* * * * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

* * * * * * * * * * * * * * * * * *

Taken before Patricia Gonzalez, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 21st day of June, 2003, between the hours of 9:00 a.m. and 12:03 p.m. at the State Bar of Texas Building, 1414 Colorado, Room 101, Austin, Texas 78701.

INDEX OF VOTES

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

CHAIRMAN BABCOCK: We're on the record. Good morning, everybody.

(Simultaneous responses)

CHAIRMAN BABCOCK: As we were saying, offer of settlement. And Elaine made a blood oath last night that we were going to get through this today, even with the intrusion by the Chief in our meeting.

(Laughter)

(Simultaneous responses)

CHAIRMAN BABCOCK: Chris said it was a good choice of words.

(Laughter)

(Simultaneous discussion)

CHAIRMAN BABCOCK: Okay. Let's go, Elaine.

PROFESSOR CARLSON: We left off yesterday on Page 6, 167.11, discussing Subsection (c). Any further comments on that, otherwise --

CHAIRMAN BABCOCK: Okay. Any further comments on 167.11(c). Everybody with it?

PROFESSOR DORSANEO: Not quite.

HON. HARVEY BROWN: Justice Brister asked me to make a remark for him that he thought of last night. He's going to be a little late this

morning.

He said that they've had some appeals where there's been some testimony about being inextricably intertwined with that court, and, on appeal, found that they weren't; and, therefore, there was no evidence of the amount of the attorney's fees that it was segregated or should have segregated. Therefore, he thought there should be some language, basically, requiring the attorney to segregate.

PROFESSOR CARLSON: By claim?

HON. HARVEY BROWN: By at least the monetary versus non-monetary.

CHAIRMAN BABCOCK: So you can say, "Hey, it's inextricably entwined, but in the alternative" --

HON. HARVEY BROWN: If it's not --

CHAIRMAN BABCOCK: "If it's not, here's what the number is."

HON. HARVEY BROWN: Right.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: Elaine, what did you end up using instead of or maybe not instead of in relation to the offeree? We were talking yesterday about saying something like, in Carl's language, "occasioned by" or "caused by" --

PROFESSOR CARLSON: "Occasioned by

the" --

PROFESSOR DORSANEO: -- "the failure to accept the settlement."

PROFESSOR CARLSON: Yes, "and occasioned by the rejection of the offer," I have.

PROFESSOR DORSANEO: Something like that. I personally would prefer to use a "but for" causing back standard, because we're familiar with that.

PROFESSOR CARLSON: So you would prefer, instead of "and occasioned by," a "but for the rejection"?

PROFESSOR DORSANEO: Uh-huh.

CHAIRMAN BABCOCK: Is that a "yes"?

PROFESSOR DORSANEO: Yes, sir.

CHAIRMAN BABCOCK: You know, she's taking it down. She can't get "uh-huh."

PROFESSOR DORSANEO: Well, I'm new at this.

(Laughter)

CHAIRMAN BABCOCK: What do you think, Elaine?

PROFESSOR CARLSON: I think that would work fine.

CHAIRMAN BABCOCK: Okay. Everybody okay

with that?

MR. HAMILTON: "But for the rejection by the offeree"?

MR. EDWARDS: How do you have it reading?

PROFESSOR CARLSON: I apologize. Excuse me?

MR. EDWARDS: How do you have it reading?

PROFESSOR CARLSON: "The litigation costs may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party" -- well, now Bill says "but for" --

MR. LOPEZ: Well, they would not have been occurred by the offering party but for the failure to settlement.

PROFESSOR CARLSON: Say that again. I'm sorry.

MR. LOPEZ: That -- something something fees that would not have been incurred but for the rejection of the offer or the failure to settle.

MR. GILSTRAP: What's the reason for the double negative in there? What's wrong with just saying "attributable to the claim that was the subject

of the offer"? That was what we had talked about earlier.

CHAIRMAN BABCOCK: Peter, do you have your hand up or are you just resting?

MR. SCHENKKAN: Yes, I do. Well, I'm trying to rest, too, but -- I think this is not a good thing to do, at least not without putting into the text of the rule something like the Nevada material that's in Footnote 9, because one of the important scenarios is when you have multiple defendants and you make offers to all of them or most of them and the offers need to be something that can be apportioned among them, and it may well be that one accepts and another does not, and we need to be able to apportion attorney's fees, or at least we need to address the issue.

If we just put this in, it seems to me, we are saying, there's no fee shifting unless all are rejected and it comes back in, which I don't think is the intent or would be clear or consistent with the purpose of the rule.

I have a second layer of question about this, which is whether this is a good idea to put in the rule as opposed to leaving it to be addressed by the case law. There's a lot of it on reasonable

attorneys fees in these multi-party, multi-issue situations, both in federal and in state, and I'm not sure if we might not just be better off -- we'd certainly be able to conclude our business faster this morning --

(Laughter)

MR. SCHENKKAN: -- by leaving the question of reasonable attorneys fees, which is what the statute says could be addressed in that way.

CHAIRMAN BABCOCK: Okay. Richard Munzinger.

MR. MUNZINGER: I wonder if we're not creating a construction problem by the insertion of words "but for the rejection by the offering party." If you look at the statute, the statute says that the litigation costs -- this is Section 42.004(c), "The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer," and there's no attempt in the statute to tie the costs to the conduct of the rejecting party, nor is there anything in the statute that puts a "but for" standard in incurring the costs. And I wonder if you're creating a construction problem, as if the rule

is attempting to impose something different than what the statute does.

MR. SCHENKKAN: Could I second that? I meant to cover the statutory part as well.

The second part of that, which is the definition of litigation costs, is directly related to the case, not "occasioned by" or "but for the action of the rejecting party."

MR. MUNZINGER: I agree with that.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: Granted, that's what it says, but I don't think it would make any kind of sense to impose all subsequent litigation costs on a person who didn't accept an offer because they didn't accept the offer, regardless of the reason why those costs were incurred, and, frankly, the statute, to me, doesn't look like it was meant to cover cases that involved something more than the monetary claim that we're talking about. I would submit that that's probably why it doesn't try to draw these distinctions.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Pete's comment about the definition, I think, is foursquare. Litigation costs -- this is 42.001 Subsection (5), means "money

actually spent and obligations actually incurred that are directly related to the case." Had the legislature intended to limit it to the conduct of the party, they would have said "directly related to the conduct of the offeree party not accepting the offer." And in all due respect to Bill, if the statute says something, and it's clear, it ought to be enforced on its face. I don't know that the Court would -- should be attempting to draw these distinctions as to what is necessary and what isn't necessarily incurred by a rejection, when the whole object is to stop litigation cost and enforce a settlement.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: Yeah. I think we ought to follow the statute. It says, "The settlement procedures provided in this chapter apply only to claims for monetary relief." That's the statute. And we're talking about putting in litigation costs on things, if we don't limit it, other than claims for monetary relief.

CHAIRMAN BABCOCK: Judge Christopher.

HON. TRACY CHRISTOPHER: Well, I agree. I think we shouldn't put in the limiting language either, because what if a defendant makes an offer to settle, say, for $10,000, and the plaintiff rejects.

Then the defendant, as part of defending against the plaintiff's case, might spend a lot of time and money trying to put a bigger percentage on a co-defendant, and, you know, is that -- you know, if you've tried to limit it somehow to the plaintiff's claim against the defendant when a big part of your defense would be trying to put a big percentage on a co-defendant, it seems me that those are litigation costs that were incurred as a result of rejecting that -- the plaintiff rejecting the settlement against you. So I don't think we ought to limit it in this manner.

MR. EDWARDS: Which manner are you talking about, because I thought we were talking about limiting it to the costs that were incurred as a result of the rejection of the monetary reason?

HON. TRACY CHRISTOPHER: "In relation to the offeree" or the "but for" text, I just think we ought to leave that out and leave it just strictly what the language is in the statute.

MR. EDWARDS: Somehow I have a problem that if somebody makes me an offer for $10,000 -- they'll take it or I'll take it, whichever way it goes, and that offer is turned down and that's one-twentieth of the case, that little old thing hanging right there shouldn't be burdened with the

cost of the rest of the case.

MR. YELENOSKY: Well, it raises an access to the court's question. If the price of litigating your injunction claim is that you have to accept this offer or you risk paying for the litigations of the injunction claim, which they would have to pay for anyway -- and maybe we leave it to the courts, but I don't see how, in those type of cases, the courts could avoid addressing whether that's what the legislature could have meant or whether constitutionally the legislature could do that.

CHAIRMAN BABCOCK: I'm not sure if this is a salient point or not, but the statute has this language, Subsection (c) in it.

MR. HAMILTON: Subsection what?

CHAIRMAN BABCOCK: It's 42.004(c).

HON. SARAH DUNCAN: Right. There's no limitation in relation to the offeree if there's no "but for" --

CHAIRMAN BABCOCK: Yeah. My point is: Are we supposed to be changing this language?

PROFESSOR DORSANEO: Mr. Chairman, yesterday you said that the rule is broader than the statute, and I fully agree with you that what we've done is to make this procedure applicable to mixed

cases. And when you do that, you have to make adjustments to stick with what makes sense. And I think following the statutory language is well and good when we're talking about exactly the same thing, but beyond that, we have to use reason to make it work in a sensible fashion. Sometimes the rule is reason enough, but frequently it is not.

CHAIRMAN BABCOCK: Okay. Alistair had his hand up first, and then Judge Christopher and then Carl.

MR. DAWSON: My suggestion would be leave the language as it's written in the statute, not limited to monetary claims or the offering party, or whatever, and drop a comment that says "in considering the reasonableness of the attorney's fees, the trial court may, you know, examine whether the fees were attributable to non-monetary claims or other part" -- these are factors that the trial court can consider in determining the reasonableness of the attorney's fees.

CHAIRMAN BABCOCK: Judge Christopher.

HON. TRACY CHRISTOPHER: I'd be happy with that, or if we wanted to, we could go back to the 167.1 definition of reasonable attorney's fees and limit it to "reasonable attorney's fees for the monetary claims" just add that little --

PROFESSOR DORSANEO: That's good.

HON. TRACY CHRISTOPHER: -- definition there.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, I still think that (c) gives us a little inside at -- if I'm representing a defendant -- one out of five defendants, and my liability is very, very small, very limited and I get a settlement offer but it's not right, so I reject it. And the plaintiff is going to have to go to trial anyway against the other four defendants and incurs thousands and thousands of dollars, I should be liable for it because I rejected a small insignificant defendant's offer? I just don't think that's right, and I think that (c) talks about, it's limited to the litigation costs incurred by the offering party after the rejecting party rejected the settlement. I mean, it could only apply to the cost related to that party, seems to me.

PROFESSOR DORSANEO: To that conduct by --

MR. HAMILTON: By the conduct by that party.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH DUNCAN: I could draw a

distinction between writing rules to create a procedure to implement a statute on one hand and interpreting a statute by this committee or the supreme court without a case or controversy, and I think either of the suggestions that have -- any of the suggestions have been made are clearly interpreting the statute without a case or controversy, and I don't think that's what 42.005 means -- instructs the supreme court to do.

CHAIRMAN BABCOCK: What do you think about that, Elaine? That's what I was trying to say a minute ago.

PROFESSOR CARLSON: Well, I think the statute -- you're right. We don't have a case, but I think there's a controversy.

(Laughter)

PROFESSOR CARLSON: I don't think it's clear what's meant under the statute and I guess we could leave that to the courts to figure out. I think Carl's point is well taken.

MR. EDWARDS: Well, I think we owe it to the practicing Bar to give them guidance and not have them making decisions on to accept or not accept, upon offer of settlement, to get rid of or not get rid of a case based on they want the case to go to the supreme

court to find out what the statute means when it's merely a matter of defining what damages you get.

CHAIRMAN BABCOCK: The problem with the language as drafted is -- the language as drafted says, "The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party, in relation to the offeree, after the date the rejecting party rejected the settlement offer." That's pretty limiting, isn't it?

PROFESSOR CARLSON: Well, I inserted "in relation to the offeree."

CHAIRMAN BABCOCK: Oh. You put that in. Okay.

PROFESSOR CARLSON: That's why it's in gray. It was a smuggling attempt.

CHAIRMAN BABCOCK: Okay. "Incurred by the offering party," and the statute doesn't limit it that way.

Bill.

HON. TERRY JENNINGS: And the statute actually defines litigation costs. Under (5), "'Litigation costs' means money actually spent and obligations actually incurred that are directly related to the case in which a settlement offer is

made," and it occurs to me that the burden is going to be on the movant to prove up the statutory definition.

CHAIRMAN BABCOCK: And it says -- Carl, the thing you're worried about is -- it's a dead-on worry by this definition, which is a statutory definition, because it says "the case," not the -- Bill.

MR. EDWARDS: The definition of the statute works fine if you have only monetary claims and only two parties. Okay?

Now, the supreme court is directed to promulgate rules that must address actions in which there are multiple parties. So this statute presumes that the supreme court is going to make rules like you're talking about -- directs the court to do it. It's not a matter of no case or controversy.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: Well, I think it's pretty clear that the legislature knew that there are multiple claims out there, because they've dealt with monetary claims. It's clear they knew there were multiple parties, because we're directed to include the potential multiple parties in this, and yet after using several times the word "claims" or "claim" and using "multiple parties" several time, they

specifically say "case" here. Now, I think it's draconian, what they've done, but they've done it. I mean, I think we've just stumbled upon that the hammer is a sledge hammer, but that's what they've done. I mean, I agree with Carl And bill, it ain't right, but I think this is one where, instead of dealing with it by rule, it needs to be dealt with by case law. And I think that if a special issue or a question were submitted on this, the supreme court would require to track the statute, not the rule, and if it had to track the statute, it would have to be on the case.

CHAIRMAN BABCOCK: Skip, what about Bill's point that maybe we have some wiggle room or some discretion because of the statute which says "The rules promulgated by the supreme court must address actions in which there are multiple parties"?

MR. WATSON: Well, I agree. I mean, that comes back to Pete's comment and my comment yesterday that I personally think we really need Footnote 9 in there dropped as a comment to further flesh out the multiple parties. But after Footnote 9 is in there, I still think it's case law -- I mean, Lord knows I'm going to be standing up saying, "Look, you know, he's got to segregate it down to the multiple party. Read footnote 9," you know, but I

still that that's for the courts to decide in their opinions rather than for us to do in the statute.

CHAIRMAN BABCOCK: So you don't think we have -- just to follow this, you don't think we have any wiggle room on Subsection (c) based on the statute the way it is. Is that right?

MR. WATSON: I think we can have all the wiggle róom we want to have and the court may or may not go with us. I just happen to agree with Sarah, that they chose the word "case." It says "case." I think it was for a reason, and we're undoing what they did. I also think the courts will undo it by opinion, but that's not our place.

CHAIRMAN BABCOCK: Carl and then Pete and then Bill and then Harvey.

MR. HAMILTON: 42.002(c) says, "This chapter does not apply until a defendant files a declaration." It says, "If there is more than one defendant, the settlement procedure allowed is available only in relation to the defendant that filed the declaration." So if there's only one defendant that files it and that defendant rejects the plaintiff's settlement offer, he's going to charge that defendant with all of the costs of all of the other defendants in the case? I don't think so.

CHAIRMAN BABCOCK: Pete.

MR. SCHENKKAN: I'd really like to see a little more discussion of Alistair's proposal, which strikes me as the best way out of this. I think the wiggle room that the court has is under the fact that the same section of the statute, the definition one, 001(5) that defines it as "money spent and obligations incurred directly related to the case" is the one that also says "reasonable attorney's fees," and, thus, I definitely think the court has the power, under the statute -- I couldn't imagine the legislature depriving them of that power -- to say what counts as reasonable fees for this purpose and in this context.

However, there are so many different issues there on what counts as reasonable attorney's fees varying with the scenarios, how many parties, on which sides, in relation to which claims, which ones of the defendants declared, which ones of the defendants made offers and to whom, which ones of the plaintiffs made offers and to whom and on what, that I'm very hard pressed to see how we can propose to the court a useful rule that covers correctly, neither overinclusively nor underinclusively, all but important scenarios. That's why, everybody else who's done this ever before in relation to any statute that

allows the words of attorney's fees has, I think, punted that to the case law development.

