

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

* * * * *

COPY

Taken before Patricia Gonzalez, a
Certified Shorthand Reporter in Travis County for the
State of Texas, on the 21st day of August, 2003,
between the hours of 9:05 a.m. and 12:30 p.m. at the
Texas Law Center, 1414 Colorado Street, Austin, Texas
78701.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX OF VOTES

Votes taken by the Supreme Court

Advisory Committee during this session are reflected
on the following pages:

9794
9797
9828
9829
9840
9852
9853
9896
9900

1 CHAIRMAN BABCOCK: Okay. Let's get
2 going. Welcome back, everybody.

3 Judge Patterson is back from judge's
4 school. And I assume you were on the faculty, not a
5 student.

6 HON. JAN PATTERSON: No. This is a
7 wonderful master's program for judicial process for 28
8 judges from around the country. So we were all
9 students. And what was interesting was how easily we
10 reverted back to being students. We took finals. I
11 had blue books and it all came back, all the horror.

12 (Laughter)

13 (Simultaneous discussion)

14 CHAIRMAN BABCOCK: Popcorn and No-Doz at
15 3:00 a.m.

16 (Laughter)

17 HON. JAN PATTERSON: It was tough.

18 (Simultaneous discussion)

19 HON. JAN PATTERSON: But I missed
20 you-all and I'm sorry I haven't been here. I know
21 you-all have worked hard. Thank you.

22 CHAIRMAN BABCOCK: Bobby Meadows called
23 me this morning -- early. I'm not quite sure how
24 early. I told him I was awake, but I lied. He is in
25 a small town in Oklahoma, the subject of a

1 disqualification motion in a very big case,
2 apparently, and so he probably is not going to make
3 it, but Justices Hecht and Jefferson and Justice
4 Wainwright was here, but maybe isn't anymore.

5 HON. TOM GRAY: I think he said he just
6 came for the free breakfast.

7 (Laughter)

8 JUSTICE JEFFERSON: Yeah. That's
9 typical.

10 CHAIRMAN BABCOCK: Yeah. We've got to
11 be careful not to let the word get out on that
12 breakfast. Right?

13 (Laughter)

14 HON. TOM GRAY: He attributed his
15 knowledge to Justice Hecht, so --

16 (Laughter)

17 CHAIRMAN BABCOCK: All right. So we're
18 honored to have them, and I guess to start, maybe as
19 we usually do, Justice Hecht could fill us in on what
20 the Court's doing.

21 JUSTICE HECHT: Well, the big news I
22 heard this morning was that Pete Schenckan signed as a
23 star on the O.C. on Fox.

24 (Applause)

25 JUSTICE HECHT: I haven't seen him, but

1 Chris tells me that his daughter thinks that Pete's
2 son is great, so --

3 (Laughter)

4 MR. SCHENKKAN: And this is exactly the
5 effect we want.

6 (Laughter)

7 JUSTICE HECHT: Takes after his dad,
8 actually.

9 The Court yesterday approved, subject to
10 any last comments, minor changes in Rule 166 of the
11 Rules of Civil Procedure, a couple of changes in
12 Rule 11 of the Rules of Judicial Administration and a
13 new Rule 13. There are copies over on the side board.

14 We don't propose that you take this up
15 today, because we know you have lots of other things
16 to do, but any last comments you want to get to us, we
17 will be happy to receive them. I know the
18 Chief Justice intends to talk to the panel,
19 Judge Peeples and Judge Brister and the other judges,
20 about these rules and make sure they're okay with
21 them, but we're going to issue them next week to be
22 effective September 1st.

23 So any -- this is different from our
24 usual procedure of publishing them and getting
25 comments. And the reason for the difference is that

1 House Bill 4 requires that the statutory analog of
2 this be effective for cases filed on or after
3 September 1st. So as I have mentioned to you before,
4 in discussions with Representative Nixon and Senator
5 Ratliff, the Court is -- the Court's view of the
6 statute have been confirmed that we're to -- that the
7 directive to promulgate these rules trumps the usual
8 rulemaking process.

9 Now, we will invite comments on the
10 rules until December 1st, the period that we would
11 ordinarily give people to comment, and there may be
12 some changes that have to be made as a result of those
13 comments, and, of course, we'll just use the usual
14 process there, but we can't do that -- there has not
15 been time to do that prior to September the 1st.

16 So we'll adopt these next week --
17 something like these, and we have -- we'll make the
18 change in Rule 407 of the Rules of Evidence directed
19 by the legislature and try to make the changes in the
20 appellate bond, supersedeas bond rule that House Bill
21 4 requires as well. Then the offer of judgment rule
22 and other changes that are before the committee at
23 this meeting will be adopted in time to publish them
24 in the October 1 Bar Journal, and there will be a time
25 to comment on those before they become effective as

1 the statute requires on January 1st.

2 So that's the timetable to try to
3 complete everything that house bill requires on time,
4 and as much of it with as much comment as possible.
5 Then there are some other things on the agenda for
6 this meeting -- and they're anticipating to carry it
7 over -- that we'll continue to look at through the
8 fall to issue when we've had a little more time for
9 deliberation.

10 I've neglected to mention that we need
11 to finish the parts of the class-action rule that
12 House Bill 4 directs us to do, but I think we're on
13 track to do that. And otherwise, we'll try to keep
14 everything that is ready to be looked at on the
15 Web site to be downloaded or shipped around as much as
16 we can.

17 The only thing I hope you will look
18 at -- well, I hope you'll look at it all, but look at
19 particularly is the way that Rule 11 is folded into
20 Rule 13. The committee didn't have a real concrete
21 suggestion on that, and what you have there is the
22 best we've been able to come up with. So if there are
23 other thoughts about how the two procedures can
24 interrelate for a substantial period of time, which I
25 think will be necessary, because the Rule 13, by

1 statute -- well, the procedures in the statute only
2 affect cases filed on or after September the 1st. So
3 there will be Rule 11 proceedings that will be in a
4 unit and there won't be any more cases filed, and
5 they'll only be under Rule 11 and Rule 13 will never
6 affect them. I anticipate there will be cases filed
7 that will overlap the deadline, so that there will be
8 assigned judges under Rule 11 and transfers under
9 Rule 13.

10 So it's kind of a tricky process to get
11 through, but if you have any additional thoughts about
12 that, of course, we welcome them all, but especially
13 on that, because that's a very difficult -- that's a
14 very difficult transition. We want it to be as smooth
15 as possible.

16 I did poll the administrative -- the
17 presiding judges in the administrative regions,
18 Judge Peeples and the others, and no one was in favor
19 of retaining Rule 11 after Rule 13 comes into play,
20 although all of them said we ought not to disrupt
21 current Rule 11 proceedings and we ought to move to
22 Rule 13 as quickly as we can. So that's the view of
23 the presiding judges who have dealt with Rule 11 for
24 the last six years, and that's what the rule tries to
25 accomplish.

1 That's all I've got.

2 CHAIRMAN BABCOCK: Okay.

3 JUSTICE HECHT: One other thing. The
4 Court very much appreciates all of the hard work that
5 this committee has done. We're aware that you've
6 given over and above your usual devotion to this
7 exciting subject that we deal with, and it's reflected
8 in the work product. Judge Wainwright was here
9 earlier, and I think most of my colleagues will be by
10 during the next two days to thank you for all of your
11 work, but we're very much appreciative.

12 CHAIRMAN BABCOCK: Well, happy to do it,
13 but this summer has been more active than we would
14 have thought, and more active than it normally is.

15 MR. HAMILTON: Maybe we can get a raise.

16 CHAIRMAN BABCOCK: Huh?

17 MR. HAMILTON: We want a raise.

18 CHAIRMAN BABCOCK: We want a raise.

19 (Laughter)

20 CHAIRMAN BABCOCK: We want CLE credit
21 for this.

22 (Laughter)

23 JUSTICE HECHT: We'll double your
24 salary.

25 (Laughter)

1 CHAIRMAN BABCOCK: Yeah. We're on top
2 of that.

3 Justice Jefferson, did you have anything
4 you wanted to share with our august body here?

5 JUSTICE JEFFERSON: I would just like to
6 take the occasion -- as you-all know, Justice Enoch
7 has announced his retirement before the end of his
8 term, and on behalf of the Court and in front of this
9 great body, I just want to say what a loss that will
10 be for the Court. He has been a fine gentleman, a
11 great judge, and he may not know this, but I've
12 learned a lot from him just by watching how he
13 operates, and we're going to miss -- the Court,
14 Justice Enoch greatly.

15 I encourage you to -- you know, his
16 departure was not easy for him and I encourage you to
17 send him notes of thanks for his many years of public
18 service, both in Dallas and Dallas County and for the
19 State of Texas, and we look forward to the governor's
20 appointment for reconstituting a court that's been in
21 tremendous transition over the last few years.

22 That's all I have.

23 CHAIRMAN BABCOCK: Okay. Thank you,
24 Your Honor.

25 Okay. Well, the schedule today is a

1 little different -- not much, but we're going to start
2 with offer of settlement, because we've never talked
3 about it before and we just need to go through offer
4 of settlement. Sorry, Justice Duncan.

5 We're going to quit at 4:30 today, which
6 is a little unusual. Other than that, it's going to
7 be 9:00 to 5:00, and then Saturday, 9:00 to noon.

8 Paula?

9 MS. SWEENEY: Justice Hecht, on Rule 166
10 in the redlined section, there's nothing marked. Can
11 you -- I hate to -- I can't tell what the change is,
12 other than it looks like the last sentence was added
13 by comparing it to the rule, but --

14 JUSTICE HECHT: Yeah. That's it.
15 That's the only change.

16 MS. SWEENEY: Is it? Okay. Thank you.

17 JUSTICE HECHT: I'm sorry it didn't get
18 redlined.

19 CHAIRMAN BABCOCK: Okay. So with that,
20 Elaine, offer of settlement.

21 PROFESSOR CARLSON: All right. You
22 should have a copy of Rule 167 that is dated July.
23 Rule 167 has been looked at one more time -- several
24 more times by our subcommittee in light of our
25 discussions at the June meeting, and I propose to kind

1 of go through it and point out to you the changes
2 that we've made that we think reflect the full
3 committee's input, but, also, we have a few additional
4 areas that we need to throw out on the table.

5 Rule 161.1 has no substantive change,
6 except the addition of Comments 2 and 4 that was
7 directed by the full committee at the June SCAC
8 meeting.

9 CHAIRMAN BABCOCK: 167.1 you mean?

10 PROFESSOR CARLSON: Yes. .1. I believe
11 Comments 2 and 4 were taken verbatim out of the
12 transcript.

13 MR. GILSTRAP: You mean the comments on
14 Footnotes 2 and 4?

15 PROFESSOR CARLSON: Yes.

16 CHAIRMAN BABCOCK: So we should start
17 with Comment 2, Elaine?

18 PROFESSOR CARLSON: To see if there's
19 any --

20 CHAIRMAN BABCOCK: Okay. Anybody have
21 any comments on Comment 2?

22 (No response)

23 CHAIRMAN BABCOCK: Going once -- Bill
24 wants to read it, so we'll take a second.

25 (Brief Pause)

1 CHAIRMAN BABCOCK: Any controversy in
2 the subcommittee about this footnote?

3 PROFESSOR CARLSON: No.

4 CHAIRMAN BABCOCK: While everybody is
5 digesting that, what about the question on Footnote 3?
6 Has that always been a question?

7 PROFESSOR CARLSON: That's always been a
8 question. We did raise it at the June meeting, and
9 the response was, "Please don't talk about that." So
10 we left that an open question.

11 (Laughter)

12 CHAIRMAN BABCOCK: We'll get to that in
13 a minute.

14 Okay. Has everybody had a chance to
15 look at Footnote 2? Any comments on it?

16 (No response)

17 CHAIRMAN BABCOCK: Okay. Should we talk
18 about Footnote 3?

19 PROFESSOR CARLSON: If there's an
20 appetite, as you would put it, in the full committee,
21 we can. Litigation costs that can be shifted under
22 this rule are not further defined or limited to
23 taxable court costs. I did -- we did raise this issue
24 in June and did not get any sentiment to further
25 clarify the rule.

1 CHAIRMAN BABCOCK: Justice Hecht, do you
2 have any thought about whether this needs clarity or
3 not? We don't want to have a whole bunch of fights
4 about it.

5 JUSTICE HECHT: No. Just generally, we
6 need to be as clear as we can, and there -- the
7 statute may not be as clear as the rule needs to be.
8 I mean, we don't want to -- we don't want to be
9 litigating our own rule wondering up there what it
10 means. So if it needs to be further defined -- but I
11 don't know if we should. I don't know whether it does
12 or not.

13 CHAIRMAN BABCOCK: Well, what would be
14 the argument, Elaine, that it was anything other than
15 taxable court costs?

16 PROFESSOR CARLSON: Well, when you read
17 case law dealing with what is taxable or nontaxable
18 court costs, there's not a model of clarity to begin
19 with.

20 CHAIRMAN BABCOCK: Right.

21 PROFESSOR CARLSON: So that's
22 problematic. But if we simply say "court costs," it
23 could be either. If we say "taxable," at least we've
24 clarified to that extent what it should be.

25 CHAIRMAN BABCOCK: The sentiment,

1 although not unanimous, but I think the majority
2 sentiment on this committee has been to make this rule
3 as soft as possible, and so that would militate in
4 favor of saying "taxable court costs," wouldn't it?

5 PROFESSOR CARLSON: Yes, it would.

6 CHAIRMAN BABCOCK: Yeah, Paula.

7 MS. SWEENEY: I also think -- Elaine, I
8 know there's some fuzziness in the cases, but it's
9 pretty clear to most of us what is a taxable court
10 cost and what isn't, but it's not clear at all what is
11 a generic court cost, and rather than invite a lot of
12 litigation over that, I think the insertion of the
13 word "taxable" limits the amount of fighting that
14 there will be over what this means.

15 CHAIRMAN BABCOCK: If anybody wanted to
16 get into a fight about this, they could go back
17 through the transcripts of our meetings, and, you
18 know, we have talked about court costs in very
19 expansive terms, you know, earlier in our discussions.
20 We talked about expert fees, all sorts of other
21 things. So it seems to me it might make some sense to
22 put the word "taxable" in there unless anybody
23 disagrees with that or the Court has a different view
24 on it?

25 JUSTICE HECHT: Do the professors have

1 an example of a court cost that's not a taxable court
2 cost, or the practitioners, does anybody?

3 MR. JACKS: Copies of deposition are not
4 taxable.

5 JUSTICE HECHT: Are court costs but not
6 taxable court costs.

7 MR. JACKS: Copies of depositions are
8 not taxable court costs.

9 HON. CARLOS LOPEZ: They're probably
10 going to be included in the first sentence, anyway. I
11 mean, the first sentence -- this is an including to
12 but not limited -- "including but not limited to" kind
13 of thing. It just says "Litigation costs means money
14 actually spent." That's pretty broad.

15 PROFESSOR DORSANEO: Premiums for
16 supersedeas bonds. Difference in our systems.

17 MS. SWEENEY: You know, that is a good
18 point that Judge Lopez raises, that we need to be
19 clear about that, because the context of the
20 discussion has always been that we mean (A), (B), and
21 (C), and I've read the transcripts of the meetings
22 that I missed and I haven't seen us deviate from that.

23 HON. CARLOS LOPEZ: I mean, the fact
24 that we haven't put the classic "includes" and then
25 "but not limited to," I don't think still limits the

1 expansiveness of that first sentence. If we mean to
2 limit that, we need to be clear about that.

3 PROFESSOR CARLSON: Yeah. That's
4 correct. What we did was just track the statute
5 exactly.

6 CHAIRMAN BABCOCK: So we don't have any
7 wiggle room on that.

8 HON. CARLOS LOPEZ: Then I think
9 argument on this minute point is probably -- well, I
10 don't want to --

11 CHAIRMAN BABCOCK: Probably doesn't
12 matter, is what you're saying?

13 HON. CARLOS LOPEZ: I hate to use the
14 word "meaningless," but -- I mean, the first sentence
15 is so broad, it's going to include both of those types
16 categories that we're discussing. I would think, you
17 know, but --

18 CHAIRMAN BABCOCK: Yeah. Justice
19 Duncan.

20 HON. SARAH DUNCAN: I hesitate to say
21 anything except that I don't think the statute leaves
22 us the option of limiting it to taxable court costs.

23 CHAIRMAN BABCOCK: Okay. Because of the
24 way the introductory language is?

25 (No verbal response)

1 CHAIRMAN BABCOCK: Okay. Bill.

2 PROFESSOR DORSANEO: Well, I don't know
3 what the statute is meant to mean. Normally, we don't
4 put the word "taxable" in front of "court costs." I
5 just looked through our civil procedure rules and I
6 don't think that adjective ever appears. From 131
7 through 141, anyway. So I don't know whether it's
8 necessary. I mean, there are some significant things
9 that are court costs that are not counted as court
10 costs. If we have the opportunity to say "taxable"
11 without running into some sort of trouble, I would be
12 inclined to add it.

13 CHAIRMAN BABCOCK: Even though it's not
14 usually added?

15 PROFESSOR DORSANEO: Yes, because I
16 wouldn't have thought that before I heard people
17 identify that as an issue.

18 CHAIRMAN BABCOCK: Right.

19 PROFESSOR DORSANEO: "Court costs" means
20 taxable court costs to me. It doesn't mean some other
21 expense that's incurred as a result of being in court.

22 CHAIRMAN BABCOCK: Right. Richard?

23 MR. MUNZINGER: Well, if you use -- if
24 the Supreme Court uses the word "taxable court costs"
25 in one context but not in another -- we all believe

1 that they do things intentionally, and it would raise
2 questions as to why they used it in one context and
3 not in another, suggesting that in the context in
4 which the word "taxable" is not used, there may be
5 something less or perhaps more.

6 I think you add to confusion by
7 inserting the word "taxable," because we've all
8 operated under the assumption that "court costs," when
9 used in statutes and rules, means those which are
10 taxable and recoverable under the law. To draw that
11 distinction in this rule would create confusion in
12 others, in my opinion.

13 CHAIRMAN BABCOCK: Who came up with this
14 footnote anyway?

15 (Laughter)

16 CHAIRMAN BABCOCK: Yeah. Good point.
17 Any other comments?

18 Yes. Judge Gray.

19 HON. TOM GRAY: Following up on
20 Richard's comment, actually, in the rules referenced
21 by Bill, we do not use the term "court" in front of
22 "cost." It is simply "cost." Is there any mileage to
23 simply saying "cost" and either in a footnote or
24 comment, or possibly there in that section, Section
25 (6), Cost, Rules of Civil Procedure, which seems to be

1 where all the cost and security is discussed? Make it
2 specific of what we're talking about.

3 CHAIRMAN BABCOCK: Justice Duncan?

4 HON. SARAH DUNCAN: Getting back to my
5 earlier comment, Section 42.004(a) of House Bill 4,
6 "The offering party shall recover litigation costs
7 from the rejecting party." "Shall." And litigation
8 costs is defined in 42.001(5). "Litigation cost means
9 money actually spent and obligations actually incurred
10 that are directly related to the case in which a
11 settlement offer is made. The term includes." It's a
12 sub subset thing.

13 The legislature has mandated that the
14 party recover its litigation costs, and it's defined
15 litigation costs. And I don't think we can, in a
16 footnote or in the rule, vary that, whatever we may
17 think, however much we may want to limit it. It's
18 already been defined what the party is going to
19 recover, and it includes nontaxable court costs.

20 CHAIRMAN BABCOCK: What about, then, the
21 Subpart (B), "reasonable fees for not more than two
22 testifying experts"?

23 HON. SARAH DUNCAN: As I say, it's a set
24 subset thing. "Litigation costs" is the set, and
25 those that are specifically included, like fees for

1 two testifying experts, are a smaller subset of the
2 whole set.

3 PROFESSOR DORSANEO: I don't read it
4 that way at all.

5 PROFESSOR CARLSON: Me neither.

6 PROFESSOR DORSANEO: I think that would
7 be a crazy reading of it.

8 (Laughter)

9 PROFESSOR DORSANEO: And I wonder, what
10 are we doing if we're not going to make this a little
11 clearer? Justice Hecht's statement, that we need to
12 make this as clear as we can, I think is a good
13 statement.

14 CHAIRMAN BABCOCK: Notwithstanding the
15 source.

16 (Laughter)

17 PROFESSOR DORSANEO: I mean, how many
18 people really do think "includes" is not "includes"
19 but -- "and only following"? That's what I think it
20 means.

21 HON. CARLOS LOPEZ: That was my
22 question -- and I missed the last meeting. I was in
23 trial. I apologize. Was the intent for (A), (B), and
24 (C) to be definitional, to simply flesh out what
25 litigation cost means or was it an example meaning

1 "including but not limited to," because that's a big
2 difference?

3 CHAIRMAN BABCOCK: Yeah. Sarah's
4 point -- Sarah, you say that the statute is clear,
5 that's it got to allow all money actually incurred.
6 And so why do we even have anything there at all?

