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MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 20, 2003

(AFTERNOON 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 1:07 p.m. and 5:02 p.m.,
at the Texas Law Center, 1414 Colorado, Room 101, Austin,
Texas 78701.

COPY

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CHAIRMAN BABCOCK: We're back on the record, and listen up or you're going to miss the Dorsaneo-Edwards fix on this.

PROFESSOR DORSANEO: I hope it's a fix.

MR. GILSTRAP: Come on, Judge Christopher. Come on, Judge Bland. Let's go. All right. Judge Brister, here's something you're going to like.

PROFESSOR DORSANEO: I don't think so.

MR. EDWARDS: Try it the other way. Here's something you're not going to like.

CHAIRMAN BABCOCK: Scott, you listening to this?

HONORABLE SCOTT BRISTER: Yes. What is it about, me?

CHAIRMAN BABCOCK: "If the rejecting party is a defendant and the award would have been more than 120 percent of the rejected offer, but the award is capped by other law, the plaintiff shall recover litigation costs from the defendant," as written by Bill Dorsaneo and approved by Bill Edwards.

MR. HAMILTON: You're going to have to read that again.

CHAIRMAN BABCOCK: "If the rejecting party is a defendant and the award would have been more than 120

1 percent of the rejected offer, but the award is capped by
2 other law, the plaintiff shall recover litigation costs
3 from the defendant."

4 MR. HAMILTON: I don't understand what that
5 means, "would have been more than 120 percent."

6 CHAIRMAN BABCOCK: Okay, Bill.

7 PROFESSOR DORSANEO: Well, it goes like this.
8 Let's take a hundred thousand-dollar cap, and this is --
9 let me begin this by saying this is as a result of me
10 listening to everybody identify the perceived unfairness
11 and then try to figure out a way to eliminate it. I'm not
12 altogether sure how unfair it is or how often it will come
13 up, but let's start.

14 100,000-dollar cap. The defendant in the
15 hypothetical suggested by various people offers 79,000.
16 The defendant offers 79,000. That number is picked because
17 under those circumstances the award -- I almost don't know
18 whether I can say it. The number takes advantage of the
19 cap in that it doesn't allow the plaintiff to make a
20 counteroffer that would result in fee shifting. Okay. The
21 plaintiff can't come back and make a counteroffer above 79,
22 let's say at the cap, because there will never be 120
23 percent, okay, above the offer when the max is 100,000.

24 So to eliminate the unfairness, instead of
25 using the cap number, use in effect the verdict number

1 because the award would have been more than 120 percent of
2 the rejected offer but for the cap.

3 MR. YELENOSKY: I didn't hear the "but for"
4 in what Chip read. Was it in there?

5 PROFESSOR DORSANEO: The words "but for"
6 ought to be put in there.

7 MR. YELENOSKY: Yeah. That needs to be in
8 there.

9 PROFESSOR DORSANEO: Because those are, you
10 know, magic language, but the idea is simply to eliminate
11 the perceived unfairness by allowing the plaintiff to
12 recover litigation expenses notwithstanding the cap.

13 MR. YELENOSKY: Well, I don't know if that
14 was Carl's question. My question was just that the
15 language didn't clearly say what you just said, Bill.

16 PROFESSOR DORSANEO: It could be clearer.
17 It's clear enough to be comprehended. Maybe not when it's
18 read outloud. It could be clearer. There could be some
19 words added.

20 CHAIRMAN BABCOCK: For the purpose of a vote
21 it's probably clear enough in terms of concept. We will
22 work on the language.

23 MR. YELENOSKY: Okay.

24 PROFESSOR DORSANEO: What this would do, it
25 would discourage defendants from making an offer that ends

1 up only producing upside benefit to them because they could
2 contemplate that if they did that the plaintiff could make
3 an offer at the cap or close to the cap and if the verdict
4 came back at 200,000, let's say, there would be fee
5 shifting.

6 CHAIRMAN BABCOCK: Stephen, then Lamont.

7 MR. YELENOSKY: Did you discuss or do we need
8 to discuss whether "the award would be but for" is
9 something that we can do consistent with the statutory
10 language?

11 PROFESSOR DORSANEO: Well, this would
12 encourage settlement at or near the cap. It would
13 discourage what some people perceive as unfairness. If the
14 statute is meant to encourage settlement at -- and if the
15 caps were meant to be legitimate numbers, I think that the
16 statutory purposes are served, and the language at the end
17 is probably broad enough to allow us to do this.

18 CHAIRMAN BABCOCK: Lamont.

19 MR. JEFFERSON: Two things. First, that
20 sounds just off the cuff like a little too much statutory
21 tinkering for me. You've got to jump through some hoops to
22 be able to do that under the wording of the statute.

23 Second thing is, the way the statute is
24 written now in response to an offer by a defendant, a
25 plaintiff can always trigger the provisions of the statute

1 as long as the response is -- I'm no mathematician, but I
2 think 83 percent of the cap, because then 120 percent of
3 that offer will always be at or just below the cap. So a
4 plaintiff now, even with the caps, as long as there is a
5 demand on the table, it doesn't matter what the number is,
6 but as long as there is an offer on the table from the
7 defendants so that the statutory provisions are triggered
8 can get the fee shifting benefit of the statute by
9 demanding 83 percent or less of the cap.

10 MR. EDWARDS: Which in effect cuts the cap by
11 17.

12 MR. JEFFERSON: It doesn't cut the cap. It
13 cuts the number to which you could trigger the fee
14 shifting.

15 MR. EDWARDS: The pragmatics of it is that
16 the cap gets cut. You've got an absolute cap case. The
17 only way you can trigger the fee shifting is by giving up
18 17 percent of the recovery and then the defendant takes it
19 in his -- in effect, cap.

20 MR. JEFFERSON: But if the defendant doesn't
21 take the deal then you get --

22 MR. YELENOSKY: But what if he does.

23 MR. JEFFERSON: Well, if he does then you've
24 settled the case early for 83 percent of its full value,
25 which isn't a bad deal.

1 MR. LOPEZ: That's not --

2 MR. EDWARDS: If somebody --

3 MR. JEFFERSON: Well, of its capped value.

4 MR. LOPEZ: Okay.

5 MR. JEFFERSON: The most you can get under
6 the law. You settled it for 83 percent of the most you can
7 get under the law. We're not writing the law here.

8 MR. EDWARDS: With somebody's foot on the
9 neck.

10 MR. JEFFERSON: Well, but the foot on the
11 neck is the cap statute to begin with.

12 PROFESSOR DORSANEO: Well, what's the cap
13 statute for? It's not just to step on people. It's to
14 encourage people to dispose of these cases in a reasonable
15 manner.

16 CHAIRMAN BABCOCK: Skip.

17 MR. WATSON: I understand Amarillo is a long
18 way from Austin, and I don't have any idea why the
19 Legislature did what they did, but --

20 CHAIRMAN BABCOCK: Starts with "A," though.

21 MR. WATSON: -- it seems to me that the
22 Legislature made it apply to both plaintiffs and defendants
23 for a reason, and I'm guessing that reason -- given
24 whatever proclivities it may have had, I'm guessing that
25 reason would be the equal access to courts provisions of

1 the Constitution, to try to at least appear to be
2 even-handed and not be favoring one side or the other, and
3 I think that the conceptual decision that we have to make
4 first and that Bill is offering is do we want to try to
5 truly make it equal, to make it even-handed, to make it cut
6 both ways. Sauce for the goose, sauce for the gander. I
7 don't know, but it looks like that decision has to be made.
8 Then we can move on.

9 CHAIRMAN BABCOCK: Carl.

10 MR. HAMILTON: I don't think that we have the
11 authority to change the procedure of looking to the verdict
12 to figure out the consequences rather than the judgment.
13 That's not dealing with other actions, and it's not writing
14 rules to implement the current statute. I think it's
15 changing the concept when we go to looking at verdicts as
16 opposed to judgments.

17 CHAIRMAN BABCOCK: Okay. Judge Brister.

18 HONORABLE SCOTT BRISTER: Well, and it also
19 means that on cases where there's a settlement offer within
20 the area that the Legislature has designated to be a
21 reasonable area for the settlement offer to happen, we will
22 give an incentive to recover -- to keep the case going so
23 you can get your attorney's fees, which you can't do in
24 medical malpractice cases, for instance, already. So I
25 think it busts the caps. I think it's -- encourages people

1 to reject what the Legislature has said, rightly or
2 wrongly, is a reasonable settlement offer so they can get
3 an added bonus, and I think that's the opposite of what the
4 intent of this was.

5 CHAIRMAN BABCOCK: Anybody else?

6 MR. EDWARDS: Anybody who tries a plaintiff's
7 med mal case with the hope of getting some small amount of
8 attorney's fees back, if that's the only reason he's trying
9 that case, I mean, first of all, he needs a psychiatrist;
10 and, secondly, I'll show you a pocket of poverty.

11 CHAIRMAN BABCOCK: Anybody else? Okay.

12 Let's see what everybody thinks about this language.

13 Everybody that's in favor of this, the concept of this
14 language. We can tinker with it if it passes. Everybody
15 that's in favor raise your hand.

16 Everybody against? We have to vote again
17 because it appeared to me to be a tie.

18 Everybody in favor of the concept of this
19 language --

20 HONORABLE TOM GRAY: Could I ask you to read
21 the language just one more time?

22 CHAIRMAN BABCOCK: Sure. "If the rejecting
23 party is a defendant and the award would have been more
24 than 120 percent of the rejected offer but for the award is
25 capped by other law, the plaintiff shall recover litigation

1 costs from the defendant." Everybody in favor of that --

2 HONORABLE TOM GRAY: Can I ask for a
3 clarification before we vote?

4 CHAIRMAN BABCOCK: Sure.

5 HONORABLE TOM GRAY: We're not talking about
6 then what we were talking about before lunch of exempting
7 actions from the statute. We are talking about a manner of
8 applying a fee shifting mechanism beyond what is in the
9 statute?

10 CHAIRMAN BABCOCK: That's what it reads like
11 to me, but, Bill, you're the draftsman.

12 PROFESSOR DORSANEO: Well, yeah, I think you
13 could characterize it a number of different ways, but we're
14 not taking a case out of the statute. We're having the
15 statute work in a particular type of case in light of the
16 added factor that there's a cap.

17 HONORABLE TOM GRAY: Okay.

18 MR. HAMILTON: But the word "award" in what
19 you read means verdict, right?

20 PROFESSOR DORSANEO: No.

21 MR. YELENOSKY: No.

22 PROFESSOR DORSANEO: No. It means judgment.
23 Award the judgment.

24 MR. WATSON: Change "award" to "judgment."

25 MR. EDWARDS: We're not talking about that.

1 We're talking about the concept, as I understand it, and
2 one of the things that the Supreme Court is given express
3 permission to do is promulgate rules that address other
4 matters considered necessary to the Court to the
5 implementation of this chapter; and that is, you know,
6 whatever is -- to me it means if you perceive what the
7 purpose of it is to make it fair.

8 HONORABLE SCOTT BRISTER: And so but you
9 could get more than the cap. It would be a way around the
10 cap.

11 MR. EDWARDS: It's a penalty. It isn't a
12 recovery. You can always get more than the cap. If you
13 get discovery sanctions put on you as a defendant in a cap
14 case, those sanctions don't come off the cap.

15 HONORABLE SCOTT BRISTER: So it's a way to
16 get a penalty, which is attorney's fees, which aren't
17 recoverable in med mal cases and exceed the cap which the
18 Legislature established in that.

19 HONORABLE SARAH DUNCAN: Scott, the whole
20 statute is designed to award attorney's fees in cases in
21 which attorney's fees are not now recoverable, so that's
22 not a legitimate criticism.

23 HONORABLE SCOTT BRISTER: And we're doing
24 legislative intent. I cannot imagine that it was the
25 Legislature's intent to make -- to use this so you can get

1 more than the cap in med mal and get attorney's fees, but
2 if you want to try a special rule like that, we can try it.

3 CHAIRMAN BABCOCK: Judge Gaultney.

4 HONORABLE DAVID B. GAULTNEY: The way I hear
5 it being argued is we're not within -- we're not
6 designating an action it doesn't apply to. We're
7 implementing it. I don't see how we can implement it and
8 give something which we all conceive is not available right
9 now.

10 MR. EDWARDS: It is available right now under
11 this statute. What's not available? You can break a cap
12 under the statute in the way it's written. You sure can.

13 MR. JACKS: Sure you can.

14 MR. EDWARDS: I make an offer -- I make an
15 offer of -- leave myself 20 percent. I leave myself 20
16 percent. I get two reasonable experts that cost me \$50,000
17 apiece. They are determined to be reasonable and a hundred
18 thousand dollars in attorney's fees because of when the
19 offer was made. I've got \$200,000 in expenses plus 250,000
20 in recovery. That's 450,000, which busts the cap, and I
21 get it under this statute right now in med mal cases.

22 HONORABLE DAVID B. GAULTNEY: Excuse me. I'm
23 not arguing about busting the cap. I'm not trying to make
24 that argument. I'm trying to make the -- if we're going to
25 say that all we're doing is implementing the statute, as I

1 understand that's the argument --

2 MR. EDWARDS: I didn't make that argument. I
3 just pointed out that that's there.

4 HONORABLE DAVID B. GAULTNEY: Well, if we're
5 not making that argument then we must be making the
6 argument that we're designating an action that it does not
7 apply to. I don't see that either. I don't see how this
8 proposal fits within our authority, regardless of the caps.

9 MR. EDWARDS: I believe the Supreme Court has
10 the authority to put one of these things, that provision in
11 place in addition to this statute and not even under
12 this -- the direction that was given here. It doesn't say,
13 "Don't do these things." It doesn't say, "This is all you
14 can do," and I think it should be the purpose of what the
15 Supreme Court does and what we do is to try to make the law
16 as fair as we can.

17 CHAIRMAN BABCOCK: Bill.

18 PROFESSOR DORSANEO: I tried to say this
19 earlier. I don't know what this "implementation of this
20 chapter" language is meant to mean. I do know that it's
21 not really my responsibility to decide that, and the normal
22 thing that happens in this committee from time to time is
23 that we advise the Court to do something if they think it's
24 appropriate, and that's what I think we're for. I don't
25 think we perform our jobs when we say we're not going to

1 give our opinion on what the right thing to do is because
2 there's some impediment under the law that precludes us
3 from making that advice available. I don't know what --
4 you may well be right. It may be beyond what the
5 Legislature contemplated, but --

6 HONORABLE DAVID B. GAULTNEY: I guess that's
7 what my struggle is with it. It seems from what I'm
8 hearing that we all -- or it seems to be a generally
9 accepted thought that there is a point at which the
10 plaintiff's access under this statute is not the same as
11 the defendant's access. That's the way I hear it being
12 articulated as a result of the statute, and so then I look
13 at the statute and I say, "Okay, what can we do about that
14 if we perceive that statute is unfair?"

15 It seems to me that the statute provides
16 there are two mechanisms to work with. One is to except a
17 cause of action, one is to implement the statute, and the
18 problem I have with the implementation provision is I don't
19 see how we can say we're implementing a statute by giving
20 something that we all concede is not available on the face
21 of the statute, and that's what I'm struggling with.

22 CHAIRMAN BABCOCK: Carlos, then Steve.

23 MR. LOPEZ: Okay -- I'm not sure we all
24 concede that, first of all. I read -- I agree with the
25 judge that (d)(1) clearly doesn't apply, because we're

1 doing the exact opposite probably, but I think (d)(2) -- I
2 personally think (d)(2) is broad enough, but I certainly
3 think it's broad enough that the Supreme Court can decide
4 for themselves whether it's broad enough.

5 "Address other matters considered necessary
6 by the Court for implementation," certainly that's an
7 awfully broad delegation, broad enough so that I feel
8 comfortable recommending to the Supreme Court that this is
9 something that everybody -- and here I go again, everybody
10 seems to concede is a reasonable application. If the
11 Supreme Court wants to take our advice, they can, and if
12 they want to not, they won't.

13 CHAIRMAN BABCOCK: Stephen.

14 MR. YELENOSKY: Well, I just have a
15 suggestion. Maybe if we split this into two questions
16 people would be comfortable voting on this, because if you
17 think that it's not consistent with the statute you can
18 take a vote on that or we can just say that it may or may
19 not be, but offer to the Supreme Court if the Supreme Court
20 thinks that this provision is consistent with the statute,
21 here's what we propose and we think would be a fair
22 resolution of this matter.

23 CHAIRMAN BABCOCK: That's not a bad idea.
24 Buddy.

25 MR. LOW: You know, what I hear the arguments

1 against is they're talking about implementing and putting
2 in other categories. Those are against doing anything.
3 More or less what I hear them saying is we can't touch it.
4 It says for us to do something, implement it, but
5 everything you come up with indicates that our group here
6 feels that we have no power to touch it, change a word, do
7 anything. If that's true then....

8 CHAIRMAN BABCOCK: Sarah, then Richard, then
9 David Peeples.

10 HONORABLE SARAH DUNCAN: When I think about,
11 David, the term "implementing" I think about what do we do
12 in interpreting statutes; and, of course, we know that one
13 of the first rules we have to follow is that we try to not
14 create conflicts between this act and that act, but to
15 harmonize them. What we've got here in cases where we're
16 at the cap, whatever cap it is that we're talking about,
17 we've got a possible conflict between that cap statute and
18 this offer of settlement statute, and so what our job would
19 be in a case -- let's say we don't pass this and it's just
20 we have to write an opinion, we have to decide. What do we
21 do?

22 I think we look at what the Legislature's
23 intent was in the cap statute, let's say the med mal
24 statute, and what was the Legislature's intent in the offer
25 of settlement statute; and I don't see how this is remotely

1 inconsistent with the intent of this statute or the intent
2 of the cap statute, given that you can, as Bill said, bust
3 the cap six ways from Sunday with this rule. But imagine
4 that this is simply the case that's up for decision and you
5 have to decide it, and I think when you -- to me, when I
6 look at it in that context, I've got to figure out how to
7 promote the intent of this statute and still preserve the
8 intent of whatever cap statute it is we're talking about.
9 To me, and I may be in the minority here, but to me when I
10 do that, this has to be in some fashion or another a part
11 of this rule.

12 CHAIRMAN BABCOCK: Richard.

13 MR. EDWARDS: What has to be?

14 CHAIRMAN BABCOCK: Bill, you're winning.

15 MR. EDWARDS: I know, but --

16 HONORABLE SARAH DUNCAN: Some way of
17 implementing the cap statute and implementing the offer of
18 settlement statute in a way that enables both parties to
19 take advantage of the statute.

20 MR. EDWARDS: I knew I was winning, but I
21 wanted to make sure everybody else knew.

22 CHAIRMAN BABCOCK: Richard.

23 MR. MUNZINGER: What are the maximum
24 litigation costs that can be awarded against a defendant?
25 And I ask that question. I'm looking at the statute here.

1 It's "50 percent of the economic damages to be awarded to
2 the claimant in the judgment, 100 percent" -- the sum of
3 these three. 100 percent of the noneconomic damages to be
4 awarded to the claimant in the judgment and 100 percent of
5 the exemplary additional damages. It seems to me that that
6 sum could be quite substantial, even in a capped case. So
7 Mr. Edward's comment that anybody who would try a case for
8 these fees is a dumbbell, I'm not so sure that's the case,
9 if I have understood the statute correctly, and I don't
10 mean to attack his motives, but if you apply the statute,
11 the recoverable litigation costs are what I just said.

12 Now, I've read statistics in Bar journals and
13 other places where plaintiffs can spend an average of 150-
14 or \$200,000 in expert witness fees and other related costs
15 in their litigation. When you take these sums, you could
16 be adding a substantial risk to a defendant, which triggers
17 Justice Brister's comment that you may be adding a perverse
18 disincentive to settlement by adopting the language that's
19 being proposed, and I question that you want to do that.

20 I personally don't -- am not so sure that the
21 Court has the authority to do this, and I'm not so sure,
22 especially given the fact that we have been told the
23 Legislature had this problem presented to them and was
24 silent in the solution. I just question the idea that we
25 are not possibly creating a disincentive to settlement here

1 along the lines of Justice Brister's comments.

2 CHAIRMAN BABCOCK: Judge Peeples, and then
3 Bill.

4 HONORABLE DAVID PEEPLES: I think we are
5 making a mistake in believing that we can settle and
6 resolve this very difficult issue with an easy fix like
7 this, but we're trying. My question is this. Okay. If
8 I'm representing a defendant in a medical case and I'm
9 willing to offer to settle the capped elements of damages
10 for the cap and litigate the uncapped elements, can I do
11 that? Can I say, "I'll pay you the caps on what you've
12 sued me for. I want to litigate the other part." I can't
13 settle it like that, can I?

14 MR. EDWARDS: My guess is you can settle that
15 way.

16 HONORABLE DAVID PEEPLES: Can you?

17 MR. EDWARDS: There's nothing that would keep
18 you from it. You're settling an element of damage. It
19 just wouldn't be submitted to the jury.

20 HONORABLE DAVID PEEPLES: I'm trying to
21 figure how this works out. Suppose that the defense lawyer
22 has the case evaluated correctly on the noncapped elements
23 and, you know, the jury -- he's willing to pay more than
24 the jury ends up awarding on those, but he ends up because
25 Bill's language allows damages beyond the cap on capped

1 elements, I think under your language would mean they owe
2 the litigation costs. I mean, you know, I'm trying to
3 figure it out. We don't know because we have no experience
4 with this.

5 MR. EDWARDS: My guess is that anybody offers
6 me a cap or anyone else a cap on one element of damage,
7 that element is gone if it's in fact capped. It's gone.
8 We settle -- you know, it's not unusual to settle property
9 damage on one hand and personal injury on the other.

10 HONORABLE DAVID PEEPLES: See, we're thinking
11 in terms of the situation that Bill posited a couple of
12 hours ago about, you know, a wrongful death and a homemaker
13 and so forth, but I think this language would apply on a
14 case that has both capped and noncapped elements, but the
15 capped elements, if the verdict exceeds the cap, could mean
16 that an otherwise reasonable offer gets you sanctioned
17 because the caps were high.

18 MR. EDWARDS: Well, the first place, the
19 defendant's going to start the fight.

20 HONORABLE DAVID PEEPLES: True.

21 MR. EDWARDS: The plaintiff can't start the
22 fight.

23 HONORABLE DAVID PEEPLES: That's true.

24 MR. EDWARDS: And if the defendant starts the
25 fight then all of those things you're talking about are

1 there anyway. It's just a question of that -- of playing
2 games with a little stretch on most cases, little bit of
3 damage on most cases.

4 HONORABLE DAVID PEEPLES: But, Bill, your
5 language would apply to everything, not just an all capped
6 case where they say, "I'm not offering you the whole cap
7 because the worst I can be hit is for the cap."

8 MR. EDWARDS: Right. But, of course, it
9 applies in an uncapped case that way.

10 CHAIRMAN BABCOCK: Judge Bland.

11 HONORABLE JANE BLAND: It looks like in
12 167.3, Professor Carlson has already contemplated the
13 problem of piecemeal settlement and saying that we must
14 offer -- proposing to add "and must offer to settle all
15 monetary claims raised by the pleadings." And as a
16 practical matter, the idea of a particular -- two
17 particular parties piecemeal settling certain claims and
18 then going forward on others and then taking advantage of
19 this statute to either, you know, fund the continuation of
20 their litigation, you know, some way -- it seems very
21 unworkable to have the piecemeal settlement between two
22 parties.

23 I'm not talking about multiparties but
24 between two parties and have this statute come into play,
25 if not all monetary claims are included because then you've

1 got the added burden of figuring out, you know, what fees
2 go with what claims and what jury verdict applies, you
3 know, to what claims, and it just sounds very impractical
4 from a practical -- to implement.

5 MR. EDWARDS: Not really, because it can only
6 be fees after the settlement. If it were submitted by
7 elements and some were accepted and some were rejected,
8 what you'd have left would be the offers on the elements
9 that are left and settlement of what's gone.

10 HONORABLE JANE BLAND: Well, you have a
11 contract claim and a DTPA claim and you offer to settle
12 the, you know, DTPA claim because it's -- I don't know why,
13 and you don't offer to settle the contract claim, and then
14 there's work done after that, and it goes to trial, and you
15 know, that work would have been the same probably for both
16 claims. And you might be saying, "Oh, that will never
17 happen." That happens all the time. We have people all
18 the time are, you know, trying to either argue that the
19 fees ought to be segregated or ought not to be segregated.

20 And even if -- if you're talking about even
21 in a med mal case, you know, then you get to trial and you
22 argue that everything ought to be hard damages and not so
23 much noneconomic damages or you settle the noneconomic
24 damages part of it and then you argue hard damages. It
25 doesn't promote the resolution of the case at all.

1 MR. EDWARDS: Well, if you settle part of it,
2 whatever is left is what you're talking about. Maybe it's
3 a problem, but that problem exists.

4 HONORABLE JANE BLAND: Right, but there's no
5 cost savings to the system.

6 MR. EDWARDS: That problem exists regardless
7 of what we do on what we're talking about now.

8 HONORABLE JANE BLAND: Yes, and you're
9 certainly entitled to do that, but fee shifting as a result
10 of that doesn't seem to meet the goals of the statute,
11 which is, you know, to end litigation.

12 MR. EDWARDS: That same problem is here
13 regardless of what we do with this little bit that we're
14 talking about now.

15 HONORABLE JANE BLAND: Right, and I was just
16 addressing Judge Peeples' concern about this part of it.

17 CHAIRMAN BABCOCK: Okay. With this
18 additional discussion let's try to do this again.
19 Everybody that is in favor of the Dorsaneo and Edwards
20 language or the concept of the language raise your hand.

21 PROFESSOR DORSANEO: Can I vote for Orsinger?

22 CHAIRMAN BABCOCK: No. All those against,
23 raise your hand.

24 It passes by a count of 17 to either 13 or
25 14, the Chair not voting. So we got this, and it seems to

1 me that the language probably needs a little tweaking.

