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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

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Taken before Anna L. Renken, a Certified Shorthand Reporter for the State of Texas, on the 8th day of March, 2002, between the hours of 1:30 p.m. and 5:45 o'clock p.m. at the Texas Association of Broadcasters, 502 E. 11th Street, Suite 200, Austin, Texas 78701.

CHAIRMAN BABCOCK: Okay. Are we ready to go on the record? Come on, Buddy. Quit kibitzing. All right. We're on to the TRAP rules. Professor Dorsaneo is home taking care of ill family according to his communication with us, so Frank Gilstrap, a member of that committee is going to talk about these two TRAP Rules 11 and 27.1.

Some of you may not know that we, or you knew, but weren't present. We had a telephone conference about two weeks ago with the full SCAC committee to talk about the TRAP rules. These were just two things that spilled over that we needed to discuss today. So without further ado, Frank, why don't you take us through Rule 11.

MR. GILSTRAP: Okay. The proposed Rule 11 is a proposed amendment to the Rule involving amicus briefs to deal with the possibility that the appearance of a particular attorney as an amicus could cause a judge or justice to recuse himself under the recusal rule. The proposed TRAP 11 is -- you should have it. It's a two-sheet handout. It's sitting back on the desk if you don't

have it. It has "Proposed TRAP 11" at the top. And the first page has the proposed change at the bottom which reads "An appellate clerk may receive but not file an amicus brief." And then you're going to add the sentence "but the court for good cause may refuse to consider the brief and order that it be returned."

During the telephone video conference meeting this was discussed, and Justice Hecht said, mentioned that it was in part prompted by a famous event that happened back when Justice Hightower was on the court where someone had filed a brief as an amicus that was related to him, and apparently and I may have this wrong. It didn't really raise much of a stir in the court; and then later it came up as an issue in his campaign.

During the meeting Pam Baron who has obviously, you know, has written a well-known seminar paper on amicus briefs said that she couldn't recall that there was a problem; but then she sent this attachment that she had forgotten because she had forgotten. That's why it begins "My memory is slipping away

quickly." She was just joking there obviously. And she has the section from her article, and she points out basically two provisions in the recusal rule which could possibly cause disqualification of a judge. If someone, either a relative or someone in his former law firm appeared as an amicus brief, the first is a provision saying that recusal will be required if the judge or certain relatives has, quote, "an interest that could substantially be affected by the outcome of the proceeding." And the second is a provision saying, requiring recusal if the judge or certain relatives has acted as a lawyer, quote, "in the proceeding." And apparently the feel is that if a person appears as an amicus, he's a lawyer in the proceeding and that may trigger recusal.

So now you know what we know that were at the -- in the video conference meeting. That's where we are.

CHAIRMAN BABCOCK: Okay. We're getting Justice MccLure on I bet.

(Ms. Lee calling Justice McClure on conference phone.)

CHAIRMAN BABCOCK: Justice McClure, is that you?

JUSTICE MCCLURE: I'm back.

CHAIRMAN BABCOCK: Great. We're talking about the proposed TRAP Rule 11, and Frank Gilstrap just went through what occurred at our prior meeting. And the proposal is to remedy a problem that has arisen perhaps infrequently, but nevertheless arisen regarding an amicus brief being filed which would necessitate recusal of an appellate judge. And so that's where we are.

And it was thought at the last SCAC meeting that this was a minor problem and probably only needed to be put on the agenda today because it wasn't on the agenda for the last meeting so that we could summarily dismiss it. Since that time however Pam Baron has come up with her prior paper on the subject, and she at least believes that this is a more serious issue than we thought at our last meeting. So that's where we are. And Hatchell, you look like you want to say something about this.

MR. HATCHELL: Well, I have for years

been troubled by the way in which amicus practice has been handled in Texas; but I guess my observation about this rule would be that it is much broader than the specific problem that has been brought up.

I was just sitting here making a list of the problems I've had on amicus briefs. I had an amicus brief filed against me by a member of the same firm representing the petitioner. I've had an amicus brief filed against me that on the first page stated that it was paid for by my opponents; and I always thought that if somebody took money from a party, that they were that party's lawyer.

In the infamous Dupont vs. Robinson case Carl Whitcomb, the stricken witness filed a 40-page amicus, handwritten amicus brief. And there are just a lot of abuses going on. The only thing I would say is that just make sure you understand when you say "but the court for good cause may refuse to consider" you're inviting a flurry of motions to strike amicus briefs. And I don't know if the court wants to get into that or not; but there are plenty of abuses in the amicus brief practice just on

the surface of the briefs themselves in addition to what lies underneath the rock.

CHAIRMAN BABCOCK: Okay. Well, I could tell you wanted to say that. Who else? Has anybody else got any thoughts about this?

MR. LOW: I totally agree. A lot of times I feel that they are not filed to inform the court on the law, but filed to tell the court that a certain powerful group is interested rather than serving the real purpose.

MR. EDWARDS: I've also seen them used to circumvent the limit of the pages.

MR. LOW: Right.

MR. EDWARDS: And I've seen one or more records where the prefiling discussion goes who is going to do the amicus and which parts are they going to file of that.

CHAIRMAN BABCOCK: Uh-huh (yes). What about a situation where it is perceived by prior decisions that the court is closely divided on an issue and a party goes out and hires the son, daughter, spouse of one of the the Justices that is perceived to be against you on a close call and gets them to write the

amicus brief?

MR. EDWARDS: Well, the federal rule is, at least the Fifth Circuit rule is that the court has the right to refuse the amicus brief if it's going to cause a recusal on a panel that is assigned or on the justice if it's an en banc thing, any justice on the court. And if somebody wants to file an amicus brief, they're going to have to find somebody else to file it. So rather than putting that onus on the court, they put it on the amicus to clean up their act.

JUSTICE NATHAN HECHT: The federal rule is just entirely different and very lengthy and provides, requires a motion for leave to file an amicus brief that must be granted by the court or you don't get to file it. That's totally different from our practice that you just send it in. Parts of that I feel certain, although I've never talked with the judges about it, is that they get more of them than we do in the state system, and so they have to worry about these problems more and that's why they're more restrictive.

Historically my experience has been that

we don't, the state courts don't get many amicus briefs. I would say in the last five years that's been changing, that we get more and more of them all the time. And now again we used to rarely get amicus briefs in our court on applications for writ of error or petitions for review; but now it's not unusual, probably I would say two out of 30. So that would be what? About five, six, seven percent of the petitions have an amicus brief at the time they're, shortly after they're filed. So the practice has changed quite a bit in the last few years.

CHAIRMAN BABCOCK: Is it the recusal that is driving this proposed amendment, or does the court want us to grapple with the increased filings issue as well?

JUSTICE NATHAN HECHT: Well, the specific, one of my colleagues asked that we talk about this; and the specific problem that was raised was recusal.

CHAIRMAN BABCOCK: Okay.

JUSTICE NATHAN HECHT: And not anything else.

JUSTICE HARDBERGER: Have we had a

recusal? I mean, has that instance actually come up?

JUSTICE NATHAN HECHT: No. The Hightower thing is the closest occurrence. And probably, I mean, it's all over with; but I imagine that if we had anticipated that problem then, we would either have struck the brief just thinking that we could do that inherently or Jack would have been recused. But it was kind of hard for Judge Hightower to recuse because he had written the opinion and it was on a motion for rehearing. And there wasn't anything else to the motion really. Just, you know, "We think you got this wrong. Look at it again." And so I felt like at the time he was being taken advantage of; but you wouldn't want to see it happen in any other situation.

CHAIRMAN BABCOCK: Justice Duncan and then Stephen.

JUSTICE DUNCAN: It seems to me that if a potential amicus hires John instead of Jane in order to trigger a recusal, for the court to determine whether to strike the brief or refuse to receive it you first have to decide

whether recusal would be warranted, and once they've gone through that process the cat is out of the bag. The party has conveyed the information that they want conveyed to the judge. So I can see how the Fifth Circuit's rule makes sense, that you have got to file a motion and it's got to be granted before you can get get your amicus before the court. Because then the court can decide the recusal question within the context of a motion without looking at whatever arguments the amicus wants to make.

But here we're going to go through that whole process so that the judge sought to be recused will have the information that is the basis for the recusal before we ever receive the brief so that we can determine whether to strike it or not, receive it, which doesn't make sense to me because the information is going to be out and the purposes will or will not have been achieved.

It also, as I said, and I guess there was a fundamental misunderstanding on my part of the video conference. I thought that was the subcommittee that was discussing the rule.

But it concerns me to give a court discretion to strike briefs. It just, you know, if we want to say you've got to file a motion and the court has, you know, some degree of latitude whether to grant it, that's fine, because then you've got a written record. But to just give the court, a court, any court the discretion to start striking briefs is of great concern to me.

In my view if somebody wants to file something, they can file something. If it causes a recusal, it causes a recusal unless we're going to go to a motion type practice. But I would hate to see particular voices or opinions stricken without some record required.

CHAIRMAN BABCOCK: Is, Sarah, in the federal system does the motion, is it accompanied by the proposed amicus brief?

JUSTICE DUNCAN: I don't know.

CHAIRMAN BABCOCK: It seems to me like maybe it is.

MR. WATSON: No. I think you send them in together.

CHAIRMAN BABCOCK: Huh?

MR. WATSON: I think you send them in together.

CHAIRMAN BABCOCK: Yes. That's what I thought.

JUSTICE DUNCAN: So you've got the same problem.

CHAIRMAN BABCOCK: You have the same problem. And if you're just going to strike the brief for recusal, it may not be the court is uninterested in what the American Medical Association has to say about the case. It's just they don't want the lawyer that has prepared the brief causing a recusal of one of the judges.

JUSTICE DUNCAN: Certainly that's a possible scenario.

CHAIRMAN BABOCK: Yes. Judge Brister.

JUSTICE BRISTER: How did Rule 11 cause the Hightower problem? This just says you recieve it, but --

JUSTICE NATHAN NECHT: The rule didn't cause it; but the question of should an amicus brief require you to recuse was the issue. The rule didn't cause the problem; but then the question arises if you had anticipated

that it might cause a recusal, should the rule specify some procedure for rejecting the brief in lieu of recusal, or do you have no choice but to recuse? Where are you?

JUSTICE BRISTER: I agree with Sarah. I mean, there has been -- we actually had a discussion in our court recently about inviting amici because, you know, there was some issue that applied to all drilling contracts in Texas and the parties that briefed it weren't that great. So, you know, you're fixing to do something that might affect millions of dollars by accident. But so I'm all in favor of hearing what outsiders have to say. We do not have a problem with these briefs. We almost never get them; but it seems like, you know, I don't see what the problem is with saying, you know, if you get one and it causes this kind of problem, you can strike it.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: We've never invited an amicus to file except --

JUSTICE BRISTER: They asked me about that, if you-all had ever done it.

JUSTICE NATHAN HECHT: -- except where a party was pro se. And then we have usually asked a section of the State Bar to find somebody to file a brief; and that's happened twice because the pro se was not able to brief the case.

JUSTICE BRISTER: Right. And of course the U.S. Supreme is inviting the Solicitor General a lot.

JUSTICE NATHAN HECHT: We do that too. If we get a case involving the constitutionality of a statute and the Attorney General is not on record anywhere in the case what he or she thinks, we ask the Solicitor General if he or she wants to comment on the case. They almost always do.

And actually it was Greg Coleman that suggested this procedure for us, because that's what they did at the U.S. Supreme Court. It works very well because sometimes the Attorney General comes back and says, "You know, we don't feel like, we don't have a dog in this hunt, and do whatever you want to do." And sometimes they come back and say "Oh, my gosh. This is going to be the end of

the world if you do this."

CHAIRMAN BABCOCK: Justice Hardberger. Stephen. I'm sorry. Stephen had his hand up.

MR. TIPPS: I was just going to say that it seems to me that this proposal deals with a relatively small problem, but one that is potentially a problem, and that this language would appear to give the court appropriate flexibility in dealing with not only the recusal situation, but if it felt a need to, it would give the court the ability to deal with various of Hatchell's examples as well. It seems to me to be probably a worthwhile addition, but not terribly important.

CHAIRMAN BABCOCK: Yes. I'm not sure that Mike was advocating --

MR. TIPPS: I'm not sure that he was either; but I'm not sure that it wouldn't --

MR. HATCHELL: I would love to advocate some stricter guidelines. On just from the court's standpoint I've been a little frustrated, and I perfectly understand that the court and judges probably don't know a lot of these problems; but when you get an amicus brief that states on its face that it's paid

for by the other side I don't understand why somebody doesn't send that back.

JUSTICE NATHAN HECHT: We just don't read it.

MR. HATCHELL: That could well be; but I do think that Stephen is correct. This would cover my problems. Just the court needs to be aware that the way I read it I would read this good cause language to mean I can now start filing motions and the court will start considering it. And do you want to go there?

CHAIRMAN BABCOCK: Or do you want only the motions on recusal type issues?

MR. HATCHELL: Yes.

CHAIRMAN BABCOCK: In other words, do you want to shrink the thing down to recusal and make that the only basis? Justice Harberger.

JUSTICE HARDBERGER: I would not favor really making any changes. In the first place recusal hasn't really happened. It could happen; but I think the court would have the inherent power to do whatever it wanted to if it was designed to recuse a judge.

CHAIRMAN BABCOCK: Right.

JUSTICE HARDBERGER: As far as Buddy

Low's position, that's the most common abuse that I've seen, which is the amicus as the lobbyist. You know, you get these lobbying groups that come in on any side. And obviously I think they should have a right to do it myself. There is more than one way though that a judge can strike a brief. I mean, you can consider the source of which that brief came and weigh it accordingly. I honestly think the medicine would be stronger than the disease if the disease even exists.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: But what if you have got a situation where Mike Hatchell has been the attorney for a group for years, it's not just a setup thing and they are truly interested, and Mike Hatchell's brother is on the Supreme Court, and then he files and it's a legitimate thing? He files an amicus. Would you say you have to take it back and get somebody else to sign it? I mean, that would come pretty close to recusal because, you know, and that would be a legitimate thing. I'm saying, you know, that he was their lawyer for years. How would you deal with that?

MR. HATCHELL: I'd write a letter and tell them I'm an only child, which is true.

(Laughter.)

MR. LOW: I guess that's fine.

CHAIRMAN BABCOCK: "This guy sure looks like you."

MR. GILSTRAP: Chip, I mean, I think we are ignoring the fact that there may come a point where recusal is warranted. I mean, what if the judge's wife signs an amicus brief? You know, at some point it seems to me that the judge should recuse himself.

CHAIRMAN BABCOCK: Sure. But the court has the power to do that too. And this Justice Hightower thing just kind of snuck up on you. Right?

JUSTICE NATHAN HECHT: Uh-huh (yes).

CHAIRMAN BABCOCK: Okay. Bill.

MR. EDWARDS: I have had Supreme Court justices recused in some of my cases. Henson vs. Structural Metals is one that comes to mind. Judge McGee didn't sit and his sister was the plaintiff.

CHAIRMAN BABCOCK: Yes, Anne.

MS. MCNAMARA: It sure can change your

advocacy if the judge is going to have to recuse him or herself because of the unexpected presence of a lawyer on an amicus brief. Depending on, you know, who you're arguing to, focusing the argument you may really be strategizing based on who you think is going to be deciding it. And if all of a sudden one of those judges gets up and leaves, it really can cause a dislocation of the advocacy unfair to one of the parties.

CHAIRMAN BABCOCK: Yes. No question that it can create mischief. And I think what I heard Justice Hardberger saying was it's not a big problem that anybody has identified right now, number one. Number two, the court has inherent power to strike a brief and particularly an amicus brief, I would think. So, you know, not to put words in your mouth.

JUSTICE HARDBERGER: That's correct.

CHAIRMAN BABCOCK: But maybe we ought to handle it that way as opposed to opening up Pandora's box which is going to lead to a lot of motions; but that is just one view. But you are absolutely right about that. There is a lot of mischief that could be created.

MS. MCNAMARA: Quite deliberately.

CHAIRMAN BABCOCK: And deliberately so.

MR. LOW: Is that case law that says the court has the inherent power? There is no rule that says it expressly now. There is just -- I mean, what I'm saying is that can the court just strike? I thought that's what this amendment was for so that the court for good cause could strike. If there is already a rule on it, we don't even need to be dealing with it.

CHAIRMAN BABCOCK: Well, if it's inherent, then of course --

MR. LOW: No. Not really inherent.

CHAIRMAN BABCOCK: -- we don't need a rule.

MR. LOW: But where, what says that it's inherent? Is it case law, is it common law, is it --

CHAIRMAN BABCOCK: It's Hecht on the law actually.

JUSTICE NATHAN HECHT: I don't know. As I say, I don't know that the issue has ever come up. We've never struck one that I know of; and we get these "me too" amicus briefs

all the time; but we just don't go to the trouble of striking them. We just don't pay much attention to them.

MR. LOW: Without something saying that you have inherent power most judges are reluctant to do it, say "Well, I've just got inherent power."

CHAIRMAN BABCOCK: Right.

JUSTICE BRISTER: You-all strike briefs that are not proper form, too long.

JUSTICE NATHAN HECHT: Yes.

JUSTICE BRISTER: And I'm just flipping through TRAP 38. I don't see anything in here about striking briefs. Is there?

JUSTICE NATHAN HECHT: Its in 9, I think.

JUSTICE BRISTER: We just do it.

MR. DUGGINS: 9.

JUSTICE DUNCAN: How do you strike something that is not filed?

CHAIRMAN BABCOCK: Send it back.

JUSTICE NATHAN HECHT: It's in 9.4(i).

JUSTICE BRISTER: Yes. That's good for you. But how about me?

JUSTICE NATHAN HECHT: That's the

general. 9 is in the general part. That works for you too.

JUSTICE BRISTER: That's the Supreme Court, 55.9.

MR. TIPPS: 9.

JUSTICE NATHAN HECHT: No. 9.

JUSTICE BRISTER: Oh, Rule 9? Okay.

JUSTICE NATHAN HECHT: Rule 9.

CHAIRMAN BABCOCK: Not really talking about this; but I suppose you could say "This is nonconforming because the guy that signed it is going to cause the recusal of one of our justices."

MR. LOW: There is not --

CHAIRMAN BABCOCK: "So fix it."

MR. LOW: -- the need because they don't need a particular rule. It's not a requirement. Even I have heard the court struck a brief because it was in the wrong print even.

MS. SWEENEY: The wrong what?

MR. TIPPS: Print.

JUSTICE NATHAN HECHT: Don't get me started.

(Laughter.)

MR. LOW: Would you like to respond to that?

JUSTICE NATHAN HECHT: It's in S.W. 3d.

CHAIRMAN BABCOCK: Okay. So the issue of inherent authority is subject to being briefed. Stephen Tipps.

MR. TIPPS: I have a question which I probably should know the answer to, but I don't. What is the reason that amicus briefs under TRAP 11 may be received, but not filed?

JUSTICE NATHAN HECHT: I don't really remember if this is historical. I could find it here in a second maybe; but I think there was some discussion, if I'm remembering correctly, that we get all kinds of stuff in our court -- maybe the courts of appeals do too -- that just comes sometimes just a concerned citizen has just read about a decision in the paper and it has just outraged him or he just thinks it's the greatest thing in the world. So he writes in and we label all those as amicus briefs and stick them in the file and give the parties notice that they come in, but we don't stamp them as having been filed. I'm not sure there is any great,

I don't recall any great reason for it other than just don't give it the dignity of a file stamp; but maybe there was more to it than that. I don't remember

MR. LOW: Are only the things that are filed given to the judges for review and not just the things that are received?

JUSTICE NATHAN HECHT: No.

MR. LOW: Even received?

JUSTICE NATHAN HECHT: You see it all. There is no practical difference to it.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: I'm just wondering, Justice Hecht. The justice that expressed the concern, does the justice want a rule, or is there concern on that person's part that the inherent power is not enough? It's a little amorphous. I'm not sure what is driving it.

JUSTICE NATHAN HECHT: Well, my colleague suggested that we should have a rule and but subject to this debate. I mean, the suggestion was not "We need a rule no matter what." It was "We need a rule subject to the advice of the Committee."

MR. WATSON: I understand. So there is

some discomfort at least by one justice with the inherent power?

JUSTICE NATHAN HECHT: Yes. This didn't come from me and it didn't come from the court. One of my collages said "Maybe we should think about that." And I said "Whenever that happens I will pass it on to you." So that's, I mean, the advice may be "Wait until in happens and go from there" or something. I don't know.

CHAIRMAN BABCOCK: Sarah.

JUSTICE DUNCAN: I may be run out of town or tarred and feathered for this question: Should an amicus brief be a basis for recusal? If for instance, to take the example that was thrown out earlier, if my husband files a brief in my court on behalf of an amicus, should that be a basis for recusing me?

JUSTICE NATHAN HECHT: Well, let me give you one example where it comes up a lot in our court, which is we will have a case and we'll get an amicus from somebody with essentially the identical case that is elsewhere in the system, but our case will decide that case;

and so they're saying "Keep in mind that this, if you are wondering whether this affects more than one person, it affects us too." And so then you're really ruling. It's at that point you know that that case is virtually before you. I mean, they've brought it to your attention in such a way that you're thinking when you are deciding the one case "Well, we're not only deciding this case, but we're deciding this case and this case and this case." And if you know that somebody is directly involved in those cases, then I think we would start worrying about whether to recuse.

Now we probably should have recused anyway if we had known that fact or at least thought about it. So it's not really that the amicus forces it. It's just the amicus brings it to your attention.

JUSTICE DUNCAN: But that's sort of my question. It's the fact of the relationship --

JUSTICE NATHAN HECHT: That does it.

JUSTICE DUNCAN: -- that should trigger recusal, not the fact that my husband signed

the amicus brief. It's the fact that my husband is involved in as a party litigation that is related to but not the same as the case under consideration. I mention this because I'm not sure the cure isn't tinkering with the recusal rule that we spent long tinkering with and not tinkering with the amicus rule.

CHAIRMAN BABCOCK: You're focusing on the attorney having a relationship with a judge; but it could just as easily be that the party. You know, in the amicus the filer of the amicus brief is the XYZ Corporation, and I'm on the court and I happen to own stock in that company. And all of a sudden that comes in and I say "Whoa, the same case. I can't decide this one. I have got to get off." And you're right. It's you're being put on notice. If you were on notice earlier, you probably should have recused anyway.

JUSTICE DUNCAN: But there are so many possibilities --

CHAIRMAN BABCOCK: Right.