There may be exceptions, and maybe there are folks here who know about the exceptions and could clarify it, but I think that's at least generally true, that's the way it's handled.

And Alistair's suggestion takes -- recognizes that fact and then allows us to have the input we're concerned about through a footnote comment that says "among the factors are, you know, who was involved in this, was it involved in the monetary claim to which the thing applies or the non-monetary" -- and we can work on the wording of that, but it handles it in the right way. It says that the court is recognizing that these are at least some of the major factors that would go into that decision, but not trying to make a blanket decision in advance that we're just not smart enough to make.

CHAIRMAN BABCOCK: Bill, if you still want to speak, Harvey and then Skip.

PROFESSOR DORSANEO: Well, I think that that's one way to deal with it. I mean, I quarrel with Skip's statement --

CHAIRMAN BABCOCK: Skip hasn't spoken yet.

PROFESSOR DORSANEO: -- or question about using the word case at the end was some sort of a marching order. To me, what clearly has happened here is, the legislature worked on this until they got tired of working on it and then they sent it over here for us to finish it.

(Laughter)

CHAIRMAN BABCOCK: I'm not sure they would agree with that.

PROFESSOR DORSANEO: And that's where we are, I think, and, really, it's the court that's going to finish it. And probably the most important thing is not what we vote on but that the court can read the transcript and see what the issues are and appreciate the discussion of them. To me, it just doesn't make any sense to impose litigation costs on somebody who doesn't accept the settlement offer when those costs have nothing to do with the rejection of the settlement offer. And you could even win the rest of the case and still have to pay the litigation costs under -- you know, under that analysis, and that's just crazy. And I don't think anybody would have that in mind.

Dealing with it in a footnote or dealing with it in a comment, recognizing that there's

considerably more complexity, that all makes sense to me, but just letting it be doesn't make any sense.

CHAIRMAN BABCOCK: Okay. Harvey.

HON. HARVEY BROWN: My point has been covered.

CHAIRMAN BABCOCK: Your point's been covered. And then Skip had something.

MR. WATSON: Just very briefly. I just wanted to caution the thought that the case law defines reasonableness in terms of whether or not the work was necessary is a little risky. You know, most of the case law out there is under Chapter 38, where it says "reasonable and necessary," and clearly the work is not necessary when it's -- when the person should have been out of there. I mean, that's been successfully argued many times under that term. Reasonableness goes more to, you know, the amount of the fee than the -- well, all the factors that the supreme court has enunciated.

I think that -- having said that, I think we can quickly vent around where reasonableness will cover necessity when only one of those terms is used, but I -- the last thing I want to say is that I have no opposition to the footnote or the comment or anything like that being in there. To me, that's a

reasonable compromise, and, again, I don't like the fact that they said "case." My problem is, I've never yet seen the supreme court statutory analysis say, "Oh, it just looks like they got tired and went home and punted it to us," but --

CHAIRMAN BABCOCK: They would take exception to that.

(Laughter)

CHAIRMAN BABCOCK: Justice Gray and then Carlos and then Bill again.

HON. TOM GRAY: This may or may not address the -- directly the concerns, but it seems like, because they have used a different term than what they used in 42.002(b) -- they did not use the term "action." They did not use the word "claim." It's not exactly clear what they mean by the use of the word "case." We are talking about a problem primarily as a result of multiple parties. Could we endeavor to define the word "case" something along "in an action involving multiple parties 'case' means monetary claims against that party." And in that fashion, you have narrowed what the case is with regard to the settlement offer that's on the table.

MR. LOPEZ: I was going to suggest -- I'm not sure -- there may be different ways to do

that, but they defined it as case in the context of one party versus another and then gave us an explicit instruction to handle it for multi-parties cases. So I don't think there's any question that we can do it. And I like the suggestion from this end about the footnote just as much as I like Professor Dorsaneo's. I don't see a whole lot of difference in it.

CHAIRMAN BABCOCK: Bill, will you yield to Pemberton so somebody on this row can talk for the first time today?

(Laughter)

CHAIRMAN BABCOCK: Except for Justice Duncan.

MR. PEMBERTON: It seems like what we have here is a framework for an offer of settlement rule geared toward the classic two-party case. Subpart (c) of 42.005 is, to me, a command to us and to the court to come up with a way to make this work for multi-party cases. I think there's a tacit recognition that this is -- the framework doesn't necessarily work and we need to play with it a little bit.

CHAIRMAN BABCOCK: Bill. Then Justice Duncan.

PROFESSOR DORSANEO: This is a comment

that fits in with regard to this idea, the notion of reasonableness. There's been discussions here over the last several days that "reasonable" means, you know, reasonable and made necessary by something. I don't necessarily think that reasonable and necessary is what "reasonable" means. I think that's what it ought to mean in this context. I mean, it's not "reasonable" has an independent -- a potential for an independent definition, whether it's something beyond usual and customary or just simply related to that. The necessity of the work here in this context would seem to be the necessity of doing the extra litigation work, incurring the extra litigation costs as a result of the fact that the settlement offer was rejected.

So I'm getting on board with Alistair's notion of talking about it and what everybody else is talking about, about having it be governed by what's reasonable, but I want the broader definition of reasonable that we've been kind of assuming is the definition, anyway, reasonable and necessary, with some sort of a suggestion as to why it was necessary.

CHAIRMAN BABCOCK: Justice Duncan, did you have something?

HON. SARAH DUNCAN: Just that I -- I applaud Justice Gray's suggestion, because I think

that is clearly contemplated by the statute, that we adapt this rule for multiple party cases.

And also, just to caution those advocates of footnotes. The only time in the court's history it was adopted by any comments is 166(a)(i). It's not to say it won't happen here, but it was very unusual when it happened.

CHAIRMAN BABCOCK: But it was fun.

(Laughter)

CHAIRMAN BABCOCK: For those of us who were here.

PROFESSOR DORSANEO: Discovery rule.

HON. SARAH DUNCAN: Discovery.

CHAIRMAN BABCOCK: Yeah. That's right.

Okay. So whose motion or proposal do we want to vote on?

Okay. Alistair, you want to repeat your solution to the problem again.

MR. DAWSON: My proposed solution -- if I can remember it -- is, leave the language as currently drafted in 167.11 Subsection (c) to read "Litigation costs may be covered by the offering party under this section are limited to those litigation costs incurred by the offering party, after the date the rejecting party rejected the settlement offer,"

and then we drop a footnote comment to say "in considering the reasonableness of the attorney's fees," which is Pete -- and the expert fees, which actually Pete points out, is covered under 42.001 Subsection (5), the definition of litigation costs, that there we drop a comment that would say "in considering the reasonableness of the attorney's fees and expert fees, the trial court may consider such factors as whether the litigation costs related to the offeree or another party, whether they related to non-monetary claims," et cetera. I don't know what all the et cetera are, but the issues that we've been discussing.

CHAIRMAN BABCOCK: Okay. Is there consensus about that or --

HON. SARAH DUNCAN: There is not consensus.

CHAIRMAN BABCOCK: There's not consensus about that.

Okay. Carl.

MR. HAMILTON: Was it contemplated that that footnote would contain language that it says the court can consider whether or not those expenses would have been incurred by the offeror anyway?

MR. DAWSON: Yes. That would be --

should have been included in the comment.

CHAIRMAN BABCOCK: Okay. Sarah, what's wrong with that?

HON. SARAH DUNCAN: Well, Mr. Pemberton and I were just discussing it. We prefer Justice Gray's suggestion that we drop a 7 in --

CHAIRMAN BABCOCK: You drop what?

HON. SARAH DUNCAN: 167.1 and define case when used in the multiple party context.

PROFESSOR ALBRIGHT: Sarah, can you say that again? Where is that?

HON. SARAH DUNCAN: 167.1(7), we define case in the multiple party context along the lines of Justice Gray's suggestion.

CHAIRMAN BABCOCK: It's 167.1(5), isn't it?

HON. SARAH DUNCAN: Well, there's already a 6.

CHAIRMAN BABCOCK: Oh, you say add a 7 in. I'm sorry. I'm sorry.

And, Justice Gray, what would -- where did he go? There you are. What would your new 167.1(7) say?

HON. TOM GRAY: I was on a different page. "In an action involving multiple parties, case

means monetary claims against that party."

CHAIRMAN BABCOCK: Frank. And then Bill.

MR. GILSTRAP: The problem with that approach is, though, while that deals with multiple party situations, it doesn't deal with the monetary versus non-monetary claims. If we're going to put some kind of comment or change in there, we need to deal with both of them.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I agree with that.

HON. DAVID GAULTNEY: Well, rather than put it as a footnote to the case, why is it -- why is it necessary to do it there as opposed to under the reasonableness definition and say "in considering the case" -- I mean, I'm not sure I understand the substantive distinction between putting it under reasonableness and defining the case.

CHAIRMAN BABCOCK: Bob.

MR. PEMBERTON: I think part of the concern voiced yesterday, that if you have a definition in the rule of what reasonable attorney's fees are, you risk doing violence and creating confusion in light of the case concepts of what reasonable attorney's fees are.

CHAIRMAN BABCOCK: Okay. We're going to -- hold those thoughts. We're going to suspend this discussion because the Chief Justice --

CHIEF JUSTICE PHILLIPS: You can go ahead and --

CHAIRMAN BABCOCK: No, no, no. We've been anticipating your comments for a day and an hour now.

(Laughter)

CHAIRMAN BABCOCK: People have been on pins and needles waiting for you. So we're going to hold off on that stuff and let Chief Justice Phillips talk to us about the complex litigation.

CHIEF JUSTICE PHILLIPS: Well, thank you. For the last 15 years, I've been fairly pleased to leave the Rules Advisory Committee to Judge Hecht, knowing that he will move in the right direction and not move so fast that we can't get on the train and look and see it if we need to check what's happening.

The legislature has given the train a big push, though, here.

(Laughter)

CHIEF JUSTICE PHILLIPS: And I'm sorry about you-all's summer.

(Laughter)

CHIEF JUSTICE PHILLIPS: I'm fixing to go out of town as soon as he gets back, however.

(Laughter)

CHIEF JUSTICE PHILLIPS: And I noticed that one of these rules particularly involves the office of chief justice, and that, of course, is the MDL panel rules where the legislature wants those to be effective by September 1, and they leave the appointment power of who's going to be on this panel solely to me. So I thought I should take a little bit closer interest in this area, and I appreciate you-all suspending the rules for me to come.

There's very little -- unlike some of these rules, which says, "You shall write any rule you want as long as it says precisely this," there's very little guidance in the statute as to what we should do in these rules, and it really gives the committee and the court a great deal of leeway to decide how an MDL should work.

I should say that I think this law is long overdue. When I've been to national conferences -- and I'm sure you're the same way. I was the chair of National Conference on Mass Tort Litigation in 1994, and I caught all kinds of grief from people all across the country saying, why have

you been so inefficient in getting pretrial consolidation. I said, "Well, we don't have any power to do that at the supreme court." And they simply didn't believe it. Nobody from any other state believed that. In fact, there had to be 254 separate proceedings in cases which had common issues of law. And now, at last, they're right. We're in line with the other 49 states.

We have a wealth, really, of options to choose from here. We can take our own rule, our Rule 11, which has worked pretty well since 1997, despite, of course, as is usual in Texas, all the outcry at the commencement that this was a terrible thing. It was the end of the free world. There have been remarkably little complaints about that.

We could take that and just tweak it a little bit to really provide this committee as the operation in lieu of the presiding judges.

Where's Peeples?

HON. DAVID PEEPLES: Right here.

CHIEF JUSTICE PHILLIPS: There he is.

You know, let them have a little more time to deal with open records requests or something.

(Laughter)

CHIEF JUSTICE PHILLIPS: Or we could

adopt, essentially, a federal procedure, and I've tried to read the federal MDL rules. My favorite rule being is, if we have no rule, then the rule is, you do it like you've always done it in the absence of a rule. We could put those kind of rules into effect in Texas, or we could look at some of the other states -- we have Colorado and California in front of you --

MR. GRIESEL: Yes.

CHIEF JUSTICE PHILLIPS: -- which have the virtue of being short, but they also provide quite a bit of guidance. California, which is the last page of this little handout, actually presumes that certain types of cases are going to be complex, and I guess a negative implication presumes that certain other types aren't going be complex.

At the very least, these rules need to say some very practical things, since the budget item for this is zero, like it is for everything else, how this committee meets, is a phone meeting sufficient, how regularly do they meet, who calls the meeting, who makes a record of this proceeding, are there going to be oral arguments.

I understand that in federal MDL you get the honor of flying to Hilton Head or something for a 20-second presentation. Are we going to allow that

always, never, or sometimes in our proceedings? What kind of timetables do we need? What kind of order does the MDL panel have to give? How much justification do they have to give? What kind of appellate review is there going to be of that?

What else do you think I should -- that I've left out?

MR. GRIESEL: I think that's --

CHIEF JUSTICE PHILLIPS: Well, you know, you'll figure the other ones out.

(Laughter)

CHIEF JUSTICE PHILLIPS: So I guess that we'd like just a little debate for this. Has there been a committee appointed or are we going to appoint --

CHAIRMAN BABCOCK: We have a committee.

CHIEF JUSTICE PHILLIPS: There's already a committee. Well, they should take notes, then.

CHAIRMAN BABCOCK: And that committee is chaired by Mike Hatchell, co-chaired by Justice Brister and also consists of Ralph Duggins, Sarah Duncan, Justice Gray, Stephen Tipps and Bob Pemberton.

CHIEF JUSTICE PHILLIPS: Great.

CHAIRMAN BABCOCK: We've got our best people on it.

CHIEF JUSTICE PHILLIPS: Do you want to preside at this point?

HON. SCOTT BRISTER: If Hatchell won't, I will, but I'd just as soon Hatchell do it, but --

CHIEF JUSTICE PHILLIPS: Well, I mean, for today, for this moment.

HON. SCOTT BRISTER: Sure.

CHIEF JUSTICE PHILLIPS: And kind of collect -- go through what your committee is looking at, and I would think that the court would need these rules sometime in early August. This is not part of the Rules Enabling Act. In other words, we don't have to have 60 days of comment between August 15th and September 1.

MR. GRIESEL: I think Justice Hecht envisions that these be adopted on September 1, published and have formal comment so we can plug the holes.

CHIEF JUSTICE PHILLIPS: And I have a tentative list of who I'm going to appoint in my mind, but I'm doing due diligence on it. Some of the people I don't know, but I think it's important to have a range of people from across the state and various perspectives within the narrow confines of, they're serving on the court of appeals or if they're one of

the administrative judges. And then we need to decide if that group needs a presiding officer and do we choose them or does the group.

HON. SCOTT BRISTER: I assume there's a reason this is put in HB 4. What is the -- what's going wrong that led the sponsors to include this as part of HB 4 fixing the --

CHIEF JUSTICE PHILLIPS: The reason it's not in a separate bill is, it had to be debated on other bills.

(Laughter)

HON. SCOTT BRISTER: Can't have that.

CHIEF JUSTICE PHILLIPS: I think the limitations with Rule 11 were, number one, there were nine -- unless some contortions were gone through, there are nine different presiding judges, and they have to have their own meetings. And sometimes -- I mean, I guess, you can -- Phen Phen or something, there may be enough cases all over the state that that's justified, but sometimes you may rather have one judge or two judges. Secondly, the assignment had to be of an active district judge, and there is a companion bill that passed and I presume will be signed --

MR. GRIESEL: 3386.

CHIEF JUSTICE PHILLIPS: -- that now allows assignments to be made in this type of case -- and it will dovetail into this, allows assignments to be made of a retired -- is it retired or former or just retired?

MR. GRIESEL: Retired or former.

CHIEF JUSTICE PHILLIPS: A retired or former judge. There may be some cases -- now that we don't have a viable visiting judge program, there may be cases of such complexity that we simply could not find a district judge with the experience to handle this kind of case who could afford to let their docket languish for the amount of time it would take to handle this. Now, that might only happen once every two or three years, but it could happen. And so now we have the flexibility to go to a retired or former judge. And we don't think it's viable to use a retired or former judge if there is a peremptory strike provision in place, because, sooner or later, one of 500 parties is going lodge a peremptory strike just for tactical reasons.

