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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 20, 2003

(MORNING SESSION)

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Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 20th day of June, 2003, between the hours of 9:06 a.m. and 12:12 p.m., at the Texas Law Center, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

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CHAIRMAN BABCOCK: All right. We're on the record, everybody. The Legislature has created a little bit of work for us, and I think, frankly, that that is a compliment to both the Court and to this committee that they have delegated a substantial amount of work to our -- to us, and it's a stark contrast to several years ago when they were trying to take stuff away from us, so it's a positive development I think.

As you can see, Justice Hecht has had a makeover and a great improvement, I will say for the record, but Justice Jefferson is here to give us the report from the Court while Justice Hecht is in Malta.

JUSTICE JEFFERSON: Yes. The last I heard from Justice Hecht's executive assistant he was conducting his business on a beach right near the Mediterranean Sea and getting a lot of work done, but you can see in your packet that he has been focusing on the important tasks that are committed to this advisory committee and to the Court, and I refer that to you for sort of the structure of this meeting and what the Court hopes this committee can accomplish.

I was reminded about the power of words and rules and laws last evening, and the need for good drafting. I went to an exhibit at the Witte Museum in San

Antonio, Texas, and it's hosting a traveling display of some of the more important American documents, and my task was to read portions of the Emancipation Proclamation. Yesterday was June 19th, and it was quite an extraordinary experience. The document itself is very fragile, and it can only be displayed for about 48 hours at a time, but its words echo today.

The words we draft here in this committee won't have the same impact I suggest, but we do have very important work ahead of us. This session the Legislature left us a whole lot of work to do, and we have assignments and deadlines, and the Court is quite serious about trying to complete them on time. Justice Hecht has noted that one of the reasons he believes we were given so much responsibility is that the Legislature has profound confidence not only in the Court's ability to do it, but by your work and the amount of effort you put into the rules making process, so we have gathered here today to embark on some very difficult tasks, and we believe, the Court as a whole -- Justice Schneider is here today. I think you are going to be seeing other justices coming in and out during these next couple of days. The Court is quite confident that with your help it will be able to get them done.

Now, let me tell what you the Court has done and is going to do during the course of the rule-making

process. The Court has received and reviewed copies of House Bill 4, and we have reviewed and discussed most of the items on the committee's to do list. We have discussed the timing of adoption for the rules, and the Court will receive weekly updates of this committee's work and comments. During the course of today's meeting you will be visited by not only Justice Schneider, maybe Justice Waynewright I think will be coming, and the Chief Justice will be here tomorrow morning to discuss the MDL issues, and we have been speaking with the House and Senate sponsors about the Bill and our plans for adoption of the rules, and that dialogue will continue.

We intend for the results of this meeting, and every meeting as well, to involve communication with every lawyer in the state who has an interest in the work product of this committee and our Court on the rules. So we will be talking to State Bar sections, judiciary sections, and statewide lawyer organizations on a weekly basis about the rules development and the comments that we receive during this process and those that come from outside this committee. And Chris is going to be talking to several of you who are involved in the sections or the associational leadership to help make sure that by at least Tuesday of next week the results of these next two days will be widely disseminated on the website and any of the

other section meetings that you guys have, and we will be asking those organizations to provide us with a way to quickly receive comments from those who can about the proposals and to disseminate and receive information for the advisory committee and for the Court.

And so with that, on behalf of the Court, again, thank you for helping us with these important duties, and I'll turn it over to Chip.

CHAIRMAN BABCOCK: Okay. Justice Schneider, anything you want to say to the assembled multitude here?

JUSTICE SCHNEIDER: Meeting is over. You can go home. No, just hello, and I am just dropping in to be reminded of how much work we've got to do, so I appreciate it. Thank you.

CHAIRMAN BABCOCK: Great. All right. Elaine Carlson, who has been to school on House Bill 4 and has actually given a speech about it, and Tommy Jacks, if he is here, but I don't think he's here yet, but he's due here, are going to give us a little overview of the rule changes required by or necessitated by the statutes adopted by the 78th Legislature. So, Elaine.

PROFESSOR CARLSON: Actually I'm still in school on House Bill 4, and I certainly don't represent that I have a working knowledge on all of its provisions. My study has focused upon changes necessitated by House

Bill 4 in the procedural area, and I'm hoping Tommy can bring you up to speed on the changes to substantive law as it affects tort and product liability and other substantive areas of the law.

House Bill 4 is very interesting to read because the Court has -- excuse me, the Legislature has through the context originally of dealing with tort reform enacted a number of changes that affect litigation in general, and it certainly is not -- I would not describe House Bill 4 as simply a tort reform bill. I would say a good half of it, if I'm going to wag an estimate, really affects civil practice in general in a variety of ways.

Justice Hecht's letter sets forth a very fine summary of some of the changes, many of the changes that we're called upon to look at. House Bill 4 is comprised of 22 articles, two of which are reserve, so actually 20 separate articles in House Bill 4; and it begins with class actions in its first article and directs the Court to do a number of things in that area, which I assume Richard might cover when we get to his part of the agenda; but among other things, it directs the Court to enact rules of procedure, quote, "to provide for fair and efficient resolution of class actions"; and we might conclude that what exists is fair and efficient or we may end up with a total rework of Rule 42 after the subcommittee and the

whole committee looks at that issue in some depth.

There's a fair amount going on in class action at the Federal level, which is of some interest and probably will have an affect perhaps on what the subcommittee might recommend. And as you know, there's bills, as I understand it, out of both the House and the Senate in Congress that have got out of committee that will go to full vote dealing with jurisdiction on class actions in Federal courts that cross state lines and involve plaintiffs from across state lines; and Federal Rule 23 has been suggested, promulgated to be amended subject to congressional approval, I believe that's by December 31st. So we've got that Federal side of things maybe to look to as well as just whether we believe and we try and discern what is it the Legislature is wanting us to do when they say adopt rules for class actions, for the fair resolution of those types of claims.

The class action rule then goes on to have some specificity in rules that must be adopted by the Court which principally address attorney's fees and the adoption of Lodestar and gives the mandate that the trial court have significant review power over proposed class actions, including looking at such things as whether a proposed class action settlement -- to what extent does it provide for cash versus noncash benefits to the class members and

directs that the attorney's fees are to reflect that in some proportionality, which is an interesting idea. So that's the class action part of the bill.

Article 2 deals with what we call the offer of judgment. It's now been renamed "offer of settlement." There were two very different versions out of the House and the Senate on that. Ultimately principally the Senate version prevailed and the article -- HB 4 directs the Court to adopt rules within some fairly defined parameters of offer of judgment, which I'll go through when we get to that part of the agenda in more detail, but it also gives the Court a fair amount of discretion in the offer of judgment rule promulgation in some areas, such as the Court having the authority to exempt out from the operation of the rules those causes of action which it believes aren't appropriate for offer of judgment treatment.

I believe the House version was defense only. The Senate version was any plaintiff or defendant can trigger the offer of judgment. The -- I suppose it's a compromise legislation that ultimately passed, does allow both the plaintiff and defendant to use the offer of judgment potential fee shifting, but it does give the defendant the initial trump card and mandates that offer of judgment fee shifting does not occur until the defendant files a declaration with the trial court that basically

offer of judgment is in play. So the way I read the statute, offer of judgment cannot be used in any case unless and until the defendant timely makes this declaration. So a defendant may choose not to invoke the fee shifting provision of the rule at all.

The rule does direct -- excuse me, the statute, HB 4 does direct the Court to decide when that declaration needs to be made in the course of the litigation. It also leaves a great amount of detail to the Court insofar as the timing, when the offer should be made and dealing with successive offers, withdrawal of offers, rejection of offers, et cetera. There is a cap that's very different from what we discussed in our last meeting on offer of judgment rule. We had ultimately suggested to the Court in our April meeting that there ought to be an outside cap, and we tied it eventually to a dollar amount. I think it was $50,000.

The way that the offer of judgment article is structured is that if an offer is made timely and properly and there is not an acceptance, there's a rejection, and the judgment entered in the case is significantly less favorable then fee shifting can arise, and "significantly less favorable" is defined by a 20 percent margin. We talked about a 30 percent. The statute ultimately as passed has a 20 percent margin, with a cap tied to the

amount of fee shifting that can occur. The legislation in HB 4 pretty much tracks what we talked about insofar as what could be shifted, costs and attorney's fees, reasonable attorney's fees, and two testifying experts.

When we get into a little more detail to that section later this morning we'll see that the cap that the Legislature placed is tied to the plaintiff's recovery. The plaintiff cannot -- and the way I read the statute, nor may the defendant be responsible for more in fee shifting than 50 percent of the plaintiff's economic damages. That's not defined in that statute, and a hundred percent of noneconomic and exemplary damages. So the [weigh|way] that I'm reading that, and I certainly welcome everybody else's read on that, is in a take-nothing judgment situation there would be no fee shifting because it's tied to the plaintiff's recovery in that case.

The Court's also given a fair amount of discretion in enacting the rules dealing with offer of judgment to enact rule provisions necessary to implement the statute. So whatever wiggle room that might give us, that might give us.

Within House Bill 4, Section 1, there is a redefinition of conflicts jurisdiction for the Texas Supreme Court, and I don't have the language right in front of me, and I apologize for that. I didn't realize until I

talked to Chip last night at 10:00 o'clock at my favorite Four Seasons location that I was going to be called upon to do this. So forgive me for not having more specificity, but my feeble recollection is that conflict jurisdiction of the Supreme Court is generally when the Court feels it's necessary to clarify the law. That's a very significant change and no doubt will enlarge the Supreme Court's jurisdiction and area. I don't know if that's going to require any rule change, but it certainly will be something for the Court to wrestle with in its decision.

Here we go. Thank you. "For purposes of subsection (c), one court holds differently from another when there's inconsistency in their respective decisions that should be clarified to remove uncertainty in the law and unfairness to the litigants." That's our new conflicts jurisdiction. I'm jumping around. I apologize because this is a little bit disjointed, as is my mind.

The effective date of different articles is distinctive, so we can't just say we have to have this done by December or July or September. Different articles have different effective dates, so we are going to have to proceed, I assume, and our Chair will direct us, among the priorities of those things that must be done by September as opposed to December. The class action rules I believe are December 31st as are the offer of settlement rules, has

the December 31st deadline as well.

There were changes made fairly significant in the area of venue forum, nonconvenient and multi-district litigation in Article 3 of House Bill 4. There was some tweaking of 15.003, the Civil Practice and Remedies Code, dealing with when a plaintiff cannot independently establish venue, how the trial court is to proceed, and in particular, who can appeal. As I read it -- Pam is shaking her head "yes," so I'm hoping you'll agree with this, Pam. There is an enlargement, as I read the statute, of any party who is dissatisfied with that ruling on the right to seek interlocutory appeal.

MS. BARON: Yeah. Elaine, it used to be limited to people who are seeking or opposing the intervention or joinder, and now it's any party affected by the decision, which I think would encompass co-plaintiffs and co-defendants.

PROFESSOR CARLSON: So that will lead probably to more review as well. In the area of forum non conveniens, as I read it, our forum non conveniens statute is out the window. It's been repealed, and the standard that's been adopted in House Bill 4 is I think very similar to what the Federal courts have been using under the Federal common law of forum non conveniens, and I don't know that that's going to require any rule changes on the

part of the Court, but it certainly will lead to a development of new jurisdiction in that area of practice.

That same article deals with the necessity to adopt rules pertaining to multidistrict litigation. As we know, Rule of Judicial Administration 11 has had an MDL potential practice at the pretrial stage through the summary judgment and defined how that procedure worked and which judges were able to participate in the decision on the MDL and also the actual ruling of the pretrial matters. As I understand HB 4, that same procedural scheme is retained, but the players have changed. That is, there is now to be a panel appointed by the Court I believe of five judges on this MDL panel and then it gets metered out to judges accordingly. Still retain the ability of the trial court when there's consolidation under MDL principles to decide not only pretrial matters but summary judgment; and in my, again, feeble mind it seems to me that that came up at the Federal level under the MDL statute; and my recollection, and it could be erroneous here, is that the U.S. Supreme Court said that that was improper for summary judgment to be adjudicated, it had to go back to the trial court; and I'm not certainly an expert in that area. That was one of those passing thoughts when I read the statute that I put on my to do list to go check, so I don't want to lead you down the primrose path. I'm not sure if that's a

problem or not.

It does direct the Court -- I think it invites the Court to enact MDL rules. It says, "The Supreme Court may adopt rules relating to the transfer of cases for consolidated or coordinated pretrial procedure," and Justice Hecht has suggested in his summary of the rules that he would like us -- the Court would like us to determine if changes are needed to our rules of procedure or Rule 11. And as you know, at the Federal level there's a whole manual for complex litigation that deals with MDL that we don't have any counterpart, and whether we're going to need that or would desire that is something I assume that subcommittee is going to look at. Again, I'm not certain, but I believe that's a September trigger.

CHAIRMAN BABCOCK: Yeah, it is.

PROFESSOR CARLSON: Yeah. So that's probably up on the priority list for this committee. There was a change, a very significant change, dealing with interest and what the Legislature refers to as appeal bond. The Legislature amended the Finance Code to provide post-judgment interest, has a maximum now of 15 percent and a minimum of 5 percent. Specifically the Finance Code says post-judgment interest is tied to the Federal Reserve prime rate as of the date -- Federal Reserve Bank of New York as provided on the date of computation. So you would look at

the day on which -- if you're figuring out post-judgment interest, you go to the website of the Federal Reserve Bank of New York and you look at what the prime was. Last week when I looked at it, it said 4.25. The statute says there's at least a minimum of five percent on post-judgment interest. It used to be 10; and there's a cap, if things go really interesting in the economy, of 15 percent as opposed to what used to be 20 percent. So that's a change. The interest statute, as I recall, also prohibits post-judgment interest, I believe, on noneconomic damages. I was at a seminar a couple of weeks kind of listening --

HONORABLE JANE BLAND: Future. Future.

PROFESSOR CARLSON: Future. Future economic damages. Thank you. I was at a seminar a couple weeks ago in which Scott Rothenberg spoke, and -- someone who I respect greatly. He suggested in his speech that many of the prejudgment interest provisions get tied to the post-judgment rate, and so a change to the post-judgment interest rate he suggested necessarily would affect in many cases also the prejudgment interest rate. So that's something to consider. Again, this is not something, of course, that we're going to write new rules on.

In the supersedeas, what the Legislature calls appeals bond, we will need to make some changes, and I've brought some proposals today for the committee. Those

changes to the supersedeas practice become effective for, I believe it's appeals -- no. That's wrong. For final judgments -- for judgments signed after September 1. So we have a fairly short time period. The legislative changes in the area of supersedeas deal only with money judgments. The Legislature has progressed from -- in our rules and our practice from you must totally bond the judgment interest and costs pre-Pennzoil vs. Texaco day to make sure that the judgment losers hold. I mean the judgment winners hold at the end of the appellate process, and as you recall, the Legislature enacted Chapter 52 several years ago after Pennzoil vs. Texaco telling the Court that it could not enact rules contrary to the statute and provided for a ability for a losing judgment debtor to put up alternate security on a standard that was very different than what we were used to, and it -- I'm going to paraphrase it -- basically said that the judgment winner only has the right to look at the same amount of assets at the beginning of the appeal at the end of the appeal. So there was an ability to obtain a court order for lesser security under that statute.