JUSTICE DUNCAN: -- in the context of an amicus brief some of which I think we'd all

agree should cause recusal once you have notice of them and some of which I think we'd all agree shouldn't cause recusal. That the question I'm posing is is it the amicus brief not receiving, sending back the amicus brief? Do we really think that's a cure to the problem, or is the problem really when should a judge recuse when they have notice of a particular relationship?

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Chip.

CHAIRMAN BABCOCK: Yes.

MR. GILSTRAP: There was one other problem that was raised at the teleconference. And that is the possibility of manipulation. In other words, that somehow if the judge's relative were an amicus, then somehow they could be manipulated.

Now frankly I can't see how that could be done. If I had a judge that was on my side and I thought was leaning toward me, why would I hire his wife and get him disqualified?

JUSTICE DUNCAN: It's just the opposite.

MS. MCNAMARA: It's just the opposite.

JUSTICE DUNCAN: It's just the opposite.

MS. MCNAMARA: If you knew XYZ judge is not disposed to your argument, you'd hire his law firm or his wife, put them on an amicus brief, not really worried about the advocacy of the brief; but you'd try to knock that person out of the room.

CHAIRMAN BABCOCK: That's the mischief. John.

MR. MARTIN: That can happen with a party, you know, hiring some lawyer as co-counsel and putting them on the brief. That's where there's a lot more potential for abuse there than with amicus briefs; and I don't think amicus briefs ought to be carved out into a special case for that reason.

MS. SWEENEY: I think the reason we had the issue come up was that among the parties at least you have some semblance of knowing who they are and what the parameters of it are. Anybody can decide they want to, you know, suddenly have an amicus interest in your case, and you know, you can get any kind of partisan group of some kind come in with an amicus brief.

CHAIRMAN BABCOCK: Yes. But John's point

is that if you're trying to knock a judge out, you don't have to, you know, line up some amicus. You know, you just hire the disqualifying person as co-counsel.

MR. MARTIN: The party can do it.

CHAIRMAN BABCOCK: Yes. The party can do it and do directly what they could also maybe do indirectly. Yes, Skip.

MR. WATSON: To me the obvious answer would be to follow the federal precedent and instead of saying you send them back, just to say you need the leave to file them. But it sounds like that messes up the internal clockworks of the clerk's office of having every lady from the little old lady in tennis shoes classified as an amicus and sending it back because it doesn't have a motion. But, I mean, there is a system in place that works. And if I were inclined to recommend anything to the court, I would tend to follow in the tracks of something that is in place and works. And I'm just wondering if it's worth enough to the court to make that change.

JUSTICE NATHAN HECHT: Well, you know, I don't think, again I don't think our court

would mind sending the stuff that was not accompanied by a motion back. We don't usually want it; but we feel it's our obligation, as Sarah said, just stick it in the file. If people want to write in and say "This is what I think," historically we have received all of that; but I don't know if we want to go to a motion practice not so much because of the workload. I don't want to -- I hear Mike. I don't want to invite any more motions than we've got; but more importantly we don't, our court doesn't want to discourage amicus briefs. Historically we felt like we didn't get enough. So we don't feel like it's a bad thing, and we wouldn't want to add to the problems of people filing amicus briefs.

MR. CHAPMAN: Justice Hecht, let me ask a question about the court's process. If a motion were required and the amicus brief were attached to the motion when it was received by the court's clerk, and let's assume that the motion on its face revealed some problem that otherwise would be the subject of recusal and it is therefore returned, is it correct that the court would not see the brief?

JUSTICE NATHAN HECHT: Well, they can see it. Anybody could see it if they wanted to. The process would be such that the motion would come in. It would be sent to one of the staff attorneys who had the motions due for the week, and that lawyer would look at the motion, make a recommendation to his or her judge, and then the motion would be ruled on by that individual judge and that would be the end of it. But if anybody said "Well, let me see what amicus brief Judge Hecht denied the motion in," they could see it.

MR. CHAPMAN: Well, I asked that question because it occurs to me that part of the problem may be, as a litigant part of the problem may be for me representing my client the motion that not withstanding the fact that there may be a basis for recusal, a clear basis, as a practical matter the entire court has seen the amicus brief. And considering it for what it's worth, well, you know, how do I know what it's worth? I mean, it becomes kind of a due process concern for me as an advocate that the skunk is there in the box and I can't get it out even if there is a good basis for

it. And that in itself may be a basis to go to a motion practice.

CHAIRMAN BABCOCK: Justice Duncan.

JUSTICE DUNCAN: Let's say an amicus brief is filed that presents facts that does show a good basis to recuse me on a case in which anybody that practices in our court very often will know that on a seven-judge court I'm the deciding vote. And it's a case I care about. I don't want to be recused. Shouldn't I be recused anyway? Should the Court have the option of essentially returning the brief and thereby negating basically the basis for recusing me?

JUSTICE NATHAN HECHT: Well, my own view is that, as we were talking before, if it shows facts that would indicate recusal, then you ought to base recusal on those facts. The concern was is there something less? What if it's just the name on the brief? There weren't any facts. It was just the name on it, as you say, your husband just files because he's an interested citizen and he knows a lot about this and he just says "For your information thus and so"? And those

facts would not require recusal. Nobody seriously thinks that that requires recusal. If that were true, then would the mere fact that his name was on the brief require it?

JUSTICE DUNCAN: What I'm suggesting is I again think it's not the amicus brief that we should be concerned with, whether it's received or not. It's what is a good basis for recusing an appellate judge.

CHAIRMAN BABCOCK: We have that. We have recusal rules.

JUSTICE DUNCAN: Okay. Uh-huh (yes).

CHAIRMAN BABCOCK: So the question is whether or not, you know, the spouse that is the author of the amicus brief that the amicus brief has enough dignity in the court that its received. It's not filed.

JUSTICE DUNCAN: I don't think my relationship to an attorney causes a recusal. It's a relationship to a party unless it's a law firm relationship.

MR. LOW: Right.

CHAIRMAN BABCOCK: Well, that's the whole point of Pam's little article here. That's the position she took in our meeting; but now

she says I now remember what I wrote, and she now says that she thinks the rules are broad enough so that just the relationship to an amicus is enough.

JUSTICE DUNCAN: I don't think that's the import of Pam's memo.

MS. SWEENEY: The import of what?

JUSTICE DUNCAN: Of Pam's memo. I don't think she's saying that if my husband signs an amicus brief, that that is a good basis for recusal.

MR. GILSTRAP: She is in part. You see, there are two provisions. There is a provision that says that recusal is necessary if the judge has an interest that could be affective of the outcome. That's what we've talked about. But there is another provision saying that the judge has to recuse if he's a lawyer in the proceeding and if a relative is a lawyer in the proceeding. And I guess signing an amicus brief can arguably make you a, quote, "lawyer in the proceeding."

CHAIRMAN BABCOCK: Yes. It's this phrase where she says "Finally, recusal is required if the judge" --

JUSTICE DUNCAN: Right. I see it.

CHAIRMAN BABCOCK: -- "(or certain relatives) has acted as a 'lawyer in the proceedings.' This phrase is broad enough to encompass participation by an amicus."

JUSTICE DUNCAN: I see it.

MR. GILSTRAP: Maybe, you know, we could at least solve that problem by amending the recusal rule to say that doesn't apply to amicus briefs.

MS. SWEENEY: Why shouldn't it?

MR. GILSTRAP: Because then you could leave the other. It would be decided based on the other one, whether or not there is a sufficient interest to trigger recusal, which is what we really think ought to cause recusal.

MR. CHAPMAN: I think there is a issue of the appearance of fairness and whether or not you can have reliance that the case is being tried on and determined on its merits as opposed to the relationship in question.

CHAIRMAN BABCOCK: Carl, both you and Sarah I think have articulated in different ways the skunk in the jury box argument which

is that this rule that is proposed doesn't really cure the stench because even if you say "Oop, that this would otherwise cause recusal, but we're going to send it back and we're going to forget we ever saw this thing," you two say that's not good enough. Right? That's what you're saying?

JUSTICE DUNCAN: That's what I'm saying. I think it's a basis for recusal whatever that might be. It's a basis for recusal. It's not a basis for deciding whether to accept or not accept an amicus.

CHAIRMAN BABCOCK: So solving it by sending the brief back doesn't do it for you?

JUSTICE DUNCAN: It doesn't solve it for me.

CHAIRMAN BABCOCK: It doesn't do it for you. Stephen Tipps.

MR. TIPPS: But this proposed additional language doesn't necessarily mean that if facts occur as you hypothesize, that the judge might not be recused, because there are circumstances that you have identified in which sending the brief back won't cure the problem. The judge has been put on notice

that she has a financial interest in the controversy, so she should still recuse.

CHAIRMAN BABCOCK: Right.

MR. TIPPS: One way to deal with that would be in the explanatory comment saying that this is available if the mere filing of the amicus would create a recusal situation that wouldn't otherwise exist.

CHAIRMAN BABCOCK: Yes. But see, Dorsaneo's fix for the perceived problem was "Hey, we'll just pretend like this never happened."

MR. TIPPS: Well, that's not a fix.

CHAIRMAN BABCOCK: Well, that's what we're --

JUSTICE DUNCAN: If you don't accept the amicus brief, my husband isn't a lawyer in the proceeding and there is no longer a basis for recusing me; but we all know that the same interests are there.

MR. GILSTRAP: He could still, you could still recuse though if his interest merely by taking money from the amicus or from the person that paid for the amicus brief caused him to have an interest in the case that was

enough to trigger your recusal.

JUSTICE DUNCAN: I think the basis for finding interest under the recusal rule, and Justice Hecht will correct me if I'm wrong, is pretty high under the interest clause.

CHAIRMAN BABCOCK: Well, do we have consensus that whatever the fix, A, whether there is a problem, and if there is, whatever the fix is this language doesn't fix it?

MR. GILSTRAP: (Nods affirmatively.)

CHAIRMAN BABCOCK: Is that fair to say? Does anybody disagree with that?

(No disagreement voiced.)

CHAIRMAN BABCOCK: Okay. Having reached consensus on that should we, and I think we should, particularly since Bill isn't here to defend his proposal, we ought to send this back for him to look at some more. Are you in favor of that, Elaine?

PROFESSOR CARLSON: I think it's a great idea.

CHAIRMAN BABCOCK: Does anybody want to talk about this anymore? Remanded.

JUSTICE BRISTER: Remanded.

CHAIRMAN BABCOCK: Okay. Let's go to

27.1.

MR. GILSTRAP: We're going to have just as much fun with 27.1. This is an amendment to the provision involving prematurely filed notices of appeal. And the document you need is called "Proposal to Rule 27.1." It's about eight pages or so. And on the first page you have the rule with the proposed amendment; and then on the second page you have starting on the second page you have the case of Miles against Ford Motor Company which really when you read the case you figure out what the real problem is, and it's much larger than the issue of premature appeals.

The problem arises from the fact that there are I believe 23 swing counties in the state of Texas; and a swing county is a county that is in more than one court of appeals district.

CHAIRMAN BABCOCK: There are how many?

MR. GILSTRAP: 23. And --

JUSTICE NATHAN HECHT: Keep in mind we have 254 counties.

JUSTICE BRISTER: Yes. And 14 of them is us.

JUSTICE NATHAN HECHT: Well, just 10 percent of them.

MR. GILSTRAP: Here is the actual breakdown: There are some that are split between Dallas and Texarkana. The big problem was when the legislature created the Tyler district it created 17 counties and left eight of them in other counties. Some are in 6 and some are in 5; and then the grand champion is Brazos county which is in the Tenth District and in the First and in the Fourteenth.

Now this is a terrible problem, and the legislature should fix it; but when you think about it you can see why the legislature is not going to fix it. Are the Tyler judges going to give up, you know, some of these eight counties where they have people that vote for them? So this leaves us with a problem.

And to understand the rule you need to just briefly understand this case; and let me just run through it real quick. This is a case that arose out of Rusk county. Not surprisingly the plaintiff wanted to go to

Texarkana and the defendant wanted to go to Tyler. And the plaintiff filed a premature notice of appeal to go to Texarkana. Then after the judgment was signed the plaintiff still beat the defendant to the courthouse and filed a timely notice of appeal to go to Texarkana. The defendant filed one to go to Tyler, and the Supreme Court wound up sending the case to Texarkana. They disallowed the defendant's argument that said "Well, it ought to go to Tyler because it's been there twice before on mandamus." The Court said "That's not the reason we're going to use to decide the case. We're going to decide the case on the concept of dominant jurisdiction," which I don't think is in the rules, at least not in the appellate rules, but basically says that the court which first acquires jurisdiction is the court that you go to. It noted and there it said that because the plaintiff had filed his notice of appeal first we're going to Texarkana. The court noticed that there is an exception to the rule of dominant jurisdiction, and two of them -- and it set forth three exceptions, and two of them are

applicable to appellate cases. One where a party has engaged in inequitable conduct that estops him from asserting prior active jurisdiction and second where there is lack of intent to prosecute the first proceeding. They really dealt only with the second one; and here they said "Well, what we're going to do is we're going to abate the proceeding in Tyler so that if it turns out that the plaintiff is not really serious about going to Texarkana, you can revive that and go to Tyler."

The proposal, you know, is appended to the rule involving prematurely filed notices of appeal; and there are two sentences. The one that really starts, that really is more important is the last sentence which says "Instead dominant appellate jurisdiction lies in the court identified in the notice of appeal that is first filed after the appeal -- after the judgment becomes final, after the appeals becomes ripe." Then it says that and it also adds that if someone files a premature notice of appeal, that doesn't create dominant jurisdiction. So that's the

problem and that's the solution that the subcommittee has proposed.

CHAIRMAN BABCOCK: Okay.

JUSTICE DUNCAN: I don't think the subcommittee.

MR. GILSTRAP: Or maybe Bill just proposed it.

JUSTICE DUNCAN: We're getting back to the same problem about confusion about whether the video conference the other day was a subcommittee meeting --

CHAIRMAN BABCOCK: Full committee.

JUSTICE DUNCAN: -- or a full committee meeting. I think the notices said that it was the subcommittee.

MR. GILSTRAP: I believe it was a full committee meeting; and I was just -- I thought it had come from the subcommittee. I stand corrected on that.

CHAIRMAN BABCOCK: It was full committee. What happened, Sarah, was that it was a full committee to discuss a certain number of TRAP rules. Bill at the end of the meeting said "By the way, what about 11 and 27.1?" I said, and we talked about it some.

And I said "But that's not on the agenda and we're not going to reach final resolution on something that is not on the agenda, and so we'll put it on the agenda for next time and we'll reach the final resolution thinking because Dorsaneo said that Rule 11 was easy.

JUSTICE NATHAN HECHT: Well, I hate to defend Bill, because he probably wouldn't do the same for me; --

(Laughter.)

JUSTICE NATHAN HECHT: -- but the language in 11 came from us not as proposed language, just as "Bill, what do you think about this?" But this Rule, unlike 11, the court would like the Committee to come up with a solution. And we don't really care what the solution is. We just don't want to decide these four or five disputes on an ad hoc basis every year. We would just prefer that the parties know that if this happens, they're going to one court, and if it doesn't, they're going to the other court. And this has been the procedure we've used. But in the course of the conference call I thought Sarah raised a good point, which was "Well, what if it is

on remand and it has come back up again? Shouldn't it go to the same court it went to before, or should some other, if somebody else wins the race, then does it go to a different court?" And whatever the answer is I think the court would just like a rules answer so that everybody knows and we don't have to write opinions in cases saying this is why we're doing it. Because otherwise it looks like, I mean, we have to explain it or it will just look like we flipped a coin or did it for some other reason. And so it would be better if we had a rule.

CHAIRMAN BABCOCK: This essentially codifies the holding in Miles vs. Ford Motor. Right?

JUSTICE NATHAN HECHT: Yes.

MR. HATCHELL: No.

CHAIRMAN BABCOCK: No?

MR. GILSTRAP: Well, Miles against Ford Motor didn't really deal with the premature notice of appeal.

JUSTICE NATHAN HECHT: Yes. Right.

MR. GILSTRAP: Premature notice of appeal didn't count because the plaintiff also got

there first.

CHAIRMAN BABCOCK: Okay. Mike Hatchell.

MR. HATCHELL: I can speak on this because I was counsel in Miles and I live in a swing county. So --

PROFESSOR CARLSON: You're a swinger.

CHAIRMAN BABCOCK: So you have standing.

MR. HATCHELL: -- unfortunately I predicted when the court went to this dominant jurisdiction thing that this was not a good thing. Historically this was handled, and I'm sorry that it's causing the court so much grief; but it used to be when we had this problem before Miles that what happened was the clerks of the two competing courts of appeals would just call the Supreme Court, and at least in Judge Calvert's era, I mean, that decision was made that day. And it probably was arbitrary; but nobody ever really complained much about that because it was the Supreme Court.

What has happened after Miles is now is in high dollar cases everybody has got a notice of appeal in their brief case; and as soon as the jury verdict is in there is a

sprint down to the clerk's office to get your premature notice on file so you can select your court. This is a very unseemly practice.

My problem with this rule is that I don't understand that it accomplishes anything. What if -- well, first of all, what is the date they call, called "ripe for decision" by the appellate court? That's not defined anywhere in the rules. I mean, is it oral submission or submission to the court, or is it -- I don't know what date that is.

And the second thing is what if, what this does now is just it seems to me exacerbates the problem. What if the only two notices of appeal that you have are premature? This rule makes them both end up in a tie and back down in Austin.

CHAIRMAN BABCOCK: Spoiled sport.

(Laughter.)

JUSTICE BRISTER: What is the dominant jurisdiction in Miles? What does it say? If the case has been --

JUSTICE NATHAN HECHT: It says the first notice of appeal filed is that, is the court,

whoever wins the race.

MS. SWEENEY: Timely or untimely?

JUSTICE NATHAN HECHT: Untimely is not involved. There was an allegation it was untimely; but it was not proved as I recall in Miles.

MS. SWEENEY: Okay.

JUSTICE NATHAN HECHT: And then in Perry we said it doesn't have anything to do with this; but one of the ideas in the Perry case --

JUSTICE BRISTER: Is it ripe enough?

JUSTICE NATHAN HECHT: -- in the Perry case was you can't file before it's time and then say "Well, give me back until the time I filed it," so that you couldn't file a notice of appeal the day after you filed the petition and then wait three years later until you get a judgment and say "Well, I won the race." You would have to win the race from the time the gun went off, not from some other time.

JUSTICE BRISTER: We have this problem, of course, because all of our counties are overlapping. And we don't have it like this. I don't think plaintiffs are in the rush to

really get to the First or the Fourteenth particularly; but we have this all the time as a routine matter because we have lots of mandamuses. That's our specialty. The one thing we can't transfer out to the rest of the state who decides our easy cases are the hard ones with all the mandamus ones. And so one court may or may not spend a lot of time on the mandamus. We frequently have the court where it's decided whether it's the First or Fourteenth is not in our course. We would have nothing do with that. That is down in the district clerk's office of any one of the fourteen counties sometimes of which the notices of appeal on a regular basis do not make it to us, get lost, and after we get the briefs we find we still haven't gotten the notice of appeal. So sometimes it is months until we get the notice of appeal and find out whether it is supposed to be in our court or not.

Now most of those we handle; and there is some discussion about whether this is right or wrong; but we handle this informally, which is we call up, I call up Mike Schneider and say

"Have you-all spent a lot of time on this or not?" If they haven't, then we take it whoever had the notice of appeal; but if they have, we transfer it between ourselves. But it's a constant routine problem for us about where it is supposed to be; but that may just be because it's crazy to have two courts in one jurisdiction.

CHAIRMAN BABCOCK: But the appeals in your court are just filed with the clerk and then you-all decide who gets it. Right?

JUSTICE BRISTER: No. The appeal is filed down in the trial court.

CHAIRMAN BABCOCK: Right.

JUSTICE BRISTER: And the district clerk down there decides whether it's going to the First or Fourteenth. Eventually they let us know about that. In the meantime we've got mandamuses and motions to stay; and frequently we get those before we have any idea, sometimes before the notice of appeal is filed.

CHAIRMAN BABCOCK: How is it that the district clerk decides whether it's going to go to the First or the Fourteenth?

JUSTICE BRISTER: Dice, I guess, with a 1 and a 14 on it. I don't know.

CHAIRMAN BABCOCK: Really?

JUSTICE BRISTER: Yes. It's supposed to be random. We have our doubts about that; but I think the First has their doubts about it too. We both think "They get all the easy cases."

(Laughter.)

JUSTICE NATHAN HECHT: Do the other counties do it the same, in your district do it the same?

JUSTICE BRISTER: They are supposed to. But I hear a lot of reservation about whether it's really random in some of the smaller counties. But again, it's not a big problem right now. Again, I'm not sure anybody perceives it as a big advantage being in one or the other.

JUSTICE DUNCAN: It used to be. We used to work really hard to get the merits of a case presented to the First Court through some type of accelerated proceeding.

MR. GILSTRAP: It is a problem in East Texas. I think there is a definite perception

that one court is more favorable to your case than another.

CHAIRMAN BABCOCK: Stephen.

MR. TIPPS: I had a question, Frank, related to one of Mike's points. Neither do I understand the words in the last two lines "after the appeal becomes ripe for decision." Is that supposed to mean something other than after the event that begins the period for perfecting the appeal? Because when I first read it I thought "Well, that is the effort."

MR. GILSTRAP: I don't know, Stephen. I think, you know, there are some. Maybe an interlocutory appeal is why they have broader language, something like that. It seems to me for a final judgment it is after the judgment becomes final. Then it's not a premature appeal and the first to file his notice wins. But, you know, maybe in an interlocutory appeal that's why they have this broad language. I don't know, though.

MR. TIPPS: Because it seems to me that if we're going to do a rule like this, that there ought to be, if the goal is to say a prematurely filed notice of appeal doesn't fix

dominant jurisdiction, then we need to be saying that only those that are not premature, which would be one that is not filed before the event that begins the period for perfecting the appeal. That would not eliminate the race to the courthouse. It would just delay it. You would race to the courthouse after the judgment or whenever.

JUSTICE NATHAN HECHT: In response to Mike's comment a little earlier, this problem predates my service on the court; but at some point the transfer of cases became an administrative responsibility that was assigned to one of our judges. And before I got there Judge Ray was assigned that responsibility; and he had transferred a case just routinely and was being criticized for having transferred it for ulterior reasons. So after that we formalized the process so that the transfer of cases is now done on a very mechanical basis and Judge O'Neil who now has that responsibility doesn't have anything to say about which case goes where. She just draws up the order after the determination is made usually by the courts of appeals. But on

these that come up four or five times a year it wouldn't. We could assign them on a random basis and just have the clerk keep a random list downstairs; and when we got one of these just give it to whoever is next on the list. That way nobody could predict which court it was going to go to so there wouldn't be any advantage to waiting or hurrying. And then but I guess the question would be then was the clerk really doing that, was he really following the random assignment?