7 HON. SARAH DUNCAN: Because they're in
8 the statute. Those examples are in the statute.

9 PROFESSOR DORSANEO: You mean like taxi
10 fare and things like that?

11 HON. SARAH DUNCAN: If that's money
12 actually spent and obligation actually incurred that
13 is directly related to the case in which a settlement
14 offer is made.

15 MS. SWEENEY: The statute does not say,
16 "By way of example this includes...but can include
17 everything else, including your taxi fare." The
18 statute and the discussion that went along with the
19 promulgation of the statute was that this was not a
20 completely wide open door, that it wasn't every
21 conceivable cost, including taxi fare, and that these
22 were the recoverable items. Otherwise, you wouldn't
23 be talking about reasonable fees for not more than two
24 testifying expert witnesses, because if you had eight
25 witnesses and you're allowing all expenses related,

1 then you're going to allow recovery for all of the
2 witnesses.

3 So by clear reading, the legislature was
4 enumerating, "This is what you may recover, not more
5 than two witnesses, court costs and reasonable
6 attorney's fees," period.

7 And I think one way to clarify that in
8 the rule is to change the word "includes" to the word
9 "means" so that it is clear that that is what this
10 rule means, which is clearly what the legislature did
11 when it crafted this, as with many other compromised
12 piece of legislation, that was meant to not throw open
13 the door completely to every conceivable cost that
14 might be generated, which is why they took the time
15 and trouble to list "court costs" rather than
16 "litigation expenses," "expenses for two experts," not
17 "all your experts and reasonable attorney's fees."

18 So I think we need to be clear and to
19 follow the legislative intent. And if the legislative
20 drafting isn't that clear, then it would be absurd to
21 perpetuate lack of clarity for no good reason.

22 CHAIRMAN BABCOCK: Carlos.

23 HON. CARLOS LOPEZ: I was just going to
24 say that we can fix it by changing the word "includes"
25 to "means," and then we make it definitional rather

1 than expansive. That doesn't answer the question
2 about footnote, but at least it clarifies the fact
3 that this is not a list that's meant to be -- because
4 that first sentence is awfully broad.

5 CHAIRMAN BABCOCK: Well, Sarah's point,
6 however, is that the statute says "Litigation cost
7 means," and then it has a sentence, and then it says,
8 "The term includes."

9 Yeah, Sarah.

10 HON. SARAH DUNCAN: Well, I think this
11 is a good time to discuss what is the role, not just
12 of this committee, because, obviously, we're just
13 offering these rules to the Supreme Court, and I think
14 this is a question, ultimately, that the Supreme Court
15 has to decide, but it is our role to decide issues of
16 interpretation.

17 And I don't doubt Paula's representation
18 of the legislative history, but all that says to me
19 is, this is an issue that's litigable and somebody's
20 going to be deciding it, and that legislative history may
21 be offered to support one or the other
22 interpretations.

23 PROFESSOR DORSANEO: Mr. Chairman?

24 CHAIRMAN BABCOCK: Yes, Bill.

25 PROFESSOR DORSANEO: It's been my

1 understanding, over all these many years, that when
2 the Court makes a rule, it's the same as deciding a
3 case in articulating a standard or class-action
4 certification in a case. So, ultimately, the Court
5 would be the one that would have to decide what this
6 statute means. And my view is that if we're nearly
7 certain -- reasonably certain that the language was
8 meant to mean something, we ought to make that
9 clarification now so the Court would have the benefit
10 of what we think about how it should be clarified
11 instead of leaving it for later. It's going to be too
12 late later in a lot of contexts and cause a lot of
13 trouble.

14 CHAIRMAN BABCOCK: Frank.

15 MR. GILSTRAP: This statute is a little
16 bit different, because this, like the class-action
17 statute, has -- the legislature has expressly told the
18 Supreme Court and empowered it to make rules.
19 42.005(a) says, "The Supreme Court shall promulgate
20 rules implementing this chapter," and I think that
21 language is the basis that we went forward on in
22 basically rewriting this rule of this statute and
23 putting it into a rule and adding things to it. So
24 I'm a little less troubled here by the Court's
25 committee to interpret -- the Court's ability to

1 interpret the statute than I would be in other areas.

2 CHAIRMAN BABCOCK: The Subpart (5) here,
3 though, that we have in our rule, the language is
4 identical to what's in the statute. Right, Elaine?

5 PROFESSOR CARLSON: Yes.

6 CHAIRMAN BABCOCK: And what's unclear
7 about it when they say it means and then it includes?
8 I mean, it doesn't seem to me like there's a whole lot
9 of ambiguity there, but I could be wrong.

10 Justice Gaultney?

11 HON. DAVID GAULTNEY: I was frankly
12 persuaded -- that's the fun of this committee is, I
13 was persuaded by Justice and then I think Paula makes
14 an excellent point. I think the word "includes" is
15 ambiguous. It did not seem ambiguous on its face; I
16 was persuaded by Justice Duncan.

17 If you've got a limitation that says
18 "not more than two testifying expert witnesses,"
19 that suggests that they were defined further,
20 litigation costs that are recoverable and limiting it
21 to just these enumerated items. So I think, in this
22 context, the word "includes" is ambiguous. I would
23 argue in favor of Paula's interpretation.

24 CHAIRMAN BABCOCK: Richard?

25 MR. MUNZINGER: We all have to operate

1 under the assumption and under Supreme Court authority
2 that the legislature carefully chooses the words that
3 it uses and that each word used in a statute is
4 given a significance given to the ordinary
5 understanding of that word. I don't think any of us
6 would believe that the word "means" is synonymous with
7 "includes." "Means" is synonymous with "equals." And
8 "includes" is a word that would -- I'm included in
9 this group. I'm not limited to this group.

10 I think it is an ambiguous statute, and
11 I disagree with the interpretation that the costs that
12 are litigation costs are only those that are
13 enumerated in 5(A), (B) and (C). I think it's quite
14 clear that the intention of the legislature was to
15 encourage settlement and to allow the recovery of
16 reasonable costs actually incurred and directly
17 related to the case when a settlement offer had been
18 made. Otherwise, why would the legislature, in its
19 wisdom, use "means" in one phrase and "includes" in
20 another.

21 If the Court says that "means" is the
22 same as "includes," what does the Court do to its
23 prior cases when it says that every word must be
24 weighed and given its usual English meaning? In all
25 due represent, "means" is not the same as "includes."

1 CHAIRMAN BABCOCK: Here's the problem I
2 see, though. You've got a case where you've got four
3 experts and you've paid them. They're directly
4 related to the case. They've helped you out a lot and
5 they're good experts, no challenge to the experts. So
6 you would think, then, that since you paid four
7 experts that you ought to be able to recover for all
8 four. If that's true, what does that Subpart (b)
9 mean, then?

10 MR. MUNZINGER: Subpart (b) means that
11 the legislature answered that question for you. You
12 can only get two experts. It's a clear limitation on
13 litigation costs. It is a limitation that you can
14 only get expert fees for two experts. You can't get
15 it for four.

16 CHAIRMAN BABCOCK: Okay. And
17 "litigation cost" means "money actually spent except
18 with respect to experts, not more than two of them"?
19 That's how you would interpret that?

20 MR. MUNZINGER: That's how I would read
21 it.

22 HON. CARLOS LOPEZ: I don't think that's
23 an unreasonable interpretation at all, and I think I
24 would go with that, but it doesn't mean that it's
25 clear, because your arguments that "includes" means

1 "but not limited to" --

2 MR. MUNZINGER: I agree it's not clear.
3 I agree it's matter of interpretation for the Court.
4 If I said "clear," I'm wrong. It isn't clear. But
5 what is clear is that they used two separate words,
6 and the prior authority of the Court says, "You've got
7 to pay attention to the choice of language that the
8 legislature uses. You can't pretend that it was
9 unintentional." Something must be inferred from the
10 use of those two separate words.

11 CHAIRMAN BABCOCK: So if your
12 interpretation is right, then, what we say about court
13 costs is very important, because that is going to be
14 either -- that's going to be a limitation on the
15 "litigation cost means," the way you read it, Richard.

16 Okay. Paula, then Bill.

17 MS. SWEENEY: Well, the legislature
18 didn't write a rule. They wrote a statute. They
19 directed the Court to write a rule. So I don't think
20 we're bound by -- and we haven't been, in anything
21 we've done, by taking just the word the legislature
22 put on paper, sticking a number on there and saying,
23 "This is now a rule," and we haven't followed that
24 process, and I think it would be absurd to do so.

25 I think the responsibility of this group

1 and of the Court is to do something that will inform
2 litigants with as little ancillary satellite friction
3 cost as possible of what the new universe is. "Court
4 costs" means something different than "expenses," for
5 instance. "Taxable court cost" means something even
6 further different than "expenses," and I think it's
7 important to know that the legislators had in front of
8 them the work product of this committee that drew
9 these distinctions when we looked at this rule before
10 the session and had the working draft that contains
11 some of these very concepts.

12 So these didn't just come out of thin
13 air and get invented by some legislative staffer and
14 stuck on here. They came from already thought-out
15 work product and were included here, and it's quite
16 clear to me, as previously stated, that this is meant
17 to be a limiting list and not an all encompassing
18 list.

19 But I think, if nothing else, the amount
20 of discussion right here demonstrates, no one knows
21 what this means. We don't know what it means. If we
22 send this to the Court with this record, there's
23 absolute -- there's complete ambiguity about it, and I
24 think we owe it to the litigants of Texas to make it
25 clear. So we either say "includes but is not limited

1 to," which opens the door wide open and let's people
2 just run their meters as high as they want and incur
3 however many unreasonable costs they want and do
4 whatever they can to bankrupt their opponent, or we
5 say -- instead of the word "includes," we put the word
6 "means" to make it clear that, "This is the universe
7 of what's recoverable and let's not make this is a
8 province for gamesmanship in attempting to bankrupt
9 your opponent."

10 CHAIRMAN BABCOCK: Yeah, Carl.

11 MR. HAMILTON: Section 42.005(d)(2) may
12 give us some comfort. It says that Supreme Court may
13 address other matters considered necessary by the
14 Supreme Court to the implementation of this chapter."
15 "Other matters" could mean clarifying ambiguities, I
16 suppose, but I agree that it needs to be made clear,
17 and I think it ought to read, "Litigation cost means
18 money actually spent and obligations actually incurred
19 for court cost, reasonable fees for not more than two
20 witnesses, reasonable attorney fees, that are directly
21 related to the case in which a settlement offer is
22 made." That limits it to those items, and then I
23 think it also wouldn't hurt to say "taxable cost," if
24 we have an argument over what are costs. That, to me,
25 would clear it up.

1 CHAIRMAN BABCOCK: Bill, Carlos and
2 then Elaine.

3 PROFESSOR DORSANEO: Well, I take back
4 my comment that "includes" not meaning "means" is a
5 crazy interpretation, but I do think --

6 (Laughter)

7 CHAIRMAN BABCOCK: Just off the wall.

8 (Laughter)

9 PROFESSOR DORSANEO: I do think it's a
10 poor interpretation. It occurred to me that in some
11 respects there's going to need to be one person just
12 working on this part of the litigation. Well, maybe
13 we'll have two or three, if, administratively, we're
14 going to try to put on -- put recovery of taxi fare.
15 And how many cents do we get per mile under this, I
16 wonder. It seems to be unwise to broaden it beyond
17 the three things listed. It's hard enough to work
18 those out, and I think it's unlikely that -- myself,
19 that the list was meant to be non-inclusive.

20 CHAIRMAN BABCOCK: Carlos and then
21 Elaine and then Pete and then Stephen.

22 HON. CARLOS LOPEZ: Well, without regard
23 to the merits of one argument versus the other. If
24 what -- I mean, there's an inherent conflict that
25 Richard has pointed -- I mean, what do you do with the

1 third expert that everybody agrees is still
2 reasonable, but it's clearly in conflict with (b) but
3 it's certainly not in conflict with the sentence that
4 starts with (5). And so I guess what we could do is
5 say, "The term with regard to the following includes."
6 In other words, make it clear that the litigation cost
7 means what it says, which is money actually spent, et
8 cetera, et cetera, with the limitation of the comment,
9 too, that makes it reasonable, that you can't just
10 bankrupt somebody. You can't just spend it just
11 because. The Court has the discretion to say, "That's
12 not reasonable." And then say, "The term with regard
13 to following includes bam, bam, bam," so that we make
14 it clear that in this subset of things that were
15 specifically enumerated, it's limited to this, but
16 with regard to some other things, it's not, because I
17 think that seems to be, as far as I can tell, the
18 intent, but I'm not gospel on that, because I wasn't
19 there.

20 CHAIRMAN BABCOCK: Elaine.

21 PROFESSOR CARLSON: Well, in response to
22 Richard's comments, there are, of course, plenty of
23 cases that say you must give the plain meaning of the
24 statute, but there's also many cases that say the
25 plain meaning of the statute must yield to legislative

1 intent, and that's the ultimate inquiry.

2 I would be amazed and frightened if the
3 legislative intent was to include all money actually
4 spent and incurred in a case. That would put Texas
5 way beyond any other jurisdiction on fees and costs
6 that are shifted.

7 CHAIRMAN BABCOCK: That's what's so
8 great about this state.

9 (Laughter)

10 PROFESSOR CARLSON: We will be the new
11 California.

12 CHAIRMAN BABCOCK: Pete.

13 MR. SCHENKKAN: I don't have a strong
14 view about whether we stick the word "taxable" in with
15 regard to court costs. I think the reasonable fees
16 for not more than two means not more than two, and I
17 think "reasonable" means "reasonable." And I'm
18 wondering if we're working too hard on this.

19 This is not -- does not -- whatever
20 ambiguity there may be in this provision poses no risk
21 of bankruptcy -- bankrupting any litigant, with all
22 due respect. This is a provision for the shifting of
23 fees if a settlement offer is rejected, limited to not
24 more than 50 percent of the economic damages awarded
25 in the case. Thus, even if the fees are shifted from

1 a defendant to a plaintiff, which I assume is the
2 bankruptcy scenario we're looking at, they won't
3 bankrupt the plaintiff, they will just cut the
4 plaintiff's recovery of economic damages in half. And
5 the only dispute we're having is about whether to
6 include court costs, something more than taxable court
7 costs and whether to look at outside of two expert
8 witnesses and attorney's fees, things that aren't
9 court costs but are costs. I don't see that as
10 creating a likelihood of a big enough dispute about
11 whether we're across the 50 percent of economic
12 damages threshold anyway to warrant our trying to tie
13 it down better here.

14 So it seems to me we're really down to
15 the question, "Do we want to stick 'taxable' in or
16 not," and the rest of it ought to be left as it is and
17 we ought to move on.

18 CHAIRMAN BABCOCK: Yeah, Stephen.

19 MR. YELENOSKY: I agree with Richard's
20 statutory construction, that the word "includes" and
21 "means" are different, but I come to a different
22 conclusion from that. I think the significance of the
23 difference of those terms is that, if it had said
24 "means," the Supreme Court would have been forbidden
25 to add anything else. Since it says "includes," the

1 Supreme Court could, through a rule or later court
2 decision, add other things to these categories, but it
3 doesn't mandate that the Supreme Court leave open
4 other possible costs. The Supreme Court could,
5 through rule, add a fourth item, let's say, and stop
6 there and say it's the three -- "The statute said plus
7 a fourth, but no more," clearly. So if the Supreme
8 Court could do that, it can certainly stop with these
9 three.

10 CHAIRMAN BABCOCK: Sarah.

11 HON. SARAH DUNCAN: This is probably the
12 best oral argument I have heard this year, and I guess
13 that's what I keep coming back to, is, "What is the
14 Supreme Court's role here?" I think Paula made
15 excellent points. I think other people have made
16 excellent points, and if I were the judge, this would
17 be a really hard case to decide.

18 CHAIRMAN BABCOCK: Well, you sort of
19 are. Is the red light on yet?

20 (Laughter)

21 HON. SARAH DUNCAN: And that's what I'm
22 uncomfortable with.

23 CHAIRMAN BABCOCK: Being the judge?

24 (Laughter)

25 HON. SARAH DUNCAN: No. I'm very

1 comfortable being a judge. I'm uncomfortable with
2 being -- with deciding what the statute means in this
3 context without full briefing and all that goes with
4 it.

5 CHAIRMAN BABCOCK: Well, presumably, the
6 Court has got that available. They just want our
7 opinion.

8 MR. BOYD: We are making a record, and
9 it sounds like we'll have a vote here in a minute. So
10 that Justice Duncan is not the only one arguing in
11 favor of her position, I agree, and I won't repeat the
12 reasons, but there are two things that come to mind.

13 One is, you know, it really does depend
14 on -- when the legislature says that "The Supreme
15 Court shall issue rules implementing this chapter,"
16 does that mean interpreting and construing the chapter
17 or filling in the blanks so that this chapter will
18 work in real practice? And if you look at the
19 statute, it lists several blanks that the legislature
20 has asked the Court to fill in. And then at the very
21 end of it it says, "and such other things as may be
22 necessary," which I will argue for two reasons --
23 well, I would argue means the role of the Court here
24 is to fill in the blanks. If the legislature hadn't
25 listed all the blanks, then we can fill in others.

1 CHAIRMAN BABCOCK: Is this one of the
2 blanks?

3 MR. BOYD: This is not a blank. This is
4 actually rewriting the statute. I mean, we're
5 actually rewriting language that the legislature has
6 already addressed, which, I mean, if you back up and
7 look at bigger principles, separation of powers and
8 what's the role of the judiciary when it come to
9 legislative enactments, you know, there's no case or
10 controversy here. There's no lawyers here with due
11 process arguing their side of the construction. The
12 Court may get to that point. So for that reason,
13 number one, I agree that we ought to leave it as was
14 written by the legislature.

15 Number two, if we think that not -- that
16 addressing this is going to eliminate litigation, I
17 think we're mistaken. All we're going to have is a
18 rule that conflicts with the statute, and when you get
19 into a real situation and one party says "Give me my
20 court costs," and the other party says, "Well, no.
21 The rule only says taxable court costs," and the first
22 party says, "Well, but the statute says court costs,"
23 then you're going to be litigating which trumps, the
24 rule or the statute.

25 You remember the appellate procedural

1 rule versus 51.014 about stays during interlocutory
2 appeal, and there was a conflict. It's not going to
3 stop the litigation from happening.

4 So I agree that we ought to leave it as
5 it is and focus our efforts on advising the Court on
6 how to fill in the blanks.

7 CHAIRMAN BABCOCK: Bill. Then Buddy.

8 PROFESSOR DORSANEO: Well, if you look
9 at our procedural rules and look at the statutes --
10 and Stephen looked only at Civil Practice and Remedies
11 Code -- there are many, many, many places where we
12 have rules and statutes that deal with the same
13 problem, and for the more than 20 years that I've been
14 on this committee, we have tried to make things work
15 together as best we could given the fact that statutes
16 frequently do not finish the job, particularly when
17 it's obvious that the Court needs to make rules so
18 that the statutory scheme can work.

19 The legislature here has said to
20 continue the work, and I find it puzzling that people
21 don't want to do that.

22 CHAIRMAN BABCOCK: Okay. Buddy.

23 MR. LOW: The government code has a
24 provision that, if we pass something in our rules of
25 procedure and it's contrary to a statute that the

1 legislature, then, doesn't do something about it --
2 there's a certain length of time. So there's not
3 going to be a conflict. If we do something the
4 legislature doesn't like, then they can do something
5 about it, but if they don't, then our rule becomes the
6 rule and there's not a conflict between them.

7 The question I have after listening to
8 all of this is, "Does attorney's fees include all the
9 satellite litigation where the lawyers go to ten and
10 twelve hearings on determining what all this means?
11 Who pays those attorneys?"

12 (Laughter)

13 MR. LOW: I mean, let's try to do away
14 with satellite litigation. We're trying to make
15 things clear so that they're uniform and so that
16 they're clear. I don't believe we can do anything
17 that's contrary to the statute, but I certainly
18 believe we can do a lot of help to it.

19 CHAIRMAN BABCOCK: Okay.
20 Judge Patterson.

21 HON. JAN PATTERSON: I just wanted to
22 throw out a couple of other elements of statutory
23 construction that we also invoke along the lines of
24 what Elaine was saying. One is that we do not
25 interpret statutes by single words alone or phrases

1 alone, but we look at the provision as a whole, and
2 often at individual phrases and words, but we have to
3 look at the provisions as a whole and then we look to
4 the intent to guide us. So I think we have to
5 establish what that is.

6 And without weighing in, I think
7 Elaine's point and Bill's point is a good one as well
8 as Paula's on what the legislative intent has to be in
9 order for us not -- to invoke another statutory rule
10 of construction, which is that the result not be
11 absurd, and there's a lot of language involving that.
12 So I think we have to adopt a common sense approach
13 and implement their intent.