52 -- Chapter 52 has been amended, several of its provisions repealed, but not 52.005 that says the Supreme Court may not adopt rules to the contrary so that today a judgment loser in a money judgment has the right to

suspend enforcement of the judgment by posting a supersedeas with a ceiling, and it is to cover today damages but not punitive damages. So only compensatory damages need to be secured by supersedeas, interests and costs. So the statute then goes on to say, however, there is a ceiling on this of a maximum of the lesser of $25 million or 50 percent of the judgment debtor's net worth, with net worth not being defined by the statute, and there's no procedure on how this needs to operate where we'll have to look at our Rule 24 to change that.

So in a case in which you have three judgment debtors of a variety of net worth who are jointly and severally liable in a case, you can end up with each of those defendants having to post very different supersedeas bonds or alternate security, cash or other things, in order to secure the judgment. The statute then goes on to say, "and the trial court shall lower the amount below that ceiling." If the judgment debtor satisfies the court that putting up security in that amount will cause substantial economic harm, not defined in the statute, then the court is to then -- trial court is to then lower the security to an amount that would not cause the judgment debtor substantial economic harm. So the focus is totally shifted from "We need to protect the judgment winner from the dissipation of the loser's assets on appeal through

supersedeas" to "We don't want to prevent defendant -- judgment debtors from being able to appeal because the supersedeas is just too economically harmful." Very, very very different shift in our practice.

There is Article 12 of the statute that deals with damages and is very interesting to read and puts limitations, of course, on damages, requires that exemplary damages be awarded only if the claimant proves by clear and convincing evidence that harm with respect to the claimant seeking exemplary damage resulting from fraud, malice, or gross negligence, taking out the former definition of willful act or omission.

The article provides that exemplary damages may be awarded only if the jury is unanimous in finding liability for -- in the amount of exemplary damages; and the article provides, as do many of the articles throughout HB 4, for specific restrictions on the jury instruction. In this area it says, "In all cases where the issue of exemplary damage is submitted to the jury the following instruction shall be included in the charge"; and it goes on to tell the jury, "You must be unanimous" and then it ends with "And the provisions of the section may not be known to the jury by any means including voir dire, introduction of evidence, argument, or instruction." So we don't want the jury to know about the caps and the

limitations. We do need to tell them "Your exemplary damage finding has to be unanimous."

There is a couple of areas where in the area of damages there is a requirement that the jury make specific findings as to distinctive types of damages, which is also going to modify the way the charge will need to be submitted. So broad form/Castille/HB 4 is continuing in my view to have a less of a broad form submission and more specific inquiry to the jury because of these mandates.

There is a new provision on proportionate responsibility that while short is probably very far-reaching. I heard Steve McConnico speak on this last week. No longer, apparently, is it necessary to name as a party a person who is a responsible third party. Today you may do that, but you can simply designate a responsible third person who need not be made a party, who then, as I understand the statute -- and anyone who knows to the contrary, let me know -- then requires that that person who is not a party's liability be assessed by the jury and that ultimately is going to affect the judgment in the case, because that issue goes to the jury even though they are not a party, which is an interesting procedural phenomenon. I'm going to have to talk to Professor Dorsaneo on how to teach that, I'm sure. Most of the rest --

MR. EDWARDS: There's one real important

thing. I think -- doesn't that provide for holding of limitations for 60 days to allow -- that's a major change. Even if limitations have run, the plaintiff has 60 days or something to bring that --

PROFESSOR CARLSON: To bring that person in even though limitations -- I believe that's right, Bill.

MR. JACKS: That's correct.

PROFESSOR CARLSON: I believe that's right. The rest of the -- you know, and it allows you to bring in someone you don't know under the Jane Doe/John Doe practice that other states and Federal courts have used. It's just a real different --

MR. EDWARDS: But it doesn't say how you sue them if the plaintiff sues a John Doe. I guess you can bring suit against the John Doe in 60 days maybe, and then if you learn who they are, you substitute them like under Rule 28, assumed name. I don't know.

PROFESSOR CARLSON: Your guess is as good as mine on that, Bill. I don't know.

The balance of the statute deals mostly with tort law and restrictions on recovery against certain governmental entities, and the med mal area -- I was hoping Tommy would get here because --

CHAIRMAN BABCOCK: He's here.

PROFESSOR CARLSON: Oh.

CHAIRMAN BABCOCK: And he's scribbling away.

PROFESSOR CARLSON: The baton is passed to you.

MR. JACKS: On med mal?

PROFESSOR CARLSON: On med mal, and if you can --

MR. JACKS: I've got an hour version, I've got a half hour version, but I bet you don't want either one of those.

PROFESSOR CARLSON: I love all of your versions.

MR. JACKS: Yeah. The changes in med mal are sweeping, and it's -- they really require more time than anyone wants to take. Obviously the ones that got the most publicity were the caps, and there are more caps in the bill than there were in the newspaper articles about the bill. The one that's best known is the hard 250 cap, 250,000-dollar cap on noneconomic losses per case, not per defendant, for each what I'll call an individual health care provider. Similarly, another and separate 250 hard cap on noneconomic losses for what are called institutional providers, and then there you can stack up to a total of 500,000, so theoretically it would be possible to get up to 750,000 in noneconomic damages in a case in which you had, say, two institutional providers, perhaps a nursing home

and a hospital, and at least one individual provider, such as a physician.

There are other caps that, for example, apply to a hospital that provides charity care to a patient and has a patient sign an acknowledgement that in return for getting free care they are subject to this more restrictive cap, and that's a a 500,000-dollar cap on all damages. There is a provision back toward the end of the bill that applies to certain hospitals that render at least 40 percent of the charity care in their counties and where it amounts to at least 8 percent of their net revenues, and that's a hundred -- 300 cap on all damages.

There's a cap that applies to physicians who provide emergency care in hospitals owned by local governmental units. That's 100,000-dollar across the board cap on all damages. So, I mean, the bill is chalk full of various caps, and you have to hunt around to find them all.

Perhaps another change that's among the more significant ones is that for emergency care rendered in the emergency department of a hospital or in an operating room or in the labor and delivery area where the emergency persists after the patient is transferred from the ER to one of those areas and if the care meets the definition of emergency care under the bill then the burden on the plaintiff is to show that the negligence instead of being

ordinary negligence was willful and wanton negligence. There's a legislative history that -- in which the sponsors explain that that's essentially meant to be a gross negligence standard similar to the one that exists under the current Good Samaritan statute.

The -- there are entirely new provisions relating to the expert report, cost bond requirements. The cost bonds have been dispensed with entirely. Now it's incumbent upon the plaintiff to file expert reports within 120 days of the date the suit is filed and then it's incumbent upon defendants to file objections, if they have any, to the report within 21 days after the report is filed. If the trial court finds the report to be insufficient then the trial court may, not "must," but may allow a single 30-day extension to cure, to allow the plaintiff time to get an up-to-snuff report filed. In either case where there is an objection, whether it's sustained or overruled, the losing party has an interlocutory appeal, so significant changes there. Golly. Let me think a quick minute to see what --

MR. LOW: Tommy, discovery is different, too, isn't it?

MR. JACKS: Yeah. There's a stay on discovery until the plaintiff has filed the report, with the exception as filed as one in order to take discovery

related to the health care of the patient. The plaintiff may take up to two oral depositions and may take written discovery. It's -- at one time there was special provisions in the bill relating to Rule 202. Those were removed before the bill finally passed, so the presumption is that we're still where we always have been in terms of Rule 202 depositions.

Hang on one second. Let me pull up -- I've actually got a little Power Point on here about all of this. Let me just glance at that outline and see what else I'm leaving out.

PROFESSOR CARLSON: And I guess 4590i is completely repealed, right, Tommy?

MR. JACKS: 4590i is completely repealed. Everything is now contained in mainly Chapter 74 of the Civil Practice and Remedies Code and in some provisions over in the Health and Safety Code. There are new broad definitions that essentially expand the coverage of the statute in some ways in terms of what health care providers are included, and there's a particularly broad definition of affiliates that is incorporated into the definition of health care provider.

Also, in addition to employees and agents, independent contractors are included. However, if you look at the definition of health care liability claim there

still is a requirement that whatever the negligence entailed must be directly related to the rendering of health care. There will be some questions that come up about administrative functions because there's an included phrase "professional or administrative services." There's also some legislative history on the floor from the sponsors about that saying that there's going to be controversy about whether credentialing cases, assuming there are any credentialing cases, that people know that, but if there are, the -- whether they do or don't fall under the act.

There is clear legislative history from Brent Cooper who was involved on the other side of drafting some of this stuff from me during the session, and I approached him last week and we both agree that HMOs are not included as health care providers. There's new language in addition to the new burden on emergency care. There's also some new language from the charge on emergency care.

The notice procedures have changed in that there is now a lengthy authorization to obtain records that a plaintiff must supply with the notice to the health care provider at the time notice is sent, that is the same 60-day before suit -- presuit notice we're accustomed to, but now it must include an authorization that was written, reason so long as it was meant to comply with HIPPA. The

plaintiff is allowed to make exception for records that the plaintiff deems to be irrelevant to the proceedings, and there's legislative history saying that that also incorporates the ability to raise matters of privilege such as mental health records that enjoy certain privileges under current law.

There's a new 10-year statute of repose and then there are new provisions regarding periodic payment of future damages with respect to future -- where future damages exceed $100,000 present value, and for medical or custodial care damages the court is required to award periodic payments, but the court is given a lot of discretion. It can do that in whole or in part. That is, not all the future medical or custodial care must be structured. Additionally, the court determines the duration, the frequency of payments, the amount of payments. No requirement that they be over the patient's lifetime, for example.

If the patient were to die before the periodic payments are exhausted, the periodic payments that relate to lost future earnings, assuming that that's been done, still go to the plaintiff's survivors, but the other structured payments cease on the plaintiff's death. The court is not required but may structure future damages other than medical or custodial only as to medical or

custodial that is mandatory. That's a rough summary, but I think I gave you certain amounts of highlights.

MR. EDWARDS: I might argue with you about some of those -- just because we're on the record, some of the caps. I'm not sure you correctly stated the medical caps the way the statute is written.

MR. JACKS: Bill, I may not have. Which ones in particular?

MR. EDWARDS: The one of 250,000-dollar cap for all medical care providers, other than institutions, a single 250,000-dollar cap. I don't think it says that.

MR. JACKS: No. What I said is you can stack those caps up to 500,000.

MR. EDWARDS: No. I'm talking about the 250,000-dollar cap.

MR. JACKS: On a single institution is 250,000.

MR. EDWARDS: No, I'm not talking about institutions.

MR. JACKS: On individuals it's 250,000.

MR. EDWARDS: On medical care providers other than institutions I don't think you correctly stated that.

MR. JACKS: It's a 250 per case.

MR. EDWARDS: I don't think that's what it says.

MR. JACKS: It says "per claimant" and all claimants are included in the definition of claimant.

MR. EDWARDS: I know, but I think it says "for the," "for the medical care provider the cap is 250,000," rather than for all of the medical care providers. It's a total of $250,000. I just wanted -- I don't want to be sitting here and have --

MR. JACKS: Okay. Well, if there's something I'm giving away that I shouldn't, I don't intend to.

MR. EDWARDS: That's what I'm saying.

MR. JACKS: Is that good enough?

CHAIRMAN BABCOCK: Here's what I think we ought to do. Let's have a mock argument tomorrow at noon.

MR. EDWARDS: I just don't want to be sitting here listening to that and having it thrown up in my face sometime in the future. That's all.

CHAIRMAN BABCOCK: Edwards was silent when -- Tommy, anything else?

MR. JACKS: I think that covers certainly the main parts of the changes.

CHAIRMAN BABCOCK: Okay. Elaine, anything else?

PROFESSOR CARLSON: No. Other than to suggest that maybe we ought to think about our standing committees each going through HB 4 and looking at whether

there are necessary changes dealing with pleadings or charge or other things because they're sort of stuck throughout the statute.

CHAIRMAN BABCOCK: Yeah. That's probably a good idea. We do have some specific projects that the Court has specifically given to us. I'm not going to summarize Justice Hecht's letter of June 16th to me, but it's posted, and everybody ought to take a look at it. We have got a tremendous amount of work to do in the next 60 or so days. The schedule is going to be that we have added a meeting in July. It will be July 18th and 19th. That will be a very important meeting because we will have to basically conclude some work on some things at that meeting and then we have another meeting on August 22nd and 23rd, and then the Court will have a conference during the week of August 25th and wants to have all of our input to them so that they can consider meeting the mandates of the Legislature such that whatever they propose can be published in the *Bar Journal* and the comment period can occur so that by the end of the year they will have final rules to implement by January 1, with two exceptions; and the two exceptions are Rule 407, which the Court, I believe, intends to implement by the 1st of September and with respect to the multidistrict, which the Legislature has mandated be implemented by September 1.

That will -- that will of necessity mean that there will be no comment period for the Bar on those rules, but I think the Court is of the view that the statute trumps the comment rules and that so that these rules that will be implemented on complex litigation will be effective September 1 but subject to revision after we have more time to achieve comment on it. Is that -- have I got that right?

JUSTICE JEFFERSON: (Nods head.)

CHAIRMAN BABCOCK: We have got one glitch in our judicial administration committee in the sense that Mike Hatchell, who is the chair, may or may not be able to turn his attention to it because of some family things which we're not sure about. So Justice Brister has graciously agreed to step in and be either the chair or the co-chair of that committee, and Bob Pemberton has agreed to join that committee, so it's Hatchell, Brister, Duggins, Duncan, Gray, Tipps, and Pemberton on that committee; and you'll have to be ready to pretty much tell us what you think ought to happen at our July meeting because that July meeting we're going to have to pretty much get through that.

Buddy, same with you on Rule 407, although I know you've done work on that and have talked to the Court and are pretty far along on that, but on our July meeting

you're going to have to pretty much tell us what your recommendation is for the purposes of discussing it. Just so I can go through it again and make sure that we're all on the same page, the chair of the Rule 1 through 14c subcommittee is Pam Baron, and Stephen Yelenosky is the co-chair or the vice-chair, I guess. Richard Orsinger is the chair of Rule 15 through 165a, and Frank Gilstrap is the vice-chair. Judge Peeples is the chair of the 166 through 166a with Justice Brister as the vice-chair. Bobby Meadows is the chair of the Rule 171 through 205. Bill Edwards is the vice-chair. Rule 215 is Ralph Duggins as chair and Justice Brister as vice-chair. Rule 216 through 299a, Paula Sweeney is the chair. Judge Peeples is the vice-chair.

Rule 300 through 330 is Justice Duncan and has no vice-chair; and, Sarah, you might try to think about who you'd like to designate as a vice-chair. Rule 523 through 734, Judge Lawrence, with the vice-chair being Skip Watson. Rule 735 through 822, Elaine Carlson. It has no vice-chair, so, Elaine, you might think about that. The appellate rules, TRAP rules, Bill Dorsaneo is the chair. Justice Duncan is the vice-chair.