JUSTICE BRISTER: So you could pass a court rule that said in Brazos County if you file a notice of appeal, whether you're going to end up in the First, Tenth or Fourteenth is a random. I mean, that makes perfect sense.

JUSTICE NATHAN HECHT: Or have the two clerks' offices run a random sequence that repeats every so many. Set it at 50 or 100 or 20; but if you set it at more than 20 or 30 or 40, there is no way anybody could predict. That keeps one court from getting too many cases in a short period of time and makes it unpredictable which way you're going to go.

JUSTICE BRISTER: Shouldn't that be the

way it is, Mike? Just random?

MR. HATCHELL: I'm very much in favor of that personally. I would not as a litigant have any complaint about that at all. And I don't perceive that the Court really needs to write an opinion or anything like that. I just I was never obviously privy to any of the conversations between the court of appeals, clerks and the Supreme Court. All I know is in Judge Calvert's era and thereafter you got it back by return mail and there just wasn't all this nashing of teeth.

I'm proud that the court is concerned to do it right; but I just think it's a legislative problem that we can't seem to be able to get fixed, and I think if the court decides it on that basis or just letting the Chief do whatever he wants or what have you, I don't have any complaint about that.

CHAIRMAN BABCOCK: Justice Duncan and then Buddy.

JUSTICE DUNCAN: I would just reiterate my concern before that once a court has gotten up to speed on a case it would be a damn shame if random assignment threw it into another

court that then had to repeat the work that the first court had done.

MR. LOW: But that would also prevent somebody from being in one court standing waiting and somebody on the phone saying "Okay. You stamp it now" and somebody here and all that race to the courthouse. You know, it would end all the confusion. That would be a good reason for it.

MR. HATCHELL: Buddy, the problem that's going on now, and Sarah both, is that these things are causing so much consternation that appeals are being held in abatement now for several months. I have got one now that's just been sitting there for about three months. People are ready to brief it and what have you; but we just can't get it decided. So something that is just quick and just gets it done.

MR. LOW: Well, but wouldn't this do that? Because I mean, what are you if you've given your notice of appeal, you know what your issues are and you're writing your brief, it doesn't make a difference what court you file it in, does it?

JUSTICE DUNCAN: Yes, it does.

MR. HATCHELL: It can.

MR. LOW: What I'm saying is if you don't have a choice, it can't make any difference.

CHAIRMAN BABCOCK: If we have a rule on random assignment, does it go in 27.1 or where does it go?

MR. GILSTRAP: I don't think it goes in 27.1. I think this whole thing is really misplaced in premature appeals. It needs to go somewhere else.

JUSTICE NATHAN HECHT: It might need to go under administrative rules.

MR. HATCHELL: Yes. That's what I think.

JUSTICE NATHAN HECHT: Rule 13 or 14, whatever you want.

HONORABLE HARVEY G. BROWN, JR.: Chip.

CHAIRMAN BABCOCK: Yes.

HONORABLE HARVEY G. BROWN, JR.: We could take care of Sarah's problem about the court that has done a lot of work. Maybe we could put random assignment unless the courts of appeals agree among themselves; but maybe that creates a problem for the courts of appeals.

JUSTICE DUNCAN: Don't ask us to agree.

HONORABLE HARVEY G. BROWN, JR.: It doesn't in Houston. I could see how it could potentially.

CHAIRMAN BABCOCK: And the way you would have done a lot of work would be if you had decided an appeal, it went up to the Supreme Court and got remanded. Is that how it happens?

HONORABLE HARVEY G. BROWN, JR.: No. They were talking more about mandamus.

JUSTICE BRISTER: And temporary injunction. I mean, the issue is the same; but after the trial it's just a different standard.

CHAIRMAN BABCOCK: Right. Right. Yes, Elaine.

PROFESSOR CARLSON: Under the current backlog equalization random method that you are using doesn't the problem that Sarah is discussing happen now?

JUSTICE NATHAN HECHT: Yes. With respect to agreement as far as I know the Texarkana and Tyler courts have never disagreed about it. They're always willing to cooperate; and

their position is always "We'll take it, or you can sent it over there. We don't care. Just make sure they get the next one" is usually their only concern is to equalize the workload. But they don't fight over the cases.

CHAIRMAN BABCOCK: Is this something, Justice Hecht, that we need to come up with today so as not to delay the court's consideration of the TRAP rules?

JUSTICE NATHAN HECHT: Well, I'm thinking if we move it over in the administrative rules and deal with the larger problem, that would involve --

JUSTICE BRISTER: This is really a clerk process more than a Civil Procedure process it seems to me.

JUSTICE NATHAN HECHT: -- then that wouldn't detain us any further on these, and it might be a better solution to the problem.

JUSTICE BRISTER: I would like to address it some, because we have some questions. I mean, some people have raised some questions about whether we can agree to swap a case just because the other courts or whether we've got

to get an order from Tom to be able to do it.

CHAIRMAN BABCOCK: Sorry for my ignorance. Where are the administrative rules?

MR. LOW: Administrative Rule 14.1 or something like that deals with the trial court.

CHAIRMAN BABCOCK: Do we have a subcommittee on rules of judicial administration?

PROFESSOR CARLSON: No. The Court does it.

MR. LOW: Doesn't 14.1 deal with a similar situation where people file one lawsuit filed in this county and another one in that county and decide if you have a provision for that in the trial court?

JUSTICE NATHAN HECHT: Yes.

MR. LOW: In the Administration Rule 14.1 or something like that.

CHAIRMAN BABCOCK: Okay. Who wants to be on this subcommittee on judicial administration rules? We shouldn't do it?

PROFESSOR CARLSON: The Court has traditionally written these.

JUSTICE NATHAN HECHT: We need some help on this.

CHAIRMAN BABCOCK: Hatchell does. Hatchell, you're chair. Who do you want on your committee?

MR. HATCHELL: Anybody that is interested.

CHAIRMAN BABCOCK: Who is interested? Ralph, Stephen, Brister. So Mike Hatchell will be chair joined by Ralph Duggins, Stephen Tipps, Judge Brister. Anybody else? Justice Duncan, would you like to?

JUSTICE DUNCAN: Sure.

CHAIRMAN BABCOCK: And Judge Duncan. And can you report to us on the next go around?

MR. HATCHELL: Uh-huh (yes)

CHAIRMAN BABCOCK: Great.

MR. GILSTRAP: Chip, I have one question, and that's this: It's my impression that in most appeals this doesn't happen. And are we by making some kind of random assignment are we going to be maybe significantly changing the number of cases that go out of one county? Like, for example, maybe most of the appeals out of Kaufman County go to Dallas and

now we're starting to send them to, which is more convenient to Kaufman County. Maybe we're starting to send a significant number over to Tyler. I just wonder if that is going to possibly cause a problem.

CHAIRMAN BABCOCK: I think that that is something that ought to be considered. We sure don't want that.

MR. LOW: Not after Mike gets through with it it won't be a problem.

JUSTICE NATHAN HECHT: And because of the administrative nature of this the subcommittee probably better touch base with the Conference of Chiefs --

JUSTICE BRISTER: Meeting in late April.

JUSTICE NATHAN HECHT: -- who will feel like this is something they should be involved in, and justifiably so.

CHAIRMAN BABCOCK: When is our next full meeting?

MS. LEE: May 17th a 18th.

CHAIRMAN BABCOCK: May 17th and 18th.

JUSTICE BRISTER: The Chiefs' meeting is April 23rd.

CHAIRMAN BABCOCK: So maybe we could put

it on the agenda for next time, Mike. Is that okay?

MR. HATCHELL: Uh-huh (yes).

CHAIRMAN BABCOCK: Okay. Great. That takes care of that. Okay. Skip, are you ready to report on Rule 329(b)?

MR. WATSON: Yes.

CHAIRMAN BABCOCK: Have at it.

MR. WATSON: Okay. To get us back up to speed quickly, this is the problem where courts are having to in some instances retry cases because they waited too long to reenter a judgment after granting a motion for new trial. Some courts are saying that a trial court's power or plenary power to reinstate a judgment previously set aside by granting a motion for new trial is limited to 75 days after the judgment was originally signed.

We discussed this two meetings ago, went through the cases, how they came about. I'll give you the briefest of thumbnails. The most recent case was Ferguson vs. Globe Texas Company out of the Amarillo court, which it held that a, quote, "trial court may only vacate an order granting a new trial during

the period in which it continues to have plenary power." It also held that the trial court's plenary power only continues for 75 days after the date judgment was signed.

Now they relied upon the Supreme Court opinion in Porter v. Vick in 1994. Porter was a per curiam mandamus in which a trial judge was ordered to set aside an order which had vacated an order granting a new trial. Porter is instructive of how bad the problem can get and why it needs to be fixed because in that case there was a trial to the court. The judge that had heard the case both as fact-finder and as determiner of what law controlled those facts was unable to hear the motion for new trial. A visiting judge was assigned. The lawyer opposing the motion for new trial was caught in trial across the hall, called over and said he couldn't be there. The motion -- the message did not get through, so the visiting judge granted a new trial by default.

When it went back to the judge that had actually tried the case and entered the judgment that he intended to enter he

reentered the judgment that he had intended to enter. The case was taken up on mandamus, and this was done outside the period of plenary power. The Supreme Court said that was right and, quote, said it was signed long past the time for plenary power over the judgment as measured from the date the judgment was signed and it cited Fulton v. Finch.

The problems pointed out in Justice Hecht's e-mail raising this problem is that the Fulton v. Finch was under a completely different rule. The version of 329(b) then in effect under Fulton v. Finch was that all motions for new trial "must be determined within not exceeding 45 days after the motion is filed." The rule was completely rewritten in '81. That language was dropped.

So under the current rule what we've got is a situation in which the timing relates solely to the finality of the judgment, not the dealing with motions affecting the judgment. And as a result we're in a situation where the courts under old case law are feeling constrained to hold that because plenary power exists for only 75 days from the

date the judgment is signed even though that judgment is set aside and exists no more for any purposes but the granting of a motion for new trial the 75 days still exists and you can't undo the undoing of that judgment. You can't undo the granting of the motion for new trial to set aside that judgment. Hence you have to go forward and have a new trial instead of just simply signing the judgment that should have been there in the first place.

The consensus of the committee when this was initially addressed was I think unanimous that it needed to be fixed, that it's fine to fix it by rule, and the only two things on the table, three things are this: First, should there be some time limit on the amount of time that the trial court can reenter its original judgment? In other words, since we're not dealing with plenary power, but it has full jurisdiction to do whatever it wants after that judgment is set aside in fairness should there be a point where it can no longer pull the trigger and reenter its original judgment? Should that be at the close of the

evidence of the second trial? Should it be the picking of the jury in the second trial? Should it be 90 days after? I mean, just pull numbers out of the sky. You know, that was on the table.

Frank Gilstrap passed me a note quite correctly pointing out that in my initial attempt to draft something that would work by making Rule 329(b)(h) that I had assumed that a judgment had been entered before a motion for new trial had been granted and so I needed to draft around that to make sure that we had something that worked even if a motion for new trial were granted prior to entry of judgment.

Finally Carl Hamilton and Bill Dorsaneo wanted to take a different approach that just simply said that the court retains full complete jurisdiction after a new trial order had been signed. In other words, that it can do anything. So there are two proposals on the table, and they're in my memo of January 18th; and I hope I have fairly stated Carl's proposal and will let him address the memo that he brought up.

The first is the modification of my original proposal which reads as follows amending Rule 329(b)(h) to read, quote, "If a motion for new trial is granted, judgment may be entered, or a judgment that has been set aside may be reentered, modified, corrected or reformed in due time prior to," and then I put in our choices that are just random based on the comments, "the expiration of 90 days after a new trial is granted/the commencement of or close of evidence in a new trial. The time for appeal shall run from the time the order granting judgment is reentered, modified, corrected or reformed, or the new judgment is signed."

And comparing that is Carl and Bill's proposal that simply adds a new subparagraph (i) which is to say "If the court grants a new trial by signed, written order before the expiration of the period of its plenary power provided by this rule, the court retains jurisdiction of the case for all purposes." That's all I have got.

CHAIRMAN BABCOCK: Okay. Carl, you're up.

MR. HAMILTON: Okay. Well, in the memo that I sent out there are cases cited that are namely from the Fourteenth Court in Houston which I think really correctly states what the law ought to be, even if it's not, as a result of Porter vs. Vick; and that is that once the court grants a new trial we start all over. The court has jurisdiction to do whatever the court wants to do.

Now I guess I don't really have a problem if you want to put a limit on it and say that the court can't go back and enter judgment on the original judgment once you've started a new trial. That wouldn't make a lot of sense to make the party start a new trial and then the judge says "Hold it. I want to enter the judgment on the first time around."

So I don't really have a problem with that. I don't know that there are many judges that would do that; but I do think the judges ought to have the power to ungrant the new trial at least up until the new trial has started. And 75 days or any kind of an arbitrary period seems to be unworkable and doesn't make any logical sense.

MR. EDWARDS: It doesn't make any logical sense to spend all of the money you're going to spend after you get a new trial granted. I don't care which side of docket. Your time and money is going into the new trial; and to not have some cutoff where that is not going to be wasted effort and wasted money. We get a lot of criticism about how much it costs for litigation. And letting a new trial happen any time until it goes to trial, again we may have people leaving the bench being promoted up to the appellate bench in an election that comes in. Somebody dies. Somebody retires and different judges looking at it. And if a new trial is granted, maybe have some short fuse, 30 days or something to give a reconsideration of it.

In the cases I have seen if you have forever to give a new trial, to put a judgment after a new trial was granted, I guarantee you that some of the lawyers I've been up against I'd be down there every other week on a motion for rehearing on motion for new trial and wouldn't have time to do anything other than just spend money and time.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Skip, if the trial court were to reenter the same judgment after granting a new trial and ungranting it, do you have an en banc problem? Can you start with that? A substantive change in the judgment that you could then appeal hopefully?

MR. WATSON: I think that could be a referral. I might have one of those early cases, in fact the first case I had, Parr vs. Tadco, where the other side asked the court to set aside its judgment so it could file a JNOV not understanding it could file a JNOV anyway. Of course, I said "Why sure" and then handed the same judgment back typos and all to be re-signed and was unsuccessful in the El Paso court on that point because of the obvious unfairness of the whole situation. I think that's why I tried to add the last sentence in my version that says that the time for appeal shall run from the time the order granting judgment is reentered, modified, corrected, reformed or the new judgment is signed. Clearly that is intended to trump the problem you're talking about. Now whether

that creates a new problem or not.

JUSTICE BRISTER: You would have to reenter it. Right? Because the problem is if you enter the judgment, new trial granted.

MR. GILSTRAP: Vacates the judgment.

JUSTICE BRISTER: Just uncover the old judgment I take that, I mean, that to me was always the Porter vs. Vick problem. If your notice of appeal is too late to do anything about the first judgment, if all you do is set aside the motion for new trial order, well, the judgment was back there and the notice of appeal runs from the judgment.

MR. WATSON: That's right.

JUSTICE BRISTER: And so now "Oh, well, I could appeal that the motion to set aside the new trial was an abuse of discretion; but that's a lot harder thing to prove. And so you have to make it --

MR. WATSON: It's got to be that you're appealing from the new judgment.

JUSTICE BRISTER: -- you have to reenter the judgment so that the appellate deadlines start over again.

CHAIRMAN BABCOCK: Skip, just so we're on

the same page, this is your memo of January 18th, 2002?

MR. WATSON: Correct.

CHAIRMAN BABCOCK: And it's the language that you have on the first page of your memo that we're talking about?

MR. WATSON: Yes. You have two alternatives. And we're talking about alternative one at this point. And Carl's is alternative two.

CHAIRMAN BABCOCK: Got you. Frank.

MR. GILSTRAP: Just so we're covering everything, it was either Porter v. Vick or one of these other cases that as I recall it was it invoked more than just the Rule 329(b)(h). I think one of the cases also invoked Rule 2 of the Appellate Rules which says the court can't suspend the rules in any way that would alter the time for perfecting the appeal of a civil case. And I think this new rule is probably specific enough to trump that; but I just want to make sure that everybody agreed with that.

CHAIRMAN BABCOCK: Judge Brown.

HONORABLE HARVEY G. BROWN, JR.: I just

want to say I don't think we should have an arbitrary time period that is too short, if we're going to have some time period. This came up in my court recently where I somewhat sua sponte suggested a motion for new trial after a verdict thinking that some evidence had been admitted improperly and an argument had been made improperly and that the plaintiff deserved a new trial. Months later the parties gave me some briefing on the evidentiary issue, and I decided I had made a mistake and that I shouldn't have granted the new trial and that the verdict should be reinstated.

We had all these arguments about whether I could do it or not. And I said "Well, I'll let -- it may be a chance for the Supreme Court to clarify this." So I entered the new judgment, essentially the first judgment. I mean, I didn't know that I had 30 days. They didn't know it was 60. It took like four months before all this briefing got in front of me and I knew the real issue. So I guess I don't think 30 days or 60 days is a fair time period to fix the problem.

CHAIRMAN BABCOCK: Okay. Skip.

MR. WATSON: The problem that we've got to deal with is finding a balance between what Bill Edwards said and what Harvey just said.

HONORABLE HARVEY G. BROWN, JR.: I agree.

MR. WATSON: Because, you know, there is a real problem both ways. On the one hand you are ostensibly getting rid of the expense and the cost and the time of a needless second trial which is where the real money is. That's where the money is being spent. On the other hand, if it's delayed too terribly long, well, why on earth have we spent $200,000 or $500,000 getting ready for trial to be told on the cusp of trial "Oops, I changed my mind."

I understand Bill and everyone's who spoke last time desire to have some point where you say "We've done this, you know, and now we're into the new one and the new one is going to go forward." And I'm not sure how I feel about that, and I'm not sure where.

I think the district judges in the room need to help us know how much time is needed to draw that line and where the balance is

between being overwhelmed with the kind of motions Bill is talking about to reconsider the order granting the motion for new trial, because those are going to be coming hot and heavy.

CHAIRMAN BABCOCK: Well, do we have consensus that your second alternative here, the commencement of or close of evidence in a new trial, that that's too far down the road?

MR. EDWARDS: It's way too far.

CHAIRMAN BABCOCK: Bill thinks it's way too far and judges are nodding their head. Carl.

MR. HAMILTON: I don't think it's too far. And I think in some cases it may not be too far. In some cases it may be too far. I have some cases sitting six years old, courts granting new trials. They may or may not ever come up. Nobody is preparing for trial until some judge decides or some side decides they want to get it to trial, and then everybody will start preparing for trial; and that ought to be the time that if this motion is going to be taken up, it would be taken up then.

CHAIRMAN BABCOCK: On the other hand if

you had a 90- or 120-day or 60-day rule, everybody would know that they had to get their act together to get it done, I would think. Judge Brown.

HONORABLE HARVEY G. BROWN, JR.: I would suggest the time frame shouldn't be from when the motion for new trial is granted, the front end, but should be from the back end of the trial because sometimes your trial is not, is put off for a year or maybe longer in some situations, and sometimes the trial it put off just for 30, 60, 90 days or something. So it seems to me the better solution is to look at the trial date and put the cutoff before the second, the retrial.

I mean, in my case this wasn't really much of an issue because as part of the new trial I limited discovery because I didn't want all that expense. But if it was to open the door to new discovery, say 30 days before the new trial, that's the cutoff date or something like that absent some exceptional circumstances. The exceptional circumstance I could see would be if some witnesses die that were very significant that somehow impacted

the judge's ruling to begin with, that might change it; but other than that I think 30 days before trial.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I don't think so. Under your schedule you've got to have all your experts ready before then. You've got to spend all your money. You can't wait until 30 days before trial to spend your money and get ready. And I've never tried a case the second time that I didn't put more money and more time in it than I did the first time. And so, I mean, and that's just not right. And if the judge thinks, you win a case and says "Okay. I'll grant a new trial and you boys go out there," and he just holds that over like holding a motion for mistrial and going along and trying to get together, I think there ought to be some time. He just can't hold you out there on a string for a long time. That's just not a good feeling; and if the judges were in the courtroom, they'd understand that it is not.

CHAIRMAN BABCOCK: Judge Peeples, do you have a comment?

HONORABLE DAVID PEEPLES: Yes, I do. I want to second what Buddy just said and what Bill said a minute ago. I think those are very valid concerns. I want to say also I'm not convinced there is such a great problem. There may be some recorded cases; but this I think doesn't come up very often. And the cases as I understood, Skip, your summary of it it seems to me that the lawyer who got defaulted on the new trial hearing was negligent for not finding out what happened in a hearing that he knew about and couldn't go to. And I don't think we ought to change rules lightly to try to keep somebody, you know, bail out him who was the guy who was negligent.

Now another point: It seems inconceivable to me that we would want to allow a judge to grant a new trial and set aside a default judgment and then to be able to reinstate that later on. Even if we want to change this, surely we wouldn't want someone who has been defaulted and has gotten set aside for the judge to be able to reinstate that months later no matter what has

happened. I think that would be incredible. And I think this business about holding it over, having it hanging over the heads of people no matter what the development of the case has been that would just be extraordinary it seems to me. I just question whether we ought to do anything except maybe lengthen the amount of time. I think that's something to talk about.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I agree with Harvey Brown that it ought to be tied to the time period when the new trial is set. Maybe 30 days is too short for what Buddy says; but maybe like 60, 90 days before the new trial that if a motion is going to be filed for the court to reconsider that, it ought to be filed 90 days before the new trial.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: I've been doing these cases for over 40 years, and it's never happened in one of my cases where anybody. You know, the new trial gets granted. It's a new trial and you get a new setting and you get whatever you're going to do between now and the new

setting and go on. We're talking about isolated instances. We're letting, on a bell curve we're letting the far ends deal with what happens most of the time; and it doesn't make good sense to me. I think if you take those far end cases and deal with them one at a time, it's a lot better for everybody.

CHAIRMAN BABCOCK: Well, the charge to us from the Court was to consider whether the holding of the Porter vs. Vick case should be changed by rule, so I guess that's what our charge is. Skip.