Thirdly -- I mean, we could have fixed Rule 11 to provide some more standards, but it was a somewhat standardless situation.

This would be a matter of opinion, I

suppose. First, let me say that I don't think the supreme court pushed this -- we pushed this other bill for former retired judges, but somebody else came up with this idea. To my knowledge, it didn't come from any of the nine of us. So I'm now into just rationales they might have.

The presiding judges are not equally distributed across the state. In other words, there are presiding judges that have only a very few courts, and the judges from there might not have any experience with this type of litigation, and they might be a majority of the nine presiding judges. And after all, they do have a lot of other duties, a lot of other things on their mind, and this board can meet much more flexibly, I guess.

So that's -- with apologies for whoever thought this up in the legislature, I think that's the reasons for it.

CHAIRMAN BABCOCK: Just in terms of timing, we've got a meeting in July, Justice Phillips, and I think we're going to add a day to our meeting. And then we have another meeting in August which is key to precede what Justice Hecht thought tentatively was going be a week of your meetings which were going to be August 25th.

Do you want us to have our work done on these rules at the conclusion of our July meeting?

CHIEF JUSTICE PHILLIPS: When is that July meeting?

CHAIRMAN BABCOCK: July 17th, 18th and 19th.

MS. LEE: Yes.

CHIEF JUSTICE PHILLIPS: Well --

CHAIRMAN BABCOCK: Because otherwise --

CHIEF JUSTICE PHILLIPS: -- I guess sooner is always better, but I would say yes if you can get a set of rules that you're satisfied with, and then maybe at least some of the court, if not all of the court, would have time to review that and come back and share ideas with us. And I think here the presiding judges would be useful, too, having had more experience with this than anybody else, if they could look at a draft set of rules between your July and your August meeting and come back with some ideas.

I certainly like David's view on this, but I think Rule 11 -- within the restrictions of Texas law, it's worked reasonably well.

CHAIRMAN BABCOCK: Yeah. Because our August meeting is going to be right before your week of discussions August 25th.

CHIEF JUSTICE PHILLIPS: Well, I would appreciate a draft that has at least the tentative informateur of this group by the July meeting.

I'll be in England teaching arbitration, which I know nothing about. So I'll learn something about it.

(Laughter)

CHAIRMAN BABCOCK: We'll fax you or e-mail you our thoughts.

HON. SCOTT BRISTER: I could run it over to him.

(Laughter)

CHAIRMAN BABCOCK: That's an idea.

CHIEF JUSTICE PHILLIPS: We'll give 100 percent of the state budget for this committee to --

(Laughter)

CHAIRMAN BABCOCK: We'll get a bunch of visiting judges to row you over --

(Laughter)

CHAIRMAN BABCOCK: All right. Does anybody have any thoughts today about this issue?

Judge Peeples, you probably are the most experienced guy in the room on this.

HON. DAVID PEEPLES: Well, I think Rule

11 has worked very well, but the court couldn't do everything it wanted to do in Rule 11 because it didn't have the rulemaking authority to go too far. This is much stronger. And I think the committee ought to pick and choose all of the best provisions from California and Colorado and Rule 11 --

CHAIRMAN BABCOCK: The federal.

HON. DAVID PEEPLES: And go with it.

HON. SCOTT BRISTER: If I'm understanding correctly, the rules we're drawing up is as just how the cases get transferred to a judge. As far as what the judge does with them in the pretrial rulings thereafter, it's beyond the scope of the rules of judicial administration.

CHIEF JUSTICE PHILLIPS: Well, I think that's right. I mean, we know two things. As with MDL, the judge cannot try the case on the merits, but I think we fixed the old Howell vs. Maldee (phonetic) problem through this and the other statute, where, technically, a pretrial judge, however selected, could not make a ruling outside the district where the case was originally filed. You could do it outside the county, but in multi-county district. But, technically -- and I don't think this has ever happened -- but, technically, our Rule 11 judges, even

if you have a judge appointed over an administrative district or you get together and appoint one over the whole state, they have to go to every county to make the identical pretrial ruling.

Now, I don't know that an objection has ever been lodged requiring that, but that, prior to September 1, 2003, has been the law as -- I mean, courts never interpret it, but as interpreted by the courts of appeals and I believe this -- a third improvement here is that the pretrial judge can actually make rulings that are binding in the case, short of a trial on the merits.

HON. DAVID PEEPLES: That was changed by statute five years ago.

CHIEF JUSTICE PHILLIPS: Oh. It's already been changed? Well, I shouldn't have talked.

HON. DAVID PEEPLES: Unless there's an objection, you can sit in a different county, pretrial.

CHIEF JUSTICE PHILLIPS: Okay. I'm sorry.

HON. TRACY CHRISTOPHER: Yeah. We can sit --

CHIEF JUSTICE PHILLIPS: All right. It's not a problem now.

HON. SCOTT BRISTER: But there will be an objection, likely.

HON. TRACY CHRISTOPHER: No.

HON. DAVID PEEPLES: No.

HON. SCOTT BRISTER: You can't object?

HON. TRACY CHRISTOPHER: No. I mean, they don't object. I mean, nobody wants to have to travel to every county. I mean, they don't.

CHIEF JUSTICE PHILLIPS: The Bar has really been reasonable about Rule 11. I mean, even before this statutory change, I don't think anybody was making complaints, but I'm glad to hear it happened and probably we had something to do with it.

Finally, the Jamail Committee has done some work on some of these issues. Towards the back of the notebook, Texas Rule of Civil Procedure 42b called complex litigation, has some ideas. Of course, this was done before this statute was conceived or passed.

Scott, what's some of the input you can use from the group right now?

HON. SCOTT BRISTER: I've never been involved in Rule 11. So I'm just not that familiar with it. So my priority would be to find out, you know, what problems there have been with it. I mean,

if it's a matter of tweaking Rule 11, surely, that won't take that long or be that complicated, but --

CHAIRMAN BABCOCK: I think you might find that there's more to it than that.

HON. SCOTT BRISTER: Right. But I would think the thing most practitioners would be worried about is, "What does the pretrial judge do," you know. They're concerned about venue rulings and trial settings and stuff like that, and seems to me, if we don't get into that, then it's a lot easier to pass this rule and leave that up to the judge who was assigned and the appellate -- I assume the supreme court who would hear any appeals from what that judge did.

CHAIRMAN BABCOCK: It seems to me, too, that even though Judge Peeples is way overburdened on committees, that you probably ought to be involved either formally or informally on this.

HON. DAVID PEEPLES: I can think of one or two I can give up.

(Laughter)

CHAIRMAN BABCOCK: Okay. Consider yourself off the Justice Rules Committee.

(Laughter)

HON. DAVID PEEPLES: That's a great

trade.

(Laughter)

CHAIRMAN BABCOCK: And you're on this one.

(Laughter)

CHAIRMAN BABCOCK: Anybody else who has Rule 11 experience?

PROFESSOR DORSANEO: Well, I have considerable Rule 11 considerable. Despite criticizing it, I've used it.

(Laughter)

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Yeah. I was the Rule 11 judge for the Bridgestone Rollover cases in my 34-county deal, and it went very smoothly. The lawyers liked it. So I'd be happy to, you know --

HON. SARAH DUNCAN: And Judge Christopher.

CHAIRMAN BABCOCK: Tracy.

HON. TRACY CHRISTOPHER: I'm the Rule 11 judge for Baycol in Region 2.

MR. LOPEZ: We didn't have any problems at all.

CHAIRMAN BABCOCK: Okay. Pete.

MR. SCHENKKAN: I have some federal MDL

experience, and I think may be partially to blame in terms of people outside the court for this being in the package this year. I was one of the outside lawyers asked by Texans for Lawsuit Reform to consider other issues that weren't already on their agenda and suggested MDL reform as one. So I have some interest in that.

HON. SCOTT BRISTER: As I read the statute, it's not really multidistrict. It can be multi-cases from the same court.

CHIEF JUSTICE PHILLIPS: It could be. I mean, generally, in larger counties, that's already being taken care of --

HON. SCOTT BRISTER: Right.

CHIEF JUSTICE PHILLIPS: -- by the local administrative judge, but if it's not, this panel could certainly step in at the request of litigants.

I stopped the -- going around the room.

CHAIRMAN BABCOCK: Oh, no. That's okay. I think, maybe, everybody that had experience had raised their hands, but I could be wrong.

Bill.

MR. EDWARDS: I had some both the Rule 11 and the MDL.

HON. TRACY CHRISTOPHER: Could I ask a

question?

CHAIRMAN BABCOCK: Yeah.

HON. TRACY CHRISTOPHER: I don't know if Justice Phillips knows this. The part of the Jamail report on moratory of signing up or settling certain cases, I mean, is that something that we really have to consider or --

CHIEF JUSTICE PHILLIPS: No. Well, first of all, I don't think you have to. And secondly, I suspect this is -- I'd kind of like Justice Hecht's view on that, but I think this -- certainly Rule 11 can stand -- well, the new -- whatever this is. The panel on multidistrict litigation could stand without this, but I suppose it would be okay -- let me look at the language of the statute, which is on Page 13 of House Bill 4, about eight pages before the Jamail language: The judicial panel must operate according to rules adopted by the supreme court. The rules must allow the panel to transfer related civil actions for consolidated or coordinated pretrial proceedings; allow transfer of civil actions only on the panel's written finding that transfer is for the convenience of the party and witnesses and will promote the just and efficient conduct of the action; (3) require the remand of

transferred actions to the transferor court for trial on the merits. And this is the biggy "(4) provide for an appellate review of certain or all panel orders by extraordinary writ." Then, "The panel may prescribe additional rules for the conduct of its business not inconsistent with the law or rules adopted by the supreme court."

So I don't think the panel ought to be adopting this, but certainly the committee could suggest to the court that they be adopted in conjunction with these rules or maybe in conjunction with -- since these rules don't have to go through the rules advisory process and the 60 days of comment, these concerns of the Jamail Committee might better be dealt with the Rules of Civil Procedure, since it seems, to me, some of these go beyond just the type of case that might be consolidated under the multidistrict.

HON. SCOTT BRISTER: David, would this replace Rule 11 or be a supplement?

HON. DAVID PEEPLES: Makes sense for it to replace it.

CHIEF JUSTICE PHILLIPS: Yeah. We would repeal Rule 11 September 1.

HON. TRACY CHRISTOPHER: And what would

happen to all the current Rule 11 pending cases? Would they --

CHIEF JUSTICE PHILLIPS: We'd like your opinion on whether the presiding judges should see those through. I think -- David, what do you think? I think they should, just at very first blush.

HON. DAVID PEEPLES: I guess case by case you could decide whether to take -- you know, the situation where nine judges are doing it right now and fold that into one judge kind of makes sense.

CHIEF JUSTICE PHILLIPS: Are most of these things a nine-judge deal or are they less than statewide?

HON. DAVID PEEPLES: It's not nine. Maybe six or seven, most of them.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Having done just one type of the case, the Bridgestone Rollovers, I mean -- when you say it's nine judges, you mean the --

HON. DAVID PEEPLES: Well, Rule 11 requires that each region do its own, the nine regions, but there's not a lot of litigation like this in West Texas and the Panhandle. So a lot of times, they don't get involved, but there's a lot in East Texas and South Texas.

MR. LOPEZ: I'm sensitive to what Chief Justice said about retired judges having the time to do it as opposed to a full-time. It took about half of my time just to do that and I was -- if I were to do -- if somebody were to do four of the districts --

CHIEF JUSTICE PHILLIPS: Nobody would be -- oh. I see what you're saying. If you're doing the whole state.

MR. LOPEZ: It's fine, but that --

CHIEF JUSTICE PHILLIPS: But how much time did you spend consulting with the other judges who had these cases in other regions?

MR. LOPEZ: Not very much. We did it all by e-mail. I mean, it was pretty simple, really.

CHIEF JUSTICE PHILLIPS: Track down a retired judge with e-mail.

(Laughter)

CHIEF JUSTICE PHILLIPS: And for that half time, were you using visiting judges back on your own docket?

MR. LOPEZ: No. And I'm exaggerating. It wasn't half, but it was, you know, a sizable chunk.

HON. DAVID PEEPLES: My experience was -- I did it two or three times. After the first hearing and maybe a second hearing, there never was

another hearing. Once you had gotten the pretrial order and sort of settled things down, everything worked out by agreement, usually.

MR. LOPEZ: I agree with that. I mean, once that type of -- whatever tort it is you're dealing with, people get to know the ground rules and it starts to take less and less time. I agree with that.

CHIEF JUSTICE PHILLIPS: Well, I know Judge Hecht is very interested -- I mean, you-all had a secretariat. The nice thing about presiding judges is, they have somebody -- or one or more people at the office -- a court administration to kind of nurse along everything they do. Justice Hecht is very interested in coming up with a -- somebody, whether it's someone in the clerk of our court or with OCA who will staff this thing and see that it works and see that, when the papers get filed, that person sees them instantly and they get them to the judges on the panel and make sure there's a ruling and makes sure it's disseminated, because judges are busy, and they need a clerk for this, to put it simply.

CHAIRMAN BABCOCK: Judge Christopher.

HON. TRACY CHRISTOPHER: Well, is it my understanding of this that the panel will decide

whether to consolidate something, but then the actual -- all the actual work would be given to a trial judge?

CHIEF JUSTICE PHILLIPS: Yes.

HON. TRACY CHRISTOPHER: Is that the way it's supposed to work?

CHEIF JUSTICE PHILLIPS: And you choose the judge.

HON. TRACY CHRISTOPHER: And this will --

CHIEF JUSTICE PHILLIPS: Not you, because you're not eligible for the panel.

HON. TRACY CHRISTOPHER: Right. I wouldn't want that burdensome chore.

This rule appears to require physical transfer of the files. Are we talking about literally physical transfer of 10,000 files to a judge in, you know, Dallas County?

CHIEF JUSTICE PHILLIPS: Well, we have to -- I mean, since the case is going to come back for trial, we have to decide whether you ship the whole file out or make a copy and send a copy to the judge.

HON. TRACY CHRISTOPHER: Who's paying the cost of the copies if we make copies?

CHIEF JUSTICE PHILLIPS: Well, we'll

stick that on the counties, if we can, with everything else done in Austin.

(Laughter)

HON. DAVID PEEPLES: It cries out for electronic filing, doesn't it?

CHIEF JUSTICE PHILLIPS: Yeah. Well, yeah, it does, and so if it's in Fort Bend County only, we're in great shape -- Fort Bend County Court.

HON. TRACY CHRISTOPHER: I have another question, like, on summary judgments. For example, in the case that I'm handling, there is no -- there's not anticipated a summary judgment on medical causation that would apply to every plaintiff. There would only be medical causation summary judgments that would apply to each plaintiff based upon their medical condition and medical records. Would that be something that, if this judge would hear 10,000 summary judgments --

CHIEF JUSTICE PHILLIPS: Yeah.

HON. TRACY CHRISTOPHER: -- individual?

CHIEF JUSTICE PHILLIPS: I mean, that's up to the judge, too. The judge could say, "This really doesn't" --

HON. TRACY CHRISTOPHER: Is that what you anticipate?

CHIEF JUSTICE PHILLIPS: -- "have any common issues of law or fact and won't promote the just and efficient resolution," and send them back, but if the judge on the other hand, I think, could say, "You know, I've got a sense of what this lawsuit is about and what the causation factors are and how it affects different people and the most efficient thing is for me to hear these summary judgments." It's certainly within the statutory authority for the pretrial judge to hear a dispositive summary judgment or a partial summary judgment.

CHAIRMAN BABCOCK: Yeah. There are medical causation cases where it's common to the whole class, and the MDL judge can decide that, but in the situation you posited, I would think -- I mean, surely, that that wouldn't be anticipated, that you do 10,000 summary judgments.

HON. TRACY CHRISTOPHER: Well, I don't know. I'm asking that from what, you know --

CHAIRMAN BABCOCK: Maybe so. Yeah.

HON. TRACY CHRISTOPHER: What is the intent?

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: If this is too much detail, that's fine, but it sounds like we're discussing it

now.

Will there be some kind of time frames to sort of -- I mean, I have this fear that this one judge is going to get inundated with -- it's going to end up being a lot more work than, perhaps, even they thought, and, in reality, it's delaying the resolution of any one case rather than speeding it up.