2 Maybe you and -- the Bills can do it.

3 PROFESSOR DORSANEO: I can do it, but I can
4 do it when I get home, if that's all right.

5 CHAIRMAN BABCOCK: Yeah. I don't mean right
6 now. We'll go onto the next thing.

7 PROFESSOR CARLSON: All right. As we
8 discussed earlier, the way the statute is structured is
9 that before any fee shifting potential can arise through an
10 offer of settlement the defendant must make a declaration
11 that the settlement procedures allowed by the chapter and
12 this rule are available, and I'm reading on -- sorry,
13 167.2(c).

14 MR. GILSTRAP: Elaine, are we off the
15 categories now? Are we past that?

16 CHAIRMAN BABCOCK: We're off categories.

17 MR. GILSTRAP: Before we do that, I mean,
18 we've got 40 people here, and maybe everybody needs to rack
19 his or her brain about what we need to exclude, and one
20 thing that pops into my mind is maybe we need to think
21 about arbitration. I'm not sure how it plays out, but I
22 just don't think we ought to back into it. If the court
23 orders a claim to arbitration, is that out of the fee
24 shifting regime, or can one of the parties come back in and
25 say, "I made an offer during arbitration." I just don't

1 know how it plays out, but I think we need to think about
2 it.

3 CHAIRMAN BABCOCK: Bob.

4 MR. PEMBERTON: I would suggest you could
5 address that type of issue just on the timetable of when
6 offers can be made as opposed to excluding that entire
7 category of cases.

8 CHAIRMAN BABCOCK: Yeah. We've exhausted the
9 time we have to spend on exclusions right now, but that
10 doesn't mean that it's not an important issue, and anybody
11 that's got another category that you think ought to be
12 excluded, let me or Elaine know and we'll --

13 MR. GILSTRAP: Fair enough.

14 CHAIRMAN BABCOCK: -- try to talk about that
15 when we come back.

16 PROFESSOR CARLSON: And, Frank, that may be
17 covered by the last page, 167.15, which language I know was
18 in our last proposal, and I'm not sure how many proposals
19 passed.

20 MR. GILSTRAP: 167.16?

21 PROFESSOR CARLSON: 167.15, page nine of the
22 rule. I don't know if that's broad enough.

23 CHAIRMAN BABCOCK: It may cover it or we may
24 have to add a word when we get there.

25 MR. GILSTRAP: It actually doesn't include

1 arbitration, but it easily could.

2 CHAIRMAN BABCOCK: That's what I'm saying.

3 We could add a word. Let's go back to where you are.

4 PROFESSOR CARLSON: Okay. And so one of the
5 things that the rule directs the Court to do -- the statute
6 directs the Court to do is to set forth a time frame by
7 which the defendant needs to make the declaration in the
8 case. Previously we had determined at our April meeting
9 under 167.4 that the offer could not be earlier than 30
10 days after the appearance in the case or the offeror or
11 offeree in a case governed by Level 1 discovery and 90 days
12 for a Level 2 or Level 3 discovery.

13 So if we are still comfortable with those
14 time frames, a party can make an offer as early as those
15 dates, what would be the appropriate date to require a
16 defendant to make the declaration that they're in or out in
17 applying fee shifting potentially in the case?

18 CHAIRMAN BABCOCK: Now, remember we've had
19 exhaustive discussions about this.

20 PROFESSOR CARLSON: All right. Then how
21 about the appearance date?

22 CHAIRMAN BABCOCK: But if anybody has got
23 anything more, we ought to talk about it.

24 PROFESSOR CARLSON: We haven't decided or
25 discussed, excuse me --

1 MR. SOULES: That.

2 PROFESSOR CARLSON: -- when the defendant has
3 to make the declaration, the new thing, that fee shifting
4 is on the table.

5 CHAIRMAN BABCOCK: Oh, I know.

6 MR. SOULES: Same times.

7 PROFESSOR CARLSON: Same time as when you
8 make the offer?

9 MR. SOULES: Right. Gives everybody enough
10 time to think about it. I don't know whether 30 days is
11 enough time.

12 CHAIRMAN BABCOCK: 30 days in Level 1, Luke?

13 PROFESSOR CARLSON: Yeah.

14 MR. MUNZINGER: 30 days following the answer.
15 Is that right?

16 PROFESSOR CARLSON: Which is ordinarily the
17 appearance date.

18 MR. SOULES: Plaintiff appears whenever he
19 files his suit, doesn't he?

20 PROFESSOR CARLSON: But it's the later.
21 Latter, later.

22 CHAIRMAN BABCOCK: Latter.

23 PROFESSOR CARLSON: I like the way you say
24 "latter."

25 MR. HAMILTON: These time limitations only

1 tell you that you cannot make it sooner --

2 PROFESSOR CARLSON: Correct.

3 MR. HAMILTON: -- than certain times, but you
4 have an open end on the other side, right?

5 PROFESSOR CARLSON: Correct. Up until 30
6 days before the case is set for trial on a conventional
7 trial on the merits, is the end of the window to make the
8 offer. So then the question becomes where do we require
9 the declaration to be made? Luke suggested when the offer
10 is made. When the time to make the offer could be made, I
11 guess. Is that correct, Luke?

12 MR. SOULES: Right.

13 MR. GILSTRAP: So the defendant can just
14 decide any time during the litigation that he wants to --

15 MR. DAWSON: No. The way I read it is if you
16 don't make the declaration by whatever deadline date then
17 you can't take advantage of this rule at all.

18 MR. GILSTRAP: What's the deadline then?

19 HONORABLE HARVEY BROWN: No sooner than.
20 It's not a deadline.

21 PROFESSOR CARLSON: But what Carl is saying
22 is our window is pretty wide for when you can make an
23 offer.

24 MR. DAWSON: You wouldn't put the deadline
25 for declaration at the 30 days or 90 days, depending on

1 what level you were at, would you?

2 CHAIRMAN BABCOCK: That's the issue.

3 MR. DAWSON: You're saying any time during
4 the window you can make the declaration?

5 PROFESSOR CARLSON: That's the decision to be
6 made.

7 MR. SCHENKKAN: I certainly hope that the
8 work on the timing for the declaration doesn't make the
9 declaration any earlier than the dates we worked out after
10 such lengthy discussion --

11 MR. SOULES: Right.

12 MR. SCHENKKAN: -- because the reality is the
13 defendant does also need some time, and they will need some
14 discovery or at least benefit by some discovery to
15 tailor-make an offer that addresses the plaintiff's
16 prove-up of damages, and thus, I would not go with what's
17 in the draft about declaration and appearance.

18 I take the point about there might be some
19 other date other than that first day at which we thought it
20 could be an offer, and maybe there needs to be some limit
21 other than that short 30 days from trial, but I hope we
22 won't vote that they should make the declaration earlier
23 than the dates we worked out last time. And it's not
24 unfair to the plaintiff because, remember the way it works,
25 is the only costs that are shifted, if any costs are

1 shifted at all, are the costs that are incurred after the
2 offer is made and rejected.

3 So if we're still saying the defendant can't
4 make an offer until 90 days after the last appearance in
5 the Level 2 and Level 3 cases and that it has to stay open
6 at least 14 days, it's not rejected 14 days thereafter.
7 It's only the costs that are incurred after a hundred and
8 whatever that is, four days, are at risk.

9 PROFESSOR CARLSON: So would you be
10 comfortable with the declaration has to be filed no later
11 than the time at which an offer may first be made under
12 that section?

13 MR. SCHENKKAN: I'm really interested in
14 hearing from some people who do a lot more of these cases.
15 The only thing I'm sure of so far is I wouldn't be
16 comfortable in the offer being made earlier.

17 MR. DAWSON: Elaine, what I hear you saying
18 is the declaration must be filed at the time the initial
19 offer can be made. 30 days in a Level 1 case or 90 days in
20 a Level 2 case. Am I right?

21 PROFESSOR CARLSON: Well, there's two ways it
22 could be done under Luke's proposal. One could be when the
23 window opened to make an offer, that's when you need to
24 make a declaration; or we could have that be a floating
25 period and say "by the time an offer could be made within

1 the window."

2 MR. DAWSON: I would advocate that the
3 declaration must be made before the window closes, and that
4 way it allows a combination for different types of cases.
5 I mean, some smaller cases you could probably evaluate in
6 30 or 90 days, and it's probably appropriate there, but
7 larger cases you need more time to evaluate to make a
8 settlement offer. So I think you get more flexibility by
9 having the declaration be tied to the closing of the window
10 as opposed to the opening of the window.

11 CHAIRMAN BABCOCK: Judge Christopher.

12 HONORABLE TRACY CHRISTOPHER: You can't make
13 an offer under this rule unless the declaration is made, so
14 you can't have a floating date, because otherwise what's
15 the point of the 90-day and the 30-day window? You need to
16 have a definite deadline to make the declaration, and it
17 seems like it could be any time from answer date up until
18 the first offer could be made.

19 CHAIRMAN BABCOCK: Is the problem that --
20 let's say that we say that you've got to make a declaration
21 60 days after appearance. You've got to make your
22 declaration. You don't have to make your offer then.

23 HONORABLE TRACY CHRISTOPHER: You don't have
24 to make your offer then. Right.

25 CHAIRMAN BABCOCK: But if you declare, that

1 opens the gate for the plaintiff.

2 HONORABLE TRACY CHRISTOPHER: Right.

3 CHAIRMAN BABCOCK: So they now are in play,
4 too, under the rule.

5 HONORABLE TRACY CHRISTOPHER: I mean, that's
6 what we contemplated the first time we did the rule, that
7 either side could start making the offer after 30 days and
8 the 90 days.

9 CHAIRMAN BABCOCK: Right.

10 PROFESSOR CARLSON: Could I say a couple of
11 things about that? One argument in favor of tying it to
12 the appearance date plus so many days is it kind of gives a
13 heads-up because both sides may want to conduct some
14 expedited discovery in trying to figure out the value of
15 the offer. We voted last time under Rule 167.6 that the
16 trial court could modify any of the time limits described
17 by the rule for good cause shown, and I don't know if that
18 gives you much comfort, but --

19 CHAIRMAN BABCOCK: Yeah. Bill, then Carl.
20 Then Sarah.

21 PROFESSOR DORSANEO: This procedure
22 contemplates that people might not want to be making
23 settlement offers under the rigors of doing the wrong thing
24 under the statute. I wonder what effect that has. I mean,
25 I don't want people having to invoke this beforehand and

1 then making something in terms of settlement actually less
2 feasible. I'm not sure that it would ever work out like
3 that, but --

4 PROFESSOR CARLSON: Bill, I'm not sure I
5 understand your question.

6 PROFESSOR DORSANEO: Well, once this thing is
7 invoked it's kind of out there. I suppose -- could you
8 uninvoke it by saying that we're going to settle this
9 without regard to anything? If there's a settlement, I
10 don't guess it would matter.

11 PROFESSOR CARLSON: Let's say the defendant
12 makes the declaration and then the defendant wants to make
13 an offer not under the rule. You may do so.

14 PROFESSOR DORSANEO: Okay.

15 PROFESSOR CARLSON: Now, if you're a
16 defendant and you make a declaration, you don't have the
17 power then to preclude the plaintiff from making an offer
18 under the rule. Following me?

19 PROFESSOR DORSANEO: No. Say that to me
20 again.

21 PROFESSOR CARLSON: Okay. If you're a
22 defendant and you file the declaration that fee shifting is
23 in play, you as a defendant can make an offer under the fee
24 shifting rule or outside of the fee shifting rule, but you
25 as a defendant who has put it on the table cannot keep the

1 plaintiff from then making a potential fee shifting offer.
2 Plaintiff can do either once the declaration has been made,
3 according to this HB 4.

4 CHAIRMAN BABCOCK: Yeah, Carl.

5 MR. HAMILTON: It seems to me as a practical
6 matter the defendant is not going to invoke declaration
7 until the defendant gets ready to make an offer. I think
8 we ought to tie that to the time the defendant makes the
9 offer.

10 HONORABLE SARAH DUNCAN: That's sort of along
11 the lines of what I was going to say. We spent a long time
12 talking about when should the window for making offers
13 close. We didn't contemplate this declaration thing, but
14 now that it's here, why wouldn't you make the last day for
15 filing a declaration the last day for filing an offer?

16 CHAIRMAN BABCOCK: The only reason you
17 wouldn't is if you're trying to sort of as a policy matter
18 balance the scales a little bit and force the defendant
19 early on to make a declaration, thereby triggering the
20 plaintiff's right to do so, too.

21 MR. LOW: And then as Carl says, what he says
22 is practically what the defendant will do. They are not
23 going to just invoke it and not be ready to make an offer.
24 They are going to have made an evaluation. The question is
25 then whether there should be a time period that they have

1 to give some notice to the plaintiff so the plaintiff can
2 kind of do his work to know and not just do it at the same
3 time. Is he entitled to have it invoked before the offer
4 is made? I mean, you can make offers without invoking it
5 all along, but as a practical matter defendant won't do it
6 until they're ready to make the offer.

7 CHAIRMAN BABCOCK: Unless the rule makes them
8 do it.

9 MR. LOW: And then should the plaintiff be
10 given -- should there be some leeway between there so the
11 plaintiff has some equal time rather than kind of slipping
12 up on his blind side that he doesn't know what's going to
13 happen.

14 CHAIRMAN BABCOCK: Judge Christopher, did you
15 have a comment?

16 HONORABLE TRACY CHRISTOPHER: No, just the
17 same thing. I mean, if we thought that 30 days and 90 days
18 was sufficient before, I don't see why we shouldn't make
19 them do a declaration at that point.

20 HONORABLE SARAH DUNCAN: Because we don't
21 make them make an offer.

22 HONORABLE TRACY CHRISTOPHER: Right. It's
23 just a declaration.

24 HONORABLE SARAH DUNCAN: We just say that's
25 the first time you can make an offer. We don't say you

1 have to decide whether you're going to make an offer by the
2 date the window opens.

3 HONORABLE TRACY CHRISTOPHER: Neither does
4 the declaration. The declaration just puts the rule into
5 play. The rule was always into play under our previous
6 draft before there was such a thing as a declaration.

7 CHAIRMAN BABCOCK: Yeah, but if you let it
8 float, if you let the deadline float, that's an advantage
9 to the defendant.

10 HONORABLE TRACY CHRISTOPHER: Yes.

11 CHAIRMAN BABCOCK: Because they can control
12 their own destiny by waiting right up until the last minute
13 and then declaring and offering; and in fact, they maybe --
14 if they wait long enough they could preclude a plaintiff
15 from even making an offer because it would be within 30
16 days of trial. If you make the declaration right at the
17 beginning, that's an advantage to the plaintiff because now
18 the plaintiff has the same right as the defendant all
19 during this time period, so it makes a difference to the
20 parties where you set that date, right?

21 MR. SCHENKKAN: It doesn't make quite as
22 dramatic a difference as what you just described, at least
23 under -- if you were using our cutoff approach that we
24 talked about in April, even the defendant who waited 'til
25 the last minute 30 days from trial, the way we had it

1 drafted last time was "or if in response to prior offer,
2 within three days of prior offer."

3 So under your scenario, if the defendant had
4 waited until the last minute 30 days from trial, plaintiff
5 would have three days to make his own counteroffer. That's
6 still not to detract at all from the principal point, which
7 is that we're really talking about the effect of how far
8 past the 30- or 90-day start time, and I think we're all in
9 agreement it shouldn't be any earlier than that, and the 30
10 days before trial end time, and I think we're all in
11 agreement the defendant shouldn't be able to wait longer
12 than that, where in that sliding scale if anywhere it ought
13 to be set.

14 CHAIRMAN BABCOCK: Bill.

15 PROFESSOR DORSANEO: Is it possible that a
16 plaintiff could make an offer under this rule before the
17 defendant files the declaration and then when the defendant
18 files a declaration --

19 CHAIRMAN BABCOCK: Say, "See, I knew you were
20 going to do that."

21 PROFESSOR DORSANEO: That it would work. I
22 haven't read every word of it, but it seems prima facie
23 that that would work.

24 PROFESSOR CARLSON: "This rule does not apply
25 until defendant files a declaration that the settlement

1 procedure allowed by this rule or chapter is available."

2 PROFESSOR DORSANEO: So when they do it's
3 available.

4 MR. SOULES: Is this a rolling trial date?
5 In other words, every time a trial date gets rescinded the
6 time for filing the declaration or the offer rolls forward
7 with it?

8 MR. DAWSON: Yes.

9 PROFESSOR CARLSON: It would be if we tied it
10 to --

11 MR. SOULES: That was our intention in the
12 beginning?

13 MR. SCHENKKAN: Yeah. At your suggestion we
14 set "trial date" to mean when the trial actually commences
15 as opposed to what you do following it.

16 MR. SOULES: It should say "when trial
17 commences."

18 PROFESSOR CARLSON: We footnoted that.

19 MR. SOULES: Well, except that that's not
20 what the rule says.

21 MR. SCHENKKAN: I think we meant to adopt
22 your suggestion.

23 MR. SOULES: It's just that that on page
24 five, "No less than 30 days before the date the trial
25 commences" instead of "the date set for trial" the effect

1 of the rule needs to be changed to conform with the
2 footnote.

3 PROFESSOR CARLSON: Okay.

4 MR. DAWSON: Chip?

5 CHAIRMAN BABCOCK: Yeah.

6 MR. DAWSON: What if you did 90 days before
7 trial or 90 days before the discovery control -- discovery
8 cutoff, one or the other?

9 CHAIRMAN BABCOCK: That's the closing bell or
10 the opening bell?

11 MR. DAWSON: That's the date the declaration
12 must be filed.

13 MR. SCHENKKAN: Closing bell for declaration.

14 MR. DAWSON: Right.

15 PROFESSOR CARLSON: Would you repeat that?

16 MR. DAWSON: It seems to split kind of the
17 middle of the strategic advantage.

18 PROFESSOR CARLSON: Would you repeat that?
19 I'm sorry. I didn't hear you.

20 MR. DAWSON: Either 90 days before trial or
21 90 days before the discovery cutoff, and I'm not saying you
22 put it in the rule one way or the other. We decide which
23 one we want. I don't think you do both.

24 PROFESSOR CARLSON: Right.

25 CHAIRMAN BABCOCK: How does everybody feel

1 about that? Carl.

2 MR. HAMILTON: Well, it still doesn't solve
3 the problem that we still have to give the plaintiff
4 additional time. You need something like the declaration,
5 the last day for filing the declaration would be like 60
6 days or 90 days before trial and then there's a 30-day
7 period after that in which offers can be exchanged by both
8 sides, and then all the offers cut off say 60 days before
9 trial.

10 CHAIRMAN BABCOCK: Judge Christopher.

11 HONORABLE TRACY CHRISTOPHER: The idea of
12 this is not settlement the last 30 days before trial when
13 all the cases settle. If you push the declaration out
14 early, the 30 days after answer date or 90 days after
15 answer date, then it forces people to look at the case at
16 that point and decide to make offers of settlement. I
17 think the earlier the better on this declaration, and it
18 shouldn't float, and it shouldn't be late.

19 MR. HAMILTON: But it doesn't force anything,
20 because the defendant doesn't have to do it.

21 HONORABLE TRACY CHRISTOPHER: Well, they
22 don't, but then everybody knows that it's not in play.

23 MR. HAMILTON: But you can put a deadline,
24 and if defendant misses it then there's no offers.

25 HONORABLE TRACY CHRISTOPHER: Okay.

1 CHAIRMAN BABCOCK: But the defendant is going
2 to have an incentive to do it because at some point you're
3 going to look at the case and you're going to say, "I can
4 do this and I can make an offer and I can cause this thing
5 -- I can increase my chance of getting it to settle at this
6 level because now I have got a little bit of a hammer of
7 attorney's fees if it doesn't settle at this level."

8 MR. LOW: Wouldn't it have to be offers made
9 during that time, because if the plaintiff makes an offer
10 earlier, that's not made during the time --

11 CHAIRMAN BABCOCK: Right.

12 MR. LOW: -- and they're not going to go back
13 and be retroactive, and he says, "Well, I made that offer
14 back there," and, you know, it should be offers during the
15 period of time and not some that are made back.

16 CHAIRMAN BABCOCK: Right. Elaine.

17 PROFESSOR CARLSON: I've used all my equity.
18 I can tell by your face.

19 CHAIRMAN BABCOCK: No, no, no. I was just
20 trying to think about what Buddy was saying.

21 PROFESSOR CARLSON: The suggestion that the
22 deadline might be 90 days after appearance day or 90 days
23 before the discovery cutoff or 90 days before trial, one of
24 the issues we haven't discussed and maybe we don't want to,
25 but is by invoking or filing the declaration with the

1 potential of recovering fees or attorney's fees and the
2 underlying reasonableness of the experts, is any of that
3 discoverable or is that something that's all worked out by
4 the trial at the end of the day based on what's presented
5 at that hearing?

6 MR. EDWARDS: There won't be any issue about
7 attorney's fees and underlying things until after the
8 judgment is rendered, so you're going to have to have a
9 separate hearing on attorney's fees after because it's
10 tied to the judgment on the award that exceeds or fails to
11 reach within 20 percent of the offer.

12 PROFESSOR CARLSON: So that's something
13 that's just simply taken up by proof at that hearing.

14 MR. EDWARDS: I would assume. There's
15 nothing you can ask about at the trial because if you're
16 asking both sides, one of them or both of them are going to
17 be immaterial.

18 PROFESSOR CARLSON: That's true.

19 MR. DAWSON: Well, but, you know, in a
20 contract case one party can plead for attorney's fees and
21 that makes them discoverable. You don't know that you're
22 going to succeed on the contract, but you're entitled to
23 the other side's fee bills, you know, probably redacted,
24 but you're still entitled to them in discovery. I don't
25 see why this would be any different.

1 MR. HAMILTON: You're only entitled to those
2 after the date the offer is rejected, right?

3 MR. DAWSON: Correct.

4 PROFESSOR CARLSON: Right.

5 MR. EDWARDS: And this thing specifically
6 excludes -- if you get fees under another statute, which
7 you do in a contract case or under the contract itself, you
8 can't get them under this. You don't get a double dip.

9 CHAIRMAN BABCOCK: Judge Bland.

10 HONORABLE JANE BLAND: I agree with Tracy's
11 30 days and 90 days that pattern our opening window in the
12 rule, and I think we should vote on it.

13 CHAIRMAN BABCOCK: Judge Benton.

14 HONORABLE LEVI BENTON: And I think the issue
15 will be discoverable, but we ought to not talk about it.

16 PROFESSOR CARLSON: Okay.

17 HONORABLE LEVI BENTON: And just leave it to
18 the trial court's discretion.

19 MR. DAWSON: Can I ask a question, Chip?

20 MR. MUNZINGER: Just one comment about the
21 short time frames, and they seem to be short under 167.4,
22 30 days after appearance in the case -- I guess two
23 comments. What do you do if there's a 120a motion filed,
24 but the other one that I had in mind is sometimes a
25 defendant -- the whole view of the case can change if they

1 learn fact A or fact B, and you want to leave some leeway
2 in there to allow a defendant to do some discovery, whether
3 it's by written discovery or a deposition to learn fact A
4 or fact B.

5 I have been in lots of cases in my lifetime
6 where if I know X, I know I've got a damn good shot of
7 winning or losing the case, and I don't think you want to
8 put the declaration date so close to the appearance that
9 you preclude a defendant from taking some targeted
10 discovery to determine whether they want to trigger this
11 election or not.

12 CHAIRMAN BABCOCK: Judge Gray, you had --

13 HONORABLE TOM GRAY: The one thing that we
14 need to keep in mind on setting the date by which the
15 defendant must do this is that every day that goes by
16 during the course of the discovery is working against him
17 in this -- under this rule because he's shifted less fees,
18 and so there is a natural incentive for the defendant to
19 want to do this as early in the litigation as they feel
20 comfortable doing it, and for that reason it seems to be --
21 mitigate more towards the closing date to achieve the
22 benefit than towards the opening date, and I would say make
23 it, you know, like 30 days before the prior dates that we
24 had agreed on for closing the window.

25 CHAIRMAN BABCOCK: Alistair, Pete, and then

1 Buddy.

2 MR. DAWSON: I would agree with Jane and
3 Tracy's suggestion if we add in a provision like we had
4 before that the trial court can change the dates upon good
5 cause shown.

6 CHAIRMAN BABCOCK: We've got that in here
7 right now.

8 MR. DAWSON: Is that in there?

9 CHAIRMAN BABCOCK: It's in the rule as
10 proposed.

11 MR. DAWSON: In that case then, if you've got
12 a particular case where 30 or 90 days after appearance
13 doesn't work for whatever reason then the party can go in
14 and petition to have that day moved.

15 CHAIRMAN BABCOCK: Pete.

16 MR. SCHENKKAN: I'm persuaded by the argument
17 that the defendant has a natural incentive to try as
18 quickly as he can talk the information he has decided he
19 wants to try to do so and, thus, I'd like to see us
20 actually vote on one that says the last date for the
21 defendant to declare that this statute is going to apply
22 here is 90 days before trial.

23 CHAIRMAN BABCOCK: Buddy.

24 MR. LOW: One of the things, I mean, I know
25 you want early settlement, but I've seen a lot of judges --

1 and I was in a case that lasted four months. He would have
2 loved for us to settle it the week after trial, some would
3 say probably, so you've got to remember the cutoff date,
4 and you've got to remember cases like that for a cutoff
5 date. I know you want to encourage early settlement, but
6 you also save four months of a jury's time or three months
7 and so forth, so you don't want to cut it off too soon
8 before trial, I don't think.

9 CHAIRMAN BABCOCK: But what do you learn in
10 trial that you didn't know?

11 MR. LOW: Oh, you got all day? I'll tell you
12 a lot of the things I've learned. Unfortunately here's a
13 scar here and a scar here.

