* *

MEETING OF THE SUPREME COURT ADVISORY COMMITTEE

June 14, 2002

(MORNING SESSION)

* *

Taken before *D'Lois L. Jones*, Certified Shorthand Reporter in Travis County for the State of Texas, reported by machine shorthand method, on the 14th day of June, 2002, between the hours of 9:04 a.m. and 12:27 p.m., at Southern Methodist University, Storey Hall, A. J. Thomas Faculty Room, Dallas, Texas.

INDEX OF VOTES

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

--*-*-*

CHAIRMAN BABCOCK: Okay. We're on the record as soon as Edwards stops getting so tickled.

MS. EADS: We're talking about websites.

MR. EDWARDS: We were talking about yours.

CHAIRMAN BABCOCK: Yeah, right, my website. Well, welcome, everybody, and I don't know that this committee has ever met in Dallas before, has it, Bill?

PROFESSOR DORSANEO: Not that I can recall, but maybe it has and I've forgotten. I find that I've lost some of the information I once had.

CHAIRMAN BABCOCK: Yeah. Well, it's nice to be here, and thanks to SMU for letting us use their facilities. It's great. We've got the first item of business is going to be the report from Justice Hecht, but before we get to that we've got some scheduling problems. Tommy Jacks just called me and very much wants to be here on the offer of judgment matter, but he is tied up in a Bar meeting and says he'll get here just as soon as he can but hopes we won't do that until he gets here.

MS. McNAMARA: Who is that, Chip?

CHAIRMAN BABCOCK: Tommy Jacks, and since Tommy is on both the Jamail committee and on Elaine's subcommittee and has had so much to do with it, it seems to me we probably need to wait for him. Orsinger is also

at a Bar function, and he's the second item on the agenda, and he asked to postpone until he got here, which takes us to the FED rules, and we have everybody here for that except that we received a number of inquiries at my office as to when that was going to be reached; and not knowing about these other problems, I told everybody that called that I thought it was likely we would reach it right before lunch or right after lunch, and I feel that we probably ought not to start with that for fear that a lot of people will show up and feel they have been tricked.

Does anybody know if Justice Duncan is --

PROFESSOR CARLSON: She will not be here.

CHAIRMAN BABCOCK: She won't be here, so Item 2.4 won't get handled. How about Skip Watson?

MS. LEE: He won't be here, but he sent his report and said that he would have someone to cover it.

CHAIRMAN BABCOCK: Is anybody here covering it?

MR. HAMILTON: Yeah. We're ready on that.

CHAIRMAN BABCOCK: Okay. Good. So we'll take that up first and then we get down to TRAP Rule 11, which is Bill's item, and while -- while Carl's doing the Rule 329b situation, Bill, you can read the materials on yours, on TRAP Rule 11, unless you're not ready to do it.

PROFESSOR DORSANEO: No, we can do TRAP Rule

11. I think we basically covered it once before, but there weren't very many people, although there may have been this many, in attendance at the time. Justice Hecht e-mailed both of us in February of 2002 that one of his colleagues wondered whether TRAP 11 should be changed to accommodate a concern -- I'm reading from the e-mail now -- of Federal Rule of Appellate Procedure 29.4 that a court may refuse an amicus brief that would require a judge or justice to recuse. A simple change would be to add after the first sentence of TRAP 11, which states "An appellate clerk may receive but not file an amicus brief," the following sentence: "But the court for good cause may refuse to consider the brief and order that it be returned," and an explanatory comment.

At our last discussion of this issue I believe the question was raised as to whether a judge or justice would be required to recuse with respect to the filing of an amicus brief. I think that someone explained, perhaps Justice Hecht, that whether or not there would be a requirement to recuse, that this type of situation can create problems for the Court and an individual justice, and I don't know whether we took a formal vote on whether this kind of a sentence should be added or not, but the general sentiment of the appellate lawyers at least was that it was not necessary and that it

was the judge's problem, frankly. So it was the justices' problem, but so I don't -- to open it up for discussion, our subcommittee does not have a recommendation on it.

CHAIRMAN BABCOCK: Okay. Let's go back to the top of the agenda and have the report from Justice Hecht and then we'll -- doesn't matter to me whether, Carl, you want to go first or Bill wants to go first, but we'll take those two items up first.

Justice Hecht, fresh from Chicago.

JUSTICE HECHT: Yeah. Well, I don't have anything to report. We're still waiting on the Court of Criminal Appeals to decide, and if they don't decide pretty quick, we'll just go on without them, but we like to accommodate them as much as we can, and they have serious issues that they're studying, so I am not saying that they're taking too long. But they don't seem to have issues with most of the changes except for Rule 47, but then Paul, Judge Womack, told me that they have a couple of other concerns that are unique to their cases, and so we have I think a July, mid-July, deadline for the September Bar Journal, which is the next one that comes out that we can meet, and so we will do something before then on the TRAP rules and the parental notification, but we are standing at ease while we hear from the Court of Criminal Appeals, and I think -- I think that's it unless

somebody has questions.

Chris, who stepped out, was at the legislative committee hearing yesterday, which I believe they had last year.

CHAIRMAN BABCOCK: Two years ago.

JUSTICE HECHT: Two years ago, to inquire about our rules that the Court is thinking about promulgating, and as contrasted with two years ago, it was very boring. He says that they thanked us for giving them too much information, and they had other fish to fry, and so far we seem to be keeping them as much in the loop as they want to be. If that's not enough then we'll do some more, but I do think the changes that resulted from that have been good in the sense that we have -- we have always been mindful of the Legislature's role in this area, but you get more or less mindful as time passes, and I think it's been good for us to have legislative representatives on the committee. I appreciate Frank's service and Representative Dunnam, and who else? Chief Justice Hardberger and somebody else, but it's been good for the committee and I think helps us be more responsive to the concern of the populous branch, and so I think that's been good, but as far as the committee was concerned they don't seem to have any issues with this committee, so that's good as well. Yes, sir.

PROFESSOR DORSANEO: Is there any chance we could or the Court would consider doing something on the jury charge rules and the post-verdict rules?

JUSTICE HECHT: Yes.

PROFESSOR DORSANEO: If there's an opportunity, it would be better to try to maximize --

JUSTICE HECHT: Yeah. We really want to get out a recusal rule. The Chief wants it. That's one of his projects. He wants a recusal rule, and it has some problems with it, not -- I mean, it's just not an easy thing. The committee has generated a product. The presiding judges have got a competing proposal, and so we'll have to look at all of that; but, yes, I mean, I think we'll -- we would like to clear our desk by the end of the year just because we're losing two judges and getting new ones and rather than getting everybody up to speed, we want to try to at least get everybody to vote on all of these issues and get them done, but I don't know if we'll get it done before July.

CHAIRMAN BABCOCK: Yeah. This committee's three-year term is expiring at the end of this year, right?

JUSTICE HECHT: Yeah.

CHAIRMAN BABCOCK: So will there be a re-appointment?

JUSTICE HECHT: Yes. There will be some new people and some holdovers, the same as we've always done for years.

MR. GILSTRAP: Is July the -- is July the cutoff date for this year effectively for the process?

JUSTICE HECHT: No. No. We don't -- we're just trying to meet the September Bar Journal. Once we concluded that we were waiting on the Court of Criminal Appeals anyway then we just kind of made that our unofficial deadline because we don't see why we should wait much longer than that. But, no, we could do -- we've done rules effective April the 1st, September the 1st. I don't think it matters. So I think we'll go ahead through the fall and post stuff.

CHAIRMAN BABCOCK: Here is technology at its work, at its best. I've got this little BlackBerry. This is from somebody by the name of Molly Mattis Burns to me, Supreme Court Advisory Committee. "Please allow this message to convey my extreme objection to the use of discovery in eviction cases." So they're e-mailing me in the room.

Before we go on to the other things, Chris, I think you prepared this slide show for the Legislature, didn't you?

MR. GRIESEL: Yes, I did.

CHAIRMAN BABCOCK: Okay. And it's got some very interesting background information about this committee and about our process, and I particularly like the phrase, which I assume you came up with, Chris, which "SCAC review," which he says is Step 3, and he calls it "Beating the dead horse, reviving it, and beating it again." Sometimes feels like what we do.

JUSTICE HECHT: I will report I was in Chicago yesterday speaking for about the 1100th time on electronic discovery, and we've got the only working rule in the country, 196.4, and there's a statute in California that they just passed in the fall that I really have trouble understanding, but I guess it makes --

PROFESSOR DORSANEO: You have to be there.

JUSTICE HECHT: -- sense to the California people. I don't know. But the Federal committee is looking at it, but they're all -- electronic discovery is a big, hot topic these days. I've been doing all this CLE all over the country and they're talking about our rule, so the committee ought to feel good about that, and there's no criticism of it. Everybody says, "Oh, no, this is the way to go, but should we put more stuff in it," and so on; and then the other rule yesterday that they were real hot on was what Steve Susman calls our snapback rule, the inadvertent disclosure rule, that they're looking at

too in this area. So I guess I'm reporting that our work is getting favorable reviews to a national audience.

CHAIRMAN BABCOCK: There is a -- there is some articles about our proposed Rule 47 in the *ABA Communications Law Journal*. I mean, it wasn't about our rule, but our rule was mentioned, I think, in the bigger article; and on that subject there was a recent *Law Review* article out of Arkansas or Oklahoma, one of the law reviews there, that talked about -- I was telling Justice Hecht about this last meeting, was something that I had not thought of but I should have, and that is the rules that prohibit citations of unpublished opinions, really if you think about it, are prior restraints, because you're -- a court, a body of government, is telling citizens they can't say something, and the question then becomes whether or not it is justified by some compelling state interest, and I had never thought about it that way, and since I do that kind of law I should have, but --

PROFESSOR DORSANEO: Well, cite them all and then cite Moore Pennington.

MR. EDWARDS: We had an interesting deal on that snapback which the Supreme Court addressed here a couple of weeks ago, and that was an inadvertent taking of a deposition on written questions and getting their own what they claim privileged documents and information on a

deposition by written questions and then when we got our copy they wanted it back, and the question was whether or not the discovery rule snapback applied to -- the written discovery snapback rule applied to deposition on written questions.

JUSTICE HECHT: We have got to deal with what's on our plate, which is considerable, but another issue that has arisen that we'll need to take a long-term look at, I think, is the whole interplay between the litigation system and all the alternate dispute resolution systems, including arbitration. I know this will be a concern for the Legislature, and my own view is that arbitration is so popular because the dispute resolution system, that the court's market is just not competing, not competitive. It's perceived to have costs and disadvantages associated with it that other systems don't have, and my perception of the courts' and the Bar's reaction to that has been "No, no, no, you can't leave" and try to make the rules why you can't leave, but at some point we need to turn to what we can do to improve our own product that will keep people from leaving, I think.

At least we need to look at the whole phenomenon of a departure of disputes from the traditional court litigation system, which I think is a fairly alarming -- growing at a fairly alarming rate.

MR. EDWARDS: You know, our Daubert system of challenges as it's developed and the no evidence motion for summary judgment in my experience has doubled the cost of litigation, extended the time of court use in these things. We see Daubert hearings going for weeks, days if not weeks.

CHAIRMAN BABCOCK: Really?

MR. EDWARDS: Oh, yeah. We just finished one which was seven days, six or seven days of Daubert challenges.

CHAIRMAN BABCOCK: Does anybody else have that experience?

MR. EDWARDS: And on a no evidence motion for summary judgment it forces you to go out and depose everybody, and you do not have access to an affidavit because when it comes time to put on evidence if you don't have it in summary judgment form you lose, and so you take -- instead of five depositions you end up taking 20 or 25 depositions just so you have the evidence for the no evidence motion, and to me those things are -- I think we need to figure out some way to put some fence around the Daubert stuff where you've got your gatekeeper function performed but it's not taking up days of court time and thousands and thousands of dollars of expert witness time; and with regard to no evidence motion for summary

judgment, something that eliminates the necessity of multiple depositions that would not be taken except for the threat of a no evidence motion for summary judgment.

CHAIRMAN BABCOCK: Well, plenty of stuff to talk about.

MS. CORTELL: I just had a question. Are we hearing statistics that there's a flight from conventional trials to --

JUSTICE HECHT: Yes. Oh, it was the key address, key subject for discussion at the Fifth Circuit, and it's a national phenomenon. Everybody is getting out of here as fast as they can, and there's already talk that there may be some effort in the legislative session to put parameters in this, but there have been past efforts to do that in Congress which have utterly failed; and so with the breach of interstate commerce as it is, unless the U.S. Supreme Court decides to go back on 150 years of jurisprudence, what the states do is not going to make a big difference to what's really happening out there, so -- but there is growing concern that -- and my problem is I think the concern is misplaced, because it's always, "Well, these people shouldn't have to" or "only under these conditions" or this, but why are people leaving? They're leaving because they don't like what they get at the courthouse, and they like what they get somewhere else

better. Maybe they're poorly advised, maybe they will wake up some day and realize they really had it good all along, or I don't know, but meanwhile that's what's happening.

And the other concern that the Federal courts expressed was the number of jury trials, that it's just gone to nothing. 800 Federal district courts in the United States tried an average of 15 cases apiece to a jury verdict last year. 94 percent of the criminal defendants pled guilty. That's the highest plea rate in the history of the United States, and why is that? Are we just better at catching them or are the pleas better or people don't want to go to trial? I mean, it's hard to know what the explanations are, but there is a departure from the traditional trial method of resolving disputes.

MS. McNAMARA: A lot of the arbitration gets out of the system without thought. It's done commercially in the transaction before any dispute has arisen, and it's largely done on ignorance of what happens once you get stuck in arbitration. The lack of appeal is a terrifying phenomenon of arbitration, but trying to challenge an arbitration board is really, really hard. And so a lot of commercial parties just put it in the contract without thinking, and, you know, five years later when something goes wrong there you are.

JUSTICE HECHT: Well, the Bar is -- you know, this is kind of a theme for the Bar is, "Oh, this is terrible," but we've already had four or five cases come to us where lawyers have arbitration agreements and provisions in their agreements with their clients, so --

MS. McNAMARA: But arbitrations are more expensive in many cases than litigation and less efficient because the arbitrators are only available for two weeks in January and then a week in March, and it is a much less efficient system once you get caught in the mechanics of it than the court system.

MR. EDWARDS: If you have a small claim, it will kill you. We had a 3,000-dollar interest problem that went to arbitration, and the first pre-arbitration conference with the arbitrator, our half of his bill was $2,600. On a 3,000-dollar deal on a mortgage.

MR. YELENOSKY: That one should have settled.

MR. EDWARDS: Well, and then if you -- you know, it's loser pay everything, so how can somebody with a 3,000-dollar complaint do anything? Most -- I'd say over half -- or most of the people with -- we might know that end up in arbitration do it because they got signed on a contract on which they had no choice. You've probably got a bunch of stuff from your banks that say

your checking account is subject to arbitration.

MS. McNAMARA: Brokerage accounts.

MR. EDWARDS: Credit cards are subject to arbitration. Now, on the brokerage area, the arbitration that's done there, the industry itself has a reason to do -- to be fair because they want to keep people coming back, but the credit card companies don't care, and you find it in leases and mortgages.

MR. YELENOSKY: Now your job.

MR. EDWARDS: Huh?

MR. YELENOSKY: Now your job.

CHAIRMAN BABCOCK: I'm going to step out for just a second. Justice Hecht's going to take over as Chair, and either 329b or the TRAP Rule 11. Here's the materials right here. I apologize. I'll be right back.

JUSTICE HECHT: Well, since Bill's already given us a slight summary, why don't we finish TRAP 11 and then we'll come back to 329b.

Another issue on 11, and I just throw this out. I don't have -- I don't have a view on this, but we're getting more motions to strike, our Court is, amicus briefs, and there really are no standards for striking an amicus brief. We struck one of them this last week or two because it was filed by the spouse of a lawyer for a party in the case and the other party complained, and it didn't

seem to add anything that couldn't -- that the party couldn't have said themselves, so we struck it, but, you know, should there be a standard? We really haven't needed them. In the past we have not had a surplus of amicus briefs in our history, but we do get more of them now, and, you know, are we comfortable with it the way it is or not?

MR. HAMILTON: Who are you going to complain to if you want to look at it?

JUSTICE HECHT: Yeah. That's right. I don't really have a feel for this. Whatever the committee recommends.

PROFESSOR DORSANEO: Well, Pam, what do you think?

MS. BARON: I don't perceive it as a broken problem. I think you and I were talking, and the Court's had one problem in 20 years on this, and it's not -- has not posed a substantial recusal problem. There are recusal issues for judges in amicus briefs, but it's usually when the judge has moved from private practice or the trial court up into the appellate system and has participated in the case earlier, or the same problem if your family member has some kind of financial interest in the outcome of the case through an amicus, that might present probably not a disqualification problem but a

recusal problem.

But those issues are governed by the rules, and if it hasn't been a significant problem, if there hasn't been a lot of abuse of the system, it's nice that parties have -- that people have the freedom just to come in and write, and plus you're going to have a problem because there is a lot of individual citizen input. Once you start down this road are you going to start bouncing school children drawings in the school finance case and so on and so forth, and it's been nice that it's easy to file, there aren't a lot of requirements, and there is a lot of participation as a result from people who may not otherwise be able to come to court and make their statements. What do you think, Bill?