MR. WATSON: I think that's precisely the point. This is not coming up as a wild hair here. This is the Court has specifically outlined the problem and, quote, "requested the Advisory Committee consider whether Porter should be changed by rule.

I understand that some might not feel that way; but there is a fundamental problem that is being overlooked. Under the existing rule today the court has the power to do whatever it wants to. The trial court can do whatever it wants to because plenary power necessarily goes away when the judgment goes

away. It's tied to the judgment instead of having to act on a motion for new trial. So all of the problems that people are talking about that we would be coming up with exist today if the rule is properly interpreted.

The problem is that some courts are going back under bad case law and misinterpreting the rule to say the courts can't do something that they clearly can do under the rule. This is our chance to A, fix a problem and B, try to deal with the problems that are going to come up if the court has to do it on its own by opinion. It's our chance to put it in a rule and deal with these things rather than deal with them on an ad hoc, case-by-case basis later.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I'm a little concerned about working backward from the trial date in a situation where it's a long period of time and the identity of the judge has changed. You know, ostensibly the new trial is granted to overturn a jury verdict because the trial judge heard the same evidence the jury heard and there is something that the judge doesn't

like about it. If we have a floating timetable and if there is no trial setting and if the judge changes, we have a new judge in that didn't hear the evidence, probably will never have read any kind of transcript of the trial; and I think they're going to be making a decision on reinstating a judgment on some ground other than what we expect the trial judge to be doing, which is operating as a safeguard when a jury gets outside of acceptable limits. And I'm concerned about the possibility that Bill has raised that the identity of the judges will change, and what you're going to end up with is a political decision instead of a decision that relates to the facts of the case.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: To respond to that, Richard, we have that opposite side of the coin in our county. Political decisions are made by the judges who routinely grant new trials whenever it doesn't suit them. So when they grant the new trial and then the case sits there two or three years. And you may have a new judge come onboard. He may have a

record he can read of the original trial, and then he may want to ungrant that new trial. So it works both ways.

CHAIRMAN BABCOCK: Bill.

MR. EDWARDS: I've seen trial courts in this state who have no briefing attorneys, no help other than themselves. I have a big picture of them reading the entire record of a trial when you're lucky if they've even looked at the style on a two-page motion when you go in front of them.

JUSTICE BRISTER: Well, it does happen.

MR. EDWARDS: If it happens again, we're out at the end of the bell curve.

JUSTICE BRISTER: I agree with the comment that this is a rare problem; but we did have a situation. Dwight Jefferson resigned from the bench, had a big case, huge verdict, decided not to rule on the motion for new trial or the remittitur questions before he left. And so we -- I transferred it to another judge who had two days to decide whether to grant a remittitur or new trial because of course she couldn't. And I of course said when I first found out about

Porter vs. Vick I said "Grant the motion for new trial. Read the trial," which this was a trial judge who certainly would have done so, "and decide what you're going to do." "Sorry. I can't do it. I have got two days."

So I mean, but that's a rare problem. I'm not sure that it might not be more complicated drafting a rule to fix this than the number of cases. You could just say "Well, let the court of appeals read the whole trial and decide whether we need a new trial or not."

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I even have a problem that once a judge grants a new trial I've always felt I was in the same position I was in before, that he couldn't rule as a matter of law for me unless I have a summary judgment or rule against me. And I always felt, and my gosh, I just can't see living with the judge having forever being able to reinstate it. I've never seen it happen. I've never had it happen to me. I have had new trials granted against me. I never even thought about asking the judge to reinstate the verdict. I guess

my thinking probably doesn't add much, because I'm not even for the concept that the judge can do anything but try it after that.

CHAIRMAN BABCOCK: You don't think that they can, you don't think the law is today that if they've got plenary power, they can reinstate the prior judgment?

MR. LOW: I find that to be the law, and it's distasteful.

CHAIRMAN BABCOCK: Do what?

MR. LOW: It's distasteful. I think that once he -- the judge shouldn't just grant a new trial. He ought to be sure. He ought to review. And it's like lawyers. You have to make decisions. The judge has to make a decision. And I think once the judge makes that decision he's declaring "Yes, this case needs a new trial." Now to go back and say "Oh, well, I was mistaken" I just don't think that adds much to our system or the way our system appears. And I think once you grant a new trial, yes, you have plenary power; but to try the case and rule on motions, but not to reinstate.

CHAIRMAN BABCOCK: Judge Brown and Judge

Brister both point the examples of instances where they would have granted one, but then later changed their mind.

MR. LOW: Like I am in trial. I've made mistakes before; but I live with them. And they should be careful when they do that, grant a new trial. Just if you know what you're doing and if something else comes up, every case I've tried I found out something a little different. I tried it different the next time. And there is no perfection. The thing is everybody has a fair and equal shot. The judge has the shot to see whether that was fair or not during that trial. If it's not, the judge just may have to grant a new trial.

CHAIRMAN BABCOCK: Could a judge grant summary judgment after granting a new trial?

MR. LOW: He can grant summary judgment before even trying the case.

MR. EDWARDS: If one is filed, the motion is filed.

JUSTICE BRISTER: We had a case on that where the judge granted summary judgment. It's easy with summary judgment. Granted the summary judgment, granted a new trial, motion

for rehearing and second amended motion for summary judgment, granted the summary judgment. You don't have the Porter vs. Vick what are you appealing from because the first summary judgment is dead and there's a new one.

CHAIRMAN BABCOCK: Right. Yes, Mike.

MR. HATCHELL: Just for the record, there are cases that say that if you go into a trial on the merits, a summary judgment record becomes obsolete. So the judge cannot enter a summary judgment absent a motion and a new record.

CHAIRMAN BABCOCK: That's good to know.

MR. ORSINGER: What if there was a partial summary judgment before, and then you go into trial on what left is over? Is a partial summary judgment still in force?

MR. HATCHELL: Good point. I don't know the answer to that.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I think there is another possibility here, and I think this happens in federal court. I don't know if it happens in state court. And that is the judge may want

to vacate his judgment and leave the jury findings intact. In other words, "I'm not going to grant a new trial. I'm simply going to vacate the judgment; but I don't want to modify the judgment. I just want." Maybe there is another issue that needs to be tried separately. Maybe he needs to think about it longer. So I guess there is that possibility that we want to give the judge the power to vacate the judgment without granting a new trial.

CHAIRMAN BABCOCK: Okay.

JUSTICE BRISTER: Understand though this proposal would make that for a long term. I could extend the plenary power for years by granting a judgment, motion for new trial and then however long you'll leave me; and then I could just extend the plenary power. If I can just reenter the first judgment I did, then the amount of plenary power is in my discretion. I decide what it's going to be.

MR. GILSTRAP: I understand.

JUSTICE BRISTER: I'm not sure we want that. I bet that is going to end up being confusing for when the appeal is.

CHAIRMAN BABCOCK: It seems to me we've got a threshold issue here, and I'm not sure which way the wind is blowing; but the Court's charge is that we advise the Court on whether the holding of Porter should be changed by rule.

MR. EDWARDS: Do I understand that the Porter Rule is 75 days? They can change after 75 days, up to 75 days?

CHAIRMAN BABCOCK: The Porter Rule as I understand it is that any order vacating an order granting a new trial signed outside the court's period of plenary power over the original judgment is void.

MR. EDWARDS: And that's 75 days?

MR. ORSINGER: Well, is it 75, or is it 105?

MR. GILSTRAP: It's more than that now. They changed that rule.

MR. ORSINGER: I think they picked 75. Didn't it say 75?

JUSTICE BRISTER: I think it's 105.

CHAIRMAN BABCOCK: It's 105 now. Right? Anyway, some period of time.

MR. EDWARDS: But maybe you ought to

divide that into two parts. Do we want a period of time during which they can change that? And the second question is if so, how long?

MS. CORTELL: Wasn't there a Dorsaneo proposal? Did I hear that, Skip?

MR. WATSON: Yes. That's the proposal number two.

MR. CORTELL: How does that read? I don't have that in front of me.

CHAIRMAN BABCOCK: That's a Carl Hamilton proposal, isn't it?

MR. WATSON: Yes. Carl, why don't you read yours.

MR. HAMILTON: Once a new trial is granted the trial court has exclusive jurisdiction in the case until a final judgment is entered and the court's plenary power as set forth in this rule has expired.

MS. CORTELL: I'm sorry. What does that mean?

MR. HAMILTON: It means that his power doesn't expire to ungrant the new trial.

MR. LOW: Ever?

MR. HAMILTON: Ever.

MS. CORTELL: Why are you referencing the expiration of the plenary power and the court's plenary power as set forth in this rule had expired? What does that mean?

MR. HAMILTON: Because the rule provides already when the plenary power expires. After the final judgment.

MR. ORSINGER: But if the judgment is set aside, that is just a hypothetical figure.

MS. CORTELL: Right.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: For what it's worth, I'm not sure I quite understand that proposal. But my leaning would be towards something that does not, that we don't have the concept of plenary power at all at this point, I mean, where it's open ended, and we not try to micromanage what happens from that point on. I think as has been stated here, the opportunity for abuse is pretty diminimus, and I'm concerned about problems that would arise from the particularized rules that have been or timetables that have been discussed regardless of from which end you try to calculate it.

MR. HAMILTON: Your proposal would be just to leave the court with jurisdiction, but not say anything about it?

MS. CORTELL: Right.

MR. HAMILTON: That's fine.

MS. CORTELL: Right.

MR. GILSTRAP: But that completely abandons the notion that there is a cutoff date. Is that what you're saying?

MS. CORTELL: Right.

MR. GILSTRAP: And, you know, it seems there has got to be a cutoff date. I mean, we have this case out in the Fifth Circuit where they addressed the problem, and the judge tried the case, didn't like the judgment, vacated, tried it again, and then went back and decided he liked the first one better and reinstated it. I mean, at some point the judge loses power.

CHAIRMAN BABCOCK: Judge Peeples.

MR. PEEPLES: I don't think there's enough of a problem we're trying to fix. But if we want to, why not give the judge a certain, a fixed amount of time from the date of the order that grants the new trial?

MR. ORSINGER: I agree.

HONORABLE DAVID PEEPLES: Thirty days, 45 or whatever. And that would be a curtailment of the plenary power. In other words, you wouldn't have plenary power after that to set aside an order granting the new trial.

CHAIRMAN BABCOCK: Okay. Let's take the first part of what you said, Judge Peeples, because I don't have a good sense of our committee. What you first said was "I don't think there is enough of a problem to do anything." And that's where Bill Edwards is coming out and maybe some others. Carl disagrees. Carl Hamilton disagrees with that; but I don't know where everybody else comes.

So the charge from the Court is to consider whether the holding of Porter should be changed by rule. And so everybody that thinks it should be changed by rule, not committing to what that change is going to be, but the status quo versus changing it by rule, I'd like to get a sense of everybody who thinks it should be changed by rule to raise their hands.

JUSTICE MCCLURE: Count my vote there, Chip.

CHAIRMAN BABCOCK: And everybody who thinks that it should not be changed by rule raise your hand. Well, we've got a vote of 11 think it ought to be changed and 10 think it ought not to be changed. So my sense of not having consensus was borne out here by that vote. Yes, Judge Brown.

HONORABLE HARVEY G. BROWN, JR.: Part of the problem is nobody is certain what the current law is.

MS. CORTELL: Right.

HONORABLE HARVEY G. BROWN, JR.: Because there is this uncertainty. So I think some people who voted a certain way maybe think "I'm worse under the current state because the judges have unlimited power" versus some who might think "When the law is clear enough the judge won't do it," which is frankly the predicament I was in.

JUSTICE MCCLURE: What was the vote? I didn't hear you.

CHAIRMAN BABCOCK: It was 11 to change the holding of the case and 10 not to change

the holding of the case, whatever the holding of the case may be.

MR. ORSINGER: Chip, the vote would be more meaningful to me, and I did not vote, if you said to impose a fixed deadline or to not impose a fixed deadline, because I'm a little unclear about what we're fixing, if we're trying to fix the holding of the case.

CHAIRMAN BABCOCK: Well, I think in light of the -- I learned something from that vote; and that is that that's something that we ought to move forward and try to come up with a concrete example that everybody can live with if we can get to that point.

MR. EDWARDS: Let me put a motion on the table to consider, that we fix a particular concrete date after the granting of a motion for new trial that granting a new trial can be revisited by the judge, the district judge or county judge.

CHAIRMAN BABCOCK: Okay. Anybody second that?

MR. WATSON: That is basically going back to pre-1981, and that's reinserting the Fulton vs. Finch language saying that everything to

do with motion for new trial must be finally decided, if at all. And then it was 45 days. We may want to go longer.

CHAIRMAN BABCOCK: Right. Judge Peeples.

HONORABLE DAVID PEEPLES: Before '81 did the date start from the date of judgment or the date of the order granting a new trial under Fulton vs. Finch?

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: The judgment.

MR. WATSON: After the motion was filed.

HONORABLE DAVID PEEPLES: The judgment.

JUSTICE NATHAN HECHT: After the motion.

HONORABLE DAVID PEEPLES: What I've proposed and Bill Edwards did too is starting the date from the date of the order granting the new trial.

MR. EDWARDS: Right.

HONORABLE DAVID PEEPLES: And during that period you can grant it; and after that you can't.

MR. LOW: Right.

HONORABLE DAVID PEEPLES: That would be different from pre-'81, I think.

MR. EDWARDS: That's the sense of my

motion.

CHAIRMAN BABCOCK: Okay.

HONORABLE DAVID PEEPLES: I second that.

MR. ORSINGER: I like it; and I propose 30 days.

CHAIRMAN BABCOCK: Let's see if we're going to fix a time. Everybody in favor of trying to work on that, let's fix a time. We've got unanimous. Okay. You proposed 30 days, Bill?

MR. EDWARDS: That's good.

CHAIRMAN BABCOCK: I heard 10 earlier.

MR. EDWARDS: That was facetious. You have 30 days to file a motion for new trial; and it seems to me to get a reconsideration that the court ought to, 30 days ought to be enough for the court to decide whether there is a problem.

CHAIRMAN BABCOCK: And that's from the date of granting the motion?

MR. EDWARDS: From the date of granting the motion for new trial.

CHAIRMAN BABCOCK: Okay. Let's have discussion on 30 days. What does everybody think about that? Too long, too short, just

right?

HONORABLE DAVID PEEPLES: Perfect number.

JUSTICE DUNCAN: Thirty days from the date of the order granting the motion for new trial?

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: We'd better say the date that the order granted is signed, because we have these huge appellate laws on the difference between granting and signing.

MR. EDWARDS: The date it's signed date. The date it's signed.

CHAIRMAN BABCOCK: All right. How does everybody feel about 30 days?

MR. JACKS: Sounds good.

CHAIRMAN BABCOCK: Everybody good? Buddy? Are you good with that?

MR. LOW: Good.

CHAIRMAN BABCOCK: All right. Anybody opposed to 30 days after the date that the order is signed?

MR. HAMILTON: I'm opposed to any time.

MR. ORSINGER: This is not unanimous.

CHAIRMAN BABCOCK: Carl Hamilton notes

his dissent. And who else?

MR. ORSINGER: Nina.

CHAIRMAN BABCOCK: Nina notes her dissent. Well, let's vote.

HONORABLE HARVEY G. BROWN, JR.: Just for the record, I think David Peeples discussed it shouldn't be from the back side.

CHAIRMAN BABCOCK: Everybody in favor of Bill's proposal which has been seconded that the concrete date run from the granting, that the order granting a new trial is signed and that that time period be 30 days, everybody in favor of that raise your hand. Everybody opposed? It carries by a vote of 17 to 3. Now, Skip, we're going to need to come up with some language. And perhaps you can --

MR. WATSON: I'll be happy to.

CHAIRMAN BABCOCK: -- work on that for us.

MR. WATSON: Okay. I'll have it for next time.

CHAIRMAN BABCOCK: Okay. Have it for next time. Let's take a break, 10 minutes.

(Recess 3:17 to 3:32 p.m.)

CHAIRMAN BABCOCK: Ready to roll? Okay.

Let's go back on the record. Hatchell, we're going to make you head of another subcommittee if you don't sit down.

MR. ORSINGER: He didn't hear you.

MR. JACKS: You need a gavel.

CHAIRMAN BABCOCK: Yes. Somebody, Ralph gave me a bell. Hatchell, you've just been made head of another subcommittee. Okay. Let's, hey, everybody, let's try to get going. We've got two items, two more items that we have just got to get through today. And I know we've had some Rule 103 people waiting patiently back there. We are going to get to that today before we go home. And I did not know until just minute ago that maybe somebody had a 4:15 flight. And I apologize; but you're just not going to make that if you want to stay for this. And seriously, any of you guys in the future if you've got flight problems, just come up and tell me, and we'll try to accommodate your schedule; but we need to talk about the offer of judgment rule; and then we're going to talk about Orsinger's Rule 103, Rule 536.

And the offer of judgment rule, let me

give you-all a little history on this because it's come to our committee in a way different than a lot of things do. The offer of judgment rule is one of the charges sent to a committee consisting of, chaired by Joe Jamail; and that was one of four charges that his committee received from the Chief on a number of different topics.

Mr. Jamail constituted a subcommittee of his group which consisted of myself, Tommy Jacks, and Dee Kelly; and later Elaine Carlson joined us; and we had a draft rule that I was the scrivener on or the draftsman on which I took primarily from a bill that Senator Ratliff had introduced into the legislature; but it was not a duplicate of that bill, because I or my some of my minions spoke to I think every rules chair that had a rule like this, had an offer of judgment rule in the country and tried to get the benefit of their wisdom in terms of both draftsmanship and how it played out in their jurisdictions. And I took that information and made certain changes to the rule; and then in our subcommittee Tommy, Dee and I made additional changes which

we then took to the Jamail committee. There was further discussion, and I think some changes. And then maybe, Tommy, did we have another subcommittee after that?

MR. JACKS: I don't -- my recollection where it stood was we did not take a vote at our January meeting. There was a lot of discussion about it.

CHAIRMAN BABCOCK: No question we didn't take a vote.

MR. JACKS: Yes. And as far as I know that subcommittee has not done anything since. Now Elaine has done quite a bit of work with a subcommittee of this committee --

CHAIRMAN BABCOCK: Right.

MR. JACKS: -- since then. Elaine and Chip, I don't know that the Jamail committee subcommittee has done anything since then on this rule. If they have, I don't know.

CHAIRMAN BABCOCK: Okay. All right. Well, then the proposal that you have with one exception is what came out of the last full Jamail meeting; but as Tommy says, no vote was taken. Justice Hecht thought it would be helpful for the Jamail committee to have the

views of this committee; and so we're going to talk about this for some period of time; and then I think that you and I and Elaine can take the views of this committee back to Mr. Jamail's group and --

MR. JACKS: On Monday I think we're going to do that.

CHAIRMAN BABCOCK: Monday, right. And tell them; and then that group will do whatever they're going to do. The one exception is on the proposed rule on Rule 9(d) it says "The amount of litigation cost awarded against the claimant may not exceed the amount of damages received by the claimant in the action." My recollection was that that had been limited as it was in the Ratliff bill to cases of personal injury and wrongful death; but I think people's recollections may or may not coincide on that; but it doesn't matter. That's something that we ought to discuss. So with that procedural background, Elaine, why don't you amplify what I just said.

PROFESSOR CARLSON: Okay. I'll do the best I can. Our subcommittee because introducing an offer of judgment rule would be

new to our Rules of Civil Procedure or to our practice, I thought it would be helpful to put together a background memorandum for your consideration. You should have a document dated March 1 called "Offer of Judgment Proposal Rule 166b." Appendix A to that document is the Jamail proposal as it now stands.

For those of you who are not familiar with an offer of judgment rule it has existed in federal practice since 1938, and some 30 states have adopted an offer of judgment rule in some form, and some by state, some by rules. What these schemes of course do is provide for the shifting of post offer litigation costs from the offeree -- to the offeree when the offeree fails to accept an offer of judgment and then suffers a more favorable judgment. That's the overall scheme of it. And so the risk is once an offer of judgment is made if the other side does not accept it, then they run the risk of having to pay the person who made the offer some form of post offer cost.

The Federal Rule 38 is pretty

straightforward. It provides for the shifting only of costs as a general principle, and it only benefits a defendant. It does not allow the plaintiff to make an offer of judgment and benefit from the shifting of costs. It does not provide for attorney's fees, for example.

State rules that Chip's subcommittee looked at and we looked at vary on this issue. Some states have offer of judgment rules that extend to both the plaintiff and the defendant. Some provide for the ability to make an offer at different times during the litigation. The federal rule allows it after a complaint I believe is filed. Some places it's later into the litigation. It may be reasonable time after discovery. So the time in which the offer can be made varies from state to state to some extent. And what post offer costs are recoverable also vary in these states.

As I said, the federal rule only allows costs on the face of the rule. Some states allow for the shifting of attorney's fees. Some allow post offer attorney's fees. Some allow for the shifting of post offer expert

fees and other deposition expenses, et cetera. So there is some variation.

The proposed Rule 166b out of the Jamail committee is an offer of judgment rule that applies to both plaintiff and defendant, that is, both the plaintiffs and defendants can make an offer of judgment and benefit from potential shifting of the post offer costs if a less favorable judgment results than the offer. The Jamail proposal would allow for the recovery of post offer litigation costs that include not only things such as taxable costs and deposition costs, but also attorney's fees and reasonable and necessary expert fees that are incurred after the time of the offer. A more favorable judgment is defined under that proposal with a 25 percent buffer zone. It provides that a judgment more favorable to the offerer exists when the amount of damages awarded is equal to or greater than 25 period of the offer to settle. The proposed rule also addresses the ability to make an offer of proof when nonmonetary relief is sought. You can make an offer to settle on a nonmonetary relief basis

and potentially shift the cost as well when the judgment is more favorable to the party who made the offer according to the proposed rule.

My subcommittee for the Supreme Court Advisory Committee consisted of myself, Tommy Jacks, John Martin and Judge Peeples. A majority of our subcommittee is conceptually opposed to an offer of judgment -- however -- to an offer of judgment rule. However a majority of the subcommittee does endorse some cost shifting and endorses a modification to Rule 131 to clarify that the trial court should have discretion for tax costs anyway meaning taxable costs against a prevailing plaintiff who receives less than the amount offered by a defendant before trial.

However we thought that because we were such a small subcommittee and because this is something that would be new to our practice and because the Court is interested in the subject and the Jamail committee proposal that we would try and present to you somewhat of an overview of the history behind this, the pros, the cons, and if this committee were so

disposed to recommend the adoption of an offer of judgment rule, the kind of factors that we would need to consider, how we view the Jamail committee proposals on those factors and what our subcommittee would suggest.