14 CHAIRMAN BABCOCK: I suppose that's right. I
15 suppose that's right. Okay. Yeah, Anne.

16 MS. McNAMARA: Chip, the times I've seen this
17 work well in other jurisdictions it was always after the
18 close of discovery where the defendant figured out what the
19 case really was all about and could make an intelligent
20 settlement offer. To the extent we force a declaration
21 earlier in the proceeding, it seems to me we're getting
22 more into game theory than litigation resolution because
23 then you give the plaintiff the opportunity and you're sort
24 of playing -- you get back to the numbers games we talked
25 about all morning as to how much you had to recover and 80

1 percent and 120 percent as opposed to simply a considered
2 settlement proposal based on the plaintiff's case as
3 developed through discovery. So I would go with a later
4 date, whether it's 90 days before the end of trial or
5 whatever date is in the --

6 CHAIRMAN BABCOCK: 30 days after discovery
7 closes?

8 MS. McNAMARA: Yeah, something like that,
9 because then you know what the case is and then you can go
10 make a settlement offer that actually relates to the
11 damages.

12 MR. EDWARDS: Sometimes discovery doesn't
13 close until the trial starts.

14 CHAIRMAN BABCOCK: Right.

15 HONORABLE TRACY CHRISTOPHER: You're taking
16 any advantage to the plaintiff by giving the defendants
17 this -- talk about games playing. By giving the defendants
18 this option, this movable option as to when this
19 declaration is, you're making it very difficult on the
20 plaintiffs. Now, perhaps that's the intent of the statute.
21 I don't know, but, you know, I think we ought to force --
22 it's not an offer that we're forcing the defendants to say.
23 We're just saying that the statute is in play.

24 CHAIRMAN BABCOCK: Judge Benton.

25 HONORABLE LEVI BENTON: I don't know why we

1 would want to cut it off -- I agree with Anne, and I agree
2 with Buddy, but I would go further. I don't know why we
3 would want to impose a deadline on the defendants at any
4 time before we start voir dire, and if the case settles
5 voir dire, great. We have saved judicial resources. We
6 have saved a jury pool. There's been some savings to the
7 civil justice system generally, and that's a good thing.

8 CHAIRMAN BABCOCK: Yeah, but the only thing
9 that nullitates against Judge Christopher's comments is
10 that there is a -- if a defendant is going to use it,
11 there's a natural tendency to try to use it as soon as
12 possible to get the benefit of it, because if you do it
13 right before trial then you're not going to get the
14 benefit.

15 HONORABLE TRACY CHRISTOPHER: That's right,
16 but the plaintiff can't ever trigger this unless you make
17 the defendant declare it.

18 HONORABLE LEVI BENTON: Wait, wait.
19 Plaintiff triggering it is one thing, but you said some
20 benefit, but if there's some -- if there's any amount of
21 benefit to the civil justice system, that's a benefit. If
22 it's the ability to call the next case that won't settle
23 and put that to trial, that's a benefit.

24 MR. EDWARDS: I personally don't have any
25 problem with making a declaration and offer under this any

1 time before the verdict comes in.

2 MR. LOW: I don't either.

3 MR. HAMILTON: I think that's right, but as a
4 practical matter, you don't gain much cost shifting at that
5 late of a date. Why have it closed at all?

6 MR. EDWARDS: It's leverage on whoever has
7 got the losing case to settle. If I'm in the middle of a
8 trial and I've got a bad case and the defendant wants to
9 make me an offer that I don't think is particularly
10 reasonable, I can come in and make one that I think is, and
11 if I don't beat it -- I mean, if I do beat it, I get my
12 costs back, too, and you know, you start talking about
13 taking an expert witness that charges you \$5,000 a day on
14 the stand for five days, if that -- if that's not a
15 substantial amount of cost in here for somebody here, I
16 want to get closer to you. I want to sit next to you next
17 time.

18 CHAIRMAN BABCOCK: Tommy.

19 MR. JACKS: Chip, it seems to me we're now
20 reopening issues we've already foreclosed, and I don't
21 think we ought to do that. We've already decided a date
22 after which you can't make an offer and certainly you
23 shouldn't be able to make a declaration after that date. I
24 mean, we've got the arguments laid out, either you're for
25 early, going with Judge Christopher and Judge Bland, or

1 you're for later, and I guess the 90 days before trial is
2 kind of the leading --

3 CHAIRMAN BABCOCK: Leading candidate.

4 MR. JACKS: -- candidate there, and I would
5 say let's just have an up or down vote, so we can move on.
6 We've got a lot to do.

7 MR. SOULES: Well, the other one is when you
8 call your first witness like we had before. That's when
9 you make your offer.

10 MR. JACKS: Yeah. We've already done that
11 and voted on it, and that's over and done with.

12 MR. SOULES: Let's just make the declaration
13 the same time and roll with it.

14 CHAIRMAN BABCOCK: Yeah, Elaine.

15 PROFESSOR CARLSON: In keeping with trying to
16 be intellectually honest --

17 CHAIRMAN BABCOCK: Is that our standard?

18 PROFESSOR CARLSON: It was this morning.

19 CHAIRMAN BABCOCK: That's right. Judge
20 Peeples wanted us to be intellectually honest.

21 PROFESSOR CARLSON: What do you think was the
22 legislative intent in including this requirement that the
23 defendant make a declaration and if the defendant doesn't
24 make a declaration by the time frame then the rule doesn't
25 shift?

1 MR. SOULES: No fee shifting after the first
2 witness.

3 PROFESSOR CARLSON: I mean, do you really
4 think the legislative intent was to allow this up to the
5 time of trial?

6 MR. EDWARDS: I think --

7 PROFESSOR CARLSON: Allow this to start --

8 MR. SOULES: Any time, I think.

9 MR. EDWARDS: If you look at the background
10 against which this Legislature was elected and which they
11 sat, it was to eliminate frivolous lawsuits. That was the
12 purpose of it, stated over and over and over again; and if
13 a frivolous lawsuit is filed, the defendant is going to
14 come in and regardless of what the lawsuit is, if this
15 thing can't apply, they are going to make a declaration at
16 the earliest possible date; and if it's not a frivolous
17 lawsuit, they are probably not going to make that at any
18 time; and if the case becomes frivolous during the course
19 of the litigation because some witness has gone south,
20 somebody has gotten caught lying, they weren't really hurt
21 in the automobile accident, they were hurt in a fight at a
22 bar, the intent would be to get rid of that lawsuit now.

23 CHAIRMAN BABCOCK: Justice Duncan.

24 HONORABLE SARAH DUNCAN: I would just like to
25 suggest a competing later date for the declaration window

1 to close, and that's the date that we've already said the
2 last offer can be made.

3 CHAIRMAN BABCOCK: Okay.

4 HONORABLE SARAH DUNCAN: We're getting a lot
5 of time periods in here, and if we -- you know, I think
6 Buddy's right. The defendant has the incentive to file
7 this earlier rather than later, so that's not really the
8 concern. The concern is when is the latest they should be
9 able to do it, and we've already said here's the latest day
10 you can make an offer. So I would propose that that just
11 be the latest day you can file a declaration.

12 MR. SOULES: Second. Second.

13 CHAIRMAN BABCOCK: The purpose is it seems
14 everybody is going to jump -- it seems like the early date
15 would be subsection (a) here, which would be 30 days under
16 a Level 1 case and 90 days under a Level 2 or 3 case and
17 then the late date would be under subsection (b), which
18 would be 30 days before the date the case commences or
19 whatever Luke's gloss on that is, right?

20 PROFESSOR CARLSON: Trial commences.

21 CHAIRMAN BABCOCK: Yeah, trial commences.

22 MR. SOULES: Time the trial commences.

23 CHAIRMAN BABCOCK: So those would be our --
24 that's one way to go early-late. So everybody that thinks
25 it ought to be early raise your hand.

1 MR. MEADOWS: Only? Only early?

2 CHAIRMAN BABCOCK: Yeah. You've got to make
3 your declaration early.

4 MR. SOULES: What if your client won't make a
5 decision?

6 CHAIRMAN BABCOCK: Everybody that thinks it
7 ought to be late?

8 MR. SOULES: Anybody ever have any problems
9 with that?

10 MR. EDWARDS: Is this early or late?

11 CHAIRMAN BABCOCK: Late.

12 Late wins by a vote of 18 to 10, the Chair
13 not voting, so let's go late.

14 MR. DAWSON: Can we choose between the two
15 lates?

16 CHAIRMAN BABCOCK: Yeah. Yeah. And late
17 could mean the declaration has to be made no less than 30
18 days before the date the conventional trial on the merits
19 commences.

20 HONORABLE DAVID PEEPLES: Bill Edwards,
21 you're not concerned about the defendant being able to hold
22 this over your head all the way up to the trial?

23 MR. EDWARDS: They haven't held it over my
24 head. They have been taking and putting all of the trial
25 preparation on the other side of the line. I'm not -- and

1 I go both ways, man.

2 HONORABLE LEVI BENTON: And if you believe
3 that, I've got a bridge to sell you.

4 MR. SOULES: There you go. He's out of the
5 closet.

6 CHAIRMAN BABCOCK: Let's be careful that
7 that's not misconstrued. Okay. So late can be no less
8 than 30 days the date the conventional trial on the merits
9 commences. That could be one and then it could be anything
10 else we want to come up with. It could be 30 days after
11 discovery. It could be 90 days before trial. It could be
12 a lot of things.

13 HONORABLE JANE BLAND: If the defendant makes
14 the declaration and makes their offer on the last date of
15 the offer, what opportunity does the plaintiff have to make
16 an offer?

17 PROFESSOR CARLSON: He has three days.

18 HONORABLE JANE BLAND: So they have three
19 days basically to get their offer --

20 MR. SOULES: After that it's ping-pong for
21 three days. Everybody plays ping-pong for three days.

22 HONORABLE JANE BLAND: Okay. And you-all are
23 fine with that?

24 MR. EDWARDS: All I need is three minutes.

25 HONORABLE JANE BLAND: All you need is three

1 minutes, okay.

2 CHAIRMAN BABCOCK: Bill is feeling pretty
3 salty this afternoon.

4 PROFESSOR DORSANEO: Many of my clients
5 cannot decide anything in three days.

6 CHAIRMAN BABCOCK: Well, you have a special
7 clientele, though.

8 MR. MEADOWS: And that's on the record.

9 CHAIRMAN BABCOCK: Okay. So what's everybody
10 want to do on that? Do you want to go with the language of
11 subpart (b)? Do we need a vote? Do we need a vote?

12 MR. EDWARDS: What does it say?

13 CHAIRMAN BABCOCK: Okay. It says "no less
14 than 30 days before the date" --

15 PROFESSOR CARLSON: "Of trial on the merits."

16 CHAIRMAN BABCOCK: -- "conventional trial on
17 the merits commences, or if in response to a prior offer,
18 within three days of the prior offer, whichever is later."

19 Yeah, Harvey.

20 HONORABLE HARVEY BROWN: So somebody --
21 defendant puts this in play 30 days before trial. The
22 plaintiff has to respond 27 days before trial, within three
23 days, the first time they've heard of this coming into
24 play. They've got to get a hold of their client, educate
25 their client in three days, everything in three days. I

1 think that's fast to do at the very end. I mean, you might
2 be on a Friday, you can't get a hold of your client for a
3 few days. Your client may speak a different language. I
4 think that's pretty tough.

5 PROFESSOR CARLSON: What would you think
6 would be appropriate?

7 HONORABLE HARVEY BROWN: I think they ought
8 to get at least a week.

9 PROFESSOR DORSANEO: Two weeks. Two weeks or
10 30 days. It takes a while to even get some places to talk
11 to them.

12 MR. EDWARDS: How about 10 working days?

13 CHAIRMAN BABCOCK: Okay. Works for me if it
14 works for everybody else.

15 MR. SCHENKKAN: What we're working on here is
16 backing earlier than the date we've already picked for
17 offers for the declaration, so instead of -- if we're doing
18 10 working days I guess what we're really saying is we
19 would be using 30 days before trial.

20 CHAIRMAN BABCOCK: I think what they're
21 talking about is making it parallel, frankly.

22 MR. SCHENKKAN: Well, but I'm saying it's not
23 really parallel because offers are in response to offers,
24 and a declaration is not an offer.

25 HONORABLE SARAH DUNCAN: Right.

1 CHAIRMAN BABCOCK: That's a good point.

2 MR. PEMBERTON: What he's talking about is,
3 is requiring the defendant -- if you want the ability to
4 make an offer under this rule, to designate that fact
5 sometime before the last day offers are allowed.

6 HONORABLE HARVEY BROWN: Right.

7 MR. YELENOSKY: Before the what?

8 MR. PEMBERTON: Before the end of the period
9 in which offers are allowed.

10 HONORABLE SARAH DUNCAN: There's not going to
11 be a prior offer because nobody has put the statute in
12 effect.

13 CHAIRMAN BABCOCK: Yeah. Good point.

14 HONORABLE HARVEY BROWN: Right. So you could
15 use 40 days for the declaration and 30 days for the offer.
16 That gives them 10 days to at least think about what's
17 going to happen under this.

18 CHAIRMAN BABCOCK: How about 45 days for the
19 declaration, 30 days for the offer, and then 10 days for
20 the plaintiff's offer?

21 MR. EDWARDS: How long do you get for
22 rejection? How long are we giving for rejection?

23 PROFESSOR CARLSON: Our last vote was 14
24 days. The offer has to be open for a minimum of 14 days.

25 HONORABLE DAVID PEEPLES: Why would a

1 defendant ever make a declaration and not an offer just
2 right at the same time?

3 MR. LOW: Because the deadline is a certain
4 time, and they say, "I know I want to settle it, but I'm
5 not sure yet, and so let's put the procedure in play
6 because we're going to make an offer and we think we know
7 more about the case than they do, but we haven't heard from
8 so-and-so, so let's don't miss this date. "

9 HONORABLE SARAH DUNCAN: But, Buddy, if we
10 say 30 days before the date the trial commences, that's the
11 last day they can file a declaration. It's also the last
12 day they can make an offer, so that's it.

13 MR. LOW: I'm not arguing --

14 HONORABLE SARAH DUNCAN: It either has to be
15 simultaneous or you've made a declaration and you've
16 enabled the plaintiff to get you under the statute when you
17 haven't made an offer because the plaintiff still has three
18 days to make an offer.

19 MR. JEFFERSON: Can you withdraw a
20 declaration?

21 HONORABLE SARAH DUNCAN: No.

22 CHAIRMAN BABCOCK: No.

23 HONORABLE SARAH DUNCAN: Or at least three
24 days.

25 CHAIRMAN BABCOCK: Do we like 45 days or do

1 we want to keep it at 30?

2 HONORABLE SARAH DUNCAN: I like 30.

3 HONORABLE LEVI BENTON: I still don't
4 understand why there's a benefit in cutting them off any
5 time before trial starts.

6 HONORABLE SARAH DUNCAN: We have already been
7 down that. I have no feelings about this one way or the
8 other except that we have a provision in here that says 30
9 days before trial commences and --

10 HONORABLE LEVI BENTON: I dissent.

11 HONORABLE SARAH DUNCAN: I might, too.

12 CHAIRMAN BABCOCK: He dissents on hindsight.

13 HONORABLE SARAH DUNCAN: I might dissent to
14 that, too, but I think it's a real mistake to start putting
15 a lot of different time periods in here for different
16 things. I'm sitting here thinking, "Thank you, God, that
17 I'm not a trial lawyer," because the calendar is getting
18 crowded just with this.

19 CHAIRMAN BABCOCK: Okay. So you're 30 days,
20 and there's another proposal of 45 days. We're talking
21 about the declaration now. Harvey.

22 HONORABLE HARVEY BROWN: There's another way
23 you could do it. You could give the party more than three
24 days to respond.

25 CHAIRMAN BABCOCK: Yeah. We have been

1 talking about that.

2 HONORABLE HARVEY BROWN: I mean, you could
3 say just 10 days there.

4 MR. SOULES: Seven.

5 HONORABLE HARVEY BROWN: Or seven.

6 CHAIRMAN BABCOCK: Which might violate your
7 "We've already decided this rule."

8 HONORABLE SARAH DUNCAN: If we change it in
9 both places, I'm fine. I don't care one way or the other
10 what it is.

11 CHAIRMAN BABCOCK: Okay. So that's -- yeah,
12 Stephen.

13 MR. YELENOSKY: Well, I was just trying to
14 understand. If we put the declaration at the same -- the
15 last date for that as 30 days before trial then unless the
16 defendant makes an offer, the plaintiff cannot, right?

17 MR. SOULES: No. They can.

18 CHAIRMAN BABCOCK: Yeah, but why would you
19 make a declaration 30 days before trial if you're not going
20 to make an offer?

21 MR. YELENOSKY: Yeah, if they're not going to
22 make an offer.

23 MR. SOULES: Well, they can under this rule
24 because they have got to be responding to a different
25 offer.

1 MR. YELENOSKY: Conceptually, theoretically
2 the defendant could file a declaration and the plaintiff
3 would have no ability to file an offer. I mean, that's
4 possible. As long as you don't move the date to prior to
5 30 days that's possible.

6 MR. SOULES: The declaration -- the only --

7 MR. YELENOSKY: Because it doesn't trigger a
8 counteroffer.

9 MR. SOULES: That's right. The only thing
10 that triggers a counteroffer is an offer under this rule.
11 We've got to rewrite that part of it if you want it to be
12 different.

13 MR. YELENOSKY: Right. So you have to have
14 at least a day before if you want to avoid that theoretical
15 possibility.

16 MR. SOULES: I think that they're --

17 CHAIRMAN BABCOCK: What did you say, Luke?

18 MR. SOULES: I mean, it's pretty -- I guess
19 this is pretty nonsensical that if on the 30th day the
20 defendant says, "I'm going to trigger this statute" --

21 MR. YELENOSKY: But never makes an offer.

22 MR. SOULES: "But I'm not making my offer,"
23 then we could say that the plaintiff has seven days to make
24 an offer and then I guess they play ping-pong right up 'til
25 trial, as long as they play ping every seven days or three

1 days or whatever the time is.

2 CHAIRMAN BABCOCK: Carl.

3 MR. HAMILTON: I need to ask a question that
4 bears upon this because the statute as written, I don't
5 find anywhere where it says that these costs are just the
6 costs that are incurred after the date of settlement. Now,
7 is that something we're going to be able to change by this
8 rule, and if not --

9 HONORABLE TRACY CHRISTOPHER: Yeah, it is.
10 It's in there.

11 PROFESSOR CARLSON: It's in there.

12 HONORABLE TRACY CHRISTOPHER: It's in (c).

13 MR. GILSTRAP: 42.004(c).

14 HONORABLE TRACY CHRISTOPHER: Limited to
15 costs incurred after rejected.

16 MR. HAMILTON: Oh, okay. Strike my question.

17 MR. SOULES: After the offer or after the
18 declaration?

19 CHAIRMAN BABCOCK: Okay. So let's get back
20 to whether we make it 30 days or 45 or some other period of
21 time.

22 PROFESSOR CARLSON: Move 45.

23 CHAIRMAN BABCOCK: Move 45. 45 has been
24 moved, and seconded by Tommy. So everybody that's in favor
25 of having the declaration 45 days before trial commences

1 raise your hand.

2 MR. SOULES: How many dates am I going to
3 have to remember?

4 CHAIRMAN BABCOCK: Everybody against having
5 45 days raise your hand.

6 23 to 3 with the Chair not voting it's going
7 to be 45 days before trial commences. All right?

8 Now, do we want to tinker with the amount of
9 time that Bill Dorsaneo's mutant clients can respond to
10 this? Just kidding.

11 PROFESSOR DORSANEO: A lot of times I don't
12 like them.

13 PROFESSOR CARLSON: 167.4(B). I'm sorry
14 about the spacing. I am my secretary.

15 CHAIRMAN BABCOCK: (a)(1)(B), right?

16 PROFESSOR CARLSON: Yes. (a)(1)(B), yes.

17 HONORABLE TRACY CHRISTOPHER: Well, I mean,
18 you've written (A) because you can't have offers before
19 declarations, right?

20 PROFESSOR CARLSON: I think we're going to
21 have to put that in.

22 HONORABLE TRACY CHRISTOPHER: Is that going
23 to be the earliest time you can make a declaration, is 30
24 and 90 and the latest time is 45 days?

25 PROFESSOR CARLSON: We're going to have to

1 tinker with the 30/90 days, provided that 45.

2 HONORABLE TRACY CHRISTOPHER: That should be
3 the earliest you can make one, too.

4 CHAIRMAN BABCOCK: Right, but the issue now
5 is whether the three days of the prior offer, whichever is
6 later, whether that's going to change.

7 PROFESSOR CARLSON: Our proposal was to close
8 the window on making an offer 30 days before the date the
9 trial commences or, if in response to a prior offer, within
10 three days of the prior offer, whichever is later. Bill is
11 saying three is I think -- Harvey, you said that, too. You
12 thought that was too short a time frame.

13 CHAIRMAN BABCOCK: Tommy has got something to
14 say about that.

15 MR. JACKS: Well, I think upon reflection I
16 think three days is too short. I can't tell you the number
17 of times when I've shortly before trial been trying to
18 settle a case with a defendant, and the defense lawyer is
19 saying, "Look, this insurer just can't make a decision that
20 fast. They've got to convene a committee in New Jersey,
21 and it's going to be two weeks before I can get you an
22 answer."

23 Now, you know, and on the plaintiff's side
24 you've got those cases where say in a toxic tort case
25 you've got several hundred plaintiffs, and you have to, you

1 know, get a meeting together and have a vote and do all
2 that stuff, and I think the 10 working days or two weeks
3 absolute days, either one, is a better approach to that.

4 MR. SOULES: Wouldn't you be happy, though,
5 you can just say, "Fine. If they don't meet next week you
6 don't get your costs."

7 MR. JACKS: Well, I just think -- I don't
8 think either lawyer ought to be put in that position where
9 they can't get an answer from their client.

10 CHAIRMAN BABCOCK: Well, that's right, but
11 also this is -- you remember this is a defendant-triggered
12 rule, so the insurance committee has probably already met
13 and they have been able to meet.

14 MR. JACKS: Well, but if they get an offer
15 from the plaintiff 30 days out from trial that they've
16 never seen before --

17 CHAIRMAN BABCOCK: Assuming they have
18 declared and opened up the --

19 MR. JACKS: Yeah. But once it's open it's
20 open for both sides, so, I mean, any of us could get caught
21 in this trap, and none of us wants to, I don't think. We
22 all like to have time to get our clients to respond.

23 CHAIRMAN BABCOCK: 14 days?

24 MR. SOULES: That doesn't keep the ball
25 rolling. I think seven.

1 MR. SCHENKKAN: I just have a question as to
2 whether we have maybe confused two different problems here.
3 This is only the amount of time you have to make another
4 offer when someone has made a prior offer. This is not the
5 time you have to accept the offer.

6 CHAIRMAN BABCOCK: Right.

7 MR. SCHENKKAN: And I would have thought,
8 Tommy, that you would have gone into that trial, regardless
9 of which side you were on, plaintiff or defendant, you
10 would have done your very dead level best to make your
11 client get together and take whatever vote is required to
12 decide on some settlement position, and thus, if the offer
13 that was made by the other side was better than what -- for
14 you than what you had already decided you would take, you
15 just take it, and if it's not better, you can still offer
16 yours without going back and getting authority. So I'm not
17 -- I think we may be making a problem by combining two
18 concepts here.

19 MR. JACKS: Pete, all I'm saying is the
20 decision whether to make another offer is an important
21 decision, and there are plenty of clients for both sides of
22 the docket where you can't get that done in three days. I
23 don't have a problem with seven working days.

24 MR. SOULES: Seven days. I mean seven days.

25 CHAIRMAN BABCOCK: And Luke's seven days

1 makes it a little bit --

2 MR. SOULES: That's a week. Not working
3 days.

4 CHAIRMAN BABCOCK: -- steady in light of the
5 fact that we've got the declaration date now out 45 days,
6 so we know whether we're under this rule in advance of --

7 MR. SOULES: And we're close to trial, or we
8 may be. We just might be going to trial.

9 MR. JACKS: Don't our rules say that where a
10 deadline is less than 10 days it becomes working days
11 automatically?

12 CHAIRMAN BABCOCK: Right. That's right.

13 HONORABLE TRACY CHRISTOPHER: No. It says
14 less than five. It's not 10. Ten is real days.

15 MR. JACKS: Is it five?

16 MR. SOULES: Just say "seven days."

17 HONORABLE TRACY CHRISTOPHER: Ten is real
18 days. It's five that it's working days.

19 CHAIRMAN BABCOCK: See, that's why I miss a
20 lot of those deadlines. Carl.

21 MR. HAMILTON: It seems to me like it would
22 be simpler to say it that when this declaration is made --
23 let's say the defendant waits until 45 days from trial to
24 make the declaration. Then that opens the window for
25 settlement.

1 CHAIRMAN BABCOCK: Right.

2 MR. HAMILTON: And we ought to just have a
3 time period from that point during which the parties can
4 exchange offers and counteroffers and without any time
5 limit, and 30 days after that or something everything cuts
6 off. Why do we want to put any time limits?

7 CHAIRMAN BABCOCK: We do have a time limit.
8 We have got 30 days. We have got declaration 45 days.
9 We've got 30 days and then you've got some period of time,
10 currently three, to make a counteroffer under the rule, and
11 then Luke suggests seven days. How does everybody --

12 MR. SOULES: This goes right on through
13 trial. This doesn't stop -- the ping-pong never stops, and
14 you've already -- how many times have you mediated a case
15 in a half a day or a day or a couple of days and gotten a
16 lot of decisions in a day or two?

17 HONORABLE DAVID PEEPLES: Why not let the
18 defendant regulate how long its offer is open?

19 MR. SOULES: He does.

20 PROFESSOR CARLSON: They can, except it says
21 has to be a minimum of 14 days, what we voted on before.
22 That's not --

23 HONORABLE DAVID PEEPLES: If defendant wants
24 to give them two weeks to talk to the --

25 MR. YELENOSKY: That's on acceptance.

1 That's on acceptance, not a counteroffer.

2 MR. JACKS: What we're really talking about
3 now is where the offer comes in at the deadline, how much
4 time after the deadline does the party that receives that
5 offer have to make a corresponding offer back, and right
6 now we've got three days. Luke's proposing seven days. I
7 say let's vote on Luke's seven days.

