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HEARING OF THE SUPREME COURT

ADVISORY COMMITTEE

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ORIGINAL

Taken before Anna L. Renken, a Certified Shorthand Reporter in Travis County for the State of Texas, on the 12th day of April, 2003, between the hours of 9:00 a.m. and 12:15 o'clock p.m. at the Texas Law Center, 1414 Colorado, Suite 101, Austin, Texas 78701.

CHAIRMAN BABCOCK: Okay. This morning we have fortunately Rules to discuss that have great sex appeal. And if we didn't, I know Judge Peeples would not stay around. And you will never live that down.

(Laughter.)

CHAIRMAN BABCOCK: Pam, I think we're, the next on the agenda is the Rule 7 that has been proposed by the Jamail committee. Anything that you want to talk about, Justice Hecht, as a prelude to that?

JUSTICE NATHAN HECHT: No.

CHAIRMAN BABCOCK: Okay.

MS. BARON: You need to have two documents in front of you. The first is tentative Rule 7, "May Appear By Attorney." And the other was handed to you yesterday, the Texas Disciplinary Rules of Professional Conduct, Rule 1.04.

Our subcommittee did have an opportunity to meet by conference call and we had a productive discussion where we raised questions and issues that we want to bring to you today. I want to compliment particularly our new members, Bob Pemberton and Robert Valadez who with less than 24 hours were able to participate very helpfully in our conversation.

Our other members are Steve Yelenosky and Bonnie Wolbrueck. Unfortunately Bonnie had to attend a funeral in Temple today. She is not going to be here. She had several concerns from a district clerk's perspective that we're going to try and present to you; but obviously will not be quite as knowledgeable as Bonnie would be. I encourage subcommittee members to break in when they want if I miss any of the comments that they raised.

I think what would be helpful to present to you is a brief overview of the rule and then to go through it section by section. And the idea is that Rule 7 and 8 would be replaced in their entirety with Rule 7.1 through 7.5. 7.1 through four expand and modify the existing rule in small ways. 7.1 just indicates who must and who can be represented by counsel. Section 7.2 and three relate to how an attorney enters an appearance. 7.4 relates to how lead counsel for a party is designated; and those are all shades and phases of the existing rules. 7.5 is new. It is a disclosure and sanction rule that requires lead counsel to disclose certain payments made in connection with the litigation and requires mandatory sanctions in the event that certain payments have been made.

Hopefully we can get through the first four rules somewhat quickly; and I think when we get to the fifth we're going to bog down a bit; but I think let's start with 7.1. Let me point out a little bit to you about it. First it does expand current Rule 7 because it now makes clear that non individual parties must be represented by counsel, which of course has been the law, but has been not been stated within the rule.

Our subcommittee did have a question about whether there should be a comment that would explain except as required by statute exactly where that might be found for individuals who may be reading the rule; and that was the extent of our comments on that section. I think it would be helpful, Chip, at this time if other people would like to comment on that.

CHAIRMAN BABCOCK: Okay. Anybody got comments about 7.1? Bill.

PROFESSOR DORSANEO: Well, I know that cases talking about corporations generally say they must be represented by an attorney; but I don't know enough to know what the answer is for whether a partnership could be represented in some way by a general partner who is representing himself. So did

everybody check all that out?

MS. BARON: No. We did not have time. We were given this less than a week ago.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: What about just an individual who has incorporated his business? He's incorporated; but I mean, he runs it.

CHAIRMAN BABCOCK: A Subchapter S Corp?

MR. LOW: Yes. And I mean, you know, they sue him individually and he can represent himself; but if they sue his corporation, he's got to hire a lawyer. Why can he not represent his company that he owns solely when if I'm a nonlawyer, I can represent myself under the same terms.

CHAIRMAN BABCOCK: Well, that may be more substantive. Justice Duncan.

HONORABLE SARAH B. DUNCAN: I had occasion to look at that for my dad. There is a serious question as to the Constitutionality of requiring a corporation to be represented by an attorney when an individual can appear pro se.

MR. LOW: That's my question.

HONORABLE SARAH B. DUNCAN: When you have got a 100-percent owner, 100 percent of the

shares are owned by one person and they're the only officer of the corporation.

MR. LOW: Right.

HONORABLE SARAH B. DUNCAN: So I'm not willing to do that by rule.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: I can't recall with specificity; but I know when we were working on the forcible entry and detainer rules we put a provision in I thought that would allow apartments to represent without counsel in an FED case the apartment.

CHAIRMAN BABCOCK: Well, I've always thought it was the law in Texas that a corporation had to be represented by an attorney; but I don't know what the source of that law is.

HONORABLE TOM GRAY: Unauthorized practice of law.

CHAIRMAN BABCOCK: Huh?

HONORABLE TOM GRAY: It's the unauthorized practice of law to have a layman representing another person or entity; and that is the basis of it in the case law. And what I looked into, whoever asked the question, it did apply to partnerships when I researched it; but that's been

some years ago.

CHAIRMAN BABCOCK: Okay. Well, let's not get bogged down in whether the statute or the case law is good or bad. That's another day. This is just a rule. If somebody has got a problem with articulating in the rule what is the law, then we can talk about that; but we can't solve that problem today. Steve.

MR. YELENOSKY: Well, I was just going to say as a predicate to this whole thing that Pam and I and the rest of the subcommittee did discuss that we received this less than a week ago exactly in this form, and unlike what we were discussing yesterday with the Jamail report there are no footnotes. There is no explanation. And so we're guessing as to why it was proposed in this manner. And a lot of our comments are going to be of that ill.

MS. BARON: Right.

CHAIRMAN BABCOCK: Yes. And sorry about the late notice; but you got it I think the day after I got it.

MR. YELENOSKY: Okay.

CHAIRMAN BABCOCK: Yes, Paula.

MS. SWEENEY: Steve's comment leads

to my question. Why are we doing this? What is the issue that we are addressing? This committee typically responds to inquiry from bench, bar or public about concerns, suggestions, complaints, comments, need for improvement, modification or evolution of the rules. This has been dropped on the subcommittee and now on the full committee with no explanation, concern or comment about what we might be doing or why. And I'd certainly like to know why we're doing it.

As we get into 7.5 which appears to be the driving force of this there is one set of issues; but this first part of the rule we seem to just be tinkering with something that does not seem to be broken in any way; and I question. The lawyers that I talk to across the state are sickened to death of new rules seemingly every few hours; and to be changing rules where no problem has been reported, no request has been made, there is certainly no recent case law evidencing a problem on who may appear by attorney or attorney in charge that I know of. I'd appreciate some insight into that.

CHAIRMAN BABCOCK: I can give you that. Bill.

PROFESSOR DORSANEO: This 7.1 looks

like it's trying to revise and make clearer perhaps rightly, perhaps inaccurately what Rule 7 now says.

CHAIRMAN BABCOCK: Uh-huh (yes).

PROFESSOR DORSANEO: And I wouldn't be -- I don't necessarily think Rule 7 needs to be changed to read any differently. But if we're going to do a right necessity 7.1, I would probably just say "unless otherwise provided by law any party to the suit may appear, blah, blah, blah," because I know that's slightly more accurate than Rule 7; but it doesn't inject itself into a whole host of the controversies that are out there about when do you need to hire an attorney and when can you proceed in your own behalf.

CHAIRMAN BABCOCK: Yes. Responding to Paula's comment, the history of this is that the Supreme Court appointed a committee headed by Joe Jamail to study four issues, this being one of them. And Jamail, the Jamail group broke up into subcommittees just as we do; and I forget who was the subcommittee on this. The crossover members of the two committees are myself, Elaine and Tommy Jacks. Just as it turned out Elaine, Tommy and I all worked on the offer of judgment rule, so we had a good crossover between this committee and that

committee. And as I say, I forget who was the subcommittee on this Rule 7 and 8, these rules; but the Jamail committee has reported this out to the Court, and now the Court is asking for our feedback on this proposal.

It's just like if the State Rules Committee had come up with, the State Bar Rules Committee had come up with something. Most of the time the Court doesn't ask our opinion about it. Sometimes it does. And so we get it and we look at it, so that's why we're doing it.

MS. SWEENEY: When you say "this is one of the charges that was sent to the Jamail committee" could you please define "this"? What is the charge that "this" responds to?

CHAIRMAN BABCOCK: I don't have it, Paula; but it is on our website if you want to look at it. I don't know if you remember specifically what the charge was.

JUSTICE NATHAN HECHT: No. But we asked. They wanted to look and we asked them to look at the kinds of things that are dealt with in 7.5; but in the process of that they were looking at Bill's restated, restatement of these rules in the revision process and were commenting on it as they

went. So here it is.

CHAIRMAN BABCOCK: And you know, one of the things we may say is "Hey, you know, the rules are fine. Don't tinker with them." Yes.

MR. GILSTRAP: Is 7.5, the subject matter of 7.5 is it currently the subject of anything the legislature is doing?

JUSTICE NATHAN HECHT: Not that I know about.

MR. GILSTRAP: Okay.

CHAIRMAN BABCOCK: Okay. Anymore comments about 7.1?

(No response.)

CHAIRMAN BABCOCK: Okay. Let's talk about 7.2.

MS. BARON: I assume we're not voting on this rule or what?

CHAIRMAN BABCOCK: No. No. We're not going to vote on this today. We're just going to get a preliminary discussion going about it; and we'll spend some more time.

MS. BARON: Okay.

CHAIRMAN BABCOCK: We'll come back to this at the next meeting. And in fact everything else we're doing today we're not voting on. The

only thing there was an imperative about was the Offer of Judgment Rule for external reasons; but everything else we're just going to get the discussion going.

MS. BARON: Okay. 7.2 would be new material that is not in current Rule 7 and 8. It adds more detail as to what information counsel must provide to the Court such as name, address, telephone number, fax number, State Bar ID number or the jurisdiction in which the attorney is licensed.

My understanding from Bonnie is that most counsel who appear are already providing that information, so that at least from the perspective of the subcommittee we didn't view this as some onerous requirement.

CHAIRMAN BABCOCK: Yes, Judge Gray.

HONORABLE TOM GRAY: This arises out of one of the subcommittee legislative hearings on the budget as to whether or not Courts can communicate with counsel on required notices by e-mail. And that will come up at some other time; but it would seem to be the appropriate time to at least go ahead and capture the attorney's e-mail address if it's available in this rule.

MR. YELENOSKY: And that came up in

our discussion; and I think the point was made and we all thought if we're going to do this, that it should include e-mail. And if we could predict the next level of technology and what that thing would be --

MR. GILSTRAP: You'd do that too.

MR. YELENOSKY: -- yes, we would do that too.

MS. BARON: The Z-mail, whatever is next.

MR. YELENOSKY: Personal I.D.

MS. BARON: I guess it would be "e-mail address, if any."

CHAIRMAN BABCOCK: Yes.

MS. BARON: Because still not every practitioner in Texas has e-mail.

MR. GILSTRAP: Can I offer a slight dissenting note on that? If we start putting our e-mails on our pleadings, does that mean the other side can give us notice by e-mail? You know, and I walk in, you know, and there is guess what? There is a summary judgment hearing a week from now, and it's on my e-mail and it's not anywhere else. That's the reason lawyers don't like to put their e-mail is because aggressive attorneys on the other

side will use it to trick them.

CHAIRMAN BABCOCK: Elaine.

PROFESSOR CARLSON: Rule 57 requires already on every pleading that the attorney provide this information.

CHAIRMAN BABCOCK: E-mail?

PROFESSOR CARLSON: Not e-mail.

JUSTICE NATHAN HECHT: But I think Bill's redraft moved it into this rule --

PROFESSOR CARLSON: Oh, I see.

JUSTICE NATHAN HECHT: -- is what I think happened.

PROFESSOR DORSANEO: So but at least in this report it's not just not replacing 7 and 8. It's replacing other things too and adding things.

