with was because a Bill had been offered in the legislature in several sessions and the Court wanted us to get out front on it. In the Bill that had been offered by the Senator who is now the chairman of the committee who is going to rewrite the Bill every time this provision is in there. It's also in the House Bill. And so here we are. I mean, it may not make either good sense or good justice; but nothing we do about this is going to have any effect. It's in here because it was in there.

CHAIRMAN BABCOCK: Yes. I think the Court ought to get a sense of our committee. Judge Peeples as usual makes a very eloquent statement about this.

HONORABLE DAVID PEEPLES: It occurred to me, you know, a little case like this if the plaintiff comes in and says "Look, I'll take $2000 if you'll let me out"; and the defendant says "No." Maybe we can draft this so that the maximum exposure would be the $2,000 offer or something. I mean, there are ways to cap this so someone wouldn't, a little bitty person wouldn't face the $50,000 sanction judgment.

But the symbolism to me is important. I

think to tell people if your case is so bad that you get zeroed on a no liability finding, you owe nothing, that's a bad message to send.

HONORABLE CARLOS LOPEZ: That's way too broad a brush, with all due respect. There are plenty of cases where the jury comes back with zero where both lawyers were sitting during the deliberations nervous because they didn't know how it was going to come out. I agree with what the judge is saying absolutely. The problem is the devil is in that detail.

MR. ORSINGER: Yes. And some of your verdicts are 10 to two. So okay, ten jurors felt like it was a bad case; but two thought it was a good case. So how can you say it's frivolous if even one juror votes in favor of liability?

CHAIRMAN BABCOCK: Justice Duncan first, then Justice Patterson, then Frank.

HONORABLE SARAH B. DUNCAN: I agree with David that the way he presented it that would be absurd. The problem is this is a no fault rule. This doesn't -- it's inherent in the rule that it is going to affect far more litigants than those who file ridiculous, but not frivolous lawsuits. So the question as in any rulemaking process is given the

breadth of the rule what is the fair thing to do if there is one answer, which I frankly don't think there is? But the problem is this isn't based on filing a ridiculous, but not frivolous lawsuit. This is going to apply to every single type.

CHAIRMAN BABCOCK: Justice Patterson.

HONORABLE JAN P. PATTERSON: Well, I think we all recognize that there are going to be some gaps in the statute -- or in the rules, excuse me, and that we can't speak to every type of case here; but I think the effort is to have it apply to a body of cases and then see how it flows and falls out and we can always tweak it. So I don't think we have to speak to every possible category of cases.

CHAIRMAN BABCOCK: Judge Christopher. I'm sorry. Frank Gilstrap first.

MR. GILSTRAP: I think Tommy's remarks kind of carry the day with me. If we were trying to draft the best rule to deal with the problem, it wouldn't come out anything like this. As a matter of fact, if the last committee had its way, we wouldn't have a rule at all. What is driving this is the need, is the fact that if we don't do something, the legislature is; and given that I can't imagine that we would come out with a

proposal that actually had more teeth than the one the legislature is proposing. If this isn't in the legislative Bill, why should we put it in here?

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I think that most of the times where you get the person that shouldn't be in a lawsuit there are other potentially responsible parties in the lawsuit like, for example, maybe you sue a doctor who prescribed a drug properly; but there is a drug, a bad reaction from the drug, but you sue the doctor and the drug manufacturer. Well, the plaintiff is going to get, if the plaintiff got some money from the drug manufacturer, why shouldn't the doctor get his $10,000 offer of settlement to get out of the case early back? Why shouldn't they? I mean, you know, he was put in there. The plaintiff now has some money.

HONORABLE CARLOS LOPEZ: Well, even if they should, I don't know if this is the right place to do that. I mean, there is a way to get, there is a way to sanction people who file --

HONORABLE TRACY CHRISTOPHER: It's not a frivolous lawsuit in that situation. I mean, it's rejecting the offer of settlement and what we

do with it. You have rejected my $5,000 cost of defense offer before I had to go to all these depositions and incur all these attorney's fees because I'm nervous and I send my lawyer to all these depositions just in case they say something bad about the doctor even though we know the doctors are just sitting there for whatever reason. I mean, I think it should be addressed.

MR. ORSINGER: I'm not sure that Judge Christopher's concern isn't covered, because if the defendant doctor hits sanction territory, actually (d)(2) says that the sanction is limited to the amount awarded the claimant by the judgment. So if they get $500,000 against the drug company.

CHAIRMAN BABCOCK: Yes. But they settled. They settled against the drug company. The drug company settles.

MR. ORSINGER: For a take nothing judgment? Okay.

CHAIRMAN BABCOCK: Yes. The case is dismissed, confidential settlement. And so Judge Christopher's point is the guy is sitting there with a half a million dollars and has cost this doctor who is not comfortable a whole bunch of money.

MS. SWEENEY: It didn't cost him

anything. We were talking about carriers earlier. It cost his carrier; but they're not a party and they're not going to sanction them. Why are we protecting them? Seriously, I mean, if now we're worried about insurance companies and their controlling the litigation; but earlier we took, you know, went away from that because they're not parties. So and the doc' in the hypothetical is going to have a carrier incurring the cost.

CHAIRMAN BABCOCK: In order to give the Court some guidance on where we are coming from I want to propose a vote that is, you know, how many people think that Judge Peeples' concern merits further attention and drafting?

MR. JEFFERSON: In this rule?

CHAIRMAN BABCOCK: Yes, in this rule? Obviously his concern merits further consideration. But in this rule. An you could accomplish that a number of different ways. You could do it by ditching (d)(2), or you could do it by some formula that Judge Peeples would come up with. But how many people? Everybody that thinks that we should attempt to in this rule come up with some language to deal with Judge Peeples' concern, raise your hand. 13. How many people think that the rule is

fine as it is and that we shouldn't try to deal with it?

(Laughter.)

MR. ORSINGER: Don't say that.

CHAIRMAN BABCOCK: All right. How many people think the opposite of what we just voted on?

(Laughter.)

CHAIRMAN BABCOCK: Judge Peeples, you lost a close one 14 to 13 with the Chair not voting. The last two parts 167.7 and 167.8 I don't think are controversial; but if anybody -- Richard, put your hand down.

MR. ORSINGER: No. I can't stand this.

CHAIRMAN BABCOCK: If anybody has got concerns about this, tell Elaine. And Elaine, if you know, if there is any way -- well, I don't know when we can get a redraft, because there is a lot of tweaking that needs to be done.

PROFESSOR CARLSON: I've got to have the record.

CHAIRMAN BABCOCK: You're going to need to get the record. So anybody who has got a concern about 167.7 or 167.8 let Elaine know

promptly and we'll deal with that. The reason I'm doing this is tomorrow I want to get to the other things we have got to deal with.

But before we close today you're not going to believe the e-mail that I just got about half an hour ago; but I'd like to read it because it follows what Justice Hecht was saying.

"Dear Mr. Babcock:

I'm a professor at Bolt Hall in Berkeley. I'm interested in unpublished judicial opinions and have followed your admirable work on this issue in Texas. I'm working on it in California. There is a Bill in the legislature here which I helped draft which uses Texas as a model in providing that all unpublished opinions that the California Court of Appeals would at least be citeable. I'm going to testify on it and I have some questions."

So when California starts following us it's scary.

(Laughter.)

CHAIRMAN BABCOCK: We are now in recess. See you tomorrow at 9:00.

(Recessed at 5:20 p.m.)

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CERTIFICATE OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 11th day of April, 2003, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 1822.00 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 15th day of April, 2003.

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