14 The other thing is that when we have an
15 opportunity to make something clear and precise, I
16 think we should bite the bullet and make that
17 decision. And if someone decides later that we're
18 wrong, they can do that, but when we can contribute to
19 the process, we shouldn't contribute confusion and
20 ambiguity knowing that it's that. Our contribution
21 ought to add some clarity and precision to it.

22 CHAIRMAN BABCOCK: Okay. Justice Gray.

23 HON. TOM GRAY: To follow up on that, I
24 would propose that the clarity and precision can be
25 accomplished without, in my view, doing violence to

1 the statute. If you change the lead-in phrase, "The
2 term includes" to "Litigation costs are limited to,"
3 same three categories the legislature has in the
4 statute, so you're not taking anything out of the mix,
5 and you are simply stating by rule that we're not
6 going to throw anything extra into that pool.

7 So that would be my proposal of how to
8 resolve that. And court costs versus taxable court
9 costs is a give me. I mean, that's just not worth
10 fussing with here.

11 CHAIRMAN BABCOCK: Well, it could be. I
12 mean, you know, copies of depositions, one category.
13 I mean, that's a big item.

14 HON. TOM GRAY: If you get into whether
15 or not that's a court cost, I don't think any
16 interpretation of any of the cases that I have -- or
17 any of the cases I've seen would include those as
18 court costs. Arguably, it would have been included
19 under the first sentence of this provision, but by
20 the -- unless you're going to open it up to the taxi
21 fares, everything else, which I don't think is a fair
22 interpretation of what the legislature did or what
23 their purpose was.

24 We're bringing clarity if we could just
25 shut it off with the three categories that are there.

1 I mean, if there's some deposition costs that are left
2 out there, copies, I mean, does that -- you know,
3 you're going to get into, as Buddy said, an endless
4 series of, "Okay. You paid the court reporter for a
5 copy and then there's 14 attorneys that are in the
6 litigation and you go back to your copy service and
7 you make 14 copies of that. Is that litigation cost?
8 Is that part of this?" And if you change the lead-in
9 phrase, I don't think you've done violence to what the
10 legislature is saying, but I think you've brought an
11 immense amount of clarity by just saying "The
12 litigation costs are limited to (A), (B), (C)."

13 CHAIRMAN BABCOCK: Okay. Carlos.

14 HON. CARLOS LOPEZ: I think the first
15 thing we have to do is decide whether or not there's a
16 consensus on this committee that that first sentence
17 was meant to modify the second or the second was meant
18 to modify the first. Until we know what we're doing
19 there, we're spinning our wheels.

20 If, in fact, as the Judge pointed out,
21 his interpretation makes it so that the first sentence
22 modified the second, and if that's what we're going to
23 do, that's fine, but maybe we could say "Litigation
24 cost means," and then say "court costs, reasonable" --
25 you know, (A), (B), (C), "that are actually spent and

1 obligations actually incurred that are directly
2 related, da ta-da ta-da," and to turn it into one
3 sentence where we make it clear that it's limited to
4 this universe of costs, "and that are actually spent
5 and obligations actually incurred," et cetera, et
6 cetera.

7 Now, I have no opinion as to whether
8 that's way more limited than what the legislature
9 meant to do, but it does accomplish what I hear people
10 saying here they want to do, which is make that list
11 not expansive. That's fine.

12 CHAIRMAN BABCOCK: Pete.

13 MR. SCHENKKAN: I think, you know, when
14 the legislature says "means," they mean "means," and
15 when they say "includes," they mean "includes," and
16 thus to define litigation cost in our rule to mean
17 "court cost, reasonable fees for not more than two and
18 reasonable attorney's fees" and exclude, let's say, a
19 million dollars of copying expense, would be
20 inconsistent with the legislation.

21 CHAIRMAN BABCOCK: Pete, you'd better
22 speak up a little bit.

23 MR. SCHENKKAN: As long as the one
24 million in copying cost was money actually spent and
25 actually incurred directly related to the case in

1 which the settlement offer was made. So I would -- if
2 the choice is as Carlos suggests, you know, which way
3 to go, I would say "means" means "means," and
4 "includes" is a specification on that that tells us
5 some more information about what is included in that,
6 and, "(B), not more than two testifying experts" is a
7 definite limitation, because you could have certainly
8 more than two expert witnesses directly related, but
9 the legislature said you only get two in this deal,
10 and certainly you can have attorney's fees that are
11 not reasonable, and the legislature is saying you only
12 get the reasonable ones.

13 So if we need to parse this further, I
14 vote in the opposite direction, that we leave it the
15 way it is because the legislature meant "means" by
16 "means" and "only includes" by "including." I would,
17 I think, argue the same practical result, if I hear
18 Carlos correctly, which is, let's take this .001(5)
19 the way it's worded and move on.

20 CHAIRMAN BABCOCK: Buddy. Then Paula.
21 Then Bill.

22 MR. LOW: You know, I have some trouble
23 talking about what the legislature intended, because
24 we talk about it as if they had one mind. They're
25 just like us. It meant one thing to one of them. It

1 might have meant something else to another. So to say
2 that legislative intent molds into one mind doesn't
3 exist. So those people had the same problem we did.
4 So you need to come up with something that makes good
5 sense, because you've got to believe that's what they
6 wanted to do, period.

7 CHAIRMAN BABCOCK: Bill. Then Paula.

8 PROFESSOR DORSANEO: Well, I don't know
9 if it's profitable to be talking about all of these
10 rules, because there's the one rule that will trump
11 the other rule. Sometimes "includes" and "means" mean
12 the same thing, and it would be sensible for that to
13 be the case here. It would make no sense to include
14 all kinds of unspecified things, and I think we ought
15 to do the clarification rather than just leaving it,
16 simply because what I think is not universally
17 accepted, even though it's the best interpretation.

18 (Laughter)

19 MS. SWEENEY: Let me get the committee
20 to assume that a defendant knows the maximum possible
21 recovery for a plaintiff and knows the dollar amount
22 that is the maximum possible that the plaintiff could
23 get in the judgment, and further assume that the
24 defendant knows that they can run up their costs to
25 meet that number or approach that number of

1 noneconomic damages, and further assume that they make
2 an offer that the plaintiff can't possibly meet the
3 math on unless we get to that later and fix it, so
4 that the plaintiff, if they go to trial to try to get
5 their maximum allowed statutory recovery, is going to
6 run afoul of this rule.

7 One, you're back to the same problem
8 that Pete and I don't agree on the math on of lowering
9 the caps in all of the cases in the state. Two,
10 you've now given the defendant a target of how much
11 money they might want to spend to make sure that the
12 plaintiff, in their cap recovery, can never approach
13 that, and it is encouraging frivolous unnecessary
14 spending. It's encouraging spending that wouldn't be
15 done if this scenario didn't exist. And I don't think
16 that the legislature intended to increase the cost of
17 litigation in the state in order to reduce the crisis
18 of insurance in the state, all of which was related
19 heavily to this discussion. So I think you want to be
20 very careful about not creating reasons for people to
21 spend money that they would not otherwise spend.

22 And the other is, I agree with Bill and
23 with Buddy, we need to write something that makes
24 sense. If we're having this debate here about what is
25 or is not the legislative intent, what these words do

1 or don't mean, and we're calling this a proposed rule,
2 we're already in a hole. And I think we need to be
3 clear what we mean, one way over the other.

4 It's clear what I think it ought to say,
5 but, either way, the rule that we send up to the Court
6 needs to be clear. We're either saying "includes
7 everything, the kitchen sink, frivolous expenses,
8 silly expenses, any expenses," because there's -- the
9 word "reasonable" is not in here either under
10 "litigation costs." It's only under attorney's fees.
11 So this can be -- we could put the word "stupid" in
12 here.

13 I think we need to be clear in what we
14 send up to the Court, that we either mean the vast
15 universe of anything you choose to spend money on,
16 whether reasonable or not, because, "Gee, look, the
17 legislature only said includes," or we need to say,
18 "The legislature made a list. They made it clear what
19 they meant the list to be. It's obvious from the
20 language what they meant the list to be, and we need
21 to put the word "means" in there or something like it
22 to delimit this and not have the kind of satellite
23 litigation that we're otherwise creating.

24 CHAIRMAN BABCOCK: Frank.

25 MR. GILSTRAP: I think we've got two

1 positions here. One, leave it as is and track the
2 language of the statute, and that leaves people free
3 to argue that litigation costs can include more than
4 court costs, reasonable fees for two testifying
5 experts and reasonable attorney's fees, and that's
6 just kind of minimum, kind of a floor, or do the other
7 thing which has been proposed and say, "Litigation
8 costs are limited to court costs, reasonable fees for
9 two experts and reasonable attorney's fees." I mean,
10 I think we're ready to vote on that.

11 CHAIRMAN BABCOCK: Yeah. I do, too.

12 HON. CARLOS LOPEZ: Got to do one or the
13 other.

14 CHAIRMAN BABCOCK: Judge Patterson.

15 HON. JAN PATTERSON: Just before you
16 vote, there is the third option, which "includes" very
17 often means this list plus similar items. So it might
18 not be a larger universe, but similar items. I don't
19 think that's what the legislature intended, but that's
20 a third reading of the word "includes."

21 CHAIRMAN BABCOCK: Okay. Let's vote.
22 And everybody who is in favor of leaving it as it is,
23 as the subcommittee proposes -- in other words --

24 PROFESSOR CARLSON: As the legislature
25 proposes.

1 (Laughter)

2 CHAIRMAN BABCOCK: Elaine says, "As the
3 legislature proposed," but the subcommittee also
4 proposed leaving it as it is -- leaving the language
5 as it is in Rule 167.1(B). So everybody who's in
6 favor of leaving it as the subcommittee has it here,
7 raise your hand.

8 (Show of hands)

9 CHAIRMAN BABCOCK: Everybody opposed?

10 (Show of hands)

11 CHAIRMAN BABCOCK: By a vote of 5 in
12 favor of leaving it as it is, 17 opposed to that, the
13 Chair not voting, we'll consider how to change it.

14 Frank, you had a -- I think you were
15 following on what Justice Gray said about how to
16 change it.

17 MR. GILSTRAP: Justice Gray said it. I
18 think Carl Hamilton said it. I don't know the exact
19 language, but that "Litigation costs will mean court
20 costs, fees for two experts and reasonable attorney's
21 fees," and we can leave aside the taxable for later
22 and maybe quibble over that in a second.

23 CHAIRMAN BABCOCK: What got us started
24 on this.

25 "Litigation cost means court costs,

1 reasonable fees for not more than two testifying
2 expert witnesses and reasonable attorney's fees, so
3 long as the money was actually spent and obligations
4 actually occurred that are directly related to the
5 case in which the settlement offer is made."

6 MR. GILSTRAP: That's it.

7 CHAIRMAN BABCOCK: So do we have
8 consensus on that or should we have a vote?
9 Consensus? Vote?

10 Pete.

11 MR. SCHENKKAN: I'm not sure I
12 understand what the question is about consensus or
13 vote, and, obviously, there are five of us who think
14 we ought to not do it that way --

15 CHAIRMAN BABCOCK: Okay. Let me try it
16 this way --

17 MR. SCHENKKAN: Is the question, "What
18 is the alternative way of changing the language?" And
19 if so --

20 CHAIRMAN BABCOCK: Well, everybody that
21 thinks the Subparagraph (5) should be changed to say
22 "Litigation cost means court costs, reasonable fees
23 for not more than two testifying expert witnesses and
24 reasonable attorney's fees, so long as the money has
25 actually been spent and obligations actually incurred

1 that are directly related to the case in which a
2 settlement offer is made" --

3 MR. SCHENKKAN: Okay. Then what I would
4 like to offer is an alternative to that is not nothing
5 but is along the lines of what Justice Patterson
6 suggested, "and other expenses actually spent and
7 obligations actually incurred reasonably required in
8 connection with litigation." Just sticking in the
9 word "reasonably" to deal with Paula's concern.

10 HON. CARLOS LOPEZ: That's the only
11 change, Pete?

12 MR. SCHENKKAN: And that's the only
13 change.

14 HON. JAN PATTERSON: Except that was not
15 my suggestion.

16 MR. SCHENKKAN: Oh. I'm sorry.

17 (Laughter)

18 MR. SCHENKKAN: I misunderstood.

19 HON. JAN PATTERSON: It was another
20 alternative of statutory construction.

21 MR. SCHENKKAN: I would at least like to
22 leave open the possibility, which, from my own
23 litigation experience is not a possibility but a
24 reality. There are a number of other actual costs
25 that are reasonably incurred that are sometimes

1 substantial that are nontaxable court costs, not
2 testifying fees for two witnesses and are not
3 attorney's fees and which I think the legislature did
4 intend to define litigation costs to include or to
5 mean. So I'd like that tagged onto it.

6 CHAIRMAN BABCOCK: Okay. Which do you
7 want to vote on first, or do you care?

8 PROFESSOR CARLSON: Yours.

9 CHAIRMAN BABCOCK: Mine. Okay.

10 Elaine, who is Chair of the
11 subcommittee, wants mine.

12 So everybody in favor of changing
13 Subparagraph (a)(5) to say "Litigation cost means
14 court costs, reasonable fees for not more than two
15 testifying expert witnesses and reasonable attorney's
16 fees for money actually spent and obligations actually
17 incurred that are directly related to the case in
18 which a settlement offer is made," period, everybody
19 in favor of that, raise your hand.

20 HON. CARLOS LOPEZ: As long as Comment 2
21 is still there. Right?

22 (Show of hands)

23 CHAIRMAN BABCOCK: All opposed?

24 (No response)

25 CHAIRMAN BABCOCK: So by a vote of 22 to

1 0, the Chair not voting, we'll make that change.

2 PROFESSOR DORSANEO: Mr. Chairman?

3 CHAIRMAN BABCOCK: Yeah, Bill.

4 PROFESSOR DORSANEO: If it's not
5 something we've already decided, and tell me that it's
6 out of order, that Footnote 2, we spent a lot of time
7 discussing the text of the footnote on what you would
8 look at in deciding reasonableness. I think that's an
9 important enough thing to be up in the body of the
10 rule. That would be my recommendation, if that's
11 something that we could consider.

12 CHAIRMAN BABCOCK: Well, I think the
13 fact that you've noted that in the record is probably
14 sufficient for the Court to -- given the weight to
15 which they accord your comments.

16 PROFESSOR DORSANEO: Ha-ha.

17 (Laughter)

18 PROFESSOR DORSANEO: Maybe I shouldn't
19 have said anything.

20 (Laughter)

21 CHAIRMAN BABCOCK: And we won't show the
22 scale here on that, but I think, in the interest of
23 getting through this, because we've only allotted this
24 morning for this rule -- and not even the whole
25 morning for this, maybe we'll just do that.

1 Stephen.

2 MR. YELENOSKY: I have to apologize.

3 This is also out of order, but backing up one

4 number --

5 CHAIRMAN BABCOCK: It's a bad way to
6 start.

7 (Laughter)

8 MR. YELENOSKY: Yeah. I know, but
9 Justice Duncan confirmed I ought to bring this up.
10 Does our definition of governmental unit include
11 municipalities and it is intended to? The statute
12 just says "governmental unit." Our definition says
13 "political subdivision of the state."

14 CHAIRMAN BABCOCK: I'm sorry. I didn't
15 get -- you're saying we're different than the statute?

16 MR. YELENOSKY: Well, I'm not sure, but
17 I bet Jeff Boyd can answer the question. Is
18 municipality a subdivision of the state?

19 MR. BOYD: The statute does have this
20 exact language.

21 MR. YELENOSKY: Oh, it does later on
22 after -- in the top it says "governmental unit." Does
23 it have that definition --

24 MR. BOYD: The statute defines, in
25 42.001(4), "governmental unit" in the exact same way

1 that this proposed rule does.

2 MR. YELENOSKY: Okay. I'm sorry. I
3 didn't see that. So just for my clarification, then,
4 that would not include municipalities.

5 MR. BOYD: I don't know.

6 PROFESSOR DORSANEO: I think it would.

7 MR. GILSTRAP: I think it does. Yeah.

8 (Simultaneous discussion)

9 CHAIRMAN BABCOCK: Judge Patterson.

10 HON. JAN PATTERSON: On Footnote 2,
11 Chip, at the last line where it says "related to the
12 actions of the rejecting party," does that mean the
13 conduct of the rejecting party and is -- I just raise
14 that, because it was confusing when I read it. It
15 also refers to "claims," and I wonder whether
16 "actions" in that context is a confusing word.

17 CHAIRMAN BABCOCK: Yeah. I think we
18 talked about that a lot at our last meeting, and so
19 the record is clear on that if the Court decides to
20 accept that.

21 Why don't we go to Footnote 4 and see if
22 there's any discussion about that.

23 MR. GILSTRAP: Chip?

24 CHAIRMAN BABCOCK: Yeah, Frank.

25 MR. GILSTRAP: Before we kind of fall

1 off the cliff and start discussing that, I'll just
2 point out that this is -- this subcommittee's attempt
3 to deal with the question of what factors you consider
4 when you decide what attorney's fees are reasonable,
5 in the class-action rule that we're going to discuss,
6 hopefully this weekend, we took another crack at it in
7 determining lodestar and determining what reasonable
8 attorney's fees are under a lodestar formula, and we
9 came up with something similar to this.

10 The legislature recently passed House
11 Bill 730, which rewrote the Residential Construction
12 Liability Act, took a third approach and just said,
13 "We considered the factors in the Rules of
14 Disciplinary Conduct, Rule 1.04." Rather than kind of
15 discuss this kind of as a small piece, maybe at the
16 end of the day somebody just needs to sit down and
17 look at all of these formulations and come up -- and
18 make sure they're all consistent. It might not be
19 productive, really, to kind of plow through that at
20 this time.

21 CHAIRMAN BABCOCK: We could save
22 ourselves some time if we discussed this in the
23 context of class-action rule, and then whatever we
24 come up with, maybe just double back and make it
25 consistent. Is that what you're saying?

1 MR. GILSTRAP: Rather than trying to go
2 through this now and then come to class action and
3 we'll say, "Oh, well, now we've got to decide this."

4 CHAIRMAN BABCOCK: Is that okay with
5 you, Elaine?

6 PROFESSOR CARLSON: Yes.

7 CHAIRMAN BABCOCK: Okay. Let's --
8 Buddy.

9 MR. LOW: I just wonder if they are the
10 same. Under lodestar, you consider certain results
11 and you multiply and factor, and does the legislature
12 intend this to be a lodestar type fee? I don't
13 think --

14 MR. GILSTRAP: No, no, no. But in the
15 lodestar formula, you do consider the same factors.

16 MR. LOW: The same factors. Okay. But
17 you don't -- you're not suggesting adding the --

18 MR. GILSTRAP: They're not exactly the
19 same. That's correct.

20 MR. LOW: Okay. All right.

21 CHAIRMAN BABCOCK: You okay with that,
22 Buddy?

23 (No verbal response)

24 CHAIRMAN BABCOCK: All right. Let's
25 move on to the next issue -- the next noncontroversial

1 item.

2 PROFESSOR CARLSON: Rule 167.2 has no
3 changes except Subsection (c), the last sentence was
4 added to reflect the vote we took at the June meeting.
5 "Such a declaration," to put this in play, "must be
6 filed no later than 45 days before the date the case
7 is set for conventional trial."

8 CHAIRMAN BABCOCK: But we voted on that
9 at the last meeting.

10 PROFESSOR CARLSON: We voted.

11 CHAIRMAN BABCOCK: Okay. So keep going.
12 Don't talk about stuff we already voted on.

13 MR. BOYD: As long as we're worried
14 about clarity -- and I know you-all spent a lot of
15 time on this last time, but there is an ambiguity here
16 about whether it's the case that the judge sets it --
17 I mean, the date that the judge sets it or the setting
18 date. 45 days before the date on which the judge
19 issues an order saying, "This upcoming date is your
20 trial date." Do you know what I'm saying?

21 PROFESSOR CARLSON: Yeah.

22 MR. BOYD: And I think that's a little
23 ambiguous about which date you're talking about.

24 HON. TOM GRAY: I thought we had voted
25 on the time period, but I was under the definite

1 impression -- and I did not go back and read the
2 transcript in relation to this, if we just take out
3 the phrase "the date the case is set for" so that it
4 reads "45 days before a conventional trial on the
5 merits," it fixes, I think, the problem that he just
6 brought up and it fixes a much larger problem of what
7 happens in the event of a continuance of a first trial
8 setting and all that, which I think was probably the
9 first comment I made when I joined this committee and
10 it just is a recurring problem when you peg something
11 to a trial setting and then it doesn't occur. And if
12 you just simply say "no later than 45 days before a
13 conventional trial on the merits," that would be my
14 suggested change. And forgive me if we did vote on it
15 and let's go on, but that's -- it does have a certain
16 amount of ambiguity with that in there, especially in
17 the event of a continuance.