Evidence, Buddy Low is the chair. There is not vice-chair. Buddy, you might want to think about that. The Jamail report, Elaine Carlson is the chair, and while

we're on that, I should say that I think it's the view of the Court that the Jamail report is a valuable resource for us to look at with respect to the items that the Jamail committee looked at, but it is only that. It's a resource. It is not intended to be anything other than something that we want to look at and consider, but whatever we recommend to the Court will be our work product, and I know that there are many people that think that the Jamail report is really good in some respects and not so good in other respects, so what we give to the Court is going to be our collective wisdom, and there's no -- unlike with the parental notification rules, there's no presumption that the Jamail report prevails unless we have a very good reason to overcome it.

And then finally, the judicial administration subcommittee is Mike Hatchell, now with co-chair Justice Brister, with Duggins, Duncan, Gray, Tipps, and Pemberton on it; and I think Elaine's suggestion is a good one that the chairs of each of these subcommittees should look at House Bill 4 to see if there are impacts on the rules that we should be talking to the Court about as we go forward.

With respect to today, the offer of settlement rule will be first for discussion, and as you all know, we have spent an enormous amount of time talking about this, so we hope to finish our work on that today;

and, Elaine and Bill, I think TRAP 24 and 29 are going to be ready for discussion today, right?

PROFESSOR CARLSON: Correct.

CHAIRMAN BABCOCK: And then on class actions, Richard Orsinger is the chair, and he is in a mediation today, and is he going to be here tomorrow?

MS. LEE: No.

CHAIRMAN BABCOCK: Not tomorrow, so, Frank, you haven't -- are you going to pinch hit, or is there any effort on that?

MR. GILSTRAP: I'm not aware of any effort on that.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: I will be glad to try to get up to speed.

CHAIRMAN BABCOCK: Okay. And then the complex litigation, Justice Phillips wants to address us tomorrow morning about that. He's got some very strongly held views on that and how it should be done, so we'll defer that 'til tomorrow morning. Pam, on the appearance by counsel, are you ready to talk about that this session or not?

MS. BARON: We can. We came to the committee last time, and we had a 50-page transcript discussion where we discussed issues but really didn't take votes. I don't

know what the Chair's intent is on that. I will not be here tomorrow, but Steve Yelenosky will be. I have to attend a bar mitzvah.

CHAIRMAN BABCOCK: Okay. We may be able to get to that today. And the ad litem, I know Bobby Meadows' subcommittee has had sort of an initial discussion, so we can talk about that as well. So that will pretty much be our line-up; and with that, Elaine, the offer of settlement, judgment, whatever you want to call it.

PROFESSOR CARLSON: The Legislature wants to call it offer of settlement, and so will we.

CHAIRMAN BABCOCK: Okay.

PROFESSOR CARLSON: There are four documents posted on the website. The third document is what -- the first and the third are what I'd like to operate off of. The first document is simply an excerpt from H Bill 4, HB 4, Article 2, settlement. That will tell you what the Legislature is directing us to do. The third document is called "Offer of settlement, award of litigation expenses." The second document I just included to reflect where we left off in April. The fourth document is the same as the third, but it's redlined for those of us who like to see redline.

Probably the first thing that needs to be discussed is the provision of Rule 167.2 that provides what

the offer of judgment -- offer of settlement rule does not apply to. The Legislature, as reflected on the Document 3 entitled "Offer of settlement, award of litigation expenses," the Legislature expressly exempted from the operation of offer of settlement class actions, shareholder derivative actions, actions by or against a governmental unit, actions brought under the Family Code, and actions to collect workers' comp, and actions filed in the justice of the peace court. The statute expressly empowers the Texas Supreme Court to decide whether other claims or actions should be exempted out.

I should tell you that the legislation on this applies offer of settlement only to monetary claims. Okay. The legislation does not provide one way or the other for trial court discretion to reduce or negate the ability of a party to shift fees in any particular case due to the conduct of the litigants. I think those two issues kind of go hand-in-hand. One is should some cases be exempt in every situation. The other side of the issue is do we want to continue to suggest to the Supreme Court that there are some instances in which the trial court should have the discretion to reduce or totally prohibit fee shifting because of several factors we talked about at our last meeting. And I think that the second issue just needs to be conceptually taken up, maybe not debated as to its

specificity right now, just so folks will know whether or not the trial court is going to have that discretion in general under our recommendation because I think folks might feel differently about what should be exempted out if they felt like the trial court would not have any discretion to reduce or deny the fee shifting provisions.

CHAIRMAN BABCOCK: You want to talk about that?

PROFESSOR CARLSON: Yes. If you'll turn to page eight of the third document, you'll see that what is now 167.13 reflects in the main where we left off in April. In April the whole committee was of the mind that the trial court should have the ability to reduce or deny fee shifting in the enumerated circumstances with the Florida factors, which Tommy Jacks read to us at the last meeting, being part of the comment. Since the April meeting Tommy has suggested as an additional factor, and it's highlighted on page -- it's not highlighted. I'm sorry. It's subsection little (viii) that there should be an ability of the court to further reduce or eliminate fee shifting when there's evidence the rejecting party has a history of suffering the imposition of litigation expenses that would indicate a pattern or practice of unreasonable litigation conduct.

CHAIRMAN BABCOCK: Is it little (viii) or

little (vii)?

PROFESSOR CARLSON: Oh, little (vii), I'm sorry. I refuse to wear reading glasses. Justice Gray on our full committee sent in the proposal that you see in (b) that would require the trial court when it is reducing or denying the imposition of litigation expenses to make written findings on why the court -- the trial court is so doing that within the timetable of our findings of fact Rule 297 and providing that that can be reviewed on appeal when properly challenged to determine if there's substantial evidence in the record to support the finding.

So we first want to start conceptually do we wish to -- and I do believe the Supreme Court has the authority under HB 4 to give the trial court discretion to reduce or deny the imposition of litigation expenses should it wish to do so.

HONORABLE SCOTT BRISTER: Which part of HB 4 is that?

PROFESSOR CARLSON: HB 4, Section 2 provides in 42.005, what will be the Civil Practice and Remedies Code, the third page of the first document, that the Supreme Court shall promulgate rules implementing this chapter. They then provide certain things that the Court must include in its rule, and subsection (d) allows the Supreme Court to promulgate rules designating other actions

to which the settlement procedure of this chapter does not apply and address other matters considered necessary by the Supreme Court to implement the chapter.

MR. LOW: Elaine, may I ask a question? There was no amendment to Government Code 22.004. This is just a supplementation or does that amend 22.004 which says that the Supreme Court can make rules inconsistent with a legislative act on procedural matters, not substantive, if they have already been passed, and then if the Legislature next time it meets doesn't do anything contrary then it has amended the legislative act? Does that affect the power of the Court under 22.004, and what's the relation between that and the power the Court has under the Government Code?

PROFESSOR CARLSON: Chris, correct me if I'm wrong, but I don't believe 22.004 was specifically modified to address this.

MR. LOW: Not specifically, but that language intrinsically, does that modify, because it's not that we might want to do that or the Court might want to, but 22.004 gives the Court certain powers to add to if it's a procedural thing.

PROFESSOR CARLSON: Right.

MR. LOW: And so I think we need to keep that in mind as we go along, not that we would want to do something in the face of what the Legislature wanted, but

must keep in mind the power of the Court in rule making unless that's been changed.

CHAIRMAN BABCOCK: Of course, we had an interesting debate about whether or not this whole rule was procedural or substantive.

MR. LOW: Don't ask me what's procedural or substantive.

PROFESSOR CARLSON: I guess that's mooted.

CHAIRMAN BABCOCK: It wouldn't be if Buddy's point is that the Court can, notwithstanding this statute, promulgate rules that are inconsistent witht the statute.

MR. PEMBERTON: Doesn't the Court ordinarily expressly repeal portions of the statute that are inconsistent with the rules? Isn't that how it works?

MR. GRIESEL: That's the way I understand it.

MR. LOW: We have done it.

CHAIRMAN BABCOCK: Yeah.

PROFESSOR CARLSON: The statute is silent on whether there is any trial -- HB 4 is silent on whether there is any trial court discretion to reduce or deny the implementation of litigation expenses.

MR. SCHENKKAN: Can I address that, Mr. Chairman? Can I address that?

CHAIRMAN BABCOCK: Sure. Yeah.

MR. SCHENKKAN: I don't think that's a fair

assessment of the legislative intent. Section 42.004 is the substantive provision that provides that these words would be made, and the language is that if the offer is made and rejected and the judgment that was rendered will be significantly less favorable, which is then defined as you described, the offering party shall recover litigation costs from the rejecting party. That is supported by the legislative history in that Senator Ratliff over the years in his offer of settlement proposals has commonly provided an express provision that the trial court will have discretion and the list of factors that are not identical to the ones that we considered in April but overlapped with them to some degree, and that proposal was not in the Senate version that, as you state, wound up being the -- at least the basis of the compromise version.

So I'm not making -- addressing the point about the Court's power either under the Government Code or under the provision you called our attention to about the Court making rules that it feels are necessary to the implementation of the statute, but I think as a matter of the legislative intent, the intent is that these would not be discretionary.

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: However, the last section, subsection (d), says, "The rules promulgated by the Supreme

Court may designate other actions to which the settlement procedures don't apply." I don't see why the Court couldn't set up a criteria whereby certain -- it wouldn't apply to certain actions and the trial court could play a part in making that determination. It seems to me that's awfully broad, and if we want to say it's discretionary, we can certainly justify it under that section.

CHAIRMAN BABCOCK: Pete, do you have a view on how that provision came into the statute?

MR. SCHENKKAN: I don't know the legislative history of that provision. I guess my feeling is that really goes more to Professor Carlson's point, which I fully agree with, that to the extent you think the legislative intent was there wouldn't be any trial court discretion on the making of an award in a case to which it applies, you might be more inclined to carve out more kinds of cases which you think in general it would be a bad idea to have this rule apply, because I do think that is clearly the intent of that provision. That's, again, without knowing the legislative history. It seems reasonably clear that the Legislature has included that the Court, if it chooses, can carve out whole categories additional to the five or six that are listed.

HONORABLE SCOTT BRISTER: Argument. What is it, ejusdem generis, ejusdem de generis? What is it, Bill?

If you say Family Code, workers' comp, and other actions, that doesn't mean -- that means other actions like the ones in the list, not other actions like whenever the trial judge doesn't feel like it.

PROFESSOR CARLSON: I think it's more sui generis.

HONORABLE SCOTT BRISTER: That will be the argument. That will be the argument. You've got a list of categories of cases, which have nothing to do with the intent but have to do with the subject matter.

PROFESSOR CARLSON: I guess what I hear Frank saying, and I agree with him, is that if the Court has the authority to exempt out other actions, would that include the trial court not absolutely exempting out, but having discretion to exempt out, and maybe that's a stretch on the read.

MR. SCHENKKAN: I mean, obviously the question is what advice to give the Court on how to read it --

PROFESSOR CARLSON: Right.

MR. SCHENKKAN: -- and my advice, consistent with the legislative intent, would be let's take up decisions about categories of cases that the Court should carve out, the Supreme Court should carve out, and not do this by putting in trial court discretion in all cases,

which I think is clearly contrary to the intent.

CHAIRMAN BABCOCK: Carl, did have you a comment?

MR. HAMILTON: I tend to agree with that. My question concerns 167.13 talks about trial court discretion to also reduce; and what is contemplated in this act, the cost shifting is court costs, reasonable fees, reasonable attorney's fees. Are those decided solely by the court, the court's read of this?

PROFESSOR CARLSON: The statute is silent on whether you go to the jury on that or whether the trial court makes that determination. I think our full committee suggestions have been that that would be a matter for the trial court to determine, with some fairly vocal dissents.

MR. HAMILTON: The court would have discretion there to reduce if the court is going to make the determination of the amount.

PROFESSOR CARLSON: Based on reasonableness of the fees as opposed to other conduct of the parties in regard to the litigation.

CHAIRMAN BABCOCK: Richard Munzinger, did you have something?

MR. MUNZINGER: Only that I question whether the Legislature intended to allow the Supreme Court to vest trial courts with the authority to ignore the law and to

make their own rules on an ad hoc basis. Why would you pass a law that says a trial court can ignore the law? That's in essence what you're doing if you give Section 167.13 -- if you engraft that onto the rule that we're now writing. We had 167.13 at a time before HB 4 was passed. We did not know that the Legislature was or wasn't going to pass HB 4. We were attempting to write a rule that would obviate the need for HB 4 insofar as it pertained to offers of settlement.

So if you now take the stretch that the Supreme Court may vest a trial court with discretions not to award the fees when the trial court feels that that's satisfactory, why would you have the Legislature pass a law? You've got thousands of district courts who now say, "Well, I don't like you, Allstate" or "I don't like you, State Farm, because you've done this three times in my court and the law doesn't apply here." I think it is a stretch of interpretation and that what little I've heard of the legislative history certainly would not support that kind of a rule from the Supreme Court and this committee.

CHAIRMAN BABCOCK: Tommy, you got any views about that? You were down there a lot.

MR. JACKS: I think there wasn't specific discussion at all about this issue. It seems to me that using the word "shall," I think the intent was that it be

mandatory, and that is the trial courts not have broad discretion simply to decline to award costs at all. I think Carl's point is well-taken that it might be some of the factors we've talked about having to do with trial court discretion that would appropriately be matters that the trial court could consider in determining the reasonableness of the fees to be assessed as essentially a penalty. Perhaps others of these factors wouldn't be appropriate for that.

My understanding, and again, it's not really based on anything that was said, because the provision for the Supreme Court to have discretion either to exclude categories of cases or to make rules that it thought necessary to implement the statute, I didn't read either one of those as being a license to the Supreme Court to give trial courts, again, broad discretion not to apply the rule in a case where, of course, the statute would apply.

CHAIRMAN BABCOCK: Anybody else have any other comments on this issue? Yeah.

MR. LOPEZ: I think perhaps where there would be some room for the trial court built in anyway is it says "awarding litigation costs" and it talks about "shall." Now, I agree with the people that say that it would be a little bit of a stretch to suggest -- in my new life as a plaintiff's lawyer, I'm sad to admit that, I don't think --

but it talks about litigation costs and it defines litigation costs, and one of the subcomponents is not attorney's fees, but reasonable attorney's fees, and so there you have I think pretty broad discretion anyway in that regard.

PROFESSOR CARLSON: There's a body of law on reasonable attorney's fees, and that's going to be whether the fees are reasonable and necessary as opposed to, well, these may be reasonable, but your conduct doesn't warrant you having them shifted.

MR. LOPEZ: Right. But in the predays reasonable was what you did reasonable as opposed to not settling the case and then incurring all these fees reasonable. So I would argue that's pretty broad.

PROFESSOR DORSANEO: I think it's broad enough to cover that, too.