PROFESSOR DORSANEO: The rule, the last time around we had added a requirement that probably is not followed uniformly that the amicus brief would identify the person or entity on behalf the brief is tendered and disclose the source of any fee paid or to be paid for preparing the brief. You know, not that this is necessarily relevant to anything, but I will never take a fee to do an amicus brief because I regard that as somehow distasteful, but I know it's a common practice and a lot of academic people do that as kind of a routine matter. I don't guess it's such a bad idea for them to get

compensated for their time when they put in a lot of time on an issue that they have been studying for a period of years; but it is true, at least in the Supreme Court, I don't guess so much in the courts of appeals, that there are amicus briefs filed by a whole variety of people; and to me, I see it as a Court issue. What does the Court want to do?

We've had a history in this state of the Court being, you know, very good at paying attention to amicus briefs filed by different groups of people. Occasionally it's mentioned in the -- well, frequently mentioned in the Court's opinions that this person or that group had filed opinions. I read one the other day that was, you know, the petition was granted on rehearing and partially due to the fact that a number of amicus briefs had been filed indicating that this is an issue of importance. I think there is a lot of good that come of this.

The Court has -- you have struck amicus briefs. Why do we need to put it in the rule, I guess would be my attitude about it. Why wouldn't the Court have authority to strike a brief that didn't comply with the rules or that had some sort of problem with it? I don't have any great problem putting a sentence in that says that, but --

JUSTICE HECHT: Anybody else want to weigh in? Frank.

MR. GILSTRAP: I think Bill kind of touches on some things I have been doing, and that is part of my lack of clarity is I don't see really any statement as what role the Court, you know, wants these briefs to play. I mean, the rule says you can receive them. Well, I mean, I guess that means the clerk can kind of put them in the corner and say, you know, "They're there, and if anybody wants to look at them, they can." Indeed it strikes me as odd that something that was never filed could be stricken.

At the same time, now the Court is posting these on its website, and so, you know, maybe -- maybe the Court needs to give us some thoughts on what it -- what role it wants amicus briefs to play. You know, I mean, or how important are they? How official are they? Some places you can -- they list the amicus curiae attorneys in -- you know, as one of the attorneys in the opinion. I think we need maybe some direction in that regard.

JUSTICE HECHT: Okay. Well, I don't have any this morning.

PROFESSOR DORSANEO: Many amicus briefs that even my clients would try to get written, you know, they just -- even from the Attorney General's office would mirror the arguments made in the main brief. I don't know

how helpful that is, but at least you know the position of a particular amicus on the thing. You know, what use does the Court make of them? Do they copy them and send to everybody --

JUSTICE HECHT: Yeah.

PROFESSOR DORSANEO: -- or do they put them in a library or what?

JUSTICE HECHT: No. We get them with the file. They come with the file.

PROFESSOR DORSANEO: Are they supposed to be read?

JUSTICE HECHT: Yes. They are supposed to be read and they are read. Everybody reads, as far as I know. We talk about them, and they are just treated just like any other brief.

MS. BARON: I've had a few problems where the clerk has accepted amicus submissions that don't show service on counsel to all parties, and the only way I found out about it is when it showed up on the case management, and that's just a clerk vigilance issue because the rule clearly provides that you do have to serve.

PROFESSOR DORSANEO: I know Dick Countess has complained over the years that he gets all of these briefs filed by interlopers in his cases and he has to

respond to them, and it just irritates him to no end. I don't respond to them.

JUSTICE HECHT: Yeah. Responses are few. Every once in a while a party will respond to an amicus brief, but that's not the rule. You can, but people don't do it. And, you know, a lot of amicus briefs are just like "me too," but some of them are very useful because they survey law that outside of Texas that the parties for one reason or another have not done, and that's all -- we're going to do it anyway, so it's useful to have somebody start it for us, and they have -- you know, we ask the Attorney General for comments on statutory construction cases when the parties -- we're not sure the parties are able to give us the full picture on that. We're going to start asking the Secretary of State to do the same thing with election issues because we had an election case this spring, and as soon as we decided it the Secretary of State, "Where was I?" And, you know, as the chief elections officer in the state she ought to have some input in what the law is, so -- well, unless there's -- unless somebody has a motion, I guess we'll leave this be for the time being, and go on to -- which is fine. I think that's fine with the Court.

362b. Carl.

MR. HAMILTON: I think I can remember what

all that went on in this case, but I think it started out with a memo from Judge Hecht as a result of the decision in Porter vs. Vick. Apparently in 1961 the Supreme Court decided Fulton vs. Finch where they said that the court's plenary power cut off at a certain time and it could not ungrant the motion for new trial, and then in '81 the rules were changed, however, but when Porter vs. Vick came out in '94 apparently the Court didn't move to the change or something and continued to follow Fulton vs. Finch.

Then there were a number of court of appeals decisions that came out, notably two in Houston, that did not follow Porter vs. -- well, it wasn't out then, the Gates case and the Biaza case, and they held that once the trial court ungrants a motion for new trial, well, as long as he does it, it has power to do anything it wants to with the case. So then the 14th Court recently in March handed down the decision in In Re: Luster where they said we were apparently wrong in Gates and Biaza because of the Porter decision, so they in effect overruled those decisions. And in this case Judge Harvey Brown had ungranted a motion for new trial more than 75 days after the judgment, and the court of appeals says you can't do that.

One of the concurring opinions is interesting that says -- by Judge Eldman, says, "The

majority opinion correctly decides the case in accordance with the prevailing decision of the Supreme Court of Texas, yet the anomalies created remain. One, after a motion for new trial has been granted how can a trial court have ongoing plenary power to retry the case, etc., but lack plenary power to vacate the decision to grant the motion for new trial. Two, once a trial court determines that a motion for new trial has been improperly granted and that a proper adjudication was, in fact, reached, why must the time and other resources of the parties in the judicial system nevertheless be wasted to relitigate it; and, three, why have such anomalies been allowed to persist?"

And so that is the issue, is whether or not we want to recommend to the Supreme Court that Rule 329 be rewritten to provide in effect that once a new trial is granted the court has power to do whatever and for however long a period of time; and my view -- and I don't know whether this is your view or not, Bill -- Skip says it is in this memo that he sent out that once a new trial is granted the Court ought to have power to do whatever it had to do to start with.

PROFESSOR DORSANEO: Yes.

MR. HAMILTON: Which would be to retry the case, to reinstate the judgment, to do whatever it wants

to do without any limitations on that, and then there was some other suggestions that there ought to be a time period by which the court would only have so many days to ungrant the motion for new trial, and then if that time period passed, the Court couldn't do it and the parties would be forced to retry the case. So that's where we are.

JUSTICE HECHT: Bill.

PROFESSOR DORSANEO: I started working on this problem many years ago with Chief Justice Guittard and Justice Quint Keith and a number of other people who were involved in rewriting Rule 329b after some significant cases were decided I guess in the mid-Seventies by this point. Mid- or late Seventies. Mathis vs. Kelton and TransAmerican vs. Three Bears. Those cases decided by the Supreme Court established in fairly clear terms that a trial court has plenary power -- and I think that term in our rules was generated by those cases -- plenary power to take any kind of legally appropriate action within periods of time after the judgment.

Those cases, as I recall, you know, increased the power of the trial judge after judgment beyond what had been thought to be a proper exercise of judicial power previously. I believe, although all of

this is quite hazy and difficult to completely corral, I believe that the attitude was the trial judges ought to grant new trials and then there needs to be a new trial after judgment or let the judgment go forward. So turn right or turn left, but that was swept away by these mid-Seventies cases, and this Porter vs. Vick seems to be a -- an aspect of that earlier attitude on the trial judge's power being restricted to certain, you know, courses of action.

I don't see myself why it makes any sense to say that the plenary power is restricted to conducting a new trial or an equivalent proceeding if it's appropriate to enter the same judgment. In these cases that I mentioned, Mathis vs. Kelton and TransAmerican vs. Three Bears, the same judgment was re-entered. I believe in TransAmerican there was a motion to vacate, the judgment was set aside, and then eleven months later after some action was taken -- I believe it's notification of the Attorney General -- the same judgment was rendered and entered.

I don't see how it makes any sense not to allow the trial judge to take legally appropriate action while the court has jurisdiction over the case. Plenary power doesn't mean you can do anything. It has to be legally appropriate action, subject to review in an

appellate tribunal and subject to reconsideration of the trial court.

And, you know, my recommendation would be to add language a little bit different from the Dorsaneo-Hamilton example on the bottom of the second page, simply saying, "Once a new trial is granted or a judgment is otherwise set aside, the trial court has plenary power to enter the same or a modified judgment at any time," maybe at any time with some restriction, prior to the announcement of ready in the new trial; or, you know, myself, I would think, you know, prior to the announcement of ready would be fine or prior to the rendition of judgment in following a new trial, although that gets to be co-illogical. "At any time" is probably adequate for me.

I guess what I'm saying is it's hard for me to understand what kind of policy Porter vs. Vick is promoting that we still recognize as an important policy choice. I don't understand it. It looks like a relic.

JUSTICE HECHT: Frank Gilstrap.

MR. GILSTRAP: I think there's two problems here. First of all, the problem with Fulton V. Finch and those cases is, is there's a trap there. Now, when you read the rule it is not immediately apparent that you can't ungrant a motion for new trial and just leave it

open for as long as you want. Those cases say that you can't, and it looks to me like every one or at least litigants in each one of those cases didn't know and they were trapped, looked like the judge didn't know.

So it seems to me a no brainer to say, "Let's fix that," and whatever the rule is let's make it clear. So, you know, Bill -- what Bill is saying makes a lot of sense; and in kind of a larger sense, why shouldn't the judge have the power simply to ungrant the motion for new trial, maybe leave the jury findings in place, who knows, figure out what to do with the case. Bill was asking what policy reasons are there for restricting that. When we had our discussion last time we did come up with a couple, and we were trying to envision how a judge could abuse this situation. The most flagrant example anybody came up with was a case out of the Fifth Circuit -- it's not cited in any of the memos -- where the judge actually tried the case a second time and then kind of took his pick. I mean, I could imagine a situation where a judge would simply in pursuit of a certain result could abuse the system, and that was I think the reason for this suggestion that maybe there needed to be a cutoff sometime before the new trial would occur, and that seems to make sense to me.

Really, in making the policy choice, I

think, you know, we're all supposed to be veteran, canny lawyers. We've got to think about how could a judge abuse the system, and that ought to be the limit we put on the judge's power.

MS. BARON: Frank, did you talk about problems about trials that are -- the second trials may not be tried by the same judge or the motion to undo the new trial grant may be heard by a different judge and then we've just got a question of how many judges can the parties go to and get it granted, ungranted, granted, ungranted. At some point there just needs to be certainty on whether you're going forward with a new trial or you're not, and at some point the judgment, the old judgment, just has to go away.

JUSTICE HECHT: Bill Dorsaneo.

PROFESSOR DORSANEO: I appreciate those comments, Frank. We do have in our jurisprudence something different from other systems that I think is a good efficiency mechanism. If a motion for new trial is denied, that denial is not appealable after final judgment in connection with the subsequent trial. Now, of course, there could be some other motion made during the course of the trial that followed the summary judgment proceeding that raises the same legal arguments and would preserve the exact same complaint, but in our system we kind of do

recognize that once something has been done and it doesn't resolve the dispute and then something is done later that does resolve the dispute, we kind of go with the last thing. Huh? I think that's an efficiency mechanism.

In the Federal system they can go back and review the grant of the new trial after the second trial, and that just strikes me as completely procedurally cumbersome and unwise from a policy standpoint. So I would think that perhaps, you know, some sort of -- "at any time" is probably too long because it would -- it could possibly raise this problem. "At any time before the conclusion of a subsequent trial" or something like that would be satisfactory to me. "Before announcement of ready for trial" would be perhaps clearer, and that would be similar to our nonsuit rule in some respect.

MR. GILSTRAP: And I think we just got into a discussion about what the appropriate time limit was. I think Bill Edwards had some comments, well, if you have to spend all this money getting ready for trial and then they say, "Well, we're going to go with the old judgment or the old verdict," that's too much. But there just needs to be some kind of, you know, practical cutoff point that does give the judge wide powers but does at least limit this kind of mischief that may occur in some cases.

PROFESSOR DORSANEO: Now, you do have -- and

I've had this problem you're talking about, Pam, where you get an election or some other thing happens and you get a new judge and the new judge is just -- well, if you want the thing changed, the new judge is just, you know, more astute than the last judge, and that's just part of the deal, I think. I mean, I think that's just life in the big city. I don't know what you can do about that.

JUSTICE HECHT: Does anybody know whether that's ever happened under Rule 330 where a judge in the county comes in and sets it aside and then another judge comes in -- I've never heard of one, but --

MS. BARON: But I could see people trying to do that.

PROFESSOR DORSANEO: Yes.

MR. GILSTRAP: We all know situations where there's an election, the judge changes, the judge has made a decision, he's still got plenary power, and you go back and get it changed because he ran against the old judge who didn't have a good judicial temperament, and he's going to show that he has good judicial temperament.

PROFESSOR DORSANEO: Some people run for office just so they can correct these miscarriages of justice.

MS. BARON: I think maybe just incorporating what the case law is into the rule or some kind of just

straight-up deadline for ungranting a grant might be the best approach because everybody will know what it is, and if they want to go and seek to have it changed, they need to do it within that time period, and after that everybody knows what's going to happen. It removes uncertainty, and I think uncertainty is costly in the litigation system.

PROFESSOR DORSANEO: It surprised me -- and I think I wrote a large part of 329b, but it surprised me to learn --

MS. BARON: How great a rule it is, right?

PROFESSOR DORSANEO: -- that, you know, for the extra 30 days after the 75 days that that didn't -- that that wasn't an opportunity to ungrant, you know, a new trial; but it says "all such timely motions are overruled," okay; and that -- you know, Clarence put that in there, and I guess I didn't notice it, so if you -- it would be easy enough to change (e) to say "ruled upon," okay, and then there would be 30 more days, all right, and that wouldn't solve Carl's problem, okay, because the cases he's talking about are cases where somebody wakes up some considerable time later and says, "Why are we trying this thing?"

JUSTICE HECHT: Well, the law changes.

PROFESSOR DORSANEO: Yeah, the law changes. And I would be inclined to not require the case to be

tried again. I guess it could be handled in some other -- see, that's the difficulty I have, is what do you mean by "tried." If somebody files a motion and the motion is based on a legal principle, I mean, that would constitute a trial of some type, maybe with evidence, maybe without evidence.

MS. BARON: Well, you can go back to summary judgment again. You don't have to have a new trial. I mean, you start over. You've got discovery. You've got the record from the first case, which you can admit in your summary judgment or in your new trial, but you start over.

PROFESSOR DORSANEO: So you couldn't move to reinstate the verdict, in other words.

MS. BARON: Exactly. Right.

PROFESSOR DORSANEO: Well, I don't know why you can't do that. What procedure says you can't do that? After the verdict is received and the verdict is set aside why can't it be set back? Why do you have to have a new trial?

MR. GILSTRAP: I've always wondered that. It seems to me that, you know, there ought to be a way to vacate the judgment without setting aside the jury verdict. I mean, in an ideal situation, you know, you have a post-judgment motion, say, "Judge, you know, we

don't have any problem with these questions that have been answered, but you've applied the law wrong." It gets to be a different judgment, and he says, "Well, I need more time, so I'll just vacate the judgment, but I'm going to leave these jury findings alone." I think you can do that in the Federal system. I'm not sure you can do that in Texas.

JUSTICE HECHT: Well, who's got a solution?

MR. GILSTRAP: Why don't we -- I don't have any language, but why don't we rewrite the rule to say -- to spell out that there is a time at which the judge can no longer, quote, ungrant the new trial; and that time is so many days before a new trial starts; and, you know, we can agree on how much time it is, you know. Now, maybe Bill was right last time. Maybe the day the new trial starts is too late because of all the work that's been done. Maybe it needs to be 60 days before, but pick some reasonable albeit arbitrary period and say, "This is the point at which the judge's power to ungrant a new trial is cut off" and spell it out in the rule so nobody falls in the trap.

MS. BARON: I would run it from the other direction. I would still run it from the judgment because the trial could be, in some cities, three years away, and it's just building more and more uncertainty into our

litigation system.

MR. GILSTRAP: That would be fine.

JUSTICE HECHT: You mean so much time after the judgment?

MS. BARON: Uh-huh. Let's resolve it while everybody remembers what the case is about, what the judgment is, what the jury held, and at some point that's how it stands and we're going to move forward; but I think if it hangs around, maybe the judge can reinstate it, maybe the judge won't for a period of two or three years. I just can't see that that's a benefit to anybody other than maybe an incentive to settle, if that's what we're trying to build in here.

MR. GILSTRAP: Which is what the judge is trying to do.

JUSTICE HECHT: Well, the legitimate reason would be that you're trying a case, you thought you were -- you tried a case in Dallas. You're the trial judge. You were following a Houston court of appeals decision on the jury charge, and you get the verdict back, and while you're sitting there looking at a motion for new trial the Dallas court of appeals decides it another way, decides the issue differently. And so you now think, "Well, I'm bound to follow the Dallas court of appeals," and so you grant the motion for new trial.

Meanwhile, the -- that case gets granted by our Court and argued months and months later, and we say, "No, the Houston court was right after all." It looks to me like -- that's a legitimate situation where both the parties and the trial judge would be well-served by getting their judgment back rather than having to go do it all over again, but there are plenty of illegitimate instances.

MR. EDWARDS: That's going to be a very, very small minority of cases, very small.

MS. EADS: But even in that situation you can file --

THE REPORTER: I'm sorry. I can't hear you.