MR. YELENOSKY: Should not the question of what you're able to do with e-mail be addressed elsewhere? I mean, because I can certainly see circumstances where it would be useful to have e-mail and how e-mail can be used just like how fax can be used. Apparently it needs to be addressed; but I don't know that that would preclude us from requesting the information.

MR. GILSTRAP: My, you know, the point is if you put it there, they're going to use

it. It would seem more logical to figure out how it's going to be used before you start requiring it to be put on pleadings.

CHAIRMAN BABCOCK: If you have got to put it on your pleadings, why is it there if you're not going to use it? I mean, if you've got a rule here that says, "By the way, put your e-mail," and then Rule 21 or whatever, 21(a) says "By the way, never ever try to give somebody notice through e-mail."

MR. YELENOSKY: Well, I think that's true. And I guess my assumption was that we would not say "never ever." I could imagine it being useful and attorneys being interested in getting e-mail from the Court in some instances. So my assumption was there would be some instances. If that's wrong, then you're correct. It should not be in here.

CHAIRMAN BABCOCK: Yes, Richard.

MR. ORSINGER: The State of Texas is moving forward with an electronic filing system statewide; and I'm a liaison between the Supreme Court or just kind of de facto liaison between the Supreme Court and the judicial committee on

information technology; and I'll have to admit I don't know the exact state of it right now, but it's expected that many lawyers will take advantage of the opportunity to have electronic filing, perhaps ultimately electronic access to court file documents. And there is a protocol that has been discussed -- I don't know if it's formally been adopted by that committee -- that if you wish to be able to file and receive notice and copies of pleadings, you can do that by some designation of your e-mail address, and you can even subscribe so that you automatically get copied on everything filed through the electronic filing system.

I think I'll try to get some concrete information about if there is protocol that has been worked out. Obviously nothing has been adopted; but I just wanted to inform everyone that we're about to step into a new world of electronic filing and we might like to know that in discussing the requirement of this disclosing e-mail or whatever.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: The committee heard last fall, was it or last summer, about this e-filing project that is going on in Bexar County --

MR. GRIESEL: Fort Bend County.

JUSTICE NATHAN HECHT: -- Fort Bend County --

MR. GRIESEL: Upton County. And we have proposed Travis County.

JUSTICE NATHAN HECHT: Upton County and proposed a proposal for Travis County. And the Court is going to get a report on it in 10 days just to see how they're doing; but it's sort of coming along. And they've already used electronic filing in Jefferson County, Montgomery County.

MR. LOW: Judge Mehaffey has had that going for a long time.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: The problem is not e-mailing. It's e-notice. And you know, I think before we get to a practice where, for example, the clerk who is real busy and needs to save money decides to start sending notices to everybody by e-mail and you're bound by that we need to look real hard at that if that's the only notice you're going to get.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: I hesitate to even say anything about this; but the Rules, the Appellate Rules don't specify how the

Court has to give notice; and we have already started giving notice by e-mail.

MR. GILSTRAP: There you go.

HONORABLE SARAH B. DUNCAN: When your budget is more than 98 percent salaries and we're looking at 12.9 percent cut, there are not a lot of things to cut. Postage and printing costs are a huge part of that budget.

MR. GILSTRAP: Is that really do we want a situation where that is your only notice, you walk in Thursday morning, and it's on your e-mail and that's it? Because that's where it can go.

MS. SWEENEY: Why is that so bad?

MR. DAWSON: What is different about that and getting a fax?

MR. GILSTRAP: Because a fax, for example, it's hard to erase the fax.

MR. DAWSON: You can get confirmation that the e-mail was sent.

MR. SWEENEY: You mean accidentally?

HONORABLE CARLOS LOPEZ: You can even get a confirmation that it was opened.

MR. GILSTRAP: Is that really where you want it? Do you want it in a list of stuff up there along with the stuff at the State Bar and all

the various solicitations and spam you get; and somewhere in there is your notice of your trial?

CHAIRMAN BABCOCK: A welcome oasis in a world of spam.

(Laughter.)

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I just want to say I think we're already there. We have at least one court in Dallas where we receive things early in the morning and are expected to be ready to respond by the time we get to Court at 8:30 and stuff. I mean, it's happening. I just think it's a question of managing the technology that is already being used and is there.

CHAIRMAN BABCOCK: Richard Munzinger.

MR. MUNZINGER: Why would you want to add e-mail address to this rule implying to practitioners that the e-mail has some utility if you don't amend the rules that allow service by e-mail? My understanding now is you can't serve me by e-mail. So if you put e-mail address in here, you're suggesting to practitioners that there may be some procedural utility or validity to service by e-mail. You're causing confusion. Why don't we leave the rule as it is and await Mr. Orsinger's

committee and the statewide change if there is going to be e-mail service and e-mail filing and what have you, electronic filing in the future. Why do it now and cause confusion? It doesn't seem to me to have any sense to do it now in anticipation of something that hasn't happened.

You have got all kinds of problems sending things by e-mail. The sole practitioners, for example. Let's pretend I use Word Perfect and you send me Word Perfect and I'm a sole practitioner. Can I Zip it and change it into Word? Is that easily done? It's not easily done if you're a sole practitioner; and you've got all kinds of problems the come out from this. And it seems to me that by including e-mail address in this rule today can only cause confusion with the Bar.

CHAIRMAN BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: I was going to say we haven't had true electronic filing. We have had a system, in fact, it's the case where Ralph was one of the lawyers in my court, and we've done just about everything by e-mail because that's how you do things nowadays. It's just inevitable. And we made it clear early on that it wasn't considered filed. You still had to go back and do

it with the clerk the old fashioned way because it's not officially sanctioned yet; but as a practical matter we were doing it all by e-mail.

And I can't tell you how many times I wished I knew the lawyer's e-mail address on that signature block so I could have the clerk do this, that or the other. If she doesn't get a return e-mail, she can call them and let them know; but 99 percent of the time she gets a return e-mail saying "Thank you for your e-mail." And it just makes life so much easier.

So I agree with Richard. We have to make it clear if we're not really officially doing it yet, let people know that we're not implicitly saying it's okay to do it; but I don't know that most people absent a rule are going to make the mistake of thinking somehow it's official or not. I don't know.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: Well, maybe this problem wouldn't come up in this context with the person designating his or her own e-mail address; but I have many e-mail addresses, and it would be very easy to send me an e-mail that I would never see. And I think that's going to be true for a lot

of people.

CHAIRMAN BABCOCK: Should we put in the rule that that is the e-mail address that you're going to see?

(Laughter.)

PROFESSOR DORSANEO: Well, I would like it to be the one that -- I'd like to be able to designate the one that' going to be used if one is going to be used.

HONORABLE SARAH B. DUNCAN: That's a good point.

CHAIRMAN BABCOCK: Richard.

MR. ORSINGER: I think that it would be helpful for us to look at what this other committee has done; but the last I recall the protocol was that if you put an e-mail address on the pleading, that means you're consenting to receive notice by e-mail; and if you don't put an e-mail address on the pleading, you're not consenting to receive notices by e-mail. And it may be advisable for us to have kind of a period of voluntary participation. I myself prefer e-mails; but I have some lawyers on other sides of cases that are not comfortable with that, so I go ahead and send them an e-mail and then I print it out and then

I fax the e-mail to them. I mean, but at least I'm not involved in preparing a letter and all this other stuff.

So, you know, we may be in a period where we need to have voluntary participation rather than mandatory participation; but since we don't have to make the decision today, you know, I'll report next time, or we'll have an official report next time whatever the suggestion is about how to implement the e-mail filing system which carries with it the implication of e-mail notices when something has been received and et cetera.

CHAIRMAN BABCOCK: We'll have a chance to visit this again. But Sarah.

HONORABLE SARAH B. DUNCAN: I think Bill made a really good point. I also have several e-mail addresses, and only one of them do I regularly check the mail; and I would like the opportunity; and I guess anyone can do it voluntarily to say "This is my e-mail address that I want you to use."

But, you know, I have to say sitting here listening to some of the comments made this is almost identical to the discussion we had about service by fax.

MS. SWEENEY: Exactly.

MR. YELENOSKY: Given the pace that we work through things e-mail will be obsolete.

(Laughter.)

PROFESSOR ALBRIGHT: Sarah, do you remember the discussion when a fax is actually received, whether it was when it went through your machine or when it was received at the other end or when it was printed at the other end? We spent three or four hours on that.

HONORABLE SARAH B. DUNCAN: Horror stories.

CHAIRMAN BABCOCK: That's what we're good at.

HONORABLE SARAH B. DUNCAN: What was going to happen?

CHAIRMAN BABCOCK: Yes. That was our forte.

MR. ORSINGER: And our committee chair believed that when you send a fax it goes out into cyberspace and floats around and eventually lands, so there was some misunderstanding about the technology.

HONORABLE CARLOS LOPEZ: It didn't do that?

(Laughter.)

CHAIRMAN BABCOCK: Okay. Anything more on 7.2? Let's talk about 7.3.

MS. BARON: Okay. 7.3 has three sentences. The first sentence permits appearance by counsel by filing a notice of appearance, so that's a very direct way. The second sentence is a more indirect way. It says you do enter an appearance if your name is shown as counsel for a party on a paper filed for the party. And I'll come back to that. The third sentence says that the clerk must note on the docket sheet the names of any attorneys who have appeared.

The first sentence our committee did not have comments on. The second sentence we bogged down because the word "paper," and Bill Dorsaneo I hope will speak to this, did not appear to be a defined term. Normally we speak in terms of appearing on a pleading or some specific document. And in the third sentence Bonnie raised a number of issues because she believes this is a change in procedure for district clerks. For example, if an associate at a law firm files a cover letter forwarding a pleading, that would be considered to be a paper, and that associate would be deemed to be

a party that had appeared; but it's not the clerk's normal procedure to enter that attorney on the docket as an attorney for the party or to enter multiple people at the same law firm.

MR. YELENOSKY: There also may be a technological problem with the state of technology now for the clerks I think to add the enumerable names to the electronic versions of the docket is something Bonnie also pointed out.

MS. BARON: There was also a concern that this is going to require the clerk to look through every piece of paper and not just the signature block on a pleading to try and identify other counsel for a party, so it was viewed as a burden. Those were the discussion questions that our subcommittee came up with.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: I think one other point was that there's no requirement that the names shown be signed; and some people thought that was fine and other people wondered if that was fine.

MS. SWEENEY: What's the point? Why is this here?

MR. YELENOSKY: Don't ask us.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Did you-all have a discussion? I know there is a difference between an appearance and a special appearance. You do certain things. You appear. What it says here is any kind of paper is deemed to have appeared. How does that jibe with Rule 120(a)? I mean, have you -- that is a special appearance. And are you waiving anything, or are you affecting that rule of special appearance in what way if you file a paper with your name on it? And then is that an appearance and you can't file a special appearance? I don't know.

MR. GILSTRAP: I think we need to have it.

MR. LOW: That's all I know. I have told you everything I know.

HONORABLE TRACY CHRISTOPHER: Well, I'd like to echo that. I think this would be extremely burdensome to court clerks to have to enter every name of every attorney who is on any pleading, or even if we change it to a pleading, extremely burdensome. And would, you know, do we have to give notice to all those people? The costs would soar if we had to include every name and notice, every single person; and I don't even know what a case docket is. Do you mean our docket

sheet? Do you mean our computer records?

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: The other question is there is a procedure called a Motion for Leave to Substitute or Motion for Leave to Appear and there are instances. This makes it sound like "I'm in." And there are instances where it doesn't work that way.

Think of the example of a party wanting to change lawyers the week before trial in order to get a continuance where you don't want them to just be able to suddenly be counsel of record or lead counsel by redesignating themselves. I think that would be an unintended, undesirable consequence of this.

But again, I ask why are we doing this? We're messing with something that ain't broke. We're adding at least three unintended consequences that we've all figured out in just a few minutes; and there is no statement here of the purpose or desirability of this or the need. I suggest we not do it.