CHAIRMAN BABCOCK: Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I just have a question, because 42.004(a) says "The offering party shall recover litigation costs," but then in (c) and (d) it says "the litigation costs that may be recovered." So I don't know whether that language would give us -- give trial courts the discretion. It seems like we've got "shall" in one, in (a), but "may" in (c) and (d) as to the amount.

MR. SCHENKKAN: Well, the "may," of course, has to do with if the trigger in (a) is met then it shall. It's "may" because it may not be triggered. The judgment may or may not be within the 20 percent for acting.

CHAIRMAN BABCOCK: Okay. Any other comments on this? Well, do we want to try to give the Court discretion? Do we think we have the authority to do that? I guess that's the vote, isn't it?

PROFESSOR CARLSON: That's it.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Well, I think it's very unlikely that there is discretion in the statute, but ordinarily we don't concern ourselves with that and just go ahead and try and determine whether what's proposed to the Court to decide to adopt or not to adopt is a sensible thing, and it comes up all the time over the years of whether there's some limitation on our jurisdiction or propriety of our action, and that's really for the Court to decide. And I must say, in this case I think it's extremely unlikely that the Court would decide that "actions" means, you know, something other than categories of cases or that the "may" doesn't mean "shall" because of the "shall" before.

You know, I've been on this committee long enough to have taken action to recommend things that even

got into the rules. Then you go argue it to the Court, and the Court looks at you as if "How would you ever think that that would be what the statute meant," and you just have to take that and sit down.

CHAIRMAN BABCOCK: Yeah, Tommy.

MR. JACKS: It seems to me that if we're going to include any of these factors, I would be more comfortable instead of saying that the trial court may reduce the amount of litigation expenses awarded or refuse to award any amount of litigation expenses, I would be more comfortable instead in saying "in considering the reasonableness of the attorney's fees and litigation costs to be awarded, the court may consider, along with other applicable factors," which would be the Johnson case, "whether the imposition of litigation expenses" and then have the one through three and then perhaps put the Florida factors in the footnote as we have previously suggested.

I mean, it's -- I do think that trial courts in their inherent power to impose sanctions have discretion and necessarily must have discretion about what the amount must be, and I don't think the trial judges are compelled simply to tally the number of hours times the suggested hourly rate and award that without eyeing any other factors about the appropriateness of the sanction. And so that would be my suggestion.

CHAIRMAN BABCOCK: Are we in agreement or not? There are so many people here today, which is great, we probably ought to take a vote, but the issue that Elaine raised is whether or not under the statute we think it is appropriate to give the court discretion to deny the imposition of litigation expenses, and I've heard different views on that. Yeah, Justice Gaultney.

HONORABLE TERRY JENNINGS: Just one last point. Under subsection (a) of 42.005, Supreme Court to make rules, it clearly says the Supreme Court shall promulgate rules implementing this chapter, and with all due respect to the idea that somehow this could be discretionary, I think when you read the context of the entire section here that's not what it's doing. It's not giving us the ability to change what the Legislature has intended at all, and this just seems to be kind of a catchall phrase for anything else.

CHAIRMAN BABCOCK: Justice Jennings, thanks. Anybody else have any other comments? Let's see if we could frame a vote on this, Elaine, unless Frank wants to say something.

MR. GILSTRAP: Yeah. Chip, you know, I guess we could vote on it. We could all have our views of, you know, the Legislature's power and what the legislative intent was, if you can divide it from the statute, but it

seems to me, though, that Tommy's proposal might be one that could get wider agreement; that is, rather than we go up or down on whether we have discretion, we simply dump all these factors over into the calculus that the judge uses in determining the amount of reasonable attorney's fees, and we get away from, you know, a more categorical approach to reasonable attorney's fees. That seems like that might work politically with the committee.

MR. SOULES: I agree.

CHAIRMAN BABCOCK: Yeah. I think we'll get to that, because what I was headed to was a vote on whether or not we would recommend to the Court that there be rules giving the trial court discretion to deny altogether.

MR. SOULES: I move we don't vote on that.

CHAIRMAN BABCOCK: You move we don't vote on that?

MR. SOULES: Yes.

CHAIRMAN BABCOCK: And why don't you want to vote on that?

MR. SOULES: For the same reason Frank just stated.

CHAIRMAN BABCOCK: Peter.

MR. SCHENKKAN: I guess I'm starting back to where Professor Carlson started. I'm opposed to Tommy's proposal because it seems to me in substance it is just a

way of relabeling the abrogation of the legislative intent instead of implementing the statute as it is written, and aside from that legal argument, which I recognize others might disagree with, we really can't have it both ways. If we adopt that approach then we are less likely to feel like we need to recommend to the Court that they carve out certain categories of cases. If we don't adopt the approach of smuggling in judicial discretion where it wouldn't have been by relabeling categories of cases in which the judges are not going to award fees as cases in which they are going to say the reasonable amount is zero then we are more likely to take up on the merits which categories of cases ought the Court to consider carving out as to ones to which the rule should not apply. I'm in favor of doing it that way because I think that's the way the statute is worded and that's the way I suspect the Court will take the matter up when they take it up. I just don't think we provide useful advice if we do it this way.

CHAIRMAN BABCOCK: Yeah. Well, I'm not sure if you're agreeing with Luke or disagreeing with him, but my thought was that there has been two -- it seems to me there are two issues presented by 167.13. One is whether the Court has discretion to deny altogether, and the second is whether or not the Court should have discretion to reduce under whatever factors we think are reasonable. I

thought I was hearing consensus that it's really not -- it was not a delegation to this -- to the Court, and by extension to this committee, in the statute to give the Court discretion to deny altogether, and it would be interesting to me, but not to Luke, to know how this committee thinks about that. Bill.

MR. EDWARDS: Hasn't that already been taken care of by the Legislature in 42.001(5), the definition of litigation expenses, and it says "Reasonable fees for not more than two testifying experts and reasonable attorney's fees"; and that obviously gives the trial court discretion to determine what's reasonable and not, and I would assume that that could be that the offer of settlement was game playing, and there is nothing reasonable after it, I guess, subject to review on appeal as to whether the trial court has been governed by applicable standards of law. Hasn't it been taken care of already by the Legislature?

MR. LOW: But they don't define "reasonable attorney's fees."

MR. EDWARDS: I know, because when they don't define it you go to the body of case law that says what reasonable attorney's fees are.

MR. LOW: But we could have -- we can add a definition we could implement by telling the court the factors in determining reasonable, if that's what we want

to do.

HONORABLE SCOTT BRISTER: I think Bill is onto something. I don't -- I think it's asking the Court to do too much to add a provision saying, you know, and if you think the general purpose of the statute of reasonable settlements wouldn't be involved, you can just disregard the law we passed. I don't want to be any part of that. But obviously most of this is going to be reasonable attorney's fees, and I can put some of these factors, perhaps some of them -- I'm not sure some of them would apply, but somebody, "a-ha" -- maybe there's somebody out there, "A-ha. They rejected my reasonable offer. I'm going to raise my rate to $500 an hour and really run up the fees now," and so, okay, no, we're reducing that to a reasonable fee. Surely --

CHAIRMAN BABCOCK: Some of them you would have to reduce to it 500.

HONORABLE SCOTT BRISTER: Right. Only some of us that would be a reduction. Nothing in that would be in any shade or form contrary to the Legislature's intent, it seems to me.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: But that isn't what's proposed here, that you're reducing attorney's fees from $500 an hour to $300 an hour. What's being proposed is

that you smuggle discretionary standards that we had talked about in 167.13 into analysis of attorney's fees so that you begin to examine a client's motives or past conduct. Does the Supreme Court of Texas know what the words "reasonable attorney's fees" mean, and if the Supreme Court of Texas adopts a commentary or a suggestion such as being bantered about here of sticking these discretionary items in, will it not then spread like a virus into other determinations of attorney's fees and pollute your law? Why don't you just give them the statute the way it's written?

This is the Texas Legislature has said, "Court, implement -- write rules to implement this statute. Don't play games with what we've decided." I think I don't want to be voting to give trial courts discretion to do something that I like if the Legislature didn't tell me to do it, and they didn't tell us to do it. Let's be frank about it. So why are we attempting to import into a law that the Legislature wrote in the name of the Supreme Court of Texas concepts that are foreign to what was passed. I think it's hubris.

CHAIRMAN BABCOCK: So you'd be against that?

MR. MUNZINGER: I just wanted you-all to know what I was thinking.

CHAIRMAN BABCOCK: Judge Peeples.

MR. LOW: What are we doing here?

HONORABLE DAVID PEEPLES: When we agreed to serve on this committee, we agreed to exercise intellectual integrity to do what the Court wants us to do, and when we've got a statute like this to fairly and with intellectual honesty do what the Legislature told us to do, and I think it's just hard to really argue with a straight face that they meant to give trial courts broad discretion. Okay. Now, the proposal to sort of back door that into reasonable attorney's fees, I say that would not be intellectually honest to do it; and, second, trial judges already have a lot of discretion to work with attorney's fees. I don't have to agree that the number of hours you said you worked was reasonable and necessary. I don't have to agree that the hourly rate is reasonable and necessary. And I have been trying to find it, but I've had cited to me a bunch of times a list of six, seven, eight factors in the disciplinary rules or --

CHAIRMAN BABCOCK: State Bar rules.

HONORABLE DAVID PEEPLES: Yeah. That just give you a lot of flexibility, and so the flexibility is there already, and I think the responsible thing for us to do is to leave it at that. It's there.

CHAIRMAN BABCOCK: Okay. Anybody else have any thoughts on that?

MR. LOPEZ: I second all of those.

CHAIRMAN BABCOCK: Okay. Well, why don't we see how many people think we should decline to recommend 167.13 as a concept? If the vote goes against that then we'll work on the details. So everybody who thinks we should not recommend 167.13, raise your hand.

Everybody that thinks we should, raise your hand. The nots have it by a vote of 26 to 5, the Chair not voting, so we'll pass on 167.13.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: And the Court will have the benefit of this discussion if they disagree with us. So go ahead, Elaine. What's next?

PROFESSOR CARLSON: I think then what is logically next is to take up whether we wish to recommend to the Court any other claims to be exempted out for any operation of the offer of settlement rule. As I said a moment ago, 167.2 as proposed mirrors the list in the -- in HB 4, and I have highlighted in gray two potential matters we might think about as well as other claims to which members of the committee might feel should be exempted, and Judge Lawrence, I guess I'll address this to you. The Legislature said that actions filed in a justice of the peace court are exempted out. Do we need to include the words "or small claims" to make sure that it applies to

when you're sitting in a small claims court, or are you comfortable with --

HONORABLE TOM LAWRENCE: I'm comfortable with the way it is.

PROFESSOR CARLSON: Okay. And the second matter is we recommended at the end of our April meeting that deceptive trade practices claims be exempted out because that statute had its own offer of judgment provision. The Legislature did not include that. I did some quick research to see if maybe the Legislature had amended the DTPA offer of judgment provision, and I couldn't find it. Chris, do you happen to know?

MR. GRIESEL: I don't know.

HONORABLE SCOTT BRISTER: How did the Legislature pick this list?

PROFESSOR CARLSON: Excuse me, Judge Brister?

HONORABLE SCOTT BRISTER: Could somebody explain how the Legislature picked this list? I mean, I understand the general principle that none of our rules apply to family law cases because the family law Bar always gets themselves excluded.

CHAIRMAN BABCOCK: Now, now.

HONORABLE SCOTT BRISTER: But I'm trying to find -- and government unit I understand because, you know, god forbid the governmental unit -- I mean, they could just

say, "You can't sue us at all," but other than that I'm having trouble with --

MR. SCHENKKAN: Well, I can help out on the workers' comp one, and Tommy probably is better still, but my understanding is simply that in the big reform of workers' comp in '89 that what they tried -- one of the things they were concerned about was regarding the abusive practices in settlement of workers' compensation benefit claims that had been litigated all the way back to 1917 of the original statute, and they tried to solve it at that time by basically putting that process inside the administrative agency and telling everybody else you can't mess with it, and I think that they didn't want to interpose this court practice inside of what essentially is an administrative agency unless we supervise special instructions problems. Maybe there's somebody here with more expert in workers' comp, but that was what was explained to me.

CHAIRMAN BABCOCK: Judge Bland.

HONORABLE JANE BLAND: There's a provision that does not allow workers' comp cases to settle.

MR. SCHENKKAN: Okay.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: I think we went over the justice court a little too quickly or maybe I wasn't quick

enough on the update, but we've had a little discussion here on the side that that may warrant a comment because it isn't clear to me from the statute that that would cover a small claims action or a number of other proceedings that are physically filed in the justice court but are also filed in the small claims court or have some other character to them, so it may warrant a comment, and I think --

HONORABLE TOM LAWRENCE: I don't object to there being a comment. You have small claims court action and justice court civil suits and a lot of other civil and quasi-civil cases that are filed with the justice of the peace, and I think generally the perception has always been if you say "justice of the peace court" it covers all of that, but it is confusing. I wouldn't object to having a comment to clarify that.

CHAIRMAN BABCOCK: That makes a little bit of sense, actually.

HONORABLE TOM LAWRENCE: I will be happy to work on that, Elaine.

PROFESSOR CARLSON: Great.

CHAIRMAN BABCOCK: Back to the DTPA. Yeah, Judge Christopher.

HONORABLE TRACY CHRISTOPHER: Well, I have a question on if anyone knows what they are trying to get to

under 42.004(e). "If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under any other law." So would that mean if you were already able to get your litigation fees under the DTPA you wouldn't get it here so that that's already sort of taken care of? Or does anybody know what the intent of that particular provision was?

MR. SCHENKKAN: Yeah. That's a no double recovery provision. If you're operating -- I don't know what the Texas law equivalent would be, but you can't get your same litigation costs twice, once under the law for settlement and once under whatever substantive statute is entitled, that party --

HONORABLE TRACY CHRISTOPHER: So then we wouldn't have to except the DTPA because it's already excepted there that if people got the litigation costs under the DTPA provision --

MR. SCHENKKAN: Yeah. It solves any -- that would certainly be one example. I'm not sure it's the only one, but --

CHAIRMAN BABCOCK: But that's a little different, though, because can't you still lose but not lose by enough and then get your attorney's fees here; whereas, under the DTPA you wouldn't be entitled to get

your --

MR. SCHENKKAN: It only prevents the double recovery under the DTPA, but there still could be cases under the DTPA where one side was entitled to its attorney's fees for getting -- let's say the plaintiff for getting a positive recovery --

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: -- but the defendant was entitled to its litigation costs under offer of settlement, because that award was, whichever it is, more or less than that 20 percent band.

CHAIRMAN BABCOCK: Right. Alex.

PROFESSOR ALBRIGHT: Well, if you leave cases in like DTPA, what this would do was in effect it could give a plaintiff an option. Like you say, okay, I can recover attorney's fees under DTPA or perhaps I can get more recovery under this offer of settlement.

MR. SCHENKKAN: I see what you're saying.