MS. EADS: I said you could file a motion for summary judgment to say that the law is changed; therefore, the holding should be as originally constituted.

MS. BARON: Actually, as a trial judge you could avoid that situation by just denying a motion for new trial, letting the Dallas court reverse it, send it back, and by that time hopefully have an answer on whether they were right or wrong.

MS. EADS: Yeah, but you might want to do that as the trial judge. You might want to actually follow the court.

MS. BARON: You're going to retry it anyway. It doesn't really much matter which way you do it. If you think that the court of appeals got it wrong, you may want to just not try it.

MR. YELENOSKY: Trial court judges don't like to get reversed.

MS. BARON: Right.

MR. GILSTRAP: I just think you have to draw a practical balance between, you know, these situations in which the system would be helped by allowing the judge to have a prolonged period and a situation in which, like Pam says, there could be abuse; and why don't we pick just as a talking point six months after the judgment is signed or after the motion for new trial is granted but some period -- what do you want to do? From the time the judgment was originally signed? Because everything else runs on that date.

MS. BARON: Yeah. I'm thinking -- what does this do to the appellate deadline?

PROFESSOR CARLSON: I guess it's the date the new judgment is signed.

MS. BARON: I guess it would run from the date the new judgment is signed.

MR. HAMILTON: It seems to me that the rule ought not to be driven by trying to correct abuses in this

case, because abuses could be at both ends. The abuse could be at the granting of the motion for the new trial or the ungranting of it. So it seems to me logically policywise if the court grants a new trial, the court has granted a new trial. Now the trial court has jurisdiction again just as it did in the beginning, and it ought to have jurisdiction to do anything it wants to do that it could have normally done to start with.

MS. BARON: But normally at the start it couldn't enter judgment because there hadn't been a trial.

MR. HAMILTON: There wasn't a new trial to ungrant at the start.

MR. GILSTRAP: Are you saying, Carl, that you would allow the judge to ungrant -- to grant the motion for new trial and give him an unrestricted period during which he could go back in and say, "Well, I want to reinstate that judgment"?

MR. HAMILTON: No. I think that in the interest of judicial economy there ought to be something like 60 days before the new trial is set again so that people don't spend time unnecessarily. That's -- the only reason for that would be for judicial economy so we didn't run the costs up more.

MR. GILSTRAP: Well, that's what we're talking about. We're talking about what is a practical

cutoff date, one that is easy to administer, one that makes sense, and one that's not going to cause everybody to go broke. You're saying 60 days before. Pam is saying maybe 60 days after the original judgment.

MR. HAMILTON: Well, but I'm saying 60 days before because you may indeed have a period of two or three years that goes back from the granting of the new trial until that 60 days, and there may be something that does happen in that time period that would cause the court to say, "Well, this original judgment ought to be entered," so to cut him off a few days after the motion for new trial has been granted doesn't seem to make any sense.

JUSTICE HECHT: I relinquish the gavel to the Chair who has re-entered the room.

MS. CORTELL: I guess my view generally is to agree with Bill. To put constraints doesn't make a lot of sense to me. I agree with Frank that we ought to probably clarify because there seems to be confusion, and I just raise for your consideration the question of whether if you put a time period in are we going to have the law of unintended consequences so now judges will all say, "Well, I have 60 days or six months where I can ungrant and then I can reconsider."

I think we have a real possibility there

with judges that want to kind of go back and forth. They see this as an additional period of time that they get to reconsider their ruling, so that may be a silly way to look at it, but I think it's a viable concern.

JUSTICE HECHT: Should there be a requirement --

MS. CORTELL: Frank says I've been practicing in Dallas too long.

JUSTICE HECHT: -- that the trial judge state a reason? Does that help?

MR. HAMILTON: I think so. I think if we're going to require judges to state reasons why they grant new trials, they ought to state reasons why they ungrant them.

MR. GILSTRAP: We haven't decided that yet.

MR. EDWARDS: We're not going to do that, so we shouldn't do it the other way, either.

CHAIRMAN BABCOCK: Yeah, Bill.

PROFESSOR DORSANEO: The thing on the time limit, I missed the last meeting, but in listening to what you're saying, is that the argument that was made is we need to have a time limit 60 days before the new trial because people will have done work in the interim, so what you're going to require the court to do is to have people do more work afterwards in addition to the work that was

done uselessly before. That doesn't seem to be advancing the ball forward.

I mean, if you got to the point of one day before the new trial, and I know all of you are prepared weeks and weeks in advance of any event that occurs, but if you looked at it one day before and you said, "Why are we doing this? This case should be resolved right now on this basis, you know, under the law and the evidence that was presented previously." Why wouldn't that make sense? Why doesn't it make sense to let the judge do what the law allows a court to do in accordance with the other rules of procedure?

MR. HAMILTON: At any time up until retrial.

PROFESSOR DORSANEO: This rule says -- or the doctrine says that you just are disabled. You're disenabled from doing what you otherwise could do just because it's too late. Doesn't make sense to me.

MR. GILSTRAP: Bill, you do accept that it at least ought to be cut off when the new trial starts? I mean, are you okay with that?

PROFESSOR DORSANEO: Well, I could go with that. I could go with that as kind of a prudential rule, but I frankly think even that doesn't necessarily make sense. What makes sense to me is after you got a new verdict, I think then the old verdict is gone. Okay.

Maybe when you start the new trial makes better sense to the public and all of that to go through the conclusion of that, because it kind of looks bad to say, "Well, I've looked at these jurors and they don't look as good as the last jurors we had, and we're just going to cut them loose and go back to the old verdict." But the time the trial starts is fine.

MR. GILSTRAP: Yeah. Because if it's after the time the trial starts, I mean, if we've got this manipulative judge, he sees how the evidence is going, he knows where this case is going to wind up, and he's making -- and the idea he's going to -- he has plenty of time to decide to go in and say, "Well, I'm going to go ahead and ungrant the new trial because it went so bad for the defendant this time," something like that. I mean, you say prudentially there's got to be a cutoff point.

CHAIRMAN BABCOCK: Yeah, Bill.

MR. EDWARDS: We're looking from the standpoint of lawyers and judges, but from the standpoint of litigants, some certainty of what's going on is very important. I mean, what we do, as far as the public is concerned, is always hazy anyway; and it seems to me that a lawyer ought to be able to tell his client, whichever side of this issue that the judge is coming down on it, "Look, there's a new trial granted, and we're going to get

ready and do a new trial. Hope doesn't spring eternal past this point. The judge isn't going to change his mind because he can't change his mind."

Now we're back to square one. We're going to try the case, and it looks to me like not only from the cost standpoint but from the certainty standpoint, we're not able to give certainty in a lot of places in what we do, but from a certainty standpoint there ought to be a point from which there isn't going to be an undone judgment going to be put back in place unless it's a matter of law, which you can do at any time anyway.

CHAIRMAN BABCOCK: Are we coalescing around any of these options or --

MR. GILSTRAP: I have a suggestion. I think we can all coalesce about around whether we clarify the rule. That's the first thing we could all agree on, do we need to clarify the rule to remove the trap. Then the second issue that maybe we could vote on is does there need to be a cutoff point at which you can't ungrant the motion for new trial; and, finally, what is that cutoff period? I mean, I think that's where we're going.

MS. BARON: I think there are two other questions to be asked, though. How many times is this really a trap for people, how much trouble is it really causing versus what we're going to be creating by inviting

this to happen by including it in the rule.

MR. GILSTRAP: That's the first question, is do we clarify the rule.

CHAIRMAN BABCOCK: It seems to me just -- well, number one, the Court asked us to look at it because the Court thought it was a problem, and now we have an opinion out of the 14th Court saying it's a huge problem, and it needs to be --

MS. BARON: Well, I think if we're trading four cases a year for 200 cases on the other hand that this may be a bad idea.

MS. CORTELL: But also what is the problem that needs to be fixed? Nothing -- Frank's first point was just clarify whatever it is. I think that's pretty easily answered.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think the clarification is very important, but beyond that I think the Porter vs. Vick and Fulton vs. Finch cases are very unusual in procedural systems. I don't think any other system has anything quite like it, and I can't see any really good reason for us to have it. It looks like the maintenance of an anomaly that was part of a mindset that's gone.

MR. GILSTRAP: You say no cutoff then.

That's really kind of -- for theoretical concerns and integrity of the system, no cutoff. I think that's where you're coming down.

PROFESSOR DORSANEO: For prudential reasons I could go with some sort of a cutoff, but to me the great evil is the one you mentioned earlier, that you get one verdict and that's set aside and then you're going to have another verdict and the judge could pick between the verdicts. That troubles me. In a bench trial, and it's just the way it will be. The judge just changes her mind and does it differently. So we're really talking about reinstating a prior verdict, huh?

MR. GILSTRAP: I think so.

PROFESSOR DORSANEO: That's the issue.

JUSTICE HECHT: Right.

PROFESSOR DORSANEO: I don't have a great problem with reinstating a prior verdict. Maybe you give reasons. I don't know. What would the reasons be? I think the case was fairly tried, that the verdict does handle the material issues.

CHAIRMAN BABCOCK: I can see some boilerplate language being developed.

PROFESSOR DORSANEO: "I liked the verdict."

CHAIRMAN BABCOCK: Yeah. Right. It seems to me on Frank's first question, the need for the rule,

the Court has pretty clearly told us they want us to come up with a rule.

PROFESSOR DORSANEO: Here is a case, you know, in our case book that there was a case tried to a jury. The injured party was a teenage girl. Jury finds against her on the liability questions and puts down zero damages. Judge looks at that and decides he's going to set aside the verdict, because, you know, he just doesn't -- he thinks somebody ought to pay her some money.

Okay. So we're going to have a new -- you know, a new trial in that situation. I can understand that. You need to pay -- when it's over you need to pay a little money here because we really have an injured party, and they get a new judge that comes in, and the new judge says, "Well, that's just extortion. I'm going to reinstate the verdict," and the little girl is going to get nothing, and that's going to be justice.

I could see how people could have different attitudes about, you know, whether that should be allowed to happen at all, during what time period should it be allowed to happen. I don't see how a hard and fast rule on it solves that problem. Maybe you're more likely to have a new judicial actor the more time passes. Huh?

CHAIRMAN BABCOCK: Well, do we want to take a vote on the second issue about the cutoff? You want to

see how people feel about a cutoff beyond which time you can't ungrant?

PROFESSOR DORSANEO: I would say it has to be the same judge. And the same party.

CHAIRMAN BABCOCK: Any appetite for voting on cutoffs?

MR. GILSTRAP: Yeah.

MS. JENKINS: Yeah.

MR. HAMILTON: I will make a motion that we have the cutoff day at the time that the parties announce ready for the new trial.

MR. GILSTRAP: Why don't we just decide on whether we're going to have a cutoff and then -- because I think we could splinter, Carl, on, you know, you know, what particular point the cutoff is.

CHAIRMAN BABCOCK: Yeah. I think that might be a good idea then. Well, everybody that is in favor of having a cutoff of some sort, and we'll talk about what that should be, raise your hand.

Everybody opposed? A lonely dissent. 12 to 1 in favor of a cutoff.

MR. GILSTRAP: She likes Dallas judges.

MS. BARON: Very interesting, Nina.

PROFESSOR DORSANEO: You're thinking about the same person I'm thinking about.

CHAIRMAN BABCOCK: Carl's got a -- Carl's got a suggestion of before the time you announce ready for trial.

MR. HAMILTON: Right.

MS. BARON: Well, can we do it this way? Can we maybe decide whether it should be closer to the time of the first trial or closer to the time of the second trial and then we can work out numbers from that? But I think that's kind of how they fall. You either run it from the judgment or the granting of the new trial or you run it from the second trial backwards, but you can either start at one place or the other, but you can't really run it from both.

CHAIRMAN BABCOCK: How does everybody feel about that? Carl, you're a second trial guy, right?

MR. HAMILTON: Right.

MR. EDWARDS: What is the maximum time that a trial court may have if the motion for new trial is overruled to act on --

PROFESSOR DORSANEO: 105 days unless we have the 90-day deal for notice of judgment.

MR. EDWARDS: So it would be 105 days. So we've got a maximum on one side. Maybe we don't confuse the lawyers if it's the same number on the other side.

PROFESSOR DORSANEO: It would be hard to

write it to be a different number. Okay. It would be hard to say it's going to be 105 days for granting a new trial but it's going to be -- or modifying the judgment. When you just read it you see it's going to be hard to make it different. Okay. And it is -- one clear improvement would be to make it 105 days regardless of whether the motion for new trial is overruled or the motion to modify is overruled or granted. Okay. This 75-day deal is really odd. All right.

MS. BARON: It's 75 days under Fulton; is that right?

PROFESSOR DORSANEO: Right. And under -- and because the language of (e), which gives the additional time, "If a motion for new trial is timely filed, the trial court regardless" -- blah-blah -- "has plenary power to grant a new trial or to vacate, modify, correct or reform the judgment until 30 days after all such timely filed motions are overruled."

MS. BARON: Oh, okay.

PROFESSOR DORSANEO: So (e) doesn't apply if the motion was granted, so -- and you have 75 days to grant it before it's overruled by operation of law. So it needs to go to 105 days anyway, it seems to me.

CHAIRMAN BABCOCK: Bill, are you -- are you looking at the version that codifies Porter vs. Vick and

Ferguson vs. Globe Texas and only objecting to the fact that it's not 75 days rather than 105, or are you looking at a different version?

PROFESSOR DORSANEO: I was looking at the word "overruled" in current 329b(e), which is not something I noticed at the time that 329b was rewritten.

CHAIRMAN BABCOCK: Of the proposals we have before us, which one fits best?

PROFESSOR DORSANEO: That was meant to be an (e), right?

JUSTICE HECHT: He likes B(2), with modifications.

CHAIRMAN BABCOCK: The one that has "Dorsaneo" next to it?

JUSTICE HECHT: Yeah.

PROFESSOR DORSANEO: Yeah. I mean, the one that's at the top of the page, I just think you could take "overruled" and say "ruled upon," and it would achieve that objective, rather than all of this other engineering.

CHAIRMAN BABCOCK: Does B(2) --

PROFESSOR DORSANEO: Down at the bottom of the page?

PROFESSOR CARLSON: I think Bill's on A(2).

PROFESSOR DORSANEO: I'm on A(2). If you took A(2) and modified (e) by eliminating the word

"overruled" and just say "ruled upon" then you have 30 more days to do whatever (e) allows, which is everything, plenary power, grant a new trial, vacate, modify, correct, or reform the judgment. That's it. Okay. There isn't anything else that you would be doing in that additional 30 days. That would -- because to me it would encompass re-entering -- you know, entering the same judgment, you know. It may be a little extra language, but the key problem in (e) is the word "overruled," all right, because it only gives you the 30 more days when it's overruled. It doesn't give you any more time if it was granted.

MS. BARON: Right.

PROFESSOR DORSANEO: And that is the clearest anomaly in this rule, and the drafters of this rule, at least some of them, did not know that that was what the language meant until sometime after the rule was in effect. And I think Chief Justice Guittard probably understood it, but I did not.

CHAIRMAN BABCOCK: So two -- so A(2) has a 30-day cutoff?

PROFESSOR DORSANEO: No. It would be 30 more days, which is the same time for plenary power generally, and that all could go to 195 days if you get 306a in, somebody didn't get notice of the judgment within 20 days. So the maximum time now is 105 days ordinarily,

but as many as 195 days if you get that other rule together; and I will say here, too, if we're going to mess with these rules then we ought to go to the recodification draft and put this all together, because this -- it's not -- this is not -- this is early work. Okay. This is early rule drafting work, and it is inferior to our current skills. Okay. All right. I mean, this is like Model T work. Well, not quite, but --

JUSTICE HECHT: And who wrote it, did you say?

PROFESSOR DORSANEO: Well, the good parts -- actually, actually, it was my idea to change it from what it used to say, which it used to talk about final judgments becoming final, okay; and I said, "We need to put plenary power in here and talk about that rather than talking about final judgments becoming final," because I can barely understand that idea, and I certainly can't teach it to anybody.

JUSTICE HECHT: Well, now, is -- I'm not clear. Is your recommendation with respect to A(2), that's not -- you still are in favor of B(2) or not?

PROFESSOR DORSANEO: I still am in favor of -- yes, but one thing that clearly needs to be done would be to make it all 105 days or whatever other time you would want. I don't think it's going to be easy to --

JUSTICE HECHT: But you could --

PROFESSOR DORSANEO: -- pick a date, okay, pick some date, and have that be for some forms of plenary power activity and a different date for other forms of plenary power activity. I think it could be done, but I think that's going to be -- my instincts are that's going to be harder to do, and it's going to be harder to justify.

MS. BARON: Right.

PROFESSOR DORSANEO: Because you'll be saying, "Well, at this point the judge can do this, but he can't do that," and you're going to come up with a case where, of course, it makes sense to do what can't be done rather than what can be done. I still like the idea of B(2), which would allow with some modification of the language, now that I look at it here today, the judge to enter the same or a modified judgment at any time before announcement of ready, to take Carl's proposal, or before the commencement of another trial or whatever, whatever we put.

MR. GILSTRAP: Or before the expiration of some time limit, you could say it.

PROFESSOR DORSANEO: Yeah. Before the expiration of some time limit. That could be done. The time limit, if we're going to pick a sensible time limit

what would we pick it in relation to? We have certain other time limits for setting aside judgments and making changes. You know, we have restricted appeals. We have other things. We could pick at least some sort of a time limit that would match up to something, huh, in the overall system.