8 CHAIRMAN BABCOCK: Okay. Let's vote on
9 Luke's seven days. Everybody in favor of Luke's seven days
10 raise your hand.

11 Everybody against Luke's seven days? Luke, a
12 unanimous 29 to nothing.

13 MR. SOULES: That never happened in 15 years.

14 CHAIRMAN BABCOCK: Not when you were the
15 Chair. Okay. Let's move along.

16 MR. SOULES: Thank you, Tommy.

17 PROFESSOR CARLSON: All right. That brings
18 us to 167.3. Anything you see that's not shaded, yeah,
19 tracks the legislative HB 4. The Legislature says that the
20 offer must state the terms by which the claims may be
21 settled and, of course, it's limited to monetary
22 settlement. My --

23 CHAIRMAN BABCOCK: Where are you?

24 PROFESSOR CARLSON: 167.3 on page three.

25 CHAIRMAN BABCOCK: Going backwards. Okay.

1 PROFESSOR CARLSON: Shouldn't the offer need
2 to settle all monetary claims raised by the pleadings, or
3 are we going to allow -- which, trust me, will then take us
4 the rest of the afternoon -- the offer to be made piecemeal
5 to some monetary claims and not others?

6 CHAIRMAN BABCOCK: Tommy.

7 MR. JACKS: I think the statute answers that
8 because "settlement offer" is defined as being an offer to
9 settle or compromise a claim. The claim includes a request
10 to recover monetary damages, so I think implicit in that
11 construct is that the offer has to be one to settle the
12 entire claim for all monetary damages sought. I think it
13 would be a colossally bad idea to apply the statute to only
14 piecemeal efforts because the purpose of the statute is to
15 effectuate settlements of the case and make the case go
16 away, not to piecemeal it, still have to incur all the
17 expense of trying a lawsuit.

18 CHAIRMAN BABCOCK: Yeah. I think that
19 clearly makes sense. Don't you think so, Richard? Anybody
20 disagree with that? Judge Bland.

21 HONORABLE JANE BLAND: I agree, and I think
22 Elaine's extra language to emphasize that should be
23 included in the rule so that nobody -- nobody is confused
24 about that.

25 CHAIRMAN BABCOCK: Yeah.

1 HONORABLE JANE BLAND: Because it uses
2 "claim" and it defines "claim" and then it says "state the
3 terms by which the claims may be settled," and I can see
4 somebody creatively arguing, "Well, I've already settled
5 these claims and not these claims."

6 CHAIRMAN BABCOCK: Yeah.

7 MR. SOULES: Elaine, don't you have to go to
8 167.7 where it says "withdrawal of offer" and limit that to
9 not before 14 days?

10 CHAIRMAN BABCOCK: You've got to leave that
11 open for --

12 PROFESSOR CARLSON: You can withdraw an offer
13 at any time. You just can't fee shift.

14 MR. SOULES: Oh, okay.

15 PROFESSOR CARLSON: But if you want to try
16 and fee shift, you've got to leave your offer, from our
17 last meeting, open for 14 days.

18 MR. SOULES: All right. If that's the
19 understanding, it's fine with me.

20 PROFESSOR CARLSON: Okay.

21 CHAIRMAN BABCOCK: Okay. So everybody like
22 Elaine's language? And I don't think all this other stuff
23 about returning documents and confidentiality ought to be a
24 part of it.

25 PROFESSOR CARLSON: Okay. Let's just talk

1 about that. When you say "not be a part of it," does the
2 offer -- are we looking at offer to settle monetary claims,
3 judgment on monetary claims, or we're not going to -- can a
4 party make an offer and fee shift by including in their
5 offer other conditions beyond the monetary claims?

6 MR. GILSTRAP: No. And here's why, because
7 the award of litigation costs is 80 percent of the rejected
8 offer, so if you're saying, "I'm going to offer to do this,
9 but I also want you to have a confidentiality provision as
10 well," are they get going to get 80 percent of the
11 confidentiality provision? I mean, it looks to me like the
12 Legislature only intended to include just an offer of
13 money. That doesn't mean people can't make an offer
14 outside the settlement regime that includes that, but it
15 seems to me it just really confuses it if we try to allow
16 other conditions on it.

17 PROFESSOR CARLSON: I agree with you, Frank.

18 CHAIRMAN BABCOCK: I do, too. Anybody
19 disagree with that?

20 MR. WATSON: I'm not sure it's that clear.
21 We might want to drop a comment to that effect.

22 CHAIRMAN BABCOCK: Yeah.

23 MR. SOULES: Well, I guess then (3) would be
24 "state the terms by which the amount will be paid." That's
25 in (3), not just the terms that it's going to be settled

1 because you're not --

2 MR. GILSTRAP: It might just need to say "the
3 amount."

4 HONORABLE HARVEY BROWN: Yeah.

5 MR. LOW: Well, you know, sometimes it's
6 important when you settle a case, they will say, "Okay" --
7 I settled one not long ago, they are going to fund X
8 dollars right now and three months later they're going to
9 pay. Now, so if they say, "Okay, I'm going to pay X, but I
10 don't know when I'm going to get it," do they have to pay
11 it in 14 days? What is it? I mean, do you outline date of
12 payment? Is that required? Because it's important to a
13 lot of people. Tommy.

14 MR. JACKS: Could we say "the financial
15 terms" or "the monetary terms upon which the case will be
16 settled"?

17 MR. LOW: Well, I think you would have to
18 outline that because if somebody just offered it and told
19 me, says, "I pay you X dollars" and I grab it, but I didn't
20 realize I'm going to wait six months for part of it.

21 HONORABLE SCOTT BRISTER: But do we want to
22 shift fees then? "Yeah. I'll pay you a million dollars,
23 but it's next Tuesday, not tomorrow."

24 "Oh." We'll shift fees for that?

25 MR. LOW: Yeah, but, Judge --

1 HONORABLE SCOTT BRISTER: I thought this --
2 see, I'm not sure what you mean by "terms." I would just
3 say "State how much you want to settle for."

4 PROFESSOR CARLSON: That was the Legislature.

5 MR. MUNZINGER: The Legislature used the word
6 "terms."

7 HONORABLE SCOTT BRISTER: What terms would it
8 be other than the amount of money?

9 MR. LOW: Well, to your client it would
10 be --

11 PROFESSOR CARLSON: It could be
12 confidentiality, return the documents.

13 HONORABLE TRACY CHRISTOPHER: Amend the
14 lease, indemnity.

15 MR. MUNZINGER: Amend the lease.

16 HONORABLE SCOTT BRISTER: Yeah. And so
17 you're wanting to exclude all of those, right?

18 PROFESSOR CARLSON: Right.

19 HONORABLE SCOTT BRISTER: So why don't we
20 just say "the amount of money"?

21 PROFESSOR CARLSON: Well, I guess what Buddy
22 was saying --

23 MR. LOW: Well, but they say that.

24 HONORABLE SCOTT BRISTER: Sure. This is what
25 it has to include. Plenty of times there will be

1 additional terms like when the payments are going to be
2 made and in what form, but is that -- my understanding is
3 what we are wanting to do is not make those conditions that
4 shift the fees, a rejection of the conditions.

5 CHAIRMAN BABCOCK: Well, but you don't want
6 to do it if it's confidentiality or if it's return the
7 documents or if it's a lease or something, but you might
8 want to do it if they say, "Okay, I offer you a million
9 dollars, but I'm not going to pay you for a year." Well,
10 that's really not offering a million dollars.

11 MR. LOW: But you don't know that. You might
12 not know that. If they just offer a million dollars and
13 then you get in a disagreement on when it's going to be
14 funded. Insurance companies fund at different times.

15 CHAIRMAN BABCOCK: Kent.

16 MR. SULLIVAN: It seems to me that's a really
17 good point, that the rule probably needs to contemplate a
18 sort of a -- and I can't think of a better way to put this
19 other than to say a payment schedule, because if it's just
20 a number, the number is meaningless if the payment is
21 totally -- or the due date, if you will, is totally
22 undefined. I'll promise you anything you want if you let
23 me unilaterally decide when it gets paid.

24 You know, it just -- I think you do have to
25 have some constraint in order for it to meaningfully be an

1 offer that would be the basis for ultimate fee shifting.
2 For you to be able to evaluate the offer you've got to know
3 X dollars that will be actually paid by within, you know,
4 some time frame. I think you do have to define that.

5 CHAIRMAN BABCOCK: "State the monetary terms,
6 including date of funding, by which the claims may be
7 settled"?

8 MR. SULLIVAN: No. See, that's the problem
9 because I think the rule is going to have to say --

10 MR. YELENOSKY: What the time is.

11 MR. SULLIVAN: -- what the time frame is.

12 MR. YELENOSKY: Because I could say I'll pay
13 you a million dollars in two years and then claim that that
14 shifts it --

15 MR. SULLIVAN: Right.

16 MR. YELENOSKY: -- if you don't accept it.

17 MR. SULLIVAN: That's my point, is that the
18 ridiculous case is "I will pay you \$10 million and I will
19 pay it a hundred years from now." It obviously is not a --
20 but we don't have anything in the rule that would say
21 that's not a 10 million-dollar offer.

22 CHAIRMAN BABCOCK: Bill.

23 PROFESSOR DORSANEO: It seems to me that
24 there is some indefinite cases that have been decided by
25 the courts of appeals here lately that identify what the

1 essential terms of settlement agreements are and that those
2 could be looked at and probably be used here.

3 MR. YELENOSKY: But they are not going to
4 resolve this issue, because you could have -- the essential
5 terms of the settlement agreement could, in fact, say,
6 "I'll pay you \$10 million in two years" and you may be fine
7 with that. It's specific enough, et cetera, but the
8 question for us is when is soon enough in order to put you
9 on the line in terms of fee shifting.

10 MR. SULLIVAN: Right. Right.

11 MR. YELENOSKY: And so we've got to say what
12 the time frame is, otherwise I can shift the fees by making
13 an offer that is a ludicrous -- to be paid at a ludicrous
14 amount of time in the future, and all I'm going to be
15 judged by is whether or not the amount of the offer
16 measures up by the 80/120 percent rule, not when it was to
17 be paid.

18 PROFESSOR DORSANEO: I don't know if I could
19 deal with that.

20 CHAIRMAN BABCOCK: Skip.

21 MR. WATSON: To me this has to be tied to the
22 way a judgment would be worded. I mean, if the judgment is
23 going to award a million dollars or a hundred thousand
24 dollars, then it needs to be just a flat cash sum, and
25 that's what's troubled me all the way through this, is

1 we've got to have a bright line between that situation and
2 the settlement.

3 For example, the annuity settlement where
4 it's a million-dollar settlement, but -- and that's the
5 offer, but it's going to be paid, okay, the 300,000 in
6 attorney's fees up front, but the last two thirds of it are
7 going to be paid over the life expectancy of the person,
8 and they are out bidding with the annuity companies who
9 have their actuaries who are trying to figure out at what
10 point we make money. That concerns me, and to me it's just
11 got to be a clean, finite, pay tomorrow or pay upon, you
12 know, execution of the release dollar for dollar figure or
13 it's not going to comport to a judgment.

14 CHAIRMAN BABCOCK: What did you -- I'm sorry,
15 Sarah. Go ahead.

16 HONORABLE SARAH DUNCAN: On another topic.
17 Go ahead. I have another concern.

18 HONORABLE SCOTT BRISTER: Under the new med
19 mal you don't do that anyway for future damages, right?

20 MR. JACKS: If there's a judgment. That
21 doesn't apply to settlements.

22 HONORABLE SCOTT BRISTER: Yeah, settlement
23 you can do whatever you want.

24 MR. WATSON: Correct.

25 CHAIRMAN BABCOCK: "State the monetary terms

1 by which the claims may be settled and must offer to settle
2 all monetary claims raised by the pleadings between the
3 offeror and offeree and fund the settlement within 30
4 days."

5 MR. SOULES: It should say --

6 MR. SCHENKKAN: But in med mal cases you have
7 to make an offer that's structured the way the med mal
8 statute was so that you can compare the judgment to the
9 offer. At least in those cases wouldn't your offer have to
10 be one that provided X payments over whatever the periods
11 were?

12 CHAIRMAN BABCOCK: Alistair.

13 MR. JACKS: I don't think so, because you can
14 obviously do present value.

15 MR. SOULES: It also needs to say "state
16 reasonable."

17 MR. DAWSON: I would advocate leaving the
18 word "terms" as it is and not limiting it to monetary
19 terms, because there are settlements where there are
20 nonmonetary terms that are important, whether it's
21 contractual or contractual amendments or business terms
22 between the parties.

23 MR. YELENOSKY: But we don't want those to
24 affect the fee shifting.

25 CHAIRMAN BABCOCK: Yeah. We don't want those

1 under the rule, I don't think.

2 HONORABLE SCOTT BRISTER: You could put that
3 in the --

4 MR. SOULES: I think No. (3) ought to say
5 "state reasonable terms by which the settlement fund will
6 be paid."

7 MR. MUNZINGER: Why don't you just say, "the
8 amount, time, method of payment"?

9 HONORABLE SCOTT BRISTER: Why don't we just
10 -- or we could just --

11 MR. SOULES: Reasonable terms for the amount,
12 time, and so forth of payment, and when you get over here
13 to rejection it should be conditioned on if a settlement
14 offer is made on reasonable payment terms and rejected.

15 MR. MUNZINGER: But that's imposing a
16 condition on the payment. You're saying that my offer has
17 to be in reasonable terms as distinct from being definite.

18 MR. LOW: Definite.

19 MR. MUNZINGER: Change the word "reasonable"
20 to "definite" and you wouldn't have a problem.

21 MR. LOW: Right.

22 MR. SOULES: No, it could be definite. "I'll
23 pay you a million dollars 20 years from now." That's
24 definite.

25 MR. MUNZINGER: And if I accept that, I'm --

1 MR. SOULES: And if I don't then I've got to
2 pay costs, and it's unreasonable. It's unreasonable for me
3 to have to wait 20 years.

4 MR. MUNZINGER: Well, not if you're willing.

5 MR. SOULES: Well, why should I be -- if I'm
6 unwilling, why should I be subject to fee shifting, if I'm
7 unwilling to wait 20 years, an unreasonable period of time
8 to be paid.

9 MR. WATSON: That's the point, Richard.

10 MR. LOPEZ: That doesn't promote settlement.
11 At a minimum the deadline has got to be before the
12 judgment.

13 MR. SOULES: You've got to have reasonable
14 payment terms.

15 MR. YELENOSKY: It's got to be present value
16 at least.

17 MR. SOULES: I want money.

18 CHAIRMAN BABCOCK: Hang on. Hang on.
19 Sarah's had her hand up for a while.

20 HONORABLE SARAH DUNCAN: I understand the
21 impetus for excluding conditions from this, but the comment
22 was made, well, you can just make an offer outside of the
23 fee shifting statute. Where is my leverage if I don't get
24 to tie it to money? There are a lot of cases in which the
25 confidentiality agreement or the return of discovery

1 products are the most important things in the case to the
2 defendant.

3 CHAIRMAN BABCOCK: The return of the trade
4 secrets.

5 HONORABLE SARAH DUNCAN: And the plaintiff,
6 if they get their money why are they going to agree to any
7 of that stuff?

8 CHAIRMAN BABCOCK: Yeah. We may have been
9 too quick to exclude.

10 HONORABLE SARAH DUNCAN: I mean, I will say
11 this again. I think this is absolutely unworkable, but we
12 are spawning -- well, I'm serious.

13 MR. SOULES: She's right.

14 HONORABLE SARAH DUNCAN: We are spawning
15 tremendous satellite litigation. I just see these little
16 mini-trials just popping up every time we turn the page.

17 CHAIRMAN BABCOCK: Judge Gaultney.

18 HONORABLE DAVID B. GAULTNEY: I really agree
19 wholeheartedly with what she said because, I mean, how many
20 times have you had a case where you thought you had a case
21 settled and you start getting all these negotiations on
22 indemnity agreements, confidentiality agreements, whatever.
23 So a lot of these terms, nonmonetary terms, are crucial to
24 settlement.

25 CHAIRMAN BABCOCK: Frank.

1 HONORABLE DAVID B. GAULTNEY: I think they
2 may be -- and, of course, the reverse problem of that is
3 that, you know, how do you then determine the fee shifting.

4 CHAIRMAN BABCOCK: Yeah. Kent and then
5 Frank.

6 MR. SULLIVAN: Obviously we can't consider
7 every conceivable issue like that, but I think that a
8 defendant who has important terms like that is not going to
9 invoke this regime. I also think that you've got to reduce
10 offers that are going to be made in the context of this
11 rule only to economic costs because otherwise you simply
12 cannot evaluate them.

13 And I think the thing we've got to focus on
14 is that ultimately you've got to look and say what's the
15 value of one thing, the judgment I guess on the one hand;
16 and what's the value of the other thing, which is the
17 offer; and the offer is going to have to be reduced to a
18 very clear value and even a present value. That's why I'm
19 kind of circling back around to the point I tried to make
20 earlier. You've got to make it clear when the money will
21 show up because the suggestion of -- that someone made, you
22 know, you'll pay the money and pay it in a year or two
23 years or whatever, you can't evaluate that vis-a-vis the
24 judgment. There's got to be certainty with respect to the
25 economic value of each of the landmarks in this rule.

1 CHAIRMAN BABCOCK: Yeah.

2 MR. SULLIVAN: Otherwise the rule will not
3 work.

4 CHAIRMAN BABCOCK: And the Legislature did
5 take out, you know, the type of cases that had "as for
6 nonmonetary relief." So that's something. Carlos, I think
7 Judge Brister had his hand up and then Frank had his.

8 HONORABLE SCOTT BRISTER: Since both the
9 settlement and the judgment can be paid out over time it
10 seems to me that should not be here. This should just be
11 the amount, and -- the amount you should pay and the
12 payment terms and then if you want to put something about
13 present value you put that over there when you're comparing
14 judgment and offer. That's where you compare 120 percent
15 of present value of the judgment, 120 percent of the
16 present value of the offer, and leave it out of getting
17 into that here.

18 CHAIRMAN BABCOCK: Not a bad point. Frank
19 and then Carlos and then Bill.

20 MR. GILSTRAP: Kent said what I was going to
21 say.

22 CHAIRMAN BABCOCK: Okay. Carlos.

23 MR. LOPEZ: Well, I just -- if we tie it to
24 present value instead of putting in a definite deadline I
25 will offer a trillion dollars 10,000 years from now in

1 every one of my cases, and it will still have decent
2 present value, but it makes no sense. I mean, this HB 4 is
3 to try to incentivize settlement, so to have anything
4 beyond -- I realize it's arbitrary, but beyond the date of
5 judgment, beyond some type of marker, I mean, present value
6 is not that simple. There's a present value for
7 everything, but it doesn't -- and the other real comment
8 was just echoing what he said. If we do this with
9 noneconomic it's just morass. We don't want to get into
10 that.

11 PROFESSOR DORSANEO: I'm not sure I'm
12 following all of Elaine's suggestions. This statute talks
13 about claims for monetary damages. Now, I guess my first
14 question is are we making the assumption that this
15 procedure would apply to a case that includes other kinds
16 of claims? And, Elaine, are you saying that all of the
17 claims would need to be settled, not just the monetary
18 claims?

19 MR. GILSTRAP: No. That's not the problem,
20 Bill. The problem is that we're tying the offer to
21 nonmonetary factors. You see what I'm saying? That's the
22 problem.

23 HONORABLE SCOTT BRISTER: Say, for instance,
24 our demand is \$10,000 and an apology. Defendant says, "I
25 will pay \$10,000 but no apology." Now, you don't settle.

1 There is no question you can refuse to apologize. And you
2 go to trial. Do we mean -- does the statute mean to shift
3 fees in that case or not, and I bet we'll get different
4 answers.

5 PROFESSOR DORSANEO: That's where I was going
6 before Frank answered whatever he thought I was asking.

7 CHAIRMAN BABCOCK: Well, you know, and in
8 that situation it could be how valuable is that apology,
9 and sometimes people don't apologize when they should.

10 PROFESSOR DORSANEO: We don't have law -- we
11 don't have claims to get apologies. All right. So, I
12 mean, if you have a monetary claim, I can understand that
13 and that can be settled and that's all monetary, and I
14 don't really have to worry about getting anything back.

15 HONORABLE SCOTT BRISTER: Apologies are a
16 regular requirement in settlements.

17 MR. YELENOSKY: Confidentiality is easier to
18 see.

19 HONORABLE SCOTT BRISTER: But confidentiality
20 you get into 76a problems.

21 MR. MUNZINGER: There are all kinds of
22 conditions that can be put on \$7 million.

23 PROFESSOR CARLSON: Right. And that was one
24 of the big reasons that I very much favored the trial court
25 discretion to deal with reduction or denial of this because

1 there are so many satellite matters that can come up that
2 the court, trial court, should be able to look at.

3 CHAIRMAN BABCOCK: Yeah, so you made a
4 mistake by bringing that up first.

5 PROFESSOR CARLSON: I apparently did.

6 MR. MUNZINGER: The statute defines claim as
7 a monetary claim. That doesn't include nonmonetary relief,
8 implying perhaps that the Legislature intended to limit the
9 fee shifting provisions to those analyses that involve
10 monetary claims only.

11 PROFESSOR DORSANEO: That's what I'm getting
12 at. I think that is what simplifies everything.

13 MR. MEADOWS: But you could have a monetary
14 claim, let's say a hundred million-dollar claim for
15 environmental contamination against my client, and what's
16 most important to me is that the property is cleaned up, so
17 I offer to clean up the property. You know, I know it's
18 going to cost \$10 million to clean it up, and I want it
19 cleaned up, and I will say in my settlement offer, "We will
20 clean up the property," and that's refused, and a jury
21 finds that that was unreasonable. Why wouldn't I be
22 entitled to have shifted the costs?

23 PROFESSOR CARLSON: Because the Legislature
24 said you have to have a monetary claim.

25 MR. MEADOWS: I have to make a monetary

1 offer? I have to state it in numerical?

2 PROFESSOR CARLSON: You have to be dealing
3 with a monetary claim. That's what the Legislature says.

4 MR. MEADOWS: It is a monetary claim, a
5 hundred million-dollar cleanup -- damage case for
6 environmental contamination.

7 MR. LOPEZ: Did you offer to write a check?

8 MR. MEADOWS: I offered to clean it up.

9 MR. SOULES: We need to go back to 42.002(b)
10 and put "actions that include claims for nonmonetary
11 relief." And just take them out.

12 MR. JACKS: Yeah.

13 MR. SOULES: "All actions that include claims
14 for nonmonetary relief."

15 HONORABLE SARAH DUNCAN: Bobby doesn't have a
16 claim at all.

17 MR. SOULES: Pardon?

18 HONORABLE SARAH DUNCAN: Bobby doesn't have a
19 claim at all. He just has an offer to clean up property.
20 He doesn't have a claim.

21 HONORABLE SCOTT BRISTER: That's part of the
22 settlement. That's not going to be part of his lawsuit.
23 You can't sue for specific performance unless there's
24 circular or something.

25 HONORABLE SARAH DUNCAN: You also can't offer

1 specific --

2 MR. HAMILTON: The statute says that what we
3 are going to be dealing with is claims for monetary
4 damages, but it doesn't tell us how we have to settle those
5 claims. We can settle claims for anything, and it doesn't
6 even have to be monetary, so if we are going to have to
7 have a hearing on what the value of this is anyway to shift
8 costs, why not let the settlement offer include anything
9 and everything it wants to include and then just let the
10 judge decide what the value of that is to compare with the
11 judgment?

12 MR. MUNZINGER: How are you going to put a
13 value on an apology, for example?

14 MR. HAMILTON: Well, that's up to the judge.

15 MR. MUNZINGER: But he's got to have some
16 kind of facts and evidence and reasonable standard to
17 apply.

18 MR. HAMILTON: That's going to be what's put
19 on at the hearing. If they don't put on any evidence --

20 CHAIRMAN BABCOCK: Tommy, did you have
21 something? Then Carlos, then Buddy.

22 MR. JACKS: Yeah. I think the only way this
23 thing is going to work is if you want to invoke it, you've
24 got to be willing to limit your settlement offer or demand
25 to money and to money paid in a lump sum within a fairly

1 short time, say 30 days.

2 CHAIRMAN BABCOCK: 30 days, yeah.

3 MR. JACKS: Something reasonable so that
4 people can get their checks ordered and so forth, and if
5 you want to dress it up and include a bunch of other stuff
6 like apology, or, you know, having the hospital start drug
7 testing their doctors or, I mean, all that kind of stuff
8 that we sometimes see in settlements, then do that the
9 old-fashioned way, but you don't get the hammer of this
10 statute unless you're just talking pure money.

11 CHAIRMAN BABCOCK: Carlos.

12 MR. LOPEZ: I agree. Because if you don't
13 write it that way then somebody can -- they can take
14 themselves out of the fee shifting by adding, comma, "and
15 an apology," and now you're out of the fee shifting. So
16 we're going to have to just say, you know, "monetary." So
17 I don't know.

18 HONORABLE SCOTT BRISTER: So if the only
19 thing is it has to be -- the only terms that are in this
20 order, this, are financial ones.

21 MR. GILSTRAP: What Tommy is saying is the
22 only term that can be in there is a number, is a number.
23 We're not even talking about paying out over two or three
24 years.

25 HONORABLE SCOTT BRISTER: But we do -- we're

1 going to have to do present value when we get a judgment in
2 a med mal case. Present value is easy. We do present
3 value all the time. Present value is money.

4 MR. JACKS: Well, in the med mal case you've
5 got the present value because the jury doesn't answer in
6 terms of stuff. They give you a hard number if paid now in
7 cash, which is present value, and so I don't think that
8 gets complicated, but, I mean, I would say -- actually, I
9 mean, I think our rule ought to say that to qualify as an
10 offer it has to be for a lump sum certain.