As you know, the United States has long rejected the English rule that does allow for the shifting of attorney's fees to the unsuccessful litigant, and that has not been a part of our American practice. The academics opine that for twofold reasons. One is to insure access to the courts. The second to because our systems, our judicial systems are sufficiently different that there is more predictability in the outcome and results under the English system with mostly nonjury trials than we enjoy or perhaps don't enjoy in this country. Nevertheless, as you know, we have a number of exceptions to the American rules that do allow for the recovery of attorney's fees stemming from bad faith litigation to a myriad of statutes that the legislature has proposed and passed.

Offer of judgment rules are said to encourage settlement. Federal Rule 38 was

written at a time of course before ADR. Today we have a lot of cases settle through mediation. It was also written before our sanction rules became a part of our practice. The offer of judgment rules really are not just to encourage settlement. There is a more precise policy behind them; and that's to try and encourage the serious evaluation of a proposed settlement at an earlier stage in the litigation so as to hopefully lead to disposition before the litigants incur the heavy expenses that we know all comes on the end when you're bumping up against a trial setting such as expert fees, et cetera.

Federal Rule 68 which only provides for the shifting of costs has been criticized. The analysis given to that rule by the Federal Advisory Committee on Civil Rules, so its own advisory committee, is that that rule has been rarely invoked and has been largely ineffective. There have been many proposals to amend Federal Rule 68 to make it more useful; but those amendments have not carried the day. In particular the federal rule has been criticized because it only provides for a

defending party to make an offer of judgment. It doesn't give the plaintiff that same benefit. It only provides for the recovery of court costs and not attorney's fees simply; and some say there just simply is not a sufficient financial incentive to litigants in the federal arena to use the offer of cost mechanism that much and that the time that the federal rule affords to accept an offer, basically a 10-day limit, is too short for parties to realistically assess whether they want to accept the offer or not. Proposals to make those three changes were not passed; but they certainly have been made over the years.

Some suggest to the contrary, that Federal Rule 38 is really not underutilized. It's in fact underreported. If a Rule 68 offer of judgment is made in federal court and it's not accepted, under the federal rule and under the 166b proposal of the Jamail committee that offer of judgment is not filed with the court, so there is no mechanism for reporting the success or unsuccess of that offer of judgment.

Furthermore it is suggested that Federal

Rule 68 offer of judgment may very well trigger an acceptance of a different judgment with a defendant negotiating for a private settlement and giving the plaintiff some incentive to accept that as opposed to proceeding under the offer of judgment rule. And of course in that situation there would not be the reporting either of this is a successful offer of judgment settlement.

The United States District Court for the Eastern District of Texas has used a local rule for an offer of judgment. Under the Civil Justice Reform Act of 1990 where district courts were encouraged to experiment with procedural mechanisms the Eastern District took up the challenge and passed a local rule that a party can make a written offer of judgment, and if it's not accepted and the final judgment in the case is of no more benefit to the party who made the offer by 10 percent, the party who rejected the offer had to pay the other side's litigation costs including trial and actual trial expenses, attorney's fees, deposition costs and expert witness fees. And according to

Chief Justice Robert Parker that it was very successful in its application. However that federal local rule was attacked sucessfully as being inconsistent with local rulemaking power, and the Fifth Circuit in Ashland Chemical did reach that. They said that the award of attorney's fees as litigation costs through a local rule is substantive rather than a procedural rule and that would require congressional approval. The ABA has proposed amendments to Federal Rule 68 over the years. The most recent one I believe is reproduced as Appendix C in your materials.

One of the concerns that was raised by our subcommittee members was whether or not an offer of judgment rule was something that was proper within the rulemaking authority of the court, whether fee shifting in particular. Because the federal rule does not shift attorney's fees, on its face anyway, that question has not been directly addressed by federal jurisprudence. We do have substantially similar rules enabling that at the federal level and at our level, so to some extent we can look to the federal opinions in

this matter to get some guidance if we were so inclined.

The United States Supreme Court has expressed general disapproval of per se fee shifting provisions. In the 1970s a doctrine developed called the Private Attorney General Doctrine. You may have studied it in law school. And it was a system whereby the federal courts through equitable power were able to impose attorney's fees in cases where the plaintiffs vindicated a right that benefited a large number of people requiring private enforcement of societal importance. In the Private Attorney General Doctrine that allowed for the shifting of attorney's fees through the common law. In Aleyska Pipeline in 1975 the United States Supreme Court eliminated that doctrine holding that the federal judiciary had exceeded its authority in crafting that broad grant of attorney's fees.

One academician believes, and I would concur, that fee shifting laws that relate to conduct that trigger a cause of action are usually substantive. However fee shifting

provisions that relate to conduct during litigation are typically procedural. And as you know, the procedural/substantive dichotomy is what we're looking to to determine whether or not the rulemaking authority is in existence under the Enabling Act.

There were several decisions, three more decisions by the U.S. Supreme Court that I think add to the study. In Marek vs. Chesny in 1985 the United States Supreme Court held that the successful plaintiff lost its statutory right to recover attorney's fees as provided in the Civil Rights Act passed by Congress in 1976 when the plaintiffs failed to accept an offer of judgment that was conditioned -- I'm sorry -- when the resulting judgment was less favorable and the fees were awarded as part of the costs. In that case the United States Supreme Court decision, as I'll read it, said Rule 68 allows for the shifting of costs when the offer of judgment mechanism is triggered and there is a less favorable judgment.

The United States Congress has defined the right to recover attorney's fees in civil

rights litigation; but they have defined them as costs. Therefore when the plaintiff turned down an offer of judgment and suffered a less favorable judgment, they lost, the costs were shifted and they lost their right to recover attorney's fees, so the United States Supreme Court did uphold that and said any statutes that provide for attorney's fees, congressional statutes that provide for attorney's fees as a part of cost then could be shifted under the offer of judgment federal Rule 68. There is a dissent by Justice Brennan suggesting it was outside the power of the Court. But one thing I think I read the decision to suggest is that all of the members of the Court would view an offer of judgment rule that provides for the shifting of attorney's fees due to the unreasonable rejection of an offer of proof -- offer of judgment would be within the rulemaking authority of the court.

We talked about that as our subcommittee. That was one of the proposals once upon a time to amend Federal Rule 68. That is, the offer of judgment could provide

for the shifting of litigation costs if a less favorable judgment resulted; but only if the judgment -- excuse me -- if the offer was unreasonably rejected.

Our subcommittee felt that while that would be wonderful conceptually perhaps for coming within Rule Enabling Act power, that it would lead to way too much satellite litigation. It would end up invading at least potential attorney-client privilege. And once you get into the question of whether an offer of judgment has been unreasonably rejected you can imagine the type of testimony and inquiry that might be warranted. So our subcommittee did not recommend that approach or that limited approach.

In 1991 the United States Supreme Court handed down Chambers vs. NASCO. It was an important case because it limited somewhat the scope of the Aleyeska's determination that fee shifting is substantive in all cases. In this case, in Chambers the district court in reliance of its inherent power sanctioned the defendant for its bad faith conduct and ordered it to pay the plaintiff fees,

attorney's fees and expenses of over a million dollars. The Supreme Court upheld the award recognizing the trial court's inherent power to assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

It is clear that the rulemaking authority allows the Texas Supreme Court to enact rules that impose the shifting of attorney's fees for the litigant's conduct during litigation. How far that power goes is the interesting question, of course. We know that the Supreme Court could not, for example, pass a rule saying in tort cases plaintiffs can recover attorney's fees. That would be something clearly legislative because it would be creating a per se ability to recover attorney's fees in every instance and wouldn't look to the conduct of the litigant and it would be substantive and it would not be procedural and would arguably be a matter solely for the legislative branch.

In Evans vs. Jeff -- I'll talk about one or two more decisions before I move on -- the court expanded fee shifting under the federal

offer of judgment rule holding that an offer in a class action case, an offer of judgment in a class action case could properly be conditioned upon the plaintiff's attorney waiving his or her right to statutory attorney's fees; and the United States Supreme Court upheld that as being proper even though there was a circuit decision to the contrary saying that is inherently unfair and puts a potential conflict between the plaintiff's attorney and the client. Nonetheless the United States Supreme Court upheld it and said that's a trade-off that the plaintiff's lawyer --

MR. YELENOSKY: That's the Evans case. Right?

PROFESSOR CARLSON: Pardon?

MR. YELENOSKY: Evans?

PROFESSOR CARLSON: Yes, Evans vs. Jeff. Finally the last case I'll talk about at the U.S. Supreme Court level, but I think it's an interesting one, is the Delta Airlines case. In Delta Airlines vs. August the United States Supreme Court held that Rule 68 offer of judgment fee shifting recovery is not

available when a plaintiff suffers a take nothing judgment. Another way, a take nothing judgment is not a less favorable judgment than what the defendant may have offered, which is a very interesting conceptual thing. Our committee was sort of stunned by that.

MS. MCNAMARA: Elaine, was there logic to that?

PROFESSOR CARLSON: Yes. Well, arguably. Professor Sherman who I have great regard for suggests that the virtue of this interpretation of the rule is to prevent defendants from making token rather than serious offers for small amounts like a dollar in order to invoke fee shifting in every case in which there is a defense verdict.

MS. EADS: And the facts of the case supported that because there was a civil rights claim by a defendant. The defendant offered, Delta offered a minimal amount of money. And then on the issue of whether their civil rights were violated the defendant lost, but it wasn't a frivolous claim.

PROFESSOR CARLSON: But the Court simply said as I read it, Linda, tell me if you

disagree, that you simply cannot -- a take nothing judgment will not form the basis to be an unfavorable judgment for purposes of your Rule 68 judgment. That's not a proposal as I've talked about.

CHAIRMAN BABCOCK: Okay. You have to lose to have an unfavorable judgment.

PROFESSOR CARLSON: And the anomaly of course on that the plaintiff under Delta could be better off with a take nothing judgment than a small judgment. You could actually net out better recovery because you don't have the fee shifting of costs. It's an odd decision. It was based upon the literal interpretation of the federal rule. It's not something constitutionally mandated, and as you point out, the facts of the case were somewhat unique.

A necessary corollary to the discussion of whether a fee shifting offer of judgment rule is procedural or substantive, which of course ties into the rulemaking power of the court, is also what law should apply when the law of another state is controlling and you have an offer of judgment mechanism. So if

you're in Texas court and the law of another states applies, which law controls? The procedural obviously Texas law would apply. And of course the same potential is there in federal court under Erie principles.

The United States Supreme Court did hold that when a federal court sits in diversity its inherent power to use fee shifting as a sanction for bad faith conduct is not limited by the forum of state law. Implicitly the decoding of that is it is procedural if we're going to apply in a diversity case the federal rule. If it's procedural, then it implicates rules indicating power.

MR. YELENOSKY: But in the course of sanctioning conduct.

PROFESSOR CARLSON: Right.

MR. YELENOSKY: It doesn't stand for the proposition that it's procedural in the offer of judgment context.

PROFESSOR CARLSON: That's right. And as I suggested, Steve, I think I speak for our subcommittee and say we do not believe an offer of judgment rule is necessarily substantive or necessarily procedural. It

depends on what that rule is, which is what I suggested earlier. The answer is it depends. Which don't you just hate law professors?

Even assuming that rulemaking power supports an offer of judgment rule we do have a fair amount of legislative entrenchment in the area of attorney's fees; and that was something that was voiced as a concern on our committee.

In the memo on pages 11 through 13 we tried to outline some of the pros and criticisms or cons on an offer of judgment rule because I think one of the things we need to figure out is is this a good idea for our practice and is it something we think the court should be doing. Of course the most apparent pro is the promotion of earlier settlement and serious consideration of offers to settle. It is serious if you're going to have fee shifting at least if it includes attorney's fees.

The second pro we talked about is it can serve realistic settlement offers early on and give incentives for an adversary to take an offer seriously. It can if it works well, an

offer of judgment mechanism can prevent the heaviest expenses being incurred if there is an early-on offer of judgment that is accepted. And if it's not accepted, the fees shift under the proposal. It gives a party with a very strong claim or defense an ability to really hold the line in an offer of judgment and maybe not compromise where the merits of the lawsuit wouldn't otherwise seem to warrant if they know that there is the fee shifting ability, and it's an effective way of countering groundless opposition to an offer. It can end up making the parties truly whole and fulfill the goal of remedial law. A party with a strong claim who makes a reasonable early offer could end up with little fee expense if the fees are shifted. And the same for a defendant. It can be compensated for their post offer expenses because of the plaintiff's unjustified persistence in not accepting a decent offer.

And there was the equity considerations. You know, a properly constructed offer of judgment rule that is within the rulemaking authority of the court, is it fair for a party

that makes a reasonable offer to settle that is rejected to have to bear the post offer costs and pay fees for preparing and trying a case successfully?

The criticisms we talked about in our offer of judgment rule came from both the subcommittee and from the jurisprudence in this area. One thing we discussed is there is no existing procedural duty to settle. That is not a duty that parties have, and that the underlying premise of an offer of judgment rule is therefore faulty. There is also concern about an offer of judgment rule undermining access to the courts because of the threat of the fee shifting if it's sufficiently a big threat.

One of the common comments that I think kept coming up in our subcommittee discussions was whether the gain from the increased settlement that an offer of judgment rule might trigger is really marginal as opposed to the complexity in applying an offer of judgment rule. If an offer of judgment rule is not properly constructed, it is arguably outside the rulemaking authority of the court

and there is that problem.

One gentleman wrote an article calling the offer of judgment rule the Vegas Rule forcing parties unfairly to have to gamble on their case. When they think they're entitled to a larger judgment and they guess wrong, then there is the shifting. Given the difficulty of predicting jury verdicts it was argued that a Rule of Civil Procedure that punishes parties who reasonably are going to fare better at trial is not a good idea and that Rules of Procedure should not punish litigants for going forward on a nonfrivolous good faith pursuit of their claims.

John Martin, who was here and had to leave to catch a flight raised the issue of insurance litigation. He said under the terms of some insurance policies would the insured have to pick up the additional costs and fees under an offer of judgment rule or would the parties themself have to pick up that, and if it's the latter, is that fair when the insurers were maybe directing the defense? Tommy, I think John talked to you and Paula about this.

MR. JACKS: Yes.

PROFESSOR CARLSON: And what I understood from his review of some hospital and medical policies that are not standardized policies that he reviewed it would indeed shift those costs.

MR. JACKS: Yes. He said that in some he found some policies where it would be covered arguably. Others very clearly would not be covered. And then of course in policies where particularly in physician cases where the physician has a right either to consent or not to consent and then how that get mixed up with the coverage issues is another layer of potential complication.

PROFESSOR CARLSON: So in those cases the insured would risk that as an additional own nickel cost.

MR. LOW: On an automobile policy it wouldn't be covered.

CHAIRMAN BABCOCK: Buddy, speak up.

MR. LOW: I'm just asking a question. On an automobile policy --

MR. JACKS: Standard auto, Texas auto policy.

MR. LOW: I don't think they'd pay it.

PROFESSOR CARLSON: John raised that issue; but then he -- John Martin. But then today he told me that in reviewing the standardized auto policies he thought that it was broadly enough written that it would.

MR. LOW: I haven't found most of the insurance companies coming in just willing to tender it.

MR. CHAPMAN: That's the problem. It drives a wedge between the carrier and the insured because the insured may say "I want my day in court." And if the carrier says "In administering this policy we think the best interest is to settle," then you have that conflict and the insured can lose coverage if they fail to cooperate. So I mean it's another.

CHAIRMAN BABCOCK: That exists today anyway.

PROFESSOR CARLSON: Of course it does. This is another opportunity for that conflict to be raised.

CHAIRMAN BABCOCK: Yes.

MR. JACKS: Well, and if, you know, in

the Stowers context only a negligent failure to settle when there is an offer within the limits gives the insured any recourse against the insurer. Under the proposed rule even a nonnegligent could simply eventually be proven to be an erroneous judgment --

MR. CHAPMAN: Erroneous, right.

MR. JACKS: -- not to settle. I mean, there is no recourse against the insurer in that circumstance under Stowers.

MR. CHAPMAN: That's right.

MR. JACKS: And so then you're back to what the policy says. Most policies include the court costs; but whether that includes expert witness fees and jury consultant fees and all the other things that could be assessed here I think is, and I know how the insurance company is going to read it.

MR. CHAPMAN: You'll be facing just the raw power of the duty to cooperate.

MS. MCNAMARA: How does it work in other states? Other states face problems.

PROFESSOR CARLSON: On the insurance issue?

MS. MCNAMARA: Yes.

PROFESSOR CARLSON: I don't know. We really did not get that far into it, Anne.

MR. LOW: Could I ask did you-all look into the legislative history? I mean, the legislature thinks that this is within their bailiwick and they turned it down. Is that true or false? Tommy, have you-all looked into that?

MR. JACKS: That's in the rule, the current draft we're looking at here was based, as Chip said, a considerable part on a bill that Senator Ratliff proposed that did not pass the legislature.

CHAIRMAN BABCOCK: And, Buddy, there were also other bills. I think there were two bills introduced in the House. I think in the last three sessions, if I'm not mistaken, there were bills introduced in either the Senate or the House or both and none of them passed.

MR. LOW: And some propose then for us to do what the legislature turned down?

CHAIRMAN BABCOCK: Right.

MR. CHAPMAN: And in response to your question, I was litigating a commercial claim

in North Carolina a year and a half ago; and North Carolina had adopted the federal rules full blush including Rule 68, and they even numbered their rules the same way. And just as the history that has been given suggested, I found that it was ineffective. I thought it was a hindrance to the resolution on the case as opposed to an aid.

MS. MCNAMARA: We've had good experience with it; but I just don't know how an insurance company like in an auto case would handle it.

MR. EDWARDS: It would increase your premiums.

CHAIRMAN BABCOCK: Richard Orsinger.

MS. MCNAMARA: Presumably it would.

MR. ORSINGER: I think I must be confused about the way insurance works. This offer of judgment rule --

CHAIRMAN BABCOCK: Is that an admission on the record?

MR. ORSINGER: Yes. This offer of judgment rule as I understand at least the federal rule is a way for the defendant to recover fees from the plaintiff. So if there

is an auto accident and the plaintiff is injured by the defendant, the plaintiff sues the defendant. Nobody has any right to recover fees. The defendant makes an offer which the plaintiff rejects. They try the case and the jury verdict is so low that this rule is triggered. So now the defendant is entitled to recover fees from his plaintiff who is this injured person that ended up maybe doesn't have any assets.

CHAIRMAN BABCOCK: Not under the federal rule.

MR. ORSINGER: Now why would their automobile insurance policy be implicated because the judgment against them has to do with attorney's fees arising in litigation, not the negligent operation of the vehicle. It seems to me like the plaintiff's insurance that would be implicated if they had it would either be the homeowners or maybe some kind of umbrella policy. Now if we're talking about a rule that swings both ways, then that makes sense that the plaintiff is picking up fees from the defendant; and the question is whether the insurance policy covers those

fees.

CHAIRMAN BABCOCK: The rule that Senator --

MR. LOW: What about if the plaintiff makes an offer and the defendant, say, the insurance company or whoever makes the offer, and the plaintiff recovers a lot more from it?

MR. ORSINGER: Well, see, that's what I don't understand. The federal rule does not permit the plaintiff --

MR. LOW: And then the defendant --

MR. ORSINGER: -- to recover fees. Right?

MR. CHAPMAN: That's true.

MR. ORSINGER: The federal rule only permits the defendant to recover fees.

PROFESSOR CARLSON: Right.

MR. ORSINGER: Okay. So the only time --

COMMITTEE MEMBER: And it's not fees.

MR. ORSINGER: -- we're talking about insurance policies.

JUSTICE PATTERSON: One at a time for this court reporter.

CHAIRMAN BABCOCK: Whoa, whoa, whoa. Hold it, hold it, hold it. Just one at a

time.

MR. ORSINGER: The only time we're talking about an insurance policy paying for the plaintiff is that we have a dual rule.

CHAIRMAN BABCOCK: That's what we had.

MR. ORSINGER: That's the proposal is that we adopt a dual rule.

MR. GILSTRAP: It swings both ways.

MR. ORSINGER: It cuts both ways.

CHAIRMAN BABCOCK: Yes.

MS. MCNAMARA: And I am assuming some states have dual rules.

CHAIRMAN BABCOCK: That's correct.

MR. MCNAMARA: We wouldn't be carving that ground.

CHAIRMAN BABCOCK: That's right. Yes. For what it is worth, either I personally or my deligees talked to, and I thought, Elaine, that we talked to 43 states. That number sticks out in my mind that have a rule. The majority of them though are patterned after the federal rule which only allows costs and only attorney's fees in situations where the underlying statute that is being relied upon in the case allows attorney's fees. And the

consensus of the people that we spoke to on those types of offer of judgment rules said you'll never use them, you know.

MR. LOW: Right.

CHAIRMAN BABCOCK: You know, nothing to them. If that's all you're going to do, you're wasting your time. And I think that's a fair consensus of what they said. There are some states. Florida is the most, I found to be the state that used it the most and which we borrowed some of their language from the Florida statute. And the chair of their rules committee says that it is they have a very active offer of judgment practice in Florida. And frankly I did not cross-examine him about things like insurance or whether there's coercive settlements or things like that; but if we go forward with this, we probably want to talk to some people there because that's where they do get fees and it does swing both ways. They have the 25 percent buffer that we actually picked up. I think we had 10 percent, and then in our subcommittee we moved it up to 25 percent. So for what that is worth. Stephen.

MR. YELENOSKY: Can I focus on the nonmonetary part since I'll state on the record my ignorance of monetary relief generally?

CHAIRMAN BABCOCK: Never got a verdict, huh?

MR. YELENOSKY: Money is usually not our primary goal. And I was curious first of all, and then maybe you can comment from that how that got in here. Isn't it true that 68 doesn't have that, the federal rule, or am I wrong about that? How did that notion get its way into here?

PROFESSOR CARLSON: Stephen, in my reading of that issue from Wright & Miller on federal practice is there are different views on whether Rule 68 extends to nonmonetary relief.

MR. YELENOSKY: Okay. Well, --

PROFESSOR CARLSON: And it could be carved out; but it makes the rule less effective.

MR. YELENOSKY: Well, yes. And I guess my comment then would be I don't think it can be effective in any rational way if it deals

with nonmonetary; and moreover that that really hits the nail on the head with respect to your statement up front that parties don't have an inherent duty to settle. When you start talking about nonmonetary relief on the effectiveness point I don't know how you qualitatively measure what you got from what they offer.