MR. GILSTRAP: Well, we do have six months on restricted appeal. And the problem with what Bill is saying is these time limits are just so doggone short. I mean, I mean, we're talking about a situation where, you know, some time does need to pass, but we just don't want too much time to pass. We don't want two years to pass because of the abuses that can occur.

MS. BARON: We've got a month, right?

PROFESSOR DORSANEO: A month is pretty short, but --

MS. BARON: I'm sorry, Judge Hecht.

JUSTICE HECHT: Well, we voted on whether there should be a time, and we want to vote on whether it should be from the first trial or backwards from the second trial.

PROFESSOR CARLSON: Right.

JUSTICE HECHT: So are we ready to vote on that? All right. Who is in favor of a time limit pegged to the first trial? One, two, three, four, five, six.

And sensing a disaster here, who is in favor of the time limit pegged to the second trial? One, two three, four, five, six. Six to six. Just as I figured.

MR. YELENOSKY: Somebody want to meet me in the hall and talk about it?

PROFESSOR DORSANEO: Six don't have a view. There's about 18 people here.

MR. HAMILTON: The Chair has to vote to break the tie.

MR. EDWARDS: The Chair is empty.

JUSTICE HECHT: He didn't give me his proxy.

MR. EDWARDS: I tell you what. Why don't one of the six of you that voted for the second trial come over and take charge for a while? We'll have a revote.

JUSTICE HECHT: Well, those who say it should be from the first trial, when do you think that it should be from the first trial?

MR. GILSTRAP: Six months, to pick a number.

JUSTICE HECHT: From the --

MR. GILSTRAP: Uh-huh. Date of judgment.

MR. EDWARDS: I would convert that to 180 days so there isn't an argument of what six months means.

MS. BARON: I would just leave it at 105.

MR. YELENOSKY: 105 days.

MR. EDWARDS: What Bill told me convinced me

105 would be good.

JUSTICE HECHT: You would change (e) to basically "rules on" and leave the rest of it alone?

MS. BARON: Uh-huh. I mean, I think we may need a comment to make clear what the holding in these cases is so that people are aware of how it works, but I just -- I'm greatly in favor of certainty and that, you know, within 105 days of judgment you should know whether you have one or not so that you can go about either resolving things with your insurance company or planning for a new trial or collecting the judgment or pursuing your appeal, but having this judgment hang around for even six months just doesn't make sense. I just think it's too costly.

MR. GILSTRAP: I guess there is a situation in which the court could grant a new trial before he signs the judgment.

PROFESSOR DORSANEO: It's called a mistrial.

MR. GILSTRAP: We don't want to deal with that? I mean, Porter against Vick just doesn't deal with that, so it's not a problem.

JUSTICE HECHT: Those who favor pegging it on the second trial, what would the deadline be?

MR. HAMILTON: I say announcement of ready.

MS. EADS: I agree, although I think

certainty is an important issue. I think that if there's a reason to change a rule, it's like Bill said originally, if it's wrong, why would we want to even go to -- why don't we want to give the judge the opportunity to fix it even if it's at the day before trial starts? Don't we all just not want to go to trial then? It just doesn't make sense to me that we would preclude a judge from doing that, and I can see some sense of saying once announced ready now we've gone -- everything is in place, let's just go, and what's likely to happen anyway at that moment? I mean, it doesn't seem to make much sense.

JUSTICE HECHT: Bill Edwards.

MR. EDWARDS: I think there's a very, very few cases where there's going to be a change on the granting of a new trial where the judgment had already been entered or what we're talking about. Very few are going to come down right before the trial and do that, and I think we're sacrificing the certainty in 99 percent of the cases for some ability on the judge to do something in 1 percent of the cases, and I think the effect on the overall system is bad.

MS. BARON: You know, I'm starting to perceive more problems. Suppose it's a big judgment against a publicly held company. The judge grants a new trial and then -- and undoes this very large award that

could be reinstated at any moment. How do you disclose that in your financial statements? I just see all sorts of problems on everybody's side in terms of just how do you deal with a situation that's so uncertain?

MR. GILSTRAP: It's on Porter v. Vick right now.

MS. BARON: At least that's certain.

MS. EADS: How do you give a judge plenary power and not allow a judge to enter a ruling that he believes is mandated by the law? I just don't understand that.

PROFESSOR DORSANEO: The issue is whether he could put that verdict back in place, isn't it?

JUSTICE HECHT: Yeah.

PROFESSOR DORSANEO: Maybe that's the vote. Do we want the judge to be able to reinstate a verdict after granting a new trial ever, given any time period, or is that just kind of like once there's -- once the verdict has been set aside it's just gone, and Humpty Dumpty rule. I mean, I don't see why, I mean --

JUSTICE HECHT: Well, implicitly --

PROFESSOR DORSANEO: Personally I would not like to see this little girl not recover any money, okay, but I don't know what that has to do with any kind of legal issues.

JUSTICE HECHT: Implicit in the vote about whether we should have a deadline is should there be some time to reinstate the verdict. I don't know what sense that vote makes if we weren't saying it should be a period of time. It shouldn't be different from the other situation where you deny the motion.

But then the vote on when that should be seems to divide us over whether it should be a fairly short time or whether it should be on a longer period of time up until like the next trial.

PROFESSOR DORSANEO: I would be willing to compromise on it being, you know, just a short time and then see if that time is too short at some future point. Giving the trial court too much time to work on this case is not desirable. Huh? Because some of them can't decide anything with any sense of permanence.

JUSTICE HECHT: Well, we could change (e), and that would give you -- that would give the trial judge 30 more days, right?

PROFESSOR CARLSON: Right.

PROFESSOR DORSANEO: Uh-huh.

JUSTICE HECHT: If we change (e), he would have 30 days in which to reinstate the verdict.

PROFESSOR DORSANEO: That would mean the losing party at the last hearing would have one more shot

to go back unless it got to be a new -- if there got to be a new judgment then there would be -- then you're back at the same deal as to where your -- that's that L&M Healthcare case where the Court wrote some opinion that's very hard to follow and doesn't seem to be right, but if they get a judgment then it -- surely if there's a judgment then we start over again with the --

PROFESSOR CARLSON: Day zero.

PROFESSOR DORSANEO: -- day zero and could keep going in perpetuity if people want to, but nobody seems to.

JUSTICE HECHT: One choice is 30 more days. That's (e). Another choice is six months from the judgment. Another choice is all the way to essentially the start of the new trial, announcing ready or whatever.

MR. MEADOWS: Would it be helpful to examine the reasons why a trial judge would want to ungrant a motion for new trial? Are those likely to occur in 30 days as opposed to 60 days as opposed to several years out from the granting?

JUSTICE HECHT: Tommy Jacks.

MR. JACKSON: I have a view about that, and I think the only circumstance in which it's likely to happen is if there's an election and you get a new judge in the same court, and I don't think that's a good reason

to ungrant a motion that the judge that lost granted, and that's why I favor Pam's suggestion of a finite period measured from the trial date. The 105 days seems to me to be a good time. I don't see a whale of a lot of policy reasons to differ between that and 180 days. It's time enough that the judge can reflect if it was a hard decision, and if after reflection he changes his or her mind, I think that's fair game; but the only thing, you know, for -- I plead guilty to looking at it from a lawyer's side of view, but the only thing worse than trying a case twice is getting ready to try a case twice and then not getting to try it the second time, so I don't like that approach.

MR. MEADOWS: It does seem to me that there are only three things that would lead to this change, and that would be a change of the judge, a change of heart, or a change of the law; and the only thing that's really not, you know, measurable is how long it would -- is the change in the law, but I suppose that could be resolved on motion for summary judgment and you -- in the new proceedings on the new trial.

PROFESSOR DORSANEO: Uh-huh.

MR. MEADOWS: I mean, I voted for the longer period of time, but on reflection I just wonder if it's really that helpful.

JUSTICE HECHT: Yes.

MS. JENKINS: I've also changed my mind after listening to the argument. I'm more persuaded that it makes more sense to run it from the time of judgment and that the 105 days is probably sufficient time in which to change your mind.

JUSTICE HECHT: Like a jury, people are sort of --

PROFESSOR CARLSON: How long do we have to change our minds?

PROFESSOR DORSANEO: That's good.

MR. JACKS: We could take on that Arthur Anderson deal.

MS. BARON: 30 days before the next meeting.

MR. GILSTRAP: It's a deliberative process. I mean, it's at work. It's wonderful.

JUSTICE HECHT: Well, maybe we're ready to vote again.

PROFESSOR CARLSON: Yeah. Let's do it.

JUSTICE HECHT: Should we vote on -- what should we vote on? 30 days or longer, or the three proposals, 30 days, 6 months --

MR. YELENOSKY: Vote on 105, because it's heading that direction. I didn't vote last time and that's what I'm going to vote for.

MR. GILSTRAP: I tend to favor the 105, having heard the discussion.

JUSTICE HECHT: Okay. Well, we'll vote on 105 days or longer. Those are the two choices, and one choice in the longer would be six months and another choice in the longer would be the pegging it to the second trial. So you've got more flexibility over there, or the 105 days, which would be a change in Rule 329b(e) basically. Is that right, Bill?

PROFESSOR DORSANEO: Uh-huh. I think that would be the best place to fix it.

JUSTICE HECHT: All right. Who is in favor of the 105 days? 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.

And in favor of the other? One, two. All right. Seems to be the way that we're going.

MR. EDWARDS: To make a side observation, when Bill Dorsaneo talks about somebody making up their mind decisively he refers to the judge as "he," and when he refers to the judge changing the judge's mind he refers to her as "she."

JUSTICE HECHT: Making a sexist comment.

MR. YELENOSKY: Could you read that back? We were talking.

MS. BARON: I move to strike.

MS. EADS: I don't want to miss a sexist comment.

PROFESSOR DORSANEO: That was a base canard. Or a baseless one.

JUSTICE HECHT: Then who will write up the change in (e) that accomplishes this?

PROFESSOR DORSANEO: We could -- the professors would like to work on the (e).

JUSTICE HECHT: All right. The professors will work on that and get back to us. And that does 329b.

Okay. Now we're ready to go back to --

MR. JACKS: Sure.

JUSTICE HECHT: -- offer of judgment. Professor Carlson.

PROFESSOR CARLSON: All right. Our subcommittee has met since our last meeting and attempted to do a redraft that we think reflects the votes that we took at the last May meeting, but there were a few areas in which we had to punt because we did not have definitive input from the full committee. One, we did garner from our last votes that the sense of the full committee was that we wanted something that had a cost shifting measure that provided certainty, that was not punitive, and that would be somewhat mechanical in application, and that what would be shifted would be costs and not attorneys fees,

expert fees, etc.

So our subcommittee met, and Tommy Jacks was the scrivener on this because I was without computer, so I will punt to you from time to time, but I think the best way to go through this is to actually track the proposed Rule 166b dated 6-4-02. Does everybody have copies of that?

MS. BARON: Are there extras somewhere?

PROFESSOR CARLSON: I don't know. Chris?

MR. GRIESEL: I will go make copies.

MR. YELENOSKY: Are you going to make copies?

MR. GRIESEL: Yes, sir.

MR. YELENOSKY: Can we take a break while you're doing that?

JUSTICE HECHT: Yeah. Let's take a -- we'll take a 10- or 15-minute break.

(Recess from 10:37 a.m. to 10:51 a.m.)

CHAIRMAN BABCOCK: Okay. We're onto the fun world of offer of judgment, and, as I understand it, have we started yet?

PROFESSOR CARLSON: No. We just started.

CHAIRMAN BABCOCK: Have you reported that the Jamail committee is meeting next week?

PROFESSOR CARLSON: No, we did not.

CHAIRMAN BABCOCK: Meeting Wednesday and, as I understand this, not everybody -- Tommy being one of them -- got Dee Kelly's memo.

PROFESSOR CARLSON: Recent memo?

CHAIRMAN BABCOCK: Yeah. You didn't get it either?

PROFESSOR CARLSON: (Shakes head.)

CHAIRMAN BABCOCK: All right. Well, I'll see if maybe Deb can make some copies.

JUSTICE HECHT: Well, Chris went to do that.

MR. JACKS: Chris went to make some copies.

CHAIRMAN BABCOCK: Okay. Of Dee Kelly's memo?

MR. JACKS: Oh, no, no. I'm sorry.

PROFESSOR CARLSON: So what's the gist of it?

CHAIRMAN BABCOCK: What's the gist of it? I'll just let you read it.

PROFESSOR CARLSON: Okay.

CHAIRMAN BABCOCK: Okay. Let's continue.

PROFESSOR CARLSON: Bill Edwards asked me to make a point of clarification that our full committee did not recommend an offer of judgment rule without condition, that the Court has asked us to draft an offer of judgment, and we took a number of votes last meeting.

We took votes, if you recall, on what time the offer of judgment should be made so as to be able to shift costs, and we have the Gilstrap proposal that we talked about, and it's been engrafted in the modified rule we're going to have before us today. The full committee felt that an offer of judgment rule should extend to both plaintiffs and defendants, both sides should be able to use it; and it should extend to all claims, at least all monetary claims; that is, you can't make a piecemeal offer of judgment.

We voted that there should be a buffer. The draft last time provided a 25 percent margin of error to the offeree before there could be cost shifting when an offer of judgment was not accepted and there was a more favorable judgment. We voted that there should be a cap on the outside exposure a party might be subject to when there is cost shifting under an offer of judgment rule, not to exceed the amount of the judgment that's awarded.

We voted that there should be an ability to make joint offers, that a party can make an offer of judgment that extends to more than one party. We voted that a offer of judgment should be kept open for a sufficient realistic period of time so that a litigant can assess whether they want to accept it or not, and we'll look at that time period we're proposing in a moment; and

then, of course, the offer should be unconditional, as should the acceptance be.

Insofar as what fees might be shifted, we voted for a multiplier of costs and not attorneys fees or expert fees or other litigation preparation fees. We also discussed that the offer of judgment rule should provide that the judgment that is looked to for purposes of fee shifting should be the final judgment after remittiturs, etc., and that the offer of judgment could be shifted based upon a judgment on summary judgment as well as after a verdict on a final judgment on the merits.

We talked about the problem in statutory cap damage cases, that those presented a unique problem in the offer of judgment land because the instinct would be if the cap is a hundred thousand and you get a 25 percent buffer then, for example, the defense would only offer 75 percent, knowing that they would be within the offer of judgment margin to be able to shift costs when maybe the case really has a value far exceeding the cap. So we did discuss and we think we have somewhat of a solution for that concern.

We also garnered from the discussion that it was the will of the full committee that a party who makes an offer of judgment should be able to withdraw it at any time and do so in writing, and if they do so then it just

simply does not serve as a basis for offer of judgment if it hasn't already been accepted. With those sort of basic votes, if you look at the proposed Rule 166b, which, does everyone now have a copy?

MR. GRIESEL: There are extra copies being run still. We jammed a copy machine and caught another one on fire.

PROFESSOR CARLSON: And the devil is in the detail. The definitions are pretty important to the scheme of things to some extent. We say "claim" means a claim to recover money damages, including a counterclaim, cross-claim, or third party claim. As you'll see in a moment when we look to the exemptions, it was the sense of the subcommittee, and we felt that we were getting a sense from the full committee, that an -- that it was desirable to have the offer of judgment rule extend only to monetary claims and not to nonmonetary claims. So that is a -- that's a big change from our last proposal.

The proposal -- I mean, the definition of plaintiff and defendant just makes clear that both the plaintiff and defendant can use the mechanism. The court costs that get shifted are taxable costs; and that, of course, has a meaning by statute and by the case law; and the court costs, of course, that get shifted when the offer of judgment mechanism is triggered are the taxable

costs incurred by the offering party after the date of the rejection of an offer or the expiration of the time to accept the offer.

MR. YELENOSKY: What about when you have mixed monetary and nonmonetary claims?

PROFESSOR CARLSON: We simply did not provide, unless when you look at Rule 4 -- you don't have it. 4 -- I'm sorry. 2(a)(4), that this rule simply does not apply to a claim for declaratory, injunctive, or other nonmonetary relief.

MR. YELENOSKY: Even if it's combined with the damage claim?

PROFESSOR CARLSON: Yeah. And it goes on to state that this rule does apply to a claim that is primarily for damages and only incidentally for nonmonetary relief, giving a little bit of --

MR. YELENOSKY: Hmmm.

PROFESSOR CARLSON: Leaving a little bit of a gray area there. But we struggled with how to deal with the nonmonetary relief, and some jurisdictions included them, Steve, and some of them didn't. And we were kind of getting mixed signals from this group last time, and --

MR. YELENOSKY: I was just trying to think how it would apply to our practice and whether -- and how you would decide what's sort of incidental and what's not.

PROFESSOR CARLSON: That would have to be something that would get fleshed out through the case law or we would have to define that more precisely than we have.

MR. YELENOSKY: And if it's determined that the equitable relief is essentially incidental then this rule does apply?

PROFESSOR CARLSON: Yes.

MR. YELENOSKY: Okay. I'm just thinking, I mean, what -- most of our cases are not damage cases, but then we have some that are wrongful death cases, and obviously those are damage cases. Then we have some that are mixed, and maybe this isn't the time to talk about it, but that's going to be the thing I'm concerned about.

PROFESSOR CARLSON: Yeah.

PROFESSOR DORSANEO: Well, to me a claim for damages is for monetary damage. I mean, there isn't any other kind of damage. I mean, we have claims for damages, you know, at law, we have equitable relief and now since the middle of last century declaratory relief, and that's it. Legal, equitable, or declaratory relief; and, quote, "monetary damages," that confuses me more than it helps me.