CHAIRMAN BABCOCK: Okay. Bill.

PROFESSOR DORSANEO: I haven't compared this to the recodification draft to know

whether this bears any resemblance to what is in there or not.

MS. BARON: Bill, I assume that "paper" is not a meaningful term. Or is it?

PROFESSOR DORSANEO: I don't think. Well, we've had in Texas a plea practice. Everything you would have thought of in the original conception that you would file that would ask for some sort of relief would be a plea. Now in subsequent years we added in a species of motion practice sometimes substituting motions for pleas, a motion to transfer venue for a plea of privilege.

On some other earlier occasions when things were included in our system they were called by odd names like a special appearance which is what you're doing rather than really what you're filing. It's frequently referred to as a special appearance; but it identifies itself as a type of motion. So we have pleas, pleadings and motions kind of capturing things; and then there are all kinds of things that are referred to as applications mostly copied from uniform acts that didn't take a position with respect to how you went about making the application. So it's just copied to say "application" as if that's some other kind of a

thing. "Paper" has no particular distinct legal meaning and we are all over the place.

Rule 21, Rules 21 and 21(a) try to capture everything. I think we might be better off just to say "paper" although we don't have that term defined at this point.

CHAIRMAN BABCOCK: Do you mean generally or just in this rule?

PROFESSOR DORSANEO: Generally.

CHAIRMAN BABCOCK: Okay. Justice Hecht.

JUSTICE NATHAN HECHT: Rule 25 says "Each clerk shall keep a file docket which shall show in convenient form the number of the suit, the names of the attorneys, the name of the parties to the suit and the nature thereof and in brief form the officer's return on the process and all subsequent proceedings had in the case with the dates thereof." And Rule 26 says "Each clerk shall also keep a court docket in a permanent record that shall include the number of the case, the names of the parties, the name of the attorneys, the nature of the action, the pleadings, the motions and the ruling that the Court has made."

And I think, although I didn't meet with

the subcommittee at this Jamail task force; but I believe Bill moved these rules, some of these rules into the --

PROFESSOR DORSANEO: Clerks.

JUSTICE NATHAN HECHT: -- and I think part of it was in the attorney.

PROFESSOR DORSANEO: I think it's in the Clerks/Court section way at the back.

HONORABLE NATHAN HECHT: Yes.

PROFESSOR DORSANEO: I don't think that's what the clerks do, what these current rules say.

HONORABLE NATHAN HECHT: Right.

PROFESSOR DORSANEO: So and I don't think those rules bear any resemblance to current reality.

JUSTICE NATHAN HECHT: But at least it appears that the clerk is supposed to list the names of the attorneys on a docket which was kept with the case throughout the case.

CHAIRMAN BABCOCK: So the clerks don't want to change to do what they're already supposed to be doing?

HONORABLE NATHAN HECHT: Well --

PROFESSOR DORSANEO: There are a lot

of things in these rules that are from the days of, you know, yesteryear

CHAIRMAN BABCOCK: Yes.

MR. YELENOSKY: But that rule doesn't require them to put every name.

CHAIRMAN BABCOCK: Yes. Right. That's different. You're right. Richard.

MR. ORSINGER: I'm also a little bit concerned that this language may, this language appears to me to require that all attorneys who have ever appeared even if they're no longer counsel have to be carried on the docket; and I think that Rule 26 may at least allow the option that you only carry the current attorneys. But some counties, particularly in rural areas, will mail notices out or whatever; and if somebody has changed counsel several times, I really don't think we ought to be carrying the other people whose information is purely historical as if they are somehow continued to be involved in the current litigation.

PROFESSOR DORSANEO: I'm confident that the recodification draft of the Courts/Clerks section which was especially the clerk's section that was done by the clerks reflects better what is going on now than the current rule book or anything

some other committee did that didn't involve the clerks or may not have involved the clerks.

CHAIRMAN BABCOCK: Pam.

MS. BARON: Along with that, I think "paper" would include exhibits. So if you file as an exhibit to a pleading a document from the trial court that has counsel shown for a party, it would in its net cast it over all of those people also. So that ties into Richard's problem.

CHAIRMAN BABCOCK: Bill has got a simple question.

PROFESSOR DORSANEO: A separate question.

CHAIRMAN BABCOCK: A separate question.

PROFESSOR DORSANEO: I have occasionally seen people file this notice of appearance as counsel, and they've even filed it. Let's say that somebody hired me; and I never see the point in this. It doesn't do anything. It is not a plea, pleading or motion, just some sort of a "Here we have got somebody new on the team or involved in the process." And I think it's just unnecessary; but I don't necessarily think it's harmful.

And let me say one other thing: This rule, Attorney in Charge; and then there is another rule, Attorney to Show Authority, Rule 12, really once were not about notice. They were about whose case is this.

CHAIRMAN BABCOCK: Right.

PROFESSOR DORSANEO: And Paula made the point of what do you do? Could I file this notice and get to be an attorney in all of her cases or the cases that I would like better than the ones I'm currently working on? I don't know that this sentence is a kind of practice that we want to encourage, that we need. It seems like unnecessary paperwork to me; but then again the practice changes over time. Maybe there is some useful purpose behind it.

CHAIRMAN BABCOCK: Wendell, did you have something?

MR. HALL: Well, a couple of things. One, is it just seems like this is a nightmare for the clerks because in multi-party cases where there are 40 or 50 defendants or 40 or 50 plaintiffs I can't imagine what is going to happen in reality when every time a document is filed with the clerk's office are they going to have to go through it and

examine it and pull out every attorney's name and then do a search in that particular case and see if that attorney's name is already on file? I mean, I just can't imagine the amount of time that would be involved with that.

And then another point that Skip just mentioned was what about out-of-state attorneys who are required to appear pro hoc viche. Will they, you know, all of a sudden just be counsel of record because their name appears on a document?

CHAIRMAN BABCOCK: Sarah.

HONORABLE SARAH B. DUNCAN: I would love to hear from the district clerks. And this budget process has been really interesting. I have found out a lot of things of course that I didn't know before. And one of the things I found out this last week is that the lead counsel rule in the Appellate Rule is beyond the comprehension of our staff.

(Laughter.)

HONORABLE SARAH B. DUNCAN: Well, I mean, really you sit down and read it. And so what we are doing is we've got legal secretaries; and they go through every single piece of paper in the file to try to capture all the attorneys so that we

will be for sure they'll for sure be sent copies of the opinion and the judgment. And we were actually talking about giving that to a staff attorney to do because it's so complicated. And I sure don't want to make it more complicated for the district clerks than it already is.

CHAIRMAN BABCOCK: Okay. Richard.

MR. ORSINGER: I think the lead counsel concept and the notice of appearance of counsel is a valuable procedure to maintain. It just so happens in my practice that sometimes I appear as co-counsel for someone who is already working in the case; but in some instances they want me to take over as lead attorney. And so I typically will file a Notice of Appearance of Counsel and then designate myself as lead counsel; and that means I get all the notice from the posting party and from the Court.

And so I think that you should have some manner of doing that to call the clerk's attention to the change and everyone else's. If you just, the only way to do that is to file a motion or file an amended pleading, it's not necessarily apparent to everyone that all you're doing is changing the identity of the lawyer who is going to receive

notices. So I think that the concept is a good one and we should maintain that.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: We have that. That's what Rule 8 does. I'm still waiting for someone to say what led to the need to change what we had. Rule 8 you just file a Notice of Change of Attorney in Charge and file it and serve it and now everything is supposed to come to you.

CHAIRMAN BABCOCK: Yes. We're going to identify who was on the subcommittee and next meeting we'll have them here and flog them.

(Laughter.)

PROFESSOR DORSANEO: It seems clear that we're not really doing anything other than recasting things maybe better, maybe not better, maybe raising new problems until we get to 7.5. And then now we are really talking about what I thought we were going to be talking about earlier.

CHAIRMAN BABCOCK: Yes.

MS. BARON: I do want to echo what Bill is saying, because every change we make has a cost. Because it is a new practice it is going to raise some new problems. And the question is is the existing practice in this area in some way not

working? And with the material we have we don't have any evidence that the existing way of appearing as counsel has any remarkable issues or problems that needs to be solved.

MS. SWEENEY: If a motion is in order, I move that 7.1 through 7.4 not be done.

CHAIRMAN BABCOCK: No. We're not voting on this today.

MS. SWEENEY: Okay.

CHAIRMAN BABCOCK: But we're just; but we can continue discussion.

MS. SWEENEY: Let me know when and I'll do it.

MS. BARON: Are you ready to move on?

CHAIRMAN BABCOCK: Yes.

MS. BARON: Okay. 7.4, Lead Counsel, obviously reflects a change in the current term, "attorney in charge" to "lead counsel." The rule is in large part consistent with the lead counsel rule in the appellate court that Sarah's court clerks are having so much trouble with. And if you look in part (c), again it's using the word "paper," and again we continue to have problems.

The current rule, Rule 8, talks about initial pleadings which is more specific in terms of

the clerk being able to identify who lead counsel is. So, for example, if a pleading is sent in with a cover letter signed by an associate, that's the first signature that appears. Is that suddenly lead counsel? So there are going to be some issues on that. We want to try and keep this simple for the district clerk.

CHAIRMAN BABCOCK: Steve.

MR. YELENOSKY: On (a) one of the things we discussed was it appeared to me that (a) doesn't say anything, "Lead counsel is responsible for the suit." To whom, in what way? That certainly can't be a statement of an attorney's duty in court to his or her client where they're not the lead attorney. So what does it mean? I don't think it means anything. And if we are going to rewrite the rule, I would drop (a).

CHAIRMAN BABCOCK: Okay. Ralph and then Sarah.

MR. DUGGINS: I think (b) is problematic too, because we've got, you have cases where parties have two or three firms involved including Wendell's suggestion an out-of-state lawyer, and this is now going to require all communications with respect to the suit to be

directed only to lead counsel where you might have the local lawyer discussing settings and that sort of thing. I think (b) should be deleted.

CHAIRMAN BABCOCK: Yes. Justice Hecht.

JUSTICE NATHAN HECHT: Well, now Rule 8, existing Rule 8 says "The said attorney in charge shall be responsible for the suit as to such party." And the next sentence says "All communications from the Court or other counsel with respect to a suit shall be sent to the attorney in charge."

Maybe these are bad rules; but they're in the book as it is.

MR. YELENOSKY: And we did realize that, that it was in the old rule; and we hadn't really realized it before until it was broken out like this and then we wondered.

JUSTICE NATHAN HECHT: Yes. "Until we read it we didn't know it was in there."

(Laughter.)

PROFESSOR DORSANEO: I think that it is as a matter of reality necessary to have lead counsel identified in some way so people know to whom you send papers; and we have had that for a long time. We used the term "attorney in charge"

because the rule earlier was not about notice. It was about who is the boss. And this responsibility language has more to do with who can control the decision making process in the case among all the lawyers, who is the head lawyer, than it's about notice. And it's really part of the attorney to show authority business; and there are cases where lawyers, claimant's lawyers would fight about whose case this is because a lot of them tend to think of it as their case rather than the client's case.

So I probably should not have said that; but it came out. This, the rule is schizophrenic. But as far as having to identify lead counsel and directing communications of lead counsel, Ralph, I just think we have to do it like that. Otherwise we just have too many pieces of paper going in every possible direction and we may miss the lead counsel.

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I agree with Bill for another reason. It seems to me that doing it as Ralph suggested lends itself to slowing down the administration of justice. If the clerk is required to give notice to five lawyers in the same case, then Lawyer Bill says "Hey, I didn't get notice of this hearing, Judge. You have to reset

this hearing because I didn't get notice." Never mind that the other four did.

The other thing is, you know, Harris County and Dallas County and other counties might well be able to perhaps bear the cost of giving notice to redundant counsel for the same party. A lot of counties don't do that. And, you know, there already are people who are sensitive to the amount of filing fees. Perhaps what we need is a filing fee for each person who appears as counsel.