PROFESSOR ALBRIGHT: So there may be some cases where it works on both sides, and there are other cases where the plaintiff would have an option of one or the other, whichever one is more profitable.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: The problem I see is that the possibility of the double recovery or even the option is

it's a conflict between the two offer of settlement provisions in the two statutes because the DTPA has its own tender. I mean, that's the whole point of the notice letter --

CHAIRMAN BABCOCK: Right.

MR. WATSON: -- is to give you the opportunity to make the tender and then that is an offer of settlement provision. It has very specific guidelines of what happens if that tender is made in the correct form, what happens. You know, I think the DTPA needs to be excepted out, but because of confusion between the two offer of settlement provisions.

CHAIRMAN BABCOCK: And the Legislature was surely aware of our recommendation that the DTPA be excepted, why didn't they do it? Bob, do you know?

MR. PEMBERTON: I was just going to offer an observation. Under the HB 4, the offer of settlement rule, defendants have to designate whether they're going to be governed by the offer of judgment settlement regime at all. So if you're defending in a DTPA case, none of that applies unless you say it does, so they could avoid the possibility of a conflict that way. If they don't want the offer of settlement rule to apply and they would rather have the DTPA regime, they just don't opt into the HB 4 regime.

PROFESSOR CARLSON: Is the DTPA defendant

only?

HONORABLE SCOTT BRISTER: Plaintiff always -- I mean, plaintiff is not going to want this. A winning plaintiff is not going to pay any attention to this. It doesn't matter about how much they are going to offer because you get all your attorney's fees, not just --

CHAIRMAN BABCOCK: All your reasonable attorney's fees.

HONORABLE SCOTT BRISTER: All your reasonable, and the defendant gets them in DTPA but only if it's bad faith.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: Well, the expert fees could be significant in some cases. Two experts could be fairly significant, so that's not in the DTPA.

CHAIRMAN BABCOCK: Pete or Tommy, any discussion that you know of about the DTPA?

MR. SCHENKKAN: You know, I only know about these prior session bills. I wasn't over at the Legislature at all on this. I don't know how this issue got discussed, if it got discussed, and I don't do DTPA cases, so I don't know the substance of it.

MR. JACKS: I don't remember -- this thing was amended a lot on the House side before it got to the Senate but then was rewritten in the Senate, and I don't

remember the DTPA having been excluded in any version, but that's relying on my memory.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: One of the difficulties of taking DTPA claims out of the coverage of this would be that you raise the mixed case problem that doesn't yet appear to be in here, and that's not a completely impossible problem to resolve, but it's an extraordinarily difficult one.

HONORABLE SCOTT BRISTER: Complicated.

PROFESSOR CARLSON: Yeah. Footnote 6 on page two, we struggled with this, what happens if the lawsuit asserts a DTPA and a non-DTPA claim. Would you allow shifting to the non-DTPA monetary claim?

CHAIRMAN BABCOCK: Yeah. That's a really good point.

PROFESSOR CARLSON: But, you know, the way the Legislature structured HB 4, it's a piecemeal settlement deal anyway on monetary versus nonmonetary.

MR. SCHENKKAN: Here's just a tiny bit of that type legislative history. I don't know how relevant it is, but Senator Ratliff's bill, which was before the actual Senate bill that went to conference committee and became the basis, had six categories to which it did not apply, and the sixth was an action for which another

statute specifically authorizes recovery of attorney's fees issued to the prevailing party. For what it's worth, that was in Senator Ratliff's version but not in the Senate's version that became the law.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: Well, that's what I was just thinking when I was reading this again, and Stephen came over and we read this again, and it seems to me that what this does is really exempt those cases. Now I think rather than an option that it is exempting these cases, so I don't know why they moved it, but if this section (e) really exempts cases then maybe we should put it in the exception and make it more clear that if you recover fees and costs under another law then you're exempted, those things are exempted under this offer of settlement.

PROFESSOR CARLSON: That is addressed later on in the rule and in the statute itself, the no double recovery provision.

MR. LOPEZ: Right. I was going to point that out to the professor. It's not an option. It's not we go under this one or we check whichever one gives us more --

PROFESSOR ALBRIGHT: I think I was wrong with this.

MR. LOPEZ: -- and it trumps it. It's trumped.

PROFESSOR ALBRIGHT: It seems to me like what this rule is doing is exempting these cases, and we ought to be more clear about it so that people know that every time there's a case for attorney's fees they're not having this same debate.

MR. LOPEZ: I mean, DTPA is not the only one. That's why it's not listed, I guess. It's meant to be broader. It's meant to be any time there is some other scheme in play already.

MR. SCHENKKAN: No, it doesn't exempt the cases. It says "if a claimant is entitled to recover fees and costs under another law, that claimant may not recover litigation costs in addition to those recovered under the other law." Plaintiffs scenario is it wouldn't be provided to recover litigation fees under the other law even if in a case of that type and would still be entitled to recover his litigation costs, and I think an example is DTPA, and we better check and see if it's right. It might be a defendant who loses in the sense that there is a judgment entered for some amount, he's not entitled to his attorney fees under DTPA, but he would be unless it's been carved out in a rule. If he's made an offer that is, what is it, 20 percent more than the amount that's awarded, so I don't think it carves out whole cases the way the provisions of 002(b) do.

PROFESSOR ALBRIGHT: That makes one moot.

MR. SCHENKKAN: House Bill 4, the House version, has the same list of six that the actual adopted legislation does, so we went from House Bill 4 that had six, Senator Ratliff, who had also this category of cases that have a prevailing party attorney's fees statute, to what we have now.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH DUNCAN: I may not be following this so good, so bear with me, but -- and this may have been what you were saying, Pete, but isn't it possible that a party can be a prevailing party plaintiff, let's say, under the DTPA and have the right to recover attorney's fees and yet have rejected reasonable settlement offers, so that the defendant opts into this system, why shouldn't that defendant be entitled to the HB 4 protections even though nominally-speaking the plaintiff prevailed.

CHAIRMAN BABCOCK: Good point.

HONORABLE SARAH DUNCAN: Tell me what I'm not following.

MR. SCHENKKAN: No, I'm with you. I agree with that reading. I'm sorry if I left a contrary impression. I was just saying I didn't think this section carved out a whole category of those cases. I think it

allows for scenarios exactly like the one you've just described. Now, there may be some policy reason and some category of cases, and maybe it's even in DTPA cases, which I don't know enough about to have an opinion, to carve them out categorically, but I agree with you. I would have to hear some reasons why that ought to be the case. Presumptively the intent of this is that even though the plaintiff had a good enough DTPA case to win something, if the defendant made a settlement offer that was for more than 20 percent more, then the defendant -- and it was rejected then the defendant ought to be able recover -- not recover it. It's not recovery. It would wind up being an offset against the plaintiff's award up to 50 percent of the economic damages and a hundred percent of the others, so what you wind up happening in that case is the plaintiff will still collect money, but less, reduced by the defendant's costs. Am I parsing that right?

CHAIRMAN BABCOCK: Skip and then Richard.

MR. WATSON: It's been awhile since I've messed with DTPA, and the version that I used to work under may have changed, so take that for what it is, but the point of the tender provision that at least was in there was that you get the notice letter, you have X number of days to make the -- the defendant has X number of days to tender the amount of the claim plus reasonable attorney's

fees or expenses incurred in, quote, asserting the claim. Then if that is not accepted or if it's rejected -- I mean, obviously if it's accepted the case goes away. If it's rejected or not accepted then the law was -- and I think Bill is looking at it, that if it's -- if the end recovery is words like "substantially similar" or something like that. You read it.

PROFESSOR DORSANEO: You're right. You're doing great here.

MR. WATSON: Oh, okay. Well, I'm really reaching back. If it's substantially similar then, what is it, Bill, no attorney's fees are awarded? There is a penalty.

PROFESSOR DORSANEO: "The consumer may not recover his damages in any amount in excess of the lesser of the amount of damages tendered in the settlement offer" --

MR. WATSON: Yeah.

PROFESSOR DORSANEO: -- "or the amount of damages found by the trier of fact."

MR. WATSON: I mean, it is a specific punitive provision that goes to damage recovery, not fee shifting, but damage recovery that's in there, which to me is potentially more punitive than the attorney's fees, which my first point is that to me there is a great

conflict in two what I would call offer of settlement rules. I mean, we have never called this provision of the DTPA an offer of settlement rule.

PROFESSOR DORSANEO: That's what it's called under the statute.

MR. WATSON: Oh, is it now?

PROFESSOR DORSANEO: Uh-huh.

MR. WATSON: Okay. Well, I'm dating myself.

PROFESSOR DORSANEO: And there are other statutes that pertain to this provision that were modeled on the DTPA provision. I don't exactly recall where they are, but I know where I could look.

CHAIRMAN BABCOCK: In a word search. Richard.

MR. MUNZINGER: My only point is that the statute, HB 4, deals with litigation costs, attorney's fees that are incurred after a settlement offer is made during the course of litigation, one of the objects of the statute seems to be to get rid of cases on the docket, except in those broad categories that the Legislature has exempted from the scope of the statute, and it just seems to me that they are not necessarily excluding -- the DTPA would not necessarily be excluded and that the two statutes are not conflicting.

CHAIRMAN BABCOCK: Okay. Well, let's take a

vote on this and then take a break. How many people are in favor of excepting DTPA claims from this offer of settlement rule? Raise your hand. Eight and a half.

How many are opposed? The nays have it by a vote of 19 to 10, the Chair not voting, so we will not include this language --

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: -- in 167.2. Let's take a 10-minute break.

(Recess from 10:50 a.m. to 11:06 a.m.)

CHAIRMAN BABCOCK: All right. We are back on the record. How much time do we have left? I'm just kidding. Six hours, right?

Okay, Elaine.

PROFESSOR CARLSON: I guess at this point, Chip, I would suggest we just open it up to the floor on whether there is any suggestion that other actions be exempt from the the operation of the rule, which the Legislature clearly allows the Court to do, or if we feel comfortable with the list that's here.

CHAIRMAN BABCOCK: Okay. Bill.

MR. EDWARDS: Does any of this stuff touch any way on cases where there's a cap in place? I know it does in the governmental because it excludes the governmental agency; but how about all the medical stuff

where it's capped; and, you know, you've got -- maybe what you've got is a housewife that's been killed, and you know you're dealing with -- there's no economic loss to speak of, and no medical expenses to speak of, because after the event, the death occurred immediately; and now somebody comes in and offers two hundred and, what, twenty-five thousand dollars. There is no way that the plaintiff can get a judgment in excess of 20 percent in excess of that.

I don't think it was the intent of Legislature with the offer of settlement to reduce the cap, but that person has almost got to take that offer of settlement because there's no way that the judgment can be in excess of 20 percent of the offer.

PROFESSOR CARLSON: I think the rule does apply to cap cases. Paula Sweeney raised this at several meetings. We went back and forth about whether capped cases should be given differential treatment or exemption. We came out that that would be something a trial court considered in its discretion. We are now of the mind that the trial court does not have that discretion, and that's where we're at.

MR. EDWARDS: That's where we're at, and it's something wrong with that scenario that I put out, and I don't know whether the -- based on the discussion I've heard here whether the Court has discretion to say that it

doesn't apply if the offer doesn't leave a big enough margin for a party to win.

CHAIRMAN BABCOCK: Harvey.

HONORABLE HARVEY BROWN: I would argue in favor that that would be Scott Brister's earlier sui generis argument since governmental units have caps under the Tort Claims Act, that this at least would be similar to that, using something that's capped as an exempt case.

MR. EDWARDS: Well, to be perfectly candid, I'm confident that it was the intent of the Legislature to give the medical care providers the benefit of the offer of settlement. I'm confident of that, but I'm equally confident that it's something wrong with the notion that you can get to the point where one side has -- can win and the other side can't possibly win. It's obvious they didn't intend that, because they didn't take the -- they didn't take this House version where that was the thrust of what was going on.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, the types of cases that are subject to considerable statutory treatment and regulation, and I think that's what we're talking about when you leave out a shareholders derivative action, probably in the context of a class action, contemplated complex procedures for the determination of how litigation

costs will be awarded, cases that are subject to a lot of statutory coverage would seem to be reasonable candidates to be exempted because you do end up with kind of an overlap, which is likely to produce odd results.

PROFESSOR CARLSON: So what you're saying, Bill, like in a clear liability case, just say the cap is a hundred thousand. The plaintiff says, "We want a hundred thousand." They're never going to be able to improve by 20 percent.

MR. EDWARDS: Yeah. You know, you have a mother of five minor children that's wiped off the map, and all she's ever done is been a housewife, and I say "all" with a great deal of trepidation because that's a big job, but there is a cap. The damages are going to be mainly grief and anguish.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Does the jury know about the cap, or do they just go ahead and make a decision? Say they come out with $5 million, in which event this formula would work if it was based upon the jury verdict. I don't know.

MR. LOPEZ: I don't think they know.

MR. JEFFERSON: It's based on the judgment.

HONORABLE SARAH DUNCAN: The statute says "judgment."

MR. EDWARDS: It specifically says they don't.

MR. LOW: I was just going to say they don't.

CHAIRMAN BABCOCK: Okay. Any other comments about Bill's suggestion of exempting capped cases from --

MR. EDWARDS: I don't know whether you can -- if there's a way you can exempt only offers that make it impossible, but --

MR. LOW: Was that already a given? I know in this committee that was -- when we were discussing it, it was talked about how unfair if you had caps in a case and that would reduce it and the effect of it, and there was a lot of argument about that. I don't know if there was any argument in the House Bill 4 about that. I would really believe that it's hard for me to think somebody didn't bring it up.

MR. JACKS: There was testimony about it before both committees, I think. Certainly before the Senate committee.

MR. EDWARDS: And the award of litigation expenses talks about the judgment to be rendered, which has nothing to do at all with the verdict that is returned, I mean, not in this context, doesn't deal with the verdict returned.

MR. GILSTRAP: There's kind of two strands of

discussion here. One that keeps cropping up is, well, did the Legislature really kind of mean this? Did they really kind of mean to cover caps? The Legislature said that the Court could designate other actions to which the chapter doesn't apply. That's what the Legislature meant. I think the Court basically can do what it wants to. The Legislature spoke, and the second question is whether it's a good idea to do that, and I think that's really where our discussion ought to go.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I agree with that, and I think as far as whether it's a good idea, I would be concerned about a blanket exception from the statute made by rule of all cases in which there are caps driven by the fact, which sounds like fact, that in one scenario for a med mal plaintiff who has little or no economic damages the cap would produce a -- the combination of the two would produce an overwhelming incentive to settle it for 20 percent less than the cap. It seems to me that's going too far to cover all the capped cases because of that scenario.

You'd at least have to take or make someone in that scenario, and again, I'm out of my depth here because I don't do med mal. But I'm wondering how unfair it is to apply even in the scenario you described since the purpose of the offer of settlement provision is to

encourage early settlements. If the case settles because the defendant, who has a right to litigate the thing all the way to the end and might well choose to do so, if the defendant thinks the liability is fairly disputable, is willing to stay at the tender of $230,000 on the front end, then the right thing that ought to happen is you take 230 and go on down the road without either side spending money on litigation. But I may not understand the way med mal cases work. Maybe that's not a realistic scenario.