MR. YELENOSKY: Like final judgments. Final final judgments.

PROFESSOR DORSANEO: I know what it is, I think, but I'm not sure whether it includes some other things that are susceptible to being characterized as having monetary value.

PROFESSOR CARLSON: Well, it could be written to simply apply only when it's a pure case for monetary damages, but the problem with that, of course, is then all you have to do is add a claim sticking some type of nonmonetary relief, and you've now carved yourself out of the application of the rule.

PROFESSOR DORSANEO: We do have those cases in the employment area where somebody is getting equitable relief but it's in money, you know, an odd thing like --

MR. YELENOSKY: Well, technically back pay wages are an equitable relief.

PROFESSOR CARLSON: And the way that the proposal was written originally out of the Jamail committee that we looked at last time is it included nonmonetary relief and then it allowed the court to decide whether substantially all the nonmonetary relief had been awarded. So under either scheme there is going to necessarily be some gray area. I don't know how you could really write around that.

MR. YELENOSKY: Well, Linda confirmed what I thought, which is that one type of thing people usually

think of damages because it is money, back wages is technically considered equitable relief in the case law. So even if a person is not seeking reinstatement, arguably all they have is an equitable claim if they're not seeking anything else.

PROFESSOR CARLSON: It could go either way. I mean, our subcommittee just felt it was easier to go with an exclusion of nonmonetary relief. Am I fairly assessing our conversation?

MR. JACKS: Yeah. I think so. You do see occasionally in the pleading in what we would all acknowledge to be a damages case some pleading for a declaration by the court of something; and, of course, if that became a way of avoiding application of the rule then you would see a lot more than that presumably. Or you might. And so that was one thought of mine.

Another is that because we decided to attach accordance to the percentage difference between what was offered and what was eventually obtained, that's harder to do when you're talking about nonmonetary relief. I mean, if you're talking about now purely a nondamages case then a lot more discretion has to be exercised by the court in determining whether what was gotten was more or less beneficial than what was offered by enough of a margin to justify the application of some penalty, and we thought

that was a -- we thought it was outside what we sensed from the last discussion to be the sense of the committee to have the court doing that.

So we decided to try to cut it out, and we cut it out in a way that would not make it easy to avoid the application of the rule at all, particularly by putting in the petition some claim for declaratory relief.

MR. YELENOSKY: And that's controlled by the term "incidental" and so --

MR. JACKS: That was the intent.

PROFESSOR DORSANEO: I would suggest that somebody try to define the term "monetary damages." If that's the most important term in the rule, it ought to be the one that's defined.

MR. GILSTRAP: Before we do that maybe we ought to distinguish between claims and actions because some of the sections say "actions" and some say "claims."

PROFESSOR DORSANEO: Uh-huh.

MR. GILSTRAP: And to my mind a claim is one thing within a lawsuit. A claim for monetary relief, I would have a claim for monetary relief even though I also had a claim for an injunction. So, I mean, I don't know. Maybe there is some -- something I'm not seeing here, but you're using "action" some place and "claim" somewhere else.

PROFESSOR DORSANEO: Yeah. Action has the ambiguity of being a civil action or a cause of action, and if it's a cause of action, you have the question as to what are the analytical contours of the cause of action under what kind of test. So it would be better to use the word "claim" if we mean, you know, what I think we're talking about and then not use the word -- the ambiguous word "action."

MR. GILSTRAP: But by "claim," I think the way they mean "claim" in No. (4) is the entire lawsuit.

MR. YELENOSKY: Uh-huh.

MR. GILSTRAP: I think that's what that means. I mean, I know these -- and just the problem with claims and actions and cause of action goes all the way back to the adoption of the Rules of Civil Procedure. We've kind of skated around it, but --

PROFESSOR DORSANEO: I would suggest using there "a civil action" or just "case."

MR. JACKS: "Lawsuit."

PROFESSOR DORSANEO: "Lawsuit," yeah.

MR. JACKS: You're right. That's an ambiguity that needs to be cleared up.

MR. MEADOWS: Well, do you even need to say anything about that it's to recover monetary damages when you've got paragraph (2) that deals with the scope? I

mean, you could just -- I wonder if you even have to try to limit it by the language "recover monetary damages" when what it doesn't apply to is spelled out.

PROFESSOR DORSANEO: That makes sense to me.

MR. JACKS: Yeah. Good point.

PROFESSOR DORSANEO: And that's the way Chapter 33 is written in the Civil Practice and Remedies Code. It says it applies to tort cases and that it doesn't apply to this, this, and this.

MR. JACKS: I guess the question is, if we draft it that way are we sweeping in some kinds of lawsuits that we haven't thought to exclude but that we don't mean to include?

MR. MEADOWS: Right.

PROFESSOR DORSANEO: May be. But, Tommy, when you try to draft it coming in two directions you always screw up. Okay. It doesn't ever want to fit.

MR. YELENOSKY: Dorsaneo's law.

MR. JACKS: That's right.

PROFESSOR DORSANEO: At least that's been my experience.

MR. MEADOWS: In an earlier drafting phase of your career.

MR. YELENOSKY: Well, on the incidental, if, in fact, the judge and/or everybody agrees that --

THE REPORTER: Can you speak up?

MR. YELENOSKY: I'm sorry.

THE REPORTER: Can you speak up a little bit?

MR. YELENOSKY: Boy, I've never had that problem before. If, in fact, everybody agrees or the judge determines that the equitable relief is, in fact, incidental and so this rule does apply then you do have a situation where the offer if made needs to include the incidental relief if -- I mean, later on the judge would be in a position of determining whether the offer on the equitable relief was equivalent to or better than what they got at trial, right? I mean, you can't avoid that determination being made by the judge if the equitable claim is considered incidental; is that right?

PROFESSOR CARLSON: Steve, let me see if I understand your question. Are you saying that if it is a claim in which there are nondamage claims that are incidental?

MR. YELENOSKY: Right.

PROFESSOR CARLSON: Nonmonetary relief claims. Is your question whether or not the judge has to consider in an offer whether an offer encompassed those as well?

MR. YELENOSKY: You know, actually, I guess

what I'm thinking is you have an offer where there is an incidental equitable claim and the offer is for damages and some sort of equitable relief. The plaintiff, let's say, in this case turns that down, goes to trial, and gets less in money damages, but something different inequitable. Then is the judge in a position of having to figure -- to compare what was offered with what was, in fact, granted?

PROFESSOR CARLSON: Not the -- I don't think the way we have it written. Do you, Tommy?

MR. JACKS: I don't think so.

PROFESSOR CARLSON: The judge is just looking at the dollars.

MR. YELENOSKY: So the judge is just looking at the dollars. Okay. And I haven't looked at this to be clear on that, so I will look more carefully at it to see if I have any questions.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: There may be that there are some other -- many classes of litigation that are highly regulated by statute as to the types of recovery, etc., like Human Rights Act. You may leave that out, and it would seem to me that if there is a statute that talks about what you could recover and what you can't recover and that regulates the action in a considerable way, that

maybe we ought not to mess with the statutory scheme.

MR. JACKS: The reason I favored trying to -- I mean, perhaps we need to define damages cases, but I think that's what we're trying to include, and if we really say includes everything except what we exclude then I'm afraid we're going to have concocted exclusion -- you know, you've got Truth in Lending Act, I mean, you know, just the mind boggles trying to think of every potential --

PROFESSOR DORSANEO: Fair Labor Standards Act, blah-blah-blah.

MR. JACKS: I mean, yeah.

MR. YELENOSKY: Well, the -- I'm sorry.

CHAIRMAN BABCOCK: Go ahead, Stephen.

MR. YELENOSKY: Well, I'm just trying to think of the cases where I guess it all turns around to the determination of incidental then, and maybe what you're suggesting with some of the human rights claims is that through this rule we would be determining up front that any equitable relief requested in those couldn't be incidental. I mean, that may be the suggestion here.

Because I can imagine -- I did a sexual harassment case once, jury trial, and at the end of all of that there really -- there were impediments to getting money damages because she ended up quitting, the question

was constructive discharge, and the jury said, "No, it wasn't constructive discharge," but -- or it wasn't for this day, but at that point she didn't really want to go back, but we briefed and got an award of attorneys fees and there was case law about the importance of vindicating or establishing that this actually happened, and she couldn't have gotten that through an offer of judgment on a small amount of money.

And so a judge might say, "Well, establishing that this really happened to you and establishing that the employer was wrong in not preventing sexual harassment is really an incidental claim"; whereas, to her it wasn't at all. In fact, there's some case law saying that it's not, but I guess that would be the kind of case I would be concerned about where a judge might say, "Well, that's incidental and, therefore, you know, you have to pay a penalty because you went through trial."

PROFESSOR CARLSON: And, you know, Steve, I don't think this rule is going to satisfy you because how do you define "incidental"? That's something that needs to be developed.

MR. YELENOSKY: Right, and the opposite, the evil you're concerned about, is someone putting an equitable on to defeat the application of this rule, and so I can see that, too, and I don't have a solution, but

--

PROFESSOR CARLSON: And the other thing that we're trying to do is to make this fairly mechanical in its application so as to avoid as much as possible satellite litigation on the fee shifting award.

PROFESSOR DORSANEO: Good luck.

CHAIRMAN BABCOCK: Okay. Any other discussion on that topic? I've got a question about section 9, and maybe -- Elaine, maybe you went through this.

PROFESSOR CARLSON: No, we haven't.

CHAIRMAN BABCOCK: I think that section 9 is an important -- perhaps the most important feature of this rule, and you remember we -- the evolution of this was that we did a canvas of other states and were without exception told that if you didn't include attorneys fees the rule just was worthless and never -- didn't -- wasn't worth the effort to go through it, and at our last meeting we decided to replace attorneys fees with a substitute, but in the view of the committee a less harsh substitute of a multiple of 10 times taxable court costs, and now in this draft I see that we have moved from that 10 times down to 2. Could you tell us -- which I think is a significant change. What was the thinking of the subcommittee on that?

MR. JACKS: Since it was my thinking I'll tell you. The -- it was driven by my understanding of the -- of the law that pertains to the Court's rule-making power, and the -- and the conclusion I reached from the law that Elaine pulled together was that the -- there's no problem with the Court developing a rule that punishes people for not settling a case if it is essentially unreasonable litigation behavior, and yet we want to avoid having hearings before courts about whether in a particular case the rejection of an offer was unreasonable or not, and so -- and maybe this was getting overly precise, but this was an effort essentially to try to make the punishment fit the crime, and the idea was that the more one's either -- well, the more one's rejection of an offer deviated from the eventual result on a percentage basis then the more one should be punished.

And the idea is that if you're within a 25 percent range you shouldn't be punished at all and that then the punishment would vary on a sliding scale that leads to a 10 times penalty, but that has graduated penalties between 25 and in this case 65 percent.

Now, the -- I just made all that up. That wasn't based on any discussion either by or with anybody, other than our subcommittee, and it -- and I don't -- it's not a rock on which I propose to die, but it was -- that

was the spirit of the thing. An alternative would be to say, "Well, anything over 25 percent constitutes unreasonable litigation behavior." If you're wrong by that much, you are deemed to have been unreasonable, and so 10 times is the only penalty, and there we are.

CHAIRMAN BABCOCK: Okay. Yeah, Mark.

MR. SALES: I was going to ask, does "taxable" include experts or no?

MR. JACKS: No.

CHAIRMAN BABCOCK: It was in an earlier --

MR. SALES: So does this include deposition costs? I mean, maybe I'm missing, but this is an eight-page rule for something that's going to -- nobody is going to go through something this complex to try to get the court costs. It has no teeth to it. I mean, this is worse than the old joint and several liability rules.

MS. JENKINS: My question was going to be similar and somewhat naive, but practicing in the family law arena, I haven't a clue what average taxable court costs are in the personal injury or commercial litigation arena. I mean, how much money are we really talking about for an average case that goes all the way through a jury trial? Is there any gauge on that?

MR. EDWARDS: It just depends. Sometimes they run up a hundred thousand, 200,000, 300,000,

depending on the litigation.

MR. JACKS: In a little case they're not much, generally a few hundred bucks per deposition is a --

PROFESSOR DORSANEO: Are you including supplementing and all different things?

MR. EDWARDS: No. I'm just talking about, you know, you get into one where there's long and complicated depositions that go thousands of pages.

CHAIRMAN BABCOCK: Yeah, Anne.

MS. McNAMARA: Yeah, I was sorry to miss the May meeting, but I would agree that this is really a lot of -- a lot of typing for very little result.

CHAIRMAN BABCOCK: See what happens when you miss the May meeting.

MS. McNAMARA: I know. You know, the cases where the greatest travesties occur are the ones that run up the outrageous attorneys fees and expert fees; and even if you put yourself in the 10 times category there is still tremendous disparity, you know, in the cost imposed on the litigant that won or that came out with an outcome that this thing would click in on and the deterrent that we're trying to build in here.

And then when you couple that with, you know, the rule not being effective if you get a zero verdict, you know, which is perhaps the most -- I can't

remember the discussion on that because that was several meetings ago, but this becomes almost useless. So you're not going to try to spend a lot of time invoking it, particularly if you've got cases that have statutory caps or one of the causes of action has a statutory cap and the other doesn't and you may have some injunctive relief as well, and so, you know, I don't think it does a whole lot.

CHAIRMAN BABCOCK: Yeah. Bill, then Tommy, then Linda.

MR. EDWARDS: What exactly is this rule supposed to deter? I heard the comment "deterrent." What is it supposed to deter?

MS. McNAMARA: Bill, what I would say it would be trying to accomplish -- maybe "deter" is a bad word -- is to resolve disputes without a lot of voice to the system so that if you've got a claim that either is meritless or the damages sought are way out of relationship to the likely damages to be recovered, you could bring some reality to the process by shifting some degree of costs for a failure to settle.

MR. EDWARDS: If that's the case then why should not making an offer of judgment under this rule, if it's unreasonably low, not impose the same penalties on the person or the party making that unreasonable offer so that we deter, if we're going to have this rule, using the

rule for gamesmanship as opposed to for what the avowed purpose of the rule is?

MS. McNAMARA: I'm not sure the making of the offer imposes any additional costs in that process.

MR. EDWARDS: If a -- if the obvious outcome of the case ought to be $10,000 and an offer for judgment is made of $1,000 on the 10 percent chance that you're going to win, it's an unreasonable offer; and if there isn't a penalty for making that kind of an offer in order to get the advantage of a rule like this, it's going to be used for gamesmanship.

MS. McNAMARA: A way to address your concern would be to get to Tommy's point of some kind of a sliding scale. My concern is excluding the biggest piece of your costs and the biggest sort of disparity situation. You could do a sliding scale. That wouldn't be so bad.

MR. EDWARDS: This -- you know, this thing calls for making an offer that has to be accepted in a finite period of time. Something may happen down the road that makes that offer way out of line, but there's a 10 percent chance it's in line because the jury goes goofy one way or the other, and here's somebody who has played games with a rule like this, made a thousand-dollar offer, and is now seeking -- 45 days out, nobody has taken the offer. They have got a built in early on recovery for

attorneys fees and whatever the penalty, costs, whatever it happens to be, and there is no penalty for making that kind of an offer.

MS. McNAMARA: Do any states have such penalties that you're suggesting?

MR. EDWARDS: What?

MS. McNAMARA: Do any states have the kind of flipping of the penalty that you're suggesting?

MR. EDWARDS: I don't think they do, that I know of, but I understand that in Florida where they have as stringent fee shifting situation as there is, that if you'll check with the people involved in the system you'd find it is a game playing deal and it is being abused.

JUSTICE HECHT: I'm unclear, though. Why would -- why wouldn't the other side offer $10,000 and then get the benefit of the -- you've got a built in penalty that way.

MR. EDWARDS: Well, if you want -- that's -- the point I'm making is if you want to dispose of litigation, it ought to be disposed of without the incurring of unnecessary court costs, unnecessary expert fees, unnecessary lawyers fees, then shouldn't both sides be required to make reasonable offers if you choose to mess with this kind of a -- if you're a party, you want to take advantage or whatever, use this kind of a rule,

shouldn't you have to use it reasonably or be under a penalty for unreasonably using it? Either side can make the offer, and it would go the same way for the one that's the plaintiff in the case.

JUSTICE HECHT: But if the case is worth 10,000 and one side offers a thousand and the other side offers a hundred thousand then it's going to be a wash. Nobody is going to get anything, and if somebody offers 11,000 and the other side offers 1,000 then it's -- you have in effect penalized the other guy for making a low offer, or not? Am I missing something?

MR. EDWARDS: Well, it's not going to get -- unless there is an impetus on both sides to make reasonable offers, litigation is not going to be resolved.

CHAIRMAN BABCOCK: Well, it seems to me that the impetus of the rule, in other words, what Governor Ratliff had in mind and where we were trying to go, was, frankly, to increase the risks on both sides not to settle the case. That's what base this whole concept is about.

Now, I said early on and I think John Martin did, too, that that has maybe as many risks for the solvent corporate defendant, for the insurance company, as it does for the insolvent plaintiff or -- and maybe not as much for the middle class plaintiff, as Bill pointed out, but the whole idea of the rule is to create an incentive

to settle and thereby dispose of litigation without going through all the additional costs and expenses of the system, and that may or may not be a good idea.

But at some point -- I sort of agree with Mark that the rule is not worth it if there's not some -- some real incentive built into it, and it may be that the rule is not worth it because, as Bill has articulated and Paula and other people, it's just too harsh for the middle class people, and maybe that's where we're headed.