(Laughter.)

CHAIRMAN BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: I'm half and half on that. I think the part about the Court is great; and I think that it actually is what we do in real life. In that case when I was talking about with Ralph I always tell my clerk "Send it to the main plaintiff's lawyer and have that person send it to all his people. Send it to the main defense lawyer and have that person send it to his or her people." Ralph and I were doing that.

The part about if Ralph wants to send a letter to some local counsel that is just between them, to have to route that through somebody else doesn't make a lot of sense to me. The part about

the Court does. The part about other counsel I'm not so sure.

MR. DUGGINS: Maybe the solution is to look at changing "Communications" to "Notices Required Under the Rule." That was really my concern, that there are communications all the time about a case that don't necessarily go through lead counsel.

HONORABLE LEVI BENTON: That's true. And that's perhaps regrettable, unfortunate, improper.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: It's not just regrettable, unfortunate and improper. It's necessary. I can't imagine why it would be worded that all parties need to direct all communications to one person. I mean, that's silly frankly if the one person that's going to be designated is going to be the person who is never available because he's getting all of these communications and is also unfortunately responsible for preparing the case for trial. He has bigger fish to fry. If I'm going to call somebody about working out a request for documents or rescheduling a deposition, I want to be able to call the junior partner or the associate who

is responsible for that witness period.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: And these are good points; but I do want you to keep in mind that this has probably been the rule since 1941 exactly as it is stated here in the paper. The rule is "all communications" at least since 1987 --

PROFESSOR DORSANEO: Yes.

JUSTICE NATHAN HECHT: -- but probably since 1941, "All communications from the Court" or "All communications from the Court or other counsel with respect to the suit shall be sent to the attorney in charge."

MR. LOW: "I haven't read that. But if I change it, they'll read it."

(Laughter.)

CHAIRMAN BABCOCK: And that's a little different than saying that "the Court and all parties must direct all communications." I mean, it's one thing --

MR. WATSON: I agree.

CHAIRMAN BABCOCK: It's one thing if you've got that lead counsel is going to get everything.

MR. WATSON: I don't mind copying

him. I just don't want to have to direct it to him.

CHAIRMAN BABCOCK: Right. But every phone call has got to go to lead counsel.

MR. YELENOSKY: How do you copy a phone call?

HONORABLE LEVI BENTON: Chip.

CHAIRMAN BABCOCK: Yes, Judge Benton.

HONORABLE LEVI BENTON: Rule 11 would permit parties to have agreements on how you communicate amongst each other; but the rule ought not require the clerk of the court to give notice to anyone other than lead counsel.

MR. WATSON: I agree. Notice is a given. We're talking about all communications by all parties.

HONORABLE LEVI BENTON: Right. Fine. But if the rule says the parties may not otherwise agree to how they are going to give notice amongst themselves, fine, as long as the clerk is not required to give notice to anyone other than lead counsel. Otherwise, you know, you four lawyers on the same side, you know, Alistair didn't get notice in the problem I described earlier.

MR. WATSON: That's a given.

CHAIRMAN BABCOCK: Justice Duncan and

then Paula.

HONORABLE SARAH B. DUNCAN: Well, in defense of our staff, it's not that they're not intelligent. It's that the Attorney In Charge Rule and the Lead Counsel Rule, one, don't work very well in real life; and two, there is at least those courts that are using the Office of Court Administration case management system there is no way for us to designate lead counsel. It's a drop down list. You've got the attorneys. One attorney looks just like any other attorney.

And three, this is why our court wants to send e-mail notices. That doesn't cost anything. The attorneys that practice in our court they don't want the notice just to go to Bill because Bill may not be there that day. They want the notice to go to Bill and Wendell and Frank and Skip and Alistair and everybody else on that side of the case so that there is maximized the opportunity for that notice to actually get to somebody on that day when its critical that it do. That's why we want to use e-mail and that's why -- okay.

These rules may have been here since 1941. There aren't any complaints. I agree let's not mess them up; but let's look at how do we affect notice

to the person who needs it, whether that's everybody on one side or not, in the cheapest possible way.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: And to note on the discussion when it comes up, one purpose of the lead counsel rule in scheduling is to prevent the, you know, "Well, this week we can't do depositions because Mike can't do it. And next week we can't do it because Pete can't do it. And next week we can't do it because Buddy can't do it. And then we sure can't try the case in the year 2003 because during each month one of us has a conflict." And they're on the same parties list.

And so that is a salutary purpose, and we need to keep the concept of designation; and a lot of local rules do fold that in; but that's only in the event that we go ahead with the bad idea of rewriting this rule.

(Laughter.)

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: Well, Justice Duncan points out that one way to solve this is by electronic filing and that removes the kind of the threshold problem here is that it is a lot of labor to send paper every month. But "If we can just get

their names, their e-mail address, we can send everything to everybody." And what is going to happen is the clerk and the lawyers are just going to input every name on a case; and when anything comes up they're going to send it out electronically. You're going to come in Thursday morning and you're going to have all the spam, all the other stuff, and you're going to have notices in 20 cases including cases that you have withdrawn from and they never got your name off of, and you're going to be just inundated with notices and documents some of which you're interested in and some of which you aren't, but all of which you're going to have to pay attention to keep from committing malpractice. That's where we're going to.

HONORABLE SARAH B. DUNCAN: We're not doing anything different with e-mail. We're just not using paper and print cartridges to do it.

MR. GILSTRAP: No, no. But it's so much easier with e-mail to send it out. You don't have to print it and use paper. You can just type a name in and everybody gets sent a 50-page document. It's no problem. And everybody is going to start getting every document; and I just question if

that's really where we want to wind up.

CHAIRMAN BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: I know that the ABA has to become a member you automatically have a right to have cbabcock@aba.com.org forever and ever and ever and ever for free. If the State Bar does something like that, there won't be an issue "Which e-mail do I send it to; is it going to be full of spam because I'm surfing the web with that address?" It's just a dedicated address that goes to hecht@texasbar.com. We all get it for free, so you can't have a problem about the solo can't afford to have an e-mail address, et cetera. That's just a working suggestion.

CHAIRMAN BABCOCK: Alex.

PROFESSOR ALBRIGHT: I think the technology is changing so quickly that it doesn't make sense for us to do much of anything in a rule, because it takes us so long to change it. You know, the one thing that happens with e-mail, you know, I think everybody will just have to learn how to manage their e-mail better. Yes, you get all your spam. You may just have an e-mail address that you can say "This is my notice e-mail address that I give to the Court and it goes to my secretary" and

she prints it out for you just like regular mail. That's a law firm management topic. I think we actually may be going to where we are basically a secure website for every case and you get your notices that way. Who knows what is going to happen. And but it seems like there are ways that it can be dealt with if you send -- the Courts could have people agree that we send our, the Rules just requires us to send it to lead counsel. We send it to lead counsel; but we'll send it to you if everybody gives us their e-mail. Other than that it is the lead counsel's responsibility to notify everybody. People have had to deal with that and they're dealing with it; but for us to try to put current technology in a rule when we don't really even know what the current technology is I think is hard to do.

CHAIRMAN BABCOCK: Yes. Frank is a particularly large target for spam because he responds to all these.

(Laughter.)

PROFESSOR DORSANEO: Well, my take on these rules, the ones that we have in the existing rule book is simply this: That the original rules didn't really talk about how you send notice and to

whom you send notice and I don't actually think required notice that counsel was supposed to keep up with the case which is a concept that strike most people as being odd in a modern society like we have rather than in a society that existed when all the lawyers went to the courthouse ever Monday morning.

These rules were changed in the '80s; and they probably were not changed as well as they should have been because they are hard to understand and they look like they're trying to look like what they looked like before while they're dealing with this concept of lead counsel and who is supposed to get notice. And then we've had technological change that maybe would indicate that perhaps more people can get notice without that being that difficult.

And I don't know what the recodification draft has been, although I have I believe worked on the recodification draft here for years. It's been years. And I'd like to look at it and see what it says and then try to deal with this, because I don't think that our current rules are very good. I don't think these replacements are necessarily all that good either.

We did go through this very carefully line by line once before. And I think that's the

starting point; but I can be expected to say that on every occasion, we look at the recodification draft and not toss that work into the ash can, because it's --

HONORABLE SARAH B. DUNCAN: A good chunk of your life.

PROFESSOR DORSANEO: Yes. It is my life's work. All right. So I can be expected to say that frequently.

CHAIRMAN BABCOCK: Why don't we, Pam, why don't we move on to the meat of this thing which is 7.5.

MS. BARON: 7.5 is a new rule, the disclosure and sanction rule. How I would propose to have the committee consider the rule would be to consider Sections (a), (d) and (f) together with the substantive provisions; and I think it's too hard to consider them separately because you don't understand them until you've seen them all together. Have that conversation and then consider the procedural sections (b), (c) and (e).

CHAIRMAN BABCOCK: You want to consider which subparts? (a)?

MS. BARON: (a), (d) and (f).

CHAIRMAN BABCOCK: (a), (d) as in

"dog" and (f)?

MS. BARON: Yes.

CHAIRMAN BABCOCK: Okay.

MS. BARON: All right. Starting with 7.4(a) --

CHAIRMAN BABCOCK: 7.5(a).

MS. BARON: -- you defined a new term of "litigation payment" which consists of basically one of two things. A payment to any person for a referral or soliciting a case without lead counsel's name or for forwarding a case; and second, a payment to any attorney who is not in lead counsel's firm and has not appeared or provided substantial legal services in connection with the case.

Once we've set up that definition it's helpful to discuss the specifics of this once you know what the consequences of that definition are, because the definition standing alone really doesn't have a lot of meaning until you know what the sanctions are relating to that definition. And that is found in 7.4(d) and (g).

Let's start with (d). It's important to know that (d) is a mandatory disqualification of lead counsel provision. It requires disqualification by the trial court if, and there

are four different situations: The first is if lead counsel intentionally fails to disclose any of the litigation payments. The disclosure requirement is in one of the procedural rules that we've skipped if that disclosure shows that a fee has been paid, that a fee has been divided in violation of Rule 1.04. And at this point it's helpful if you look at Rule 1.04, which you should have next to you, and I believe it's subsection (f) that addresses when a division of a fee is appropriate or inappropriate; and basically it says you may not divide a fee except in three situations. Well, unless you meet three criteria. First, the client has to have no objection, the fee has to be objectively reasonable under section (a) of the rule; and finally, the division must either, one, be in proportion to the services rendered; second, made to a forwarding lawyer; or third, made with a lawyer who assumes joint responsibility for the case with the consent of the client. So Rule 1.04 does permit fee division and very clearly permits a forwarding fee if the fee is not objectively unreasonable.

The third situation in which disqualification would be required is if any of the the defined litigation payments that are disclosed

are in excess of $50,000 or 15 percent of the fee, whichever is less. And fourth, disqualification is required if the representation occurred as a result of a solicitation that does not state the attorney's firm.

There is some ambiguity in this section because the attorney appears to refer to lead counsel though it's unclear whether it's the solicitation must include lead counsel's firm or it must in turn include the forwarding attorney's firm. So it's unclear to me whether or not this provision is in direct conflict with Disciplinary Rule 1.04 that does permit a forwarding fee without regard to whose name is any solicitation from which the case was generated.

This rule has raised a lot of issues in the subcommittee as identified and particularly given that we were provided no background information about the rule. But obviously the most significant question, what is the problem that the rule is trying to correct and how pervasive is that problem? Second, why is the disciplinary system not adequate to address this problem? Third, should a rule of procedure prohibit conduct that disciplinary rules may not prohibit? If in fact forwarding is

prohibited by this rule, do we want to bar counsel from forwarding a case to a specialist who can do a better job with the case and is more qualified to handle the client's matter in the client's interest? I mean, the issues can go on and on; but in terms of general issues the last one we identified would be should Texas trial courts be charged with mandatory enforcement of our disciplinary rules? And specifically are these cap amounts reasonable? So we've got a host of issues that are raised by those provisions of the rule.