On the rights point if you take it from an individual perspective, somebody sues for damages for lost employment and they also want reinstatement in their job. Suppose they get some damages, but not reinstatement. Does that trigger the rule? I don't know.

But then let's talk about just the rights issue. A recent case I did in state court, summary judgment. The question was what are the rights of individuals in state hospitals with respect to visitation by children? We had a rule that seemed to be contrary to state law. Now I don't think that my client basically wanted a declaration. The whole notion of declaratory relief to me is that there is a legitimate dispute that you are entitled to have a court decide. And if the

state had come back and said "Well, you know, we'll give you half the time you can visit with your children" and then I lost the case overall, I'm going to pay their attorney's fees because this person won an adjudication as to whether or not they had a right to visitation by the children. I just don't see how nonmonetary works. And I object to it.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Elaine, did you see any states? I mean, as I understand ours is personal injury and death. Isn't that, didn't I hear somebody say that?

CHAIRMAN BABCOCK: No. What, Buddy, what I -- you did hear me say that; but it had to do with Section 9(d).

MR. LOW: Okay.

CHAIRMAN BABCOCK: Which got added after our last full meeting of the Jamail committee. And I don't know if I made a scrivener's error or not; but the Ratliff committee had a similar provision to 9(d) that limited it to personal injury and wrongful death. This as written is not so limited.

MR. LOW: Okay. Because I would think if

we just pick and choose what kind of case, that's legislative clearly.

CHAIRMAN BABCOCK: That's what?

MR. LOW: You know, legislative clearly if we just pick and choose that it applies to this kind of case or that kind of case, because here is a guy that's got title to the land or thinks he does. Somebody else sues him. I offer to take title. I offer to take title and the loser pays attorney's fees. I mean, we have got to -- it's going to be hard to apply it across the board; but we can't not apply it across the board or we pick and choose; and we can't do that.

CHAIRMAN BABCOCK: The rules, and you may be right. It's a matter of just rulemaking authority. But the rationale for it was this: That and 9(d) says that the recovery a defendant gets or that a nonclaimant gets against the claimant is limited to the amount of recovery. So if you get zero, it's just like the holding of this case. The party making the offer gets zero.

MR. LOW: But --

CHAIRMAN BABCOCK: And but hear me out.

The reason it was thought that in personal injury and death cases that was appropriate is because by in large the plaintiffs are without resources.

MR. LOW: Right.

CHAIRMAN BABCOCK: But in the commercial context you've got, you know, IBM suing Hewlett Packard.

MR. LOW: Right.

CHAIRMAN BABCOCK: And they're just slugging it out and they're just doing it for competitive reasons. And there is some thought that you might bring reason to them if you could up the anti a little bit through these offers of judgment.

MR. EDWARDS: But IBM may be suing the mom and pop computer store on the corner.

CHAIRMAN BABCOCK: No question.

MR. EDWARDS: The clank you hear under this proposal is the courthouse doors being slammed shut on people with no money in favor of people with a whole pile of money period.

MR. CHAPMAN: And there's another problem.

CHAIRMAN BABCOCK: So you're against it?

(Laughter.)

MR. EDWARDS: I'll let you know after a while.

MR. YELENOSKY: It sounds like he is undecided.

CHAIRMAN BABCOCK: Representative Dunham. Hang on.

REPRESENTATIVE JIM DUNHAM: I don't want to shock anybody; but I think this is a legislative issue. I mean, we're talking about a lot of specifics; but I would ask that you look at the fundamentals. This is a major state policy issue, a political issue, an issue that a lot of money is given to various legislators for routinely. We're graded on how we vote on this issue by political groups routinely.

The current law is that you cannot recover this type of relief. That is the current law. Routinely under incredible political pressure the legislature has been asked session by session to change current law to allow this type of relief. It has not been successful. I think you all will agree that Senator Ratliff has some stroke in the

legislature and even he could not pass this type of change in the current law.

The Supreme Court rules power is to pass rules that are not inconsistent with current law. This is a change in substantive law. It affects everyone's right to a trial by jury unless you're in a class action under the exception here. And I don't know how it could be any plainer. I believe that there is a lot of sentiment out there, correct or incorrect, that people that have been unsuccessful in obtaining this type of change in current law in the legislature are being asked to go to the court to obtain this type of change in current law. And I think that's the fundamental issue.

You-all can talk about time lines and dates. We've been asked. We've been pressured. We've been supported and criticized politically, monetarily, rated, graded on this issue. And for whatever reason the legislature -- well, I know the reason. It's because it's a bad change in law. That's why it hasn't passed session after session after session. And I would just let that

speak for my sentiment.

Again, I don't vote around here; but I don't know how that could be any plainer. And I think that the Court -- I have been one that has looked and requested rules reform in the legislature and been successful in the House for several sessions. That is a further example that I think will have the legislature act in a way that would change rulemaking; and I don't -- that's why I'm here today. I have tickets to the basketball tournament and I'm here because this is so clearly, blatantly a legislative function. I don't really know what else to say.

CHAIRMAN BABCOCK: Phil.

JUSTICE HARDBERGER: Well, I guess just to pick up on that last point, you know, even if it could have been argued whether it's legislature or judicial, it gets kind of hard to argue when the legislature has already handled it several times and has clearly given their intent. I think it's very undesirable from several viewpoints, the legislative of course being about a very substantive one, but by no means the only one.

We have heard for so many years that you ought to do anything to encourage a settlement. That just is that's a moral precept. Whatever the price if it encourages settlement, that's a good thing. Well, we've now got our civil cases down to less than one percent is decided by a jury verdict, .8 percent in this state. So I throw out on the table maybe we have gotten about as far as we ought to go with encouraging settlement, especially when very high prices have to be paid, which I think they do in this case. There it would be, such a rule has a really chilling impact on the litigants. To put it in common terms it would scare the hell out of most plaintiffs. And the poorer they are and the further they are down on the social scale the more terrorized they will be that they're going to get hit on this.

It is true with two big companies, you know, maybe it is a good thing; but there is no way you're going to ever be able to I think distinguish and separate those out that it would only apply to two big commercial companies that are lined up against each other

with unlimited resources.

The paper that Elaine did does a wonderful job of setting out the various things that would have to be considered if you're going to enable this. If you're going to put this into effect, you're going to have to work this out and work that out and work that out. It's a good committee. We could probably spend a lot of hours working on this; but I would say before we breathe life into Frankenstein and put a tuxedo on him and try to make a gentleman of him that we might just better let him lie and go on with the system we have.

CHAIRMAN BABCOCK: Carlyle.

MR. CHAPMAN: I just want to raise another concern and it may very well be substantive. I think that is to point out with the Texas Commission on Human Rights and the adoption of a whole bevy of employment laws that exist under the ADA and the Title Seven under the ADEA, and that implicit when tried and the plaintiff gets a verdict even if it is much less than the verdict that was sought, that under federal jurisprudence that

has been adopted wholesale by the Texas courts in interpreting the Texas Commission on Human Rights Act that those plaintiffs were entitled to attorney's fees, and the whole lodestar analysis is required. That has not been affected by Federal Rule 68 because Federal Rule 68 by in large does not go to attorney's fees, but only goes to cost.

The adoption of a rule such as this I just point out may very well be at odds with the substantive law with regard to the right to recover attorney's fee that is implicit from the employment law, federal employment law decisions as they have evolved under those various acts.

CHAIRMAN BABCOCK: Linda.

MS. EADS: I think the issue about whether it's procedural or substantive probably should end our debate; but if it doesn't, then -- I think it's substantive. I don't think we should do it. But if it doesn't, the Attorney General's Office is a litigator that has lots of cases, that defends lots of case; and there is no doubt in my mind that there would be a chilling effect.

On the other hand, when you have a number of cases that you see over and over again day after day, you make a settlement offer that's reasonable under the facts and you get a no answer and then they come up short at trial, and you realize the revenue that was expended and the time that was expended and you're a massive litigator like the Attorney General's Office you understand that offers of judgment rules have a real place.

Now that's probably something for the legislature to consider. I do think this is substantive; but it really is a big problem. I'm sure on the other side of the ledger it is a huge problem when you have a lot of litigation and make reasonable offers and get rejected and you have to go to trial and it costs a lot of money, and you end up winning over and over and over again and you have no recourse to leverage in any way a settlement because there is no sting to refuse.

CHAIRMAN BABCOCK: Okay. Who else?

MS. MCNAMARA: I would just agree with that. You know, representing a company that litigates in a lot of different places

including jurisdictions that have these rules we don't see people intimidated and running for the bushes and feeling compelled to accept the offer of settlement. With that being in the rule I think it gives the lawyer maybe a little bit more leverage in the discussion about what a reasonable settlement in a lawsuit that maybe is an awful lot of money. But there is just an awful lot of money spent on litigation where the claim is in many ways frivolous or the plaintiff has a wildly overinflated view of his value.

Now I have no idea about the separation of powers issues and the constitutionality here in Texas. It is troubling to think the legislature has looked at this a couple of times and has spoken on the subject and not acted. And I think if we're going to do it, that to me is a whole different issue. But just in terms of the costs of the litigation and the dynamics of the process we just don't see anybody panicking and heading for the door when we use this procedure.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: I think the fact that the

legislature has considered it a number of times I would differ only with the phrasing that Anne used. They didn't not act. They acted. They have rejected this. They have ruled. They have decided that the policy of the State of Texas as a substantive matter is that this is a bad thing, and that decision has been made; and I think for this Court by way of rulemaking or this Committee by way of advising that process to invade that is definitely without any doubt stepping into the substantive area.

I'm also very troubled that although we have taken care in this committee, we have a court reporter present, we have a website, we post our agenda and we post the agenda items, we post matters that will be considered, people can look at that and come to our meetings, I have looked for the website for the Jamail committee and have not found it nor have I been able to go and attend those meetings to see what is happening there. I don't know the members of the committee. I don't know what is on their agenda. I don't know how their decisions are made. It is not

public. It is not quasi-public. It is not semi-public. It is secret; and I think that that, for that to be a what we're going to have this discussion and then send our consensus to a secret group and for them to do something secret and advise the Court which will then have secret deliberations and write the policy of the State of Texas is exactly why this is a bad idea and exactly why it is a substantive public policy decision that the legislature has made repeatedly under glaring public scrutiny and has spoken very loudly on. So I think that is a critical, important point.

In addition there is a presumption by this rule that in some way the use of the jury system is wrong and that in some way a litigant who trusts his or herself on either side to a jury and loses in some way deserves a penalty. And that issue, that attitude more and more permeates or society and the sound bite type discussions that have developed, and I think we particularly in this group and I would hope the Bar and the bench would stand up and say that it ain't so, that we have as

one of the most important cornerstones of our nation have a jury system. And for us to be somehow implying in a rule like this saying that to use that is fraught with peril, that there is a punitive component to the use of the jury system and you best be rolling your dice the right way and you best be prepared to take bankruptcy if you lose, plaintiff, if you make a case and the jury doesn't agree with you some day. And the poorer you are, as Carlyle pointed out or Justice Hardberger pointed out, the harder this will hit and the more likely it is to slam shut the courthouse door to litigants in this nation. And I think that we do this at our peril, and I think the legislature has so decided and has decided that we will not shut the doors in this state to our litigants.

There are also drafting problems with this rule should we get to that I'd like to comment on; but I think on a policy level those are the big picture issues. I would simply point out that as written another substantive change of enormous magnitude is implicit in this rule which is that any case

in the State of Texas that currently has a cap on damages whatever it may be, punitive damages, the medical malpractice, wrongful death cap of 1.3 million dollars as currently constituted per defendant has just effectively, wham, been reduced by 25 percent because if the defendant offers 75 percent of cap and the plaintiff doesn't beat that by at least 25 percent, then the plaintiff owes the defendant the cost of attorney's fees.

So without further consideration or ado and probably because of the lack of a legislative and open deliberative process things like that are implicit in this rule that I don't think we have any business doing. Certainly if the legislature wants to lower the cap in the state by 25 percent, there is a proceeding for doing that, and I don't think this is the right proceeding.

CHAIRMAN BABCOCK: Richard.

MS. SWEENEY: Strong letter to follow.

(Laughter.)

MR. ORSINGER: The language doesn't suggest to me whether you're entitled to have the jury determine the fees that are assessed

as a penalty. And sometimes when it says "the court shall determine so and so" that's inferred that the jury will determine if you request a jury; but I would like to be sure that we are not discussing a Court making a decision about the amount of reasonableness of the fees if someone has requested a jury and they want a jury to determine that. If there is an effort to have this be a Court only decision, then I start having constitutional concerns about that component of it. And so if the jury can decide it, I would presume it would be the same jury that just returned the verdict would then have a subsequent trial as soon as the verdict is in.

CHAIRMAN BABCOCK: Right after the punitive damages trial.

(Laughter.)

MR. ORSINGER: On the attorney's fees. Otherwise you'd have to come back in a separate trial just on reasonableness. Secondly, --

CHAIRMAN BABCOCK: You keep that jury in session.

MR. ORSINGER: That's what -- I mean, I

think there is a right. I think probably most of us would agree there is a right to a jury on determination of attorney's fees.

Secondly, I'd like to find out what the experience is in states that have the rule, those with a rule like Florida where they actually do use it and see if the lawyers are ever getting sued if they recommend that a settlement be rejected, then they lose, then there's penalty fees, because it seems obvious to me that any plaintiff that got hit with a penalty fee is going to turn around and sue their own lawyer for malpractice if the lawyer recommended that they turn down the offer. So then that means what we're doing is we are shifting the defendant's fees through the plaintiff to the plaintiff's malpractice carrier in all situations where the lawyer recommends that you not take the fee. So then the lawyer has to make a decision "Well, am I willing to take the personal risk of having a negligence suit by telling my client that I think this offer is too low knowing that the jury could go high, low or give us no liability at all?" And so the lawyer is over

here evaluating his own personal risk about his recommendation, and then the insurance companies are going to be watching these recommendations and setting premiums based on it. There is a whole level of insurance impact on society, rates, cost shifts and all of that that I'd like to find out if that has been explored in some of these other states.

CHAIRMAN BABCOCK: Good point. Yes, Justice Duncan.

JUSTICE DUNCAN: I just want to make a little short statement because I think Paula has made such an eloquent statement that frankly I think the Committee is ready to vote on this up or down. My only little tag line to what you said, Paula, is frankly I don't care how the courts have wound their way around through the procedural/substantive distinction. If it walks like a duck and it talks like a duck and it looks like a duck, it's a duck; and this is a duck.

CHAIRMAN BABCOCK: Tommy.

MR. JACKS: The -- everybody I've talked to about this issue has such strong opinions about it. I can tell you from the standpoint

of the Plaintiff's Bar the Plaintiff's Bar will see a rule of this sort as being targeted at plaintiffs, whether rightly or wrongly, even if it's written on the page to be a neutral rule or a two-way street, and simply for the reasons that others have pointed out, and that is that litigants who have limited means find this hammer far more coercive than litigants of unlimited means.

I actually think it's not the poorest of the poor who are at risk, because they're judgment proof; and really in those cases it's the defendant who bears all the risk. You know, my -- you know, the average schmo who is judgment proof doesn't really have anything to lose under this rule. And so defense lawyers have obviously recognized that; and I have lots of defense lawyer friends who think this is a horrible idea. I think --

CHAIRMAN BABCOCK: Can I just stop you for a second? I know John Martin is not here. But I think that's what he thinks, isn't it?

MR. JACKS: It is. John has been vocal in his opposition to this rule.

CHAIRMAN BABCOCK: Yes. Okay.

MR. JACKS: And regretted that he had to leave. He has to be in Chicago in the morning.

PROFESSOR CARLSON: Tommy, didn't John represent that when this issue had come up before that the Texas Association of Defense Counsel was in opposition as well?

MR. JACKS: I can tell you it would create a fire storm in the Bar. I really think the litigants who are, who I feel the sorriest for if this rule or anything like it would be enacted are frankly the people who do have some means, but not enough to be able to withstand the coercion of the risk of this, people that, you know, they perhaps have been injured and injured severely. They're on the ropes. They've still got some, you know, the kid's college account. They've got some assets and so forth; and it's they've got something to lose, in other words. And it's a rule that I think is, you know, we're talking about punishing people for rejecting a settlement offer.

I mean, our concepts of punishment of

litigants for things that occur in the litigation process our Supreme Court has said "Well, the punishment has to fit the crime, and if not, that you can't do it." I mean definitely the punishment has to fit the crime and the crime has to be severe and it has to be documented over time.

But here we are talking about punishment perhaps to the tune of million of dollars that could be imposed where rejection of the offer was reasonable, potentially even where the offer itself was unreasonable as in the case where there is a take nothing verdict and the token offer in a serious case where there are legitimate, but tough issues and somebody is going to lose, particularly the all or nothing kind of case.

I do think it's a malpractice trap. I think lawyers are going to have to start writing disclosure letters as long as both my arms to let their clients know what the risks are; and of course that only enhances the coercive operation of the rule, yet lawyers have to do that. And if they don't do it, well, then the comments are valid that people

will come back on them.

The complexity of how you administer this, I mean, I think of multi-party cases. In a situation, I mean, are you going to say? I mean, you know, for a plaintiff where I've got several plaintiffs, and I make an offer on behalf of one plaintiff and the insurer is in the position of having to make a decision "Well, are we going to take that offer or not? But if we do, we're going to leave our insured exposed because we've still got all these plaintiffs coming along behind them." You know, under our situation under our law where it's a 51 percent joint and several threshold we can only have one joint and severally liable defendant in the case. And how do you deal with a joint offer to all defendants and if some want to take it and some don't? Are the ones -- but all have to take it in order to get the case settled. Are the ones who wanted to take it going to be punished just like the ones who didn't?

You know, Paula talked about the cap cases. You know, the early offer cases a lot of times for the plaintiffs I've got my case

worked up and ready to go when I filed the case. If I then catch the defendant with an early offer and they let time run and don't respond or reject it and only then find out six months down the road after discovery that they're in a world of trouble, well, they're already screwed. They can't come back and say "Wait a minute." In other words, if it's too early, you have got a problem; and if it's too late, you're not saving anybody any money. I mean, under the proposed rule it would be 10 days after trial when, you know, 80 to 90 percent of the money has been spent on the case that is going to be spent.

There is just I think the punishment of litigants should be reserved to situations where there has been conduct that is unreasonable or in bad faith, I mean, at least unreasonable or beyond; and this rule doesn't make those kind of distinctions. And if you tried to write a rule that did, then you're going to have all the litigation about, well, what is reasonable and what is not at the time that you made the decision to reject the offer and get into lawyers having to testify about

all the problems with the case and things they know and don't know and so forth. That's the reason why I opposed it in this committee, the subcommittee opposed it and I oppose it in this subcommittee.

CHAIRMAN BABCOCK: Linda.

MS. EADS: Articulate plaintiff's lawyers. And I really in a way I feel I shouldn't even say anything because I really believe we should vote this down because it is substantive. But in case for the record, you know, I believe in the jury system; but when you see -- and I wish we all -- I face this in the Attorney General's Office. There are good lawyers that are in this room who would accept a reasonable offer of settlement for the benefit of their client; but I have seen hundreds, no, thousands of cases in which lawyers did not take a reasonable settlement offer for whatever reason. I mean, I don't know what their dynamics are in their attorney-client relationship because they figured they had a deep pocket with the State and then they rolled the dice and they lost a lot. And I worry that that does more harm to

the jury system and the toleration of the people for that system than an offer of judgment rule would.

Like I said, I don't think we should pass this. I do think it's for the legislature. This is an enormously complex issue. We need a lot of real thought about it; but it's not just an attack on the jury system. There are such prices we pay. As a profession we're not very accountable when we have a lot of us who don't do this job very well for our clients. And when you see a lot of litigation day in and day out and thousands of cases and you look at these and think "Why would this person turn this offer down"? I mean, the Transportation Division at the Attorney General's Office I can't tell you how many automobile cases they handle, you know, and right-of-way cases, and they make reasonable offers and they get rejected; and we're talking about the taxpayers footing an enormous bill on that. Now maybe we should make an exception for state cases. That would be fun.

(Laughter.)

MS. EADS: But I mean there really is something about our profession and about damage to the system that comes from this kind of behavior that really the legislature does need to think about when it makes its decision.

CHAIRMAN BABCOCK: Buddy, have you got something to say?

MR. LOW: Yes. I shouldn't say this. But the only two cases I've had involved against the State they made no offer and I stuck with mine.

CHAIRMAN BABCOCK: They're ought to be a "Buddy" rule.

MS. EADS: When I see your name I say no to settlement.

MR. LOW: Basically I was told that.

CHAIRMAN BABCOCK: Let me say a couple of things and then we'll let Justice Hecht get the last word in before we vote. A couple of things: One, about the first thing about this substance/procedure dichotomy; and then the second, about the process that we're going through; and maybe the third is the motivation for this rule.

First about the procedure/substance dichotomy, I recognize that there is a difference between perception and realty. The reality which is looking at the case law and reading rules, what has been done in other states, what the U.S. Supreme Court has said on this issue and what other cases have said about it, I think it's a close question, frankly. I think the Court has the power myself; but I can see how reasonable minds would differ on that. And that's the reality what the case law is.

Now I have no doubt that Jim Dunham is expressing his heartfelt feelings and those that would be shared by other people in the legislature that "Hey, we've talked about this for the last three sessions at least, and by God, this is our bailiwick and it's not theirs, and don't tread on our turf." And that is the perception regardless of what the law may be, and it's a close question. So I recognize that, and I think that this discussion has been helpful in highlighting that issue.

The second about the motivations for this

rule, I can tell you because I've been involved in it that it is borne of an effort to discuss a way of making our jurisprudence better. Now I also think its a close question whether this rule is a good rule or a bad rule. I think it may cut against defendants just as much as it cuts against plaintiffs; and if I had to vote right now up or down on this rule on the merits, I don't know exactly what I would say about it; but I think it was something and is something that is worthy of discussion.

And let me say, Paula, there is nothing secret about this. We wouldn't be having this discussion today if there was anything secret about it. The Jamail committee is not secret, and if they recommend something to the Court, that's going to be public, and if the Court decides to adopt it, they're going to send it it out for comment to the Bar just like they always do.