CHIEF JUSTICE PHILLIPS: Well, I think that's what the panel -- well, I mean, the panel needs to be alert to that. If this isn't making things move faster, then it's a bad idea. And that's the main complaint about federal MDL and the main reason a whole lot of lawyers try to stay at state court, is that they fear it swallows up and nothing ever happens, but, you know, if Texas is doing anything right right now, we are moving most cases through the trial courts pretty well. And I think the panel, although I think it's mainly appellate judges, will be sensitive to that. You file a motion with a -- you know, file a motion to remand them back or something.

MR. LOPEZ: I think we're moving them along as well and I think the federal MDL, perhaps, isn't, and yet now we're moving more towards that, which, the legislature has done what they've done, so --

CHIEF JUSTICE PHILLIPS: I reiterate, the changes in the visiting judge program may make this rule very timely. And there may be cases that deserve this that certainly don't deserve treatment by region. There may just be ten cases across the state, but it's all the same parties and all the same witnesses and it would work better for pretrial this way.

Mr. Griesel has several emendations and observations, one of which I can handle, but, really, it only applies to cases filed after September 1. So I guess if you have 500 cases filed after September 1 and 500 that are identical filed before September 1, we might -- I guess let's just say, we might be using Rule 11 for another year or two during the transition period. We might not want to repeal it yet.

And secondly, tell us about Texas Online and how this -- it might not be ready by September 1, but maybe one day soon this could be handled electronically.

MR. GRIESEL: The state is exploring electronic filing. The committee has passed electronic filing standards that are in use in pilot projects in various counties. In terms of who gets the documents and how -- what you transfer the file,

California's manual for complex litigation, there's statements that suggest creating electronic central document depositories, and I believe even the federal MDL rules suggest forms of electronic filing.

And I think that, in looking at the federal rules in the California system, one way that we can run a system with less personnel cost or less copying cost is creating electronic -- either some form of electronic filing and disposition to the various judges or some method of having the parties create electronic document depositories to shift the burden back to the parties to create the systems.

So I think that is something we're going to have to look at.

CHIEF JUSTICE PHILLIPS: And these rules either contain it or ought to have -- the committee ought to give some suggestions to the court and to OCA.

MR. GRIESEL: The number one -- the two people that have talked specifically about MDL have both been clerks of various courts who have wrestled me to the ground and threatened me if their court is chosen to host the documents. So that is --

CHAIRMAN BABCOCK: And what sort of threats have they made, Chris?

MR. GRIESEL: Bodily.

(Laughter)

CHAIRMAN BABCOCK: Yeah, Peter.

MR. SCHENKKAN: I want to encourage this, if we can, and maybe we already have such contact, but, if we don't, make one with the people who know the most about the way the California system works. I think California is much more analogous to our situation than any other go-by. It's another state. It's not the federal system. So it has state issues, and, yet, it's a very large state with many different cities and regions like us, unlike Colorado. And they've had this for a long time and they've worked their way through a lot of these problems, and see if we could make some sort of human contact with somebody in the court of an MDL system there who knows how it works. We can off-load an awful lot of what they've learned.

CHAIRMAN BABCOCK: Peter, the Jamail Committee did do that. And I think I've got the files on that. So I can -- and, Bill, you may know somebody, too. Between us, we can probably -- and that's a great suggestion. We'll try to do that.

And, Scott, I'll try to get you the files that I've got on this from the Jamail Committee.

It's larger than you can imagine.

MR. VALADEZ: Can I just make a suggestion?

CHAIRMAN BABCOCK: Yeah, Robert.

MR. VALADEZ: There are two or three firms that, like, were involved in Phen Phen and PPA, and now in Rezulin, that have all gone through the Rule 11 process. And there's just a couple of lawyers that have been a constant through all that litigation, like David Greenstone in Dallas and the lawyers from Clark Thomas, Gail Dalrymple from San Antonio, who have a lot of experience with the pros and cons of what is involved up until now.

I've been involved on the side of retailor counsel, but just in going through it with them, it's kind of nice and refreshing to see that we're going to a federal MDL style, though I realize there's a lot of downsides to it. The advantage I've seen over -- Rule 11 works great in Texas if you have a really attentive judge in a particular region or Judge Peeples or the judge in Harris County or in Dallas, but one of the problems that has happened that I've seen in Rule 11 up until now is, if you have other counties that have a few cases that have been designated by the administrative judge, you'll have

inconsistency in rulings.

For example, like one of the big -- one of the big issues in this whole thing that Rule 11 works nicely for is when you have -- like PPA, for example, and everybody is wanting all these corporate witnesses in every different county and wanting to designate them -- you know, set them for depositions on different dates. In San Antonio, for example, in the fourth region, we have a real set procedure that we follow to ensure that, you know, witnesses aren't being tied on different days; whereas, in the Valley, the judge there has not made a similar ruling. And so, you know, you're having to file motions to quash and it's just very difficult.

That's the advantage of the federal MDL. You have one judge that decides for the entire country what the discovery process and how the discovery is going to proceed.

So you may want to consult several of those lawyers in your committee work, just because they can help you really kind of focus down. Judge Peeples is going to have a lot of knowledge of it as well, being the administrative judge on PPA.

CHAIRMAN BABCOCK: Okay. Great. Thanks, Robert.

Yeah, Buddy.

MR. LOW: Chip, we would set up the framework, but then wouldn't the committee draw administrative rules? I mean, they have had -- we don't do every detail, but wouldn't they draw how they would operate within that framework? I mean, they would have to, you know, the multi -- the federals have their rules.

CHIEF JUSTICE PHILLIPS: Yes. I think that's right, but I think anything that we want the Bar to know about how to get started ought to be in these rules.

MR. LOW: I know. I know, but we set up the framework and you have the committee, but I don't think we should tell the committee how to dot every "i" or cross every "t."

CHIEF JUSTICE PHILLIPS: I agree with that, because some things will change as they go along.

MR. LOW: And they can change, whereas our rules are not that easy to change.

CHIEF JUSTICE PHILLIPS: Well, these rules are not going to be rules of procedure. This will be a Rule 13 or 14 -- or whatever we're up to in the administrative rules. So they are a little easier

to change.

MR. LOW: The problem with Rule 11 is that a lot of lawyers don't even know about it, administrative rule. They don't look at administrative rules.

CHIEF JUSTICE PHILLIPS: Well, I'm sure we'll put a cross-reference in the Rules of Civil Procedure, somehow. We can at least do that. And there's no reason why this couldn't be a rule of civil procedure. We could have an administrative rule for six months while this went through comment. I mean, the legislature on the one hand -- and we talked to some legislators about this -- wants us to be very slow and deliberate on these rules, and on the other hand, they wanted them immediately.

(Laughter)

CHIEF JUSTICE PHILLIPS: And so we might -- I mean, you-all, and I would particularly appreciate your input on this, whether a solution might be to have an administrative rule which requires some posting, too. I mean, we may have to have a tentative order and then an administrative rule to be replaced by a rule of procedure.

MR. LOW: We did that in discovery. Remember the order in December that came out so you

can be sure that discovery -- there was no hiatus where a case didn't come within the old or the new.

CHIEF JUSTICE PHILLIPS: Well, I think we established, after a little talk, that we're going to have to have Rule 11 around for a while on these type of cases that are just now being filed.

CHAIRMAN BABCOCK: Anybody have any other thoughts about this?

MR. MEADOWS: Chip, I have a question.

CHAIRMAN BABCOCK: Yeah, Bobby.

MR. MEADOWS: We've heard that the Jamail committee has got a running start at this. How do we bring that work into this committee?

CHAIRMAN BABCOCK: Well, there is a big old thick file of materials, and then, of course, you have a draft of what the Jamail Committee came up with, although it's very -- it's in very summary form and didn't go through the kind of process -- the torturous process that we put language through, but I'll get all that to Scott, all that background material that the Jamail Committee came up with. And you already have or should have posted the tentative TRCP 42b that the Jamail Committee came up with.

So that's it. I mean, that's everything there is. We were not a committee that was on the

record like this.

MR. MEADOWS: Well, that's the interesting thing about it. I believe in response to a question, it was stated that there was due diligence in the Jamail Committee actually contacting those in other states who were knowledgeable about the process, and it would seem important to me, given the short time we've got to work on this, that that somehow is communicated in that information, be imparted to those who are charged with the primary work on this.

CHAIRMAN BABCOCK: Yeah. As far as I know, to the extent that contact was made, it was either made by me or one of my associates at the firm.

MR. MEADOWS: So you think you can handle that?

CHAIRMAN BABCOCK: I think I can handle that part of it.

All right. Anything else?

(No response)

CHAIRMAN BABCOCK: Anything else, Justice Phillips?

CHIEF JUSTICE PHILLIPS: Well, most everyone on this committee volunteered to be on it. So be careful what you ask for. For those people who we purely recruited, we apologize for needing so much

work over the summer months, but we'll have to work in the fall. So it all evens out.

(Laughter)

CHIEF JUSTICE PHILLIPS: But we really do appreciate your work on this and on everything else. You perform a vital function for the state.

CHAIRMAN BABCOCK: Well, and we said yesterday, Chief Justice Phillips, that we appreciate the fact that the legislature has shown great confidence in the court and you in turn have shown great confidence in us. So we're going to try not to let you down on this.

CHIEF JUSTICE PHILLIPS: Thank you. I know you won't.

CHAIRMAN BABCOCK: Okay. We'll take a break here in our morning break for 10 minutes.

(Break: 10:22 a.m. to 10:40 a.m.)

CHAIRMAN BABCOCK: Frank's got a way out of this for us. So, Frank, tell us.

MR. GILSTRAP: I think, in view of the shortness of time, maybe we need to vote up or down on whether or not we want to have something in the rule that imposes some kind of segregation mechanism or attribution mechanism before we can parse out the attorney's fees on various claims of parties. Then if

that fails, then we can go on. If it passes, then we've got to decide whether we want to parse it out among parties. It seems like there's some support for that and maybe a little less support for claims. But that might be a way to get over the hump here.

CHAIRMAN BABCOCK: Okay. And our up or down would be generally to modify Subsection (c) of Rule 167.11 in what way?

MR. GILSTRAP: To add a mechanism for attributing attorney's fees to particular claims or parties.

MR. JEFFERSON: And the alternative to that is just leaving it to a reasonableness standard based on --

MR. GILSTRAP: One of the ways of attributing it might be to modify -- to say what reasonable attorney's fees is, but there was some sentiment for just doing nothing and leaving it.

CHAIRMAN BABCOCK: Right. I think this is sort of an all-or-nothing approach. The nothing approach being to leave Subsection (c) of 167.11 as is, as the legislature suggested. So I think that's a good vote to take. So let's take that one.

How many people are in favor of leaving it as is, as the legislature has drafted it? Raise

your hand.

PROFESSOR ALBRIGHT: What is the vote?

MR. JEFFERSON: I'm not sure I understand --

CHAIRMAN BABCOCK: 167.11 Subpart (c) is in the statute, and Elaine tinkered with it a little bit. And then this discussion yesterday and this morning, there's people that want to tinker with it a lot. And so this is sort of a vote on, "Do we leave it the way it was originally drafted by the legislature or do we tinker with it?"

PROFESSOR ALBRIGHT: Now, is this the vote that he was just talking about, whether we want to include it somewhere or include it here or not include it at all?

MR. GILSTRAP: Include it somewhere.

CHAIRMAN BABCOCK: Include it somewhere.

HON. DAVID GAULTNEY: Are we talking footnotes as a possibility or are we talking about amending the --

CHAIRMAN BABCOCK: We're talking --

HON. SARAH DUNCAN: Something or nothing.

CHAIRMAN BABCOCK: Go ahead, Sarah.

HON. SARAH DUNCAN: This vote is

something or nothing.

CHAIRMAN BABCOCK: Yeah. Without defining what the something is.

PROFESSOR ALBRIGHT: Okay. Because the way you were wording it, I thought you were talking about including it in a particular place.

CHAIRMAN BABCOCK: I'm sorry. I was using that as an example.

Pete.

MR. SCHENKKAN: Do I understand that nothing, which sounds a little pejorative, covers Alistair's proposal which I support to address this in case law under reasonableness?

CHAIRMAN BABCOCK: Yes.

HON. SARAH DUNCAN: That's something.

MR. SCHENKKAN: That's what I'm trying to get at, I'm trying to understand what it is we're voting on.

MR. GILSTRAP: If you vote for nothing, then Alistair's proposal is out.

MR. WATSON: Nothing is nothing.

PROFESSOR ALBRIGHT: Because he has notes. Alistair's proposal was having notes. So what the vote is, is, don't address it at all, leave it only the statutory language or address these issues

somewhere either in the rules somewhere or in notes somewhere. Is that correct?

CHAIRMAN BABCOCK: Right.

MR. WATSON: That vote's to come.

CHAIRMAN BABCOCK: That vote's to come.

HON. DAVID GAULTNEY: So if you're in favor of Alistair's suggestion, you would vote against nothing.

CHAIRMAN BABCOCK: That's right.

HON. TOM GRAY: Unless you think the something you may get is worse than the nothing.

(Laughter)

CHAIRMAN BABCOCK: There we go.

Okay. So everybody that wants to do nothing, raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: Okay. Keep them up, because people have been raising their hands.

(Brief Pause)

CHAIRMAN BABCOCK: Okay. People that want to do something, raise your hand.

(Show of hands)

THE COURT: The somethings are 16; the nothings are 11.

HON. SARAH DUNCAN: Somethings have it.

CHAIRMAN BABCOCK: So the somethings have got it.

Now, Frank, you've got a resolution on what the something is.

MR. GILSTRAP: Well, there's two ways to push. One way, we can say, "Do we want a footnote?" Another way, "Do we want to tinker with the language," or more substantively, we could say what the something should include, and the something -- I think the debate is "Should the something include" -- and I hope I don't lose some votes on this word, but a segregation mechanism for claims against parties and a segregation mechanism for monetary versus non-monetary claims. I mean, those are the two somethings we're talking about adding.

CHAIRMAN BABCOCK: Yeah, Judge Christopher.

HON. TRACY CHRISTOPHER: Well, maybe I'm beating a dead horse, since no one ever jumps on this bandwagon. I think when we address something, we need to address the something with respect to when a party gets money from one defendant but not the other defendant, whether they're going to get their litigation costs or whether litigation costs are going to be solely in relationship to what the plaintiff

recovers against that defendant.

HON. DAVID GAULTNEY: I think Justice Gray's suggestion about defining cases applies to multiple parties but doesn't apply in this situation. I think we're -- we may be authorized under the statute to deal with multiple parties. I'm not convinced we're authorized to deal with multiple claims.

MR. GILSTRAP: That's the vote.

CHAIRMAN BABCOCK: Yeah. That's the vote.

HON. DAVID GAULTNEY: I like the, dealing with the footnote of reasonableness rather than trying to deal with defining cases. First of all, I'm not sure I understand the substantive difference to deal with -- I think you can deal with both under reasonableness, with a footnote; I think you can only deal with one aspect under cases. I would prefer not to have any substantive modification in the rule trying to deal with either one. I'd like a footnote.

CHAIRMAN BABCOCK: Fair enough. Sarah.

HON. SARAH DUNCAN: Couldn't you define case, though, in such a way that you deal with both at once? Cases used in -- I'm not giving the exact

language, "but case as used in 167.1 Subsection (5) means the monetary claims against a party." Doesn't that do both?

(No response)

HON. SARAH DUNCAN: No?

CHAIRMAN BABCOCK: I don't know. I'm thinking about it.

MR. EDWARDS: What is the difference between a case and an action and a claim and a suit, because this thing uses all of them?

HON. SARAH DUNCAN: I understand. I mean, the statute indiscriminately uses all of those terms. And all I'm saying is that if we add a definition of case that is only monetary claims and only monetary claims against a particular party, we will have resolved both the monetary claim aspect of it and the multiparty aspect of it without doing anything to the two-party instance.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I think there's a problem if you start looking at 167.2 and the use of the word case there, and probably in other places in the rule, and we start creating great confusion if we define it as anything other than the entire case. Maybe the solution is to change the word case there. I don't

think so. I think it's getting -- we're introducing great opportunity for confusion.