I also want to note just very briefly that at 7.4(g) -- no. I'm sorry. In addition to disqualification there are additional sanctions. The trial court, and it is a mandatory rule again, the trial court must impose sanctions, such sanctions as are just, and this may include a voiding of the fee agreement with lead counsel.

So it's a pretty powerful mandatory disclosure and sanction rule that raised significant issues to be addressed by the committee today. I think we should save (b), (c) and (e) which are mechanisms of how the rule works.

CHAIRMAN BABCOCK: By the way, Pam, I think you have been inadvertently referring to it as

7.4 a couple of times. It's 7.5.

MS. BARON: I'm sorry. 7.5.

MR. YELENOSKY: Do it all over again.

MS. BARON: Yes. I'll start over.

CHAIRMAN BABCOCK: Yes. Start off all the way at the beginning. Wendell.

MR. HALL: So if I'm hired by someone to work on a jury charge or a Robinson/Daubert motion, is the lead attorney required to disclose all that under 7.5(a)(2?

PROFESSOR DORSANEO: It depends on whether that is substantial professional services.

MS. SWEENEY: That was mean.

(Laughter.)

MR. HALL: Assuming that it was, not to mention excellent. No. Seriously only if it was not substantial.

PROFESSOR DORSANEO: It doesn't say here who the payment is from. I would hope that payments from the client don't count; but I also would like to be able to send, well, maybe even you, Wendell, a bill if you hired me to do something rather than send it to the client.

MR. HALL: Right. Exactly.

CHAIRMAN BABCOCK: Frank.

MR. GILSTRAP: I have the same problem as Wendell. I would take comfort if 7.5(a)(2)(b) since presumably the service he is providing is substantial professional services. But I've got a question in 7.5(a)(a) "person" could include attorney. So, I mean, if there is also a referral involved, even where there is substantial professional services rendered you'd still have to disclose it because it's a payment to a person.

CHAIRMAN BABCOCK: Richard Orsinger.

MR. ORSINGER: Two comments: Pam, when you go back to your subcommittee would you write down "United States Constitution" as one of the things you're going to investigate?

MS. BARON: Where would we find it?

(Laughter.)

MR. ORSINGER: Also the concept between 7.5(a)(2)(b) about providing substantial services I think is misconceived. If I detect the evil they're attempting to stamp out here, it's people getting paid a lawyer's fee for not doing any work. And if someone hires you to write a jury charge or draft a motion for summary judgment, that may not be substantial professional services when you consider the overall professional services in

the case; but it shouldn't depend on whether you're hired for a big job or a small job. It ought to depend on whether you're paid for doing work or not paid for doing work.

PROFESSOR DORSANEO: An appearance in the case might not be very meaningful either, because you could appear in the case I guess according to this by sending a notice that you're in the case. So it's not crafted. It not crafted all that well.

Now myself if we're going to talk about what we're really talking about, I have never paid or taken a referral fee; and I don't think I ever will, because I don't think that that's as I understand referral fees something that I want to do.

Now what other people do within the context of what the Rules of Professional Responsibility allow is a different matter. If we're going to talk about that, I mean, I could talk about that if it's appropriate for us to talk about it.

CHAIRMAN BABCOCK: Sure it is. That's what this is all about.

PROFESSOR DORSANEO: That's a start

anyway.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Wasn't there in redrafting one of the Canons of Ethics some move to say that you can only receive a fee for work or substantial responsibility in a case, which would do away with this referrals? But then and then the argument against that was that then people would just take the case and mishandle and the public wouldn't be served. And so there are conflicting philosophies. I agree with you, Bill; but there is another side to the coin.

CHAIRMAN BABCOCK: There are many states that in order to get a referral fee you've got to earn it.

MR. LOW: Right.

CHAIRMAN BABCOCK: You have got to be working the file; and you can't get these referral fees that you can in this state where they don't do anything other than pick up the phone and say "Here is the case."

MR. LOW: And there was a big when the Canons were redone I'm going to tell you this, and you're going to think I'm old. In 1963 we worked on redoing the Canons of Ethics; and that

came up back then. It's been an issue in Texas longer than I've been here.

PROFESSOR DORSANEO: And we are old.

CHAIRMAN BABCOCK: Well, Dorsaneo wrote those '41 rules.

(Laughter.)

MR. ORSINGER: On the referral fee issue an important thing to remember, assuming the legislature doesn't change it in the Sunset process, is that our professional ethics rules that govern whether we can or can't have referral fees has been voted on and adopted by 51 percent of the lawyers participating and a majority of those voting. A rule promulgated by the Supreme Court is supported by a majority, or perhaps on something this important it would be 9-0.

But to eliminate referral fees in the context that the lawyers of Texas in their self regulation have voted to maintain them; and for the Texas Supreme Court to vote 9-0 or worse 5-4 to eliminate them to me is a very sobering prospect.

CHAIRMAN BABCOCK: Judge Peeples.

HONORABLE DAVID PEEPLES: Would this eliminate referral fees or just limit referral fees to $50,000 or 15 percent?

MS. BARON: I think there is a question about whether the Rule requires. There are two issues. It does limit straight forward forwarding fees. If a case came in through an advertisement or solicitation, then to me it's not clear whether lead counsel's name must have appeared in that advertisement, which means it could not be forwarded in that event. Is that?

CHAIRMAN BABCOCK: Yes. But what I think just from hearing sort of the scuttlebutt on this committee is that one of the objects of this rule, and I hadn't seen it until just a few days ago on how it was going to be carried out; but one of the objects is the television lawyers or the big advertising lawyers who draw a huge volume of business to themselves through their television advertising or whatever and then refer it out to --

MR. ORSINGER: Competent lawyers.

CHAIRMAN BABCOCK: -- other people. What?

MR. ORSINGER: Refer it out to competent lawyers.

PROFESSOR DORSANEO: Well connected lawyers.

CHAIRMAN BABCOCK: You would hope

they would refer it to competent lawyers; but in any event and what I see here is that those guys are pretty much going to be out of business if they continue doing business the way they are now under this (d)(4).

HONORABLE CARLOS LOPEZ: That's why he said check the Constitution. Like it or not they ruled on it.

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Well, and maybe they should be out of business; but I don't know. But the mechanism here I assume the Constitutional issue that Richard, one of them he may be referring to is this disqualifies an attorney. And so if the evil are individuals soliciting cases only to refer them, perhaps that should be dealt through a disclosure system to the Bar, something like that. But why would that lead to a disqualification of an attorney here where the client might not want to have his or her attorney disqualified and is certainly not protecting the client in that instance?

And the disclosure, I mean, really just requires once the disclosure it made is pretty ministerial. I mean, you can tell by the disclosure itself whether or not you have violated this rule.

So if in every case where there is a referral you have this disclosure to a district judge which on its face shows or doesn't show a violation of the rule, why are we going to ask district judges to look at all of those?

CHAIRMAN BABCOCK: Yes. And if you believe the model that the referring attorney is the less competent and that the lead counsel is the competent lawyer, then you're disqualifying all the competent lawyers and throwing the client back to the person that the view is is less competent. But Paula had her hand up first and then Buddy.

MS. SWEENEY: I don't think that's an unintended consequence. When I was on the State Bar Board of Directors we wrote rules to prohibit the sleazy advertising that folks have referred to. Those rules have been held Unconstitutional. I don't think we can do anything about sleazy advertising. It is.

And it's not just lawyers. If you look at Texas Monthly, it's plastic surgeons and it's every other field of practice. I wish we could do something about sleazy advertising, because the people that it affects the most are our juries, and it leaves a bad taste for the entire system.

This Rule does not do anything in my judgment to curb that practice. What it does however is exactly what you just identified in part, which is disqualify the competent lawyer who has spent years learning a field intimately but does not advertise, does not choose to advertise, does not want to advertise and receives business from other members of the Bar who have recognized that area of special competence.

I don't think that we want to do that to the people of Texas. The great benefit of the existing referral system is that instead of having an incentive to keep the case and try to learn how to do this area of the law while working on the case a lawyer will instead forward it.

I have worked in other states, many other states where the forwarding lawyer who has retained me is required to show substantial participation, so they follow you around and go to everything, and you can't schedule things without them; and then they have substantially participated in the case, which solves this problem entirely. You'll just have the guys with the sleazy ads following you around. Must we?

There are other issues with this that are

very troublesome. There are many instances where a forwarding lawyer is a personal advisor, counselor and friend to the potential party, but who for political reasons in his or her own community does not wish to appear publicly as counsel, but they do want to refer the case. Why do I have to name them and file something in court when it's between the client and them and me and everybody has consented? Why out them if they don't want for their own political reason?

CHAIRMAN BABCOCK: Have you ever been outed, Paula?

(Laughter.)

MS. SWEENEY: For their own political, personal practice reasons many defense lawyers refer business when for a whole host of reasons they would not want to appear in a pleading or a notice to the court to that effect. And yet the client is happy with it. The system works. It benefits everybody. Why uniquely are these clients going to be forced to expose their personal relationship with the lawyers publicly?

What about the case of local counsel who is hired for the reasons that we hire a local counsel on both sides who may not do anything other

than^ owner, you know, show up once in a while at docket call or sit there in the back of the courtroom while you're arguing a motion? Is that substantial work? In a contingent fee system almost always those lawyers or very often those lawyers are paid a contingent fee because those are the funds available at the end of the case to pay those lawyers. But is that substantial work? They may not have had to do anything. You might not even get to pick a jury; but you had to have them to get that far down the road.

So, you know, I am all in favor of finding a Constitutional way to ban sleazy advertising. I'm all in favor of finding a Constitutional way to ban hucksterism and to ban the things that are so demeaning to our profession. However this rule, if that is its intent, I don't think accomplishes it; but what it does is single out a class of litigants and force them to expose their personal relationships with their lawyers by public filing which I think is inappropriate and then sets a really strange and odd arbitrary sort of limit that you alluded to, Pam, on what fee would trigger it and what is or is not appropriate, which I think is real peculiar. But in any event those are comments

at this stage.

If the problem is sleazy lawyers, then let's do something about sleazy advertising lawyers and somebody point out a Constitutional way to do it. This doesn't accomplish it.

CHAIRMAN BABCOCK: But you're against this rule?

(Laughter.)

MS. SWEENEY: I'm in favor of the concept of eliminating sleazy lawyers, absolutely; but I don't think this rule does it and I oppose it.

CHAIRMAN BABCOCK: Everybody who likes sleazy lawyers raise your hand.

(Laughter.)

HONORABLE CARLOS LOPEZ: Eliminate the advertising, not the lawyers.

CHAIRMAN BABCOCK: By the way, Paula, you made a comment to the State Bar advertising rules. And although a couple of subprovisions of those rules were declared Unconstitutional, by and large they were upheld.

MS. SWEENEY: It was. And I can't -- we had a bunch of clauses in there about if you advertise, you couldn't do certain things in your ad, and if you advertised, you had to designate

your main city where you practiced, which is still being done. But there were three aspects that we tried to put in there that got taken out that would have solved a lot of this, that you couldn't -- there was something in there that said you couldn't take a case by advertising if your sole purpose was to advertise for a whole bunch of stuff you never intended to handle.

CHAIRMAN BABCOCK: There were three stages to the advertising rules.

MS. SWEENEY: Yes.

CHAIRMAN BABCOCK: The first two occurred at the Supreme Court; and the Supreme Court made revisions to the proposal of the State Bar to save the Constitutionality of the proposals. And then there was a lawsuit that was tried before Judge Justice; and Judge Justice declared two or three of the provisions of the rules Unconstitutional, but upheld the balance of them specifically.