The reason why we are having this discussion, this open discussion today on the record with the proposed rule on our website is because Justice Hecht wanted to run it by

the Supreme Court Advisory Committee before the Jamail people did anything with it. So there is nothing secret about this process. And one of the great things about this Committee is that I think everybody comes here in good faith; and I think everybody comes here trying to express what they think is best for the citizens of Texas. We don't agree obviously on what we think; but we darn sure ought to have the forum to be able to come and talk about it and talk about it honestly and openly; and that's what we're doing today. And so nobody ought to be resentful of this process or think that something is trying to put something over on somebody, because I certainly wouldn't be a part of that and none of you would either. So that's why we've had this discussion.

I think it would be enormously helpful to Mr. Jamail and his group of which I'm a member, Tommy is a member, Elaine is a member, Justice Hecht is a member, Chris Griesel is there. If anybody has any questions about when we're meeting and what we're going to be talking about, I hesitate to invite you all to

Mr. Jamail's office; but I suspect if you called him up, he probably wouldn't mind if you showed up if you're that interested. But anything we're doing you can ask me for and I'll given it to you. So there's nothing secret about any of this.

So that's my story and I'm sticking to it. And we'll have a vote here in a second whether people think this rule is a good idea or a bad idea unless Justice Hecht wants to say something.

JUSTICE NATHAN HECHT: I do. The great asset of this committee is its deliberative function and its advisory function. And since just after I got to be here we have tried to make it that and not a "take a vote and that's the way it's going to be," but more of a "let's discuss it and let's iron out the details." And of course it can't help but get rhetorical from time to time when people feel strongly about particular issues and issues that they have dealt with in other forums including the legislature.

But I have been pleased to see that, for example, in working on parental notification

rules I only remember about five minutes out of all those hours of discussion when it got a little touchy about the issue that most people in the United States feel very strongly about, which I think is a great tribute to this group and its ability to deal with a system that we all handle all of the time, we all care about from different perspectives, and we all want the best for in the end.

I'm pleased that Representative Dunham would tell us about the experience in the legislature, because his impression is mine, and that is that the debate over there has been driven mostly by contributions and who is on whose side and various political realities and perceptions that don't have a lot to do with just the mechanical working of our legal system, but are more of a political nature; and there is that component to this rule, and it's undeniable.

Whether it's procedural or substantive I agree is a close question. We'll just have to worry with that; but Professor Carlson has done a wonderful job of surveying the law on that; and as I think the bottom line is it can

be written so that it's procedural, and it can be written so that it's substantive, so that sort of remains to be decided.

I do think it's silly to say that there is not problem out there. I think this discussion indicates that there are problems; and anybody who has had much experience with the litigation system knows that there are real problems. I think it with all respect, Chief, we can't try any more cases without more courts than we've got. Everybody claims to be working awful hard. So unless they're malingering, then I don't see how we're going to do any better. And in fact all of the trial judges tell me anything we can do to process the cases fairly, justly, but efficiently is something we need to look at. And since I have been a trial judge which was only 15 years ago we now mediate every single case in Dallas county and as I understand it every single case in Harris County and maybe every single case in Travis County. I don't know.

When I was on the trial bench we never even heard the word mediation; and so

I -- what was mediation was when I brought the lawyers back in the chambers and said "You-all talk about settlement," and that was as artful as it got. And it really is in all of your best interest and the client's best interest and in the best interest of people to figure out a way where people do feel like at the end of the day they would rather have the litigation system than arbitration, which is not the present perception. The present perception is anything but the courthouse. And part of that is our fault, and we've got to do something to make that more of the kind of dispute resolution center it was intended to be.

I very much agree with Tommy, about 65 percent of what he said, that this should not be viewed as punishment. It should be viewed as an attention-getter. It shouldn't be viewed as draconian. Is shouldn't be viewed as closing the courthouse doors. If it's anything like that, then the the penalties are far too severe.

By the same token, I think Linda speaks eloquently to the fact that we surely have all

known, and that is some lawyers either willfully or ignorantly just will not fairly evaluate a case. They just won't do it. And it happens on both sides.

And my friends, I don't know about -- I haven't talked to Harvey; but several of the judges have told me in Harris county that they try a lot of cases these days because the insurance company won't pay the specials. They just say "We'll see you in court." Now without prejudging those cases, that seems a little unreasonable to me, and it seems like that that means that they're going to try a lot of auto car wreck cases over special damages that ought not to be taking up a district judge's time, which is my view of it.

But I do think we ought to step back, think about what really would help the system, if anything. We don't want a fire storm in the Plaintiff's Bar or the Defense Bar, although I must say anything that makes them both upset may end up being in the state's best interest. I don't know. But at least we need to see if there is something that can be

done that will help the system settle the cases that ought to be settled, let the cases go to trial that should go to trial and will provide some encouragement.

I do think it's too late in the day to overlap this kind of rule with mediation, because although I would be interested in this committee's views, that mediation seems to be working. I really don't know, I guess I should say; but at least it's disposing of a lot of cases. And that may be fair and it may not be fair. I'm not sure. But in any event we need to consider the impact of this rule on mediation.

The work of the Jamail committee is not secret. In fact I told you about the Jamail committee on the record at the time, I think even before it was formed. And I did promise you that the work would come back here, and it will. And the reason for that is for the very kinds of discussions that we've had all day; and that is as we all know as tedious as or work is as we as sit around and listen to each other we begin to think "Well, we can can fix this, we can do this and come up with a better

product in the end than we started with even though that was given a lot of thought."

It is complex. And that's why I must tell you frankly I would rather this committee looked at it and decided those complexities than a profession that I think with all respect to the legislature, I think it's their business, that has to be largely politically driven. That's just the nature of it. And just as we have worked on a lot of hard issues before like recusal that we didn't want to work on; but I think we came up with and solved a lot of the problems. This ain't no helpful climate; and so we should at least be willing to tackle those complexities.

And then finally we do have some accountability to the system; and that's another good thing about this group is that it can think about those kinds of issues. It may be at the end of the day that this is not a good idea topside or bottom, that there is just nothing to be done and we should forget about it. It may be that the 41 states and the federal courts that have some variation of it are suffering more than they know and that

we should relieve them of that before rather than have them labor in that ignorance any longer.

But just in case there is something of good here that we might gain I think the Court will want me to say to you that we're going to have, even if you're against it from the get-go, we need your best judgment on if the world should end and the rule should be adopted, what would it look like and still work. And we've worked on those kinds of issues before.

And so even if everybody is against it, Chip, I do think we need to spend some time getting your advice at least on if for no other reason than to report back to the legislature that we see these good things and these bad things and whatever we can come up with. So I think that's what the Court would like.

CHAIRMAN BABCOCK: Okay. Representative Dunham.

REPRESENTATIVE DUNHAM: I would just like to suggest that the State Bar of Texas has a committee I believe that can study these types

of issues and make recommendations to the legislature on legislation. There is a State Bar Legislative Committee as I understand it that is a forum for this type of discussion and recommendation to the legislature. And I do not think -- I want to make one thing clear. I do not think that the end result of this idea not becoming law was the result of money contributions. I think that this is not law despite money contributions. So I want to make sure what I said is very clear. But I think there is a forum for the legal community to discuss whether there is this type of a problem and then discuss how it could be addressed from a policy standpoint because this is a policy issue. Do we need to encourage settlement, do we need to do this, that and the other? And that forum is through the State Bar of Texas.

And if they don't have sufficient forum and access to the legislature for that type of thing, please let me know because I sit on the Texas Sunset Commission, and the State Bar is before sunset in April, and I'll make sure they have the right forum to approach the

legislature; but I think it's there. And I would encourage you if you-all think it's an issue, let them come advise the legislature.

I don't know that the Court can lobby the legislature on policy types of issues of the ethics codes. I don't know if that is allowed or not; but the Sate Bar surely can, and that's why that committee is there.

CHAIRMAN BABCOCK: Okay. Here is what this votes means: This vote means that the sense of our committee is either we're against this rule or we're for it. I will report that to the Jamail group; but I'm going to put it on the agenda for the next meeting just so I can keep you coming back, Jim.

REPRESENTATIVE DUNHAM: Thank you. Please make sure it's on a basketball day too.

(Laughter.)

CHAIRMAN BABCOCK: Okay. We'll try to do that. So those who are opposed to this rule as Justice Hecht says, topside or bottom? No, we're not going to talk about it anymore, Carl.

MR. HAMILTON: I just want to know are we talking about this rule or just some concept

like this rule?

CHAIRMAN BABCOCK: A concept, conceptually a rule.

MR. HAMILTON: Okay.

CHAIRMAN BABCOCK: Not the specific language. We're just talking about an offer of judgment rule generally. So that who are against --

MS. EADS: Without regard to the substance or procedural issue? With regard to whether we should consider it or not?

MR. YELENOSKY: No.

MS. SWEENEY: No. With that regard.

CHAIRMAN BABCOCK: You can vote against it, Linda, for any reason.

MS. EADS: All right.

CHAIRMAN BABCOCK: I think you think it's substantive, so that's why you're going to vote against it.

MR. CHAPMAN: You're suggesting, Chip, that it would have some nature of the kind of provisions that were here? What I'm trying to understand is would it be as broad and encompass something that is just a cost rule as opposed to a cost and fee rule?

CHAIRMAN BABCOCK: Yes. We may shrink it down to just a cost rule and take the fees out of it; but I'm talking about conceptually an offer of judgment rule. Because like Elaine says, I mean, how you write it depends on whether it's substantive or procedural or all sorts of other things. This is just something to talk about and shoot at.

MR. EDWARDS: I still can't tell what I'm voting on.

MR. CHAPMAN: Yes. I think that's pretty vague.

MR. EDWARDS: I don't know what I'm voting on.

CHAIRMAN BABCOCK: The State of Texas currently does not -- let me frame it this way: The State of Texas currently does not have an offer of judgment rule. Are people in favor of that, continuing the status quo and not having an offer of judgment rule?

MR. EDWARDS: The only thing I've got in front of me is a proposal.

MR. ORSINGER: We're not voting on that proposal. We're voting on the concept of having one or not having one.

MR. EDWARDS: Well, I have a terrible time when I have been presented with a proposal and then you tell us "Just forget what is sitting on the table in front of you and vote on a concept." I have a difficult time separating that.

CHAIRMAN BABCOCK: Well, we can take two votes, Bill, if that would make you feel better.

MR. EDWARDS: Well, it will never make me feel better.

CHAIRMAN BABCOCK: We can vote on the concept and we can vote on this proposal; but we haven't really talked about the details of it too much. And frankly what I propose to do is talk about the details next time; but I'd like to give Mr. Jamail and his group a sense of what this, because Tommy is quite clear that he doesn't think we should have any rule, and so if people share that view. And, Bill, that's my sense of where you are headed.

MR. EDWARDS: My position is what you're saying is you want the nose of the camel to get under the tent.

JUSTICE PATTERSON: It's another instance

of insidious accretion.

MR. ORSINGER: Well, I mean, I think in light of Justice Hecht's comments he's saying it may be instructive to the Court to hear that we're all against it; but he would still like us to contribute on what it would look like if there were one.

MR. EDWARDS: I'm not saying I'm not --

MR. ORSINGER: And if we don't do that, they're going to do it on their own.

MR. EDWARDS: I did not say that I wouldn't sit here and give comments on what a rule might look like if we inappropriately passed one.

(Laughter.)

MS. MCNAMARA: Wouldn't it be more meaningful to say assuming we can solve the substantive versus procedural issue?

MR. ORSINGER: No.

MS. MCNAMARA: Are you in favor of it?

MR. ORSINGER: No. I think a lot of votes will turn on that issue.

MS. MCNAMARA: That's why I think it might be meaningful.

MR. ORSINGER: We can't solve it.

MS. MCNAMARA: We might be able to.

MR. ORSINGER: There are some of us that think it's substantive no matter what you say.

MR. YELENOSKY: How about a vote on those people who would not vote any way, any form; and then if that fails go to the next one?

CHAIRMAN BABCOCK: Well, that's what I was trying to do.

MR. CHAPMAN: I think that's what he thought he was doing.

CHAIRMAN BABCOCK: Right.

MR. CHAPMAN: But that wasn't clear to me.

MR. LOW: Should this committee say that we can pass any tender of judgment rule not that's procedural? Do you think we can't or shouldn't for procedural reasons or substantive or what is what you're saying, isn't it?

CHAIRMAN BABCOCK: We'll flesh out why people are against it next time; but this is just my sense of being able to say "Look I've got 20 people who were here and 18 didn't think we ought to have any kind of rule for a variety of reasons, or it's 10/10." I mean,

you know, whatever. Yes, Frank.

MR. GILSTRAP: Chip, am I correct that, you know, assuming the Committee says "Well, we don't think a rule like this is a good idea," we may still be asked to draft a rule?

CHAIRMAN BABCOCK: Right.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: That's right. That is what Justice Hecht just finished saying.

MR. EDWARDS: I understand that too. And I just wanted to make sure that it was clear that we're not -- what the vote was.

CHAIRMAN BABCOCK: Well, yes, actually, Bill, the vote is anybody that votes against having the rule doesn't get to say anything next time. No. That's not it at all.

(Laughter.)

MR. EDWARDS; I'll bring my sleeping bag.

CHAIRMAN BABCOCK: That's not it.

JUSTICE DUNCAN: I don't want to make anybody ill; but this is precisely the course we followed with the no evidence motion for summary judgment rule.

CHAIRMAN BABCOCK: Yes. This has some of the same characteristics. All right. Listen,

we have got another agenda item to go, so let's get this done. And I'm going to frame it the way I originally framed it. How many people for whatever reason, Linda, are against having any offer of judgment rule? Raise your hand.

JUSTICE MCCLURE: Include my vote, please.

CHAIRMAN BABCOCK: And how many people think we should have some form of offer of judgment rule? That would be 17 to 3 on that vote, 17 thinking we should not have any form of offer of judgment rule and three thinking we should continue to consider it. So that's where we are on that.

Now we're going to quickly move, and I understand that we're over time; but we are going to do this Rule 103 thing, because we've got a visitor waiting patiently to talk about it with us. Richard, do your best considering the time of the day.

MR. ORSINGER: Okay. Real quickly, this could be simple, or it could be we're mired down. Since we last met I took the instructions of the Committee and tried to

rewrite the rule we've been fighting over that would permit a kind of a passport and what the terms of the passport were. However, the process servers were busy on their own, and they have come up with two alternative proposals that are greatly simpler than we might consider. And the constables have gotten involved and have sent over a proposal that is probably even more restrictive than what the Committee had been debating.

To begin with there is the process server groups that are speaking with us are proposing that we consider the federal process or the federal rule. And the federal rule basically is that anybody can serve civil process if they're 18 years of age and not a party to the lawsuit. There is no bond required. There is no educational requirement. There is no fingerprint or background check or anything else. It's pretty much, you know, if you're out there walking around and you're 18, you can serve process.

Now there is another part of the federal rule that we may or may not want, and that has to do with allowing the plaintiff to invite

the defendant to appear voluntarily without the necessity of service; and if they refuse to, then the cost of service can be assessed against them. That is something to consider. We don't need to have that in order to use the federal concept that basically anybody who is 18 and not a party can serve process.

MR. LOW: The federal rule has that.

MR. ORSINGER: Yes. But the federal rule has this other add-on about voluntarily appearing upon the invitation of the plaintiff.

MR. LOW: Right.

MR. ORSINGER: Another proposal which is astoundingly simple is that we already have a licensing structure in place in Texas, the notary public structure, which is monitored by the Secretary of State's office; and the proposal is this simple: Allow notary publics to serve process statewide. They can't be felons. They have to be I think a performance bond of $10,000. They are regulated by an insurance agency. There's places you can go, office you can go to, insurance companies who are in the business of providing these bonds;

and we rely on notary publics to take affidavits for summary judgment proof, to authenticate documents that are where millions of dollars of wealth transfer on the basis of a signature. And if we can trust a notary public to make those kind of decisions and trust their integrity and the regulation process to guarantee honesty among the notary publics, then certainly they should be qualified to serve private process.

The constable's proposal is very, a few pages down in here, and they're more or less following the lead of our previous discussions only they would like 10 hours of continuing education and they want a written examination that you have to score at least 70 on before you can do it. You need to carry $300,000 in insurance, and the authorization would permit you to serve in the county that issued the authorization and the surrounding counties which is the jurisdictional scope of the constables and sheriffs apparently in serving is in their county and contiguous counties.

Now that is a kind of a philosophical change from our current approach. The current

approach is the initiating court authorizes the service of process anywhere in Texas for that process. The constable's concept is more like let the Travis courts, let the courts of Travis County decide who can serve process in Travis County no matter what court it comes from. And that decision also works for Grayson and all the surrounding counties which is more rational actually because that means that the people that live in a place are authorized to work in that place instead of someone that lives in Austin has to go to El Paso to get authorized to deliver process in Austin. So the logic of shifting the focus to where they work and having it geographical probably makes more sense than the system we have now, but maybe not as much sense to piggybacking onto the notary public system or allowing anybody to do it like the feds do. They also suggest that we attach a written copy of the written order authorizing this individual to make service, that the authority under the court order not be transferable to other people or employees who have not themselves personally been authorized and that

on a quarterly basis a list be provided to all of the districts, county and justice courts as to who is authorized to serve process, private process in that county.

They also don't think these people should be armed when they're serving process even if they have a concealed handgun license issued by the State of Texas pursuant to all of that statute and regulation, and they would like a proscription against any identification cards, badge, patch or insignia that causes another person to think that they're a peace officer or acting with the authority of the peace officers.

The private process server people that are in communication with us have responded to a lot of those details; but I don't want to take that up yet just in case one of the simple solutions is compelling to enough of us that we favor it.

To go behind the constables you have revisions of our prior work product in which I've tried to fold in the recommendations that were made by the Committee, not that anyone was voting in favor of examination or

insurance or anything; but there were suggestions that made the rule more workable assuming we decided to vote in favor of a test -- pardon me -- schooling or insurance and whatnot.

And so just to highlight that, basically there is one thing I need to add. Rule 103, subdivision (1)(b) includes the possibility of a citation being served by registered or certified mail sent by an attorney of record in the case. That's a plausible suggestion. It's not substantially different I don't think from having the clerk of the court send it by registered or certified mail; but there seemed to be some desire for lawyers to be able to affect service through the mail.

I don't know what to do about proof of service, whether you require that it be a certified, return receipt requested signed by the defendant or whatever. I guess we'd have to look into that. That's in there if you want to look at it; but the main private process is in new (1)(c), "Any person authorized by law or written order of the court not less than 18 years of age and not

interested in the outcome of the case." Then you drop down to 5 to find out when the passport can be issued. But understand that any judge can authorize the service of process on someone that doesn't meet these criteria insofar as process out of their court is concerned. And so this is only an issue of when one judge in Texas would be authorizing someone to serve process for all courts in Texas. That's the practical effect of 5(b); and those criteria as suggested or as discussed before are 18 years of age, U.S. citizen, not convicted of a felony or a misdemeanor involving moral turpitude, a DPS fingerprint check within the previous 12 months, either blank number of hours of continuing education or not depending on how we do that, and it's either anybody's education or approved by some standard that we adopt or we allow the judges to specify which defeats the passport concept probably. Error and omissions policy or general liability policy for an unknown amount, that's a controversial provision. And then the issuance of a card that would be basically

your authority to serve process for any process issued by any court in Texas.

And there is a concern about the fact that they're all staggered and it becomes an administrative nightmare for the larger people to keep track of when authorities are being revoked or when renewal comes up because each court is on its own timetable depending on when the court order was signed. So we just merely suggested they all expire on December 31st which would create a big rush everywhere; but at least it's during the Christmas break so there won't be much other business in the courthouse other than private process servers down there getting their passports renewed.

And then Item 7 there has a typographical error. It should read "An order issued under subsection (5) of this rule may be set aside at any time" -- insert the word "time" -- "by the court issuing such order including whenever the court determines that the conditions for issuance of the order are no longer being met." Basically that means if a judge gives that authority, they can revoke it any time they want, and that among grounds,

but not the only ground for revocation is that the criteria are no longer met. That would authorize the judge even though someone has met the criteria for reasons because of circumstances or allegations or whatever to say "I revoke the authority I gave you. If you can get it from someone else, fine; but I'm revoking my authority." Then there is a withdrawal of authority saying the private process that can be served in this method would not involve seizing a person or seizing property. Then there would be equivalent changes for under Rule 536.

And that's kind of the executive summary of what the competing proposals are; and frankly I don't think we ought to debate the passport with the aid criteria if there is a trend here to go to either the federal rule or to piggyback onto the notary public certification process as a convenient way to find people honest enough to serve private process, privately serve process.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: I just had a comment. One thing you said caught my interest. The

judge could revoke it, and then if they could get one from somewhere else, that's up to them. Is there any responsibility or could there be any responsibility that someone who has been revoked by a judge reveal that in applying to another judge? Obviously you can't police that; but failing to reveal it ought to -- there ought to be some penalty. I'm just concerned about somebody that is revoked because of an aggressive incident, for instance, and then shopping around and getting permission from some other judge who doesn't know about it.

MR. ORSINGER: We could easily write that in there. It's hard to say that's not wise.

CHAIRMAN BABCOCK: Bonnie.

MS. WOLBRUECK: Richard, on Rule 103, the one about registered/certified mail by the attorney, I noted that you have it in Rule 103, but you don't have it in 536.

MR. ORSINGER: Well, that's a drafting error; and I apologize for that. And furthermore there is another rule that we're going to have to change if we're going to permit the lawyers to do that; and that is I

think the rule that authorizes clerks to do it. But I put it in here just so we'd have a concept in front of us.

Frankly if the clerk can issue process by certified mail, I don't know why it adds anything to say that the lawyers can; but there seem to be some people that wanted the lawyers to be able to be involved in the service process.

MR. HAMILTON: It's $90 cheaper.

MR. ORSINGER: No. The clerks charge. They don't charge $90 for service. They charge $90 for the issuance of process. The service charge is more like $15.

MS. WOLBRUECK: The issuance is $80.

MR. ORSINGER: Oh, okay. The service is $90. Okay.

MS. WOLBRUECK: The service is the same fee as the sheriff would receive.

MR. ORSINGER: Okay. Then I'm backwards, and what Carl is saying is it might economize if lawyers did it because they would not be out of pocket. So maybe that's a rationale to let lawyers do it just like court clerks do it now. How do you feel about that, Bonnie? Is

it bad to lose control of that process?