CHAIRMAN BABCOCK: Okay. Frank.

MR. GILSTRAP: Why don't we go up or down on parties, up or down on monetary versus non-monetary. Once we figure out what the committee wants to do substantively, then we figure out whether we want to tinker with the definition of case or put a footnote.

CHAIRMAN BABCOCK: Yeah. I think that makes some sense. We voted 16:11 to do something. So how many people think that that something ought to be to have some mechanism, whether you call it segregation or not, relating to parties? Can we have an up or down on that?

Everybody that thinks it ought to be as to parties, raise your hands.

PROFESSOR DORSANEO: Well, could somebody explain exactly how that differs from what that would have to do with claims? I can't get my mind around that one completely yet.

CHAIRMAN BABCOCK: Go ahead, Frank.

MR. GILSTRAP: Well, Bill, let me say this. I think if you vote for parties, it doesn't mean you're voting against claims.

PROFESSOR DORSANEO: I know that, but I want to know what it means that I'm voting for, parties.

MR. GILSTRAP: When you have a suit against two different parties, there's a mechanism for segregating attorney's fees as to Party A as opposed to Party B.

PROFESSOR DORSANEO: Explain it to me. Explain the mechanism.

MR. GILSTRAP: Well, I mean, I don't know what the -- I'm not going to go out and say what the mechanism is. I think it probably is something like the segregation mechanism that's presently in the law concerning reasonable, necessary attorney's fees.

PROFESSOR DORSANEO: Which has to do with claims.

MR. GILSTRAP: No. You can also segregate by parties.

PROFESSOR DORSANEO: Well, I know, but we're segregating claims and parties when we're segregating parties.

CHAIRMAN BABCOCK: Okay. Skip. Then Peter.

MR. WATSON: The problem I have with what Frank's calling for, up or down segregating

parties, up or down segregating claims, is that that appears to leave out Alistair's suggestion of dropping footnote of just factors that may be considered as -- it sounds like Frank is flipping it to factors, that we're voting on "shall" be considered -- that you shall do this. And I understand Alistair's language to be, you know, advisory of, "We don't know what the courts are going to do with this," et cetera, et cetera, "but here's the footnote saying these are factors you may wish to consider in exercising your discretion."

MR. GILSTRAP: I don't think so. I think we can still decide whether or not we want to go in and have something mandatory in the rule, some type of -- or want to do it by way of footnote, but it seems to me it helps if we could get the parties versus claims out of the way.

MR. WATSON: I agree.

MR. SCHENKKAN: I don't think it does help, because I think we don't know what we want to do without then going through it. And right now we've had a discussion, which I think has been fairly candidly conceded.

If you took the next step, you said, "Yes. I vote we're going to put a mechanism in for

parties and a mechanism in for claims, but I don't know what it is." Okay? It seem to me that that's precisely why it's better to adopt the footnote approach which says, "This reasonableness discretion is addressed in case law and among the factors the court should consider are," and list the factors, which is not a mechanism. It doesn't tell you what weights you put on in specific cases.

And I would really much prefer to have an up or down vote on that. And if we have to, if the footnote passes, then we can, maybe by consensus or if necessary by vote, talk about "Are there any things we feel strongly need to be in that footnote or feel strongly shouldn't be?" If it fails, then we're back to actually putting something in the rule, and we're going to be here a while talking about those specifics.

MR. GILSTRAP: That's a way forward.

CHAIRMAN BABCOCK: Yeah. That makes some sense.

Buddy.

MR. LOW: Chip, it looks like there's a division among the something either being in the body of the rule or footnote, and I would put that to a vote and see, because then we can get to what we're

going to put if it's in the body of the rule or in a footnote.

CHAIRMAN BABCOCK: Okay. Let's do that. How many people think we ought to have something in a footnote as opposed to the body of rule. Raise your hand if you want a footnote.

(Show of hands)

CHAIRMAN BABCOCK: How many people do not want it in a footnote?

MR. HAMILTON: You mean you want it in the rule?

CHAIRMAN BABCOCK: Want it in the rule.

(Show of hands)

CHAIRMAN BABCOCK: Chair may have to vote.

(Laughter)

CHAIRMAN BABCOCK: It's 12:12, and so the Chair votes for a footnote, but the court will note that we were evenly divided on this.

Yeah, Bill.

PROFESSOR DORSANEO: Well, before Alistair left, what he said and what was added to it was a pretty good start, and I don't think I necessarily can repeat it, but --

CHAIRMAN BABCOCK: Let's hear it.

PROFESSOR DORSANEO: No. I don't think I can repeat it.

(Laughter)

CHAIRMAN BABCOCK: Okay. Well, Peter is the big proponent of this footnote. So he can repeat it.

PROFESSOR CARLSON: I think he said something like, "In considering the reasonableness of fees or costs incurred, the trial court may consider such factors as whether the fees and costs were incurred or related to the non-offering party, whether they were necessarily incurred."

CHAIRMAN BABCOCK: Peter, did you --

MR. SCHENKKAN: I did not write it down.

CHAIRMAN BABCOCK: You're such a big proponent of this.

MR. SCHENKKAN: I can try myself and see how this sounds.

CHAIRMAN BABCOCK: Yeah. Give it a shot.

MR. SCHENKKAN: "May consider, among other factors, the extent to which the costs were reasonably related to the rejecting party and to the claims that were the subject of the rejected offer."

MR. WATSON: We're going to do, in

addition to the Perry vs. Arthur Andersen factor and just ignore those.

MR. SCHENKKAN: I'm assuming that's built into it by case law, when you use the word like reasonable in the statute, that's what the court's --

CHAIRMAN BABCOCK: She can't hear you, Peter, if you're looking at Skip like that.

MR. SCHENKKAN: I'm sorry. The question was, "Do we need to put the Perry vs. Arthur Andersen factors in the footnote as it would be now, and I guess my reaction was, when the statute says "reasonable" in the Texas statute, I'm assuming the Texas Supreme Court is going to say, "That is what it means." I don't know whether they need to put that in the footnote, but maybe if they're alerting practitioners to it, that would be --

CHAIRMAN BABCOCK: Justice Duncan had a comment. Then Carlos.

HON. SARAH DUNCAN: I just want to point out, I just read all of 167, and the only place that case is used is 167.1 Subpart (5). "Cases" is used in something we added in 167.4(a)(1)(A).

MR. WATSON: What does that mean?

HON. SARAH DUNCAN: It means that I don't think the definition of "case" as used in 167.1

Subsection (5) to mean only monetary claims and only those monetary claims against a particular party would be confusing, because there are not other instances where "case" is used. And my suggestion was to refer back to 167.1 Subpart (5). I don't care whether it's done in the footnote or in the text. I still think that's the cleanest way to do it, but I don't have a --

MR. BOYD: I'm looking at 167.2(a), and I know we talked about this one already. This very specifically says that all of these procedures only apply to claims, which is defined above for monetary relief, and it seems to me that statutory construction, if you have to read that -- to understand what 167.1(5) means and whether it means that you can get all of your expenses incurred in the entire case, you have to read that in conjunction with 167.2(a), which says, "No. This whole thing only applies to claims." And it seems to me that gives us the statutory ability to say what we're trying to say.

In other words, you start with the claim. And then when you apply these procedures to that claim, as defined above, and figure out what the litigation costs are as to that claim, the reference to the word "case" doesn't broaden that. It means

your litigation expenses, your litigation cost is pursuing that claim within this case.

So I think that's the way you've got to read these, because it's the only way that makes sense, and it's certainly the only way that gets us where I think this group is wanting to go.

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

MR. BOYD: And so the footnote, you might want to drop it under 167.2(a).

CHAIRMAN BABCOCK: Yeah, Carl.

MR. HAMILTON: I think the --

CHAIRMAN BABCOCK: I'm sorry. Carlos had his hand up earlier.

MR. LOPEZ: Mine is short. I agree with what he was saying. If we're all in consensus that the logic behind this is to try to tie it to the costs that were necessitated by the fact that the offer wasn't accepted, might we want to say "shall" rather than "may," because it's in addition to other things. "The court shall consider the extent to which" --

CHAIRMAN BABCOCK: Yeah, but --

HON. SARAH DUNCAN: I hate to be picky, but we don't use "shall" anymore. We just use "may." It's been dictated -- "must." I'm sorry. We just use

"must." It's been dictated by Brian Garner.

CHAIRMAN BABCOCK: "Shall" or "must" in a footnote, I don't know.

Carl.

MR. HAMILTON: I think there's a possibility, in 167.1(5), that the key word there is not "case," it's "directly." What the legislature said is that we're only going to allow those costs that are directly related to the case and not some other attorney's fees, let's say, that were sort of peripherally involved in the case or something else. I don't think "case" is the significant word. I think it's just talking about the lawsuit.

CHAIRMAN BABCOCK: Yeah, Alex.

PROFESSOR ALBRIGHT: It seems like everybody is focusing on where this footnote needs to be. We need to remember, we've had notes in rules before. They are not footnotes to particular places. They are notes to the rule. So we can say, "This rule contemplates" -- and I think everybody's identified, there are many different places that it indicates the legislature was contemplating this segregation, or whatever you want to call it, and you don't have to tie it to a particular place when it can be in relationship to the entire rules. So we don't really

need to talk about exactly where a footnote is going to be dropped, because that's not the way we write.

CHAIRMAN BABCOCK: That's a good point, Alex.

Peter, have you come up with the language yet?

MR. SCHENKKAN: I'm sorry. I didn't know I was in charge of --

(Laughter)

CHAIRMAN BABCOCK: Hey, if you're going to advocate on behalf of somebody who leaves, then --

MR. SCHENKKAN: My own version of a footnote would be reasonable factors, and factors include the relationship to the offering -- to the rejecting party and to the claims that were --

CHAIRMAN BABCOCK: The claims of the rejected party.

MR. SCHENKKAN: The claims that were the subject of the offers and the other factors that are discussed in --

CHAIRMAN BABCOCK: I think that's close enough that --

MR. SCHENKKAN: -- case law citing Perry vs. Arthur Andersen.

CHAIRMAN BABCOCK: I think that's close

enough that Elaine can come up with a note. And I agree, I don't think we need to footnote it to a particular provision of the rule; we just have a note at the end. That makes sense to me.

Stephen and then Bill.

MR. YELENOSKY: Well, I just want to observe -- I had said earlier, it may be something that has to come to case law construction. I guess I wonder whether putting it in the footnote, just in observation, which will have "may" language actually works against a later interpretation that, in fact, this is the only consistent interpretation with the statute that you have to segregate. It makes it as if it's a matter of discretion. And so for that reason, I don't know that I support a footnote.

MR. SCHENKKAN: I'm sorry. If that's the wording problem you have -- may I respond?

CHAIRMAN BABCOCK: Yeah. Sure.

MR. SCHENKKAN: -- because I think the case law is that -- you know, others check me on this. I think the case law is, you actually have to show you've considered each of the disciplinary rule of factors. And some cases have been overturned for alleged failure of proof on one or more of them. So it's sort of magic "Mother, may I" deal. The witness

needs to say, "I considered No. 1 this way, No. 2 this way and No. 3 this way. No. 4 didn't apply because" and so on.

So if you had to choose between "may" and "shall" -- or "must," I guess it ought to be "must," but I don't know that you need to do it this way if it's a footnote. It just says "The factors are" or "The factors include the relationship to the rejecting party, relationship to the claims that were the subject of the offer and the factors listed in Texas Rule of Disciplinary Procedure," whatever it is, and "see Perry vs. Arthur Andersen."

MR. YELENOSKY: Well, maybe it's the language in the footnote that -- I got direction that a footnote was, basically, something at the court's discretion and the court may want to consider the following, which is different from what you're saying.

MR. SCHENKKAN: It is. I did not mean it that way, nor do I understand case law to be that way.

CHAIRMAN BABCOCK: Justice Duncan and then Jeff.

HON. SARAH DUNCAN: I agree with all that Steve said. I also just want to reiterate the comment that Mr. Pemberton made earlier, that we're

really messing with reasonable and necessary here, and I'm concerned.

CHAIRMAN BABCOCK: That we are what?

HON. SARAH DUNCAN: We're messing with reasonable and necessary, and I'm really concerned about that.

CHAIRMAN BABCOCK: Okay. Yeah, Jeff.

MR. BOYD: I think that's what I was -- I think you're saying what I was wanting to say, which is, all these factors deal with whether or not the fees are reasonable, and I know there's some overlap between reasonable and necessary, so this is arguable, but, generally, reasonable has to do with the amount. Necessary has to do with, "Did you have to do it to pursue this claim?" And it seems to me to start listing factors on what's reasonable is -- overcomplicates this and we don't really need to be doing that here, because we've got the factors out there and the word "reasonable" is in the statute and the rule.

The problem is the word "necessary" is not in the statute or the rule, and instead of the word "necessary," what they've said is "directly related to the case" in one provision and "applying only to claims" in the other provision.

The footnote I would -- the note/comment that I would perceive would be something that just simply says that the award of litigation expenses or cost, whichever -- "litigation costs should include only those costs that were necessarily incurred in pursuing the claim for monetary relief," and however you want to define that, "as set forth in 167.2(a)," and just say what we're meaning, which is, you can limit it to a per claim basis rather than getting off into what's reasonable.

MR. LOPEZ: If we can just add "and necessary" for purposes of multiparty cases, two words.

MR. EDWARDS: I thought that what we were talking about was limiting the expenses to those expenses that were incurred by the offeror because the offeree rejected the offer. Isn't that what we're doing? And if that's what we're doing, why don't we just say that?

CHAIRMAN BABCOCK: Peter.

MR. SCHENKKAN: We went through that earlier before. It doesn't cover all the cases. One of the cases it doesn't cover is when you have multiparties who are identically situated with regard to the issue getting a portioned offer and one or more

of them takes it and one or more declines it. Then your only solution is to apportion or to say, "You don't get any benefit of the procedure as to the non -- to the rejecting party or parties," and the states that have confronted this, like Nevada, have gone with apportionment rather than with the "but for" causation test. I'm inclined, if we had to choose, to recommend that the court go with that.

CHAIRMAN BABCOCK: Go with what?

MR. SCHENKKAN: Go with apportion rather than the "but for" in that scenario and just say that's fairer and more consistent with the purpose of the statute than to say "You can duck it by taking advantage of the fact that one or the other parties decline."

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I think what Peter is talking about is, if there's a claim, let's say, for failure to prevent drainage in an oil/gas case by, you know, a little old lady landowner against a big oil company operator and ten non-operating working interest owners who are necessary parties to the case and you desire to pick off two or three of the non-operating working interest owners who may be funding it or may be driving the defense or whatever,

it's exactly the same claim being -- and same defenses being asserted by those people, but you are approaching two or three of the non-operators and are saying "I want to settle with you guys for X. Here's the offer," et cetera, et cetera, and they reject, but you're having to do exactly the same work, prove exactly the same things, have the same expert expenses as relation to the others -- or flip it. You know, it really doesn't matter whether it's plaintiff or defendant making the offer.

Then the question is, "How do you prove what litigation expenses or what attorney's fees were reasonable because those non-operators don't take the offer?" It has to be somehow apportioned out. My problem remains. I'm not sure that's what the statute says and -- but that's involved -- unless I'm misstating what Peter said, that's involved in where we're going here.

MR. SCHENKKAN: I think that's exactly the illustration of the kind of problem that we would have to address.

MR. WATSON: The dollar amount of the attorney's fees is going to be identical. You know, it's going to be identical.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I think we're trying to micromanage this too much. I think we need to really have the general definition that Bill stated, but also, I think we ought not to forget about cost. We've been talking about reasonable fees, but there may be a whole lot of deposition cost, let's say, that the nonsettling defendants incur that the rejecting defendant has not incurred, and that shouldn't be a factor that gets charged against a nonsettling defendant.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Well, there's a million scenarios, and that's why we should leave it up to the courts to decide what's reasonable in those million scenarios.

CHAIRMAN BABCOCK: Okay. What I think we should do is, Elaine, with whomever you want to draft to help, see if you can get a note drafted, and there's couple of other draft things that need to be done in light of the votes that we've taken. And at the end of the day, we'll come up with a new rule, e-mail it to everybody, and they'll get comments back to you on that.