Tommy had had his hand up, Frank, before and then Linda had, too, and then to you, Frank.

MR. JACKS: Well, I was going to say one of the problems we've had is that experience differs so much around the state. At the last meeting the thrust of the discussion was the problem really is not in the big cases, it was in the small cases; and, in fact, cases that should be Level 1 discovery track cases, although most people, we were told, don't designate them as such so we couldn't target them in that way.

And certainly the voices from Harris County, Judge Brister, was talking about that that was the problem there. It wasn't the high dollar cases with high dollar lawyers involved. And Judge Peeples from San Antonio, who is on our subcommittee and who still questions whether there should be any rule at all, said that he didn't see

anything like the kinds of problems in Bexar County that Judge Brister saw in Harris County with the kind of behavior of defendants in small PI cases. He said he tries very, very few of those cases; whereas, Judge Brister said when he was on the district bench he tried little else.

And the -- the answer to an earlier question in what I would call the higher end personal injury cases, it's not uncommon for taxable court costs to be a few tens of thousands of dollars. The low end of the range, I would say in the 10 to 20,000 range is typical, and on the higher end, perhaps the 30 to 50,000 range. So 10 times either of those sums is an appreciable amount of money. Ten times 15,000 bucks is 150,000 bucks. 300,000 bucks at some of the higher end of the range, so it's not a piddling amount of money necessarily, and whether it's enough to influence settlement behavior, I don't know.

There's a real concern, I know, for -- and Bill Edwards expressed this -- for sort of the average civil litigant, be they a plaintiff or a defendant whose insurance company policy isn't going to pick up the penalty to have to pay the other side's attorneys fees and expert witness fees and so forth, because very few litigants who are ordinary folks could ever do that. And in the case of those who are insured, except in the rare

policy like a physician's policy, they don't have control over settlement anyhow; and so it's their insurance company whose settlement behavior you would want to try to influence; and yet when John Martin at the first time we discussed this, John had pulled out policies in his practice and had found some that he thought would and others that he thought wouldn't pay the penalty at least that was being discussed at that time, which was the attorneys fees and the --

CHAIRMAN BABCOCK: Expert fees.

MR. JACKS: -- whole expert witness fees and so forth. So it was -- I think it was a combination of all of those things that drove the discussion last time to a pretty lopsided vote in favor of 10 times the cap on the penalty, and the -- and that is -- there's no other state that's done that. They've gone whole hog one way or the other. Either just taxable court costs, whatever those are, times one or attorneys fees at least --

CHAIRMAN BABCOCK: Right.

MR. JACKS: -- at the other end of the spectrum.

CHAIRMAN BABCOCK: Right. Linda, then Frank, and then Carl.

MS. EADS: Let me echo what goes on in Houston from the Attorney General's office position, is

that the problem cases are the lower end cases, not the high volume cases, and it's across the state as far as I could tell when I was there, that it's really hard. It's very difficult to deal with some of these cases. There's a cottage industry out there where people grind out cases, and they don't want to settle even when a reasonable offer is given, and it is a problem, I think.

Saying that, I've always been most concerned in this area with the injunctive kind of case where we have a civil rights issue or we have an issue that deals with, you know, being progressive on human issues, and I don't want those cases not to be able to go to their logical conclusion because of the fear of settlement risks; and if we can define monetary damages in a way that satisfies that we'll be able to still make good law in areas that are important, then I think that just doing the costs -- I wasn't at the May meeting either -- and not thinking about attorneys fees is problematic. I would want to know a lot more data exactly on what the numbers are, which goes to the issue of whether we should be doing this at all, because we don't have enough information.

But if we're going to -- if this is a rule to reduce or to make people realistically figure out what the case is worth, and in some of these situations the people who are handling the case don't have any clue on

how to do that evaluation. They -- they're not sophisticated legal or economic thinkers. They just have a case, and they want to win, and they think maybe they can if they get to a jury. Then if the purpose of this rule is to do that then I'm not sure doing costs at that low end is going to do that, make people really be realistic in evaluating the risk of pursuing litigation.

And I think there's something to be said, going back to what Justice Hecht said in the beginning, is we need to think about how we make the judicial system a place where people want to resolve their conflicts and not push corporations in their agreements to go for arbitration rather than for adjudication because it's just too risky in the judicial system. So I really think we need to think about the level of hit somebody is going to take for not being realistic in evaluating a case.

JUSTICE HECHT: Let me ask Linda just a second, the suits by and against the state are excluded in here, but I suppose the only reason for that is whether the state can be liable for attorney fees.

MS. EADS: Right.

JUSTICE HECHT: But in the unlikely event that the state were sanctioned for discovery abuse or something, I suppose it pays -- I suppose it pays those sanctions. I mean, it doesn't take the position that it's

not liable for sanctions?

MS. EADS: No, it doesn't.

MR. YELENOSKY: Can I ask a question?

CHAIRMAN BABCOCK: If Frank will yield to you.

MR. YELENOSKY: Go ahead.

MR. GILSTRAP: Let me say this.

CHAIRMAN BABCOCK: Or not.

MR. GILSTRAP: At the last meeting I thought we had kind of beaten this horse into submission; and now, to use Chris Griesel's phrase, we've kind of revived it and we're beating it again; and there's nothing wrong with that. I think it can be helpful. That's what this committee can do well and --

MR. YELENOSKY: Beating and resurrected.

MR. GILSTRAP: I think it may be helpful. I think we may be making progress on this, but we need to at least be aware of where we went to last time and why we did it. There were several different competing interests that were thrown on the table last time. The one that Anne and Linda talk about is the big person who is sued a lot. You know, in many cases they regard these suits as frivolous or maybe even not a big person. That's the first thing.

We also have some institutional or business

defendants that just, by gosh, they don't settle, or they don't settle for anything realistic. I think Judge Brister was talking about a particular company that kind of had an inflexible position on slip and fall cases. And then, you know, we've also got the situation where we're concerned maybe about the little guy who is solvent who if he has to pay lawyers fees simply will not be able to go after the big company no matter how meritorious his claim because the downside is so big.

And we kind of put that all on the table, and I think the feeling was, well, you know, we needed -- we needed some teeth in it. Attorneys fees were just too much, and so we came up with this 10 times costs, and it was a compromise, and it's not going to apply in every case; but, as Bill points out, it's not nothing in some cases; and the idea was, I think, if we're going to go forward with a rule like this, this was a good posture to go forward in because, frankly, we don't know how this rule is going to work; and the Court is telling us we're going to have a rule.

So this was kind of a practical way of going forward; and, frankly, to me it still seemed to have some merits. I think we need to go back to the 10 times cost and go on down the road.

CHAIRMAN BABCOCK: Yeah. I think the point

I was trying to raise by leading off this discussion was that I agree at the last meeting all those things that Frank has just talked about were discussed and there was a compromise -- maybe was a compromise or maybe just one side outvoted the other, but whatever, it was based on the 10 times rule, and we kind of have drifted now down to two times, which may be a good idea, maybe not. I was just trying to understand where that came from.

One other thing I wanted to clarify. Tommy, when you were talking about small cases versus big cases, I assumed you were talking in the personal injury context.

MR. JACKS: Yes.

CHAIRMAN BABCOCK: Because -- and, Anne, I don't know if your experience is the same as mine, but in the big commercial cases I see -- and I have been on both sides, both plaintiff and defendant -- I see enormously unreasonable behavior going on which this rule might cure, and so when we're talking about big cases, I think there is a class of high dollar cases -- and let me just give you an example.

I had two companies. Plaintiff company is on a contingency fee contract, hires an expert who comes in with an astronomical, ridiculous dollar figure, you know, multiple millions of dollars. Expert is probably not going to get through Daubert; and if he does, probably

not going to get affirmed on appeal and the jury is probably not going to pay much attention to him. In that instance this kind of a rule would have, if it had some teeth in it, whether it's 10 times court costs or it's got attorneys fees, expert fees, etc., that would, I think, have an impact in settling that case; but right now the plaintiff corporation with the expert who has come up with this astronomical monologue has really no incentive to be reasonable.

And I see that happen a lot, and I am not saying I'm always on one side or the other of the case, and I recognize that the big commercial cases are a small percentage of the court's docket, but nevertheless, that does happen, and it does take an enormous amount of resources of both the companies, the clients, and the court. So, point of clarification.

We had somebody else. Bill, then Carl.

MR. EDWARDS: A couple of comments on what you just said, because I had something else I wanted to say. There is a very interesting report on the internet. It is a report of a roundtable discussion of the in-house general counsel for big corporations in which it talks about the relationship between litigation and the business purpose of the corporation, and it tends -- as I read the various general counsels, tends to put the business goals

and purposes of the corporation ahead of what happens in the courtroom in many instances; and if you've got a business decision made by a corporation that they're going to fight a lawsuit no matter what it costs them, it doesn't matter what teeth you put in one of these rules, they're going to fight 'til hell freezes over.

Secondly, with regard to that expert who was going to get disqualified on Daubert eventually, there's no reason why he can't be disqualified on a Daubert sooner because what he's saying in his qualifications and whether it fits and all of those things are going to be available at the time he comes up with that opinion just as well as later.

There are two things I wanted to have the record clarified on. One, with regard to Frank Gilstrap's comment, I did not understand that we had been told by the Supreme Court that there is going to be a rule. What I understand -- understood that we were talking about, was if there was going to be a rule, what would our recommendation be about the rule.

Secondly, what was omitted from the discussion, from the record today, was that when we got in the discussion about where we should go with penalties if there's going to be a rule was in part flavored or influenced by the thought on the part of many of us that

if we go past court costs we're running into legislative matters that are not for this committee or the Court, but are for the Legislature, against the backdrop of this proposition when the Legislature -- it has gone to the Legislature and has been denied by the Legislature.

JUSTICE HECHT: Just to clarify on that, I think there's a good chance there will be a rule, but I don't think it's a foregone conclusion. I mean, we did -- our only undertaking, as it always is with the second branch, is to study about it; and we told the Governor, just like we told Chairman Bosse the other day, that we will take a look at it; but we can't -- I mean, we've got the smarter people there are --

CHAIRMAN BABCOCK: That would be us.

JUSTICE HECHT: -- and we'll report back what they think and then you can do whatever you want. I mean, we never make a commitment.

MR. GILSTRAP: Well, let me amend what I said. We have been told to draft a rule. I think we all agree on that.

CHAIRMAN BABCOCK: Right.

JUSTICE HECHT: But we do want to see the best of it. Yeah.

CHAIRMAN BABCOCK: Anne.

MS. McNAMARA: I just want to say two words

on behalf of corporate America. I did not read the thing on the internet, but corporate America almost always behaves economically, and that's my concern about the level of the cost, of the amount of costs that are shifted, because in the large -- I agree with what Chip said. In many cases you're in litigation where a small amount of shifting of costs isn't going to change any behavior at all, and I think anything pegged to court costs falls in that arena in the big case. But at the end of the day it is usually very irresponsible for a corporation to make a decision that's not economically driven, so if you have enough of a shifting of costs, which is often attorneys fees and experts, I think that is where you start to get the more realistic behavior.

MR. EDWARDS: That article I'm talking about, there's a magazine or a periodical out there that's written primarily for corporate counsel.

MS. McNAMARA: There are a number of them, yeah.

MR. EDWARDS: It's called *Corporate Counselor* or something. I will --

MS. McNAMARA: I've got it.

MR. EDWARDS: I'll get that, and I'll --

CHAIRMAN BABCOCK: I'd like to see that, too.

MR. EDWARDS: I will put that on e-mail to everybody next week so you can take a look at it.

MR. MEADOWS: But wouldn't the point of what -- I'm curious as much as anything, but I think you and Anne may be saying the same thing. I mean, frequently the economic drivers for a corporation transcend a particular case.

MR. EDWARDS: That's right.

MR. MEADOWS: It could be about a docket of cases. It could be about an emergeing tort or an emerging --

MS. McNAMARA: Right.

MR. YELENOSKY: Tobacco litigation.

MS. McNAMARA: Yeah. And in those cases they will take the additional cost of proceeding.

MR. MEADOWS: Right.

MS. McNAMARA: On the other hand, if the additional cost of proceeding gets to be real money, they may decide that this isn't such an important principle or the decision gets boosted to a level of the organization where you don't have as much emotion in the game.

MR. EDWARDS: Well, they were pointing out in that thing that there's oftentimes a pretty big gulf between corporate counsel and management on one hand and outside counsel on the other hand, and the outside counsel

doesn't know the goals of corporate management or corporate counsel, and as a result, things happen in the courthouse that might not otherwise happen.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I can see the argument of penalizing the losing party for court costs and attorneys fees, but I have a hard time with the concept of penalizing someone on a multiplication table for a crap shoot and not guessing as to what the jury is going to award. I mean, it's one thing to lose and have to pay, but just because you guess wrong about what the jury verdict is going to be and then you get tagged for 10 times or 8 times doesn't seem -- seems to me like there's a constitutional problem with that in imposing penalties on someone because they guessed wrong about what the jury would do.

JUSTICE HECHT: Can I ask Carl a question also? I don't think John Martin has been here since he made that comment originally, and I have been wanting to ask somebody that does insurance defense work the same question I asked Linda. I assume if like, for example, discovery abuse, that it's the insurance company that pays the sanction, not the insured.

MR. HAMILTON: Right.

JUSTICE HECHT: Okay.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: I was going to ask Linda earlier because you were talking about the small cases at the AG's office, and I guess you were characterizing some of the lawyers in those cases as irrational in going forward with those cases, and I'm wondering even without the current -- even without a rule like this how long can they sustain that, and if they are so irrational that they continue to do that, how will a rule that requires them to think rationally about court costs change it?

Is it because they have to tell their client they get hit with these costs, or what is it that will make an irrational lawyer who fails to predict again and again what's going to come of these cases think more rationally with this rule? That's my question.

CHAIRMAN BABCOCK: You know, word gets around.

MS. EADS: Right.

MR. YELENOSKY: But then you would think that you don't even need word to get around. If you're one of those lawyers who lose, you know, three cases in a row and take nothing, don't you learn without ever hearing word from anyone else? I mean, if you don't --

CHAIRMAN BABCOCK: Word gets around to prospective clients.

MR. YELENOSKY: Prospective clients. Well, I assume word gets around, too, that this lawyer loses all his cases.

MS. BARON: Not necessarily.

MS. EADS: But they often don't lose all of their cases. They often do settle. They often do get settlements, okay, and it's just that it takes a longer time to get settlements from them than you would think someone rationally behaving.

Also, they have -- a lot of these lawyers handle an enormous number of cases, and nothing is forcing them to make rational economic decisions until they reach a point where it's just time to settle, you know, whatever their internal clock tells them to do; whereas, a rule like this would require them to say, "Okay, now I'm going to" -- that actually prompts them to think "I have to think about this case economically" rather than "What file do I pick up next and look at?"

MR. YELENOSKY: Well, and if it is -- you know, I mean, then when you get to the amount issue, I do think court costs, if you're thinking about solvent middle class plaintiffs that court costs whether or not multiplied have an effect. I mean, any time we would have to tell a solvent middle class family who has a child, "Now if we're wrong about this, you could end up paying

them some money."

CHAIRMAN BABCOCK: Right.

MR. YELENOSKY: I mean, I don't even have to talk about the amount. Just the idea that they could lose and end up having to write a check is a deterrent, and when we try to refer cases out that we don't do that are small middle class damage actions, if it's a type of case we don't do, we don't find a bunch of these lawyers who are ready to take them. So with respect to the amount of money -- and maybe different cases it's different. I don't know which cases you're talking about, but when I talk about small cases, if you have a solvent plaintiff family, any amount of court costs will be a deterrent.

CHAIRMAN BABCOCK: Let's see if we can resolve this issue because I think, unless my recollection is way off, I think it is a change in section (b) from where we left this process last time because we've gone from 10 times taxable court costs to a sliding scale, and Tommy has articulated why, and, Tommy, you can say some more in a minute.

MR. JACKS: I was actually going to move to change my own rule.

CHAIRMAN BABCOCK: Okay. Well, that's acceptable, too, I guess, but we ought to resolve that issue. I am not for or against the sliding scale. I'm

just saying that's not where we were when we left last time. So let's see if that's where we want to go; and if it is then we'll leave it in; and if it's not, we'll take it out; and then we'll see if there's anything else we need to talk about and finish up with this rule.

So, Tommy, you want to make a "on second thought"?

MR. JACKS: Yeah. I mean, I had some uneasiness about it when I did it, but my subcommittee didn't rein me in.

PROFESSOR CARLSON: We just ran it up the flagpole.

MR. JACKS: They saluted and we kept on going. For simplicity sake, if nothing else, and I am persuaded that if we're going to use up this much paper it ought to be for at least 10 times court costs, and so I would propose amending -- it would be 9(b) on page six -- to delete the sliding scale table and just say that "The amount of court costs awarded shall be 10 times the amount of taxable court costs actually incurred by the offering party after rejection or expiration of the offer," period, putting a period where the comma is, and then deleting the rest of that section.

CHAIRMAN BABCOCK: How does everybody feel about that? People opposed to it? In favor of it? Carl.

MR. HAMILTON: I'm opposed to it.

CHAIRMAN BABCOCK: You like the sliding scale?

MR. HAMILTON: I don't like either one. I think it ought to be just plain court costs, and court costs ought to just go to the losing party, and we ought not to have to guess about this verdict.