11 MR. GILSTRAP: Chip, why don't we do this?
12 Why don't we vote first --

13 CHAIRMAN BABCOCK: Hold it, hold it, hold it.
14 Let Frank talk.

15 MR. GILSTRAP: Why don't we vote first of all
16 to decide whether we want to include nonmonetary terms or
17 not, and then if we decide that we want only monetary terms
18 then let's vote on whether or not we just want a straight
19 lump sum or we want to have some kind of payout.

20 MR. SOULES: Or whether we want to just say
21 that this does not apply to actions that include any claims
22 for nonmonetary relief.

23 MR. GILSTRAP: But that's different, Luke.
24 What we're talking about here is settlement of a monetary
25 claim tied to nonmonetary terms. That's the problem with

1 that.

2 MR. SOULES: Well, you're not going to have
3 that unless you're suing for it in your lawsuit.

4 CHAIRMAN BABCOCK: John Martin.

5 MR. MARTIN: I'm in favor of a lump sum
6 monetary term, but a defendant has to be able to get a
7 release signed to put the defendant in the same position as
8 if you pay a judgment. That's a nonmonetary term, but that
9 needs to be made clear or some lawyers are going to say, "I
10 don't have to sign a release."

11 HONORABLE DAVID B. GAULTNEY: I think that's
12 the reason -- may be the reason the Federal rule is housed
13 in terms of offer of judgment, you know, because you get a
14 judgment, so but this is offer of settlement, so I think
15 you should get the release.

16 MR. LOW: If there's an offer and they're one
17 of the insurance companies where they've sued under Stowers
18 and they made an offer of policy limits but they included
19 that they had to have an indemnity and the court held that
20 that wasn't -- you know, that was outside the policy limits
21 and, therefore -- and so we get into the same trouble when
22 we start adding something other than just dollars.

23 CHAIRMAN BABCOCK: Okay. Sarah.

24 HONORABLE SARAH DUNCAN: I don't understand.
25 Let me just say first, instead of "financial terms" we

1 could just say "the amount if paid now in cash" in this
2 provision, but if only the defendant can start this ball
3 rolling and the plaintiff has a hundred thousand-dollar
4 monetary claim and the defendant offers 500,000, but the
5 plaintiff won't settle without an apology or whatever,
6 we're going to shift fees on that plaintiff even though
7 they haven't gotten the one thing they want most out of a
8 lawsuit, the lawsuit, which is an apology.

9 HONORABLE SCOTT BRISTER: Right. Because
10 we're trying this lawsuit because you wanted an apology,
11 and no jury can order the defendant to apologize. That's a
12 waste of time. If you can trade off some money by cutting
13 your fee and getting an apology and settle it, fine, but if
14 we're trying this case over an apology, we can't order it
15 anyway.

16 HONORABLE TOM GRAY: And the defendant still
17 doesn't get his litigation costs because there's no dollars
18 involved in the lawsuit; therefore, there is no fee
19 shifting because it's capped at the maximum of plaintiff's
20 recovery.

21 MR. JACKS: I imagine that case is going to
22 settle anyway because when the plaintiff comes back and
23 says, "Well, I'll take 75,000 and an apology," I bet they
24 give them an apology.

25 CHAIRMAN BABCOCK: There are some clients

1 that --

2 HONORABLE SCOTT BRISTER: That's dickering
3 over price.

4 CHAIRMAN BABCOCK: Right.

5 PROFESSOR DORSANEO: I'm back to my first
6 question. Does this statute apply to cases that involve
7 monetary claims coupled with nonmonetary claims?

8 MR. SOULES: Yes, it does.

9 PROFESSOR DORSANEO: Where does it say that?

10 CHAIRMAN BABCOCK: Where does it exclude it?

11 HONORABLE TRACY CHRISTOPHER: It doesn't
12 exclude it.

13 MR. SOULES: Because it talks about actions
14 and it talks about claims. Actions are one thing. That's
15 causes of action. That's a broader term than claims, and
16 what you're settling are claims.

17 PROFESSOR DORSANEO: Well, claim has got --
18 is monetary claim. Settlement offer means an offer to
19 settle or compromise a claim. Granted some of the things
20 that are excluded arguably are not necessarily monetary
21 claims for monetary damages.

22 MR. SOULES: But somebody said that the
23 purpose of this was to settle the entire case.

24 PROFESSOR DORSANEO: Well, I'm reading it. I
25 don't see where it says that.

1 MR. SOULES: I don't know where that is
2 either, but somebody said that.

3 PROFESSOR CARLSON: No, no. We talked about
4 that as a committee for a long time. I think the
5 Legislature by carving out the monetary claims is
6 envisioning piecemeal settlement.

7 PROFESSOR DORSANEO: Me, too. Me, too.
8 That's what I think this statute means.

9 PROFESSOR CARLSON: I think that you can come
10 in, unless we structure this otherwise, and offer to settle
11 all monetary claims; and if that offer is rejected that you
12 can shift costs and you don't have to offer to settle the
13 nonmonetary claims insofar as affecting the fee shifting.

14 CHAIRMAN BABCOCK: What if we said this:
15 "State the monetary amount if paid now in cash by which the
16 claims may be settled and must offer to settle all monetary
17 claims raised by the pleadings between the offeror and the
18 offeree."

19 MR. SOULES: When?

20 CHAIRMAN BABCOCK: Now in cash.

21 MR. SOULES: I thought you said --

22 CHAIRMAN BABCOCK: "If paid now in cash."

23 MR. SOULES: "If paid now in cash."

24 MR. MARTIN: How about "settle all monetary
25 claims in exchange for a full and final written release"?

1 MR. YELENOSKY: No, it can't be full and
2 final if it's coupled with nonmonetary.

3 PROFESSOR DORSANEO: Sometimes you don't want
4 a release, or can't get one.

5 CHAIRMAN BABCOCK: "Settlement offer must be
6 in writing, state that it's made under the rule; state the
7 monetary amount if paid now in cash by which the claims may
8 be settled; and must offer to settle all monetary claims
9 raised by the pleadings between the offeror and the
10 offeree; state the deadline by which the settlement offer
11 must be accepted, which must be a date at least 14 days
12 after the offer is served; and be served upon all parties
13 to whom the settlement offer is made."

14 MR. SOULES: "To be paid now in cash."

15 MR. JACKS: Yeah.

16 PROFESSOR DORSANEO: Mr. Chairman?

17 CHAIRMAN BABCOCK: "To be paid now in cash."
18 Okay. Yes.

19 PROFESSOR DORSANEO: I think maybe you're
20 doing this, but I think that settlement offer ought to be a
21 settlement offer to settle monetary claims, but we've
22 talked about settle the whole case, et cetera.

23 MR. YELENOSKY: Settle all the monetary.

24 PROFESSOR DORSANEO: I think it's only
25 workable if you just restrict it to the monetary claims to

1 be settled by the payment of money.

2 PROFESSOR CARLSON: Yes, and that's what it
3 was --

4 CHAIRMAN BABCOCK: "'Claim' means a request,
5 including a counterclaim, cross-claim, or third-party claim
6 to recover monetary damages." Defined term.

7 PROFESSOR DORSANEO: I know. I'm just saying
8 what you read -- you talked about claims and then you
9 talked about monetary claims.

10 CHAIRMAN BABCOCK: Yeah, but we're going to
11 have a -- we've already said we're going to have a footnote
12 that has the query comment that Elaine included.

13 MR. HAMILTON: The problem with that, Chip,
14 is that that puts the defendant at a decided disadvantage
15 because most defendants are not going to want to settle
16 claims unless it does the whole thing.

17 CHAIRMAN BABCOCK: Yeah.

18 MR. HAMILTON: The whole lawsuit.

19 PROFESSOR CARLSON: But that's the
20 legislative calling. I don't know that we can do anything
21 about that.

22 CHAIRMAN BABCOCK: This is going to settle
23 most cases. So once you get the money right, I mean, the
24 other things tend to get resolved. Most of the time.

25 PROFESSOR DORSANEO: I would say "no" to the

1 query, though. The query has got to be out of the
2 question.

3 MR. MUNZINGER: Which contemplates that the
4 settlement must be paid now in cash or state the value
5 because there are some people that are not going to be able
6 to come up with an acceptable amount of cash in one lump
7 sum. That may require 18 months or whatever to gather it
8 or what have you, and the plaintiff or defendant may be
9 willing to wait 18 months.

10 CHAIRMAN BABCOCK: Yeah. That's why I
11 originally had "if," but Luke thought it should be "if paid
12 now in cash" would incorporate --

13 MR. JACKS: It takes you back to the
14 trillion-dollar 10,000 years --

15 MR. LOPEZ: Well, if paid no later than three
16 years from now is cash.

17 MR. JACKS: I think you need some --

18 CHAIRMAN BABCOCK: "Within the time agreed by
19 the parties"?

20 MR. MUNZINGER: Again, if you state the
21 amount, method, and terms of payment to include method and
22 time of period, if I'm silly enough to accept an offer that
23 I'm not going to get paid, I don't know that the purpose of
24 the rule is served by restricting creativity in the parties
25 to a lawsuit.

1 PROFESSOR CARLSON: You can't offer to pay
2 something 30 years from now and shift fees --

3 MR. GILSTRAP: Chip?

4 PROFESSOR CARLSON: -- because the plaintiff
5 or the other side doesn't accept it.

6 MR. JACKS: Right. That's the problem.

7 CHAIRMAN BABCOCK: Frank.

8 MR. GILSTRAP: My feeling is if they want to
9 be creative, they can move outside the settlement regime
10 and try to settle the case. That's where that's really
11 going to go on; and if the numbers are right, then -- and
12 they say, you know, "I like this number, but you know, I
13 can't pay it out," they can try to settle the case outside
14 the regime; but once you start putting terms in there as
15 part of the offer of settlement regime I think the problem
16 is going to become unworkable.

17 CHAIRMAN BABCOCK: Yeah, Peter.

18 MR. SCHENKKAN: I think that's right, and I
19 think that Tommy's notion tries to address the problem that
20 we get put in if the defendant does make an offer. We try
21 to settle the number and then we're worried about what the
22 judge does if the offer is not accepted, and we're now
23 having to compare numbers, but the defendant's number is
24 not really a cash number. I think we just ought to set a
25 cap on it and say it's a number for an amount in cash that

1 will be paid no less than 90 days from, and then I think we
2 need a date.

3 Since we're talking the settlement of a case
4 that isn't going to be tried until a trial date that's
5 farther down the road maybe you can build something more
6 than 90 days from the date of the offer maybe, but we've
7 got to draw a cap that's fairly tight and works out to be
8 no longer than a short number of days after the trial, and
9 that's the basis on which these numbers are going to be
10 compared if the offer is not accepted. If people like that
11 number then it's going to people to see if they can work
12 out the rest of it.

13 MR. JACKS: Would you make it X days from
14 the date of acceptance --

15 MR. SCHENKKAN: Sure.

16 MR. JACKS: -- and that's the point at which
17 you've got the deal?

18 MR. SCHENKKAN: Yeah. Yeah.

19 CHAIRMAN BABCOCK: So it could say, "State
20 the monetary amount to be paid now in cash and in no event
21 more than 90 days after acceptance."

22 MR. EDWARDS: 90 is -- my god, this is -- if
23 you're talking about a 10 million-dollar offer 90 days
24 is --

25 CHAIRMAN BABCOCK: I'm not wed to that days.

1 It's just Tommy -- that's what your buddy here said.

2 MR. EDWARDS: I didn't hear him say 90 days.

3 MR. JACKS: I said 30.

4 CHAIRMAN BABCOCK: You said 30?

5 MR. JACKS: I said 30.

6 CHAIRMAN BABCOCK: All right. 30 days.

7 MR. JEFFERSON: What do you do about John's
8 concern about a release? What do you get for the money
9 you're paying? I mean, is that --

10 MR. DAWSON: Can't we include that in the
11 comment language? We are going to have comments that it
12 can't be conditional.

13 MR. JACKS: Yeah. I think you can include it
14 in the rule and say that if -- that the offer may include a
15 demand for a release of all monetary claims that are
16 covered by it. That's a nonmonetary term that we are
17 saying, yes, you can include and still be under the rule.

18 MR. JEFFERSON: Can you get an agreed
19 judgment or a dismissal with prejudice or you include the
20 lawsuit as part of the -- that might be important to a
21 defendant.

22 CHAIRMAN BABCOCK: What if it said this:
23 "State the monetary amount to be paid now in cash, and in
24 no event more than 30 days after acceptance, by which the
25 claims may be settled and must offer to settle all monetary

1 claims raised by the pleadings between the offeror and
2 offeree in exchange for a full release of the claim."

3 PROFESSOR DORSANEO: Well, that's too simple.
4 You don't necessarily want a release.

5 CHAIRMAN BABCOCK: Well, I'm sorry. I know
6 simplicity is not our goal.

7 PROFESSOR DORSANEO: You may want to cover it
8 not to execute. You may want a variety of different
9 things. A release may not be appropriate in the context of
10 the layers of insurance carriers. It's just you just can't
11 make the world that simple.

12 MR. MEADOWS: Well, can't you waive that
13 then?

14 PROFESSOR CARLSON: You don't have to. The
15 defendant doesn't have to request the release.

16 MR. DAWSON: How about "release or dismissal
17 of prejudice of such claims"?

18 PROFESSOR CARLSON: Huh. How about that?

19 MR. EDWARDS: Every defendant wants to be
20 sure that they are protected from any statutory liens or
21 other liens and subrogation, et cetera.

22 MR. LOPEZ: There is a definition of
23 settlement offer at the very beginning that says,
24 "'Settlement offer' means an offer to be made in compliance
25 with this chapter," so what we are really doing is fleshing

1 out what we mean by that.

2 MR. YELENOSKY: We have to make sure
3 plaintiff has made equitable claims as well and gets an
4 offer from the defendant which under this rule if he or she
5 or it is trying to invoke cost shifting can only be about
6 money, and I'm not sure -- maybe somebody here smarter can
7 think through all this, how that's going to work if you
8 have a plaintiff who makes a claim for back wages and
9 reinstatement. The defendant comes back and says, "I don't
10 want to give you the job back, but I will give you this
11 amount of money." End of story. Does that invoke the cost
12 shifting? Because they have now made a claim for all --
13 they have made an offer for all the monetary claims, plus a
14 monetary offer for the injunctive claim; or does the
15 plaintiff get to say, "No, you can't include a monetary
16 offer in your fee shifting offer"? That voids it in terms
17 of fee shifting.

18 HONORABLE SARAH DUNCAN: Chip, that's what I
19 was going to suggest earlier, that we add "monetary" before
20 "claims" in subsection (3).

21 PROFESSOR DORSANEO: Yes. That's what I was
22 saying.

23 HONORABLE SARAH DUNCAN: Oh, sorry.

24 MR. YELENOSKY: But from the defendant's
25 point of view it's something that can be reduced to a

1 monetary claim. Perhaps from the plaintiff's point of view
2 it remains an injunctive claim and they don't want to
3 settle it for money. They want the job. Does the
4 defendant get to invoke the fee shifting?

5 PROFESSOR CARLSON: Yes, unless we exempt out
6 cases that have both monetary and nonmonetary claims.

7 MR. SOULES: Amen.

8 MR. YELENOSKY: But you can only make an
9 offer on monetary claims.

10 PROFESSOR CARLSON: Correct.

11 MR. YELENOSKY: So if a defendant makes an
12 offer on a nonmonetary claim which is injunctive relief, is
13 it within the fee shifting?

14 MR. GILSTRAP: No.

15 PROFESSOR CARLSON: No.

16 MR. YELENOSKY: So the answer is, no, the
17 defendant can't do that.

18 PROFESSOR CARLSON: Not on the nonmonetary.

19 MR. GILSTRAP: Not and invoke fee shifting.

20 MR. YELENOSKY: Not and invoke -- okay. I
21 think that's right, but I'm not sure we were thinking about
22 that when we were raising it.

23 CHAIRMAN BABCOCK: Carlos.

24 MR. LOPEZ: Well, the real problem I think is
25 when the case doesn't settle because, I mean, if it

1 settles, it settles, and this is all for naught. If it
2 doesn't settle, you've -- we're trying prospectively to
3 help the trial judge figure out whether the judgment is
4 significantly less favorable, and that's the bottom line,
5 and that is something that, you know, there's a trillion
6 cases in different fact patterns that are going to
7 determine that. Just like the judge who has to decide who
8 really won, who really prevailed in a case, to see who the
9 prevailing party is for a bunch of other analyses, I think
10 they're going to have to do the same thing here. We're
11 just going to have to trust the trial judge to get it right
12 on this specific situation.

13 CHAIRMAN BABCOCK: Skip Watson.

14 MR. WATSON: I was just going to answer
15 Steve's question. To me it appears that if it's carefully
16 targeted at one specific chunk of claims that we can deal
17 with, that we can get on, and that the Legislature can deal
18 with, and that is a claim for money damages; and even if
19 that claim for money damages has declaratory relief or
20 injunctive relief proposed or other things tacked onto it,
21 that doesn't matter.

22 We're going to carve out the claim for money
23 relief, but to settle that, the rest of the stuff can go.
24 The defendant cannot get greedy and try to put a dollar
25 value on a claim for declaratory relief or a claim for

1 injunctive relief and say, "Okay, I have converted your
2 nonmonetary claim which you pleaded into the monetary claim
3 which I wish you had pled." We're not going to let that
4 happen, but I think we're in agreement here that it's got
5 to be on very close to what you're talking about here,
6 Chip. Monetary claims, we can get that done for a release
7 or dismissal of judgment as to that monetary claim; and if
8 they want to stay and fight over declaratory relief or
9 apology or whether the sunrise should be called pink, they
10 can, without the -- but this isn't going to get invoked.

11 CHAIRMAN BABCOCK: Yeah. Judge Brister.

12 HONORABLE SCOTT BRISTER: Since the statute
13 defines what a settlement offer must and just says "state
14 the terms by which the claims must be settled," if what I'm
15 hearing is correct, if you want to settle and put a lot of
16 other things in, it doesn't seem we ought to disqualify it
17 at that stage saying what can and can't be in your offer
18 and how long it has to be paid and how quick, especially
19 for like asbestos cases and some of these other things. I
20 mean, sometimes the payout -- that will be a deal buster if
21 you've got to pay it all out in 30 days, because the
22 company will be bankrupt.

23 It seems like we ought to -- to me we ought
24 to -- because the statute specifically says, "State the
25 terms by which claims will be settled," we ought to say the

1 same thing and then deal with this in rejection and say
2 that it's not considered a rejection if you accept the
3 monetary amounts.

4 CHAIRMAN BABCOCK: Settlement offer --

5 HONORABLE SCOTT BRISTER: In other words, we
6 get over to rejection, which is not addressed anywhere in
7 the statute, in 167.9, and you just say it's not considered
8 a rejection if you accept the monetary part of the
9 settlement, put anything you want to in the offer and just
10 quote exactly what the statute says about the offer and
11 deal with it on the rejection.

12 PROFESSOR DORSANEO: Or on the acceptance.

13 HONORABLE SCOTT BRISTER: Or acceptance.

14 MR. YELENOSKY: Regardless of the timing of
15 the payment?

16 CHAIRMAN BABCOCK: Yeah, Luke.

17 MR. YELENOSKY: So it is a rejection if you
18 say the money is fine but getting it in 20 years is not
19 fine. That's a rejection.

20 MR. SOULES: We always have a tendency and
21 have for many, many years of trying to write rules to
22 govern a hundred percent of the cases that will fit and
23 work for 5 or 10 percent of the cases that are really hard
24 to fit into what we're working on, but most personal injury
25 cases, most breach of contract cases, most of the types of

1 cases that are hanging out there in the courts that need
2 resolution are just straight old monetary damage cases.

3 An easy way for us to get through this is to
4 simply say that this does not cover actions that include
5 both monetary and nonmonetary damages. Now, what have we
6 excluded? Well, we excluded the 10 or -- 5 or 10 percent
7 of the cases that are out there that are complicated cases
8 and are going to be hard to figure out how to use this rule
9 anyway and probably going to baffle judges on how to deal
10 with them. That's the first part of what I want to say.
11 If we could just get this to monetary damage cases and
12 cases that only deal with monetary damage cases, then we
13 will be way on down the road here.

14 CHAIRMAN BABCOCK: Well, Luke, if you do
15 that, though, I mean, think of this case --

16 MR. SOULES: And cases don't settle -- most
17 cases don't settle piecemeal. When we start talking about
18 settling the monetary damage pieces -- this is part two.
19 We start talking about settling the monetary damage pieces
20 of cases that have other problems such as intellectual
21 property cases. Some of the cases fortunately they've
22 taken out like family law cases, so we don't have to worry
23 about those, but intellectual property cases, certain
24 employment cases, some of these other cases you can't
25 really settle them piecemeal because the issues are so

1 intertwined that they need to be settled in a package.

2 So what we're going to say, I suppose what
3 we're trying to do is write a rule that says if you
4 reject -- even though a case should be settled in a package
5 and that's the best way, by far the best way to resolve the
6 issues between the parties, if somebody doesn't settle the
7 non -- the monetary damage piece of that, at a certain time
8 fees shift, and that may be the tail wagging the dog. That
9 may be the small issue in the case, particularly in some IP
10 cases. I'd like to see us just get to cases that involve
11 only monetary damages, get this rule written. We can write
12 it pretty easy if we do that, get some experience with it,
13 and then see what we can do with these other problems, and
14 I don't think we are going to have a problem.

15 HONORABLE SCOTT BRISTER: But, Luke, then you
16 allow -- any party can opt out of this whole thing by
17 adding a dec action.

18 MR. GILSTRAP: No. No. We talked about that
19 earlier, Judge. That is theoretically true, but the point
20 is the dec action, the judge can just dismiss it because if
21 it's just a damage case the dec action doesn't belong in it
22 to begin with.

23 MR. SOULES: That's a summary judgment case.

24 MR. GILSTRAP: You know, you just get rid of
25 it and dismiss it because you're not supposed to file a dec

1 action and couple it with your damage case.

2 HONORABLE SCOTT BRISTER: Mirror image, but,
3 yeah, but not all dec actions are mirror images.

4 MR. GILSTRAP: I understand. I understand.

5 MR. SOULES: Well, maybe the world is going
6 to just mess this all up because we leave them the option
7 to file a dec action and therefore nullify the statute, or
8 maybe they won't. We don't know. I don't think they will.
9 I think people are going to try to use this statute, and if
10 we could cover 80 or 90 percent of the cases that it's
11 designed -- that are out there in the courts that need to
12 be resolved by use of this statute then we can probably
13 meet our deadlines that we need to meet with this.

14 MR. JEFFERSON: Now we're talking.

15 MR. SOULES: But if we're going to try to
16 write for the other 5 or 10 percent in hopes of figuring
17 all that out, I think we're just going to get into a morass
18 that's going to be more unworkable than we can deal with,
19 than even the statute is.

20 CHAIRMAN BABCOCK: Carl had his hand up
21 first.

22 MR. HAMILTON: I want to second what Luke
23 says and add to that. Maybe, Tommy, you can change my
24 mind, but I think one of the purposes of this is to get rid
25 of the lawsuit. If we're just going to do it piecemeal,

1 we're not going to be getting rid of the lawsuit. If we
2 limit this to monetary claims and exclude all others, we
3 can get rid of the lawsuit.

4 MR. SOULES: Actions that involve only
5 monetary claims.

6 HONORABLE SCOTT BRISTER: Luke is backing up
7 to the exclusion part of the statute.

8 CHAIRMAN BABCOCK: Right. Luke's talking
9 about excluding --

10 MR. HAMILTON: I understand.

11 CHAIRMAN BABCOCK: I've got a trade secret
12 case, and I mostly want damages, but I also want to get my
13 trade secrets back, and I want an injunction --

14 MR. HAMILTON: Not covered.

15 CHAIRMAN BABCOCK: -- against all their
16 engineers using it in the future. Then you say that's not
17 covered.

18 MR. HAMILTON: That's not covered.

19 MR. GILSTRAP: Right.

20 CHAIRMAN BABCOCK: You say that's not a
21 covered action.

22 MR. HAMILTON: It's got to be a strict
23 monetary claims suit, and that's it, and then the
24 settlement gets rid of the lawsuit.

25 CHAIRMAN BABCOCK: And, you know, and who's

1 to say, I mean, you say, okay, if you file a dec action
2 it's not any good. Okay. But if you have excluded cases
3 that ask for nonmonetary relief, are you going to say
4 nonmonetary relief that's ultimately successful when the
5 trial judge finally grants summary judgment? That's a
6 problem.

7 MR. SOULES: Yes, for now. If it's got
8 monetary and injunctive relief and --

9 CHAIRMAN BABCOCK: And, see, the plaintiff,
10 the plaintiff goes into this litigation, if they've been
11 listening to our debates, knowing that the Legislature has
12 done something that is not even-handed as to plaintiffs.
13 So plaintiffs are going to want to opt out of this if they
14 can, and it's easy. It's a paragraph if we do this. It's
15 a paragraph to say, "And, by the way, I also want an
16 injunction" or "I also want declaratory relief" or I want
17 some other equitable relief and then they're out of this
18 rule. I don't think that's smart.

19 MR. GILSTRAP: Chip, let me say this. You
20 know, you may be right on that, but I think the reason that
21 we got back such a skeletal rule from the Legislature is,
22 is that they couldn't figure a lot of this out, and a lot
23 of it can't be figured out and certainly can't be figured
24 out without any experience. I mean, there's a lot to what
25 Luke says about trying to get something in place that deals

1 with your average car wreck case and getting in place
2 having only monetary claims -- restricting it only to
3 monetary claims, having your offer of settlement involve
4 only monetary offers, and put it out there and let it work.
5 Otherwise --

6 HONORABLE SCOTT BRISTER: Yeah, but we're
7 talking about two different things. We're talking about
8 let's just give them carte blanche if you add anything but
9 damages you're out of the whole thing versus pay no
10 attention for shifting fees in settlement offers to money.
11 Pay no attention to anything except the money. That's easy
12 enough to draft.