Since I know you're not going to be here in July, we may take this up again in August.

PROFESSOR CARLSON: Tommy said he would be here in July.

CHAIRMAN BABCOCK: Either July or August, then. So let's go on to the next thing.

PROFESSOR CARLSON: There are a number of footnotes on Page 7 that are really more -- I don't know if they're matters that need to require any rule inclusion or not. I will leave that up to you, if anyone wants to bring up any of those questions, such as defining "incurred," and we already talked about segregating the attorney's fees.

What I would like to focus on next -- and I don't think it's a drafting problem, but I'd like a consensus of how people are reading the statute -- is the actual text on Page 7 of the rule, Subsection (e). "If a claimant or defendant is entitled to recover fees and costs under another law, that claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law."

PROFESSOR DORSANEO: What?

PROFESSOR CARLSON: Page 7.

CHAIRMAN BABCOCK: No double-recovery. In other words, if the fees are already shifted by statute, you can't get a windfall by getting the same

fees under this rule.

PROFESSOR CARLSON: I'm told there are some discretionary attorney fee statutes, and I guess that will leave it to the court to figure out how that works --

CHAIRMAN BABCOCK: Lanham Act case.

PROFESSOR CARLSON: -- whether you're entitled to them or not.

CHAIRMAN BABCOCK: Be discretionary.

PROFESSOR CARLSON: I guess that will be left up to judicial decision, but that was a problem that I saw in the way the statute was drafted.

MR. LOPEZ: I've seen people make this argument, that whether you're entitled -- you're entitled to them whether you got them or not. In other words, you're entitled to ask for them if it's something that could happen but maybe didn't. So we want to clarify that what we really mean is, if you've already gotten them awarded, you're not going to get them again. But if for some reason they're entitled to them, you can get it again -- maybe we ought to make it clear that that's what this means, "entitle" means you actually got them.

CHAIRMAN BABCOCK: Yeah, Richard.

MR. MUNZINGER: Well, I think that the

statute is envisioning the situation, the award of litigation costs is considered prior to the entry of judgment. Presentably, let's say you have a jury award of attorney's fees in a state court for a Lanham Act case, what the statute is saying is, the judge cannot award litigation costs in addition to the attorney's fees that were found by the jury. I don't think that there is a problem about the use of the word "entitle," because the way the statutory scheme is set up, the judge that's going to award litigation costs has got to consider them prior to the entry of a judgment is being told by this rule, "If a party is recovering attorney's fees because it's a contract case," or whatever, "don't double-recovery litigation cost."

CHAIRMAN BABCOCK: Yeah, Harvey. And then Bill.

HON. HARVEY BROWN: A jury might award a very low figure for the reasonable attorney's fees and a court might think the reasonable attorney's fees, after the offer, were higher than the total attorney's fees from a jury. So that might create a problem that we need to kind of at least think about.

PROFESSOR CARLSON: And you might get attorney's fees, but not cost under another --

HON. HARVEY BROWN: Yeah. Certainly not expert fees.

MR. LOW: I don't think anybody ought to have a double bite at the apple. If you submit that to a jury, you ought not to be able to come back and say, "Well, I don't like what the jury said." You make an election when you ask for attorney's fees. You file your lawsuit. You ask for attorney's fees under a statute and you go under that. And if you don't like what the jury did, well, you do like I do, just bow your head and go on. You shouldn't have a double bite.

CHAIRMAN BABCOCK: Bill and then Harvey.

PROFESSOR DORSANEO: I would just change it to say, "If a claimant or defendant recovers fees and costs under another law, that claimant or defendant may not recover the same litigation costs." You know, I think -- I don't think the legislature meant to be so linguistically technical. It's just a no double-recovery provision.

CHAIRMAN BABCOCK: Yeah. That's the sentiment.

Anne.

MS. McNAMARA: What about a contractual right to recover attorney's fees? It's in the

promissory note. That's not a law.

MR. LOW: It just proves the point.

MS. McNAMARA: It's in the --

MR. LOW: I know, but you plead for it when you're filing your lawsuit. That's what I'm talking about.

CHAIRMAN BABCOCK: Yeah. But Bill's solution would fix that. I like Bill's solution, don't you?

Okay. Anybody against Bill's solution?

MR. GILSTRAP: Say it again.

PROFESSOR CARLSON: Strike the words "is entitled."

PROFESSOR DORSANEO: Anne is right. "Under another law' is too narrow. Should it be that narrow? If you just recover them --

MR. LOPEZ: Why can't you say --

MS. CORTELL: Delete another --

MR. LOPEZ: I mean, that's what they're to avoid is double-recovery. Just say, "If the claimant or defendant has recovered fees and costs." We can say it "under another law" or maybe not.

MR. SCHENKKAN: I think I can reasonably use this "entitled" here. I'm not sure this solves the problem we're trying to get at, but at least maybe

explains the problem. They're using entitled because the sequence of events is, you first decide what the judgment would be and then you decide what attorney's fees are going be offset under the offer of settlement in the offset.

So I think what they're saying is, these are the fees you would get in your judgment, but for the fact that we're now going to either offset or tack on, whichever direction it's going, offer of settlement.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Did we reject the construction that says if you're entitled to $1 under 38.001, you can't get anything under this statute? Because that's what it literally says. It says, "If you're entitled to recover fees on the DTPA and it's $10, then you can't get fees in addition to that." I mean, that's what it literally says.

MR. LOPEZ: It's not two bites at the apple. It's two bites at two different apples. I mean, I've had juries all the time where they just didn't like the lawyers, and so they didn't offer attorney -- they didn't award attorney's fees. It was clear there were attorney's fees.

CHAIRMAN BABCOCK: Richard.

MR. MUNZINGER: I think Bill's answer is correct. If you say you can't recover the same cost, then you've obviated the problem, because there is no double-recovery. If Bill's idea is correct, which is that the legislature is attempting to avoid double-recovery for the same cost, the use of the word "entitlement" comes about because the judge is sitting here trying to figure out, prior to the entry of judgment, what he's going to put into his judgment. If you are entitled to recover litigation costs because of the implication of this rule, you are also entitled to recover your attorney's fees under some substantive law or statute or whatever it might be that allows the recovery of attorney's fees. "Mr. Judge or Ms. Judge, do not award double-recovery for the same services and the same expenses."

Bill's suggestion was, you just simply put in the words "the same" and you've cured the problem.

MR. LOPEZ: May I ask a question to clarify that?

Jury, breach contract, straight up. Jury comes back with zero in the attorney's fees. Question: Is that -- and yet the verdict was such that fee shifting was triggered. Is that jury verdict

of zero somehow --

CHAIRMAN BABCOCK: Preclusive? No.

MR. LOPEZ: -- preclusive? I mean, I don't think it should be, but --

CHAIRMAN BABCOCK: No. It's not preclusive because -- what?

PROFESSOR DORSANEO: The last language here, "in addition to the fees and costs recoverable under the other law" is a very awkward way to say "don't duplicate." Otherwise, those words are just added on there for no particular reason.

CHAIRMAN BABCOCK: But under Bill's solution, you're getting zeroed by the jury is not preclusive.

MR. SCHENKKAN: Well, zero cases are not really offered settlement cases anyway, because, remember, the offer of settlement fee shifting fees are capped for either side by all or a portion, depending on the nature of the damages of the award to the plaintiff. So if the award to the plaintiff is zero.

CHAIRMAN BABCOCK: No, no, no. Attorney's fees.

(Simultaneous responses)

THE REPORTER: One at a time.

CHAIRMAN BABCOCK: Hold it. The court reporter can only get one at a time.

You can list that as a chorus of nos to the --

(Laughter)

MR. SCHENKKAN: Followed by a quick retraction.

(Laughter)

CHAIRMAN BABCOCK: Alex had her hand up first.

PROFESSOR ALBRIGHT: Well, I think it's very interesting how we've spent a day and a half of everybody saying, "We can't change the legislative language on all of this stuff," and suddenly, we get to this one, and everybody is just all ready to say, "The legislature made a big mistake here. So we've got to change it."

I agree with Frank, that what the legislature has said here is, "If you're entitled to recover fees and costs and the jury awards zero, then you're just out of luck here, because this says you've got to take your attorney's fees under the attorney fee statute and you're not entitled to this one."

Maybe other people will disagree with me, but I think it would be a big mistake for us to

have a rule that says something completely different than what the statute says, because if we're picking it up, putting it in the statute and changing it, that's -- I mean, I see this as a lot more problematic than some of these other things that you-all have said, "No, no, no. We can't mess with."

CHAIRMAN BABCOCK: You-all?

(Laughter)

CHAIRMAN BABCOCK: Wait a minute.

(Laughter)

CHAIRMAN BABCOCK: Buddy and then Richard.

MR. LOW: I agree with Alex, because assume, instead of the zero verdict for attorney's fee, gives me a dollar. And I say, "Okay. Judge, I'm entitled to more than that, so that's not double-recovery. Give me money under this." I think the legislature intended that if you are entitled to it under that, then you get it under that, with a jury verdict or whatever, and you're not entitled to it under this. I don't think you can have two shots at it.

CHAIRMAN BABCOCK: Carl and then Judge Gray.

MR. HAMILTON: I agree. And I think

that the concept here is that there are a lot of cases where a party can recover attorney's fees, and if you're in one of those kinds of cases, that's where we leave it, to the jury, and we don't have the cost shifting. It's cases where there's no recovery of attorney's fees such as just plain personal injury cases where the legislature wants to create the payment of attorney's fees to the offeror if there's a settlement that's rejected. So if the attorney's fees are available, then the -- this rule is just not available to that person.

CHAIRMAN BABCOCK: Judge Gray and then Richard and Carlos.

HON. TOM GRAY: Couple of aspects of it. They're not entirely left out on the fee shifting -- or the cost shifting aspect because they still have the experts that could still be shifted even if there was a jury finding of no attorney's fees, but it appears to me that what the legislature was trying to do -- and I haven't thought this fully through -- that they were addressing one of the concerns that caused us so much problem last time when we were discussing this on, "What issue do you submit to the jury when you're in a potentially cost shifting situation on the causes of action where there are attorney's fees?" Do

you ask two questions, up until the date of the settlement offer and then after the settlement offer, because there may be some ability to avoid the double-recovery. You have to take that into consideration. In other words, factor out those afterwards and give them under the fee shifting provision instead of under the contract cause of action or whatever other provision you're entitled to.

So I think there is, as Professor Albright -- I mean, the statute is clear. It says, "If you're entitled to it over here, it's not over there." I think the legislature, there is at least some rationale for what they were doing here, and go with it.

CHAIRMAN BABCOCK: Richard. Then Carlos and then Judge Christopher. Then Lamont.

MR. MUNZINGER: If a jury returns a zero verdict for attorney's fees, you're not entitled to recovery fees and costs under another law. If the jury returns $1, you are. I don't know that we can write a rule that draws all these fine distinctions, but, again, you're not entitled to recover those things if the jury give you a zero verdict.

CHAIRMAN BABCOCK: Carlos.

MR. LOPEZ: Well, that's the exact

ambiguity I was mentioning earlier, about whether some people agree with that or not.

I think it's pretty clear, though. Isn't it clear to everybody that if they had meant for the fee shifting scheme to not apply in any case where you can get fees somewhere else that they could have said that?

MR. GILSTRAP: That's what they said.

PROFESSOR ALBRIGHT: That's what they said. They may not have meant it, but they said it.

MR. YELENOSKY: What if you're entitled to fees based on a higher standard but you can't meet that standard? Does that close you out of getting it based on this fee shifting standard?

CHAIRMAN BABCOCK: Judge Christopher.

MR. LOPEZ: That's fine. I disagree with the interpretation, but -- that's fine.

HON. TRACY CHRISTOPHER: This leads us back to the problem of claims again, because sometimes you'll sue under the DTPA where you get attorney's fees and you'll also sue under fraud where you don't get attorney's fees. And maybe when you testify you'll say they're inextricably intertwined and ask for 100 percent of your fees and maybe the jury will only give you 50 percent of your fees because they

didn't believe in inextricably intertwined. And then what do you do? Are you entitled to the shifting based on the fraud finding, the claim? I'm just throwing that out. I don't know the answer.

CHAIRMAN BABCOCK: Lamont.

MR. JEFFERSON: It seems to me like your entitlement to attorney's fees comes in the judgment, not in the verdict. So what the statute is saying is, "If you get a judgment that gives you a right to recover under some statute or under whatever other provision, you're not going to get fee shifting under this statute as well."

MR. LOPEZ: Whether you actually get them or not? Whether you're actually awarded them or not?

MR. JEFFERSON: If a jury says it's a zero verdict on attorney's fees but a judge thinks you ought to get your attorney's fees and puts it in the judgment that you get your attorney's fees because the evidence supports it and the jury's verdict is wrong, I mean, you shouldn't be able to get a double-recovery. I think that's all the statute is saying.

MR. LOPEZ: What if --

CHAIRMAN BABCOCK: Sarah.

MR. LOPEZ: -- will convince the judge to grant that directed verdict?

MR. JEFFERSON: Then you're not entitled to it.

CHAIRMAN BABCOCK: Sarah.

HON. SARAH DUNCAN: Nobody wants to hear this, but I'm just going to say it once again.

CHAIRMAN BABCOCK: No. We all want to hear it.

HON. SARAH DUNCAN: We are, again, construing the statute, and I don't read 42.005 to give this committee or the supreme court the authority to construe the statute.

CHAIRMAN BABCOCK: Yeah. That's a pretty powerful argument.

Buddy and then Carl.

MR. LOW: Entitled. If I have a case where there's statutory attorney's fees involved and my client says, "Well, what about attorney's fees?" I say, "I'm entitled to attorney's fees. I'm entitled by that statute." He says, "Are you going to get attorney's fees?" "That's another thing, whether I get it in a judgment." I'm entitled to it by law. Now, whether I can prove it or so forth. So that's what I think "entitled" means.

MR. JEFFERSON: Well, I agree with what Peter said, though, about entitled, is, the reason it's in the statute is because we're trying to decide what the judgment is going to look like and it's at a point before the judgment has been entered.

MR. LOW: I'm not talking about judgment.

CHAIRMAN BABCOCK: The problem, though, is -- Alex is right, it looks to me like, because it says "entitled," and then it says "the claimant or defendant may not recover litigation costs in addition to the fees and costs recoverable under the other law." If it had said "recovered" -- if it had said "recovered," then that would --

HON. SARAH DUNCAN: But there's no "recovered" -- as Richard pointed out, there's no "recovered" until a judgment is entered.

PROFESSOR ALBRIGHT: This is all very interesting and you-all can all argue it in your oral argument to the supreme court, but we can't fix these problems in this rule.

HON. SARAH DUNCAN: Right. Here-here.

CHAIRMAN BABCOCK: You're winning, at least with me, and that is that when you say "entitled" coupled with "recoverable" as opposed to

"recovered," that -- I agree. I think that, for whatever reason, they were trying to knock this out of the rule.

MR. GILSTRAP: It's the reason Carl said.

PROFESSOR ALBRIGHT: I'm not sure they intended it to be this way. I think they probably intended it as a no double-recovery rule. I don't have any clue, but that's what the statute said.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Just for the record, I'd like to say that some people are reading "not recover any litigation costs" into the language and the word "any" is not there. If we're going to use a kind of bluntless literalism, let's be consistent.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: Well, the term "cost" there troubles me under this analysis because in almost every case the winning party, plaintiff, let's say, is going to be entitled to recover costs. So under that analysis, you could never fee shift the costs.

HON. SARAH DUNCAN: But "litigation cost" is a defined term in the statute. It doesn't

say "just costs."

MR. HAMILTON: It includes court costs.

HON. SARAH DUNCAN: I understand, but neither the rule nor the statute says "just costs." It says -- at least in this provision says "litigation costs."

CHAIRMAN BABCOCK: And this says "fees and costs," not "fees or costs."

HON. DAVID GAULTNEY: What gives us the ability to construe the statute, as Justice Duncan says, or change it -- well, as says Professor Albright argues -- I mean, why are we just --

CHAIRMAN BABCOCK: Because the senior academic on our group disagree, so --

PROFESSOR DORSANEO: Actually, the supreme court has the ability to construe statutes. And rules made by the supreme court are the equivalent of decisions handed down by the supreme court. So it's a question of how you want to go about doing our job. If you want to just say, "We are not capable of making sense out of this, so let's just repeat it," let's do that.