18 PROFESSOR CARLSON: This was the
19 language that we ended up agreeing upon at the end of
20 the June discussion. I think some people probably
21 thought that it was okay to leave it for the date set,
22 even if the date set gets changed, and then you roll
23 into the Hostle v. De Joya (phonetic) kind of thought
24 process that, "Well, that can be with a floating date
25 if you end up with a recess."

1 CHAIRMAN BABCOCK: Bob.

2 MR. PEMBERTON: Not to beat this to
3 death, but there is parallel language in the discovery
4 rules regarding the discovery periods of the term
5 "date set for trial" is used, and it doesn't seem to
6 create a whole lot of problems.

7 CHAIRMAN BABCOCK: Okay. Let's move on
8 to the next one.

9 PROFESSOR CARLSON: 167.3, there are a
10 number of changes. We were directed to do a fair
11 amount of work on this.

12 Judge Christopher and Buddy Low kind of
13 headed up the language on proposed release and
14 indemnity provisions, but we took a look -- the whole
15 subcommittee took a look at the entire rule, and
16 Subsection (c) -- I'm sorry, Subsection 167.3 (a)(3),
17 the subcommittee is suggesting that we include the
18 second sentence, which is new.

19 One of the things that we understood
20 from the June transcript of our last meeting was that
21 it was the sense of this committee that the way the
22 offer should be structured is monetary claim and then
23 you can pair it with the verdict on the monetary
24 claim. We were not precise in our discussion --
25 probably was my fault -- on how we were going to deal

1 with pre-offered costs and interests.

2 Judge Christopher stated several times
3 that we need to be very careful that we make sure we
4 structure it so that the offer can compare apples to
5 apples with the verdict. We have to be careful on how
6 we allow the offer to be structured so as to
7 facilitate the trial judge's ability to effectuate the
8 shifting of costs. And so our subcommittee felt that
9 an offeror may very well want to deal with costs --
10 the offeree made with costs and interests that have
11 accrued up to the date of the offer and that we didn't
12 want that to be included in the dollar amount of the
13 monetary claims, because that would not facilitate the
14 apples-to-apples comparison if the offer is rejected
15 and you end up going to trial.

16 So we thought that the best thing would
17 be to allow the offeror to state whether their offer
18 includes or excludes costs or interests accrued up to
19 the date of the offer without having the necessity of
20 specifying an amount, with the court dealing with that
21 on the back end, and, of course, if the parties agree
22 to the number, then that's the number.

23 MR. BOYD: If I don't include it in the
24 offer and you accept the offer, do I still have a
25 claim against you for cost and interest?

1 PROFESSOR CARLSON: Well, when you get
2 to the release language, arguably not.

3 CHAIRMAN BABCOCK: How does everybody
4 feel about adding this sentence?

5 MR. BOYD: So in what circumstance would
6 I choose not to include that in the offer?

7 PROFESSOR CARLSON: Well, there's
8 another open question on what happens if you have
9 monetary claims and non-monetary claims and then you
10 proceed -- and the offer is not accepted and you
11 proceed to trial and the plaintiff wins on the
12 monetary claims but not by a 20 percent margin. And
13 maybe they're successful or not on their injunctive,
14 the monetary relief. How do you deal with Rule 131 on
15 the imposition of costs? Can you be a successful
16 party under Rule 131 when you recover monetary damages
17 when you have received a significantly less favorable
18 judgment under our rule and the statute?

19 CHAIRMAN BABCOCK: Justice Gray and then
20 Bill and then Buddy.

21 HON. TOM GRAY: I had no comment. You
22 just asked how do we feel about it, and I didn't feel
23 very good about it. I wouldn't include it. It just
24 injects another level of uncertainty. I thought the
25 whole concept was, "Here's the pot of money. Here's

1 what I'm offering to settle all your claims." That
2 would include cost and interest.

3 PROFESSOR CARLSON: But the problem with
4 that, Justice Gray, what if the offer gets turned down
5 and now we go to trial and now the trial judge is
6 supposed to figure out whether there's a significantly
7 less favorable judgment? Does the judge then hobble
8 back in the interest and cost to the monetary claim,
9 or do we want to set this up that's clear, "You can
10 look at the monetary claim offer and the monetary
11 claim received, and then separately deal with offer
12 and cost -- offer and interest"?

13 HON. TOM GRAY: As I understood the way
14 the computation was going to work, you'd calculate
15 what the judgment would be without regard to Rule 167,
16 calculate what it would be, compare that to the pot of
17 money that was put on the table at some point and
18 determine whether or not it was significantly less
19 favorable, and, therefore, invoke the fee shifting
20 mechanism of the rule.

21 MR. LOW: What if you say, "Okay. I
22 accept that money," then do you mean I accept it if
23 you pay court costs or you don't? In other words,
24 usually the prevailing party is going to get its court
25 costs.

1 So you offer me \$500. Let's say I
2 accept it. Okay. So, "Well, what do we do about
3 court costs?" I say, "Well, I prevailed. I'm the
4 one, so you pay them." "Well, I didn't offer to pay
5 them." So, then, do you have an acceptance?

6 CHAIRMAN BABCOCK: Bill and then
7 Justice Gaultney. Did you have your hand up?

8 PROFESSOR DORSANEO: Yes, I did. It
9 seems to me that it would be well understood by --
10 should be well understood by the parties that a
11 prejudgment interest claim is a monetary claim, just
12 like any other monetary claim.

13 Now, the costs -- I just heard Buddy
14 talk about cost. That puzzled me a little bit there,
15 because we do frequently think of costs as some sort
16 of additional thing that needs to be taken into
17 account. That happens all the time.

18 MR. LOW: Yeah.

19 PROFESSOR DORSANEO: So I halfway agree
20 with what I started out to say.

21 (Laughter)

22 CHAIRMAN BABCOCK: That's always
23 helpful.

24 PROFESSOR DORSANEO: I think we ought to
25 deal with cost, but I don't know whether we really

1 need to deal with interest.

2 CHAIRMAN BABCOCK: Justice Gaultney and
3 then Buddy.

4 JUSTICE GAULTNEY: Well, getting back --
5 I think what Buddy said is correct. If you're
6 settling a small case, sometimes what happens is that
7 you agree on the settlement and then the opposing side
8 says, "Well, are you going to pay costs?" I think, by
9 including it in the rule, you've clarified that on
10 what the offer is, and I think it makes a difference
11 in small cases -- is where it's going to make a
12 difference, and you don't, you know, get into the
13 trouble, "Well, I assumed, in our area of the state,
14 if you make a settlement offer, you always pay costs."
15 I mean, so I think by putting it in the rule, you
16 resolve that there are different practices around the
17 state in terms of "Does the defendant pay costs in
18 addition to what they offered to settle?" By putting
19 it in the rule, you've clarify it.

20 CHAIRMAN BABCOCK: Okay. Buddy and then
21 Richard Munzinger.

22 MR. LOW: One of the things that my
23 initial proposal -- and I'm not disagreeing with what
24 they're doing -- is that prevailing party usually pays
25 costs and that any offer of settlement included

1 whatever the judge did -- you know, whatever included
2 costs. Tracy had a different idea, but I agree with
3 Elaine that it ought to be addressed, and I agree with
4 what they've done.

5 CHAIRMAN BABCOCK: Okay.

6 Richard Munzinger.

7 MR. MUNZINGER: When all is said and
8 done and we've had our jury trial, the verdict has
9 been rendered and the judgment is going to be entered
10 and we're now addressing whether or not the settlement
11 offer is one that triggers the applicability of the
12 statute, if you look at the statute, the statute says,
13 "The judgment is what you compare it to," and so the
14 judgment is going to include prejudgment interest and
15 court costs. And I think the addition of the sentence
16 makes it clear that that's what you're doing in this
17 Number (3), and it ought to be in here because you
18 have to compare the settlement offer to the judgment,
19 and the judgment is going to include interest and
20 costs.

21 CHAIRMAN BABCOCK: Yeah. Let's vote
22 this up or down.

23 HON. TERRY JENINGS: Chip, before you do
24 that, they have an alternative here. I would like to
25 make a point about that.

1 It seems to me that the way the sentence
2 is phrased now, the offer should stay, and in the
3 alternative, why not just say outright -- looking at
4 the alternative but editing it, why not just say
5 outright "Any offer to settle made under this rule
6 must be for" and then clarify the language?

7 CHAIRMAN BABCOCK: I'm sorry? What are
8 you -- where are you, Judge Jenings?

9 HON. TERRY JENINGS: Footnote 8, the
10 alternative.

11 PROFESSOR CARLSON: It comes from
12 another state.

13 HON. TERRY JENINGS: Just say it
14 outright.

15 CHAIRMAN BABCOCK: Oh. I see what
16 you're saying.

17 HON. TERRY JENINGS: Instead of "It is
18 deemed" or "It should," just say "Any offer to settle
19 made under this rule must be for the stated monetary
20 terms and include costs and interests that have
21 accrued up to the date of the offer." Is there a
22 problem with that?

23 MR. LOW: Would that mean that, I
24 offered \$10,000, that includes that, or it means that
25 I've offered \$10,000 in addition to that? Does

1 "included" mean in the monetary?

2 See, that was my initial proposal, was
3 that I offered \$10,000, but automatically, I have
4 offered these others, too, and I thought it would be
5 clearer, but --

6 HON. TERRY JENINGS: Well, you could
7 separate them out and state the rule that way.

8 MR. LOW: How?

9 HON. TERRY JENINGS: "Any offer to
10 settle made under this rule must be for," and you can
11 add it up that way.

12 CHAIRMAN BABCOCK: Justice Jenings, you
13 like the alternative better than the language that's
14 up here in the body for what reason?

15 HON. TERRY JENINGS: Just to make it
16 clearer. It seems unclear when you say, "The offer
17 should state." Why not just say "It must state"?

18 CHAIRMAN BABCOCK: Maybe I'm looking at
19 the wrong draft, but this -- doesn't it say "must"?

20 HON. TERRY JENINGS: Oh. I'm looking at
21 the wrong draft. This is the one I picked off of the
22 table.

23 MS. SWEENEY: No. (a) says "must," but
24 then (3) says "should." So you start off with "A
25 settlement offer must."

1 CHAIRMAN BABCOCK: Right.

2 MS. SWEENEY: And then you come down to
3 (3), but then -- yeah. The "should" should come out.

4 CHAIRMAN BABCOCK: Wait a minute. The
5 sentence that -- you guys -- we're not on the same
6 page, so to speak. The language that we're voting on
7 says, "The offer must state whether the offer to
8 settle includes or excludes costs or interests accrued
9 up to the date of the offer without the necessity of
10 specifying an amount."

11 MS. SWEENEY: This is what Chris posted
12 yesterday.

13 (Simultaneous discussion)

14 HON. TERRY JENINGS: I apologize,
15 because this is what I picked up off the table there
16 just a minute ago.

17 MR. GILSTRAP: Mine says "offer should."

18 (Simultaneous discussion)

19 THE REPORTER: Hold on. I can't --

20 (Simultaneous discussion)

21 HON. TERRY JENINGS: I got 7/9.

22 MS. SWEENEY: 7/9 was on the Web site
23 yesterday.

24 CHAIRMAN BABCOCK: Time out. I've got a
25 7/9 that says "must."

1 (Laughter)

2 MR. LOW: This 7/9 says "should."

3 (Laughter)

4 CHAIRMAN BABCOCK: Okay. Let's get on
5 the same page here. The language is -- that Elaine
6 proposes is, "The offer must state whether the offer
7 to settle includes or excludes cost or interest
8 accrued up to the date of the offer without the
9 necessity of specifying an amount." If that's the
10 language, Justice Jenings, is that okay for you?

11 HON. TERRY JENINGS: I think that's much
12 better, yes. I'd like to get a copy of that.

13 (Laughter)

14 CHAIRMAN BABCOCK: Judge Bland.

15 HON. JANE BLAND: I prefer Terry's
16 version, because even though this sentence says
17 "must," it then gives the parties the option whether
18 or not to include interest or costs -- and/or costs, I
19 guess, and I think what we would like is one number
20 that would include interests and costs, because if we
21 do not include interests and costs, then that is not
22 really settling all monetary claims, and at the end of
23 the day, when we tack on interest and costs, we're
24 going to have this problem. And I don't think
25 allowing the option of including them or not including

1 them is a good idea. Then we start a decision tree.

2 CHAIRMAN BABCOCK: So if you took the
3 word "whether" out and put the word "that" in -- "The
4 offer must state that the offer to settle includes."

5 MR. YELENOSKY: Well, take out
6 "excludes."

7 MS. SWEENEY: Then you've got to take
8 out "or excludes."

9 MR. YELENOSKY: And you have to add
10 in -- yeah. That's right.

11 PROFESSOR ALBRIGHT: And it wouldn't
12 have to state it. You can just say, "The offer must
13 include costs or interests accrued up to the date of
14 the offer." I don't really like "without the
15 necessity," but I haven't figured out what to say
16 instead.

17 MR. YELENOSKY: Shouldn't it say "costs
18 and interests"?

19 PROFESSOR ALBRIGHT: "Costs and
20 interest."

21 MR. YELENOSKY: Instead of "or."

22 CHAIRMAN BABCOCK: Okay. Conceptually,
23 is that what we want to do, everybody?

24 Judge Jenings?

25 HON. TERRY JENINGS: I think so, but --

1 and again, I apologize, because what I have here is
2 not consistent, obviously, with what everybody else
3 has. What I'm trying to say is this: "Any offer to
4 settle made under this rule must be for the stated
5 monetary terms and include cost and interest that has
6 accrued up to the date of the offer." That's what
7 I'm --

8 CHAIRMAN BABCOCK: Elaine.

9 PROFESSOR CARLSON: Judge Bland, could I
10 ask for some clarification on your last comment? Is
11 it your preference as a trial judge to have a lump sum
12 number in the offer that includes costs and interests
13 up to the date of the offer and not have that
14 separated out from the monetary claim and then you're
15 going to try, at the back end if the offer is turned
16 down, to figure out whether the 20 percent margin has
17 been cleared without those discrete numbers?

18 HON. JANE BLAND: Well, if at the front
19 end interests and costs are included in the offer,
20 then it would make sense at the back end to include
21 interest and costs in a comparison, and I just think
22 it needs to be clear that the initial offer includes
23 those things, so that when people are making their
24 evaluation about whether or not to settle, they don't
25 carve out interest or costs, and then at the very end

1 of the day they're surprised when this is triggered,
2 because when you add on interest and costs, you know,
3 you fall over or short.

4 You know, I think that it's more
5 important to me that there's clarity and that all
6 claims for monetary relief are included in the offer,
7 because the ultimate goal is to get people to settle.
8 And so if you don't include interests and costs, it's
9 not really an offer to settle all monetary relief,
10 because then there's the ancillary squabble over costs
11 usually -- not usually interest, but squabble over
12 costs that, you know, may or may not keep the parties
13 from reaching an agreement.

14 CHAIRMAN BABCOCK: Justice Hecht has a
15 comment.

16 JUSTICE HECHT: But I take it your
17 concern, Elaine, is that you don't want to have the
18 80 percent or 120 percent margin turn on whether
19 somebody miscalculated prejudgment interest at the
20 time they made the offer.

21 PROFESSOR CARLSON: That's right.

22 JUSTICE HECHT: You just want it to be a
23 number plus whatever this is and that would be --
24 that's the offer.

25 PROFESSOR CARLSON: Right. And I had

1 understood Judge Christopher to say that that would
2 probably be the preference of most trial judges,
3 because they like the discrete number on the monetary
4 terms and will figure out the cost and interest at the
5 end of the day.

6 HON. JANE BLAND: Well, that's true.
7 The only problem with that, though, is, then the offer
8 doesn't -- then it's not -- the other side is going to
9 say, you know, "Will this settle everything or
10 does" -- there is, you know, among some lawyers in
11 some kind of cases, that an offer is the offer for the
12 case, and, then, of course, you will bear the cost,
13 but a lot of defendants these days are apparently, you
14 know, saying, "Well, no, you know, this is the offer
15 and this includes the costs," and, you know, that's
16 always a subject of negotiation.

17 I don't think this second sentence is
18 going to cure that problem on the back end, because
19 you give them the option, anyway, of including it or
20 not including it --

21 PROFESSOR CARLSON: Say we took out
22 "exclude." Then what would be your preference?

23 HON. JANE BLAND: Well, if you do
24 "excludes," that's okay, too, but basically you're
25 saying to the party that they can't get their

1 interests or costs accrued to date included in their
2 settlement offer.

3 CHAIRMAN BABCOCK: Frank.

4 HON. JANE BLAND: So I think that's a
5 problem. I think it would be better if the settlement
6 offer included everything.

7 MS. SWEENEY: I think it has to.

8 HON. JANE BLAND: I think it has to.

9 MR. GILSTRAP: The settlement offer in
10 the statute has to include everything, and you're
11 going to be making an offer -- "I offer \$10,000 to
12 settle all claims." Nobody is going to say, "I
13 offered to pay \$10,000 to settle all claims excluding
14 interest or including interest." It just doesn't make
15 sense, "Leave cost aside; interest." It doesn't make
16 sense.

17 The offer ought to be, "I offer this
18 much money to settle all claims." At the end of the
19 day, after the trial is over, the judge sits down and
20 says, "Okay. Here was the offer. Here is the
21 judgment that includes interest. We compare the two.
22 Did they hit 20 percent? I mean, that's the way to
23 approach it. Costs are different. We need to have a
24 provision in there requiring them to say whether the
25 offer includes or excludes court costs -- who pays

1 that -- but interest, I don't think we ought to
2 include that. It just makes it much too complicated.

3 MS. SWEENEY: I agree with that and with
4 what Judge Bland said. I think you got to have a
5 solid identifiable number. Costs can be handled
6 differently, but interest has got to be rolled into
7 the number. Otherwise, you're going to get into a
8 fight over interest, which currently we're not
9 fighting about. I don't think we want to add things
10 to fight about.

11 CHAIRMAN BABCOCK: Okay. Bill.

12 PROFESSOR DORSANEO: Yeah. We need to
13 make it easy so somebody can look at the offer and see
14 what the number is and then look at the judgment to
15 see what the number is, and costs are not written down
16 in the judgment as a number. So that ought to be
17 taken out of the equation. The easiest way to do that
18 is just let people say one number and then -- we could
19 even leave it to the commentators to tell people they
20 need to talk about costs.

21 CHAIRMAN BABCOCK: The commentators
22 being?

23 (Laughter)

24 PROFESSOR DORSANEO: Me and others.
25 Elaine will put it in her book, too.

1 (Laughter)

2 CHAIRMAN BABCOCK: Jane.

3 HON. JANE BLAND: I think that the
4 concern is, at the back end on the judgment, being
5 caught off guard by costs or interests, that we
6 clarify what the comparative number is on the other
7 end -- on the judgment end of it. So we could say,
8 "The judgment, either including or not including
9 interests and costs," but for the offer -- and I
10 understand that that's not an exact comparison of
11 apples to apples, but for the offer, it would seem to
12 me that it would settle -- it needed to settle
13 everything, and if it ends up that, you know, on the
14 back end we decide, we don't want to include costs,
15 then that can be a decision that, you know, we look
16 to, but the front end has to be one number.

17 CHAIRMAN BABCOCK: Buddy.

18 MR. LOW: Many of the small cases --
19 costs are a big, big factor in some of the real small
20 cases, and, you know, they say, "I'll accept \$1,000,"
21 and then if you haven't addressed cost -- I mean, I've
22 had settlements blow up over cost. I wasn't the one
23 that was being irrational, but --

24 (Laughter)

25 CHAIRMAN BABCOCK: Well, Judge Bland,

1 how would you like to see Subparagraph (3) read?

2 HON. JANE BLAND: Along the lines of
3 what Terry suggested, which is, you know, "The offer
4 must" --

5 CHAIRMAN BABCOCK: Terry's language is
6 sort of the alternative down in Footnote 8. "Any
7 offer to settle made under this rule must be for the
8 stated monetary terms, and in addition, for costs and
9 interests that has accrued up to the date of the
10 offer." That's --

11 HON. JANE BLAND: Well, you could
12 jettison the second sentence entirely, and, you know,
13 just include in the first sentence, "Must offer to
14 settle all monetary claims, including interest and
15 costs, between the defendant and claimant."

16 CHAIRMAN BABCOCK: Elaine, how do you
17 feel about that?

18 PROFESSOR CARLSON: That's fine. You're
19 going to end up with one number.

20 HON. JANE BLAND: I know.

21 PROFESSOR CARLSON: It's the one-number
22 problem that we're kind of concerned with when the
23 offer gets turned down.

24 HON. JANE BLAND: Well, I think we
25 compare one number to one number. It's just a

1 question of, at the end, what that number is.

2 CHAIRMAN BABCOCK: Okay. How many --
3 we're going to vote on this, because we've really got
4 to move on, but Bill feels strongly that he has to get
5 the last word on this.

6 PROFESSOR DORSANEO: No, I don't, but we
7 don't want people -- despite what Buddy said, do we
8 really want people for this purpose comparing the
9 costs -- doing the costs?