13 MR. SOULES: You've got to write on it, too,
14 Judge. All you've got to do is you've got to file a
15 summary judgment and say, "Money will take care of all
16 these problems. No injunctive relief is appropriate."
17 Summary judgment granted. "I made a monetary offer back
18 then."

19 HONORABLE TOM GRAY: There comes the problem
20 in making sure that summary judgment gets granted.

21 MR. SOULES: And if it doesn't get granted
22 then this rule doesn't work.

23 MR. EDWARDS: 42.002 says --

24 MR. LOPEZ: I think there's the problem as to
25 the way things are said. Isn't part of the penalty that

1 gets shifted is all these litigation costs which they have
2 incurred are reasonable? Well, how does a judge determine
3 that if the reason it didn't settle is because of this
4 injunctive piece that they stuck in? This only makes sense
5 in the context of cases that are about the money, period.
6 So we're fixing a bunch of stuff -- we're trying to fix
7 unsuccessfully stuff that I don't think the Legislature bit
8 off, number one.

9 Number two, there is a way to fix, I think,
10 the guy who just frivolously adds injunctive relief so that
11 he won't get in it. Put in something that says if the
12 judge finds it was frivolous and it was done just to avoid
13 fee shifting, it doesn't work. You still have fee
14 shifting.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: We have practiced -- Luke is right.
17 We practiced -- a lot of us practiced a long time without
18 this rule, you know, and for years we got along fairly
19 well. So we're trying maybe to put too much into it, but
20 if we put just monetary and it needs to be added to or
21 something, but we lived without the whole thing and
22 everybody got along pretty good. So I think we could live
23 with just monetary, something that's definite, and aren't
24 most states -- isn't that the Florida and the other rules
25 are monetary? Aren't they limited?

1 PROFESSOR CARLSON: A lot of them are, yeah.

2 CHAIRMAN BABCOCK: But not in the way you're
3 talking about.

4 MR. LOW: Pardon?

5 CHAIRMAN BABCOCK: But not in the way you're
6 talking about, excluding cases that have nonmonetary claims
7 in them.

8 MR. LOW: If you exclude cases that have
9 nonmonetary then that only leaves you monetary. And so
10 that's what I'm saying, and we would be consistent with
11 most other states. It would be something that's pretty
12 definite. You can look at the award and the offer, and you
13 can compare them, and you know whether you hit the jackpot
14 or not.

15 MR. EDWARDS: 42 --

16 CHAIRMAN BABCOCK: Justice Jennings.

17 HONORABLE TERRY JENNINGS: Maybe I'm missing
18 something here, but just looking at the plain language of
19 this, the applicability of this that's provided, "The
20 settlement procedures provided in this chapter apply only
21 to claims for monetary relief." And then settlement offer
22 means "an offer that" -- means "an offer to settle or
23 compromise a claim made in compliance with this chapter."

24 Claim. "'Claim' means a request, including a
25 counterclaim, a cross-claim, or third party claim to

1 recover monetary damages." There's a reason they use the
2 word "claim" in here. They're not talking about the
3 lawsuit or anything like that. They're talking about
4 claims for money damages, and it just appears to me that
5 we're really overanalyzing this, that by its plain language
6 that's all this is talking about, and the offer itself has
7 to be an offer, and it can't be conditioned on anything
8 else other than a money offer to settle the damage for
9 money damages. That's all it's talking about, and I wonder
10 if we're really overanalyzing this.

11 CHAIRMAN BABCOCK: Peter.

12 MR. SCHENKKAN: I want to second that and say
13 that I think the concern that this is unfair in a case in
14 which the plaintiff hasn't tried to game the system by
15 putting in an artificial nonmonetary claim but the
16 nonmonetary claim is real and important and may even be
17 more important than the case, getting the trade secret back
18 or whatever, than the monetary claim. I think we still
19 make the statute work by having only the monetary claim be
20 settled -- be subject to the fee shifting part of the
21 settlement. That's not terribly unfair because under your
22 hypothesis that the really important thing in the case is
23 getting the trade secret back anyway, that's because there
24 isn't much actual monetary damage, and remember, the fee
25 shifting is capped at a portion of the monetary damage.

1 So the fee shifting tail in that case is not
2 going to get wagged. I mean, the case is not going to get
3 wagged by the fee shifting tail there. You're going to be
4 able to make an offer to settle the not-very-important
5 monetary part of it, and you're going to get your fee
6 shifted if that part of the settlement is rejected when the
7 monetary part comes in significantly better, and y'all are
8 going to keep on fighting about the trade secret if you
9 can't work that out.

10 HONORABLE TERRY JENNINGS: And it occurs to
11 me that if you're the defendant and you're trying to
12 condition your offer on some other aspect of the case,
13 you're screwing yourself because you're taking yourself out
14 of this because you're making your offer conditioned on
15 something which by definition does not fall under the
16 definition of "settlement offer."

17 CHAIRMAN BABCOCK: Frank.

18 MR. GILSTRAP: There's one problem with what
19 you said, Pete, and that is that the attorney's fees that
20 you're going to be shifting are -- or if the case is really
21 about trade secrets are going to be generated largely by
22 the trade secret aspect of the case. So what are we going
23 to try to do? Are we going to try to split that up and say
24 how much of that is attributable to the trade secret and
25 how much is attributable to the damage case? You know, if

1 the case is really about trade secrets, that's what the
2 lawyer's fees are going to be about, and that's what's
3 going to be shifted. I think there's a problem with that
4 analysis.

5 CHAIRMAN BABCOCK: But, Frank, the courts do
6 that all the time.

7 MR. SOULES: Not very well.

8 MR. GILSTRAP: In theory. In theory.

9 CHAIRMAN BABCOCK: Not very well, but they do
10 do it. You have a contract claim in which you're entitled
11 to attorney's fees and you've got a tort claim that you're
12 not.

13 MR. GILSTRAP: And every plaintiff gets up
14 and stands up and says they are inextricably intertwined.

15 CHAIRMAN BABCOCK: I've heard that. Justice
16 Duncan.

17 HONORABLE SARAH DUNCAN: I'd like to vote on
18 Luke's proposal and then take a break.

19 CHAIRMAN BABCOCK: What is Luke's proposal
20 again?

21 HONORABLE SARAH DUNCAN: To exempt cases that
22 involve nonmonetary relief.

23 MR. HAMILTON: I'll second.

24 MR. SOULES: Actions that involve any claim
25 for nonmonetary relief.

1 CHAIRMAN BABCOCK: Bill, you second it?

2 MR. EDWARDS: No, well --

3 CHAIRMAN BABCOCK: Carl seconds it.

4 MR. EDWARDS: No, I have been trying to
5 iterate what they said down here about this applying only
6 to claims for monetary damages. The problem comes if
7 there's something else in the offer other than a monetary
8 offer, you can't figure out what 80 percent or 120 percent
9 of the offer is. If we mess around -- if we can come to
10 how to determine that and say that you cannot look beyond
11 the four corners of the offer, if an offer requires
12 extraneous evidence or extraneous looking of any kind such
13 as the reduction to present value or other things, it is an
14 offer outside of the system and then I think the problems
15 are taken care of.

16 It doesn't matter whether you've got 10
17 cases, 10 claims for trade secrets and one for \$10,000
18 damages. This deals with the 10,000-dollar damage claim,
19 and if you make an offer to settle it for \$7,500, that's
20 the amount you're talking about that you add in there and
21 give up your trade secrets or return the trade secrets or
22 it's not an offer.

23 CHAIRMAN BABCOCK: Yeah.

24 MR. EDWARDS: So if we look at -- if we look
25 at the 120 percent or the 80 percent in determining that

1 only by the face of the offer in dollar amount on the face
2 of the offer and you don't have to look beyond that. If
3 you have to go and figure out what -- you know, you're
4 going to pay it out over 20 years, that takes extraneous
5 evidence. You've got to have an economist or somebody come
6 in and say what the present value of the money is.

7 CHAIRMAN BABCOCK: Yeah. There are two ways
8 -- I think what what you're saying is there are two ways to
9 attack it. One is the way you just articulated, that the
10 settlement offer has got to be in compliance with the
11 chapter and only deal with money so you can measure it.
12 The other way to attack it is Luke's way, which you just
13 say, hey, if the case involves anything other than money,
14 you just exempt the case. Even though it does also involve
15 money it's outside the rule.

16 MR. LOW: But a claim for damages for money,
17 it doesn't answer when it will be paid.

18 MR. GILSTRAP: That's a different question,
19 though.

20 CHAIRMAN BABCOCK: Yeah. That's a different
21 question.

22 MR. LOW: That's a different question, okay.

23 CHAIRMAN BABCOCK: And Sarah either seconded
24 or did something --

25 HONORABLE SARAH DUNCAN: I did second.

1 CHAIRMAN BABCOCK: -- so Luke's proposal of
2 exempting all actions that have a claim for monetary relief
3 and a claim for nonmonetary relief are exempted from this
4 rule, that's what we're voting on. Luke says -- Luke's
5 idea is that we're going to exempt from the Rule all
6 actions that have a claim for nonmonetary relief coupled
7 with a claim for monetary relief. Everybody that thinks we
8 ought to exempt that class of cases, raise your hand.

9 If you're going to raise them, raise them.

10 PROFESSOR DORSANEO: Meaning exempt cases
11 that include both, right?

12 CHAIRMAN BABCOCK: Right.

13 MR. SOULES: Well, if they include
14 nonmonetary relief. I don't care whether they have
15 monetary.

16 CHAIRMAN BABCOCK: Right. All right. You
17 can put your hands down. Now everybody that's against that
18 proposal.

19 Luke's proposal fails by a vote of 20 to 11,
20 so we will take a 10-minute break.

21 (Recess from 3:32 p.m. to 3:51 p.m.)

22 CHAIRMAN BABCOCK: All right. The record is
23 back open and we're now very optimistic about moving
24 forward quickly because Luke has left the building.

25 (Laughter.)

1 CHAIRMAN BABCOCK: All right. Judge
2 Christopher has solved our problem over the break, which is
3 terrific, so read us the solution which will garner
4 unanimous support.

5 HONORABLE TRACY CHRISTOPHER: Rather than
6 trying to say what should be in the offer, my thought was
7 to say, "Any conditions added to the settlement offer other
8 than a release of the monetary claims will prevent the
9 application of the award of litigation costs."

10 CHAIRMAN BABCOCK: How about that?

11 PROFESSOR CARLSON: It's neat. It's snappy.

12 CHAIRMAN BABCOCK: Snappy?

13 MR. EDWARDS: It does not take care of the
14 problem if the offer includes a monetary payout over a
15 period of time and reduces the present value for purposes
16 of the 120 and the 80 percent that's required to --

17 HONORABLE TRACY CHRISTOPHER: I think that
18 would be a condition.

19 PROFESSOR CARLSON: I do, too, under what you
20 just said.

21 HONORABLE TRACY CHRISTOPHER: If we stick
22 with the first language for payment --

23 CHAIRMAN BABCOCK: What does it say next?

24 MR. EDWARDS: Present payment?

25 HONORABLE TRACY CHRISTOPHER: Yeah, present

1 payment, but not put like 30 days or 60 days or 90 days,
2 and then we say "any condition."

3 MR. PEMBERTON: Quick question. At what
4 point does the compliance or noncompliance of HB 4 get
5 raised? Is this something that parties have to raise an
6 objection, or you just kind of wait 'til the end and gripe
7 about it then? I mean, maybe there might be some need,
8 perhaps a procedure for objecting, if you don't -- maybe if
9 you don't object you waive the issue and all of the
10 nonmonetary things can be on the table.

11 MR. LOW: It is something required and if you
12 don't meet the requirement then you don't come within them,
13 like a lot of other things. You know, I don't think you
14 have to -- it's a waiver.

15 CHAIRMAN BABCOCK: Let's stick with Judge
16 Christopher's language and, Bill, do you think that that
17 wouldn't solve the problem with response to your concern?

18 MR. EDWARDS: If we have present payment or
19 payment within 30 days, some reasonable period to complete
20 the paperwork, you know, that is traditional. I mean,
21 normally there's a period of anywhere from 10 to 30 days.

22 CHAIRMAN BABCOCK: So would you pick up my --
23 the language that I suggested, "State the monetary amount
24 to paid now in cash and in no event no more than 30 days
25 after acceptance"?

1 HONORABLE SARAH DUNCAN: "Or."

2 CHAIRMAN BABCOCK: "Or." "Or in no event."

3 Right.

4 MR. EDWARDS: "Or" what?

5 CHAIRMAN BABCOCK: "Or in no event."

6 MR. EDWARDS: Oh, "or in no event."

7 CHAIRMAN BABCOCK: "More than 30 days after
8 by which the claims may be settled. It must offer to
9 settle all monetary claims raised by the pleadings between
10 the offeror and offeree." And then add your language?
11 What about the release? What does your language cover?

12 HONORABLE TRACY CHRISTOPHER: I said "other
13 than a release of the monetary claims."

14 CHAIRMAN BABCOCK: Okay. So you cover the
15 release.

16 MR. EDWARDS: I think you need something to
17 make people comfortable on the other side of what I'm
18 usually on, you need something in there about statutory
19 leaves and subrogation of claims and subrogation or
20 something.

21 PROFESSOR CARLSON: Huh? What?

22 MR. EDWARDS: Why?

23 PROFESSOR CARLSON: What? I'm not following
24 you.

25 MR. EDWARDS: Well, first of all, if somebody

1 gets hurt, for example, and they get taken to the hospital,
2 the hospital can file what is a hospital lien.

3 PROFESSOR CARLSON: Isn't that dealt with,
4 Bill, in the legislation that carves that out?

5 MR. HAMILTON: Yes, it is.

6 MR. EDWARDS: Carves out of what?

7 HONORABLE TRACY CHRISTOPHER: Yeah, but most
8 defendants when they want to settle want to make sure
9 they're indemnified from any claim.

10 MR. EDWARDS: They want to make sure that
11 they're getting the lien taken out. They want to get rid
12 of the claim. They want to get rid of the subrogation.

13 HONORABLE DAVID B. GAULTNEY: They don't want
14 to pay twice.

15 MR. EDWARDS: That's right. You've got the
16 same thing -- you've got the same -- I understand that
17 that's dealt with in the medical portions of it. We're
18 talking about more than the medical portions here.

19 PROFESSOR CARLSON: Well, but HB 4 says the
20 litigation costs can be awarded at 50 percent of economic,
21 100 percent noneconomic, 100 percent exemplary.
22 Subtracting from the amount determined under (1), the
23 amount of any statutory or contractual liens in connection
24 with the occurrences or incidents.

25 MR. EDWARDS: I understand that. That has to

1 do with the amount of penalty, but as for before you get an
2 offer, there's not going to be an offer that doesn't
3 include a release and protection from the liens and so
4 forth. I'm just saying from a pragmatic standpoint it's
5 the same as in the Stowers area that's been laid out very
6 clearly by the Texas Supreme Court that in order for it to
7 be a valid offer there has to be a -- include an offer to
8 protect release from the liens and subrogation and other
9 things that are out there.

10 MR. LOW: Wouldn't that include a release
11 from all claims by, through, or under or subrogated to our
12 rights?

13 CHAIRMAN BABCOCK: Just add to Tracy's
14 language there.

15 MR. EDWARDS: We're just talking now what
16 kind of -- doesn't matter to me --

17 MR. LOW: Yeah.

18 MR. EDWARDS: -- personally if you get there
19 on just a release.

20 CHAIRMAN BABCOCK: But you're talking about
21 what kind of release it takes.

22 MR. EDWARDS: But if I'm a defendant, it
23 ain't fine with me.

24 MR. LOW: You've got a client and he says,
25 "Wait a minute. I thought you were going to take care of

1 that, too," and this says a release from all.

2 CHAIRMAN BABCOCK: Okay. If Judge
3 Christopher's language is okay otherwise, can we make it
4 perfect by just adding to the release language the
5 statutory liens and all that stuff?

6 MR. EDWARDS: Perfect, I don't know. But --

7 CHAIRMAN BABCOCK: Good enough for today?

8 MR. JEFFERSON: Should we also include
9 something about how the lawsuit gets disposed of, whether
10 it's by agreed judgment or by --

11 HONORABLE TRACY CHRISTOPHER: Well, I didn't
12 want to include that --

13 CHAIRMAN BABCOCK: No.

14 HONORABLE TRACY CHRISTOPHER: -- because
15 we're only settling the monetary claims.

16 CHAIRMAN BABCOCK: Right.

17 HONORABLE TRACY CHRISTOPHER: And the whole
18 lawsuit might still be -- I mean, other parts of the
19 lawsuit might be still alive.

20 MR. JEFFERSON: That part of the lawsuit. I
21 mean, the part of the lawsuit for monetary claims has to be
22 disposed of in some way. It might resolve the whole case,
23 but it might not.

24 CHAIRMAN BABCOCK: John Martin.

25 MR. MARTIN: Typically the release or

1 settlement agreement is going to say how you dispose of the
2 lawsuit, whether it's by judgment or order of dismissal.
3 It might be better to call it a settlement agreement
4 instead of a release to deal with the problem that Bill is
5 raising.

6 MR. LOW: But defendants are comfortable with
7 the word "release."

8 MR. MARTIN: "Release and settlement
9 agreement." I don't know. I don't know.

10 MR. EDWARDS: If you want the offers to be
11 made and litigation to be disposed of, I think that the
12 business about liens and stuff needs to be part of it.

13 MR. JEFFERSON: No doubt.

14 MR. EDWARDS: Otherwise you're --

15 HONORABLE TOM GRAY: "Substantially in the
16 form attached to here in Exhibit A." We will get to
17 Exhibit A later.

18 HONORABLE TRACY CHRISTOPHER: We could. That
19 would be kind of nice to have a standard release in a
20 settlement case and offer because we wouldn't argue about
21 it all the time.

22 CHAIRMAN BABCOCK: That's true.

23 HONORABLE SCOTT BRISTER: The idea is to
24 limit to it monetary. It seems to me we could probably
25 spend a lot of time thinking about additional conditions

1 that ought to be excepted out like release, indemnity, et
2 cetera. The easier way, again, would be to do it on a
3 rejection. It's not a rejection of the statute unless you
4 reject the monetary part. If you reject the indemnity but
5 accept the release, if you accept indemnity and release but
6 object to the apology, it's not a rejection unless you
7 reject the monetary demand.

8 MR. LOW: But does the monetary, Scott,
9 include the subrogation? I mean, it's still out there.
10 Where is it?

11 HONORABLE SCOTT BRISTER: Yeah, but, and if
12 you say -- if you say, yes, we'll -- "We accept your offer.
13 We'll pay 10,000," you have accepted the monetary demand
14 and then you add to it, "but we've got to be indemnified"
15 and make sure the liens and stuff like that, that's not a
16 rejection. You have accepted the monetary terms.

17 HONORABLE TRACY CHRISTOPHER: But if the
18 settlement offer doesn't go through because they didn't
19 agree on the liens, should we have fee shifting?

20 HONORABLE SCOTT BRISTER: My feeling is if
21 you have an agreement on the monetary terms, since the
22 statute only addresses monetary, you know, the fact that
23 you didn't accept apology or something like that ought to
24 be -- is a waste of time.

25 HONORABLE TRACY CHRISTOPHER: Certain things

1 need to be in there. The defendants or whoever pays the
2 money is entitled to certain considerations, the release,
3 the protections under the liens.

4 HONORABLE SCOTT BRISTER: And surely in most
5 cases those are not going to be a problem. I'm just
6 concerned if you make a list, once you start making the
7 list of things that can't be in the offer, conditions that
8 can be in the offer, you're going to always have to add to
9 it because more cases are going to come up with acceptable
10 things that ought to be added.

11 PROFESSOR CARLSON: Judge Christopher, were
12 you envisioning the situation at all where you've got a
13 joint offer? Defendant says, "I'll settle with Plaintiff 1
14 and Plaintiff 2 on these terms"; or the plaintiff says,
15 "I'll settle if Defendant 1 and 2 agree to X," and that
16 would be a condition outside?

17 HONORABLE TRACY CHRISTOPHER: Yeah. I think
18 so. I mean, I think you have to have -- people have to
19 know what the offer is to them and it has to be specific,
20 so if you're making an offer to two people --

21 PROFESSOR CARLSON: It's another condition.

22 HONORABLE TRACY CHRISTOPHER: It's a
23 condition. I don't think that that would be a fair
24 trigger.

25 MR. LOW: But to get to the offer, I mean,

1 when you make that monetary offer that tells what you get
2 for it and that includes to subrogate all claims by,
3 through, so it's not that you offer something in that.
4 You're just offering money, and the statute itself tells
5 you what you get. So the person making that offer knows
6 that -- or the person receiving it knows that he's got to
7 take care of releasing these liens and getting a release
8 for all of that. So it's not a question of an offer. It's
9 a question defining what you get.

10 HONORABLE TRACY CHRISTOPHER: True. You
11 could do it that way.

12 MR. LOW: And so then you don't muddy up the
13 water with anything but a money offer.

14 CHAIRMAN BABCOCK: So how would you propose
15 that language?

16 MR. LOW: The same way she did. I would put
17 that "include settlement of claims, all monetary claims,
18 by, for," or "anyone claiming by, through, or underneath or
19 through subrogation of my rights." And then when the
20 defendant -- when the plaintiff accepts that money, well,
21 he knows if he -- he knows what he's got to take care of,
22 and there's no argument about it. If he can't take care of
23 that, he can't accept the offer.

24 CHAIRMAN BABCOCK: Okay.

25 MR. EDWARDS: Do you want to develop a form

1 of offer to reference?

2 MR. LOW: The offer is just money.

3 MR. EDWARDS: I know. So everybody gets it
4 and is on the same page you could have a form.

5 MR. LOW: Yeah. Right.

6 MR. EDWARDS: There's forms -- I see forms in
7 the statute. There's actually --

8 MR. LOW: Okay. Yeah. I see.

9 MR. EDWARDS: -- a form of offer. Or form of
10 acceptance is easy. You either accept or reject.

11 CHAIRMAN BABCOCK: Right. What do you think
12 about that, Elaine, a form?

13 PROFESSOR CARLSON: I think if Bill wants to
14 do that, it would be great.

15 MR. EDWARDS: I would be happy to do that.

16 CHAIRMAN BABCOCK: He would be happy to do
17 that. And perhaps Buddy and Judge Christopher could get
18 together on massaging that language that she came up with,
19 and we will try to rewrite this subpart (3) with that in
20 mind. And, yeah, Stephen.

21 MR. YELENOSKY: Just a minor point, but when
22 you're writing it, have we thought through making sure this
23 works both ways? Because I think most people, including
24 myself, usually think of it as the defendant's offer, and I
25 can think of one small way in which it doesn't work well if

1 it's also supposed to define a plaintiff's offer, because
2 we layed out a time frame saying now or in no case longer
3 than 30 days. You've got to worry about the other end, the
4 plaintiff saying "Pay me tomorrow." There needs to be a
5 minimum amount of time in the plaintiff's offer for the
6 defendant to pay. So out of fairness to defendant we need
7 to define the time frame there, don't we?

8 MR. EDWARDS: I would assume it would be the
9 same time frame.

10 CHAIRMAN BABCOCK: The same time frame,
11 because the offer would be "I want you to pay me now." The
12 plaintiff would say, "I want you to pay me now, but in no
13 event more than 30 days."

14 MR. YELENOSKY: Oh, well, if that's what the
15 language meant, I thought -- I thought it was a prerogative
16 of the offer, "I'll pay you now or in 30 days."

17 CHAIRMAN BABCOCK: No.

18 MR. YELENOSKY: And if that were true then we
19 didn't want to leave it to the prerogative of the plaintiff
20 to say, "Pay me now or no go." There has to be some time
21 period in there for the defendant to pay. There may be
22 more important ways in which it doesn't work for a
23 plaintiff's offer that I haven't thought of.

24 CHAIRMAN BABCOCK: Okay. Carl.

25 MR. HAMILTON: Are we going to have something

1 in this that says that if the offer is not in accordance
2 with this rule it doesn't trigger cost shifting?

3 CHAIRMAN BABCOCK: There's something else in
4 the rule that says that, I think. Somewhere.

5 MR. LOW: Chip, one of the problems with a
6 form offer is that you might have a different form for
7 plaintiff and defendant, who's going to take care of the
8 liens and so forth like that; but if you had in there just
9 that the release given, you know, "This offer is made and
10 the release" and put it that way, because they might be
11 different forms. And it could be done, but it's the
12 plaintiff's form going to say, "I take care of all the
13 liens and so forth if you pay me this amount of money" or
14 "Pay me this amount of money and you take care of them."
15 So --

16 MR. EDWARDS: Now you're back to a problem
17 with the 120 and the 80 percent.

18 MR. LOW: Oh, man. Don't put me back there.

19 CHAIRMAN BABCOCK: We're not going back
20 there. All right. So that language is going to be
21 drafted, and we'll consider it as soon as we can.

22 Speaking of that, somebody raised the issue
23 with me that we're not going to get everything done with
24 the amount of time we have left, which is a day and a half
25 in July and a day and a half in August, and how do people

1 feel about adding a day in August, like the 21st?

2 HONORABLE SCOTT BRISTER: July would be
3 better. The way these meetings go, there's usually more
4 work to be done after the meeting than before. What we
5 come to the whole group for is direction first and then,
6 second, hammering out the details.

7 CHAIRMAN BABCOCK: Maybe you add a day to
8 both meetings.

9 HONORABLE DAVID PEEPLES: Chip, the other
10 alternative would be for us to discipline ourselves, to
11 pace ourselves, and get through with it in the time we
12 have.

13 CHAIRMAN BABCOCK: Well, we don't need to
14 go --

15 MR. DAWSON: Let's talk about that for a
16 while.

17 CHAIRMAN BABCOCK: We'll check on the
18 availability of the hotel on both July 17th and August 21st
19 and see what we've got available. Let's keep going.