MR. GILSTRAP: No. We've made good sense out of it. We understand exactly what they said. You can't get attorney's fees if you can -- fee

shifting under this rule if you can get -- entitled to attorney's fees under, say, 38.001. If you're entitled to them, that's all you get. Carl said the reason. The court said, "If you're entitled to it under another statute, we're not going to allow you to use this statute." I think we ought to just agree and --

CHAIRMAN BABCOCK: Let's vote on this. How many people agree with Professor Albright, that the language is clear, that our discussion is at odds --

HON. SARAH DUNCAN: Don't load this up.

CHAIRMAN BABCOCK: What?

HON. SARAH DUNCAN: Don't load this up.

(Laughter)

HON. TRACY CHRISTOPHER: The vote is whether we want to change the language, because we don't want to vote --

(Simultaneous discussion)

HON. TRACY CHRISTOPHER: -- that's the vote, if we want to change the language.

CHAIRMAN BABCOCK: Okay. I'm sorry. Good point.

Do we want to change the language? Everybody that wants to change the language, raise

your hand.

(Laughter)

CHAIRMAN BABCOCK: The record should reflect a lack of beating of wings. Can I assume that -- Pete, you want to change the language?

MR. SCHENKKAN: I don't want to change the language, but I want to say, I don't think that's the final question. It's the court, who will be making the rulings, can only make rules that are consistent with statute, but when the statute is ambiguous, the court not only can but must either choose an interpretation or also punt by simply leaving the wording exactly the way it is in the statute and wait and make a decision later on when there is a fight.

That means that one of our options -- and I think this is ambiguous. I mean, I've now heard arguments that read the statute three different ways. One person says, "This means that if you are entitled under the statute that is at issue in the case to attorney's fees, you can't invoke the statute at all." If it's an 038 -- if it's a 38 case, you can't do it. I don't agree with that interpretation, but I understand the argument.

I hear another version of it that says,

"If you have a statute under which you can get attorney's fees and you've elected to try to -- this is Buddy's position -- "then you're stuck with it." I don't agree with that interpretation, but I understand it. It is another theory of it.

A third interpretation, which is the one I lean to, is, "If this is a statute under which you can get attorney's fees and you have gotten them in the proposed judgment, then you can't double-recover those fees."

Those are three different interpretations of this statutory language. They're all fair scope for argument. I can see we might tactically choose to punt because we don't feel like between now and the next 30 minutes we can come to some consensus on which of the three we like best, but I think we're perfectly proper to choose one of the three if we do have consensus on it and recommend it to the court, because I think it's perfectly within their powers to choose one of those three now as opposed to later in some case.

CHAIRMAN BABCOCK: Okay. Richard.

MR. MUNZINGER: I move that we not change the language of the draft rule as is and move on to another subject.

CHAIRMAN BABCOCK: Okay. How many people are in favor of that? Raise your hand.

(Show of hands)

PROFESSOR DORSANEO: Looks like I get my way.

(Laughter)

CHAIRMAN BABCOCK: How many against?

(Show of hands)

CHAIRMAN BABCOCK: 23 to 1. Richard, you're almost perfect.

All right. Let's move on to the next thing.

PROFESSOR CARLSON: Okay. Further into the mire, Subsection (f). "If a claimant or defendant is entitled to recover fees and costs under another law, the court must not include fees and costs incurred by that claimant or defendant after the date of the rejection of the settlement when calculating the amount of the judgment to be rendered under shifting litigation costs."

Footnote 31, this seems to suggest -- this is mine. This seems to suggest that otherwise the amount of attorney's fees and costs are included in calculating the amount of the judgment. Meaning, if your case is one in which you cannot otherwise

recover fees and costs under another law, the trial court now has to figure out whether the 20 percent margin has been hit, for purposes of fee shifting.

Is the court to look at just the monetary claim offer versus the monetary claim awarded or does the court also look at the totality of attorney's fees and costs along with the monetary award in figuring out the application of 20 percent?

And we don't have to decide this, but I think it's really -- Subsection (f) raises that.

PROFESSOR DORSANEO: I think it means exactly the opposite of what you said it means.

PROFESSOR CARLSON: Well, it means the opposite when you're otherwise entitled to recover fees and costs under another law, but my question to you: What if you're not entitled to recover fees and costs under the law? Are we to infer from the Subsection (f) that the court then would include fees and costs incurred by the claimant after the date of rejection when calculating the amount of judgment?

CHAIRMAN BABCOCK: Buddy.

MR. LOW: In federal court, you know, in arriving at jurisdiction, you can't include, you know, attorney's fees and so forth arriving at the amount, and here, you got to just keep it short and simple;

that is, the amount of money awarded and ask for the money damages and you don't include interest and all that. That's my opinion.

PROFESSOR CARLSON: Well, I think that would be great, if that was the application, because it's pretty apples to apples, but this troubled me.

MR. SCHENKKAN: I actually do know the explanation for this clause. This clause comes out of federal case law that marry Federal Rule 68, offer of judgment, which only covers costs, to certain federal statutes which define costs for purposes of that statute to include attorney's fees, and, thus, in that one subset of cases, the federal courts have experience with this problem, what is essentially an offer of settlement in a case in which -- at least one side. In some statutes, both sides -- have a chance to recover their attorney's fees under the statute itself.

What they're saying is, "For purposes of comparing the offer that's rejected with the judgment, you cut off the rejecting party's attorney's fees incurred after the date of the settlement." He didn't get the benefit of piling up further attorney's fees. He pays two prices. One, he pays the fee shifting price, but he also doesn't get credit in deciding

whether the fee shifting occurs to the attorney's fees after he rejected the offer.

I may not have stated that exactly, technically correct, but I know that's the general concept that comes out of federal case law. Whether we still have a problem in light of that for differences in our Texas law, I don't know.

PROFESSOR CARLSON: Well, Pete, what's your understanding if -- you're not entitled to recover attorney's fees and costs under another law. Okay? And we've got fee shifting in play and the court is looking at figuring out whether you have a significantly less favorable judgment. What does the court look at in making that determination, only the monetary claim award? Does the court also look at costs and fees?

MR. SCHENKKAN: If the claimant is not entitled?

PROFESSOR CARLSON: Right.

MR. SCHENKKAN: I guess I don't understand the question, because it seems to me that you don't put the attorney's fees in the comparison -- the offer if they're not entitled to them. And then even if they are, you don't do two things with them, which are the two addressed by (e) and (f). You don't

count the ones after the fact -- after the rejection for purposes of comparison and you don't double-recover.

PROFESSOR CARLSON: So the court just looks at the monetary claim offered and the monetary claim awarded and makes the determination on fee shifting without regard to attorney's fees and costs that are going be shifted? That doesn't go in the formula --

MR. SCHENKKAN: Right.

PROFESSOR CARLSON: -- for figuring out the 20 percent.

MR. SCHENKKAN: Right.

PROFESSOR CARLSON: Is that everybody's understanding?

CHAIRMAN BABCOCK: Yeah.

PROFESSOR DORSANEO: "Entitled to" means recovered.

HON. TRACY CHRISTOPHER: My understanding of this is, suppose the plaintiff is suing for breech of contract and they claim their damages is $50,000, and at the time the defendant says, "No. Your damages are really $30,000." So the defendant makes an offer of $30,000 plus some attorney's fees at this particular date. When you --

and ultimately, the plaintiff recovers the $30,000 but a lot more attorney's fees. You would only -- in considering whether the defendant would be able to shift costs there, you only look at the attorney's fees incurred as of the time of the offer to compare, not their total recovery of attorney's fees at the end, because you're trying to determine whether the judgment is significantly less favorable under Subsection (a). That's what they're pulling it back to.

Did that make sense? I think that's what that's for.

CHAIRMAN BABCOCK: Carl. Then Frank.

MR. HAMILTON: It doesn't make sense if we've already concluded that in that kind of a case cost shifting wouldn't be available, because if you recover --

HON. TRACY CHRISTOPHER: But the plaintiff couldn't cost shift. This is to help the defendant cost shift if they made a decent offer. And if we looked at the fees at the time of the offer, the defendant would be able to cost shift their fees.

MR. HAMILTON: Why would either party be able to utilize this law if it's a suit where attorney's fees are recoverable?

HON. TRACY CHRISTOPHER: Because a defendant cannot recover attorney's fees in a breech contract case. They don't have that right. To defend a contract case, you don't get to recover attorney's fees.

MR. HAMILTON: The law says "if a claimant or a defendant is entitled to recover attorney's fees under some other law, then this rule isn't available to them."

HON. TRACY CHRISTOPHER: That's (e). I think the intent of (f) is to allow the defendant to cost shift if the plaintiff rejects an offer with reasonable fees and then runs up a whole bunch of unnecessary fees afterwards.

MR. HAMILTON: Well, my point simply is that that kind of a case wouldn't come under the rule. It would have to be a case only involving a simple monetary loss, in which event, the judge would look at the verdict, the judgment of that, compare it to the offer and then decide whether or not it was within the 80 or 120 percent.

HON. DAVID GAULTNEY: I think that's another interpretation of (e) in addition to the three interpretations already given.

MR. YELENOSKY: (e) says -- the phrase

you mentioned is followed by "that claimant may not recover." So it doesn't exclude the whole case as you're saying, in my opinion.

CHAIRMAN BABCOCK: Justice Duncan.

HON. SARAH DUNCAN: And I have, yet, another interpretation of (f) that I'm not going to state on the record because it may become a subject of decision in a case, and that's what concerns me about all of this.

CHAIRMAN BABCOCK: Yeah. Aren't we at the same place on this that we were on (e)?

PROFESSOR CARLSON: I think so. I just really wanted to get a little bit of discussion on it.

CHAIRMAN BABCOCK: Oh, you're just toying with us, Elaine.

(Laughter)

PROFESSOR CARLSON: If there was any appetite to address it.

CHAIRMAN BABCOCK: All right. Let's go on to the next thing.

PROFESSOR CARLSON: Page 8, 167.12. The word -- where you see "litigation expenses" throughout, it's going to be changed to "litigation costs." When this rule was drafted, before the statute, we talked about litigation expenses, but when

you go back to 167.1 they speak in terms of litigation costs. Pete was kind of enough to point that out.

Otherwise, I think 167.12 is reflective of what we agreed upon at our April meeting, unless anyone has any comments or concerns.

CHAIRMAN BABCOCK: Peter.

MR. SCHENKKAN: The shaded sentence, the second sentence defines the motion to oppose "made after judgment," which implies the judgment has already been rendered. Both the statute and the earlier portion of the rule embodying the statute contemplate that you do this not after judgment but by considering the judgment to be rendered. And thus -- you know, I don't think it is, in fact, a motion to modify, correct or reform judgment, but if it is, that may be something we might need to --

PROFESSOR CARLSON: A way to make the -- what if the court signs a judgment and then you move for JNOB?

MR. SCHENKKAN: Okay. If granted after judge -- in those cases --

PROFESSOR CARLSON: Right.

MR. SCHENKKAN: Okay. I'm with you. Then that would be the case, yeah, but I would want that -- make it clear that we're not changing the way

it's done. We're saying that in some cases you may have a judgment that's modified afterwards, and in that case, you're awarded litigation expenses will be done that way.

MR. EDWARDS: You're suggesting putting "if" in there.

CHAIRMAN BABCOCK: Yeah.

MR. SCHENKKAN: Yeah.

CHAIRMAN BABCOCK: Got that Elaine?

PROFESSOR CARLSON: I do.

HON. TRACY CHRISTOPHER: I think that just unnecessarily confuses people as to when they should be making this motion.

MR. GILSTRAP: I don't think we need the language. I mean, if the judgment has been signed and you file a motion to modify, one of the things you can say is, "Judge, you messed up the fee shifting" or "You should have shifted fees and you didn't do it," but I think it does, you know, kind of imply that you can file the motion itself after the judgment than you can under the rule -- or under the statute.

HON. TRACY CHRISTOPHER: I think we should not have the shaded part.

PROFESSOR CARLSON: We voted to include it last time at the suggestion of Professor Dorsaneo.

(Laughter)

PROFESSOR DORSANEO: As Bill Edwards was saying yesterday, on some days you think this and on other days you think --

(Laughter)

HON. SARAH DUNCAN: So which way is the wind blowing today?

(Laughter)

CHAIRMAN BABCOCK: Yeah. Which day would today be, Bill?

PROFESSOR DORSANEO: I don't have an opinion on it today.

PROFESSOR CARLSON: So could we just see if that's a consensus, to remove the shaded sentence?

CHAIRMAN BABCOCK: Remove the shaded section?

(No verbal response)

CHAIRMAN BABCOCK: Going once.

(No verbal response)

CHAIRMAN BABCOCK: Okay. It's gone.

HON. HARVEY BROWN: I have a question.

CHAIRMAN BABCOCK: Yeah, Harvey.

HON. HARVEY BROWN: It's not addressed by this specifically, but if you have a number of offers and counteroffers and the whole thing is in

play, who decides the reasonable attorney's fees at those points of the litigation? Is that a jury question? And if so, are we going to ask the jury, you know, not only what were the reasonable attorney's fees through trial, but what were they on this day and this day and this day?

CHAIRMAN BABCOCK: I think we talked about that at some length --

PROFESSOR CARLSON: We did.

CHAIRMAN BABCOCK: -- and determined it was a Bench issue.

PROFESSOR CARLSON: Yeah. The consensus was that it would be a determination made by the trial court after --

HON. HARVEY BROWN: If so, I don't think this is clear about that. I mean, because you're not only -- in other words, the Bench is not only deciding whatever the litigation expenses but they're also determining what were the expenses at certain defined points.

CHAIRMAN BABCOCK: That's necessarily implicit in the hearing.

HON. TRACY CHRISTOPHER: Right. I mean, that's -- those are the ones they're entitled to. The ones that occurred after a certain point, they have to

put on evidence of what occurred after a certain point.

CHAIRMAN BABCOCK: Right. Right.

Okay. Elaine, do you have anything else that's troubling you?

PROFESSOR CARLSON: Two more things and they're both --

CHAIRMAN BABCOCK: That was too open-ended a question. Anything about this rule that's troubling you?

PROFESSOR CARLSON: Are you willing to listen to my troubles?

(Laughter)

PROFESSOR CARLSON: 167.15, yesterday Frank Gilstrap raised the question of whether that should address arbitration.

CHAIRMAN BABCOCK: It's surely not intended for arbitration. Right? So is there anything wrong in putting arbitration in there?

MS. McNAMARA: Isn't that covered by other alternative dispute resolution mechanisms?

PROFESSOR CARLSON: I asked that, and Frank said, "Not necessarily."

CHAIRMAN BABCOCK: Why, Frank?

MR. GILSTRAP: Why not make it clearer?

Why not make it clearer?

CHAIRMAN BABCOCK: Why not make it clearer. Yeah.

PROFESSOR DORSANEO: In arbitration, you're going to have a substitute dispute mechanism that's going to operate on its own basis, and arbitration is not typically -- you know, pursuant to a contract, is not typically considered to be an alternative dispute resolution mechanism like court-annexed arbitration. Okay?

Mediation is adequate -- we could mess with this language, but if you're talking about arbitration as a substitute for judicial resolution, then it's kind of a side point.

PROFESSOR CARLSON: Yeah, because it wouldn't be in the court anyway.

PROFESSOR DORSANEO: It'd be over.

HON. TRACY CHRISTOPHER: Why don't we just add after "in a mediation proceeding," comma, "to arbitration," and should not affect any other alternative dispute resolution?

PROFESSOR CARLSON: Judge Christopher, did you say --

PROFESSOR DORSANEO: Or just leave it alternative dispute resolution and --

HON. TRACY CHRISTOPHER: Well, it says "should not affect." I thought it was more clear to say, "The rule does not apply to any offer made in a mediation proceeding, to arbitration," meaning it does not apply to arbitration, "and should not affect any other dispute resolution."

MR. PEMBERTON: This sort of follows, from the general proposition, that there's a whole regime of settlement negotiations that go on outside this rule entirely, and maybe you just distill down this thought and the possibility of arbitration, mediation, whatever, into, perhaps, a comment to the rule.