MR. SCHENKKAN: I think it would be very helpful for our future discussion of this issue to be furnished with maybe an e-mail notice of the cite to that opinion, if Judge Justice wrote an opinion, furnished so that I could get reoriented on the Constitutional issue.

But I guess I'm -- well, perhaps this rule as presently drafted is excessive or conceivably unconstitutional. I'm not entirely clear that there isn't something useful that could be done here in the rule. And I wonder, for instance, if you cut this off at (a) and (b) and clarified that, if you care to do this wording, that any person other than an attorney. I think the draftsman of this just accepted that "persons" did not include attorneys. If you can fix that, just cut it off at (a) and (b), I'm not sure you wouldn't be accomplishing something useful.

CHAIRMAN BABCOCK: (a) and (b)? I'm sorry?

MR. SCHENKANN: (b), disclosure.

CHAIRMAN BABCOCK: Right.

MR. SCHENKKAN: You wouldn't be getting into the enforcement issue. You wouldn't be requiring mandatory sanctions; but you might get quite a bit of prophylactic value out of having to disclose the litigation payments you make. And I'm not sure that you cross into Paula's area of concern at least in most cases because I think the circumstances, at least the ones I have in mind that are comparable I would be taking care of and I would

be referring a client that I love dearly and want to make sure is taken care of, but for some reason or other I can't take the case.

CHAIRMAN BABCOCK: Please speak into the microphone.

MR. SCHENKKAN: Or they would be better off not having me take the case. I'm not taking any money for that. So I don't think I would be covered by that. And if I am taking money for that, I am not so sure it shouldn't be disclosed just like the ones that we were talking about generated by these solicitations.

CHAIRMAN BABCOCK: Let's take the situation where you have a television advertising lawyer and he attracts a client and then refers it to Paula and takes a fee, takes a referral fee. What is the benefit of having, requiring Paula to disclose the television, you know, the Texas two-step lawyer?

MR. SCHENKKAN: One thing is it is going to generate some data on the frequency of which this happens. For another thing you are probably going to force some attention to the relationship between that advertising lawyer and that appearing lawyer; and that attention is

probably going to force that appearing lawyer to do a little bit better of job of making sure who it is he associates himself with in terms of who he takes referrals from. He is now taking some of the benefit of those advertisements.

Now whether that's a good thing or a bad thing, I don't know enough about this area to say. I haven't been involved in any of the prior discussions.

CHAIRMAN BABCOCK: Alistair.

MS. SWEENEY: There haven't been any.

MR. DAWSON: The only thing I can think that might come out of disclosure is it might be relevant to recusal and disqualification issues. I could see a situation where if the referring lawyer had a prior relationship with the judge, you might want to know that. Other than that I don't see much benefit gained from it. The rest of the rule we don't need it.

Like it or not referring lawyers perform a service; and you know, to me it's between those, the referring lawyer and the accepting lawyer to negotiate whatever they want to negotiate. I'm in favor of letting them. And if the referring lawyer doesn't have to do any work, well, that's the deal

that those lawyers strike, and that's between them as far as I'm concerned.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: You know, and back before advertising this -- there was a time -- this came up.

(Laughter.)

MR. LOW: And the example that would be used is you live in a small town. Doctor so and so is a friend; but your good friend so and so has a claim, and you think it's a valid claim to pursue. And you don't necessarily want to; and you owe it to him to give him somebody, because in the malpractice area the lawyers know who are the good lawyers in malpractice, who knows what to do. And, okay, now you don't handle the case; but Sue talks to you and says "Well, about the case" and you feel some responsibility.

And that's where it really came out. That's where there at that time there was never this prohibition against, you know, paying a referral fee. But even if you take (b) and you disclose to the Court, the only reason I can think of is just what Alistair said, that's the only reason. Why disclose to the Court?

MS. SWEENEY: Because there is no need for recusal if you're not disclosed.

MR. LOW: Right.

HONORABLE DAVID PEEPLES: The Court doesn't know. If you tell the Court something that if they knew would make them biased, so you tell them and you bias them and you recuse them.

CHAIRMAN BABCOCK: Yes. You're telling the other side maybe. Maybe the judge does know.

HONORABLE TOM GRAY: Well, that brought out an observation that I had on the language. The disclosure specifies that it must be filed with the Court, and that rang bells in my head on Rule 21. You file documents with the clerk; and I don't know if that was an intentional distinction or whether or not they meant something by that. But...

CHAIRMAN BABCOCK: We will definitely have these guys here to flog them. I think D. Kelly is my suspect on this. Yes, Pam.

MS. BARON: I will point out we haven't talked about the procedural questions; but when you do the disclosure statement you are required to attach an incredible amount of

information. Bonnie expressed significant concern about adding more pieces of paper to the district clerk's file. These are going to be thick contracts or referral fee agreements or whatever. And then the obligation again because it is a paper filed with the clerk that they're going to have to go through there and then enter all of the attorneys who are shown in there as counsel for the parties. So there are system costs to a system that doesn't have the money to absorb those costs at this point.

MR. YELENOSKY: You also you actually have to attach a transcript of the advertisements.

CHAIRMAN BABCOCK: Paula, you're not just going to pile on this rule, are you?

MS. SWEENEY: No. I'm not really totally sure. You said something. I'm having trouble parsing it. But does this contemplate that you've got people paying money to nonlawyers to refer cases and that then those same people are going to go ahead and file that with the court?

COMMITTEE MEMBER: No.

MS. SWEENEY: Because it -- well, if you look at it, we're talking about, yes, we're distinguishing between persons and lawyers. And it just kind of astounds me to codify "If you're

practicing unethically, please file a notice and reference the court," which does seem to be what this says, which is, I mean, if that's what they're doing, disbar them; but this doesn't seem to be the mechanism for doing so.

And then, you know, I really object to filing my contracts with my clients. And, you know, there are many, many, many situations where there are lawyers on both sides that are hired where, you know, then what are we going to get? All of the co-counsel agreements filed and co-defendant agreements would have to be filed under this rule, so...

MR. SCHENKKAN: No. I think the rule intends not, because that would be covered by the "provided substantial professional services." They're only trying to catch the ones that really haven't done any work.

CHAIRMAN BABCOCK: Ralph.

MR. DUGGINS: Pam, did you-all consider whether this part of the rule impacts or is impacted by Disciplinary Rule 105?

MR. YELENOSKY: Confidentiality.

MR. DUGGINS: Confidentiality.

MR. WATSON: That's where I am going.

What happened to fiduciary duties and confidentiality? That's the client's right. It's not ours to waive, and it's not the Court's to waive.

HONORABLE CARLOS LOPEZ: There's tons of case law on that.

HONORABLE SARAH B. DUNCAN: This is none of our business. This is not a Rule of Civil Procedure. This is --

MR. WATSON: That is a DR.

HONORABLE SARAH B. DUNCAN: This is a DR. And we don't write DRs. We don't give it to lawyers to approve. We don't -- this is none of our business in my opinion.

CHAIRMAN BABCOCK: Skip.

MR. WATSON: I am concerned; and I just want to express this just so that it's out there, because I think some of us are feeling it, but out of deference to all the hard work that the Jamail committee has done and the other committees that have looked at that work I don't want to appear to in any way be trivializing or ridiculing that work, because it's not. I think this is good people doing good work trying to help.

My concern however is, that necessarily

needs to be said, is the direction we're going with what we're envisioning the Court to be doing. I don't want to oversimplify this; but I kept listening yesterday for the reason we were drafting legislation. And what I heard was, one, that an influential chairman of the committee, former Lieutenant Governor had repeatedly tried to get legislation passed, but failed, and asked us to do it. And second, that legislation was pending and the legislature doing its job was going to do something bad to us. Therefore the Court needed to be involved to do something less bad.

Now I personally with politics aside believe in the concept of judges not being legislators with robes; and sometimes that concept comes to bear under bad facts. And these are bad facts. This is the one time you would want to step out of that and say "Well, this is politics or this is needed, so we're going to do something that is not really the role of the Court to be doing."

I'm sorry. I'm a purist. I come back to I understand the plight. I understand the problem. I personally think the Court need not be doing it. Over half of the people in this room were not here when we had this discussion in an abbreviated

fashion before and voted overwhelmingly, I mean, overwhelmingly not to pursue this issue. We were told --

CHAIRMAN BABCOCK: Skip, which issue are you talking about now?

MR. WATSON: I'm talking about what we did yesterday. I'm now shifting to what we are doing today.

CHAIRMAN BABCOCK: Okay.

MR. WATSON: Today we are asking apparently the people who did this are thinking that the State Bar's disciplinary system is not adequate or that there is a way to get around some of the Constitutional concerns or whatever and that the Court needs to become more overtly involved in the area of discipline by circumventing the disciplinary rule process through its capacity of rulemaking, the same thing we were doing yesterday, using the rule authority to do that.

Again, it disturbs me. It's not just why are we doing this; but should we even be doing it at all in the concept of separation of powers and in the concept we have set up?

Again, I'm not throwing rocks at the Court. I'm not throwing rocks at the people who are

serving at the bidding of the Court doing what the Court has asked it to do. I'm just saying that from my standpoint we are stepping out of the traditional role of what this Court has done in the past, and I personally have a problem with that.

HONORABLE SARAH DUNCAN: (Applause.)

CHAIRMAN BABCOCK: Judge Benton.

HONORABLE LEVI BENTON: I second Skip's motion.

CHAIRMAN BABCOCK: It wasn't really a motion.

HONORABLE LEVI BENTON: I know.

MR. WATSON: No. It was a diatribe.

HONORABLE LEVI BENTON: Yes. I know.

HONORABLE SARAH B. DUNCAN: I join Skip's diatribe.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: Let me say it's not quite that simple, because the legislature we have got and the problem with the legislature we did something that was a rule. The legislature they pour over. We repealed it years back; and this is by rule we said this is Unconstitutional. It had to do with recusal or something. So there's been a fight. Well, the legislature comes and they say "Okay.

Boys, where do you get your funding?" The legislature comes to the Court and they want where do rules stop and the law start? I testified; and the best answer I could give, I said, "Well, it's a rule if it's in the book now and it's legislative if it's not."

(Laughter.)

MR. LOW: But it's not that simple. And I mean, for instance, the Section 22 of the Judicial Branch Code says that the Supreme Court passes rules, and if it conflicts with a law, then what happens if the legislature doesn't change it? So it's contemplated that there's going to be an overplay. And I'm not trying to argue with you, Skip.

MR. WATSON: I know it's not simple.

MR. LOW: I'm just saying that it's sometimes a fine line; and then the legislature comes to the Court and they say, you know, "We fund you and we'd like for the Court to do such and such." You say "Skip out. Just the Court can't do that."

I mean, there has got to be an interplay between the Court and the legislature; and I'm not saying that we are overstepping their bounds. I

sure have accused them -- none of them are here, are they -- overstepping ours? But it's just, you might, you know more about that than I do, Judge.

JUSTICE NATHAN HECHT: Well, I do need to correct some of what Skip said. The Court is not responding to Governor Ratliff because he's Governor Ratliff. But if people think that even though an offer of judgment rule is in the rule books of about 40 states, that this is not the subject matter of the rule, then we need to stop Tommy Jacks before he goes over there on Monday and tries to give them the benefit of our thoughts on what that rule ought to look like if it were in the book like it's in the book of 80 percent of the states in the United States and has been in the book of the Federal Rule since 1937 so that we won't be in violation of that. But I don't think that's what this committee wants to do; but that's an option.

I understand that there is considered judgment of this committee from time to time that we didn't need to change the summary judgment rule even though the legislature wanted us to and was going to put it in the statute book if we didn't or that we didn't need to change the offer of judgment rule even though the legislature is on the verge of doing

it; but I think in the rule making process it is very important for the two branches to work together on this.

And while we may have some disagreement from time to time about the way things, the way the government and the operation of the government ought to go, we can't just tell them "No." That's just not an effective response. We have to look at it more closely than that.