20 So we're going to rewrite subsection (3) here
21 of Rule 167.3. Subsection (4) we've already voted on.

22 MR. WATSON: Chip?

23 CHAIRMAN BABCOCK: So we're not going to talk
24 about that again. What else?

25 MR. SCHENKKAN: I'm sorry to do this to you,

1 but before we leave (3), the only place I see that the
2 legislative commandment in 42.005(c) that we address
3 multi-party is in Footnote 9, which is hung on 167.3.

4 MR. WATSON: That was my point, too. I think
5 we need that Nevada footnote, No. 9.

6 MR. SCHENKKAN: Or something like it.

7 PROFESSOR CARLSON: Are you talking about
8 42.005(c)?

9 MR. WATSON: We're talking about Footnote 9
10 on page three.

11 MR. SCHENKKAN: (c) says, "The rules must
12 address actions to which there are multiple parties and
13 must provide if the offering party joins another party or
14 designates a responsible party after the settlement offer
15 you have the option to declare," but the first part "must
16 address actions in which there are multiple parties." As
17 far as I can tell it is only addressed here in Footnote 9,
18 and doesn't it need to be addressed in the rule?

19 PROFESSOR CARLSON: Well, that's why I was
20 asking Judge Christopher if her proposal was if an offer is
21 made conditioned upon acceptance by multiple parties that's
22 a condition outside.

23 MR. SCHENKKAN: Well, but what about the
24 issues of making a joint offer, making an offer to two or
25 more parties but doing it portioned, and what happens if --

1 not sanctions but with fee shifting if one of the
2 apportioned parties rejects and another one does not.
3 Those all seem to be three material issues that could be
4 addressed in the rules and I'm gathering from the statute
5 are supposed to be.

6 PROFESSOR CARLSON: Well, the statute says
7 that the rules promulgated must address actions in which
8 there is multiple parties and must provide if the offering
9 party joins another party or designates responsible third
10 party prior to when a settlement offer may declare the
11 offer void. That is incorporated later on. I guess you're
12 reading it as these need to be two separate provisions.

13 MR. SCHENKKAN: Well, I now hear you reading.
14 That's a fair question. Are we just saying we don't have
15 to say anything about multiple parties except if they
16 designate?

17 PROFESSOR CARLSON: Right. And we do get
18 that. If you read it as one, we do get that in 167.10.

19 CHAIRMAN BABCOCK: Okay. Let's --

20 HONORABLE TOM GRAY: Chip, based upon the
21 vote that was taken before the break, I would assume that
22 this does contemplate piecemeal settlement. We would need
23 to then identify in the offer the specific claim to which
24 the offer is applicable.

25 CHAIRMAN BABCOCK: It must offer to settle

1 all monetary claims.

2 HONORABLE TRACY CHRISTOPHER: All monetary
3 claims.

4 PROFESSOR CARLSON: Raised by the pleadings
5 between the offeror and offeree.

6 HONORABLE TOM GRAY: Is that out of the
7 statute or it that out of the --

8 CHAIRMAN BABCOCK: That's out of this rule.

9 PROFESSOR CARLSON: That's our rule. That is
10 not a part of the statute.

11 HONORABLE TOM GRAY: Okay. I didn't know if
12 that was going to be discussed again, but I take it that
13 it's not.

14 CHAIRMAN BABCOCK: Correct.

15 PROFESSOR CARLSON: I will defer to the
16 Chair, Justice Gray.

17 HONORABLE TOM GRAY: Another comment with
18 regard to 163.7(3), I think that may be the only place that
19 the reference change from chapter to rule may need to say
20 "chapter." "State that it is made under Chapter 42 to the
21 Civil Practice and Remedies Code."

22 PROFESSOR CARLSON: I think either way would
23 work, but that's fine.

24 CHAIRMAN BABCOCK: Well, we're going to have
25 a rule, and the rule is going to be broader than the

1 chapter.

2 HONORABLE TOM GRAY: But the chapter or the
3 statute requires -- if I understood the way she set this
4 up, and I think even in the statute, the statute says that
5 the offer must state that it is made under this chapter.

6 PROFESSOR CARLSON: You're correct. That's
7 42.003.

8 HONORABLE TOM GRAY: And if that's what the
9 statute says for it to be a valid offer under the statute,
10 it would seem to have to reference the statute.

11 MR. JACKS: Well, it has to comply with both,
12 so why not just say both?

13 HONORABLE TOM GRAY: Well, both is fine, but
14 I think we have to say the statute.

15 PROFESSOR CARLSON: Okay.

16 CHAIRMAN BABCOCK: Okay. Anything else on
17 167.3?

18 MR. HAMILTON: Well, I -- yeah. I think the
19 part that I asked about a while ago said -- where is that,
20 Elaine, that it has to be made under this rule? It's on
21 page two on 167.2(e). "An offer to settle or compromise
22 that is not made under this rule," then it doesn't shift
23 costs. Well, that to me doesn't really say that if you
24 don't make it precisely like the offer has to be made, it
25 doesn't shift it. I'm wondering if we need to say

1 something there that --

2 CHAIRMAN BABCOCK: Where are you, Carl?

3 MR. HAMILTON: Well, I'm on page two, which
4 is 167.2(e).

5 CHAIRMAN BABCOCK: Okay.

6 MR. HAMILTON: The offer can be made under
7 the rule, but it still won't comply with what has to be in
8 the settlement offer if that's the case. Does it shift
9 costs or does it not?

10 HONORABLE SARAH DUNCAN: In compliance with
11 167.3.

12 CHAIRMAN BABCOCK: You know, this whole thing
13 about the rule and the chapter, the rule is going to be
14 broader than the chapter, and it seems to me that what we
15 want people to do is follow the rule; and if they only
16 follow the chapter, they're not going to be doing
17 everything they should be doing. So Judge Gray says, well,
18 wait a minute, but the statute says it's got to be made
19 under the chapter.

20 HONORABLE TOM GRAY: It's not just that it
21 has got to be made under it, but the statute says it has to
22 refer to, state that it's being made under the chapter.

23 CHAIRMAN BABCOCK: Maybe we say whenever we
24 are -- maybe in the definitions we could say whenever we're
25 referring to the rule we're referring to the chapter.

1 MR. HAMILTON: Also what I'm saying is that
2 an offer that's not made in accordance with 167.3 of the
3 rule doesn't trigger the cost shifting.

4 CHAIRMAN BABCOCK: So you would have subpart
5 (e) more limited than it is now?

6 MR. HAMILTON: I would have it broader. "An
7 offer that is not made under this chapter or rule and under
8 Rule 167.3, in compliance with Rule 167.3, is not entitled
9 to offer."

10 CHAIRMAN BABCOCK: Okay. How does everybody
11 feel about that?

12 MR. JACKS: Makes good sense.

13 CHAIRMAN BABCOCK: Okay. Did you get that,
14 Elaine?

15 PROFESSOR CARLSON: Was that part of 167.3?

16 CHAIRMAN BABCOCK: We're talking about
17 167.2(e) now, and Carl says, "An offer to settle or
18 compromise that is not made under this" -- whatever we call
19 it, rule or chapter, and is that where you insert "and in
20 compliance with 167.3"?

21 MR. HAMILTON: Right.

22 CHAIRMAN BABCOCK: "And in compliance with
23 167.3."

24 PROFESSOR DORSANEO: Does compliance mean
25 substantial compliance or is that compliance or you don't

1 want to say?

2 CHAIRMAN BABCOCK: Okay?

3 PROFESSOR CARLSON: I've got it now.

4 CHAIRMAN BABCOCK: Okay. Elaine, what's
5 next?

6 PROFESSOR CARLSON: 167.4, 5, 6, 7, and 8 are
7 what we signed off on in April. The HB 4 directs the
8 Supreme Court in the rule to provide procedures for making
9 the initial settlement offer, successive settlement offer,
10 withdrawing an offer, accepting an offer, rejecting an
11 offer, and modifying the deadlines for making, withdrawing,
12 accepting, or rejecting, so I think that is in compliance
13 directly with the statute. I don't know if anyone wants to
14 revisit any of that. If not, I'm ready to move on.

15 CHAIRMAN BABCOCK: Okay. Move on.

16 HONORABLE SARAH DUNCAN: Well, hold on a
17 minute.

18 CHAIRMAN BABCOCK: Sarah wants to revisit
19 these issues.

20 HONORABLE SARAH DUNCAN: Well, I think Judge
21 Christopher's comment earlier about 167.4(a)(1)(A)(i) there
22 needs to be something about the question of are there
23 declarations for that.

24 PROFESSOR CARLSON: I noted that. Yeah.

25 CHAIRMAN BABCOCK: Yeah. We're going to fix

1 that. Anything else? Okay. What's next?

2 PROFESSOR CARLSON: 167.10 is directly out
3 of HB 4, and the Supreme Court is directed to do this, that
4 in actions involving multiple parties if the offering party
5 joins another party or designates a responsible third party
6 after making the settlement offer, the party to whom the
7 settlement offer was made may declare the offer void.

8 That's the statute, verbatim, and my question
9 was do we need to put a time frame on this? Can an offeree
10 declare the offer void after a second or should there be a
11 time limit? The outside time limit to designate a
12 responsible third party looks to be on or before the 60th
13 day under the statute cited. "On or before the 60th day
14 before the trial date unless the court finds good cause to
15 allow the motion to be filed at a later date." So we have
16 to think about when we said the offer could be made, think
17 about when the responsible third party can be designated,
18 and figure out if we need to put time parameters.

19 HONORABLE TOM GRAY: A void offer -- if the
20 acceptance of a void offer has no effect, so even if the
21 offer has been accepted --

22 CHAIRMAN BABCOCK: It's "void" versus
23 "voidable" is what you're talking about.

24 HONORABLE TOM GRAY: And maybe use the word
25 "void." So in other words, the acceptance wasn't valid,

1 and so there wouldn't be any need to put a closure on it.

2 PROFESSOR CARLSON: So you could actually
3 then settle, fund, and then there is a joinder of a party
4 and then that is all undone under this legislative fiat.

5 CHAIRMAN BABCOCK: Well, but the void is
6 something that happens upon the occurrence of another act,
7 which in here is joins another party or designates a
8 responsible third party, but that is inconsistent with the
9 "may declare" language because that is something that is in
10 control of the party receiving the offer. So it has a
11 mixtur of void and voidable in it.

12 PROFESSOR CARLSON: Boy, that's --

13 MR. LOPEZ: Does "void" mean just for the
14 purposes of this chapter, i.e., the fee stuff, or does it
15 mean void as in you can't be sued for breach of contract
16 anymore?

17 PROFESSOR CARLSON: I don't know. That's the
18 language. I don't know.

19 MR. LOPEZ: If it was accepted before it
20 expired, you've got a contract.

21 MR. JEFFERSON: Yeah.

22 MR. LOPEZ: Right? Yeah. Assuming it's a
23 fee shifting offer. Yeah. If everybody agrees on that, we
24 should put that in there I think.

25 PROFESSOR CARLSON: For purposes of fee

1 shifting under this rule?

2 MR. LOPEZ: I mean, I don't know, you know.

3 MR. JEFFERSON: Well, I mean, if, say,
4 someone adds a party and the party is affiliated with you
5 and it's going to mean that money is coming out of your
6 pocket, you ought to be able to get out of it. Even if --
7 but at what point can you not do that? I mean, after
8 you've got a deal, should you still be able to get out of
9 it? Probably not. You would think that the release would
10 address it if --

11 MR. LOPEZ: It just seems kind of strange
12 when you start messing with private -- people's private
13 agreements, which these are semiprivate, I guess, if
14 they're in the middle of a lawsuit. Offer acceptance
15 equals contract, medium lines. I don't think the
16 Legislature could come in later and declare it void from
17 its exception, which, I mean, I don't know.

18 PROFESSOR CARLSON: Pete, do you know much
19 about the background on this?

20 MR. SCHENKKAN: I don't know anything about
21 the background of this clause. In fact, I'm having
22 difficulty understanding the scenario. I appreciate -- I
23 mean, could you walk us through an example?

24 MR. JEFFERSON: Yeah.

25 MR. SCHENKKAN: I mean, there may be lots of

1 people here who understand this, but some of us at least
2 don't.

3 MR. JEFFERSON: Defendant wants to make an
4 offer to the plaintiff and then the plaintiff adds another
5 party while the offer is pending and the party is somehow
6 affiliated with that defendant.

7 MR. SCHENKKAN: Give me an example of where
8 it would be a problem here.

9 MR. JEFFERSON: Parent subsidiary.

10 MR. SCHENKKAN: Okay.

11 MR. JEFFERSON: And the subsidiary agrees to
12 pay, you know, \$10, and after the offer is on the table it
13 gets accepted. Plaintiff then sues the parent on the same
14 basis. Now the parent is going to have to pay the money
15 that the parent was going to pay all along.

16 MR. SCHENKKAN: In addition, yeah. Yeah.
17 Well, isn't that covered by the release situation?

18 MR. JEFFERSON: As I was walking through it,
19 that was my answer to my own question. I think that the
20 release would or should address it.

21 CHAIRMAN BABCOCK: What if we said at the end
22 of the sentence "may declare the offer void for purposes of
23 this rule if such declaration occurs not later than 30 days
24 from the joinder of the other party or designation of a
25 responsible third party"?

1 MR. EDWARDS: If the offer is accepted,
2 you've got a finished deal.

3 CHAIRMAN BABCOCK: Well, except for this
4 language that says you can declare it void.

5 MR. EDWARDS: Well, you can declare it void
6 if the addition occurs before the acceptance.

7 CHAIRMAN BABCOCK: Well, if --

8 MR. EDWARDS: But if they start demanding --
9 in your scenario if the subsidiary starts demanding a
10 release from the parent or vice-versa then you've got
11 something in there in addition to the monetary release of
12 the party.

13 MR. LOPEZ: The party is to whom the offer
14 was made, so we're not going to get to that problem.

15 HONORABLE DAVID B. GAULTNEY: Sure looks to
16 me like the -- I mean, I don't know what the purpose of
17 this is, but it looks to me like it's a circumstance where
18 the third party has been joined, and in order to -- that
19 changes everything. That changes the analysis, the
20 settlement analysis of the case from the offeree's
21 standpoint, so the offeree can say, "Okay, that offer is
22 void," I guess. I'm trying to understand it in terms of
23 the fee shifting why there would be a necessity to declare
24 it void when the third party is joined. Maybe I don't
25 understand it.

1 MR. JEFFERSON: Yeah. I don't see it clearly
2 either, but let's say plaintiff makes an offer of X dollars
3 to the subsidiary. While that offer is pending plaintiff
4 then joins the parent. At that point the subsidiary can
5 say, "No, I want out of the deal. I don't like the -- you
6 know, you suing my parent."

7 MR. LOPEZ: Well, we're thinking contract.
8 They can declare the offer void for purposes of the fee
9 shifting in the first place. They don't have to make a
10 counteroffer or anything. It's as if it never happened,
11 which maybe that's fine.

12 CHAIRMAN BABCOCK: Tommy.

13 MR. JACKS: I think where the idea came from,
14 actually Senator Ratliff put this in; and after some
15 testimony from Mike Swack during the Senate hearings when
16 Mike pointed out how the dynamics of the case change,
17 particularly was focusing on this new procedure for
18 designating responsible third parties who are submitted but
19 they're never sued, and in some cases it can be because it
20 can be an employer, a bankrupt company, and so on; and this
21 was the response to it. There wasn't thereafter any real
22 discussion of it.

23 I -- you know, it's really not a problem
24 where the offering party always can withdraw their offer
25 before its acceptance, so that's already taken care of. I

1 think it contemplated giving the offeree the opportunity
2 while an offer was pending to declare it void because
3 there's been a change of circumstances here and, of course,
4 nothing then prevents -- nothing then prevents the offering
5 party from coming up with a new offer, which I suppose -- I
6 mean, I don't know in real practice how this is going to
7 work, but I'm not in favor, I don't think, once there's
8 been acceptance of then going back and saying, well, you
9 can undo the deal after the fact. I think that's cockeyed,
10 but in any case that's how I think it got in and why I
11 think it got in.

12 CHAIRMAN BABCOCK: All right. For the
13 purpose of this rule, "if there has been no acceptance and
14 in any event the declaration has to be within 30 days"?

15 MR. HAMILTON: Why wouldn't it have to be
16 within 14 days, if that's when the offer has to be --

17 MR. JACKS: Well, the offer has to be open
18 for at least 14 days, but offers could be left open for a
19 longer time. I don't know whether they ever will be.

20 HONORABLE TRACY CHRISTOPHER: I think we just
21 don't touch it.

22 MR. JACKS: Just leave it as-is?

23 HONORABLE TRACY CHRISTOPHER: Just leave it
24 as-is.

25 MR. JACKS: And let you figure it out.

1 HONORABLE TRACY CHRISTOPHER: I can't imagine
2 how it's ever going to get invoked.

3 CHAIRMAN BABCOCK: Do we want to add the
4 language "for purposes of this rule" or not? Or just leave
5 it totally? Leave it? Everybody feel strongly about this?
6 Alex.

7 PROFESSOR ALBRIGHT: Isn't an offer -- once
8 an offer is accepted it's not an offer anymore, is it? It
9 becomes a contract.

10 CHAIRMAN BABCOCK: It is if it's void.

11 PROFESSOR ALBRIGHT: Huh?

12 CHAIRMAN BABCOCK: It could be if it's void.

13 PROFESSOR ALBRIGHT: If --

14 CHAIRMAN BABCOCK: Certain acts are taken
15 that if they're void -- like if you have a meeting in
16 violation of the Open Meetings Act, it's still a meeting,
17 it's just a void meeting.

18 PROFESSOR ALBRIGHT: So if your offer is
19 voided after it's accepted then you have no contract.

20 CHAIRMAN BABCOCK: That's the problem.

21 PROFESSOR ALBRIGHT: I mean, this seems to me
22 to be something thrown in that was not intended to void
23 already accepted offers.

24 CHAIRMAN BABCOCK: Judge Gray.

25 HONORABLE TOM GRAY: It would seem to me as

1 far as the mechanical application only pose a problem as
2 between the parties if it had already been funded and
3 settled in some fashion. Any time up until that point in
4 time -- and I'm talking about there may be another problem
5 of how to fund these if you're settling less than the
6 whole, which I know is another issue; but what I'm trying
7 to drive towards here is that the -- once the -- it has
8 been in the terms of contract, offered, accepted, and then
9 I use the term "papered," where there's actually the
10 settlement done, whether it's in the form of ultimately a
11 judgment or whatever, then it's no longer an offer and
12 acceptance and all that's passed because the plaintiff or,
13 excuse me, the offeree under this has done both. They have
14 impliedly not declared it void; but if there remains any
15 act to be done that would in effect bring it to fruition,
16 if they do that act, they have elected not to declare it
17 void; but any act short of that that would not work to the
18 offeror's detriment in the context of the offer and
19 settlement concept, the transfer of funds in effect, you're
20 going to be able to declare it void up until that point.

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: Maybe I look at this different as
23 to how it may arise, and I see it under an indemnity
24 agreement. Say, for instance, you've got multiple parties
25 and one of them has an indemnity, but one of them doesn't

1 have a lot of insurance or money, say; and so plaintiff
2 says, "Okay, I'm going to -- I will settle with you for X"
3 and then he learns, he says "okay." Then they bring in
4 this party against whom they've got indemnity. You come in
5 and indemnify, he says, "Whoa, I didn't know he was. Man,
6 he's got big pockets," you know.

7 So all right. It could be just the reverse.
8 Somebody has got an indemnity agreement, and I guess the
9 person that wants to take care of that, he has to realize
10 when the shoe's on the other foot. So I see it in that
11 term where there's something out there like an indemnity
12 agreement that somebody doesn't know about and another
13 party brought in, if a plaintiff brings another party in
14 and defendant says, "Okay, well, wait a minute. I've got
15 to indemnify them, so I can't settle." That's the way I
16 look at it.

17 CHAIRMAN BABCOCK: Carl.

18 MR. HAMILTON: But under Buddy's scenario the
19 plaintiff -- the plaintiff can't declare it void.

20 MR. LOW: Well, no. I thought the offer --

21 MR. HAMILTON: The party to whom the
22 settlement offer was made can declare it void.

23 MR. LOW: Well, what if the defendant makes
24 that offer to the plaintiff, offers to settle to the
25 plaintiff, and then the defendant then -- he says "okay"

1 and defendant brings in somebody that's got an indemnity
2 agreement and they have got heavy pockets.

3 MR. HAMILTON: In any event if it's declared
4 void, the offeror can turn around the next day and make the
5 same offer.

6 HONORABLE TRACY CHRISTOPHER: Right.

7 CHAIRMAN BABCOCK: Right.

8 MR. LOW: Well, I understand, but I don't
9 know. I'm trying to figure a logical reason for them to
10 put this thing in here, and that's the best I can come up
11 with.

12 CHAIRMAN BABCOCK: Well, Tommy was about to
13 tell us why.

14 MR. JACKS: I did my best. I mean --

15 CHAIRMAN BABCOCK: Well, did you understand
16 it at the time?

17 MR. JACKS: Well, I didn't understand the
18 language at the time. I understood I think what the
19 motivation was.

20 CHAIRMAN BABCOCK: Try that one more time.

21 MR. JACKS: The motivation was that where by
22 virtue of either the additional parties or the designation
23 of responsible third parties without adding them as
24 parties, the dynamics of the case have changed since the
25 offer was issued. I mean, clearly if the dynamics change

1 in a way that the offeror wants to do something about it,
2 they simply have to withdraw it. I mean, that's their
3 prerogative, but the only way the offering party could do
4 anything about it is if this provision enables them to
5 simply declare it void. It doesn't answer the question,
6 though, of what you do, you know, after those parties are
7 in and the dust has settled when the party reissues --

8 HONORABLE TRACY CHRISTOPHER: The same offer.

9 MR. JACKS: -- the same offer. So I don't
10 know whether it really gets you anywhere.

11 MR. EDWARDS: I think what he must have been
12 talking about is where, for example, you can bring in the
13 employer for contribution in a personal injury case now and
14 the employer hasn't been brought in and there may be some
15 thought the employer isn't going to be brought in, and an
16 offer is made which without the employer there to be
17 submitted is an unreasonable offer; but if the employer is
18 brought in, it's a reasonable offer.

19 And so before the offer -- before the
20 employer is brought in, the plaintiff rejects the offer,
21 and now they bring in the employer's negligence, and
22 there's no way that the employee is going to beat that
23 offer, and he's going to lose, and so what this would do
24 would allow the employee to declare the offer void. It
25 would not have then been rejected and would not have

1 triggered the fee shifting provisions of this act, and if
2 the defendant wanted to make a new offer to bring this fee
3 shifting into place, they would have to make a new offer
4 and give maybe the same offer and give the employee an
5 opportunity to reject that offer or accept it under the
6 present conditions. I don't think it's intended to apply
7 where the offer has been accepted, but only where it's been
8 rejected and then it eliminates or gives another shot --

9 MR. JACKS: Yeah.

10 MR. EDWARDS: -- at the real case. You can
11 start over. That's the way it looks to me.

12 CHAIRMAN BABCOCK: Sarah Duncan.

13 HONORABLE SARAH DUNCAN: This may be exactly
14 what you're talking about because, as we all know, I don't
15 understand this real well, but if plaintiff sues car dealer
16 but not -- sues manufacturer but not car dealer and there's
17 an offer on the table that's reasonable, if all we're
18 talking about is the manufacturer's liability for its own
19 acts, but then while the offer is pending plaintiff brings
20 in dealer to whom the manufacturer owes indemnity. That's
21 going to change the analysis of the case from the
22 manufacturer's perspective, and what may have been a
23 reasonable offer for only the manufacturer's liability is
24 now not a reasonable offer because the manufacturer is also
25 going to have to indemnify the dealer.

1 MR. EDWARDS: That could be. Or it could be
2 that if the dealer is going to be held to some independent
3 act of negligence which would cut down on the liability of
4 the manufacturer --

5 HONORABLE SARAH DUNCAN: Right.

6 MR. EDWARDS: -- and, therefore, what would
7 be a reasonable number for the case as it was when it was
8 made is no longer reasonable for the manufacturer alone.

9 HONORABLE SARAH DUNCAN: Right. It could go
10 either way --

11 MR. EDWARDS: Yeah. It goes either way.

12 HONORABLE SARAH DUNCAN: -- in terms of being
13 too much or too little, but I could see how in that
14 situation you would want to go back to the situation that
15 existed before the offer was made.

16 MR. EDWARDS: Where there had not been an
17 offer and not been a rejection.

18 MR. LOW: But I point, this wouldn't be
19 invoked with just what you said. You've got to have
20 multiple parties to start with. This wouldn't apply if I
21 sued General Motors, the dealer, and they bring -- says,
22 "in action filed with multiple parties," so it wouldn't
23 apply. It it only applies maybe if I sued the -- said
24 something is wrong with the car and then the driver, I
25 guess.

1 HONORABLE SARAH DUNCAN: Buddy, this isn't
2 limited to multiple parties.

3 MR. LOW: Why?

4 HONORABLE SARAH DUNCAN: It just says, "The
5 rule must provide that if the offering party joins another
6 party or designates a responsible third party after making
7 a settlement offer the party to whom the settlement offer
8 was made may declare the offer void."

9 MR. LOW: Okay. I'm sorry. I was looking at
10 another provision.

11 MR. EDWARDS: It would apply to any case
12 where somebody was joined after the offer.

13 HONORABLE SARAH DUNCAN: Right.

14 MR. EDWARDS: But I don't see how it can
15 apply if the offer has been accepted.

16 MR. LOW: But doesn't it say in actions
17 involving multiple parties?

18 MR. EDWARDS: Sure, but every lawsuit
19 involves multiple parties. Without two parties you haven't
20 got a --

21 MR. LOW: I never considered two parties as
22 multiple.

23 MR. EDWARDS: Well, you're thinking multiple
24 defendants and multiple plaintiffs, but --

25 MR. LOW: But how can you have a lawsuit

1 without multiple parties?