MR. JACKS: Let me say that I'm with Carl, but I was asked to draft a rule, so --

CHAIRMAN BABCOCK: Yeah. We're talking just now about the sliding scale.

MR. JACKS: If I could cast the same vote, I would cast with Carl.

CHAIRMAN BABCOCK: We're talking just about the sliding scale now. People want to retain -- how many -- I guess we'll take this in the form of a motion. How many people want to delete the sliding scale in section 9(b)? Raise your hand.

How many people want to retain it?

By a vote of 10 to 2, the Chair not voting, it is gone. So we're back to 10 times taxable court costs as the measure; and, Elaine, I assume you can redraft this in that fashion.

PROFESSOR CARLSON: Yep. Yeah.

CHAIRMAN BABCOCK: What other -- what other

issues that we have not already voted on?

PROFESSOR CARLSON: Well, the exclusions in subsection 2, we have not looked at all at those that are now included.

CHAIRMAN BABCOCK: Right. 2(a)(1) we've talked about. 2(a)(2) we've talked. 2(a)(3) we've talked about. 2(a)(4) I think we've sort of talked about already today. 2(a)(5) we have not talked about. This is a change because in the prior draft the state had the option of opting into this rule.

PROFESSOR CARLSON: Right.

CHAIRMAN BABCOCK: And that was derived from Governor Ratliff's bill. The opt-in provision was derived from Governor Ratliff's bill; and, Linda, I think you felt at a prior meeting that that was a good feature.

MS. EADS: I wasn't present at the last meeting.

CHAIRMAN BABCOCK: We've talked about it for three or four meetings, but maybe not. Anyway, do you think it's a good feature? Do you like the state being excluded from this rule? There is no opt-in provision here.

MR. EDWARDS: Which one are we looking at now?

CHAIRMAN BABCOCK: Bill, it's 2(a)(5).

2(a)(5).

JUSTICE HECHT: It's frankly hard for me to understand why the state should even be allowed to opt in. It looks to me like they ought to be out.

MR. JACKS: One of the things that swayed us in that direction was that to the extent that state litigation is under the Tort Claims Act, then you've got the statutory cap issue that you've also got in wrongful death cases under 4590i, that that is that in the case where you've got a hundred thousand-dollar cap, say, on a county that then the max offer you'll ever see out of them is a 75,000-dollar or thereabouts offer and the -- so it's kind of a double whammy of an influence that drove us just to take them out altogether.

MS. EADS: Yeah. But there's so many --

THE REPORTER: I'm sorry?

MS. EADS: There's so many other cases other than the Tort Claims Act cases. I mean, I agree with you on that one that it doesn't make any difference.

MR. EDWARDS: That involve money.

MS. EADS: That involve money, yeah. I mean --

MR. EDWARDS: Like what?

MS. EADS: Well, right now the state is suing how many drug companies for manipulating the average

wholesale price that they sell the doctors their drugs.

MR. EDWARDS: Is that -- what's the remedy in that case?

MS. EADS: Money.

MR. EDWARDS: I mean, is it a class action or is it --

MS. EADS: No. It's a lawsuit against five or six drug companies.

MR. EDWARDS: What happens to the money? Where does it go?

MS. EADS: It will go to the general revenue.

MR. GILSTRAP: Chip?

CHAIRMAN BABCOCK: Yeah, Frank.

MR. GILSTRAP: On this opt in, I mean, the state already has so many advantages. I mean, they're immune from suit. They're immune from liability. They have interlocutory appeals at the drop of a hat. Now we're going to say, "Well, if it suits their interests, we're going to allow them to tag you for attorneys fees or costs."

CHAIRMAN BABCOCK: Right now what we're looking at is where they're just excluded.

MR. GILSTRAP: I think we ought to exclude them. They ought to be all in or all out, but they

shouldn't have the discretion to come in when it's to their advantage.

CHAIRMAN BABCOCK: How about putting them all in?

MR. GILSTRAP: I don't care. I just don't like the option.

CHAIRMAN BABCOCK: Anybody an all in, in the all in camp?

MR. EDWARDS: Are these penalties under the Tort Claims Act, for example, within the cap or are they outside the cap? How does that work? We don't know. If you're outside of the cap, it can't be done without legislative action.

MS. EADS: Right. I mean, I would think -- I know what we would argue. That they're capped, yes.

MR. EDWARDS: So it means nothing to the plaintiff who has got a 200,000-dollar claim against a county that has a hundred thousand-dollar limit.

CHAIRMAN BABCOCK: Yeah. Carl.

MR. HAMILTON: I think they ought to be left in. I don't see any reason to discriminate just because some of the claims may be under the Tort Claims Act and others are not, and if it facilitates settlement then they ought to be left in.

MR. EDWARDS: Well, any place you have a cap

it's an open invitation for tooling around, as Paula Sweeney pointed out last time. It's an opportunity for misusing the system.

MR. YELENOSKY: Well, didn't Elaine say you tried to address caps somehow in here?

PROFESSOR CARLSON: We did.

MR. EDWARDS: By this.

MR. JACKS: By cutting out the state and cutting out wrongful death 4590i cases.

MR. YELENOSKY: But there are caps in employment discrimination cases.

MS. EADS: Right. Yeah. There are. Yes.

MR. EDWARDS: And what I was going to suggest in these exclusions is any other cause of action that's based on a statute with limits.

MR. YELENOSKY: Right.

CHAIRMAN BABCOCK: Why don't you make (5), the number (5) exclusion that?

MR. YELENOSKY: Caps?

CHAIRMAN BABCOCK: Just say "anything that's capped."

MR. EDWARDS: That's really what you're talking about.

MR. YELENOSKY: Yeah. Whether or not we have (5) applying to the state, I would be concerned about

the cap cases that apply to private litigants. In employment discrimination the caps are based on the size of the employer.

MR. JACKS: Originally we actually had a draft that said any case where there is a statutory limitation on damages, and I don't know whether we had a good reason or not for then going just to 4590i.

PROFESSOR CARLSON: I thought John Martin was talking about punitive damage cases.

MR. GILSTRAP: Yeah. That would take punitive damages cases out.

MR. EDWARDS: Well, you exclude punitive damages real easy by, you know, "anything that caps damages, other than Chapter 44" or whatever it is.

MR. JACKS: But they are -- that limits compensatory damages.

CHAIRMAN BABCOCK: Right.

JUSTICE HECHT: I'm having trouble remembering why that's a problem, because if damages are capped and --

MR. YELENOSKY: It automatically lowers the cap essentially, is my remembrance without being able to articulate it well. Whatever the Legislature said is the cap, this rule automatically drops it to 75 percent of that, but I'm not sure how we got to that.

MR. EDWARDS: The plaintiff in a case like that, the only way that the plaintiff in a case with a cap with a 25 percent threshold can take advantage of the cap -- I mean, advantage of the rule, is to make an offer for less than 75 percent of the cap, even if that's not warranted, so that the people with the better cases get penalized because they can't make an offer that means anything under this rule.

MR. YELENOSKY: Or the defendant can offer 76 percent of the cap --

MR. JACKS: Exactly.

MR. YELENOSKY: -- and be sure that you've got to take that because you're never going to get 25 percent more.

MR. JACKS: If you've got a county with a hundred thousand-dollar cap and assuming we do the all in approach for the state, someone that has clearly got a case that exceeds the cap could never get the cap in settlement.

MR. YELENOSKY: Right.

CHAIRMAN BABCOCK: Anne.

MS. McNAMARA: On the other hand, putting aside the state issue, which I really don't know anything at all about, you've got a plaintiff who's suing you for a billion dollars in a case that's capped at a hundred

thousand. I'm not sure that excluding that situation from the rule is getting us where we want to go, which is to, again, discourage, you know, the process where it's really not productive.

MR. EDWARDS: If they're suing for a billion dollars and there's a hundred thousand-dollar cap, I don't care if he asks for a trillion dollars, it's still a hundred thousand-dollar lawsuit.

MS. McNAMARA: Right. So why exclude it from the rule?

MR. EDWARDS: Because -- because the defendant with the cap, who ought to be paying the cap, say a hundred thousand dollars --

MR. YELENOSKY: Pays $75,000.

MR. EDWARDS: -- makes an offer of $76,000, and is at no risk whatsoever.

JUSTICE HECHT: Yeah, but the other side then offers a hundred.

MS. McNAMARA: Yeah.

JUSTICE HECHT: The plaintiff can --

MR. EDWARDS: The other side offers a hundred and they turn it down, you can't --

JUSTICE HECHT: You can --

MR. EDWARDS: You can not get your attorneys fees back because there's no way you can increase your

damages above the hundred thousand dollars.

JUSTICE HECHT: No, but if you offer a hundred, which is the cap. The plaintiff does, offers a hundred, and that's the cap, then if the defendant doesn't take it, he's going to lose attorneys fees.

MR. EDWARDS: Why?

JUSTICE HECHT: Because he made an offer under the rule.

MR. EDWARDS: Who made the offer?

JUSTICE HECHT: The plaintiff.

MR. EDWARDS: Well, but how -- it's not --

MR. JACKS: He made an offer of a hundred and the recovery is a hundred.

JUSTICE HECHT: Just like a standards case.

MR. HAMILTON: He has to get 125.

MR. YELENOSKY: He has to get the 25 percent.

MR. SALES: He's got to get more than --

MR. YELENOSKY: He's got to get 25 percent.

JUSTICE HECHT: More.

MR. SALES: The way it's written right now.

JUSTICE HECHT: That defeats that.

MR. JACKS: The only other way you could make it work is that if the offer is made by the party who is subject to the cap, it has to be no less than the cap.

JUSTICE HECHT: Right.

MR. JACKS: That's the only other way you could do it and make it work.

JUSTICE HECHT: And that's in essence Stowers.

MR. EDWARDS: Not really, because Stowers is negligence, and this has nothing to do with negligence. It may be reasonable to turn down the offer, and under this it's an absolute liability for the penalty if you guess wrong.

MS. McNAMARA: Some of those cases come under 10,000. You know, so at the end of the day you're at 75 and a hundred and the jury comes back with --

MR. EDWARDS: I understand that, and so the party that made the 75,000-dollar offer has the opportunity to take advantage of this, but the person who made the hundred thousand-dollar offer never has the opportunity to take advantage of this.

JUSTICE HECHT: But I don't see why the state, of all the litigants there are, should look at a 750,000-dollar case that's capped at a hundred or 200 or whatever the cap is and say, "Well, you know, this is the most we could lose, and, you know, we're the state, and we will rag them around as long as we can. Maybe they will stub their toe some day, and we'll get out of it

altogether." It looks to me like the state in no circumstances ought to be paying for the game, if that's what they're going to play.

MS. EADS: For the same reason as his analysis. I mean, I agree with that.

MR. EDWARDS: But if the -- but if the penalty is within part of the cap as opposed to --

MR. YELENOSKY: Yeah. Then you've got --

MR. EDWARDS: If it's not within the cap then what you're doing is reducing them. You still don't have it, and we don't know whether it's within the cap or not within the cap, just like we don't know whether it's within the insurance policy or out of the insurance policy.

MR. JACKS: You want to give us an advisory opinion on that?

JUSTICE HECHT: No. The short answer is "no."

MR. SALES: You asked the question if sanctions were part of the cap. Did we decide that they weren't?

JUSTICE HECHT: Well, I dont know of a -- I was just asking. I don't know of any situation where sanctions are part of any cap. So this is really in some sense a sanction for not settling, which has its own

problems.

MR. EDWARDS: Well, the question is, you know --

JUSTICE HECHT: But as a sanction it doesn't seem to me to be within any caps or within any limits any more than discovery sanctions are.

MR. EDWARDS: You know, there are exclusions in the Tort Claims Act against penalties and things of that nature, I think. Are there not? And if this is a penalty, it is excluded by the very terms of the Act itself, so there we are back again.

MS. EADS: It will be definitional whether that is a penalty or whether it is not a penalty, but there are penalty exclusions in the Tort Claims Act.

MR. EDWARDS: There's exclusions for intentional acts. There are exclusions for a whole lot of things that go back on governmental immunity.

CHAIRMAN BABCOCK: Frank.

MR. EDWARDS: How about discretionary acts?

MR. GILSTRAP: I'm a little uncomfortable with this whole business about just excluding caps. I mean, you know, we started out with the idea of excluding or not excluding the state, which seems to me something I can kind of get my hands around, but when you start doing caps, I really don't know where that goes. I mean, aren't

malpractice claims capped in some cases?

MR. EDWARDS: Death cases.

MR. GILSTRAP: I mean, I don't know where we're putting our foot. I think before we just jump off the cliff and say, "We're not going to apply this to cases that are capped" we might want to look at the cases that are capped and be sure that's where we want to go, because my impression is that, for example, malpractice cases, this is one of the things that -- one of the areas that the rule wants to address.

MR. JACKS: Well, the problem is in a -- and it's an even bigger problem because it's a percentage of a bigger number. There is a cap that applies in death and doesn't apply in nondeath cases brought under 4590i, again, for the plaintiff whose damages clearly exceed the cap; and the cap right now is, what, about a million three per --

MR. EDWARDS: A million four forty.

MR. JACKS: Yeah. There in that range. A defendant who offers 76 percent of the cap can take advantage of the rule. The plaintiff who offers the cap can't.

MR. YELENOSKY: Right. And so we can't just ignore it.

MR. JACKS: And so the only way you can --

if you're going to bring those cases in, the only way you can do it is in a cap case that applies only if the defendant offers the cap and then the plaintiff falls short by the --

CHAIRMAN BABCOCK: Well, the plaintiff could offer 74 percent and take advantage of the rule. 74 percent of the cap.

MR. YELENOSKY: Can you use the number --

MR. JACKS: Yeah, but for the plaintiff whose damages exceed the cap, they could never --

MS. EADS: Get the cap.

MR. JACKS: They could never take advantage of the rule.

CHAIRMAN BABCOCK: Well, they could, because they could -- they may not --

MS. BARON: They can discount their case by 24 percent or 26 percent.

MR. YELENOSKY: Right, but we still will by rule have essentially decreased the legislative cap.

CHAIRMAN BABCOCK: And that's the point.

MR. YELENOSKY: And that's a problem.

CHAIRMAN BABCOCK: Yeah. Carl and then Richard.

MR. HAMILTON: We could eliminate the 26 percent and just if the judgment is the same as the offer

or more favorable then the consequences apply. We could do that to everybody or we could just do it to those that are capped.

MR. YELENOSKY: What about using the actual judgment? I mean, before the judgment doesn't the jury determine how much is damages and then it gets capped? So you can tell whether or not more than the cap is awarded.

CHAIRMAN BABCOCK: That's a good point. Richard.

MR. ORSINGER: It seems to me that instead of excluding capped cases we ought to just say for the plaintiff it's acceptable to offer the cap and get it and you get recovered if your offer was rejected, but Carl's suggestion that we do away with the 25 percent or 26 percent deviation scares me because somebody may get one dollar more or one dollar less and then many hundreds of thousands could change hands, and that's not what we're trying to do.

But it's not fair for a defendant who has a cap to be able to say, "Ha, ha, I don't have to agree to pay you the cap even though your damages may be 10 times the cap because I know that if you offer me the cap you'll never get your costs." That's why really the fix is just to fix it from the plaintiff's side, who's facing a cap, to waive the 26 percent deviation rule if their offer is

--

MR. YELENOSKY: What -- doesn't it work to say -- I mean, don't you actually get a number that then is capped? A number -- I mean, the jury --

MR. ORSINGER: Yeah, but we're staying away from using jury verdicts.

MR. YELENOSKY: Huh?

MR. ORSINGER: We're staying away from using jury verdicts, and that's probably smart because there may be some either cross-claims or counterclaims or whatever that get netted on the jury verdict and --

MR. YELENOSKY: Yeah, but if you take -- if you say you use a number that is reduced only because it's statutorily capped, what's the problem with that?

MR. EDWARDS: Well, the problem is, is that the evidence that would get you the higher jury verdict --

MR. YELENOSKY: May not be introduced. Yeah.

MR. EDWARDS: -- may not be introduced. It may take two or three other experts and you've got to spend more money trying to get the advantage of this rule than you get out of it.

CHAIRMAN BABCOCK: Okay.

MS. EADS: Can I just make one point about the state?

CHAIRMAN BABCOCK: Yeah.

MS. EADS: I'm wondering about sovereign immunity here because the state agreed through the Legislature, for example, on tort actions to waive its immunity within the parameters of the Act. This -- if we -- if the state were subject to costs --

CHAIRMAN BABCOCK: Right.

MS. EADS: -- 10 times costs, then are we changing the legislative waiver of immunity?

MR. EDWARDS: That's what I asked.

MS. EADS: Yeah, and I think that there's a good chance of that.

JUSTICE HECHT: It seems to me that we're not if it's a sanction. There are lots of problems with that, but if you call it a sanction, there is no waiver of immunity for discovery sanctions.

MS. EADS: No, there isn't.

JUSTICE HECHT: But the state pays them. I've never even heard them complain; and, again, with the insurance policies, I was just curious; but I assumed that the insurance company pays it. So if it were a sanction then it seems like there wouldn't be an immunity problem, but I say, again, I mean, there are the conceptual problems, I think, and philosophical problems with sanctioning people for not settling. I mean, you don't

have to settle, but, I mean, they may be -- once you overcome those I don't know if you have an immunity problem.

MS. EADS: And I would think that the Bar as a whole would be resistant to us calling these sanctions because that would mean -- whatever that would mean to a lawyer who is engaged in a case upon which now we're saying, "You're sanctioned because you didn't accept a settlement offer."