MS. WOLBRUECK: I personally would feel that because we have difficulty sometimes with service not being proper in courts. I must tell you-all there are issues with proper service all the time and to have an attorney do it and you know sometimes maybe it's not accomplished as well as maybe if the clerk is taking care of it because the court knows, you know, by the return card. You have to make sure that the return card is there and everything; and I believe that that process has really worked. I haven't heard throughout the state that that process has not worked so that the court has the returned card and knows that the papers have been served. Your procedures for handling it otherwise you'll have to work out something to make sure the court is aware of that service.

MR. ORSINGER: That proposal may then boil down to whether or not we want to have everyone pay the clerk the fee. But it seems to me like we ought to see if there's interest in either of the simpler solutions because we may not need to discuss the 103(5)

subdivisions.

CHAIRMAN BABCOCK: Frank had a comment.

MR. GILSTRAP: Isn't one of the simpler solutions the notary public piggyback?

MR. ORSINGER: Yes.

MR. GILSTRAP: And that's apparently very simple, and it looks real attractive here at 5:20 on Friday afternoon. But I've got one question or two questions. One, one of the attractive things about it is they already post a bond. Would their activities as private process servers come under that bond, and would the apparent possible increase in liability affect the premiums on the bond for your regular notary public?

MR. ORSINGER: I don't think it would because the notary public bond is -- I mean, we'll have to explore that if we're interested in that; but I think that there are statutes telling you what notaries do, and certainly private process is not one of those.

MR. YELENOSKY: But it will be now.

MR. ORSINGER: No, it won't. The statute won't be any different just because we allow.

MR. GILSTRAP: Okay. But then the bond,

I can't see how the bond would cover it.

MR. ORSINGER: I don't think the bond would cover it. What the bond means though is that you can get a bond.

MR. GILSTRAP: Okay. You are bonded.

MR. ORSINGER: Even if it's just a $10,000 bond.

MR. GILSTRAP: You're bonded. I see.

MR. ORSINGER: If you can't get a $10,000 bond, then maybe we shouldn't have you serve the private process.

MR. GILSTRAP: I understand that.

MR. ORSINGER: If you don't have an insurance policy like $300,000, sure. That's why we wouldn't want to do that. Or maybe you should say notary publics who also have a $300,000 liability policy can serve private process or something.

MR. GILSTRAP: Okay.

MR. ORSINGER: But you know, the nice thing is that the licensing mechanism for notary publics is in place and it's widely available and the infrastructure exists instead of dropping it on local district clerks and county clerks to be issuing cards

of different shapes and stripes with not a lot of continuity.

MR. GILSTRAP: As long as it wouldn't affect the existing notary public structure, it's attractive. That's the only concern I would have.

MR. EDWARDS: As I understand it you're using the notary public structure just to qualify the person as a person that you are willing to have serve process. That's what I understood. You're using it as a qualifying tool.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: You said we had a visitor. Are we going to hear from that person?

CHAIRMAN BABCOCK: We've got two visitors.

MR. YELENOSKY: Are we going to hear from them?

CHAIRMAN BABCOCK: If they want to speak, then we will.

MR. YELENOSKY: I was wondering, I mean, since they're here.

CHAIRMAN BABCOCK: We've heard from them

before; but we'll hear from them again if they want to talk, but we won't make them talk. Tommy.

MR. JACKS: I was going to suggest to call a vote whether we had rather do something simple or something complicated.

(Laughter.)

MR. EDWARDS: Before we take that vote --

MR. YELENOSKY: I need to know whether that's conceptually simple.

MR. EDWARDS: Before we take a vote like that remember what we heard the last time we visited with this, and that is that the proposal for a licensing process on process servers has been before the legislature every session for the last 20 years. It passed both houses only once and was vetoed by the governor. And I think if we get into setting up a license process, we're getting, we're treading on legislative territory and we're going to get burned. The other I think we can do with impugnity either with the federal rule or the --

MR. ORSINGER: The piggybacking rule.

MR. EDWARDS: -- piggybacking rule. No

problems from that standpoint.

CHAIRMAN BABCOCK: Yes, sir. One of our visitors.

MR. MCMICHAEL: I'm Dana McMichael with Assured Civil Process in Austin. I've been very much involved in the actual drafting process of these two simple procedures. The notary concept is actually mine. I'd be more than happy to take any questions on either one of these. I think the industry viewpoint is that we would really pursue the federal rule as the preference. From the federal courts there are concerns about all those issues, and it's working. Why not make it the state standard? But because of the concerns of the various judges in the metropolitan counties the notary provision was a concept that I came up with 12 years and started to try to get bills passed in the legislature while other elements of the industry would like the licensing provision get through.

I've always opposed the licensing bill. I've actively lobbied against it the entire time because it's a bad concept always promoting ultimately the Federal Rule 4 model

because I don't as an individual who has been in the industry for 15 areas see what the confusion is between the state and the federal courts having that same simplicity; but because there are those political forces and whatever to satisfy, the notary provision really is quite sublime. And I don't know if you noticed there was a comment at the bottom of that that was added to clarify that it would not be in a notarial act. Therefore you wouldn't run into those issues.

CHAIRMAN BABCOCK: Thank you. Nothing to add from our other visitor. Bonnie.

MS. SWEENEY: Is there any opposition to doing either the federal or the notary?

CHAIRMAN BABCOCK: I don't know.

MS. SWEENEY: Piggyback.

CHAIRMAN BABCOCK: I don't know. Any opposition? Judge Brown.

HONORABLE HARVEY G. BROWN, JR.: I don't personally have any opposition, I don't think; but I will say that the Harris County judges have had a number of experiences with people who have acted inappropriately, that because of that there has been an education

requirement imposed, and there have been a number of judges who have said that the private process servers have outright committed perjury in statements about service. And therefore I think a lot of the judges at least would like to see something more than just anybody over age 18 because it's a very important act. We have so many default judgments presented to us that we have no way of knowing anything about the person who signs it other than that's their signature.

PROFESSOR CARLSON: Is the educational requirement by local rule?

HONORABLE HARVEY G. BROWN, JR.: I don't actually know how it's been done because it wasn't my bailiwick. It was another couple of judges who were very involved.

MR. ORSINGER: I think it's an understanding that you can't get a Harris County order without taking the Harris County class; and I don't think it's a local rule. I just think you don't get the order unless you can show you've taken the class.

CHAIRMAN BABCOCK: Yes, sir.

MR. FRENCH: You're right about Harris County on that particular issue of education. But as far as Dallas County, Collin County, all up in that area other counties require education. They require that we have an eight-hour, seven-hour education course; and what it does is it's a state association that teaches it, and they accept the certificate as the education; but you have to do it every two years.

COURT REPORTER: Could you tell me your name?

MR. FRENCH: Kirk, K-i-r-k French. But it's every two years is when the license or the standing order runs out. But what my problem is with it just like I said last time is just like Harris County, I have got to go down there on a Friday afternoon in rush traffic and all that to get on the order to serve it. I've got attorney groups in Dallas and Austin and Houston that they send me the process. If I'm not on the Harris County order or not on any other order and the attorneys send it to me, then I can't serve them. So therefore that's what I'm looking

for is something where they don't have to worry about me having the order or not.

CHAIRMAN BABCOCK: Yes, Bonnie.

MS. WOLBRUECK: I just have one conceptual question regarding the notary public concept. What if the court finds that there is somebody that they possibly feel like is doing the servicing improperly or something? Would the court or the judge have any recourse or anything?

MR. ORSINGER: If somebody lies under oath, obviously they can refer it to the District Attorney and probably should. That ought to take care of that problem. I mean, the Court has inherent power to protect the judicial process, I suppose, through contempt citations.

MS. WOLBRUECK: I understand. I'm just saying other than saying you don't meet the criteria or something.

MR. YELENOSKY: Are you saying does the judge have the authority not to use that person?

MS. WOLBRUECK: Yes, use that person.

CHAIRMAN BABCOCK: Richard, did you hear

that question?

MR. ORSINGER: I'm sorry. What?

MR. YELENOSKY: I asked her if she meant, if she was asking whether the judge had authority not to use a notary because of circumstances that come to the judge's attention, doesn't trust that person?

MR. ORSINGER: This would be like --

MS. WOLBRUECK: I'm just asking.

MR. ORSINGER: -- banning someone from serving process? I don't see how a judge can, how a judge with one court can ban someone from serving process across the state. If we wrote that in here, they could.

MR. YELENOSKY: But he or she doesn't have to use that person.

MR. ORSINGER: Well, I don't know. See, it depends on how we write the rule. If we write the rule that any notary public is authorized to serve process anywhere, then we don't need court orders anymore. If we say that the court is free to let even a non-notary serve, but if you're a notary you can automatically serve no matter what the judge says, then we're forcing those people on

the judges. And if we say a notary can serve process anywhere in Texas except for a court that specifically rules they can't serve process in that court, we can write it that way.

MR. JACKS: And I suppose a court could then say "Well, if you haven't taken my course, you're banned."

MR. ORSINGER: From my court.

MR. JACKS: And so we're right back where we started.

MR. ORSINGER: And if the Houston judges all do that, we haven't accomplished anything.

CHAIRMAN BABCOCK: Mr. McMichael.

MR. MCMICHAEL: Process servers don't serve for judges. They serve for the legal community, attorneys. And there is an instantaneous, automatic policing element within our industry. If I don't do a good job for you, I lose my client. If I do a bad enough job for you or enough clients that it arouses the judge's attention to it, I'm doomed in short order because the word will run through the legal community and no one will use me.

Private process is a free enterprise system at work; and that's why we've increased the efficiency level of that part of the court proceedings because we do what we do and we do it well. But those of us that don't do it well or don't know what we're doing we're out of business quickly because the industry, you can't serve papers in Texas if the attorney doesn't give them to you to serve. So that's where the policing takes place.

Now if you do something that is illegal, there is a penal code that deals with that. If you do something that is unethical, our clients deal with that. I think that's part and parcel to why this works in the federal courts. The client/process server relationship polices the industry. And if we do something that is, you know, God awful, then the courts take care of the penal side of it.

CHAIRMAN BABCOCK: Judge Brown.

HONORABLE HARVEY G. BROWN, JR.: Again, I'll kind of speak for some of the judges who will be very interested in this. There are so many private process servers that the ability

of the judges to police this in the sense that, you know, "I know that in this court something happened" is very small. There is no way we can keep up with all the private process servers without some systematic procedure in place. Just anecdotally won't do. So the free market doesn't work in that sense.

CHAIRMAN BABCOCK: But in fairness to what Mr. McMichael said, he said it's not the judges, but it's the lawyers who are hiring these guys.

HONORABLE HARVEY G. BROWN JR.: I was just getting ready to address that. I mean, I think the judges do in a sense. When you sign a default judgment for a lot of money that's going to change somebody's life, and I think the judges feel like we have some obligation to the judicial system to make sure it's right.

CHAIRMAN BABCOCK: I think his point though was that if I hire a guy, if I hire him, and I get a default, and then it gets set aside because the application was wrong or whatever it was, then I'm not mad at you,

judge. I'm mad at him for not doing the process correctly.

HONORABLE HARVEY G. BROWN, JR.: Right. So you don't hire him again.

CHAIRMAN BABCOCK: Right.

HONORABLE HARVEY G. BROWN, JR.: But Elaine does or somebody else does because we have --

CHAIRMAN BABCOCK: Well, Elaine does.

HONORABLE HARVEY G. BROWN, JR.: -- so many private process servers.

(Laughter.)

CHAIRMAN BABCOCK: Yes, sir.

MR. FRENCH: Let me ask the judge something. What is the difference between me and a deputy constable? I was a deputy constable for 12 years. I've been in private process for 22 years. I mean, I never have understood that, because when I was in the constable's office I saw a lot of deputy constables do process.

HONORABLE HARVEY G. BROWN, JR.: I guess one of the differences is that they have been through some specialized training. Again, I'm not saying this is my position.

MR. ORSINGER: But it's not training on serving process. It's training on arresting people and drawing your gun and shooting.

MR. LOW: But you can call a constable. And I'll guarantee you if he runs for office, he is not going to want to hear a complaint against a deputy constable. He might get fired. Who is going to fire you if you don't work for somebody like that? Another lawyer might not know you. I bet I don't serve three a year. I agree that it's not a big point to keep up with the servers.

CHAIRMAN BABCOCK: Paula, just a second. Linda, we are meeting tomorrow at 9:15.

MS. EADS: 9:15. I love you.

(Laughter.)

MR. ORSINGER: You can have an extra glass of wine.

CHAIRMAN BABCOCK: That's right. In deference to one of our most distinguished. Yes, Paula.

MS. SWEENEY: I want the record to reflect I like you and am very fond of you also.

I think we have anecdotal little

incidents where somebody screwed up; and again we're letting the police carry the dog around. I mean, let's let this dog be for a while and let them have what they want. It sounds to me like the system is working and they need help to make it work more smoothly. We've taken out I think the thing that really upset me was the insurance requirement, and we're talking now about using a well established, well-known procedure like the notary procedure and the federal rule. Let's do it. And if we end up with a whole bunch of surprise bad eggs, we can undo it; but I don't think from what we gather around the state and from what we're hearing that that's a big problem.

CHAIRMAN BABCOCK: Paula makes a good point as always. What do you think? Tommy.

MR. JACKS: I would move that we go to the system that piggybacks on the notary system, its credentials of a sort that are already in place. I have served lot of people. I've never lied awake at night worrying about that, whether it be federal court or state court. I've never had a

problem with it in 30 years of law practice. And I think from the litigant's point of view the more you have a crazy quilt system where you've got to have this to satisfy the judge in that county and something else to satisfy another judge in another county and let alone being limited geographically to where you can get somebody to serve particularly when you're in a pinch and really need them served fast, I would be in favor of simplicity and I find that a useful way to split the baby.

CHAIRMAN BABCOCK: Skip Watson.

MR. WATSON: I too am in favor of simplicity. I however become worried about insidious accretion here. Can we have a bathroom break or something or go ahead and vote?

(Laughter.)

CHAIRMAN BABCOCK: I'll take either motion.

MR. JACKS: If he'll say "second."

MR. WATSON: Second.

CHAIRMAN BABCOCK: Second Tommy's. Okay. What are we voting on, Tommy?

MR. JACKS: Well, I think it's, and

Richard, tell me if I'm wrong; but on the page that says Offered Notary Publics at the top, is that the page we're looking at? It's in boldface italics. The page isn't numbered, so I can't give you that.

MR. ORSINGER: I know what you're saying; and I'm not finding it either.

MS. CORTELL: It's kind of in the middle.

MR. ORSINGER: I thought it was just a conceptual thing rather than specific rule language.

MR. GILSTRAP: The rule is at the bottom.

MR. ORSGINER: The rule down here in the middle?

MR. CHAPMAN: There's the rule down there.

MR. ORSINGER: Okay. I'm with you. I see it right here. "Any person who is appointed by the Secretary of State as a notary public and not a party to or interested in the outcome of the suit."

MR. JACKS: That's it. That's what I move.

MR. ORSINGER: Okay.

JUSTICE MCCLURE: Second.

(Laughter.)

CHAIRMAN BABCOCK: Hey, you're in a different time zone. It's only a quarter of 5:00 there.

(Laughter.)

JUSTICE MCCLURE: I'm still here. I have been on this phone with this phone glued to my ear for eight hours now.

CHAIRMAN BABCOCK: Okay. It's been moved and seconded. Richard, read the language, please.

MR. ORSINGER: Rule 103, "Who May Serve: (a) Citation and other including process may be served anywhere by:

(1) Any sheriff or constable or other person authorized by law, or

(2) by any person (A) appointed by the Secretary of State as a notary public and (B) not a party to or interested in the outcome of the suit."

MR. HAMILTON: What happened to the lawyers? Are they out?

MR. ORSINGER: Well, that's a separate vote.

CHAIRMAN BABCOCK: The lawyers are out for the purpose of this vote. Everybody in favor of what Richard just read raise your hand.

JUSTICE MCCLURE: I vote "yes."

CHAIRMAN BABCOCK: Everybody against raise your hand. By a vote of 14 to zero that passes. Now, Richard, have we got anything else to talk about?

MR. ORSINGER: We could, as Carl pointed out, we could still breathe life into the proposal that lawyers can serve by certified or registered mail in addition to the clerk being able to serve that way. And Bonnie has already stated her concerns about the loss of control over the process.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I have another question. In the federal system where you send the pleading directly to the party or the lawyer, send them directly.

CHAIRMAN BABCOCK: Right

MR. HAMILTON: And if they don't agree, then you have them served. If they can accept service, it seems to me like that's a good

rule.

CHAIRMAN BABCOCK: Richard and I talked about that yesterday. It is a very complex rule understand Rule 4. We can certainly look at that; and I don't know that it, that that works all the time although there are certain --

MR. HAMILTON: If it doesn't work, then you just have them served.

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: But the way the federal put some teeth into it is that they say that if you force somebody to issue process, you can recover your attorney's fees and the cost of service; but there are a lot of people in Texas who would never show up as a litigant in federal court who would show up as a litigant in state court. A lot of them won't speak English so they won't be able to read the letter you send them.

I mean, I think before we take that part of the federal procedure and drop it down to the litigation that the State of Texas does we ought to seriously consider all of it, because the federal court cases, you know, usually are

of a greater magnitude in at least some senses.

CHAIRMAN BABCOCK: Let's stick on this attorney concept right now before we get to the Federal Rule 4 issue. Does everybody want to add that? Paula, then Mr. McMichael.

MS. SWEENEY: Is there any reason for it? Has anyone asked for it? Is there any ground swell?

CHAIRMAN BABCOCK: No. Richard just thought it up yesterday.

(Laughter.)

MR. ORSINGER: No. There was some discussion here about lawyers being able to do it.

CHAIRMAN BABCOCK: Richard thought it up yesterday.

MR. ORSINGER: And Carl says it saves 90 bucks.

CHAIRMAN BABCOCK: Mr. McMichael.

MS. SWEENEY: It's a bad idea.

MR. MCMICHAEL: Right now there has been a question as to whether or not people that work in a law firm are authorized to also serve process for the law firm. And the

courts have pretty much been consistent to say "No, you have an interest in the outcome of the suit." An attorney has a direct interest in the outcome of his lawsuit. So the very next provision in this, the wording of that would exclude the attorney anyway because he's interested in the outcome of the suit.

I have known attorneys in the past who regardless of the rules have sent all their citations out by certified mail not giving a flip about filing return, because if a defendant files an answer, that's a service that, you know, they're performing. So a lot of them have enjoined the defendants simply by just sending out certified mail and just hoping they file a return. Maybe that's the spirit behind this concept; but in terms of the actual service of process the attorney is an interested party.

CHAIRMAN BABCOCK: Yes.

JUSTICE NATHAN HECHT: I'm not clear. Is the question whether the attorney could issue just the paper and then have somebody go serve it, or no?

MR. ORSINGER: No. The question is

whether the paper issued by the clerk can be mailed by the lawyer by certified mail.

MR. WATSON: Rather than by the clerk.

MR. ORSINGER: Because right now only the clerk can serve by registered or certified mail. This concept is the attorney in the case could send it, and if they can prove that it was received, then that is sufficient. If an answer is filed, then it's moot. But you know, the discovery rules permit lawyers to issue subpoenas now which scared me. I mean, that's always been a government job as far as I am concerned, and I never even wanted to be liable for wrongfully issuing a subpoena; but there seems to be more of a sense that lawyers can do things now than before. So, you know, it just depends.

CHAIRMAN BABCOCK: "Step over here. I have some paper for you."

(Laughter.)

CHAIRMAN BABCOCK: Okay. Do we want to try to add this or not?

MR. HAMILTON: I make a motion we add the provision that lawyers can serve by registered mail.

CHAIRMAN BABCOCK: Does anybody want to second that?

MR. ORSINGER: By certified.

MR. HAMILTON: Certified or registered mail.

MR. ORSINGER: Okay.

CHAIRMAN BABCOCK: Does anybody want to second that?

MR. ORSINGER: Well, I'd second it so there is a vote on it.

CHAIRMAN BABCOCK: All right. Moved and seconded for the purpose of voting.

MR. JACKS: A qualified second.

CHAIRMAN BABCOCK: Everyone that thinks Carl's motion which is to add a provision allowing attorneys to serve by certified mail or registered mail.

MR. ORSINGER: Uh-huh (yes).

CHAIRMAN BABCOCK: Certified or registered mail raise your hand.

MR. EDWARDS: That's serving process?

MR. ORSINGER: Yes, serving process.

CHAIRMAN BABCOCK: Serving process raise your hand. Well, the second didn't even vote for it.

MR. ORSINGER: Am I required to?

CHAIRMAN BABCOCK: Everybody that's against that? That fails by a vote of 12 to 1. 13 if Richard votes against it. Okay. What else?

MR. ORSINGER: You know, that pretty much clears it up. If we're going to -- I mean, the rule is written basically.

MR. LOW: Do you want to propose mailing and return?

MR. ORSINGER: If you want to, you can. I don't personally think that is wise to get into.

MR. LOW: Well, let's don't do it.

(Laughter.)

MR. ORSINGER: I mean, right now you're free to mail a letter and ask someone to make an appearance. The question is do you want to put teeth into it by having a transfer of expenses and cost. And I'm worried about some of the litigants in Texas courts who can't even read the letters that they get.

CHAIRMAN BABCOCK: Hold on for a second. Have we satisfied you-all's concerns?

MR. FRENCH: Yes, sir, you have.

CHAIRMAN BABCOCK: We have? Mr. McMichael?

MR. MCMICHAEL: Yes, sir.

CHAIRMAN BABCOCK: All right. Now our meeting tomorrow, unfortunately there is one. And rather than being at 8:30 which is inhumane, because Justice Hecht has a scheduling conflict he has allowed me to schedule our morning meeting for 9:15.

MR. EDWARDS: He's just getting soft.

(Laughter.)

CHAIRMAN BABCOCK: He is getting soft. So we will finish the agenda tomorrow at 9:15 for those of you who choose to be here.

MS. SWEENEY: What is left?

CHAIRMAN BABCOCK: Huh?

MS. SWEENEY: What is left?

CHAIRMAN BABCOCK: We've got something that you dogged me on yesterday.

MS. SWEENEY: Moi?

CHAIRMAN BABCOCK: We've got electronic media coverage. We've got Rule 21. We've got Rule 306(a), and we have got ex parte communications and patient/physican confidentiality, which is what you were

dogging me on.

MS. SWEENEY: Moi?

CHAIRMAN BABCOCK: Yes, moi.

(Adjourned 5:45 p.m.)

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CERTIFICATE OF THE HEARING OF

SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 8th day of March, 2002, and the same was thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $ 1591.00 charged to Charles L. Babcock. Given under my hand and seal of office on this the 18th day of March, 2002.

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