CHAIRMAN BABCOCK: I wonder, Bill, if maybe we could deal with this in a different part of the rule.

MR. EDWARDS: I'm just sitting here listening and thinking that the category of case that we might exclude is that category of case where the cap would prevent -- you don't award the defendant litigation costs if the cap prevents the plaintiff from getting -- actually prevents the plaintiff from getting 20 percent more than the offer, and that would be where the verdict was higher than the cap, but the cap keeps the plaintiff from getting 20 percent more in the judgment. And that might solve the problem of unfair offers where you've got clear liability and clear damages, which is the only thing we're really -- I was really addressing.

CHAIRMAN BABCOCK: Yeah. Is it best to deal with it as an exception, or would it be better to have a

rule that talked about unfair offers or something?

MR. EDWARDS: Well, the problem is that there's specific authority for an exemption and not an express authority for unfair offers.

CHAIRMAN BABCOCK: Yeah. Okay. Tommy, you said that there was some testimony about this before the Legislature. What was that?

MR. JACKS: Paula testified and simply pointed out exactly what Bill has pointed out, and that is that it becomes a rule that is unavailable to plaintiffs in a case with a hard cap unless the plaintiff pays the price of making an offer that is outside the 20 percent parameter; that is, in the case of a 250 hard cap the offer would have to be 199,000 and change to trigger the provision where a recovery at the cap would --

CHAIRMAN BABCOCK: Right. Did that argument fall on deaf ears, or did they say, "Oh, the Supreme Court will take care of that"?

MR. JACKS: Well, they don't really comment about that. They just listen, or at least in that case they did.

HONORABLE TRACY CHRISTOPHER: We haven't dealt with competing offers yet. The defendant offers 230. The plaintiff turns around and offers 250 at the same time. They are both winners. Okay. And so then what happens?

So I don't think that the cap is going to be that big of problem. Presumably they are both winners. They're both going to get their expenses. We haven't dealt with what happens when the offer and demand are within the range.

CHAIRMAN BABCOCK: Yeah. Yeah.

HONORABLE TRACY CHRISTOPHER: But....

MR. LOW: Who knows. Maybe the argument Paula gave is the very reason they said, "Okay, let the Supreme Court decide that." Maybe that was why another category was created. I mean, you know, or you could argue, well, they could have done it themselves, so there are two ways you can look at what they intended. Maybe that was it.

CHAIRMAN BABCOCK: Yeah. Okay. What else? You want to try to vote on Bill's proposal whether we should have another category of exempt cases that are tied to the cap? We'll have to work on the language, of course.

MR. EDWARDS: I would rather see the language before we voted on it, I think.

MR. JEFFERSON: Does Judge Christopher's comment address your concern?

MR. EDWARDS: Well, we're going to get to that, I guess. What does happen when there are competing offers? It might. That's what I'm saying, it may be premature to vote on it, but it is certainly something I

want to consider.

CHAIRMAN BABCOCK: Okay. Alex.

PROFESSOR ALBRIGHT: What about a category where -- we have kind of been talking around it, a category that says that it shouldn't be awarded in cases where it's unfair to do so or something like that and that would include the caps. I think that gets into the discretion issue, but it is doing it in -- as part of cases, types of cases, where it shouldn't -- this rule shouldn't work, and maybe what we need to do is talk about the broader rule first, because maybe a broader rule could say it includes the cap situation.

CHAIRMAN BABCOCK: Okay. Yes, Justice Duncan.

HONORABLE SARAH DUNCAN: This question is directed at Elaine. Is there a provision in this draft for a counteroffer?

PROFESSOR CARLSON: There is a provision for successive offers.

HONORABLE SARAH DUNCAN: Successive offers.

PROFESSOR CARLSON: Any person can make an offer, even if another side makes an offer.

HONORABLE SARAH DUNCAN: So how would that work in Judge Christopher's example?

PROFESSOR CARLSON: I'm not sure because I

don't know how you can clear 20 percent as a plaintiff to trigger the shifting if you're asking for the cap.

HONORABLE TRACY CHRISTOPHER: Well, you're within the -- you would be within the range if you offered 250 and got 250, wouldn't you? You offer to settle for 250 and then your award is 250, wouldn't you fall within the range?

MR. JACKS: No, because you have to hit 120 percent.

HONORABLE TRACY CHRISTOPHER: Oh.

HONORABLE SARAH DUNCAN: So that doesn't affect this at all.

MR. EDWARDS: Yeah, but the counteroffer that she talked about, sitting here thinking about it, the defendant could get litigation costs, but the plaintiff could not.

MR. JACKS: That's right. Unless the plaintiff is willing to make an offer that's lower than 200,000 --

HONORABLE TRACY CHRISTOPHER: Right.

PROFESSOR CARLSON: 20 percent less than the cap.

HONORABLE TRACY CHRISTOPHER: Okay. That wouldn't work then.

CHAIRMAN BABCOCK: Yeah. Pete.

MR. SCHENKKAN: I'm sorry to do this. I'm having very bad deja vu from our April meeting. I think I asked about six times then --

CHAIRMAN BABCOCK: Get used to that.

MR. SCHENKKAN: I seem to misunderstand this one compared to everybody else. I hate to do this, but I ask indulgence to just walk through 42.004(b)(1) as applied to the med mal cap scenario we were worried about, because it seems to me it doesn't have that implication. "A judgment will be significantly less favorable to the rejecting party than is the settlement offer, if the rejecting party is the claimant." That would be the med mal plaintiff who has no substantial economic damages, "and the award," the judgment, which is going to be set in our scenario by the cap, "would be less than 80 percent of the rejected offer."

So the defendant can't get the plaintiff down to 20 percent less than the cap. The plaintiff has to offer 20 percent more than the cap, more than 20 percent more than the cap to trigger the award. I don't see the problem. To me if what we're doing by leaving this alone is giving defendants in capped cases an incentive to offer 20 percent more plus 1 dollar more than the cap to settle the case at the beginning, isn't that a good thing?

MR. EDWARDS: Well, how about (2)? You're

looking only at --

MR. JACKS: No.

MR. EDWARDS: You've got to look at (2) as well.

MR. SCHENKKAN: No. (2) is if the rejecting party is the defendant. We were talking about forcing the plaintiff to take 20 percent less than the cap.

MR. JACKS: That's not what we're talking about. What we're talking about, Pete, is that --

MR. SCHENKKAN: I thought it was. I'm sorry.

MR. JACKS: No. What we're talking about is this: If I'm a plaintiff and I want to be able to employ the statute to help persuade a defendant to offer me the cap, I can't do that because in order to trigger the same thing I must recover 120 percent more under (b); that is, the rejecting party is the defendant and the award is 120 percent of the offer that was rejected. There's no way if I'm offering to settle the case for the cap of 250 that I can ever recover 120 percent of that amount because I'm -- I kept the ceiling with the cap. The only way I can hit 120 percent is if I offer to settle for 199 and change, and then if I recover the cap I've recovered 120 percent of the offer that the defendant rejected.

CHAIRMAN BABCOCK: Carlos.

MR. SCHENKKAN: Well, Tommy, help me on that,

because I had understand the -- not to say med mal caps. I had understood the med mal caps were not caps on all types of damages but were caps on noneconomic.

MR. JACKS: And but Bill's hypothetical was the case in which there are no economic losses but only noneconomic damages, so that it's effectively an across the board cap. If you want to move to another example of the cap within the bill you could use the 500,000-dollar cap on the charity patient. That is an across the board cap and encompasses all damages, or the hundred thousand-dollar cap on the doctor that provides ER care in a local governmental hospital, which is an across the board cap, but in each case it is the case that the only way the plaintiff can make an offer that can eventually be triggered against the defendant is if the offer is more than 20 percent less than the cap.

CHAIRMAN BABCOCK: Carlos, did you have anything?

MR. LOPEZ: No. Just is there some magic to why it says "judgment" and then it says "award"? I mean, that's not a meaningful distinction, and I think we should eliminate the distinction here, just say "judgment" because somebody is going to make an argument on that. "A jury award," I mean, I've heard that referred to many times, so if you don't mean that, let's call it "judgment."

MR. GILSTRAP: That's what the Legislature meant.

MR. LOPEZ: That's what I'm saying.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: Bill, how about this? It seems to me that if you exempt the types of cases you're talking about you will force defendants to settle marginal cases that they might not otherwise settle by offering the cap. So if you use the authority of 42.004(d)(2) to change it from judgment to more than 120 percent of the -- if the verdict is more than 120 percent of the offer, that permits the defendants to defend marginal cases, marginal liability cases from their perspective, but still permits the plaintiff to get the benefit of the statute.

MR. EDWARDS: I think that's what I suggested or was trying to.

HONORABLE LEVI BENTON: No, no. I don't want to diss. I just want to change the language. As to those rules instead of saying "judgment," make it -- change it to a "verdict." So if the verdict comes back -- let's see. $500,000. Then the -- and the judgment is kept at 250, the defendant is not penalized for having defended what it evaluated as your marginal case. The plaintiff still gets the benefit of recovering its litigation costs.

PROFESSOR CARLSON: What do you do about

remittiturs and JNOVs if you tie it to the verdict?

HONORABLE LEVI BENTON: That's a good question.

HONORABLE SARAH DUNCAN: And to me the bigger problem is --

HONORABLE LEVI BENTON: I'm sorry. Tied to the verdict, if so long as there's not a JNOV.

PROFESSOR CARLSON: Or remittitur.

HONORABLE LEVI BENTON: Yeah. I'm sorry, Sarah. I cut you off.

HONORABLE SARAH DUNCAN: I like your thinking. It's just the bigger problem to me is we have express authority in the statute to create exempted cases, but we don't have express authority in the statute to make the statute apply differently to different types of cases.

HONORABLE LEVI BENTON: Yeah, but, I mean, you do under 42.004(d). I mean, it's not fair to preclude or prevent defendants from going to trial on cases where their evaluation is there's little or no chance of an adverse result.

MR. LOW: But only the defendant can invoke it. You think the defendant is going to invoke the rule in marginal cases? I don't think so. Isn't that true, only the defendant can --

HONORABLE LEVI BENTON: I thought the

plaintiff can invoke the rule.

MR. LOW: No. So if I'm a defendant in a marginal case, I don't want to get sued for malpractice for invoking this thing.

CHAIRMAN BABCOCK: Are we stymied?

MR. SOULES: Well, I think Bill's right. I think it specifically changes the caps, and it seems to me like a type of case that could be exempt is a case where the sole reason that the plaintiff doesn't recover more than 20 percent of the defense offer is the application of the caps.

CHAIRMAN BABCOCK: Now, say that again, Luke.

HONORABLE SARAH DUNCAN: Wouldn't it be 120 percent, Luke?

MR. SOULES: I'm sorry?

HONORABLE SARAH DUNCAN: 120 percent.

MR. SOULES: Right. Okay. Cases where the sole reason that the plaintiff --

MR. GILSTRAP: Claimant.

MR. SOULES: -- does not receive the judgment for more than 120 percent of the defense's offer is the application of the caps.

MR. YELENOSKY: But --

MR. JACKS: No. It's 120 percent of the plaintiff's offer the defendant rejected.

MR. SOULES: If for some reason it was the application of the caps, that's the only reason why the plaintiff fails to recover more than 120 percent the defense offers.

MR. YELENOSKY: Then it would be exempted from --

MR. SOULES: It would be exempted.

MR. YELENOSKY: What does that accomplish, because --

MR. SOULES: Then the plaintiff would get the caps and not be exposed to the defense attorney's fees. That's what I'm trying to get at.

CHAIRMAN BABCOCK: Yeah, but the offer is --

HONORABLE TRACY CHRISTOPHER: You've already got the offer.

CHAIRMAN BABCOCK: Yeah. The offer is going to be made before you know.

MR. SOULES: Before you know what?

CHAIRMAN BABCOCK: Before you know what's going to happen.

MR. SOULES: They always are. If we knew that, we wouldn't have to practice law. We could just give opinions on what's going to happen in the end.

CHAIRMAN BABCOCK: Bill, what do you think about Luke's idea?

MR. EDWARDS: Well, the problem is, is that maybe the Court has the power to add to what the Legislature has done to provide that in those cases where the plaintiff would not recover under the statute because caps keep the plaintiff from getting 120 percent of the offer that there will be a penalty equal to what the Legislature has here that would be put on the defendant.

MR. YELENOSKY: By the way, I don't think the math is right, because what we're trying to avoid is being 80 percent below, having your award be 80 percent below, and the flip of that is not 120 percent.

MR. SOULES: You're right. You're absolutely right on that.

MR. EDWARDS: No, it's 20 percent more.

MR. MARTIN: 208,333.

MR. SULLIVAN: A threshold issue that mentally I'm trying to get back to is how serious an issue is it in these sorts of cases, and the thing that I think we have to remember is that the plaintiff can't invoke offer of settlement unless the defendant does. That's the threshold, and in a case like the one we're discussing, the defendant -- I'm now circling back to where Pete Schenkkan was. The defendant is -- if there's an expectation that this case is going to be in excess of the caps then the defendant, if I understand it correctly, has to offer more

than the cap in order to get any benefit for it.

MR. SOULES: No.

MR. LOW: No.

MR. SULLIVAN: So the defendant is not going to --

MR. JACKS: It's the plaintiff that has to do that.

MR. SCHENKKAN: He's saying for the defendant in triggering --

MR. SULLIVAN: Yeah.

MR. SCHENKKAN: -- the defendant --

MR. SULLIVAN: Think about it from this perspective. Why does the defendant want to do it? Because there's an expectation that the defendant is going to be able to recover the attorney's fees and costs. That's the only reason he's going to do it, so and maybe I should defer to Pete, because I think he hit the center of the bull's-eye with his comment earlier, and I think we sort of passed it by.

MR. JACKS: And I thought he missed the target entirely.

MR. SULLIVAN: But maybe we ought to clear it up and decide whether it's one way or the other before we go on.

MR. SCHENKKAN: The defendant won't get --

the concern is, as I understand it, not that the defendant by its offer can force the plaintiff to take less than the cap.

MR. JACKS: Correct.

MR. SCHENKKAN: We've clarified you can't do that. The concern at the moment is, is the plaintiff unable to take advantage of the settlement rule by making an offer that when the cap prevents the award from being -- the judgment from being 20 percent more than the cap, and what Kent is saying and it seems to me is right is that doesn't happen, that scenario doesn't arise in a defendant triggered scenario, because the worse that happens is the defendant and the plaintiff are left exactly where they were by the subsequent part of the statute that is under the cap.

If the defendant triggers it, he's going to have to trigger it with an offer that's more than whatever we have calculated it to be, 120 point something percent of the judgment. A defendant, knowing it's a cap case, ought to take that offer. He's just gotten more than the cap.

MR. SOULES: The plaintiff.

MR. SCHENKKAN: I'm sorry. The plaintiff ought to take it.

MR. SULLIVAN: My point is just before we pass it by, is that if I understand the application of the

statute, realistically in the context of the sort of case that we are discussing now and we are concerned about, the offer of settlement is not going to ever be invoked by a defendant.

CHAIRMAN BABCOCK: It's not going to be what, Kent?