10 MR. LOW: No. No. All I'm saying is
11 that we make an offer and you don't say anything at
12 all about costs and the other side said, "Well, you
13 know, costs are a big factor in this little case.
14 Well, it's not settled."

15 My idea was that initially -- and I've
16 been persuaded to change, that any offer was -- you
17 included automatically, you were going to have to pay
18 costs in addition, not interest, and that would just
19 take costs out of it and you can compare factor to a
20 factor, and then that would be it, a number to a
21 number. Short of doing that, I don't know how else --

22 PROFESSOR DORSANEO: Well, I'd like to
23 take costs out of the comparison, if that's possible
24 to do that, because it complicates things and we're
25 going to cause trouble, unless it's essential to put

1 it in there.

2 CHAIRMAN BABCOCK: Alex, and then
3 Judge Bland.

4 PROFESSOR ALBRIGHT: Okay. What we want
5 is a number to settle the claim, but we want to be
6 sure that they're setting interest and costs, too.
7 The judgment doesn't specify interest and cost, does
8 it? Don't you have to make that calculation after the
9 judgment? So doesn't the judgment usually say
10 "Interest at X percent"?

11 (Simultaneous discussion)

12 PROFESSOR DORSANEO: The number will
13 say -- will include prejudgment interest almost all
14 the time.

15 THE REPORTER: I can't write you all
16 down at the same --

17 CHAIRMAN BABCOCK: Yeah. One at a time,
18 guys.

19 PROFESSOR ALBRIGHT: Do you calculate it
20 in the judgment?

21 JUDGE BLAND: Often.

22 PROFESSOR ALBRIGHT: Often you do?
23 Well, what I was thinking is you say -- okay. You
24 make your offer to settle the claims, but you're
25 settling interests and costs that accrued up to that

1 date also but you don't necessarily want them to
2 specify the amount of interest and costs at that time.
3 Right? I mean, you don't really care what that amount
4 is unless they settle it and calculate it.

5 So you could say you want them to
6 specify -- you know, "The offer of settlement will
7 settle everything, but the offer shall not state the
8 amount of interest and costs to be -- and that's to be
9 calculated later." Could you craft it to say that?
10 I'm saying, "The offer must include costs and
11 interests accrued up to the date of the offer, but
12 shall not specify an amount therefor." I don't know
13 if that works or not.

14 CHAIRMAN BABCOCK: Judge Bland, you had
15 your hand up, and then Justice Gray.

16 HON. JANE BLAND: I'm down now.

17 CHAIRMAN BABCOCK: You're passing?

18 HON. JANE BLAND: I'm passing.

19 CHAIRMAN BABCOCK: Justice Gray.

20 HON. TOM GRAY: I hate it when I do
21 this.

22 (Laughter)

23 HON. TOM GRAY: And I need some
24 clarification from trial judges. Isn't there a
25 certain amount of discretion in the awarding cost?

1 HON. JANE BLAND: Not really.

2 HON. TOM GRAY: In defining who a
3 prevailing party is in a multi-party litigation
4 there's not?

5 HON. JANE BLAND: Tiny -- very little.

6 HON. TOM GRAY: But not enough to upset
7 the allocation of cost in this rule?

8 (No verbal response)

9 HON. TOM GRAY: Okay. Then I'm okay.

10 CHAIRMAN BABCOCK: Judge Patterson.

11 HON. JAN PATTERSON: Why doesn't the
12 phrase "state the terms by which" take care of some of
13 this, and that allows for some variation in the
14 process by the courts, but it also allows litigants to
15 have a degree of precision that they want and need.
16 This may not be an issue in most cases.

17 CHAIRMAN BABCOCK: Well, it seems to me
18 that if the trial judges are happy with the one-number
19 situation, then what Judge Bland proposes, just make
20 it clear at the rule that, when you make this offer,
21 you're going to include your interest and costs, and
22 so now we're going to have a number that is going to
23 be an apple to the apple at the end of the case and
24 it's not going to be open for somebody to say, "Oh, by
25 the way, I wasn't -- my offer wasn't for interest and

1 costs."

2 So if that's the objective, to get a
3 one-number comparison, then it seems to me
4 Judge Bland's language does that. If we have
5 different objectives or different concerns, then maybe
6 it doesn't.

7 What's the problem we're trying to fix?

8 PROFESSOR CARLSON: We're trying to fix
9 the problem when the offer is not accepted and you're
10 at the back end.

11 CHAIRMAN BABCOCK: Right.

12 PROFESSOR CARLSON: And so the offeror
13 has got to be pretty precise in being able to
14 calculate the cost and the prejudgment interest at
15 that point. If they don't, it skews the 20 percent
16 margin at the end of the day.

17 CHAIRMAN BABCOCK: Right. Right. So
18 here's the proposal -- we're going to vote on this.

19 The proposal from Judge Bland is that
20 Subparagraph (3) -- (a)(3) in rule 167.3 says, "State
21 the terms by which the claims may be settled and must
22 offer to settle all monetary claims, including
23 interest and costs between the defendant and the
24 claimant." Everybody in favor of that, raise your
25 hand.

1 (Show of hands)

2 CHAIRMAN BABCOCK: All those opposed?

3 (Show of hands)

4 CHAIRMAN BABCOCK: By a vote of 18 to 3,
5 the Chair not voting, that passes, and we'll take our
6 morning break.

7 (Break: 10:49 a.m. to 11:07 a.m.)

8 CHAIRMAN BABCOCK: All right.

9 Everybody, let's go.

10 Elaine, we're back on the record. Where
11 are we next on this rule?

12 PROFESSOR CARLSON: There were two more
13 comments about 167.3(a)(3) that Carl Hamilton has
14 raised that I think are worthy of consideration.
15 (a)(3) is meant to provide that the party must state
16 the terms by which the monetary claims may be settled.
17 I think we all agreed, in our last discussion on this,
18 an offeror may not include an offer to settle
19 nonmonetary claims and come within the fee shifting
20 potential.

21 MS. SWEENEY: Elaine, can you speak up,
22 please?

23 PROFESSOR CARLSON: Yes. The question
24 is whether we should insert the word "monetary" before
25 the word "claims" in the beginning of Subsection

1 167.3(a)(3). Carl raised the concern that if we just
2 say, "State the terms by which the claims may be
3 settled" that would imply that the settlement offer
4 could include monetary and nonmonetary claims or other
5 terms that we don't envision being proper.

6 And I would say as a further comment on
7 this, that 167.3(a)(10) drafted by Justice -- by Judge
8 Tracy Christopher includes a vote we took last time,
9 that, "Any condition adding to the settlement other
10 than provided in this section takes the offer out of
11 the fee shifting potential."

12 CHAIRMAN BABCOCK: Hang on, Stephen.

13 PROFESSOR CARLSON: The second concern
14 that Carl raises is when we say that in order to have
15 a qualifying offer to potentially shift fees you must
16 offer to settle all monetary claims. As I suggest in
17 Footnote 7, the literal reading of that is that an
18 offer by a defendant to settle only its counterclaim,
19 but not the claims made the basis of the plaintiff's
20 suit, under the literal language of this rule, it
21 would be inadequate to qualify as a fee shifting
22 offer.

23 So the two points of clarification in
24 (3) is, you can only seek to settle monetary claims in
25 your offer to fall within the rule, and if you

1 condition it on settling other things, it's a
2 nonqualifying offer to shift fees. And secondly, do
3 we agree that counter -- that a defendant who files a
4 counterclaim and wishes to make an offer to settle is
5 going to have to offer to settle all claims, the
6 counterclaims and all of the claims?

7 CHAIRMAN BABCOCK: Okay. Let's take
8 those in order. The proposal is to add the word
9 "monetary" in front of "claims." So the sentence
10 would read, "State the terms by which the monetary
11 claims may be settled and must offer to settle all
12 monetary claims, including interest and costs between
13 the defendant and the claimant."

14 PROFESSOR CARLSON: Correct.

15 CHAIRMAN BABCOCK: Okay. Stephen.

16 MR. YELENOSKY: Did we not discuss the
17 use of the word "amount" instead of "terms"? Since we
18 separate out later the deadline by which we would pay,
19 why are we using "terms" if we only mean "amount"?

20 PROFESSOR CARLSON: That would work.

21 MR. HAMILTON: Yeah. That would work.

22 CHAIRMAN BABCOCK: So "State the amount
23 by which the claims may be settled."

24 MR. BOYD: "For which."

25 JUSTICE GAULTNEY: "For which."

1 MR. BOYD: But is that the same thing as
2 saying, "Your offer may not include an effort to
3 settle nonmonetary claims"? In other words, are we
4 trying to prohibit -- for example, if I say, "Okay.
5 I'll take \$10,000 plus a written apology published in
6 every major paper in the state," and the judgment two
7 years later is for \$5,000. Am I now liable?

8 MR. GILSTRAP: No. Your offer was
9 outside the rule.

10 MR. BOYD: So because I included a
11 nonmonetary -- so what happens in a case where you
12 have both monetary and -- I mean, obviously, a written
13 apology, there's no legal basis to get it, but what if
14 it's an injunction that you are seeking?

15 PROFESSOR CARLSON: You can make a
16 separate offer pertaining to the nonmonetary.

17 CHAIRMAN BABCOCK: Right. Right.

18 MR. BOYD: So do we need to be more
19 clear about that and say, "In order to come into this
20 rule, an offer may not address nonmonetary claims"?

21 CHAIRMAN BABCOCK: That's what
22 Subparagraph (10) does.

23 JUSTICE GAULTNEY: I still think you
24 need --

25 MR. BOYD: Well, yeah, but Subparagraph

1 (10) --

2 MR. HAMILTON: Subparagraph (10) doesn't
3 talk about monetary or nonmonetary.

4 MR. BOYD: It just says you can't have
5 any conditions, which I --

6 MS. SWEENEY: That would be like
7 confidentiality. You can't throw confidentiality in,
8 but I think there's -- you're talking about a
9 different issue than throwing in confidentiality. If
10 you've got a negligence claim for damages and you want
11 an injunction, if we're trying to encourage settlement
12 but we preclude them from discussing the injunction
13 when they're trying to trigger settlement -- you know,
14 if we want to give people a tool by which they can
15 force a settlement -- we want them to settle the whole
16 case, don't we?

17 CHAIRMAN BABCOCK: Yeah, we do, but we
18 had a long, long discussion about that.

19 MS. SWEENEY: Yeah. I read it.

20 CHAIRMAN BABCOCK: We just decided we
21 can't get there.

22 Yeah, Sarah.

23 HON. SARAH DUNCAN: Just as a matter of
24 construction, I don't think putting monetary into
25 Subsection (3) and adding Subsection (10) says you

1 can't include in your offer an amount by which you'll
2 settle the nonmonetary claim. I think if that's what
3 you want to do, you need to say, "State the amount for
4 which only the monetary claims may be settled."

5 MR. BOYD: How does that work -- I'm
6 thinking wrongful termination. I want \$10,000 lost
7 wages plus reinstatement, which I'm entitled to. I'm
8 not willing to take just the lost wages, because I
9 want my reinstatement. So I guess what you're saying
10 then is, there's no way that my desire to settle could
11 ever fit within this rule.

12 PROFESSOR CARLSON: You have to have two
13 distinct offers, one that could potentially allow the
14 fee shifting; the other doesn't. And that's not the
15 subcommittee's call. I mean, once the legislature
16 went from "offer of judgment" to "offer of
17 settlement," you necessarily had this piecemeal
18 approach.

19 MR. HAMILTON: How can you have two
20 offers? I thought you had to dispose of the whole
21 case.

22 PROFESSOR CARLSON: All the monetary
23 claims.

24 CHAIRMAN BABCOCK: On the monetary
25 claims.

1 Okay. Paula.

2 MS. SWEENEY: I know it's been visited
3 at great length, but if you offer someone \$10,000 or
4 they demand \$10,000 plus reinstatement and you offer
5 them \$10,000 but not reinstatement, you've just cost
6 shifted the entire lawsuit to them because they still
7 want reinstatement, and yet you've only addressed a
8 small portion of their lawsuit.

9 I don't care if the legislature wrote a
10 crummy statute. I'm not willing to stick my head in
11 the sand and write garbage and -- meaning no
12 offense -- and promulgate it or --

13 PROFESSOR CARLSON: So noted.

14 MS. SWEENEY: -- send it to the Court
15 and say, "Well, you know, too bad, we're going to
16 screw up this many kinds of litigations in the state."
17 I think we have to take that on and try and
18 conceptually wrap our brains around it and find a way
19 to make it work, because, otherwise, in all of those
20 cases with some other kind of claim, you're creating
21 an impossible situation for the litigants.

22 CHAIRMAN BABCOCK: Frank.

23 MR. GILSTRAP: The litigants can still
24 settle the case. They can't just settle under the
25 rule. In your example, Paula, that first offer, "I

1 offered to settle for money plus something," you're
2 outside the rule. The rule doesn't apply.

3 MS. SWEENEY: That's what I mean. But
4 if on the other hand he says, "I offer you \$10,000"
5 and doesn't say anything about anything else, he's
6 just triggered the rule, leaving the other litigant
7 with no opportunity or with a real problem in trying
8 to pursue the nonmonetary aspect, which may be more
9 important.

10 MR. YELENOSKY: But you can accept the
11 monetary amount without settling the whole case.

12 MR. BOYD: Yeah, but the problem is, now
13 the defendant -- all right. So the plaintiff says,
14 "I want my \$10,000 backpay plus reinstatement." The
15 rule is not applied yet. As the defendant, and a
16 lot -- you know, I've represented employers who are
17 very willing to do this, they'll pay anything just to
18 get rid of the person and not have to worry about
19 reinstatement.

20 So the defendant makes an offer and
21 says, "You want \$10,000. Here's what I'll do, I've
22 give you \$25,000 to settle your monetary claim only,
23 and that's the offer." Now, the defendant has just
24 basically bought themselves application of the rule
25 plus a probable award of their costs and -- their

1 litigation costs, because the plaintiff is not going
2 to be able to get \$25,000.

3 MR. YELENOSKY: But the plaintiff
4 accepts the \$25,000 offer and does not release the
5 injunction, because the offer did not include a
6 release of the injunctive claim.

7 HON. CARLOS LOPEZ: You're saying
8 because the offer didn't --

9 MR. YELENOSKY: The employer says, "I'll
10 give you \$25,000." In order to trigger the rule, that
11 offer of \$25,000 did not include a release of
12 nonmonetary claims. So the employee has just won
13 himself \$25,000 and can continue his suit for
14 reinstatement.

15 CHAIRMAN BABCOCK: And see, you're not
16 going to make that offer if you're really worried
17 about reinstatement, and now you've funded his
18 litigation for 25 grand and he could still go forward
19 and try to get reinstatement. So the plaintiff is in
20 a no-lose situation there.

21 HON. CARLOS LOPEZ: So they can't make a
22 piecemeal offer back and trigger the rule?

23 MR. YELENOSKY: They can't make an offer
24 which settles the whole case if what they want is
25 something other than just a release of the monetary

1 claims, because the rule says you can't do that -- I
2 mean, the statute says you can't do that.

3 CHAIRMAN BABCOCK: The point is that,
4 under Jeff's scenario, the defendant is unlikely to
5 make an offer in the first place.

6 MR. YELENOSKY: Well, if he makes an
7 offer, it won't be within the cost shifting procedure.
8 He'll make an offer outside -- and this is what the
9 discussion was last time, the defendant in that
10 instance will make an offer knowing that it's not
11 going to invoke cost shifting, because the offer will
12 be, "I'll give you \$25,000 if you go away entirely."
13 That is not within this regime, and that's the offer
14 that a rational employer would make.

15 CHAIRMAN BABCOCK: Yeah. Well, let's
16 get back to the issue at hand, which is whether or not
17 we put the word "monetary" in front of "claims." And,
18 Elaine, are you in favor of doing that or not?

19 PROFESSOR CARLSON: Yes.

20 CHAIRMAN BABCOCK: You are in favor of
21 doing that.

22 Any more discussion on whether we add
23 the word "monetary" in front of "claims"?

24 MR. YELENOSKY: What happened to
25 "amount"? Is that in?

1 CHAIRMAN BABCOCK: It's floating out
2 there.

3 MR. YELENOSKY: I'm sorry?

4 CHAIRMAN BABCOCK: It's floating out
5 there.

6 MR. YELENOSKY: Sorry. We're having
7 trouble hearing now that the table is closer to the
8 door.

9 CHAIRMAN BABCOCK: Yeah. I'm having
10 trouble hearing down here, too.

11 Stephen.

12 MR. TIPPS: Why do we need to put the
13 term "monetary" in (a)(3), given the fact that we've
14 got 167.2(a) which explicitly says that the procedures
15 apply only to claims for monetary relief?

16 PROFESSOR CARLSON: Carl expressed a
17 concern that by using the word "terms" and "claims"
18 without further limiting it to monetary, that it could
19 be read to include other than those.

20 CHAIRMAN BABCOCK: Notwithstanding
21 167.2(a). That's Stephen's point.

22 MR. HAMILTON: Well, you could be
23 settling monetary claims but imposing other terms
24 besides money.

25 CHAIRMAN BABCOCK: Does adding

1 "monetary" in front of claims hurt anything? Does
2 that create a problem? Justice Jenings, you don't
3 think so.

4 HON. TERRY JENINGS: That's what I was
5 thinking. I don't see a downside.

6 CHAIRMAN BABCOCK: Right. I don't
7 either.

8 Jeff.

9 MR. BOYD: 167.1(a)(1) defines the word
10 "claim" to mean a request for monetary damages. So
11 the definition is intended to limit it, but I tend to
12 agree that -- I mean, I'd rather throw out the
13 definition and only use the word "monetary claim" and
14 never use the word "claim," because otherwise it
15 leaves open too much confusion about what it means.

16 CHAIRMAN BABCOCK: Okay. Everybody in
17 favor of adding the word monetary in front of claims
18 in Section 167.3(a)(3), raise your hand.

19 (Show of hands)

20 CHAIRMAN BABCOCK: All those opposed?

21 (Show of hands)

22 CHAIRMAN BABCOCK: By a vote of 21 to 2,
23 Chair not voting, that passes.

24 Now, let's go to this Footnote 7. Do
25 you propose to have that in as a comment, Elaine, or

1 just --

2 PROFESSOR CARLSON: No. I just raised
3 that for the committee to see if there were any
4 concerns or not.

5 CHAIRMAN BABCOCK: And the concern
6 you're raising is, you think that this is the way it's
7 going to operate as currently written, but does
8 anybody not want it to operate that way? Is that
9 the --

10 PROFESSOR CARLSON: I'll let Carl
11 address it. He's the one that raised the --

12 MR. HAMILTON: I have a problem with
13 counterclaims. There are some compulsory
14 counterclaims, so they have to be brought. Once the
15 counterclaim is brought, then that really puts the
16 ball in the court of the plaintiff who's now a
17 defendant. You've triggered the settlement rule, and,
18 you know, which the original defendant might not have
19 wanted to do. So I know the rule -- the statute
20 speaks to counterclaims, but I don't know if we can
21 write a new rule that says that even though he's a
22 nominal defendant in a counterclaim that doesn't give
23 the counter claimant the right to trigger the rule.

24 CHAIRMAN BABCOCK: How does everybody
25 feel about that?

1 PROFESSOR CARLSON: I understand your
2 concern, Carl, but I do think the legislature
3 contemplated that that would be the case when they
4 defined a defendant in 42.001(3) to be "any person for
5 whom a claimant seeks recovery on a claim, including a
6 counterdefendant, cross-defendant or third-party
7 defendant." But you're quite right, when we say "only
8 a defendant can invoke the fee shifting by
9 declaration," that includes a plaintiff when a
10 counterclaim has been filed as written by legislature.

11 So I think it's more of a -- the
12 subcommittee doesn't propose any change, but I --

13 CHAIRMAN BABCOCK: Okay. No proposed
14 change from the subcommittee. Does anybody want to
15 make a -- anybody want to go counter to what the
16 subcommittee proposes?

17 MR. HAMILTON: Then the question is
18 whether or not the counterclaim can be settled
19 independent of the other claim.

20 PROFESSOR CARLSON: And under the
21 proposed rule, you must -- an offer must offer to
22 settle all claims, third counterclaims and all of the
23 other kinds of claims, unless we provide to the
24 contrary.

25 PROFESSOR DORSANEO: Why did we decide

1 to do that? That seems to make it more complicated
2 and the statute doesn't seem to require it.

3 PROFESSOR CARLSON: The statute does
4 require that all monetary claims --

5 PROFESSOR DORSANEO: Does it?

6 PROFESSOR CARLSON: I believe so.

7 PROFESSOR DORSANEO: I may -- won't be
8 the first time I'm wrong.

9 PROFESSOR CARLSON: Me neither.

10 CHAIRMAN BABCOCK: It will be the first
11 time you admitted it.

12 (Laughter)

13 CHAIRMAN BABCOCK: Okay. Anything else
14 on this?

15 (No response)

16 CHAIRMAN BABCOCK: All right. Unless I
17 hear a motion to disregard what the subcommittee wants
18 to do, then we're going to move on.