MR. YELENOSKY: It's the client who doesn't. It's the client who doesn't accept.

MS. EADS: Well --

CHAIRMAN BABCOCK: Tommy has got to go here in a second. Elaine, are exclusion (6) and (7) new, or have we talked about them before? I don't think we have talked about (7).

PROFESSOR CARLSON: We have not talked about (7).

CHAIRMAN BABCOCK: What about (6)?

PROFESSOR CARLSON: I think (6) was there.

CHAIRMAN BABCOCK: I think so, too.

PROFESSOR CARLSON: Nor have we talked about (9).

CHAIRMAN BABCOCK: We talked about (9) for sure.

MR. JACKS: Yeah. We did talk about (9).

CHAIRMAN BABCOCK: Yeah.

MR. JACKS: We took a vote on that.

CHAIRMAN BABCOCK: We took a vote on that. But (7), why are we excluding claims filed in small claims court or justice court? Because Judge Lawrence doesn't want to have to fool with this rule?

PROFESSOR CARLSON: Well, the thought process here was that most of the litigants in those courts appear pro se and there's an outside exposure essentially of $5,000 in justice court. Could be more depending on if additional damages occur, but basically $5,000, and the filing fee is --

HONORABLE TOM LAWRENCE: 67 or 70.

PROFESSOR CARLSON: Say 70. So the thought was do we want to put a burden on pro se litigants to be familiar with the mechanism of this rule and risk $700 on a potential 5,000-dollar case. It just seemed like it was a lot to put on --

MR. YELENOSKY: There ought to be at least one court you can go into and not put yourself at risk.

PROFESSOR CARLSON: Just kind of bottom line, it's the people's court. There's not that much money on the table. On the other hand, you can make the argument, well, you're there. You should be reasonable.

CHAIRMAN BABCOCK: What's everybody feel about this, those two sides of the argument? Richard, you've got a --

MR. ORSINGER: Yeah. It's not worth forcing them -- I could just see the mess between the laypeople. The judge is going to have to explain it to them because they don't have a copy of the rule. It might take longer to explain how the rule would work than it would to try the case.

CHAIRMAN BABCOCK: That does seem like kind of a burden to put on that system.

MS. McNAMARA: And a defendant who spends a lot of money on that kind of case is crazy.

CHAIRMAN BABCOCK: Yeah. All right. Anybody disagree with that exclusion?

Okay. It looks to me like (8) and (5) are kind of linked in cap land.

PROFESSOR CARLSON: Yes.

CHAIRMAN BABCOCK: And you're going to have to --

PROFESSOR CARLSON: Can we get a sense from the committee on this?

CHAIRMAN BABCOCK: On whether the caps ought to be in or out?

MR. JACKS: I'd like a vote on the state.

CHAIRMAN BABCOCK: Okay. The state -- all right. That's a good point. How many people think the state should be excluded as (5) is written now? Raise your hand.

How many people think the state should be in for all purposes? Raise your hand.

MR. SALES: As written now?

CHAIRMAN BABCOCK: Well, it's not written now. Just do the flip of what's written now.

MR. SALES: But I was saying somebody said if we take out this 25 buffer zone.

MR. YELENOSKY: No, we're talking about just taking them out altogether.

PROFESSOR CARLSON: Yeah, just whether they're in or out.

MR. SALES: Okay.

CHAIRMAN BABCOCK: How many people think they ought to be in? Okay. By a vote of six to four, Chair not voting, the committee thinks they should be out.

PROFESSOR CARLSON: Thank you for the clear direction.

CHAIRMAN BABCOCK: Clear direction.

JUSTICE HECHT: With a fifth of the committee voting.

CHAIRMAN BABCOCK: Yeah. A fifth of the

committee voted that they should be out. So any other sense of the committee you wanted?

MR. JACKS: Well, let's go back to the caps issue. We've had some ideas tossed out. I guess one vote that would be helpful is keep caps out, except for punitive damages, but if there's a cap on compensatory damages then that case isn't covered by the rule. That's choice A, and then choice B would be it applies to cap cases, but you make some accommodation so that it's two-sided and not one-sided opportunity to employ the rule.

CHAIRMAN BABCOCK: Okay. Everybody who thinks it should not apply to cap cases, putting punitive damages aside, raise your hand. Keep your hands up.

Okay. Everybody that thinks it should apply to cap cases with some adjustment of the 25 percent raise your hand. By a vote of seven to six, the Chair not voting, the seven is that it should not apply. So there's a good sense of the committee.

PROFESSOR DORSANEO: So the cap issue is to vote on what?

CHAIRMAN BABCOCK: To come back with more language.

PROFESSOR CARLSON: You want us to come back with alternatives on both of those?

MR. EDWARDS: It was a seven-six landslide that the caps would be excluded.

CHAIRMAN BABCOCK: There's going to be a Jamail meeting on it next week.

MR. JACKS: Yeah. So we will get back into it then. Let me ask this, finally, because it will be helpful for next week.

CHAIRMAN BABCOCK: Hang on, guys.

MR. JACKS: If caps were -- if capped cases were covered, I'd like some sense of the committee of what's the best way to take care of the inequity; and the ideas that have been tossed out there, one is to say, well, the party who benefits from the cap has to offer the cap. A second approach was to say, well, the party whose claim is capped gets the benefit of the rule if they offer to accept the cap, and then if they get at least that in their judgment they get the cost shifting, regardless of the 25 percent rule. And then the third alternative was to look to the jury verdict, which is something we've generally tried to avoid having to do.

MR. YELENOSKY: How would it ever work if they offer the cap? Because if they offer the cap, it's always going to be taken.

MR. MEADOWS: Not the -- the plaintiff makes the offer.

MR. YELENOSKY: Yeah, but, I mean, if the defendant offers the cap.

JUSTICE HECHT: That's the point. He should go ahead and offer.

MR. JACKS: You want them to be incentivized to offer the cap.

MR. YELENOSKY: Oh, I see what you mean. If they don't offer the cap and then that --

CHAIRMAN BABCOCK: If they offer the cap then "see ya." We're all going home.

MR. SALES: If the offer triggers the cap then this 25 percent thing goes away, is what I think you're saying.

CHAIRMAN BABCOCK: That's Option 2.

MR. SALES: That's the simple thing. So if the guys gets over a hundred or better --

MR. JACKS: That's the Orsinger suggestion.

MR. EDWARDS: Suppose there is 90 percent of the cap offered by the plaintiff. Out of the rule?

MR. SALES: No. That would be in the rule.

MR. ORSINGER: Yeah. The plaintiff has the benefit of the 26 percent, but he shouldn't lose just because of the cap.

MR. EDWARDS: That's what I'm saying. You've got the problem of an offer made by the plaintiff

somewhere between 75 percent of the cap and the cap. What happens?

MR. JACKS: Yeah. I see what you're saying.

MR. EDWARDS: The plaintiff can never get anything -- 76 percent to a hundred percent of the cap, the plaintiff can never beat the 25 percent.

MR. ORSINGER: But my suggestion would be the plaintiff ought to recover -- if he's within 26 percent of recovery below his offer --

MR. JACKS: Right.

MR. ORSINGER: But the fact that he's so close to the cap that he can't get more than 26 above should not operate to the plaintiff's detriment. So the plaintiff still has the same advantage of the scope of choice that the defendant would, and we just ignore the arbitrary ceiling that the cap puts on it. Otherwise, you're not treating the plaintiffs fairly in cap cases.

MR. EDWARDS: I'm asking how do you ignore it?

MR. JACKS: I think I understand the idea and then we will see if we can figure out the drafting.

CHAIRMAN BABCOCK: Okay. So I think that's everything we need to talk about on this, or not?

PROFESSOR CARLSON: Do we want to get a sense of the committee on the nonmonetary relief?

CHAIRMAN BABCOCK: I think --

PROFESSOR CARLSON: We're okay?

CHAIRMAN BABCOCK: You're okay.

MR. GILSTRAP: I've got one clarification I'd like to see made. I mean, for example, on (c) -- 2(a)(2), DTPA claims. Now, you know, we all know that the DTPA Act really doesn't protect us. In other words, it's a tool in business litigation, and it's often accompanied by claims of fraud. Now, if I file a DTPA claim and also include claims of fraud, is my claim in or out, or is only the DTPA in or out?

MR. EDWARDS: I would assume it would be the election you made after the verdict as to what you were going to recover on, but I don't know that.

CHAIRMAN BABCOCK: Well, what Frank's point is, does the language need to be an action brought in whole or in part under the DTPA or --

MR. EDWARDS: You're going to have to -- when you get your findings to the jury, to get findings on both of them, you have to make an election as to which one you're going to take for the judgment.

CHAIRMAN BABCOCK: But the point is -- I think Frank's point is under exclusion 2(a)(2), this rule may not apply if there's a DTPA claim.

MR. YELENOSKY: In the pleading.

MR. GILSTRAP: It's just not clear. I mean, is our intent to say if there's a DTPA claim or, for example, a case in which there is a family claim coupled with a tort, I mean, does the assertion of the DTPA claim or the assertion of the family claim knock the whole case out, or is it our intent to allow the notice of -- the offer of judgment rule to apply to the nonexcluded claims that are in the same lawsuit? I don't care what it is. I just want to see what the answer is.

CHAIRMAN BABCOCK: An action brought primarily under the DTPA, brought primarily under the Family Code?

MR. EDWARDS: How about that "portion of an action brought under"?

PROFESSOR DORSANEO: All that learning that I can't use anymore in the Chapter 33 context will be back. I'm back in business.

MR. YELENOSKY: The Bill Dorsaneo protection.

CHAIRMAN BABCOCK: Bill's idea, that portion of it is.

PROFESSOR CARLSON: Bill's claim is --

CHAIRMAN BABCOCK: Right.

MR. EDWARDS: Or whatever you call it.

MR. GILSTRAP: You could do it -- you could

simply say in this hypothetical that if you wind up with fraud damages then the fee shifting works. If you wind up with DTPA damages, it doesn't apply to both. Maybe that wouldn't be practical, but that would be one way to do it, and you'd get away from this problem identifying the type of lawsuit it is.

CHAIRMAN BABCOCK: Right. Good point.

MR. JACKS: Just a drafter's plea. I mean, if we get into a situation where the rule applies to one part of the lawsuit and not the other part of the lawsuit and, I mean, first place, as a practical matter, I think we're getting away from the purpose of the rule because there may be some very good reasons to reject an offer, settling only the fraud part of the case, if you're still going to get your rear-end sued over the DTPA part of the case. And beyond that, you know, we then also have to sort out how the application of the comparison of what was offered with what was gotten works and, boy, I really would like not to have to draft all that.

MR. ORSINGER: I think there's an even bigger problem when you have a bifurcated case like that. You make an offer on the fraud case. What if it's accepted? What if the defendant accepts the offer on the fraud case and you still have to try the DTPA case? What have we created there?

MR. JACKS: Yeah, I know. It's --

MR. GILSTRAP: Simple lawsuit.

MR. ORSINGER: A second lawsuit.

MR. EDWARDS: A credit.

MR. ORSINGER: Maybe that would be it.

MR. HAMILTON: Shouldn't the offer be one that's going to dispose of the whole case?

MR. JACKS: It should be, and that's why I -- you know, the DTPA has its own burden of an offer of judgment rule, and so that's why we excluded it, and I just -- I don't think it's a good idea to try to separate the claim in that matter.

CHAIRMAN BABCOCK: You have the same problem, though, that Elaine was talking about before under exclusion 2(a)(4), which is somebody, you know, wants to opt out of the rule and so they just throw a DTPA claim in there.

MR. YELENOSKY: Well, or if we exclude cap cases, you include a claim as a cap.

MR. JACKS: I suppose if it's a -- I mean, if it's really a case where it doesn't apply, for example, in medical malpractice case, the law is pretty clear that you don't have a DTPA claim except in one little rare now almost unheard of circumstance, and so summary judgment is available, and you can get that knocked out of the case,

and then it seems the rule starts applying again. I don't know. It's just not a perfect world. What can I say?

CHAIRMAN BABCOCK: Nina, then Bill.

MS. CORTELL: I was going back to what Elaine was talking about earlier, but now looking back at the rules, sometimes we use "action," sometimes we use "claim" and I would just say when you start looking back at it you might --

PROFESSOR CARLSON: Yeah. We will.

CHAIRMAN BABCOCK: Clean that up. Okay. Richard, last -- no, Bill had a comment before, didn't you, Bill?

PROFESSOR DORSANEO: You know, just being a little bit facetious now, but we've been down this road. I mean, General Motors vs. Simmons --

MR. JACKS: Yeah.

PROFESSOR DORSANEO: -- decided that we didn't have the statute apply to mixed cases and then Duncan essentially provided the answer to -- the better answer to the question is not what's in the pleadings. It's whether somebody is held accountable --

MR. JACKS: Right.

PROFESSOR DORSANEO: -- on the excluded claim --

MR. JACKS: Yeah.

PROFESSOR DORSANEO: -- that ought to make the difference. I mean --

MR. JACKS: So you're saying take care of it --

PROFESSOR DORSANEO: -- you could just say only nonmixed cases are covered by this, but it might be better to say that if it's a DTPA case in terms of where liability is important that it's covered. Maybe the verdict.

MR. JACKS: In other words, if the judgment is based on findings of violations of DTPA it does not apply?

PROFESSOR DORSANEO: That would be probably better than going by the pleadings because it's really not a DTPA case just because somebody says it is.

MR. GILSTRAP: But what about -- that may be helpful, but what about a case where you get awards under both common law and DTPA? It is possible.

PROFESSOR DORSANEO: Well, shouldn't that one be -- shouldn't that one be covered rather than not covered? But if it's just a DTPA it's not covered.

MR. YELENOSKY: Well, what about cap cases where you can have a statutory claim that involves a statutory cap and then another claim that doesn't?

MR. JACKS: Well, I guess another way you

could approach it is say if you've got a mixed -- if you're the plaintiff who has brought the mixed case, the DTPA/fraud case, and you want to take advantage of the rule, you've got to offer to settle your whole case.

PROFESSOR DORSANEO: Whole case.

MR. JACKS: You can't just offer to settle the non-DTPA part of the case, and then on the backside, if the judgment ends up being based on -- solely on DTPA findings then the rule -- I don't know. That's why I said I sure wish I didn't have to draft it.

PROFESSOR DORSANEO: It's a nightmare to draft it.

MR. JACKS: Yeah, it is.

CHAIRMAN BABCOCK: Richard, last word.

MR. JACKS: I wonder whether it reflects the work that we did.

MR. ORSINGER: We have discussed only generalities today, but there is a lot of specifics in here, and I presume that we should take our concerns to the subcommittee about those specifics?

CHAIRMAN BABCOCK: Yeah. And if you would just show up to a meeting for a change.

MR. ORSINGER: I think this is my highest priority next to --

CHAIRMAN BABCOCK: Yeah. What we're going

to do is -- yeah, take your specific thoughts to the subcommittee and what we're going to do is the Jamail committee is meeting Wednesday of next week. There's a memo that Dee Kelly has -- have you made copies of this -- that Dee Kelly has sent me apparently that we'll circulate to everybody. We'll see what they have to say. They're apparently going to do something Wednesday, and then we'll go back to the subcommittee, take everything into account, and bring that back for our next meeting.

MR. ORSINGER: And who's the addressee on the letter? Is it Tommy or Elaine?

CHAIRMAN BABCOCK: Probably Elaine, but Tommy could --

MR. JACKS: If you give it to either one of us, we'll get it to the subcommittee.

PROFESSOR CARLSON: Right.

MS. McNAMARA: Chip, if other states have solved this last issue, it might be kind of informative.

CHAIRMAN BABCOCK: If you'll look in your materials for today you'll see that Florida has got both a rule and a statute, and it does not look to me like they have addressed this problem.

MS. McNAMARA: They haven't thought of that problem.

PROFESSOR CARLSON: Which problem?

CHAIRMAN BABCOCK: The exclusion problem.

MS. McNAMARA: And the multiple causes of action, some included, some excluded.

CHAIRMAN BABCOCK: I don't think they have, Anne.

MR. HAMILTON: I didn't even know it was a problem.

MS. McNAMARA: That may be informative.

CHAIRMAN BABCOCK: The Florida rule, as I understand it -- the Florida rule, as I understand it, is applicable across the board.

MS. McNAMARA: Is it?

CHAIRMAN BABCOCK: Yeah.

MR. JACKS: I don't know that anybody ever uses it, so it doesn't matter.

CHAIRMAN BABCOCK: Florida, I think is --

MR. JACKS: Yeah, but I don't know whether their DTPA has an offer of judgment rule of its own.

CHAIRMAN BABCOCK: Okay. Let's take a lunch break. It's 12:30. We'll back at around 1:30.

(A recess was taken at 12:27 p.m., after which the meeting continued as reflected in the next volume.)

* *

CERTIFICATION OF THE MEETING OF
THE SUPREME COURT ADVISORY COMMITTEE

* *

I, D'LOIS L. JONES, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above meeting of the Supreme Court Advisory Committee on the 14th day of June, 2002, Morning Session, and the same was thereafter reduced to computer transcription by me.

I further certify that the costs for my services in the matter are $ 1,129.00 .

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

Given under my hand and seal of office on this the 1st day of July, 2002.

ANNA RENKEN & ASSOCIATES
1702 West 30th Street
Austin, Texas 78703
(512)323-0626

D'Lois L. Jones

D'LOIS L. JONES, CSR
Certification No. 4546
Certificate Expires 12/31/2002

#005,080DJ/AR