MR. SULLIVAN: Will not be invoked by a defendant, and as a result the plaintiff will not have an opportunity to respond.

MR. JACKS: No, that's not right. That's not right. You're not allowing for the fact that defendants and plaintiffs have the ability to misevaluate cases. The defendant thinks they've got a wonderful case.

MR. SULLIVAN: But with all due respect, that's a different case, I think, than the one we were hypothesizing a moment ago, because I think what we were all talking about was an extreme case, one that would have dramatic unfairness, and that is where both sides look at this case and say the liability is clear and the damages far exceed the cap. That is not the sort of case, and I think the underlying fundamental is that it is not the sort of case that the sides will misevaluate. It's a case in which both sides say this case is -- the clear value is way in excess of the cap and then we, I think, all tend to agree, well, you don't want, you know, that unfairness to

occur.

All I'm trying to say is in a clear case like that, because of the operation of this statute, the specifics on how it works, it's never going to get invoked. I don't know whether Pete agrees with me or not. I think he does.

MR. SCHENKKAN: I think I do.

MR. SULLIVAN: I'm trying to do the math.

MR. EDWARDS: If I'm the defendant and I'm defending a case and I think it's a cap case and I tell my client I think we ought to pay this but the insurance company or my client says, "No, we ain't going to pay it," then as a defense lawyer under this scenario I think I would be obligated to come in and make an offer of settlement, assuming I could get the permission to do so, that would be 19 and a half percent less than the cap, because juries can always tell everybody that they're wrong and come in 20 percent below the offer, and I get my attorney's fees and court costs and litigation expenses for my client at no risk whatsoever to me or my client for the offer that I've made.

CHAIRMAN BABCOCK: And, Pete, isn't that right? I mean, the defendant --

HONORABLE TRACY CHRISTOPHER: No.

CHAIRMAN BABCOCK: It's not right? Judge

Christopher says that's not right.

HONORABLE TRACY CHRISTOPHER: Well, it says the award will be less than 80 percent of the rejected offer. So, and the defendant made -- let's make it real simple. The cap is a hundred thousand. The defendant offers 80,000, okay, but the award is going to be a hundred thousand.

MR. EDWARDS: No. You're assuming that the jury is coming with a hundred thousand. What I'm saying is there's a chance that jury is going to come in with 50,000.

HONORABLE TRACY CHRISTOPHER: Well, that --

MR. EDWARDS: That's what I'm saying. So I can make an offer for 19 and a half percent less than the cap with no risk to my client at all, and a possibility that I get my attorney's fees because the jury might come back with 50 percent of the cap.

MR. SCHENKKAN: Well, but your client is taking a risk. He's taking a risk by offering 80,000 when you think you've got a good chance that it's only 50. The point of the rule is to make you make that offer despite the fact that you think it --

MR. EDWARDS: I, as a lawyer -- I, as a lawyer have made the decision that this case is going to go for more than a hundred thousand, but I may have a doctor as a client who has an insurance policy that has a consent

provision in it. He says, "I don't care. We want this case tried. I'm not going to give my consent. I don't care what you do, because I don't want my name to go to the national data bank up in Washington."

MR. JEFFERSON: Don't you then have the counteroffer issue? Claimant says it's going to be more than a hundred thousand dollars. "Okay, I'll take a hundred." Now you've got a possibility of a more than 80 percent recovery.

PROFESSOR CARLSON: But then you go into(b)(2).

MR. EDWARDS: Yeah. Then you're under (b)(2).

MR. JEFFERSON: Well, 120 percent recovery. 80,000 plus -- what's 120 percent of 80?

PROFESSOR CARLSON: If the plaintiff came back and said a hundred and the defendant said "no," well, you can't beat a hundred.

HONORABLE TRACY CHRISTOPHER: But your scenario is going to happen regardless of whether there's a cap or not. You know, if you assume there were no caps and you think, "I'm going to lose $100,000, but I'm only going to offer 80," and the jury comes back with 50, you're getting a windfall, regardless of whether the cap's there or not. Because the jury was at 50, you're going to get

your attorney's fees.

MR. EDWARDS: That's true, but the other side has the possibility of getting their attorney's fees as well under your scenario with no cap, because the jury may come back with 200,000.

CHAIRMAN BABCOCK: Carlos and then Harvey.

MR. LOPES: Well, that might be the case if (b)(2) said "the rejecting party," period, but (b)(2) is limited to when the rejecting party is the defendant. So the case that I think Paula was worried about is you've got a cap that's a hundred thousand. Defendant says "I'll offer 90." Plaintiff says, "I don't want to take 90. It's a 4 million-dollar case. There's a cap for a hundred. I want my hundred." They get penalized because now the verdict comes in at -- the defendant was within that window, so (b)(2) says the rejecting party is the defendant, not the plaintiff in that case, the rejecting party, so --

MR. YELENOSKY: So there the plaintiff couldn't take advantage of the fee shifting, is what you're saying, right? But how, Tommy, can we allow the plaintiff to take advantage if our only choice is to suggest that the Supreme Court that it exempt --

HONORABLE TRACY CHRISTOPHER: Right.

MR. YELENOSKY: -- these capped cases? I

don't know what we can do that would allow the plaintiff to take advantage of that.

MR. JACKS: Stephen, I think, I mean, I really think our choice is -- to me the offense is that this was intended to be a two-way, not a one-way provision, albeit it's sort of a one and a half-way and that only the defendant can trigger the process; but if the defendant triggers the process then it was meant to be two-way. But in the case where a plaintiff is subject to a hard cap, it's still effectively only one-way unless the plaintiff is willing to sacrifice the opportunity to get the cap. I mean, to me I think the only way you can do an exemption is something along the lines of exempt those cases, and I was going to put it not in rule language but in plain English which effectively is one-way because one party has got a cap.

MR. YELENOSKY: So you won't be able to give the plaintiff the advantage of the cost shifting. You will just -- you would just take it away from the defendant out of fairness.

MR. JACKS: Yeah. I haven't figured out a way to do that. I think you just take it away from the defendant.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: One thing you could do is to put

a provision that says that in cases where there are caps on damages that the trial court can examine the jury verdict as opposed to the judgment in determining the application of the statute. Now, you could put it in (b)(1), (b)(1) and (b)(2). I recognize that's rewriting the rule a little bit, or you could put it in another provision and say that in those cases where the cap applies the court can look to the jury verdict, because what you want to encourage is the case when the jury verdict is 500,000 or 5 million and it should have settled; and in Tommy's situation, he can't make the offer because he can't get it over the judgment, but if you allow the jury verdict in that situation to trigger application then it gives him the right to make a demand that's more than a cap but less than the jury verdict.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I would be reluctant to let trial courts look at verdicts. If you're going to tinker with the rule, tinker with it in a way that says if the application of the statute and the rule to a precise judgment results in an absence of parity between the two parties the rule shall not apply.

MR. DAWSON: Then you've exempted all the medical malpractice cases.

MR. MUNZINGER: You wait until the judgment

has been entered. You know the precise amount of the judgment. If it's 119 percent for the defendant and it could not have worked out that way for the plaintiff, the rule doesn't apply. First off, we're speaking about an infinitesimally small category of cases, I think, if I understood your hypothetical, because -- let me finish my sentence, Bill, and then you can correct me if I'm wrong.

It just seems to me that if you have a medical malpractice case, I don't know if prejudgment interest runs on the pain and suffering verdict. I think it would be a rare case in which there are not some economic damages, be they hospital bills, doctor bills, ambulance bills, or the fair market value of a housewife's services to a family. I think it's a -- I'm not sure that there is a large category of cases to which this would apply, but if you're going to do it, I think you ought to avoid playing games with verdicts and write a blanket rule that would insist on parity between the two parties after you examine the results of the judgment.

MR. EDWARDS: Well, in some of these cases we have caps no matter what you're dealing with. You have an absolute cap in some of these cases. For example, you've got what's now about a million and a half-dollar cap on everything but medical expenses in a medical case no matter what you're doing.

MR. MUNZINGER: But this statute and this rule speaks to the judgment. In the application of the settlement offer, if I'm making an offer just on the pain and suffering award but I've got other elements to my verdict and judgment that I have to be concerned with as a defense lawyer or as a plaintiff's lawyer, we're not just looking at the capped portion of the lawsuit when we look at the judgment.

MR. EDWARDS: I just know that from the standpoint of handling a case that if one side has the ability to shift expenses and the other side does not, it gives the side that has the ability to shift the expenses an unfair advantage over the side that does not, whatever that is.

MR. MUNZINGER: And I agree with that and say that if you're going to tinker with the rule, tinker with it in a general sense so that parity between the parties is maintained by the application of the rule. Don't be looking at verdicts, don't be exempting all cases in which there is a cap, because I think there you've frustrated the intention of the Legislature. Don't do more than solve the vice that you have perceived in the statute.

MR. EDWARDS: And you can't, I don't think, look at the judgment to make that determination, because this is a settlement statute, and you've got to look at it

at the snap in time when the offer is made and the offer is rejected to have it in context.

MR. MUNZINGER: Not so, because you don't know whether you're going to get the cost shifting until the judgment is entered.

MR. EDWARDS: That's right, but again, you're talking -- when you're talking settlement, you're talking in terms of possibilities and probabilities, what's possible and what's probable to happen with a jury verdict.

MR. MUNZINGER: And that was Tommy's point. None of us ever know at any time. That was Luke's point. None of us ever know.

MR. EDWARDS: That's right, so that what we need to do, it seems to me, is -- I don't know whether we can or not -- deal with the problem that it's possible for the person who is dealing with caps, who doesn't get the caps, to get the advantage of the litigation expense shift if that's possible, and one of the suggestions I had was it may be the Supreme Court can add to this statute by looking at the judgment, if you will, and giving -- not saying nobody gets a shift, but if the plaintiff would have, but for the caps, have gotten a judgment 20 percent more than the offer, then under a court rule the cost would be shifted just as they are under the statute.

We spent hours last year when this thing was

not law and at the request, I understand, of folks over in the executive side, of trying to write a rule on this cost shifting, and so I would assume that everybody agrees that we have the power to do it.

MR. MUNZINGER: Well, I don't agree that you have the power to do it because you are now dealing with a law which the Legislature has enacted, has made it clear that you will deal only with what's in the judgment. I agree that the statute ought to apply equally to plaintiffs and defendants, and I think that the cure to it is to write a rule that simply says if when you analyze the judgment there would not have been parity under these circumstances then the rule doesn't apply.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: I just have a hard time with seeing that there's a scenario where the caps aren't going to apply to one side or the other. There are just too many permutations. If you have got a hundred thousand-dollar cap, the defendant has to trigger the offer of judgment rule with an offer. If the defendant offers $50,000, the plaintiff then comes back and says, "No, I want my whole hundred." If the plaintiff is successful then there is fee shifting, correct? If it's a 79,000 -- if it a's hundred thousand-dollar cap, if it's a hundred thousand-dollar cap and the plaintiff -- and the defendant triggers it by

saying, "Okay, I'm going to offer $79,000," and it's a hundred thousand-dollar judgment, there's still fee shifting. The plaintiff gets the benefit --

HONORABLE HARVEY BROWN: No.

MR. JEFFERSON: If the plaintiff turns around and says, "No, I want my full hundred," there's still fee shifting. The plaintiff gets their fees.

MR. JACKS: No. Only if -- they can't, because when the plaintiff says, "I'll settle the case for a hundred," and they can only shift fees if they recover 120, and they can't recover 120 because the cap cuts them off at a hundred.

MR. JEFFERSON: If the judgment is $80,000. All right. Okay.

MR. SOULES: We keep changing that around. Let's go back to --

MR. JEFFERSON: No, I'm with you. I'm with you. If the plaintiff says, "I want a hundred" --

MR. JACKS: Right.

MR. JEFFERSON: Plaintiff's got to get a judgment for 120 before they get fee shifting.

MR. JACKS: Right, and they can't, so it's a one-way rule.

CHAIRMAN BABCOCK: Luke and then Judge Christopher.

MR. SOULES: If you take (b)(1), and there's an offer from the defense that's rejected by the plaintiff, and using Bill's example, there's a 250,000-dollar cap. The plaintiff comes -- the defense comes in and says, "I'm going to offer you 210,000." 120 percent of that is over 250. You've got to take the 210 because you are at risk of having an offset of the defense's attorney's fees, et cetera, against whatever you recover, which can't exceed 250, and you know that the judge is probably going to give them $40,000 for trying a med mal case, even the kind of case that Bill is talking about.

So that you can't do any better than that. You cannot -- if you're representing that plaintiff, you can't turn down 210,000-dollar settlement offer because your chances of getting beyond that are nil in the end after they apply the offset.

HONORABLE SCOTT BRISTER: You still get the 40,000 if you get the full 250.

MR. SOULES: No, because the judge is going to give the other side $40,000 in costs and medical.

HONORABLE TRACY CHRISTOPHER: The award has to be less than 80 percent of the rejected offer, so the award has to be $170,000, not $250,000 before the fees start coming.

MR. JACKS: Yeah. Judge Christopher is

right.

MR. SOULES: "The claimant" and "the award" --

HONORABLE SCOTT BRISTER: When you're dealing with a cap, the effect of the statute, as I understand, is to make -- if you offer 10 percent less than the cap, by definition it's a reasonable offer and none of this matters because this only punishes unreasonable offers. Right?

MR. JACKS: No. It punishes unreasonable rejections.

HONORABLE SCOTT BRISTER: Or unreasonable rejections, but the effect is by definition if you're within 10 percent of the cap, it ain't an unreasonable offer; and who disagrees with that? If you're within 10 percent of the cap, is it an unreasonable offer?

MR. EDWARDS: At that point in time it technically reduces the cap.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I suspect that the Legislature probably couldn't agree and maybe couldn't really figure it out. I think that's where we are. Wait, wait, wait. That's not a slam against the Legislature. I think that's where we are.

MR. JACKS: Makes our heads hurt.

MR. GILSTRAP: We certainly can't agree, and

a lot of us can't figure it out, and myself included. Maybe the only logical answer is simply to do what the Legislature did give us the power to do and say, "We are going to exempt out cases in which there are caps," and that solves the problem.

MR. SOULES: Yeah. That's what happens, is if the defense offers 210 then the plaintiff cannot get attorney's fees against the 250 caps.

HONORABLE TRACY CHRISTOPHER: So it means no one will get attorney's fees, so --

CHAIRMAN BABCOCK: And the rationale for that is it's not fair because you're basically reducing the cap. That's what Bill and --

HONORABLE TRACY CHRISTOPHER: But you have to get way below to get the --

HONORABLE SCOTT BRISTER: You can still get the cap. You may have to go to trial. You're not rejecting the cap. A cap's a cap.

MR. MUNZINGER: Wouldn't prejudgment interest be added to the award?

MR. EDWARDS: No.

MR. MUNZINGER: Why?

MR. EDWARDS: Because it's included within the cap.

HONORABLE SCOTT BRISTER: It's not our fault

the plaintiff can't do better than the cap. I mean, that's the law they passed. It's not our -- if that creates -- only one side can get a bonus in those cases.