This is, this proposal is one that comes from -- that has been discussed I know at some length by those well-known defense lawyers Joe Jamail, Tommy Jacks and Steve Sussman. And maybe it doesn't do what ought to be done or accomplish even the goal that I think they have in mind; but it is something that they have asked be looked at the Court.

And as Buddy and I were talking yesterday, this Court, the Court has traditionally looked at every request for rule making that has come from anybody in or out of this state. And a large part of those suggestions were without merit; but we looked at every single one of them and said "No" or "Yes."

That's the tradition of the federal

committee. It looks at every single suggestion that comes to it. And so I think the response, I know that the Court wants to know as it did with offer of judgment given the effort of this rule to try to curtail what many people in the Bar in all areas of the Bar think is a problem with the way, with referral fees, is this a workable way of addressing it, are there better ways, what are they, rather than this is just none of the Court's business and we ought to go on, because the Court really relies very heavily on the advice of this committee as to how things ought to work and what are the best, what the best solutions are.

But whether it's a good idea to be involved in offer of judgment or not is a bigger question than really this committee can decide. I mean, it does involve a lot of machinations and the interrelationship between the three branches of government.

CHAIRMAN BABCOCK: And, Skip, or not just Skip, but everybody, one of the things that I tried to do when I was appointed chair three and a half years ago was to see what I could do about smoothing out what was a very difficult relationship between the Court and the legislature. And through

a variety of things that aren't necessarily transparent I think we have tremendously improved our relationship, the relationship of the two branches of government; and it's a much more cooperative type relationship than it was four years ago.

As an example of that, as you may recall, we did a lot of heavy lifting on the recusal rule. We're going to have to do that again unfortunately in light of the U.S. Supreme Court's decision in the Republican Party of Minnesota versus White case. But the legislature's frustration with the Court led principally Senator Harris to pass a little known and totally unworkable recusal statute that is on the books right now; and frankly if anybody was following it, it would reek havoc on the practices of many lawyers in many counties.

And Frank and I had many meetings with Senator Harris talking to him about his concerns and the legislators' concerns trying to straighten out that issue and that problem with a very complicated rule that this group worked on and reported up to the Court which has not taken action on it and probably won't because it's going to get remanded to us.

So I guess the point is the line is often not a straight line between here and there between procedure and substance, and we just have to try to do the best job we can with the projects the Court gives us which includes saying to the Court as we did on the offer of judgment -- get ready, Carl. Here it comes -- as we did when we said "We don't think an offer of judgment rule is a good idea. We ought to remain one of the seven states in the country that does not have an offer of judgment rule." That was the bottom line.

And the Court then asked us, said "Okay. If we have one, what should it look like?" And that's what we made an effort to do, and that's what our job is. And it's always I hope done in good faith and without rancor. And if people get on the record and say what they want to say, that's to the good. And let's take a break.

(Recess 10:53 to 11:05 a.m.)

CHAIRMAN BABCOCK: Justice Hecht would like to know if this is sexy enough.

(Laughter.)

CHAIRMAN BABCOCK: Well, if you think that was sexy, now we're going to talk about class actions. Again we're not going to decide anything

today; and but I think the discussion we just had will be helpful for the Court to get a sense of where we're headed on the other rule. But now we're on to class actions. And Richard Orsinger has drawn the straw on this. Yes, Justice Hecht.

JUSTICE NATHAN HECHT: Let me say a word about this, because some people said at the break that they didn't hear the history of the Jamail committee that I gave yesterday, so I won't repeat the whole thing. But Joe asked if he and a group of lawyers could study referral fees and ad litems; and at about the same time Governor Ratliff asked us to look at offer of judgment; and then Steve had mentioned, Steve Sussman had mentioned in the past that we should look at mass litigation. So we told them if they wanted to work on some of it, they could work on all of it; and that's what they have reported back.

And meanwhile quite a bit has gone on with the federal class action rule over the last 16 or 17 years, I guess, since 1986. And the committee that I serve on has done a lot of work on this. Not much has come of it; but the federal rule has been amended to provide for interlocutory appeals of certification orders at the discretion of the

circuit court. And House Bill 4 we already have that in Texas for the Court of Appeals; and House Bill 4 would extend it to the Supreme Court.

The committee has made recommendations that have gone to the United States Supreme Court that look a lot like (g) in the papers, (g) and (h) in the papers that you have. And these changes are regarded as conforming to practice and sort of supervisory and oversight. They have not generated a lot of controversy in the federal process; and everybody expects that they'll be adopted later this year to be effective next year.

The federal committee has looked at what is suggested in (2) and (3) on pages one and at the very top of two which is to change class (b)(4) what in our rule is (b)(4) class actions to "opt in" rather than "opt out." That was the rule in the federal system until 1966; and the federal system has studied whether this should be changed or not and has not reached a conclusion on that subject is the short answer. There is a long history to it.

And then the only other thing of interest in this general discussion, not just this rule that has been proposed, is that I understand the Senate Judiciary Committee voted out of committee yesterday

a bill that would remove most nationwide classes to federal court, would create minimal diversity jurisdiction over federal class actions, I mean, over class actions so that if they reached certain other parameters, at least two million dollars involved and at least 100 class members and I forget what the others are, they can be removed to federal court.

And that's an effort to try to deal with the overlapping of class actions that get filed in various different states and federal forums and then there is no mechanism for consolidating them or coordinating them or doing anything to get them resolved in an orderly way.

So that Bill passed the House last year. So if it passes the Senate, then that would have that effect on class action litigation. But that, so this, these proposals come again from the Jamail group that was designated a couple of years ago and have looked at these things.

MR. ORSINGER: Justice Hecht, could I inquire as to the source of the first paragraph regarding inchoate claims and the inability to certify a class for inchoate claims and the suspension of running of limitations for an inchoate

claim?

JUSTICE NATHAN HECHT: I don't recall who wrote it. I went to the meetings; but so I'm not sure who the scrivener was. And I don't remember. I'm like Chip. I don't remember who was exactly on the subcommittee. I think Steve was, Steve Sussman; but I know the concern that was expressed was that class actions work both ways; and the Bar is basically divided four ways over class actions.

People who file class actions in the sort of traditional idea of economic injury for rebate of price paid or for price fixing or something like that, some economic injury, the plaintiff's bar likes those class actions a lot and the defendants do not. They view them as strike suits.

When there are personal injury class actions there is a substantial segment of the plaintiff's bar that does not like plaintiff's personal injury class actions because their view is that the plaintiff never gets enough in the class action to justify the broader procedure and that the individual plaintiff would get more if he files suit in a smaller group.

And the defendants in those cases, sort of

mass disaster cases, tend to like those cases better because they can buy res judicata at a fairly low price that they can't get anywhere else except in the bankruptcy court.

So that's again that's an overgeneralization; but the testimony that the federal committee has taken all over the country with a lot of Texas lawyers involved sort of supports that basic view.

So the concern with the first paragraph was that people who have potentially significant claims, but right now not very significant claims and maybe no very strong claim at all shouldn't be helped or hurt by the class action procedure. The concern was that they would get lumped in with the class of people who were really hurt and the defendants would buy them off for a relatively small amount of money. And then if they show up later on down the road and maybe something really bad has happened to them, then it would be too bad. They would be bound by the judgment in the class. That's happened a lot in the asbestos litigation where in some classes of certified asbestos litigants there is a class or a sub class of people who may have some claim some day arising out of some exposure at

this location or under these circumstances; and those folks don't -- there's not a lot of time spent on adjudicating their claims; but because the class action rule has the effect of barring everything else later on when it's time to settle defendants like to move as much, as many claims as possible into the class so that it's over forever.

So one concern, and I don't know who wrote the language, but a concern was that these people ought to get, their day to present their claim ought to be deferred until they really have something they can complain of; and that's the most I know about it.

CHAIRMAN BABCOCK: Yes, Bill.

PROFESSOR DORSANEO: There are a lot of cases across the country, because I'm handling some of them. I'm not going to really comment on them; but the Bridgestone/Firestone case out of the Seventh Circuit that is cited and the Henry Shine case decided by our Court is a good example. If anybody wants to kind of look to see what these things are about, that would be a good place to start.

MS. SWEENEY: Can you repeat those cites?

PROFESSOR DORSANEO: Pardon me?

MS. SWEENEY: Can you read us those cites?

PROFESSOR DORSANEO: Sure. I mean, there are many cases of this type. This is a hot thing around the country. There are some Texas cases now, but not too many.

MR. ORSINGER: The Texas cases have migrated to the appellate courts.

PROFESSOR DORSANEO: Yes.

MR. ORSINGER: Is there a name we can find on West Law?

PROFESSOR DORSANEO: Well, they have migrated. The one that I'm handling has been argued, but the outcome is still in doubt.

JUSTICE NATHAN HECHT: Our Court has had, our court had three. We had the Bernal case, B-e-r-n-a-l, a couple of years ago when Judge Gonzalez, Judge Al Gonzalez was on the court. And then we had InterTex against Beeson, B-e-e-s-o-n, that Judge Hankinson wrote a year or two ago. And then the Shine case. And there may be others.

PROFESSOR DORSANEO: The Standing case, is the most close Supreme Court case on this subject.

MR. BOYD: Two issues on this: One when it talks about discernible or detectable manifestation of injury or damage I think there could be some more clarification of what -- I know in the asbestos context, for example, there is radiological manifestation of pleural plaques. So they can get an expert to come in and say it's a one plaque measure and there is absolutely no evidence, and everybody agrees, of any type of impairment, physical impairment.

And so I know historically the issue has been does some manifestation of physical change give you a cause of action, or do you have to have some manifestation of physical impairment? And I'm not sure that this answers that question, and maybe that was intentional; but I think that raises some issue about what is intended here.

And the second question I have goes more to the legal.

CHAIRMAN BABCOCK: Before you leave that, isn't the language since there is no discernible or detectable manifestation of injury or damage, doesn't that?

MR. BOYD: Well, because pleural plaques are damaged; but there is really no injury.

I mean, it depends on which expert you're asking; but generally speaking you can show on the X-ray that there is some change, some physical change that one expert will call injury or damage and another will say is not; and then everybody will agree that there is no effect on breathing or function.

JUSTICE NATHAN HECHT: We wrote our case that said an action had not accrued because of that condition for asbestos.

HONORABLE C. LOPEZ: Pustejovsky.

JUSTICE NATHAN HECHT: Pustejovsky.

MR. BOYD: That was my next issue, which is --

COURT REPORTER: I didn't understand what you just said.

PROFESSOR DORSANEO: Nobody is going to be able to spell that one.

MR. BOYD: That was my case. P-u-s-t-e-j-o-v-s-k-y.

COURT REPORTER: Thank you.

MR. BOYD: And in that case the Court held that there are separate causes of action for non malignancies on the one hand and the malignancies on the other. So if you've got some nonmalignant condition and you settle or try your

case and get a judgment, there is no res judicata impact if you later develop cancer from the same course of exposure.

JUSTICE NATHAN HECHT: And the reason for that and explaining the opinion is that that is the current state of medical understanding of the migration between the diseases. You can't just because you have pleural thickening or asbestosis doesn't mean you're going to get mesothelioma.

MR. BOYD: And so the issue there is can you certify a class? Well, I guess presumably then you have to break this down. There is not detectable -- there may be a detectable manifestation of injury of a non malignancy; but there is not a malignancy, so they're not certifiable as a class nor is there any res judicata as to any malignancy that may come about in the future.

CHAIRMAN BABCOCK: Carl.

MR. HAMILTON: I haven't really thought it through; but I'm wondering if this is going to, this language is going to affect the language in the cases that talks about you don't have a cause of action that's accrued in some of these type cases unless you have an objectively

verifiable injury. It's an inherently undiscoverable situation. You have to have that plus an objectively verifiable injury. I don't know if this language in here may arguably change that or whether we need to use that same test in here.