19 Yeah, Richard.

20 MR. MUNZINGER: Chip, did you change
21 "terms" to "amount"?

22 CHAIRMAN BABCOCK: I think we came to
23 the conclusion that if we added the word monetary with
24 the other provisions such as 167.2(a) and
25 167.1(a)(1), that that would be unnecessary.

1 MR. YELENOSKY: Is there any reason to
2 leave it as "terms"? Are we thinking of anything
3 other than "amount"?

4 MS. SWEENEY: Yeah. I move amount.

5 MR. YELENOSKY: I just think "amount" is
6 clearer.

7 MS. SWEENEY: Yeah.

8 CHAIRMAN BABCOCK: It's okay with me if
9 it's all right with Elaine.

10 PROFESSOR CARLSON: Sure.

11 CHAIRMAN BABCOCK: Okay. It will be
12 "amount." It should be "the amount for which,"
13 shouldn't it? Yeah.

14 All right. What else, Elaine?

15 PROFESSOR CARLSON: All right.
16 167.3(a)(4) was something that our subcommittee worked
17 on based on the comments of and our votes at the last
18 meeting in June. Our subcommittee had a dissenting
19 view on this. The majority view of the subcommittee
20 is that "The settlement offer must state the
21 settlement offer per claimant and per defendant." So
22 a joint offer would not qualify.

23 Judge Christopher and Buddy who helped
24 us on some of this -- but Judge Christopher pointed
25 out that the problem with a joint offer to plaintiffs

1 is the rule requires the court, at the end of the day
2 if the offer is not accepted, to figure out the less
3 favorable judgment, and since we don't have a joint
4 judgment, we have individual damages per person, she
5 persuaded the majority of the committee that the offer
6 should be per claimant and per defendant with an
7 exception in the vicarious liability situation you see
8 there.

9 I'll let John Martin speak for himself,
10 because he shares a contrary view in certain
11 situations.

12 John, if you don't mind, I'm going --
13 MR. MARTIN: Sure. I am the
14 dissenter --

15 (Laughter)

16 MR. MARTIN: -- in this instance, but
17 only with regard to one issue, and that's wrongful
18 death cases, and I'm talking about wrongful death
19 cases -- I'm not talking about multiple fatalities.
20 I'm talking about one decedent who leaves multiple
21 beneficiaries, and I think the defendant has to be
22 able to make a joint offer to settle that one
23 individual's wrongful death claim, even if he's
24 survived by several children, parents and a spouse,
25 because the defendant has very little incentive in

1 most cases to try to settle individually with wrongful
2 death beneficiaries.

3 In fact, I think it's very common for
4 there to be an understanding among the different
5 beneficiaries, particularly if they are adverse in
6 some way. There's usually an understanding going into
7 settlement negotiations about how they are going to
8 allocate the money among themselves, but the defendant
9 is not privy to that information and has no way of
10 guessing what a fair allocation or what allocation
11 they might have agreed on. So I think in the
12 situation of wrongful death cases that the defendant
13 should be able to make a combined offer to the group
14 of plaintiffs.

15 CHAIRMAN BABCOCK: Okay. Paula.

16 MS. SWEENEY: I agree with both
17 positions. I think we need to carve out wrongful
18 death as a separate category to deal with exactly that
19 issue, because otherwise you're creating a problem for
20 both sides.

21 CHAIRMAN BABCOCK: Why did the majority
22 of the committee not accept this?

23 PROFESSOR CARLSON: The majority of the
24 committee felt that it would facilitate operation of
25 the rule to have discrete offers made, if the offer is

1 not accepted at the back end, but they also thought
2 that it really wouldn't preclude joint offers from
3 being made; it just would be taken outside the rule,
4 fee shifting.

5 CHAIRMAN BABCOCK: Yeah. It just
6 wouldn't happen in the rule.

7 MS. SWEENEY: But then you're saying
8 defendants in wrongful death cases could never use
9 this rule, which is okay by me, but I don't think
10 that's the intent of the legislature.

11 CHAIRMAN BABCOCK: Well, it's not that
12 they can't use the rule. It's just that it's unlikely
13 that they would for the reasons that John suggests,
14 because you wouldn't want to -- you wouldn't want to
15 make the individual offers to all of the beneficiaries
16 with the thought that four out of the six would take
17 you up on it, and so now you've transferred a big pot
18 of money to -- you know, to two-thirds of the
19 claimants but you haven't gotten rid of the case.

20 MS. SWEENEY: I just -- why not --
21 Elaine, is there a reason not put in a proviso for the
22 unique situation of wrongful death cases?

23 PROFESSOR CARLSON: It could be done.

24 CHAIRMAN BABCOCK: Justice Gray.

25 HON. TOM GRAY: I wanted to ask John a

1 question. Is it only in those situations where there
2 is a pot sharing agreement among the plaintiffs that
3 it's a problem or is it in all wrongful death cases?

4 MR. MARTIN: In all wrongful death
5 cases. It's pretty rare. It doesn't happen, but it's
6 pretty rare for a defendant to go out and make a
7 separate settlement with the widow and then settle
8 with the children later on. It does happen, but it's
9 pretty rare. It would just severely limit the ability
10 of a defendant to use the rule.

11 HON. TOM GRAY: So the mechanics
12 wouldn't work to say -- as the carve-out, "all cases
13 in which there is an agreement regarding how the
14 proceeds of settlement or litigation are resolved,"
15 because it would seem that in any case where there is
16 an agreement among the plaintiffs on how the pot of
17 money that is ultimately obtained is divided should
18 fall into this exception, if we're going create an
19 exception.

20 MR. MARTIN: I would not limit it to
21 that situation where there is an agreement. I even
22 raised with Tommy Jacks during our debate about this,
23 because he feels differently than I do about this, but
24 I even raised the question that that would make the
25 agreement discoverable. Today, I don't think it is,

1 but that would make the agreement discoverable, if we
2 were going to have to figure out how to allocate it.

3 I've settled a number of wrongful death
4 cases where the plaintiffs get together. Maybe it's
5 somebody who had several different marriages, so
6 different children by different marriages, but I've
7 gone to a number of mediations where the plaintiffs as
8 a group agreed that the defendant's offer is an
9 acceptable offer, but they're disagreeing among
10 themselves about how to allocate it, and I'm settling
11 a couple of cases where the agreement was, "The case
12 has settled for X dollars. We're going to let the
13 judge apportion it." Now, usually it gets worked out,
14 but one time, we had a contested hearing about how the
15 proceeds were going to be divvied up, but I would
16 apply it to all wrongful death cases.

17 CHAIRMAN BABCOCK: Elaine.

18 PROFESSOR CARLSON: So, John, if your
19 position were to carry the day and you made a joint
20 offer to five defendants for \$3 million and two of
21 the -- excuse me, to plaintiffs, and two of the
22 plaintiffs would take it and three of them won't, and
23 so you don't have a settlement. You go to trial. How
24 does that play out at the end of the day?

25 MR. MARTIN: I would write the rule so

1 the fee shifting would only be awarded against the
2 parties who would not accept the offer.

3 PROFESSOR CARLSON: That's sort of the
4 Nevada rule we talked about. Nevada has a similar
5 provision of that. I think the majority of the
6 subcommittee just felt that that got terribly
7 complicated.

8 CHAIRMAN BABCOCK: Okay. Judge Bland
9 and then Buddy. Hatchell, do you have your hand up,
10 or you're just stretching?

11 MR. HATCHELL: No. Assuming that I do
12 is disqualification.

13 (Laughter)

14 HON. JANE BLAND: There are a number of
15 categories of cases where the application of this rule
16 is problematic. We talked about DTPA cases, I think,
17 at one of our earlier meetings. We discussed cases
18 involving requests for reinstatement or some other
19 nonmonetary relief today. I think this is another
20 instance where there may be some problem in applying
21 this to this particular kind of case, but I see no
22 reason for making a separate rule for wrongful death
23 cases.

24 I also think that to make a joint offer
25 and then assess fees against those who don't accept

1 the offer without some allocation in the joint offer
2 is to potentially penalize people who didn't accept an
3 offer but their recovery at trial was greater than
4 their allocation of the settlement. And so then do we
5 have a hearing about what that person's settlement
6 was -- settlement percentage was and then whether that
7 matches what they ultimately received from the jury?

8 I agree with the majority of the
9 subcommittee, that it would be difficult to compare a
10 joint offer with individual jury verdicts, and since
11 wrongful death cases are not -- the questions are not
12 asked with respect to the beneficiaries as a whole but
13 rather are broken out for each beneficiary, I think
14 the offer should be similarly broken out.

15 CHAIRMAN BABCOCK: Buddy.

16 MR. LOW: It would be difficult, because
17 quite often you'll get two families that don't get --
18 you know, get along too well, and so you make a joint
19 offer. You can make a joint offer to one family or
20 both families and still be joint, but then they don't
21 have an agreement, even among the separate families or
22 groups, how they're going to divide. So if you don't
23 make an individual to each one, how can you tell that
24 that person turned down an amount of money that you
25 offered?

1 MR. MARTIN: Because they have the
2 option to accept the offer. If a million dollars is
3 offered and this is a million-dollar wrongful death
4 case, the plaintiffs can all say, "We accept that,"
5 and they can go fight among themselves about how it's
6 to be divvied up.

7 MR. LOW: No, but generally a plaintiff
8 is going to say, "Well, yeah. I'll take that million,
9 but I want \$700,000. I'm the widow. I'm that."
10 "Well, no." So then if you have money and the other
11 one is saying, "Well, look. I wanted half. I would
12 have taken that." Well, one person here is being
13 reasonable and another unreasonable, and in the end,
14 you can't figure out which one -- because you had no
15 specific offer to each one. I just don't see how it
16 can work. Maybe I just don't understand.

17 CHAIRMAN BABCOCK: Okay. I think we've
18 had a pretty good discussion on this. So the proposal
19 is to not include the wrongful death provision.
20 That's the subcommittee's view.

21 PROFESSOR CARLSON: Right.

22 CHAIRMAN BABCOCK: So that would be to
23 vote on Subparagraph (4) of Rule 167.3(a) as is as
24 opposed to adding language. So all in favor of that,
25 raise your hand.

1 (Show of hands)

2 CHAIRMAN BABCOCK: All opposed?

3 (Show of hands)

4 CHAIRMAN BABCOCK: By a vote of 17 to 5,
5 the Chair not voting, we'll leave Subparagraph (4) as
6 is.

7 Let's go to the next one.

8 PROFESSOR CARLSON: All right.

9 167.3(a)(5), we voted in June that one of the
10 conditions for the offer is that it must state that
11 payment will take place within 30 days of acceptance
12 of the offer. Judge Tracy Christopher raised the
13 point that there are some settlements, of course, that
14 have to be approved by the court, such as in the case
15 of a minor. And so we added the language "or approval
16 by the court when approval of a settlement is
17 required," so that an offer to settle in a case, when
18 the settlement must be approved by the court, payment
19 would take place 30 days after the court has made its
20 approval.

21 CHAIRMAN BABCOCK: Tracy was pretty
22 spunky on this rule, wasn't she? She's come up with a
23 lot of ideas.

24 PROFESSOR CARLSON: Oars in the water.

25 (Laughter)

1 CHAIRMAN BABCOCK: Stephen.

2 MR. YELENOSKY: Well, just a minor
3 point, but it doesn't say 30 days after approval. It
4 says "on approval of the court." If you meant 30
5 days, I think it needs a little different wording.

6 CHAIRMAN BABCOCK: So it should say --
7 what -- Stephen?

8 PROFESSOR CARLSON: For people who
9 operate in this arena, what would be realistic? Would
10 it be 30 days after the approval?

11 MR. TIPPS: Yeah.

12 CHAIRMAN BABCOCK: Oh, yeah.

13 Okay. What's the proposed change?

14 MR. YELENOSKY: Instead of "upon," it
15 should say "or after" -- "within 30 days of acceptance
16 of the offer or after" --

17 MR. MARTIN: That's the old draft.

18 PROFESSOR CARLSON: Yeah. I apologize.
19 That's the July 8th version. We figured out that
20 problem by, I think, July 15th. So it now reads,
21 "State that payment will take place within 30 days of
22 acceptance of the offer or approval by the court when
23 approval of a settlement is required." So I think
24 that is --

25 MR. YELENOSKY: Mine still had the

1 "upon" in there.

2 PROFESSOR CARLSON: I apologize.

3 CHAIRMAN BABCOCK: Okay. So everybody
4 cool with this one? Any opposition -- okay. Let's go
5 to the next.

6 PROFESSOR CARLSON: Okay. (6), we
7 already voted. 167.3(a)(8) is the next thing that we
8 need to discuss. We've already done (6) and (7).

9 One of the things we were directed to do
10 was to include model release and indemnity language to
11 be included in the offer. Buddy and Judge Christopher
12 proposed in our subcommittee --

13 MR. LOW: No. Wait. Let me correct.

14 Tracy had a proposal that said "include
15 all affiliates" and so forth like that, and sometimes
16 they're treated as different companies. I didn't
17 think we could draw a release, because you don't get a
18 release when you get a judgment. You get a release of
19 judgment; the judgment provides.

20 So I didn't think that -- to be
21 consistent with making an offer and you compare it
22 with a judgment, that you could impose certain terms
23 of the release. Does it include an indemnity
24 agreement? Tracy proposed a form of release, which I
25 was opposed to.

1 PROFESSOR CARLSON: Ultimately, I had
2 understood you had reached agreement on the language
3 that you stated here.

4 HON. JANE BLAND: Buddy, I think Tracy
5 ultimately agreed with you that the form of release
6 was not going to work. She commented to me that,
7 after discussing it with you, she didn't feel like
8 there was a form --

9 MR. LOW: Okay. My memory is not -- I
10 think you're right. We did agree. I remember we
11 disagreed, then we agreed, but what we agreed upon, I
12 don't remember.

13 (Laughter)

14 CHAIRMAN BABCOCK: But other than that,
15 you're a model of clarity.

16 (Laughter)

17 PROFESSOR CARLSON: Our subcommittee
18 voted to include the language in 167.3(a)(8) with --
19 again, John, if I'm correct, you wanted some
20 distinguished language in with --

21 MR. MARTIN: Well, I just don't think a
22 one-size-fits-all release is going to work for every
23 kind of case, and I think it ought to just be
24 conditioned on signing appropriate settlement papers,
25 including indemnification or something like that, and

1 leave it to the lawyers to work it out.

2 That's typically what happens in a
3 mediation, you sign a little one- or two-page
4 mediation agreement that has a provision in there that
5 says that the settlement will be formalized in
6 formalized documents later on, instead of trying to
7 build into this rule what the exact language is going
8 to be that might apply to some cases but not all.

9 PROFESSOR CARLSON: And the subcommittee
10 proposal was fairly concise language that -- and I
11 think John feels it's too specific for all cases, but
12 a majority of the subcommittee felt differently. That
13 is, Subsection (8) required that the offer include a
14 request for the release language you see, "Claimant
15 agrees to release, acquit and forever discharge a
16 defendant from any and all claims and demands from
17 monetary damages," so that you can't require a release
18 on the nonmonetary, "directly or indirectly relating
19 from or in connection with the lawsuit, including all
20 claims currently on file and all claims which could
21 have been filed relating to the matter asserted in
22 this lawsuit. The monetary claims will be terminated
23 by dismissal with prejudice."

24 MR. LOW: My memory is coming back.

25 (Laughter)

1 MR. LOW: I do remember that. That
2 would be consistent with the fact that all claims --
3 I mean, if you get a judgment for a certain amount, it
4 includes all claims that could have been brought to be
5 included and it was only the parties to this lawsuit,
6 and I think there's nothing inconsistent with what you
7 would get in a judgment with this particular language.

8 I think her language is not just a
9 one-size-fits-all, because it doesn't encompass
10 anything other than these parties and claims that are
11 brought or could be brought, and certainly if you get
12 a judgment, that would be -- those would be precluded.
13 And the defendants I represent feel more comfortable
14 when they've got a signed piece of paper, you know,
15 that says they're released. And generally, when you
16 settle, you do get a release.

17 PROFESSOR CARLSON: If I could just
18 state for the record, John, your alternative language
19 was, "The offer may include a requirement that the
20 offeree execute settlement documents containing
21 appropriate release and indemnification provisions."

22 MR. MARTIN: Right. I think that was
23 the language before. We also have (9) here. So I
24 think we all eventually did agree that the
25 indemnification language is appropriate, and you've

1 got multiple versions here for people to consider, but
2 there was all that e-mail exchange between Tommy and
3 me on that point. So that became less of a concern to
4 me after that got in there.

5 CHAIRMAN BABCOCK: Stephen.

6 MR. YELENOSKY: Just a friendly
7 amendment. Since this is release language, that we
8 put the adjective "monetary" each time we use the word
9 "claims."

10 PROFESSOR CARLSON: All right.

11 MR. BOYD: The concern we're trying to
12 address here is that we don't want the offeror to be
13 able to demand greater releases or indemnification
14 than would otherwise be available if they prevailed.
15 Is that --

16 PROFESSOR CARLSON: I think that's a
17 fair statement. Yeah.

18 MR. BOYD: So why don't we just address
19 it that way and say that, "The settlement offer must
20 require the offeree to provide only such releases and
21 indemnification as the offeror could obtain by
22 prevailing on the claim"?

23 PROFESSOR CARLSON: And the reason we
24 didn't do that, Jeff, is, the vote in June was that we
25 wanted to have specific release language that could be

1 included, because there was a concern of satellite
2 litigation on, "Well, could we or couldn't we?"

3 CHAIRMAN BABCOCK: Justice Gray.

4 HON. TOM GRAY: Maybe I missed something
5 here, but with the use of the terms "claimant" and
6 "defendant," is there a reason that it's not mutual,
7 in that, we could make it read something on the order
8 of, "The parties to this agreement agree to release,
9 acquit, forever discharge each other from," so that
10 it's a mutual release as opposed to one party
11 releasing the other.

12 PROFESSOR CARLSON: Justice Gray, I
13 think the reason "claimant" and "defendant" were
14 chosen, because that's the language in the statute
15 and the rules which are defined.

16 HON. TOM GRAY: And a defendant, in a
17 traditional sense, can be a claimant under the
18 definitions, because of cross-claims, and I was just
19 trying to make both parties to the agreement
20 understand that this is a mutual release that is
21 accomplished by the payment of whatever funds change
22 hands, that both parties are releasing everything they
23 have against the other, because if you have
24 cross-claimants and cross-defendants, then -- you're
25 not having to, then, deal with that language, but I

1 just -- I kind of offer that as a friendly amendment,
2 to think about how that might impact a particular
3 settlement where there's cross-claimants.

4 PROFESSOR CARLSON: So your proposal
5 would be, "The parties agree to release, acquit,
6 forever discharge each other"?

7 HON. TOM GRAY: Uh-huh.

8 PROFESSOR CARLSON: Buddy, do you see
9 any problem with that?

10 MR. LOW: Well, I have no memory on
11 that.

12 (Laughter)

13 MR. LOW: No. I don't see a problem. I
14 didn't think of it in those same terms.

15 HON. TOM GRAY: And it would have to be
16 the parties to this agreement or to this release, I
17 mean, because you're obviously not wanting to go
18 beyond just these.

19 MR. LOW: Basically, that would include
20 anything that was mandatory, you know, counterclaim or
21 something like that. It's just not traditional that
22 the defendant, when you just settle a case, gives the
23 plaintiff a release. That's going to be something
24 kind of new. I mean, I guess we can get used to new
25 things, but sometimes it takes time.

1 CHAIRMAN BABCOCK: Bill.

2 PROFESSOR DORSANEO: I don't know
3 whether it's a good idea to put this specific language
4 in here, or any specific language. I'm inclined to
5 think that it's not. Why is it here? What specific
6 thing -- what specific point is the subcommittee
7 trying to make --

8 PROFESSOR CARLSON: Well, before --

9 PROFESSOR DORSANEO: -- about what the
10 release needs to say?

11 PROFESSOR CARLSON: The full committee
12 voted in June that we thought it was prudent to have a
13 release provision as a requirement of the offer, and
14 further voted that they wanted that modeled language
15 to be drafted by our subcommittee for the full
16 committee's consideration.

17 PROFESSOR DORSANEO: That doesn't mean
18 that the committee would still think it was a good
19 idea after looking at the language and trying to
20 remodel.