CHAIRMAN BABCOCK: Yeah. Pete.

MR. SCHENKKAN: I don't see how the combination of this statute that we're trying to provide some advice on how to do an implementing rule and the cap statute makes the plaintiffs worse off than the cap statute. The cap statute may be a very bad statute, either in principle or in the dollar amount, but taking it as the law, the application of the offer of settlement statute does not make the plaintiff worse off. The defendant can't make the plaintiff worse off. He can only offer more than the cap if he wants to have a chance of getting his attorney's fees, in which case the plaintiff ought to take the offer.

MR. SOULES: The problem is --

MR. SCHENKKAN: The fact that the plaintiff can't take advantage of this statute in a cap situation in which he has no economic damages --

MR. SOULES: The problem is we can't add cases. We can only take cases away. Okay. We can't -- we're only authorized to take cases away from what this applies to, and what Bill is trying to do is add a case to which this would apply, and that is where the cap prevents

us going past 120 and being able to use this statute to shift fees, and there is no authority for this committee to do that, so we might as well go on.

CHAIRMAN BABCOCK: Harvey and then Tommy.

HONORABLE HARVEY BROWN: Well, I think it does make the plaintiff's case worse. To use the simple figures of a hundred thousand again, if the defendant thinks it's a case of liability and it's probably going to be a hundred thousand or more, they should always offer at least $79,000 and probably should always offer 79 exactly is their first offer and trigger the statute, because there is no harm to them in doing that. They can only gain. They should always offer $79,000, and then the plaintiff is at risk of fee shifting.

And if you're the plaintiff's attorney, you go to your client and say, "Now, they have offered us $79,000. If we reject that, we might get 21 more, but if we reject it, we have the risk that we get some strange, weird jury that, although everybody thinks this is a case of 100,000-dollar case comes at 79 and then you may have to pay them 40- or 50- or $60,000 in attorney's fees.

MR. HAMILTON: It's got to be 80 percent below that.

HONORABLE HARVEY BROWN: My 79,000 is 20 percent below 100,000.

HONORABLE TRACY CHRISTOPHER: It's got to be below the 79.

MR. YELENOSKY: It has to be lower than the offer.

HONORABLE SCOTT BRISTER: And if you turn down an offer for 79 and get 40, the Legislature says you ought to get your fees. I'm sorry, but that's what they said.

MR. SOULES: That's right.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: The offense is not what the plaintiff can be forced to do. The offense is that the plaintiff cannot employ the statute to persuade a defendant to offer the cap. They can't do it because they could never recover more than 120 percent of that. In order to bring this to a head I'm going to propose that we exempt, and I've got some language.

CHAIRMAN BABCOCK: Okay. Good. That's what Bill wanted.

MR. JACKS: And the language is that the rule shall not apply in any case in which all damages included in a claim are subject to a statutory limitation on damages. In the case where the cap is on noneconomic losses, if the plaintiff limits their claim to noneconomic damages then the rule wouldn't apply. If the plaintiff is

going to seek both economic and noneconomic damages, the rule does apply.

In a case where the cap covers all damages, as it does in some of the caps under House Bill 4, then the rule wouldn't apply. And the spirit of this is simply that it assures that any time the rule does apply, if it's triggered by defendants then it truly is a two-way opportunity for both sides, and those cases where it's not a two-way opportunity for both sides to employ the statute to equal advantage then the rule wouldn't apply.

CHAIRMAN BABCOCK: You want to read that language again?

HONORABLE SCOTT BRISTER: Just briefly, let's understand what we're recommending the Court do. In a medical malpractice case where they put a firm cap, we're going to exempt it if the plaintiff says, "I'll settle it for the cap" and gets zero, and that's our idea of fairness and what the Legislature intended to do, to not do fee shifting in House Bill 4 if the plaintiff gets zero after demanding the full cap. I just can't imagine anybody in the Legislature is going to say, "That's what we intended," but that's what this exemption would do. I didn't write the statute, but I --

MR. GILSTRAP: He's saying exempt all cases. Judge, he's saying we exempt all cases, not -- we don't

look at the judgment or the offer. We just exempt those capped cases.

HONORABLE SCOTT BRISTER: And I'm saying the effect will be in all medical malpractice cases if the plaintiff demands the cap and gets zero, we refuse to apply 4 because we exempted it out.

MR. JACKS: If plaintiff gets zero there's not cost shifting anyway because the cap is determined by the plaintiff's damage.

HONORABLE SCOTT BRISTER: Well, the plaintiff gets 50. If the plaintiff gets 50 after demanding 250, a clearly unreasonable demand, we're going to exempt it and say "no fee shifting."

MR. YELENOSKY: But it would be fee shifting. If the plaintiff is demanding, the defendant would have to offer, and the plaintiff would have to reject.

HONORABLE SCOTT BRISTER: Whatever. Just the analysis I gave, 250 demand from plaintiff, 50 offered from the defendant, you get zero.

MR. JEFFERSON: We're also taking away those cases in which it's not a clear cap case where the damages may not be 250. They may be 50. The plaintiff thinks they're 50 and makes the 50,000-dollar offer that the defendant rejects, and there's a more than 120 percent recovery on the 50. In that event there would be fee

shifting unless we adopt your suggestion.

MR. GILSTRAP: Chip, Tommy, he -- aren't you suggesting, Tommy, that just certain categories of cases we're not going to apply fee shifting period?

CHAIRMAN BABCOCK: Right. That's what he's saying.

MR. GILSTRAP: And if it's a cap case and it's noneconomic damage and that's all I'm seeking, cap doesn't come into play.

CHAIRMAN BABCOCK: Yeah.

MR. GILSTRAP: Is that what you're saying?

CHAIRMAN BABCOCK: Read your language again.

MR. JACKS: Yes. "The rule shall not apply in any case in which all damages included in a claim," and "claim" is defined, "are subject to a statutory limitation on damages."

MR. GILSTRAP: That's clearly within our power. The Legislature allowed us to exempt actions from this -- the procedure of this chapter. It's a pretty discrete reach.

CHAIRMAN BABCOCK: Okay. Tommy has recommended some language, which satisfies Bill, does it?

MR. SOULES: How do you define "claim"?

MR. JACKS: "Claim" is defined in the statute and in the draft rule to mean "a request, including a

counterclaim, cross-claim, or third party claim to" --

MR. SOULES: I got you.

MR. JACKS: -- "recover monetary damages."

MR. SOULES: You're not changing the definition of "claim."

MR. JACKS: No.

CHAIRMAN BABCOCK: Bill, you okay with this language?

MR. EDWARDS: I would be happy to see it, but I'm worried that --

CHAIRMAN BABCOCK: We've got to vote on something.

MR. EDWARDS: I'm worried that that particular language might precipitate a special session of the Legislature.

HONORABLE SCOTT BRISTER: I think it's serious.

MR. EDWARDS: I mean, I think I'm sitting here scratching a little bit, and what I'm thinking of is something a little less far reaching than that that said it would make it not apply to a case where the defendant's offer is greater than an amount which would be equal to -- I'm not sure how I want to say this. Where the offer is greater than an amount which when added to 20 percent of that amount exceeds the possible applicable caps under the

plaintiff's pleading. Now, what I'm trying to do is -- maybe I'm not --

MR. YELENOSKY: Employ actuaries.

MR. EDWARDS: Well, what I'm trying to do is say that if you look at the plaintiff's pleadings at the time of the offer, you know what caps are applicable, you know what damages are sought, and you know what caps can possibly be in place; and if the offer that is made exceeds an amount which when -- you take the offer, add to it 20 percent of the offer, and if it exceeds that amount or is equal -- or is equal to or exceeds that amount then the plaintiff, no matter what happens and then --

MR. LOW: What you're saying is they have to offer the caps, so a certain range it doesn't apply.

MR. EDWARDS: No. I'm just saying it doesn't apply either way if you get an offer that is greater than a certain amount.

CHAIRMAN BABCOCK: But, Bill, aren't you -- see, Tommy's proposal, it seems to me, is within the spirit of what the Legislature delegated to us because it's talking about all cases of a certain type.

MR. EDWARDS: Yeah.

CHAIRMAN BABCOCK: Your proposal is like tinkering in --

MR. EDWARDS: Well, I'm thinking I can get

away with the tinkering and can't get away with the --

CHAIRMAN BABCOCK: You're an honest man.

MR. EDWARDS: I think that's why I get paid to be here.

MR. SCHENKKAN: I'm going to suggest that Tommy's is not consistent with the spirit of the legislation in two important particulars. First, it was the subject of remarks, especially of mine, it's way over-inclusive. It allows the plaintiff to designate his claim in a particular way to wipe out many, many scenarios of capped cases in which the intent clearly was that in a two-way street to be able to have a defendant make an offer and there's good reasons to encourage both sides to make them.

But second, the fundamental mechanism it uses is plaintiff trigger. The statute is a compromise between only defendants get to do this at all, which was the House version, and both sides get to do it any time they choose to, which was Senator Ratliff's original version, and we get defendant trigger. Tommy's flips it around and says it's a plaintiff trigger. So, I'm sorry, I don't think it is consistent.

MR. JACKS: I disagree. The plaintiff -- it's saying that "all damages included in the claim." That really punishes the plaintiff in a case where the plaintiff

has the option -- I mean, for example, the homemaker that Bill described. I mean, there is a potential claim there for economic loss, that is, loss of household services; and if the plaintiff makes that claim and if the only cap is a cap on noneconomic damages then the cap doesn't cover all the damages that the plaintiff would claim; and, therefore, the rule applies, even though as a practical matter it's -- juries are usually uninclined to award money on damages for loss of household services.

I truly don't see it to be a case that -- I mean, now you could say, well, the plaintiff could exempt themselves from the rule by giving up those damages and just plead for the noneconomic losses, but if so, they have paid a price for doing that.

MR. SCHENKKAN: Oh, I agree completely, but it's just that the structure of the act was the decision on triggering -- just like the decision on filing the lawsuit is on the plaintiff. No matter how you slice it, there will be an asymmetry. The legislative decision was invoking offer of settlement is a defendant's choice, and this is saying, no, it's up to plaintiff.

MR. JACKS: But the Legislature clearly gave the Supreme Court the authority to exempt whole categories of cases.

MR. SCHENKKAN: Absolutely.

MR. JACKS: And that's all this does, and it's the only way I could see to get at what we're talking about. Either we're for it or we're again' it, but I think it's time to find out rather than chew up the whole day on this one issue.

MR. SOULES: There's one other way we could do that, Tommy, and that is --

MR. JACKS: Yeah.

MR. SOULES: And that would be to go down the trail from the pleadings to the award and say it would not apply to cases or parts of cases where the award is less than the amount of the verdict because of caps.

MR. JACKS: And the problem with that is the pressure on you settlementwise is at a time you don't know whether you're under the rule or not. It seems to me that in fairness the parties ought to know whether when they reject an offer they are going to be subject to sanctions or not, and if you've got to wait until after judgment to find out then that to me is confound.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: There's going to be a lot of cases where we're talking about realistic damages in the range of say $100,000, so there's areas where both the plaintiff and the defendant could invoke the offer and incur the fee shifting if the party wrongfully rejects it.

It's only in the areas where we're at the cap level that there's probably not even going to be a problem because at the cap level if the defendant makes the 79,000-dollar offer, for him to get fee shifting it's got to be 80 percent below that; and if it's that far down the line, the plaintiff is not going to get anything anyway for his offer. So the plaintiff is not really losing anything by not being able to make this fee shifting because there's a cap. It's just as a practical matter it isn't going to be there.

CHAIRMAN BABCOCK: Okay. Stephen, then John, and then Judge Gray, and then let's try to take a vote.

MR. YELENOSKY: Pete, I don't see how you can say that the fact that the plaintiffs may have some choice in this, which seems to me to be losing a choice, is contrary to legislative intent when the Legislature included itself different classes of cases to which this doesn't apply that entail also a plaintiff's choice. In most cases also a loser even may be real because if you file this as a class action it doesn't apply, and there are times when you might or might not file something as a class action, and maybe that will make the decision for you.

Justice court, I have trouble imagining that, but I guess there are some cases that could be close enough that you file it in justice court because you want to avoid

that. So there are plaintiff decisions that can be made based on the statute, so I don't see how you can say the legislative intent was to preclude any decision by a plaintiff from resulting in an application or nonapplication of this.

CHAIRMAN BABCOCK: John Martin.

MR. MARTIN: The Legislature also has put on the ballot in the fall a constitutional amendment that gives the Legislature -- that if passed by the voters, would give the Legislature the power to cap other types of damages in the future, and I really think we're making a mistake by trying to carve out an exception for capped cases here that really isn't going to come up but in a very small number of cases that might have more serious consequences in the future.

CHAIRMAN BABCOCK: Justice Gray, final word.

HONORABLE TOM GRAY: Before we vote on the specific language I would like to point out that the statute does not use "claim" or "case" in those matters which the chapter does not apply nor to the other matters which we can exempt. It uses the term "action," a very, very broad term. My concern in the language as proposed is that if we use the term "cases" in a case where there is a hundred thousand-dollar cap applicable to one defendant, you have exempted not only that claim against that

defendant, but you have exempted the entire case under the structure of the statute.

CHAIRMAN BABCOCK: Good point. Okay. Everybody that's in favor of Tommy's language, "any case in which all damages included in a claim are subject to a statutory limitation on damages," raise your hands.

All opposed, raise your hand. Tommy's motion fails by a vote of 22 to 11, the Chair not voting. Anybody hungry?

MR. EDWARDS: I've got one other thing. Let me throw this out, and we can talk about it later --

CHAIRMAN BABCOCK: Okay, sure.

MR. EDWARDS: -- but I've been trying to mess with the language in my thoughts, and let's give some consideration to a rule that says that the fee shifting, expense shifting, does not apply to any action where the defendant's offer is in such an amount that under the plaintiff's pleadings at the time of the offer the plaintiff cannot receive a judgment in excess of 120 percent of the offer because of caps.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I'm sitting here listening to this, and I'm having as much trouble with it as anybody else, but if you have the case where there's a hundred thousand-dollar cap, the defendant comes in and

offers 79 in order to try to get the benefit of the fee shifting. The defendant does that because defendant thinks that's no risk. What we need to do to make this fair is to put the risk back. All right. And the way you put the risk back is to allow the plaintiff to offer to take the cap and to fee shift if the verdict -- if the verdict would have otherwise made the award a sufficient basis for fee shifting, and that can be written, and I don't see that that's particularly inconsistent. I think that's exactly what Bill is talking about.

MR. EDWARDS: Yeah.

HONORABLE SARAH DUNCAN: Uh-huh. Go write it.

PROFESSOR DORSANEO: Okay.

CHAIRMAN BABCOCK: Okay. Why don't -- over lunch why don't you and Bill write it and then we will talk about it briefly right after lunch because we have got a long way to go. Elaine, don't we have a long way to go?

PROFESSOR CARLSON: The woods are lovely, dark, and deep.

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

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CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 20th day of June, 2003, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,108.00 .

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

Given under my hand and seal of office on this the 24th day of June, 2003.

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