HON. LEVI BENTON: Why is it necessary to have this here, anyway, when it doesn't apply unless the defendant declares it applies?

MR. PEMBERTON: Same idea.

CHAIRMAN BABCOCK: Yeah.

HON. DAVID GAULTNEY: Because, I guess, if the declaration is prior to the mediation then you've got an offer made during mediation.

HON. LEVI BENTON: But why would we want to take that offer out of the rule just because it's made in mediation? What policy is promoted by doing that?

MR. EDWARDS: Because nothing that happens in mediation -- it's all confidential and not subject to anything.

CHAIRMAN BABCOCK: Yeah. Jeff.

MR. BOYD: Well, I think that was my question. I'm trying to remember why an offer made in mediation wouldn't be --

MR. EDWARDS: Because you made it on the mediation process and --

MR. BOYD: I understand it's confidential. I understand the confidentiality provisions and the 408 rules on admissibility, but it doesn't make any sense to me -- I mean, doesn't this discourage mediation in a case where you want this to apply?

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I think we're talking about two different things. In mediation, it does undercut the confidentiality of the mediation process. I mean, that just brings this extra layer in of saying, "Okay. This offer of settlement hasn't worked up until now. We're going to cut that out. We're going to have the secret confidential mediation, and it's" -- you know, it's not covered by hand.

Second, though, I think all -- I

personally agree that arbitration ought to be in there for a different reason, and that is that at least I've seen increasingly when the parties say, "No, no. This lawsuit should not have been filed," you know, refer it to arbitration, "Here's the agreement," et cetera, et cetera. The court takes it out; it goes to arbitration. Arbitration starts going badly, people don't like the rulings they're getting in arbitration. They start running back to the trial court they just asked to divest itself of jurisdiction over the case and say, "We want discovery," or, in this instance, "We are doing the declaration. We're making an offer of settlement. Even though this thing is going over here in arbitration, we want to bring pressure to settle it in arbitration by doing this back in the trial court." That's just nuts. If you're in alternative dispute resolution, you're in alternative dispute resolution, out from under this rule. It is an alternative to this rule and we need to make that clear.

CHAIRMAN BABCOCK: By the way, on the mediation point, the guy from Florida that we talked to said that this offer of settlement rule always has an impact in mediation, but the way it comes up is, the declaration and the offers have been made

premediation. So when they go into mediation, they say to the mediator, "Hey, not only are we going to kick their butts, but, you know, we're going to get attorney's fees," and so that's -- so then there's a dialogue about that, but the offer isn't made in mediation. And if it was made in mediation, because of confidentiality and just the timing, because mediations are usually one day or sometimes they stretch over time, but it just wouldn't come up that way, I don't think.

Yeah, Jeff.

MR. BOYD: You've demanded a million and I've offered $10,000. We both rejected each other's offers but we agree to go to mediation.

CHAIRMAN BABCOCK: Right.

MR. BOYD: And in that mediation, we chip it down to where it's $600,000, $400,000, but we don't close the gap. When we walk out of mediation, we're back to a million and $10,000. So I guess at that point I could send you a letter outside of the mediation saying, "I offer $400,000," and I've triggered it.

PROFESSOR CARLSON: Right.

MR. LOW: What happens if -- you have your mediation and you don't do that. You ask,

finally, the mediator, "Do you declare this mediation closed?" "Yes. Mediation is closed." You give them the letter. I mean, you can't do it in the mediation as the statute says.

MR. EDWARDS: Overton will do it right while you're mediating. We do that all the time. Right out, hand out a Stowers demand, put on the top of it, "Outside of mediation." Go over and say, "I'm not dealing with you on mediation now. Here's an outside mediation offer."

(Laughter)

HON. SARAH DUNCAN: We won't comment on that, Bill.

(Laughter)

CHAIRMAN BABCOCK: "Outside mediation." Yeah, Jeff.

MR. BOYD: On the arbitration issue, do you ever make an offer in arbitration? I mean, arbitration -- I'm not sure how we -- arbitration on many trials or some of these other ADR procedures could even be affected by this, because you're not making offers in arbitration. You're presenting evidence for a decision.

CHAIRMAN BABCOCK: Well, unless you have Skip's situation where you're in court; you're in

arbitration; and you're back in court. That could happen, I guess.

So the issue is whether you put arbitration in this rule or not.

HON. SARAH DUNCAN: Let's finish.

CHAIRMAN BABCOCK: That's the whole objective here.

(Laughter)

CHAIRMAN BABCOCK: Do we put arbitration in it or not?

HON. SARAH DUNCAN: We still have one more provision.

CHAIRMAN BABCOCK: I know we do. I know that.

Do we put arbitration in?

(Simultaneous responses)

CHAIRMAN BABCOCK: All right. How many people want to put arbitration in the rule? Raise your hand.

(Show of hands)

CHAIRMAN BABCOCK: All right. How many people do not want to put it in the rule?

(Show of hands)

CHAIRMAN BABCOCK: It's in the rule by a vote of 15 to 7.

Okay. Let's go --

MR. GILSTRAP: 167.15. Right?

CHAIRMAN BABCOCK: That's in 167.15.

Okay. Stephen.

MR. YELENOSKY: Judge Christopher's language earlier, I think, I said "to arbitration," and I just wanted to make sure that we meant that we were excluding offers made in arbitration, not the whole -- because otherwise what you're saying is, if you have an arbitration, the rule doesn't apply, and I don't think we mean that.

CHAIRMAN BABCOCK: Right. It does not apply to any offer made in a mediation or arbitration proceeding.

HON. TRACY CHRISTOPHER: That's fine.

HON. LEVI BENTON: That's not clear, because once a trial court sends a case off for arbitration, though the case is still pending before the court, they're in arbitration. I mean, and that arbitration proceeding might go on and then they'll come back to the court for an order to confirm the arbitration award, and if the purpose of the statute is to reduce or eliminate litigation cost, it seems to me what we just did is contrary to the purpose of the statute.

CHAIRMAN BABCOCK: Anybody want a rehearing on motion of Benton J?

(No response)

CHAIRMAN BABCOCK: Hearing no second --

HON. LEVI BENTON: I guess -- well, fine.

MR. MEADOWS: I thought that what we did, actually, was just clarify the language "should not affect other alternative dispute resolution," or make it clear that that embraces arbitration.

HON. LEVI BENTON: Let me -- can I try one more time?

CHAIRMAN BABCOCK: Sure.

HON. LEVI BENTON: Bobby, let's say you and Skip have this case that has an arbitration -- that's subject to arbitration. You file suit. Skip wants the case in arbitration. I sign an order sending you to arbitration. Fine. You're off for arbitration.

You should not be precluded from getting the benefits of the statute if you choose to make an offer before you complete all of your work and go before an arbitration panel, because the purpose of the statute is to reduce or eliminate litigation costs.

And so if you want to, before you've done all your discovery in arbitration, make the offer to Skip's client to get the case settled, you should -- you're talking I'm being entitled to the benefits under the statute. That's my story and I'm sticking to it. Thank you very much.

(Laughter)

CHAIRMAN BABCOCK: Buddy.

MR. LOW: That would not be made in arbitration if it's made before.

HON. LEVI BENTON: Well, no. Once a trial court signs the order referring the case to arbitration and they've paid their fee to AAA, they're, quote, "in arbitration."

MR. LOW: That's true, but that doesn't apply to anything made before. If you're going to do that and you want to take advantage of it, you just do it before.

CHAIRMAN BABCOCK: Is the case dismissed at that point?

HON. LEVI BENTON: No, sir. It's abated.

CHAIRMAN BABCOCK: Judge Gray.

HON. TOM GRAY: Levi, in the connection with that, is part of your concern what would

otherwise be denominated litigation costs, attorney's fee, whatever that's accruing during the course of time that the arbitration is going on?

HON. LEVI BENTON: Yes sir, because the statute didn't say, "Well, I'm sorry. I don't believe the purpose of the statute is to reduce or eliminate" -- "or reduce litigation costs only before the trial court."

MR. LOW: But you either go there by reason -- you contracted to go there or you agreed to. And if that's important, don't agree to it. If you contracted to do it, you can do nothing about it.

HON. LEVI BENTON: That suggests the purpose of the statute is to only reduce litigation costs before a trial court, not before some other --

MR. LOW: It's to afford the opportunity to reduce costs and so forth in situations in which you choose that you couldn't by statute otherwise.

MR. MEADOWS: I think it's just a completely different system, and despite -- I mean, apart from how you get there, you don't have -- in arbitration, you don't have the controls and limitations imposed in litigation that we do by the rules.

HON. LEVI BENTON: Okay. I withdraw my

motion for rehearing, because no one has joined in.

(Laughter)

CHAIRMAN BABCOCK: Okay. I mean, we can move on, Alex, unless you want to --

PROFESSOR ALBRIGHT: Well, I just want to say that "should not affect other alternative dispute resolutions" is somewhat nonsensical. Maybe it should say "should not apply to -- "This rule should not apply to."

HON. TOM GRAY: Well, now, you have really impacted one of Levi's concerns about the litigation costs.

PROFESSOR ALBRIGHT: This isn't in the statute, is it? This is ours. Right?

PROFESSOR CARLSON: Yeah. This is ours.

MR. LOW: It might impact what they do in part when they start talking about it. You've already made it before. It might impact that.

MR. YELENOSKY: That's why we don't want to say that.

PROFESSOR ALBRIGHT: What does it mean to say "it will not affect"?

MR. YELENOSKY: Can I just suggest, in the language, just take that out?

CHAIRMAN BABCOCK: Okay. Elaine is

going to work on that. Let's go to 167.16, because Sarah is chomping at the bit, because she doesn't want to be limited to abusive discretion. She wants to be able to look at this de novo.

(Laughter)

HON. SARAH DUNCAN: It used to be that we, in our stupidity, thought attorney's fees awards were subject to abusive discretion standard, but Justice Hecht explained to us that we all had it wrong and now there are -- sometimes subject to -- some parts of it are subject to de novo review, some parts of it are subject to abusive discretion standard, and I don't think we really want to get into that, 167.16.

CHAIRMAN BABCOCK: I know. Why would we want to get into that in the rule?

PROFESSOR CARLSON: Should we just eliminate --

CHAIRMAN BABCOCK: Why don't we just eliminate this?

PROFESSOR CARLSON: Just eliminate it.

CHAIRMAN BABCOCK: It's late in the day.

(Laughter)

HON. SARAH DUNCAN: There is a constitutional right to appeal the civil cases to an intermediate court --

MR. YELENOSKY: Well, who do we come to when we get tired?

CHAIRMAN BABCOCK: Judge Benton.

HON. LEVI BENTON: I mean, it is helpful when you give the trial court some clear direction on what standard the appellate court is going to use in reviewing its orders or judgments.

HON. SARAH DUNCAN: And do you find Kaye vs. Herring to be clear, definitive, helpful guidance?

HON. LEVI BENTON: I haven't read it today.

CHAIRMAN BABCOCK: Well, I think probably, rather than try to put in a rule, in light of conflicting juris prudence, we're going to have to help the trial judges by the parties arguing to the trial judge, that, "Hey, you're under an abusive discretion standard for these reasons," whereas the opponent says, "Oh, no, no, no. It's" -- you know, "It's not."

HON. SARAH DUNCAN: Attorneys don't argue the case, so --

CHAIRMAN BABCOCK: Well, when they're telling them.

PROFESSOR DORSANEO: It's going to be a mixed standard under this statute anyway.

CHAIRMAN BABCOCK: So we ditch 167.16.

PROFESSOR CARLSON: I'm sorry. There's two really light matters.

CHAIRMAN BABCOCK: No. That's fine. We can blow those off in a minute.

(Laughter)

PROFESSOR CARLSON: Okay. Back on Page 1, 167.1, do we want to leave it just as court costs and not discuss whether it's taxable court costs that you recover all court costs?

CHAIRMAN BABCOCK: You're talking about 167.15?

PROFESSOR CARLSON: What if the legislation says "court costs"?

PROFESSOR DORSANEO: We don't want to talk about taxes.

PROFESSOR CARLSON: Don't even go there.

(Laughter)

PROFESSOR CARLSON: And then on the definition of expert fees, the legislation in 167.1(5)(B), "reasonable fees for not more than two testifying expert." The shaded language is what we had in our April version. Do we want to take that out or do we want to retain it?

CHAIRMAN BABCOCK: What's the consensus?

Everybody --

PROFESSOR DORSANEO: Take it out, yeah.

(Simultaneous responses)

CHAIRMAN BABCOCK: -- is saying take it out. Out.

PROFESSOR CARLSON: The other thing that we haven't discussed is whether or not -- and I don't know that this is part of the rule or not, whether discovery is going to be permissible on the reasonableness of the attorney's fees and expert fees. We can just leave that up to the trial court to deal with when its having its hearing?

CHAIRMAN BABCOCK: Yeah. I would -- my thinking is that it probably would be permissible, but -- and that's on the record, but I wouldn't try to deal with it in a rule.

MR. WATSON: Can we let Sarah decide that on a mandamus?

(Laughter)

CHAIRMAN BABCOCK: Sarah is going to decide that on mandamus.

Okay. Any other little thing?

(No verbal response)

CHAIRMAN BABCOCK: All right. We're done.

So what's going to happen is, Elaine is going to incorporate all this stuff and e-mail it either to Deb, and she'll get it to everybody, or e-mail it directly. Anybody with comments, get the comments back to Elaine within the next ten days, and we'll go from there.

Thanks.

If any subcommittees are going meet, let Deb know so she can let the court know, because some members of the court may want to listen in to the subcommittees.

MR. WATSON: Do we know if we have a place to stay on the 17th?

MS. LEE: We don't yet, because no one has returned my call yet. I'll work on that and I'll let you guys know Monday morning.

CHAIRMAN BABCOCK: Yeah, Bobby.

MR. MEADOWS: I have a question. There's been a lot of interest expressed in what's happening with the ad litem issues, House Bill 1815 and the Jamail 173 draft. And what is the question for our subcommittee on this? Is it the current rule, the existing rule, the Jamail rule, and/or how that's impacted by 1850?

It would be helpful to know that,

because --

MR. GRIESEL: I think it's both questions. I think, one, "Does the Jamail Committee draft and 1815, if you read those together, suggest, improvements over existing -- the way ad litems are existing, appointed, paid, retained and their duties.

MR. MEADOWS: For example, would it be an outcome to determine that the existing rule, with 1815, look like they'll work just fine or is it -- are we charged with bearing down on the Jamail 173 proposed --

MR. GRIESEL: I think you're asked to comment on why, if you don't think -- I think it's like Chip described earlier, that it's not, "Use the Jamail report or explain why you deviated from it." I think it's, "Here is a suggestion from another committee on how ad litem rules ought to work. What are your comments regarding this?"

And then the second question is, with 1815, specifically the third section of 1815, does that have any impact on our cases that we need to move? Those would be the two questions, I think, at the minimum, you have to ask.

MR. MEADOWS: It's all in play?

MR. GRIESEL: Yes, sir.

PROFESSOR ALBRIGHT: There's not a deadline on this one --

MR. GRIESEL: I think there is in Judge Hecht's letter, that he asks that the committee's work be done on the things in HB 4 and those highlighted other issues by the end of August.

MR. MEADOWS: So is it -- should we expect that this will be on the next agenda for July.

CHAIRMAN BABCOCK: Yes. Now, whether we get to it, I don't know, but it will be on the agenda. I would have thought that maybe this would have gotten quicker --

MR. MEADOWS: For those of you who are in the room on that sub, we'll try to convene some kind of meeting to deal with that.

CHAIRMAN BABCOCK: We're adjourned. Thank you, everybody.

(Proceedings concluded at 12:03 p.m.)

* * * * * * * * * * * * * * * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

* * * * * * * * * * * * * * * * * *

I, Patricia Gonzalez, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 21st day of June, 2003, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $1,117.00 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 30th day of June, 2003.

ANNA RENKEN & ASSOCIATES
610 West Lynn
Austin, Texas 78703
(512) 323-0626

Patricia Gonzalez

PATRICIA GONZALEZ, CSR
Certification 6367
Cert. Expires 12/31/2004