21 PROFESSOR CARLSON: As I understood the
22 concern of the full committee, it was the potential
23 for satellite litigation. "Well, does the release
24 really meet the terms of our agreement or not," and
25 the thought was, if we had structured language that

1 that would take that issue out of --

2 CHAIRMAN BABCOCK: Elaine, was that one
3 of our close votes or was it fairly lopsided?

4 PROFESSOR CARLSON: I'm sorry, Chip. I
5 don't know. I really don't know.

6 MR. LOW: I mean, if you settle -- I
7 mean, it's just been forever that you get a release --
8 some type of release. Any defendant -- I mean, I
9 don't know why I've tried to persuade them, "Well, get
10 a judgment, take nothing, and that includes" -- they
11 don't believe that. They want to see it. And so if
12 you offer to settle, most defendants are going to want
13 a release. And so this comes closer to meeting the
14 tradition and what's been followed than anything I've
15 seen.

16 CHAIRMAN BABCOCK: What, Elaine, is
17 meant by the fact that you say, in Subparagraph (8),
18 that the offer must include a request for the
19 following release and dismissal if applicable? I
20 mean, how is one to determine whether it's applicable
21 or not?

22 PROFESSOR CARLSON: Well, that was
23 Judge Christopher's --

24 CHAIRMAN BABCOCK: And where is she?

25 (Laughter)

1 CHAIRMAN BABCOCK: Judge Bland, you're
2 her alter ego. Answer that for her.

3 HON. JANE BLAND: You know, she would
4 take strong exception to that.

5 (Laughter)

6 PROFESSOR DORSANEO: Mr. Chairman?

7 CHAIRMAN BABCOCK: Yes.

8 PROFESSOR DORSANEO: It's usually true
9 that a release is given, but it is not universally so.

10 PROFESSOR CARLSON: That's what you said
11 last time.

12 PROFESSOR DORSANEO: And it might be a
13 very bad idea. Just one of the cases I've had
14 recently, there were settlements in order to
15 facilitate getting to the next layer recovered, and
16 they couldn't -- that wouldn't have worked if you
17 required a release.

18 I don't think that it's a good idea to
19 try to cover all cases here with the specific
20 language. I do think that something that could happen
21 to a lawyer inadvertently would be if they got focused
22 on a release of all of the claims rather than the
23 monetary claims, because this statute seems to want to
24 encourage people to at least talk about settling the
25 monetary claims in all cases.

1 Oh, and by the way, I don't necessarily
2 read the statute to say that all the monetary claims
3 need to be settled either, but I would recommend
4 leaving this language out, because although most of
5 the time it wouldn't cause a problem, sometimes it
6 would.

7 CHAIRMAN BABCOCK: Sarah.

8 HON. SARAH DUNCAN: I wish we had the
9 transcript. My memory of what prompted this was the
10 concern that Bill just raised, that people would say,
11 "Yes. I agree to settle for \$10,000," and then the
12 release is written to also cover reinstatement, and
13 this was going to be an attempt to limit the release
14 that was required for settlement to settlement of only
15 the monetary claims. Is my memory correct?

16 CHAIRMAN BABCOCK: I think so, but --
17 yeah, Carl.

18 MR. HAMILTON: Why don't we just make it
19 optional, that if the offeror wants to include as one
20 of the terms, "I want this kind of a release," they
21 can. Just leave it up to parties at the end.

22 CHAIRMAN BABCOCK: So you would say,
23 "The offer may include"?

24 MR. HAMILTON: "May include a release in
25 the following terms."

1 MR. BOYD: I don't think the point of
2 this is to ensure that there's release language. It's
3 to ensure that there's not a demand for releases that
4 you're not entitled to get.

5 (Simultaneous discussion)

6 MR. BOYD: So if we have permissive --
7 if we have claims that can be permissively joined but
8 aren't mandatorily joined or permissive counterclaims
9 but not mandatory so that a judgment in this case is
10 not going to be res adjudicata.

11 As to the other monetary claim I may
12 have against you, I can't say, "I'll give you this
13 much money if you release everything you have against
14 me, whether it's a part of this lawsuit or not."
15 We're trying to limit the scope of the release and
16 indemnification, not require release and
17 indemnification.

18 CHAIRMAN BABCOCK: Stephen.

19 MR. TIPPS: I think Carl's idea is a
20 good one, because what it basically does is, enable
21 parties to get some kind of a release without running
22 afoul of (10), which basically says, "If you can put a
23 condition on the settlement offer, then this
24 statute -- this rule doesn't apply." Well, everyone
25 who is paying money is going to condition the payment

1 of money upon getting a release, but, basically, what
2 we're saying here is that you can do that so long as
3 you ask for only a plain vanilla release. If on the
4 other hand you want a release not only of the
5 defendant but all the affiliates and everybody else,
6 then you've taken yourself out of the rule.

7 CHAIRMAN BABCOCK: Richard.

8 MR. MUNZINGER: The language of this
9 Section (8) has now grown, and it seems to me invites
10 a conflict with Subsection (10) because of its
11 breadth, and it seems to me to be running afoul of
12 what the purpose was, which was to simply say, "You
13 may get a release if the claims asserted in the case,"
14 or, "which would have been asserted in the case," but
15 when you start talking about "directly or indirectly
16 arising from or in connection with this lawsuit and
17 all claims which could have been filed relating to the
18 matters asserted in this lawsuit," you may be
19 expanding that and setting some conditions that would
20 violate Subsection (10).

21 CHAIRMAN BABCOCK: What if, Richard, you
22 had a Subsection (8) that said, "The offer may include
23 a request for release and dismissal and/or
24 indemnification," period?

25 MR. MUNZINGER: And/or indemnification?

1 CHAIRMAN BABCOCK: And/or
2 indemnification, period.

3 No? That doesn't work?

4 MR. BOYD: No, because it doesn't limit
5 it.

6 Can I read mine out again and see if
7 this works?

8 CHAIRMAN BABCOCK: Sure.

9 MR. BOYD: I would combine both release
10 and indemnity into one statement instead of trying to
11 address them separately. "A settlement offer must
12 require the offeree to provide only such releases and
13 indemnification as the offeror could obtain by
14 prevailing on the monetary claim."

15 CHAIRMAN BABCOCK: Carl.

16 MR. HAMILTON: You don't get anything if
17 you -- I mean, you don't get that if you prevail. You
18 get a judgment.

19 MR. BOYD: But the judgment -- if the
20 effect of the judgment is to release the claim and
21 bar their assertion --

22 MR. HAMILTON: That's the effect of it,
23 but you don't have that language in there of
24 indemnification and all that.

25 CHAIRMAN BABCOCK: Yeah, but under

1 Jeff's proposal -- that's true. You're not going to
2 get a judgment, but what he's saying is, "If you
3 settle it early, the only thing you're entitled to is
4 what you would ultimately get if you got a judgment."

5 MR. LOW: Right. Right.

6 CHAIRMAN BABCOCK: And you can only
7 require contractually by language what you could have
8 gotten if you'd gone to the end of the game.

9 MR. LOW: And that was the whole idea.

10 MR. GILSTRAP: How do you get indemnity
11 for the judgment?

12 PROFESSOR DORSANEO: You want to take
13 indemnification out of there. I've never given
14 indemnification.

15 CHAIRMAN BABCOCK: Okay. Take
16 indemnification out. Jeff, how does that work? Buddy
17 is not going to say it for you.

18 MR. BOYD: Yeah. I'm trying to think.

19 CHAIRMAN BABCOCK: Dangerous in this
20 crowd.

21 (Laughter)

22 MR. BOYD: If we go to judgment and you
23 prevail against the defendant, the defendant pays the
24 judgment to you and a month later someone else sues
25 purportedly on your behalf, is there a legal right to

1 indemnification against you, the plaintiff, in that
2 second lawsuit?

3 HON. SARAH DUNCAN: Huh-uh.

4 MR. LOW: And if there is, you're
5 entitled to whatever relief, you know.

6 CHAIRMAN BABCOCK: What if we took
7 Jeff's language and knocked indemnification out of it?
8 Can you read it without indemnification?

9 MR. BOYD: "Settlement offer must
10 require the offeree to provide only such releases as
11 the offeror could obtain by prevailing on the monetary
12 claim."

13 CHAIRMAN BABCOCK: How does that work
14 for everybody? Richard, work for you?

15 MR. MUNZINGER: Yes.

16 CHAIRMAN BABCOCK: Judge Bland.

17 HON. JANE BLAND: I don't feel strongly
18 about how this ultimately comes out, but if you take
19 out indemnification, you then have the problem of
20 liens, segregating interests, and when a final
21 judgment is rendered, you know, except in rare
22 circumstances, those segregated interests are cut off
23 if they haven't intervened and inserted their
24 interest, but without indemnification language, in the
25 context of settlement, there would be the issue as to

1 whether or not those interests were settled,
2 compromised and whether or not the defendant could be
3 liable for them.

4 CHAIRMAN BABCOCK: Okay. Frank.

5 MR. GILSTRAP: That language is just
6 cryptic. I mean, I don't -- I mean, I know kind of
7 what we're getting at, but it seems like we're going
8 at it backwards, you know. We ought to say what the
9 release covers and not make you try to figure out;
10 "Well, what would have been in the judgment and what
11 does that imply?"

12 MR. BOYD: So if you did it backwards,
13 "The settlement offer must not be conditioned upon the
14 receipt of releases" -- "upon the receipt of a release
15 of claims other than the monetary claims."

16 MR. GILSTRAP: "Must be conditioned on
17 receipt of releases of the monetary claims."

18 MR. BOYD: But then there's no limit if
19 you put it in that way. We're trying to impose a
20 limit.

21 MR. MUNZINGER: "Requires a release of
22 all monetary claims and demands for monetary damages
23 asserted or which could have been asserted in the
24 lawsuit."

25 CHAIRMAN BABCOCK: How about that?

1 MR. GILSTRAP: I like that better.

2 CHAIRMAN BABCOCK: Does that work?

3 MS. SWEENEY: If you add only.

4 (Simultaneous discussion)

5 MR. BOYD: There's got to be a limit.

6 We're trying to limit the scope and release you can
7 have.

8 MR. MUNZINGER: "Requires a release of
9 all monetary claims and demands for monetary damages
10 asserted or which could have been asserted in the
11 lawsuit."

12 MR. YELENOSKY: "Only."

13 MS. SWEENEY: "Only."

14 CHAIRMAN BABCOCK: Bill.

15 PROFESSOR DORSANEO: I think the rule is
16 that, in contract cases, you don't need to amend your
17 pleading to add new claims that accrued after the
18 filing of the original pleading. You can make new
19 monetary claims.

20 PROFESSOR CARLSON: For res adjudicata
21 purposes.

22 PROFESSOR DORSANEO: For res adjudicata
23 purposes, but you don't have to. You probably would.

24 Every time somebody says something, I'm
25 thinking to myself, "Is that right? I don't

1 necessarily think that's right. I'm not sure." This
2 is very complicated, and I would go with John Martin's
3 suggestion that they put in there whatever is
4 appropriate and maybe with a caveat to say that we're
5 talking about disposition, not release -- the
6 termination of the monetary claims only.

7 CHAIRMAN BABCOCK: John.

8 MR. MARTIN: I just think a real simple
9 sentence that you can ask for settlement papers is
10 going to solve it in 99.9 percent of the cases --

11 CHAIRMAN BABCOCK: Okay. What's your --

12 MR. MARTIN: -- we're talking about
13 here.

14 CHAIRMAN BABCOCK: Tell us your simple
15 sentence.

16 MR. MARTIN: Well, the sentence I
17 proposed before, "The offer may include a requirement
18 that the offeree accept to execute settlement
19 documents containing appropriate release and
20 indemnification provisions."

21 CHAIRMAN BABCOCK: Buddy.

22 MR. LOW: John, I mean, how many times
23 have you gotten a release? We're in one right now,
24 Stephen and I. We're arguing about what's
25 appropriate, what's not appropriate, a

1 multi-million -- not Stephen and I. We're on the same
2 side.

3 MR. MARTIN: Almost never.

4 MR. LOW: Oh, my God. I can't believe
5 that.

6 MR. MARTIN: I've had a few. I've had a
7 few.

8 CHAIRMAN BABCOCK: Stephen and then
9 Bill.

10 MR. YELENOSKY: Well, whether we're
11 going to use specific language or describe it, I've
12 got to get back to what Paula and Jeff agree on, which
13 is, it has to be limiting language. We have to be
14 saying you can't ask for a release that goes beyond
15 monetary claims, and I didn't hear that in yours. I
16 think you meant that, but I didn't hear that in
17 Richard's either.

18 CHAIRMAN BABCOCK: Bill.

19 PROFESSOR DORSANEO: I didn't get all of
20 that, but I do think it ought to say something at the
21 end "disposing of the monetary claims."

22 MR. MARTIN: Something like that.

23 MR. YELENOSKY: "Only."

24 PROFESSOR DORSANEO: And I wouldn't
25 necessarily use the word "release," because that is

1 not probably essential and has a lot of technical
2 baggage that goes with it.

3 CHAIRMAN BABCOCK: Buddy.

4 MR. LOW: I mean, if you don't limit
5 it -- I mean, like this particular release we're
6 arguing about now, they wanted to go all monetary
7 damages, but for things that could occur in the future
8 that we don't know about that's not even really
9 related. If you don't just tie it down related to
10 this, you've got all kinds of problems in drawing a
11 release.

12 CHAIRMAN BABCOCK: All right.
13 Justice Hecht, fix this.

14 (Laughter)

15 HON. TOM GRAY: Is there a way that we
16 could solve this by not putting the release language
17 in the offer but simply say in the rule that the
18 "acceptance of the settlement operates as," and then
19 "it operates as a release, quit claim, whatever,
20 forever discharges each other from the monetary
21 claims," and state what the effect of the acceptance
22 is, because if it's not in there and it's not
23 accepted, it's probably not going to matter, but if it
24 is accepted, the comfort is, "What is the effect of
25 having accepted the settlement offer," and in the

1 rule, state what the effect of that is.

2 CHAIRMAN BABCOCK: You could add that in
3 167.8.

4 JUSTICE HECHT: Just for the record, I
5 had written that down here in my notes.

6 (Laughter)

7 CHAIRMAN BABCOCK: Yeah. I saw you
8 scribbling as he was talking.

9 (Laughter)

10 MR. LOW: You had it solved and wouldn't
11 tell us.

12 (Laughter)

13 HON. TOM GRAY: Just for the record, let
14 it show that I'm not sitting next to Nathan Hecht.

15 (Laughter)

16 CHAIRMAN BABCOCK: Yeah, Jeff.

17 MR. BOYD: Does that give us --

18 MR. YELENOSKY: It doesn't give us the
19 limiting.

20 MR. BOYD: It doesn't give us the
21 limiting to say whether or not the specific offer
22 we're dealing with fits within the rule to effectuate
23 cost shifting, because -- I'm trying to think of a
24 reasonable and realistic example, but if I send you an
25 offer that says, "Look, I'll give you \$100,000, and in

1 exchange for that, you release any and all claims that
2 you asserted or could have asserted arising out of the
3 event that gave rise to this litigation, plus you
4 release any and all claims from all of these other
5 possible things that aren't even a part of this
6 litigation," and I condition my very gracious and
7 generous offer on releases I have no right to, then
8 you're stuck in a box now, because if you reject that,
9 unless we have some limiting provision as to what kind
10 of a release that I can try to extract from you, then
11 you're stuck with the possibility of cost shifting.

12 CHAIRMAN BABCOCK: Okay. Bill and then
13 Sarah.

14 PROFESSOR DORSANEO: Well, maybe this
15 isn't -- I'm looking at the July 9th proposal,
16 Footnote 11.

17 MR. YELENOSKY: Which July 9th?
18 (Laughter)

19 PROFESSOR DORSANEO: Well, I'm not sure.
20 The language that I thought was attributed to John
21 Martin in that note says, "The offer may include a
22 requirement that the offeree execute appropriate
23 settlement papers." I do think that's probably too
24 vague, but if we added "disposing of" or maybe
25 "finally disposing of the monetary claims" or added

1 another sentence to say that that's what -- one of the
2 things or the thing that we're concerned with, that
3 would work for me, without talking about the effect of
4 this automatically effects a release or does something
5 that may not be what people are after in this
6 settlement.

7 CHAIRMAN BABCOCK: The later draft says
8 something almost like that, Bill. "The offer may
9 include a requirement that the offeree execute
10 settlement papers containing appropriate release and
11 indemnification provisions." And that's from you,
12 John. Right?

13 MR. MARTIN: Yeah.

14 PROFESSOR DORSANEO: See, the
15 indemnification bothers me, because indemnification is
16 not always part of the process.

17 MR. MARTIN: Again, I drafted that
18 language before 9 Versions A, B, C and D got in here,
19 and so it's probably not necessary if we're going to
20 have some form of indemnification in (9).

21 I don't know which draft you're looking
22 at, but if you're looking at the 7/15 draft, Version
23 9 -- Paragraph (9) has four different versions of
24 indemnification language, I guess, for this committee
25 to vote on.

1 PROFESSOR DORSANEO: At any rate, the
2 important thing to me is that it be made clear that
3 what we've been talking about, that if you're making
4 an offer to settle the monetary claims, then the only
5 thing that should be disposed of are the monetary
6 claims.

7 MS. SWEENEY: Can we solve some of this
8 issue, Chip, by adding intent? Because what we're
9 really talking about is conditions being added ex
10 postfacto. You make your offer, and it's plain
11 vanilla, but then you send the papers over and they
12 got the kitchen sink in them. Can we solve the
13 problem by adding "intent, any condition added to a
14 settlement offer or to the release papers to the
15 required release"? In other words, pull that concept
16 in there so that you can't make an acceptable offer to
17 resolve only the monetary issues, trigger the rule,
18 force them to accept it and then send over papers that
19 would choke a goat and now everybody is wondering,
20 "Well, is the rule still triggered? Is the rule not
21 triggered? Can they expect this from me because
22 they've triggered the rule to put the onus on the
23 person sending the papers over to keep them within the
24 intent of the rule?"

25 CHAIRMAN BABCOCK: Carl.

1 MR. HAMILTON: I don't know where
2 Section (10) came from. I don't think it's in the
3 statute. I think we must have put that in ourselves,
4 but --

5 MS. SWEENEY: We did.

6 MR. HAMILTON: If we, maybe, modify
7 Section (10) somewhat we can provide that part of the
8 settlement offer is that you tender the release that
9 you want. If that release is not acceptable, then
10 there's no deal.

11 CHAIRMAN BABCOCK: But is it within the
12 rule or not?

13 MS. SWEENEY: Yeah, but have you
14 triggered the rule?

15 MR. YELENOSKY: In Paula's suggestion,
16 you don't answer the question of what required release
17 is. I mean, we get back to, we have to say somewhere
18 that it cannot include a release, for example, of a
19 claim for reinstatement. So we have to say "Cannot
20 include a release for nonmonetary claims," or
21 something of that sort.

22 CHAIRMAN BABCOCK: Buddy.

23 MR. LOW: All right. When you talk
24 about an appropriate release, most releases say "Do
25 not admit liability," but I've seen it say, "We

1 confess that we were wrong and so forth." Is that an
2 appropriate settlement or what is? I mean, if you
3 don't just tie it down, what is appropriate here might
4 not even be appropriate down in the valley or vice
5 versa. I mean, what -- if you don't just tie it down
6 and we just say, "Okay. Do what's right," well,
7 that's fine. You can't have just general release
8 language. That's all.

9 HON. DAVID B. GAULTNEY: Are we trying
10 to prevent overreaching -- that's what it sounds
11 like -- in the settlement document drafting? What is
12 wrong with the proposal of actually submitting what
13 your proposed settlements document with the offer?
14 And then you're never going to -- the trial judge is
15 always going to be involved in the equation. When the
16 costs -- if an offer is rejected because the
17 settlement documents are overreaching, the judge who's
18 going to decide whether to award fees is going to --

19 MR. BOYD: I don't think -- the concern
20 is not the settlement document. The concern is the
21 offer. I mean, I'm the other side who gets this
22 offer. You send me a written offer. I've got to be
23 able to look at it right then and there to know
24 whether it falls within this statute.

25 JUSTICE GAULTNEY: Right.

1 MR. BOYD: By declining this, am I
2 running a risk of cost shifting? I've got to know
3 what -- it's got nothing to do with what the final
4 settlement documents look like. It's whether the
5 offer fits.

6 HON. DAVID B. GAULTNEY: Right. But if
7 you're also provided with a copy of the settlement
8 documents at the same time, "This is the settlement
9 document we're going to offer you," and the settlement
10 document is unreasonable; it's overreaching; it's
11 requiring a release of claims that aren't in the case,
12 can't you reject it based on the fact that the
13 settlement documents offered are overreaching?

14 And then when it comes time to the award
15 of cost and attorney's fees, your argument to the
16 trial court is, they were asking me to release claims
17 that aren't even here and indemnify claims that aren't
18 involved in this lawsuit.

19 CHAIRMAN BABCOCK: Frank and then
20 Alistair and then Stephen.

21 MR. GILSTRAP: I think we've got to have
22 certain language. I agree with Buddy. I don't think
23 we can have open-ended language, "The parties are
24 going to agree."