2 MR. EDWARDS: That's exactly right, but once
3 you add a party, once a party is added, it now involves
4 three.

5 HONORABLE TOM GRAY: In a suit for a name
6 change this might not apply.

7 MR. LOW: Well, how are we going to change
8 something we don't understand?

9 CHAIRMAN BABCOCK: Carlos.

10 HONORABLE SARAH DUNCAN: How can we write
11 something we don't understand?

12 MR. LOPEZ: I think we should try to refocus.

13 CHAIRMAN BABCOCK: We're about to vote on
14 that.

15 PROFESSOR DORSANEO: I don't understand it a
16 bit, so --

17 MR. LOPEZ: I didn't mean to open up a can of
18 worms. I'm not even sure why we're debating this point.
19 The Legislature mandates us to do this, so here it is.

20 MR. SCHENKKAN: Isn't the rest of this
21 commentary?

22 MR. LOPEZ: All I wanted to do was do we want
23 to say something that affirmatively said just for purposes
24 of the subchapter so we don't we get into the whole breach
25 of contract argument, and then there's the question about

1 time limits, which I think they sort of figured out,
2 because of the reference to other time limits that are
3 already there, they are what they are, so, you know.

4 HONORABLE SARAH DUNCAN: And it says, "The
5 rules promulgated by the Court must provide," so let's just
6 stick it in and we'll figure out what it means later.

7 MR. LOPEZ: Yeah.

8 CHAIRMAN BABCOCK: There's been a motion made
9 by Judge Christopher and seconded by Justice Duncan that we
10 do nothing.

11 HONORABLE SARAH DUNCAN: No. No. That's not
12 my motion at all.

13 CHAIRMAN BABCOCK: Sorry. What's your
14 motion?

15 HONORABLE TRACY CHRISTOPHER: What language
16 did you want to add to it?

17 HONORABLE SARAH DUNCAN: Well, I think put it
18 in a rule.

19 HONORABLE TRACY CHRISTOPHER: Right.

20 HONORABLE SARAH DUNCAN: "Do nothing" implies
21 not to do the rule.

22 CHAIRMAN BABCOCK: No, I'm sorry. Do nothing
23 other than verbatim.

24 HONORABLE SARAH DUNCAN: Yeah, put it in the
25 rule verbatim.

1 HONORABLE TRACY CHRISTOPHER: Verbatim.

2 CHAIRMAN BABCOCK: Put their language in
3 verbatim and do nothing else. Sorry.

4 MR. EDWARDS: I'll tell you, that gives me a
5 great deal of difficulty where I've accepted an offer. I
6 have paid the bank with what little I might get out of it
7 on my note and have given the rest to my client who's now
8 gone to Mexico and then they say that the deal was void and
9 they want their money back.

10 PROFESSOR DORSANEO: It doesn't say the deal
11 was void. See, that's what people think it might mean.

12 MR. EDWARDS: But it can be argued. I know
13 it doesn't, but --

14 MR. GILSTRAP: But that only happened, Bill,
15 because you sued someone else after the offer had been
16 accepted. That's -- you know, if you don't want that to
17 happen --

18 MR. EDWARDS: Well, then I may have to give
19 my E&O carrier notice if I don't sue them.

20 MR. LOPEZ: My point is we don't have a
21 choice. We don't have to like it. I mean, we don't have a
22 choice.

23 MR. WATSON: Call the question.

24 CHAIRMAN BABCOCK: I think we're ready to
25 vote on this. Everybody in favor of leaving the language

1 in here without any addition or modification raise your
2 hand.

3 HONORABLE SARAH DUNCAN: Trust your courts of
4 appeals, Bill. We'll take care of you.

5 HONORABLE SCOTT BRISTER: We'll figure it
6 out. Trust us, Bill.

7 MR. EDWARDS: Wow.

8 CHAIRMAN BABCOCK: All those opposed raise
9 your hand.

10 HONORABLE SCOTT BRISTER: We've got to have
11 something to do.

12 PROFESSOR DORSANEO: Yeah, Bill. No Corpus
13 court is going to make you give it back.

14 MR. EDWARDS: Well, if I could stop at Corpus
15 I would be all right.

16 CHAIRMAN BABCOCK: By a vote of 24 to 1 --

17 HONORABLE SARAH DUNCAN: I think it was two.

18 CHAIRMAN BABCOCK: -- the Chair not voting,
19 that passes.

20 PROFESSOR CARLSON: Bill didn't raise his
21 hand.

22 CHAIRMAN BABCOCK: Bill didn't raise his
23 hand, so --

24 MR. EDWARDS: I'm raising my hand.

25 CHAIRMAN BABCOCK: 24 to 2. The vote will be

1 amended to 24-2. All right.

2 PROFESSOR CARLSON: All right. That brings
3 us to 167 --

4 CHAIRMAN BABCOCK: As we're getting giddy,
5 what's next?

6 PROFESSOR CARLSON: 167.11, awarding
7 litigation costs. The first sentence in subsection (a) is
8 verbatim out of HB 4 except the word "final." It also has
9 a typo in the last -- first sentence says "costs from." It
10 should be "from the rejecting party." I'm sorry I did not
11 pick that up.

12 "If a settlement offer is made and rejected,"
13 I included the word "final," "judgment to be rendered will
14 be significantly less favorable to the rejecting party than
15 the settlement offer," and the offering party recovers
16 their litigation costs from the rejecting party. I
17 included the word "final" because I thought it might help
18 make clear that in determining Footnote 24 whether a
19 judgment is significant or less favorable the court should
20 consider any remittiturs, any modifications to the
21 judgment, granting of judgment NOV.

22 HONORABLE SCOTT BRISTER: Doesn't that end up
23 circular, though, because you've got to offset it?

24 PROFESSOR CARLSON: Offset the --

25 HONORABLE SCOTT BRISTER: If there's a

1 shifting of fees, you offset the instant of recovery.

2 PROFESSOR CARLSON: Yes.

3 HONORABLE SCOTT BRISTER: You go around in a
4 circle.

5 PROFESSOR CARLSON: If the shifting of fees
6 is in the defense's favor. Right.

7 HONORABLE SCOTT BRISTER: Right, but then
8 that affects the final judgment, so --

9 MR. GILSTRAP: Chip, I think we can solve the
10 problem. Instead of saying "final judgment," you might say
11 "the judgment that would otherwise be rendered," and that
12 way we only have one final judgment.

13 HONORABLE SCOTT BRISTER: Right.

14 MR. GILSTRAP: And the final judgment
15 includes the shifted fees.

16 HONORABLE SCOTT BRISTER: Right.

17 MR. GILSTRAP: I guess that raises the
18 possibility that someone could come in and make a
19 remittitur, but under Rule 315 the remittitur, strictly
20 speaking, only happens after the judgment is signed.
21 Query, whether someone before the judgment is signed could
22 monkey with it by voluntarily saying, "I don't want this,"
23 I don't know. But I think we solve this problem by just
24 saying "the judgment that would otherwise be rendered."

25 PROFESSOR CARLSON: I included the current

1 language of Rule 315 dealing with remittiturs in that
2 second paragraph of Footnote 24 for the same reason Frank
3 just suggested.

4 MR. GILSTRAP: Elaine, can you think of a
5 situation where the plaintiff would say "I don't want this"
6 and somehow affect the fee shifting?

7 MR. EDWARDS: No. No way.

8 MR. GILSTRAP: Yeah. Yeah.

9 MR. EDWARDS: There's no way, because
10 plaintiff says "I don't want it" he starts losing.

11 MR. GILSTRAP: So the plaintiff can't change
12 anything by saying "I don't want part of it," so it's not a
13 problem.

14 MR. EDWARDS: May even change the -- may hold
15 the fees to keep it a final judgment -- he may have to pay
16 some fees in order to keep the judgment.

17 PROFESSOR CARLSON: So, Frank, what was the
18 language you suggested?

19 MR. GILSTRAP: Delete the word "final" and
20 delete the word "to" and put in place of the word "to,"
21 "that would otherwise."

22 MR. HAMILTON: I don't know what that means.
23 What does "otherwise" mean?

24 MR. GILSTRAP: Well, that would be rendered
25 without the fee shifting, you see. To determine what is

1 significantly less favorable or more favorable you don't
2 include the fee shifting, but the fee shifting comes in
3 before the judgment is final. The fee shifting is included
4 in the final judgment.

5 MR. YELENOSKY: But don't we need to say
6 that? "Otherwise" doesn't entail all of that.

7 MR. GILSTRAP: Well, if someone can think of
8 a better way to do it, but I think that solves the problem.

9 MR. SCHENKKAN: The statute -- I agree with
10 Frank. The statute does provide it by saying "fees will be
11 an offset to the rest of the judgment," so I'm in favor of
12 that. I think that works.

13 HONORABLE DAVID B. GAULTNEY: The judgment
14 that would be entered before the offset.

15 MR. SCHENKKAN: Yeah. Otherwise it's real
16 depressed but you need this other "but for the fee shifting
17 under this chapter."

18 CHAIRMAN BABCOCK: Sarah.

19 HONORABLE TOM GRAY: "Judgment to be rendered
20 without regard to this rule."

21 HONORABLE SARAH DUNCAN: We don't want to go
22 here, I don't think, but Elaine's footnote causes me to
23 wonder what happens when we reform the judgment on appeal.

24 MR. HAMILTON: What happens when what?

25 HONORABLE SARAH DUNCAN: Do we just go home?

1 MR. EDWARDS: You do the same thing you can
2 do with court costs. Court costs may be awarded to one
3 party in the trial court, you reverse and render at the
4 appellate level, and you reverse the court costs.

5 MR. GILSTRAP: The judge could grant an --
6 the judge could grant some kind of -- modify the judgment
7 and, you know, that would invoke fee shifting or take it
8 out. I mean --

9 HONORABLE SARAH DUNCAN: So do we have to
10 start --

11 HONORABLE SCOTT BRISTER: That's easy.
12 Whenever it's -- if it's a difficult calculation, we remand
13 to the trial court to figure it out. That's an easy
14 problem.

15 MR. GILSTRAP: But the trial court can do it,
16 too. The trial court could say, "Well, you know, I'm going
17 to knock out this damage element," and that invokes fee
18 shifting.

19 MR. EDWARDS: Or the appellate court could do
20 the same thing.

21 MR. GILSTRAP: The appellate court could do
22 it. Yeah.

23 MR. YELENOSKY: Could we say and don't we
24 need to say something about the judgment regarding the
25 monetary claims for which the offer was made, because we're

1 not really -- we've already said this can be piecemeal?

2 HONORABLE SARAH DUNCAN: Right.

3 MR. YELENOSKY: And so we're not talking
4 about the whole judgment, and if we say that, we get rid of
5 the problem of pulling in the -- or specifying the offset,
6 so if we say if the settlement offer is made and rejected
7 and the judgment that will be -- is rendered on monetary
8 claims for which the offer was made will be significantly
9 less favorable, don't we solve both of those problems?

10 CHAIRMAN BABCOCK: Judge Benton, did you have
11 -- you had your hand up?

12 HONORABLE LEVI BENTON: No, no. Excuse me.
13 I was saying something to Judge Christopher. Excuse me.

14 HONORABLE TRACY CHRISTOPHER: We're
15 conspiring.

16 HONORABLE LEVI BENTON: I was talking about
17 raising something sua sponte tomorrow, raising something to
18 our agenda tomorrow.

19 CHAIRMAN BABCOCK: Oh, good.

20 HONORABLE TRACY CHRISTOPHER: I'm vetoing
21 that.

22 HONORABLE SARAH DUNCAN: I think Elaine
23 should take it, don't you? Whatever it is I say we assign
24 it to Elaine.

25 PROFESSOR CARLSON: No.

1 CHAIRMAN BABCOCK: Yeah. Good. Stephen, you
2 had your hand up. Are you done?

3 Carl.

4 MR. HAMILTON: I have a question. If there's
5 a counterclaim pending for monetary relief but only the
6 main claim is settled, then we've got to wait 'til the
7 final judgment to see about the counterclaim and then the
8 judgment may be offset by the counterclaim, so --

9 PROFESSOR CARLSON: Then we put in the offer
10 that it has to settle all monetary claims raised by the
11 pleadings between the offeror and offeree.

12 MR. HAMILTON: So it has to be both.

13 CHAIRMAN BABCOCK: Right. How about
14 Stephen's idea that we --

15 MR. JACKS: Of course, the plaintiff is
16 responding to the counterclaim under our definitions, so I
17 guess we have a plaintiff trigger if there's a
18 counterclaim.

19 HONORABLE TRACY CHRISTOPHER: More creative
20 pleading.

21 PROFESSOR DORSANEO: Could you repeat
22 Stephen's suggestion?

23 CHAIRMAN BABCOCK: Yeah. He says, "If a
24 settlement offer is made and rejected and the judgment that
25 would otherwise be rendered on a monetary claim will be

1 significantly less favorable."

2 MR. GILSTRAP: How about "the monetary
3 judgment that would otherwise be rendered"?

4 MR. YELENOSKY: Well, I mean, it only can be.
5 I think the important thing is to specify you're talking
6 about a claim which may be a subset of the entire judgment,
7 and so you do that by referring to the monetary claim.

8 MR. GILSTRAP: All right. That works.

9 CHAIRMAN BABCOCK: Justice Duncan.

10 HONORABLE SARAH DUNCAN: Shouldn't "will" be
11 "would," in subjective terms?

12 PROFESSOR CARLSON: Legislature wrote it that
13 way.

14 HONORABLE SARAH DUNCAN: Well, that's not my
15 fault.

16 CHAIRMAN BABCOCK: Should be "would." What
17 else?

18 MR. YELENOSKY: I don't know that we need the
19 "otherwise would be" part if we --

20 MR. GILSTRAP: No, we don't.

21 MR. YELENOSKY: Because once you specify on
22 the monetary claim you're excluding the fee shifting, that
23 that's something else.

24 PROFESSOR CARLSON: Got it. So your proposal
25 is to add the words "on the monetary claim" after

1 "rendered"?

2 MR. YELENOSKY: Take out "final."

3 PROFESSOR CARLSON: Right.

4 MR. YELENOSKY: The "judgment to be
5 rendered," I don't know, "on the monetary claim." I guess
6 you may have to specify "monetary claim" -- or "monetary
7 claims," I guess, because we did say it had to cover all
8 monetary claims, right?

9 MR. JACKS: "Claim" is defined as the claim
10 to recover monetary damages, so it's redundant to call it
11 monetary claims.

12 MR. YELENOSKY: Okay. So just -- but
13 something that indicates it may be less than the entire
14 judgment and that it doesn't include the fee shifting.

15 HONORABLE SARAH DUNCAN: I think we ought to
16 put it all in there.

17 CHAIRMAN BABCOCK: I'm sorry, Sarah?

18 HONORABLE SARAH DUNCAN: Even if it's
19 redundant, it's only redundant for people that have lived
20 with the statute for the last year. I think it would be,
21 you know, which -- "that would otherwise be rendered on the
22 monetary claims would..."

23 CHAIRMAN BABCOCK: "be significantly less
24 favorable." You got that, Elaine?

25 PROFESSOR CARLSON: Yep.

1 CHAIRMAN BABCOCK: Okay. What else? Bill.

2 PROFESSOR DORSANEO: At the end part, I don't
3 know if we're at the end part, this opener, "the offering
4 party," instead of saying "shall recover litigation costs"
5 say "the offering party" -- we talk about the offering
6 party being awarded litigation costs.

7 CHAIRMAN BABCOCK: That's pretty substantive,
8 and that's from the statute. I'm not sure we ought to
9 tinker with that.

10 PROFESSOR DORSANEO: All right. It just
11 seems like awkward wording. Maybe you'll recover and maybe
12 you won't.

13 CHAIRMAN BABCOCK: Yeah.

14 PROFESSOR CARLSON: That's true.

15 CHAIRMAN BABCOCK: Okay. Elaine, what else?

16 PROFESSOR CARLSON: (b) is nothing that we
17 can do anything about. That's tracking the statute exactly
18 on what is a less favorable judgment or significantly less
19 favorable.

20 Subsection (c) again tracks the statute
21 except for what is highlighted in gray. This is where we
22 get into whether or not the litigation costs that can be
23 recovered under the section should be limited to those in
24 relation to the offeree, and should we say as to the
25 monetary part, because, of course, those litigation costs

1 could be incurred in relation to other parties. It could
2 be litigation costs incurred on the nonmonetary claims.

3 And you'll see when you complete reading (c)
4 that the legislation provides that you could get those
5 costs after the rejecting party rejected the settlement
6 offer, which ends there, which goes back to Bill's
7 observation we talked about last meeting, don't we need to
8 have a cutoff date on when the litigation costs end for
9 purposes of fee shifting.

10 MR. YELENOSKY: And do we need to get the
11 segregation of costs that are unrelated to the rejected
12 claim.

13 PROFESSOR CARLSON: Right.

14 MR. YELENOSKY: That's not in the statute,
15 but we all talked about that.

16 PROFESSOR CARLSON: Right. So we could where
17 the highlighted or the gray highlighted language is, we
18 could put in "relation to the offeree as to the monetary
19 claims."

20 PROFESSOR DORSANEO: I think that it doesn't
21 really make sense to load up the litigation costs if those
22 costs would be -- would have been incurred anyway. Let's
23 say if you have a case that's an antitrust case and there's
24 a monetary claim and then there's a claim for injunctive
25 relief, and you --

1 PROFESSOR CARLSON: Did the same work.

2 PROFESSOR DORSANEO: It's the same liability
3 facts or a substantial part of them are related to both of
4 those claims for relief. I don't think it makes sense to
5 give somebody all of the expenses for litigating something
6 that would still need to be litigated anyway even if the
7 settlement had been accepted; and I kind of see it almost
8 as the opposite of the segregation, you know, failure to
9 segregate idea, that if the same activity would be involved
10 in litigating the balance of the case anyway then instead
11 of recovering those fees, you don't recover those fees.

12 PROFESSOR CARLSON: And what if they're not?

13 PROFESSOR DORSANEO: I sense that's what
14 you're talking about here in this "in relation to the
15 offeree with respect to the monetary claims."

16 PROFESSOR CARLSON: Yeah.

17 PROFESSOR DORSANEO: But I don't know if that
18 language exactly captures it. Philosophically I don't --
19 again, I'm not saying this very well, but I don't think it
20 makes sense to shift fees because somebody didn't make a
21 settlement if those fees would be incurred anyway because
22 of things that the settlement could not have forced off.

23 MR. LOPEZ: We could put a phrase in there
24 that says "necessitated by the rejection of the offer," but
25 that's a fairly substantive change, you know. It was in a

1 different -- it was in a version somewhere in here that I
2 saw, but the penalty is the costs that were incurred that
3 wouldn't have been incurred had he settled are --

4 PROFESSOR DORSANEO: What else makes sense?
5 I mean --

6 MR. LOPEZ: Yeah. I mean, it makes sense.

7 CHAIRMAN BABCOCK: Alistair.

8 MR. DAWSON: Well, I mean, I guess I have two
9 comments. One is in Bill's example in the antitrust case
10 with the request for injunctive relief, I think the only
11 thing you're probably going to be entitled to recover is
12 the damages experts because everything else is going to
13 overlap with your monetary claim and your equitable claim.

14 PROFESSOR DORSANEO: That's what I meant.

15 MR. DAWSON: I don't think that's what the
16 drafters of House Bill 4 had in mind.

17 The second thing is if you start trying to
18 segregate what's attributable to a monetary claim and not
19 attributable, I think you're creating a nightmare. How do
20 you decide whether a deposition you took, whether it's
21 attributable to this claim or that claim? How is the trial
22 court supposed to sort through --

23 MR. GILSTRAP: We've already got that
24 nightmare.

25 MR. YELENOSKY: Yeah.

1 MR. GILSTRAP: I mean, you still have to
2 segregate it. Yes, it's difficult, and yes, it's an
3 imperfect --

4 MR. DAWSON: You don't have to segregate.
5 It's an imposed rule --

6 MR. JACKS: He's saying under case law.

7 MR. GILSTRAP: Under cases. Under cases.
8 There are cases where you have to --

9 CHAIRMAN BABCOCK: Whoa, whoa. Hey, guys.

10 MR. GILSTRAP: -- segregate your cases.

11 CHAIRMAN BABCOCK: The court reporter can't
12 get it if you guys are talking over each other. Peter.

13 MR. SCHENKKAN: I'm with Frank. I mean, we
14 do already have that problem in the case law, but the
15 solution I draw from that is let's leave that with the case
16 law. We're trying to legislate when the Legislature didn't
17 do it and do it in the rule when the way the case law does
18 it is handle it under the case law. Let's leave this with
19 case law.

20 It says "directly related to the case." It
21 says "after the offer is rejected." It says "reasonable
22 attorney's fees." I think that's good enough for the rule,
23 and there are going to be some cases where the dollars are
24 so substantial, and the legal fees that are shifted; and
25 there is definitely going to be a shifting in that

1 particular case that's been decided that somebody is going
2 to think it's worth fighting in that case about, well, do I
3 get to segregate the part on the injunctive relief for the
4 antitrust from the damages; and the person on the other
5 side is going to say whichever is the opposite side of that
6 issue and then they're going to fight about if you do have
7 to do it, how do you do it; but that's not solvable in a
8 rule. So I would really like to see us leave this part of
9 the rule alone and move on.

10 CHAIRMAN BABCOCK: Bill Dorsaneo.

11 PROFESSOR DORSANEO: I think there are three
12 ways to deal with this vague language. You could either
13 say everything is shifted for however long you're going to
14 do shifting, which seems excessive; or you could split it
15 on some basis; or let the trial judge make a reasonable
16 allocation, either a mathematical allocation or a
17 discretionary allocation; or you could evaluate the extent
18 to which the failure to effectuate the settlement increased
19 the costs. Leaving it -- leaving it vague seems like it
20 would cause a considerable amount of trouble along the way.
21 Maybe the Court would like to do that, maybe the Court
22 would want to do that, but maybe they would like our
23 opinion on what would be a good way to handle the problem
24 if they desired to do so.

25 CHAIRMAN BABCOCK: Judge Christopher, and

1 then Carl.

2 HONORABLE TRACY CHRISTOPHER: Well, this is
3 -- I think we brought this up the last time, but I don't
4 know if we ever got an answer, and you can correct me if
5 I'm wrong. But at this point we would want to figure out
6 what we do when there are two defendants in the case, too,
7 and the one defendant made the 5,000-dollar offer that's
8 rejected, and the judgment against that one defendant is
9 zero, so they would be entitled to the fee shifting. They
10 get money.

11 The plaintiffs get money from the second
12 defendant, but are the defendant's attorney's fees going to
13 be limited to zero because the plaintiff recovered zero
14 against them, or is it going to be in relationship to the
15 -- you know, the fact that they got money from the other
16 defendant? I don't know if we answered that. I don't know
17 if the statute answers that.

18 MR. YELENOSKY: The statute says "in the
19 judgment." I don't know.

20 CHAIRMAN BABCOCK: Carl.

21 MR. HAMILTON: I think we ought to decide on
22 behalf of the Court that the Legislature intended that the
23 only costs to be shifted were those occasioned by the
24 rejection of the offer and give the judge some guidance in
25 determining what those costs are.

1 CHAIRMAN BABCOCK: So is the language of (c),
2 the language of subpart (c), adequate or not?

3 MR. HAMILTON: No.

4 MR. GILSTRAP: No.

5 MR. EDWARDS: No. If you took out "offeree"
6 and put in "in relation to the monetary claims which are
7 the subject of the offer" it's probably limited to that.

8 MR. GILSTRAP: How about this? You could go
9 to the end of (c) and strike the phrase -- which is on page
10 seven. Strike the phrase "until the date the final
11 judgment is signed," because I don't think that's
12 necessary, and just insert the phrase "attributable to the
13 claim that was the subject of the offer," and "claim"
14 includes both the claim against the person and the monetary
15 claim as opposed to the nonmonetary claim.

16 MR. LOPEZ: "Attributable to the failure to
17 settle the claim."

18 MR. GILSTRAP: Well, it really didn't settle.
19 It was the claim that was the subject of the rejected offer
20 to settle.

21 MR. LOPEZ: Right.

22 MR. EDWARDS: Then you take out "in relation
23 to the offeree" because you wouldn't need it anymore.

24 MR. GILSTRAP: And you could probably take
25 out "in relation to the offeree" because you don't need

1 that if you have that language.

2 MR. EDWARDS: You and I are saying the same
3 thing. I just put it a different way.

4 CHAIRMAN BABCOCK: Sarah, what do you think
5 about that? Does that work, Sarah?

6 HONORABLE SARAH DUNCAN: I have no idea.
7 It's 5:00 o'clock. I don't have any opinions anymore.

8 CHAIRMAN BABCOCK: Oh, I bet we can put a
9 couple of questions on the table that you would have
10 opinions about. How about an assignment of opinions in the
11 court of appeals?

12 HONORABLE SARAH DUNCAN: Manana. This is
13 very tiring, this rule.

14 CHAIRMAN BABCOCK: I know.

15 HONORABLE SARAH DUNCAN: I don't know how
16 Elaine has done it.

17 CHAIRMAN BABCOCK: I know. We're all tired,
18 so let's quit. So we're going to quit and come back at
19 9:00, because I think 8:30 is uncivilized, don't you?

20 HONORABLE SCOTT BRISTER: Here, here.

21 CHAIRMAN BABCOCK: So we'll be back at 9:00,
22 and I think in deference to the Chief Justice we'll
23 probably go to his issues first and then we'll be --

24 JUSTICE JEFFERSON: He'll be here at 9:30.

25 CHAIRMAN BABCOCK: He'll be here at 9:30?

1 Well, then we'll whip this out in a half hour before he
2 gets here.

3 (Meeting adjourned at 5:02 p.m.)
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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, Afternoon 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 \$ 1,571.00 .

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

Given under my hand and seal of office on
this the 26th day of June, 2003.

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