25 The subcommittee proposal -- the

1 criticism of it was, "Well, there's some cases it's
2 not going to work in." Well, that may be right, but I
3 think it will work in most cases and it does do what
4 we want it to do. It releases the claims, which is
5 all you're really entitled to. I think we ought to go
6 with the subcommittee language, and then, you know, it
7 may be that sometime later we can come back and look
8 at it again, but we've got to get moving on this
9 thing, and it seems to me it's either -- if we're
10 going to have a rule, we ought to have the language in
11 that's been proposed by the subcommittee for release
12 language.

13 CHAIRMAN BABCOCK: Alistair.

14 MR. DAWSON: You got competing
15 interests. You've got overreaching on the one hand
16 and then you've got people who want broader release
17 language and therefore can't, under this proposal,
18 take advantage of the rule.

19 One proposal or compromise might be to
20 go with John's language as amended in the latest
21 version and drop a comment that says that, "In
22 determining whether or not to shift costs under this
23 rule, trial court may consider whether the release
24 language requested by the settling party was
25 reasonable and customary," or language like that, and

1 let the trial judge decide if it is overreaching or
2 not in determining whether to award costs.

3 CHAIRMAN BABCOCK: Sarah, did you have
4 your hand up?

5 HON. SARAH DUNCAN: I think so. I've
6 talked myself out of the this once, but I just talked
7 myself back into it.

8 CHAIRMAN BABCOCK: Oh, no.

9 HON. SARAH DUNCAN: What if we say "If
10 you're going to ask for a release, it can't exceed
11 this"?

12 MR. LOW: And come within the rule.

13 HON. SARAH DUNCAN: And come within the
14 rule. And you can ask for anything you want, but the
15 rule says, "If you ask for more than this, you're
16 outside the rule, and you can ask for nothing," and
17 that would be Bill's case.

18 CHAIRMAN BABCOCK: Buddy.

19 MR. LOW: The problem with Alistair's
20 proposal is that -- I mean, you have a judge. We want
21 everything uniform and just mechanical, you know, so
22 it applies or it doesn't. The judge here might say,
23 "Well, this release will be unreasonable," but the
24 judge can also say, "Oh, no. It's not unreasonable."
25 There's so many different -- we want it applied

1 uniformly.

2 CHAIRMAN BABCOCK: Okay. Stephen and
3 then Bill.

4 MR. YELENOSKY: Well, I think the
5 assumption was that if somebody goes beyond this they
6 can do that, but they're outside the rule. So I don't
7 think "if" helps us any there.

8 And there's always going to be a margin
9 where there's some uncertainty, but I think we need to
10 reduce that uncertainty so that, as Jeff said, when I
11 get the offer, I have a pretty good idea whether I'm
12 in the rule or not and the individual trial judge
13 isn't going to be able to consider a whole array of
14 things in determining whether or not the release is
15 reasonable. I think we can narrow it. I mean, one
16 thing we clearly have to agree on, I think, is that it
17 cannot include nonmonetary claims. And if nothing
18 else happens, I'd like to see that exclusion.

19 CHAIRMAN BABCOCK: I think I had Bill
20 next. Right?

21 PROFESSOR DORSANEO: I think all this
22 should say is that -- I'm having trouble with "must,"
23 Sarah's point. I think all that it should say,
24 whether it says it in the language of the release form
25 or in just textural language, that the offer may

1 include a request for release and dismissal of the
2 monetary claims.

3 I don't like the language that we have
4 here, "all claims and demands for monetary damages
5 directly or indirectly arising." I don't know what
6 that's all about, but if we're talking about the
7 monetary claims, if we're talking about all of them,
8 which I don't even necessarily think we have to, but,
9 "This settlement offer," you know, "may include a
10 request for a release of the monetary claims," and I
11 think that's all we need to say.

12 CHAIRMAN BABCOCK: Okay. A couple more
13 comments. Justice Jenings.

14 HON. TERRY JENINGS: How about the idea
15 of maybe taking what John is saying and then dropping
16 a comment, "For example, see," and then see the
17 language, "Claimant agrees, et cetera"? That would be
18 an example of an appropriate release.

19 CHAIRMAN BABCOCK: Paula.

20 MS. SWEENEY: Back to Sarah's comment,
21 which I agree with, the onus is going to have to be on
22 the defendant that's trying to trigger this rule, that
23 when they send the papers over, they haven't put a
24 whole bunch of other stuff in there.

25 Right now, if I get papers like that, I

1 just send them back and say, you know, "No. We're not
2 settled. We'll go to trial," but we're envisioning a
3 different universe here where now my client is facing
4 cost shifting by virtue of this offer having been
5 made. We're, therefore, in a different universe in
6 terms of the ability to say, "Forget it. We'll go to
7 trial."

8 And to force plaintiffs to accept terms
9 of a settlement that go well beyond, "Here's your
10 money. Give us a release," by being able to load
11 those up in the papers after the "deal" has been made
12 on the play. "Here's the number." "Okay. I'll take
13 the number," I don't think that's a situation we
14 should accidentally back into.

15 So I agree with Sarah's comment, and I
16 think -- I want to hear your language again, but to up
17 front make it clear that if you load up the settlement
18 papers with any other terms, any other terms, you're
19 not going to get a Cadillac with all the bows and
20 ribbons and whistles on it if you trigger this
21 provision. If you want all that other stuff, then
22 don't be trying to mess around with cost shifting
23 provisions and enter into a different deal. For this
24 deal, you're getting a release, period, and you're not
25 going to get all the other stuff you can think of to

1 slide into the papers after the fact, and I think the
2 way to do that is with Sarah's language up front.

3 CHAIRMAN BABCOCK: Okay. Bill.

4 PROFESSOR DORSANEO: The permissive
5 character of it so that a release is not a problem,
6 release doesn't necessarily mean something definite
7 either. "A release of finally disposing of the
8 monetary claims" would seem to be clear enough, and
9 I'm thinking about the monetary claims where I have
10 actually been made, not the monetary claims that
11 might -- could have been made or might be covered by
12 some principle of res adjudicata which could operate
13 independent, I think.

14 MS. SWEENEY: But, Bill, didn't we agree
15 on that? You offer me \$10,000 for my monetary claims.
16 I say, "Great." Then you send me the papers and they
17 have confidentiality, and they have, "And if it's not
18 confidential, we can sue you," and they have "Return
19 all our documents," and they have "Never litigate one
20 of these cases again against our company" -- the
21 lawyer, you know, they've got all this other stuff in
22 there, "Well, what's wrong with that?"

23 PROFESSOR DORSANEO: Well, the offer may
24 include a -- John's language. "The offer may include
25 a requirement that the offeree execute a release

1 finally disposing of the monetary claims, but not any
2 other" --

3 MS. SWEENEY: Conditions, which is why
4 you could either address it in (10) or you can address
5 it there, but you've got to have that language some
6 place.

7 CHAIRMAN BABCOCK: All right. Richard
8 Munzinger has some proposed language that says --
9 which I've amended slightly, Richard. You'll see.

10 "The offer may include a requirement
11 that the offeree execute settlement papers releasing
12 only all monetary claims and demands for monetary
13 damages asserted or which could have been asserted in
14 the lawsuit, and the entry of an order dismissing" --
15 you said the lawsuit, but I don't think that works,
16 "dismissing, with prejudice, those claims."

17 HON. CARLOS LOPEZ: Releasing it in
18 exchange for what? That's the problem. She's
19 agreeing to release the monetary claim as an exchange
20 for what?

21 MS. SWEENEY: I think that solves it if
22 that's what the settlement -- read the first part
23 again. Does that say "the settlement agreement"?

24 CHAIRMAN BABCOCK: Yeah. "The offer may
25 include a requirement that the offeree execute

1 settlement papers releasing only all monetary claims
2 and demands for monetary damages asserted or which
3 could have been asserted in the lawsuit and the entry
4 of an order dismissing, with prejudice, those claims."

5 MS. SWEENEY: That makes me happy.

6 HON. SARAH DUNCAN: That doesn't limit
7 the release to that. It just says, "You can include a
8 requirement of this release of the monetary claims."

9 MR. MUNZINGER: She's correct, and I
10 agree with that.

11 HON. SARAH DUNCAN: I'm not crazy?

12 (Laughter)

13 MR. MUNZINGER: No, you're not

14 CHAIRMAN BABCOCK: Not in his eyes.

15 (Laughter)

16 MR. MUNZINGER: And I think, as you
17 discussed this, the purpose of the language is to make
18 certain that the settlement agreement and the release
19 doesn't go beyond the monetary claim asserted. I
20 agree with that comment. She's correct.

21 CHAIRMAN BABCOCK: Here's what we're
22 going to do. We're going to vote on the language that
23 the subcommittee proposed in 167.3(a)(8). And if that
24 fails, then we're going to vote on the John Martin's
25 language that's in Footnote 11 of the most recent

1 draft. And if that fails, we're going to have lunch.

2 (Laughter)

3 (Simultaneous discussion)

4

5 MR. YELENOSKY: That's encouraging us to
6 vote a particular way.

7 CHAIRMAN BABCOCK: John.

8 MR. MARTIN: My language has been
9 modified several times and there's been modifications,
10 so I would suggest, if we get that far, we vote on my
11 language.

12 CHAIRMAN BABCOCK: Okay. Well, you be
13 thinking about how you're going to modify your
14 language.

15 MR. HATCHELL: Can I make one comment?

16 CHAIRMAN BABCOCK: Hatchell will be
17 making one comment.

18 MR. HATCHELL: I don't have a lot of
19 dogs in this fight, but a lot of the language you're
20 voting on about talks about "may." This section
21 begins, "A settlement offer must." So your language
22 will be, "The settlement offer must," and then you'll
23 say "may."

24 PROFESSOR CARLSON: What we'll do, Mike,
25 is, we'll put "must if requesting a release, state."

1 CHAIRMAN BABCOCK: Well, wait a minute.
2 The first thing we're voting on says "A settlement
3 offer must (8) State the offer includes a request for
4 the following release."

5 MR. HATCHELL: That one is okay.

6 CHAIRMAN BABCOCK: Okay. So that's what
7 we're first voting on, but then your point is well
8 taken as to the subsequent.

9 MS. SWEENEY: And we don't have the word
10 "only" in (8) under this proposal. So it can include
11 that and the kitchen sink.

12 CHAIRMAN BABCOCK: It's what it is.
13 "State that the offer includes a request for the
14 following release and dismissal, if applicable."

15 MR. GILSTRAP: Could you read the
16 language to make sure we've all got it?

17 CHAIRMAN BABCOCK: Yeah. Subparagraph
18 (8), "State that the offer includes a request for the
19 following release and dismissal, if applicable:
20 Claimant agrees to release, acquit and forever
21 discharge the defendant from any and all claims and
22 demands for monetary damages directly or indirectly
23 arising from or in connection with this lawsuit,
24 including all claims currently on file and all claims
25 which could have been filed relating to the matters

1 asserted in this lawsuit. The monetary claims will be
2 terminated by dismissal with prejudice." So that's
3 what we're voting on.

4 HON. SARAH DUNCAN: If I could make one
5 point responsive to Paula's comment --

6 CHAIRMAN BABCOCK: Sure.

7 HON. SARAH DUNCAN: -- the kitchen sink.
8 I think (10) would keep the kitchen sink out of it.

9 MS. SWEENEY: (10) is the -- no. It's
10 the settlement offer. It's not the papers. If we
11 modified (10) to say "The papers can't include
12 anything else," then I'm okay, but nobody bit on that
13 when I opened it up before.

14 CHAIRMAN BABCOCK: We're not there yet.
15 Okay. Everybody --

16 MS. SWEENEY: They go hand in hand,
17 Chip.

18 CHAIRMAN BABCOCK: What?

19 MS. SWEENEY: They go hand in hand. I
20 mean, (8), as you just read it is okay if (10) says
21 that you can't load up conditions in the papers, but,
22 otherwise, we're voting in a vacuum.

23 CHAIRMAN BABCOCK: That's the whole
24 premise of this, that you can't load it up. Right?

25 MS. SWEENEY: I'm not going to vote on a

1 promised premise. I want to know what (10) is going
2 to say before I vote on (8). Otherwise, you're asking
3 us to vote one way on (8) not knowing -- saying it's
4 going to be informed by (10), but we haven't decided
5 on (10) yet.

6 CHAIRMAN BABCOCK: Go ahead, Jeff.

7 MR. BOYD: I agree with your concern
8 about loading up the papers, but I don't think that's
9 what this rule is intended to address.

10 If I make you a written offer and you
11 accept it and then I give you papers that go beyond
12 our contractual agreement, then the court will take
13 care of that. I mean, it's a motion to enforce the
14 settlement agreement at that point, because now we've
15 got an offer and acceptance in a deal and you can --
16 the court will help you take care of my attempt to
17 overreach on the settlement papers.

18 HON. CARLOS LOPEZ: But what if the
19 court says, "Sorry. File another lawsuit. You've got
20 a breach of contract"?

21 MR. BOYD: What this is trying to do is
22 just determine when an offer by itself qualifies to
23 get -- to trigger the potential for cost shifting. So
24 it's not that I disagree with your point. I agree
25 with it, but I think it overcomplicates what we're

1 trying to do here, which is simply say, "I can't offer
2 to settle your monetary claims by offering money but
3 conditioning it on you giving me more than the release
4 of those claims." I mean, that's all we're trying --

5 CHAIRMAN BABCOCK: And this thing about
6 Subparagraph (10), it seems to me that it does cover
7 the situation that Paula is worried about, because if
8 the settlement offer must state that the offer
9 includes a request, et cetera, with this language,
10 (10), as it now reads says, "Any condition added to a
11 settlement offer other than is provided in this
12 section will prevent the application of the award of
13 the litigation costs." And so if you load up your
14 offer to go beyond what is here in (8), (10) is going
15 to take care of you as written.

16 MS. SWEENEY: So you're reading the word
17 "offer" in (10) to mean sort of this whole process
18 including up through and signing the papers as opposed
19 to just the letter that goes through the mail that
20 says, "Here's your offer"?

21 MR. YELENOSKY: It doesn't have to,
22 Paula, because they make the offer to you. They
23 haven't loaded up the papers. You accept it. Then
24 they load up the papers. You accepted the offer for
25 purposes later. If they don't go through with it when

1 you get to the end of the trial and they say, "We made
2 this offer," and you say, "Yeah, and I accepted it,
3 and then you wouldn't go through with it because you
4 loaded up the papers."

5 CHAIRMAN BABCOCK: Yeah. I think (10)
6 takes care of it as written, but anyway, so now we're
7 going to vote for sure on (8).

8 (Laughter)

9 CHAIRMAN BABCOCK: Everybody in favor of
10 (8) as written, raise your hand.

11 (Show of hands)

12 CHAIRMAN BABCOCK: Everybody opposed?

13 (Show of hands)

14 CHAIRMAN BABCOCK: By a vote of 19 to 4,
15 the Chair not voting, it fails.

16 So now, John, think about saying
17 something that incorporates other people's comments on
18 yours.

19 MR. MARTIN: Here's what I have written
20 out. "The offer may include a requirement that the
21 offeree executes settlement documents that release the
22 monetary claims only."

23 PROFESSOR ALBRIGHT: May or must?

24 HON. CARLOS LOPEZ: How about
25 "settlement documents that conform to the offer"?

1 CHAIRMAN BABCOCK: Okay. We've got the
2 must/may problem here.

3 MR. MARTIN: Well, you don't have to ask
4 for settlement papers. That's why --

5 CHAIRMAN BABCOCK: It says, "A
6 settlement offer must," and then you're going to get
7 down to (8).

8 PROFESSOR CARLSON: We could either make
9 that a (b) or we could say, "If requesting a release,
10 it must."

11 PROFESSOR DORSANEO: Just say, "if the
12 offeror wants."

13 CHAIRMAN BABCOCK: Okay. "A settlement
14 offer must, (8), if requesting a release, include a
15 requirement," et cetera, et cetera. Does that work,
16 Mike?

17 MR. HATCHELL: That's pretty good.

18 CHAIRMAN BABCOCK: Okay. You got that?
19 So read it again with that, John.

20 MR. MARTIN: "A settlement offer must,
21 if requesting a release, include a requirement that
22 the offeree execute settlement documents that released
23 the monetary claims only."

24 CHAIRMAN BABCOCK: Okay. Richard.

25 MR. MUNZINGER: What happens if I ask

1 for an order of dismissal with prejudice. Under that
2 interpretation and under Section (10), have I imposed
3 a condition that destroys the application of the rule?
4 There isn't anybody that's going to pay money without
5 an order of dismissal with prejudice, because you get,
6 A, a contract and release, and, B, res adjudicata in a
7 dismissal order. You'd be a damn fool if you didn't
8 demand an order of dismissal.

9 CHAIRMAN BABCOCK: As to those claims.

10 MR. MARTIN: Once you have that release,
11 you can file a motion with the court and get it if
12 they refused to sign it.

13 MR. MUNZINGER: Why would we want to go
14 through that expense if you could just say that,
15 "Demanding an order of dismissal dismissing the claims
16 asserted is not a condition within Section (10)"?

17 CHAIRMAN BABCOCK: Richard, you're
18 winning. John says that's okay with him.

19 MR. MARTIN: It's fine with me to add
20 that in there. I'm not sure it's necessary.

21 MR. YELENOSKY: As long as it's the
22 claims and not the suit.

23 CHAIRMAN BABCOCK: Yeah, right. The
24 claims, not the suit.

25 Jeff and then Bill.

1 MR. BOYD: Can I stake a stab? "An
2 offer must not contain any condition other than an
3 agreement to release and dismiss the monetary claim."

4 CHAIRMAN BABCOCK: Let's stick with
5 John's language, Jeff, if that's okay, and vote it up
6 or down. I don't care if it wins or doesn't, but --
7 actually, I do, but -- Bill.

8 PROFESSOR DORSANEO: The thing about
9 Richard's point, about putting the res adjudicata
10 effect in there, I don't think that's a bad point with
11 respect to other aspects of the monetary claims,
12 regardless of the kind of case, but wouldn't that also
13 have res adjudicata effect, "the dismissal with
14 prejudice of the monetary claims" with respect to
15 other claims that aren't supposed to be part of this?

16 I mean, wouldn't the transactional test
17 encompass something more than what you're intending to
18 cover? That's what's troubling me, that it goes
19 further than what this is about.

20 CHAIRMAN BABCOCK: John, read it now
21 with Richard's friendly amendment that you've
22 accepted.

23 MR. MARTIN: I'm not sure I can do that.

24 CHAIRMAN BABCOCK: "If requesting a
25 release."

1 MR. MARTIN: "If requesting a release, a
2 settlement offer must include a requirement that the
3 offeree execute settlement documents that release the
4 monetary claims only and an order of dismissal of the
5 claims" --

6 CHAIRMAN BABCOCK: "As to those claims."

7 MR. MARTIN: "As to those claims."

8 CHAIRMAN BABCOCK: All right.

9 Obviously, we're going to have to make sure that the
10 grammar is correct, but everybody that's in favor of
11 John's language, raise your hand.

12 PROFESSOR DORSANEO: Almost in favor of
13 it.

14 CHAIRMAN BABCOCK: Well, almost doesn't
15 count.

16 (Laughter)

17 (Show of hands)

18 CHAIRMAN BABCOCK: All those opposed?

19 (Show of hands)

20 CHAIRMAN BABCOCK: By a vote of 12 to 6,
21 the Chair not voting, John's language passes. So we
22 can move on to something, but not before lunch.

23 MR. TIPPS: Chip?

24 CHAIRMAN BABCOCK: Yeah, Stephen.

25 MR. TIPPS: With regard to fixing the

1 language, I voted for it because I thought we were
2 going to fix the language. I think "only" needs to
3 come earlier in the --

4 CHAIRMAN BABCOCK: We'll wordsmith the
5 language, Stephen. In fact, you're in charge of it.

6 MR. TIPPS: The point is, that's the
7 only kind of release you can ask for.

8 CHAIRMAN BABCOCK: Okay. We're in
9 recess until 1:30.

10 (A recess was taken at 12:30 p.m., after
11 which the meeting continued as reflected in the next
12 volume)

13

14

15

16

17

18

19

20

21

22

23

24

25

1 * * * * *

2 HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

3 * * * * *

4

5

6 I, Patricia Gonzalez, Certified

7 Shorthand Reporter, State of Texas, hereby certify

8 that I reported the above hearing of the Supreme Court

9 Advisory Committee on the 21st day of August, 2003,

10 and the same were thereafter reduced to computer

11 transcription by me. I further certify that the costs

12 for my services in the matter are \$ 1420.00 charged to

13 Charles L. Babcock.

14 Given under my hand and seal of office

15 on this the 25th day of August, 2003.

16

17

18

19

20

ANNA RENKEN & ASSOCIATES

610 West Lynn

Austin, Texas 78703

(512) 323-0626

21

22

23

PATRICIA GONZALEZ, CSR

24

Certification 6367

Cert. Expires 12/31/2004

25