CHAIRMAN BABCOCK: Bill.

PROFESSOR DORSANEO: I think people need to know a lot more about this before we can talk about it. We're talking about virtually all of these cases, all of these cases being economic loss cases. The claim is not for some sort of physical harm or physical injury. The claim is that as a result of the product having some design flaw there was some loss even though the design flaw had not manifested itself in a way to cause some harm to the person's property or whatever. So when I hear you-all talking about this you're not talking about what this is really about.

CHAIRMAN BABCOCK: Well, we haven't been talking very long.

PROFESSOR DORSANEO: No.

CHAIRMAN BABCOCK: Give us a chance.

(Laughter.)

PROFESSOR DORSANEO: Long enough for me to tell. And it's an -- the argument is made

that if there is an arguable design flaw, there is a manifestation of the injury and the product is out there manifesting that injury from the very minute it left the showroom through the present time even though nobody has been hurt or even though the product had never failed to work in any circumstance.

Now you can make arguments about those claims not really being viable claims. You can make arguments about those claims not being the kind of claims that even if they are viable, that should be for class action treatment, a whole host of arguments; but that's really kind of what you're talking about. If they were making claims for personal injury, they wouldn't be after Bernal they wouldn't be class action certifiable claims anyway because their common issues would not predominate.

CHAIRMAN BABCOCK: Alistair.

MR. DAWSON: Following to what Bill just said, the proponent of the class of the class will take the position that there has been damage manifested because I believe you use the benefit of the bargain analysis, you bought a product and it is supposed to be this, but you didn't get exactly what you bargained for. So therefore there has been some

damage sustained at the time of the purchase. And I'm not sure, if that's the object, I'm not sure by including manifested damage that you're solving the problem you're seeking to solve.

PROFESSOR DORSANEO: A lot of people won't argue that because they don't think they can prove benefit of the bargain at least by diminution in value because they can't establish that the product was worth less than what was paid for.

MR. DAWSON: However it was framed the position will be that the damage was sustained.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: How would this affect? I understand with an insurance company on a class action the case is over now. But I'm wondering and I oppose a class; but I'm more or less agreeing with the other lawyer that I thought I should win in summary judgment. But here is the question: Whether the thing you sign when you apply for an insurance policy and you sign an application whether that constitutes a waiver that is required of underinsured or uninsured motorists. That was the real question we were fighting over. And if I lose that, I mean, under Rule 42 you can have a class on certain issues. And how would that affect a

situation like that?

CHAIRMAN BABCOCK: How would this proposed rule?

MR. LOW: Yes. Yes. I mean, because these people, they if my client did not comply with the law, I guess if they never had a wreck, they hadn't been damaged; but yet they paid for that protection they didn't have. So I don't know how this would affect that. The insurance company charged their rates for that; and obviously you couldn't have a class to say how much were you damaged, because you can't have a damaged class. Each one is different. But it was, you know, if we're wrong, it was great to have a class that said and people get notice and go from there. But I don't know how that would conform to this rule.

CHAIRMAN BABCOCK: Justice Duncan.

HONORABLE SARAH B. DUNCAN: I guess I'm showing my age and my inability to change quickly here; but I just have to say this: It used to be on this committee that the night, sometime before the meeting we would get a book and the book would have a statement of the problem that we were going to try to fix or not fix, and we would get a proposal of some type of rule change, and generally

it came in the form of a red line rule change.

That was something I knew how to do. I could get my book, I could settle in, I could read the problem and read the proposed solution or why the subcommittee was not recommending a fix.

I don't know how to do this. When somebody doesn't tell me what the problem is and how they propose to fix it I'm beginning to think maybe I should just resign from this committee, because I don't have expertise in offers of judgment and the disciplinary rules and class actions so that I even know what the problem is we're trying to fix.

I'm sorry. But I just I have to put that on the record, because I don't know how to do what we're doing, and I'm not any good at it.

CHAIRMAN BABCOCK: Well, this is a little unusual because it's not coming from one of our subcommittees. But anyway.

PROFESSOR DORSANEO: This is a big problem area, I mean, a problem with class action suits.

MS. SWEENEY: What is the problem?

HONORABLE SARAH B. DUNCAN: I'm not saying it's not; but nobody has framed the problem and given me materials to read so that I can

understand what the problem is and why it needs to be fixed and how it should be fixed. I'm not saying it wasn't a problem.

MS. SWEENEY: What is it?

PROFESSOR DORSANEO: I feel uncomfortable talking about it since I'm working on these cases. I don't know what to tell you. I can tell you. I'm just not going to tell you.

MR. ORSINGER: Why don't you tell us from your client's standpoint what the problem is.

(Laughter.)

PROFESSOR DORSANEO: And I'm not going to do that either. I mean, I could do that. I could do that in good faith; but I just don't think it's the right thing to do.

MS. SWEENEY: Someone tell us. Who knows? Why are we here?

MR. SCHENKKAN: I think what we're talking about, and I'm not sure because I don't know that case; but I think what we are talking about is cases like this where the alleged defect is in the computer which hypothetically meant it was possible for you to get a wrong answer out of your computer. There were no reported instances of you ever getting a wrong answer out of your computer that had caused

a problem that would cause you to do, you know, I don't know what, sell the stock when you meant to buy or crash your car. I'm not sure what the actual problems were. It was but you could have proven that there was something about the way that the computer software or hardware was designed that it was possible that it would print "yes" when it was supposed to print "no," and on the basis of that a class action was filed because class actions when you release an entire line of computers you have if you're looking at it from one side, enormous leverage to force a settlement which maybe there shouldn't have been a claim in the first place; but you're not going to be able to take the chance of litigating that. And on the other side you have the ability to cut a deal which forecloses everybody in the world including some people who may later have one that flips in the bad way that costs a whole lot more than that in the way of damages than the coupons that people get.

Now, you know, this is not an argument against what you just said. I agree with you, Judge Duncan. I think it would be more effective if we had some more advanced material about these things that would help us frame these issues and we could

all participate better. But I think that's what this particular one is at least partly about.

PROFESSOR DORSANEO: Whatever the product is if you have 15 million of them that have not failed, it makes a nice class number when you multiply $25 times the number of products. The class action device makes these cases not only viable, but "It's the Promised Land" I heard somebody say.

HONORABLE SARAH B. DUNCAN: And what is it in the current rule that needs to be changed to address that perceived problem?

JUSTICE NATHAN HECHT: The addition of this paragraph.

HONORABLE SARAH B. DUNCAN: This whole process is just driving me nuts.

CHAIRMAN BABCOCK: Jeff.

MR. BOYD: It seems to me, and I wasn't involved in this either; but reading it it seems to me that the problem that is trying to be addressed by this paragraph is not a problem with class actions, although that's where we may see it most often, but it's an underlying problem of what is a judicable claim, what is a compensable injury, and when is that triggered. And that raises a

concern in my mind that if we try and answer that question solely in the context of Rule 42, have we now created a compensable claim for a class action a rule that says that you've got to, that applies in class actions, but not in other actions?

PROFESSOR DORSANEO: It would be a standing issue in the context of the class action rule; and that's how it would fit into the structure here. I don't know if there's a specific standing paragraph.

MR. BOYD: I assume it would be the same standing paragraph --

PROFESSOR DORSANEO: There ought to be.

MR. BOYD: -- if someone brings a case individually, because really you get to this before, well, I guess at or before you get to certification of a class when you ask whether these representatives have a compensable injury and whether the people they propose to represent have the same.

PROFESSOR DORSANEO: It may only be theoretical on an individual basis because nobody brings a claim for something that hasn't happened.

CHAIRMAN BABCOCK: Buddy, then Carl.

MR. LOW: He's talking about a case that is over, and I was in it. And it wasn't exactly like you said.

(Laughter.)

MR. SCHENKKAN: I apologize.

MR. LOW: What happened was anybody that had damage they were excluded. It was not a damage class.

MR. SCHENKKAN: Okay.

MR. LOW: It came about by reason of a particular chip that was in a medical procedure, the same kind of chip that's in the computer and the case was gone. And it caused a misdiagnosis of blood and a lady died. And there was an argument that there is nothing wrong with the chip; but the defendant had some documents where they said they recognized that it would do this.

And I don't want to argue a case because there's one; but it was that's what happened. But it wasn't that people were out, because later on they -- there is some damage. I shouldn't even say anything, because I'm not unbiased; but I apologize.

MR. SCHENKKAN: I'm unbiased, but wrong, ignorant and wrong.

(Laughter.)

MR. LOW: I didn't mean that; but --

MR. ORSINGER: Well, I think, Peter, there was a problem with the manufacturing of chips that were coming out of the chip manufacturer, and he's talking about Compaq computers. I think you're talking about a new story.

MR. SCHENKKAN: Okay.

MR. ORSINGER: He's talking about a case that he settled.

MR. DAWSON: It's settled.

CHAIRMAN BABCOCK: Carlos.

HONORABLE CARLOS LOPEZ: I agree a lot with what Jeff said about doesn't this really boil down to justicability and the trigger and the accrual? And I'm just I'm a little uncomfortable with the idea that at best what are we doing? Are we refining the definition of when something is justicable, are we changing the substantive case law on standing? Those are things at best I think that maybe -- I don't have a history here, so bear with me. But I just wonder even if we do something in the affirmative here, I don't know how we do that. We can't change the case law on what makes something justicable and on standing, so I don't think. And

if I'm wrong, correct me and tell me. So I don't know what to do.

CHAIRMAN BABCOCK: Judge Patterson.

HONORABLE JAN P. PATTERSON: I guess I would appreciate some framing of issues, because I view justicability and these other issues as a larger group and inchoate claims as a subset of those. Is the problem what he has spoken to, or is it a more narrow class of cases, or are we confining it to inchoate?

PROFESSOR DORSANEO: The way these cases have tended to be litigated, the ones that are, and there are numerous ones of them, they have been cases involving --

HONORABLE JAN P. PATTERSON: Give me an example.

PROFESSOR DORSANEO: Bridgestone/Firestone Tires or --

MR. SCHENNKAN: Explore that just a little bit just for the benefit of those of us who haven't read the Seventh Circuit opinion.

PROFESSOR DORSANEO: There are cases that involve claims that products are defective as designed and people didn't get what --

MR. SCHENKKAN: Because some other

people's Bridgestone/Firestone tires have blown out or and caused personal injury or death where there is a class action --

PROFESSOR DORSANEO: There is a risk of being injured.

MR. SCHENKKAN: -- everybody who has bought a Firestone/Bridgestone tire --

PROFESSOR DORSANEO: And the risk of injury is an injury in and of itself.

CHAIRMAN BABCOCK: And you know, you can take it to a lot of industries. There are a lot of these cases around. The mobile phone industry there have been class actions filed all over the country not by people who claim to have any injury, but who say that they represent a class of people of mobile phone users who might get brain cancer.

HONORABLE JAN P. PATTERSON: And they're now speaking to inchoate claims.

CHAIRMAN BABCOCK: Yes. That would fit in this definition.

MR. SHENNKAN: In terms of the question then of what is proper for a Court, all we're doing is advising the Court what is proper for the Court to address as opposed to the legislature to address in some kind of law area at least as it

stands now, maybe this changes after House Bill 4 if it passes; but at least as it stands now a class action is entirely a creature of the Court's rules. And I don't see any reason in the world why the Court can't in its rules set some limits on when the class action device will be available and when it won't and in cases where it's not clear enough in the mind to set limits to set a limit that can be considered. This certainly looks like one objective fact.

I'm not saying the actual words in this paragraph are right; but I don't have any problem at all with the Court choosing to address in its class action rule when you should or when you shouldn't be able to use class actions for this kind of claim, and that doesn't strike me as a bad idea.

CHAIRMAN BABCOCK: Justice Hecht.

JUSTICE NATHAN HECHT: And let me say that the law at this point I think is pretty well settled in the jurisdictions that have something like our rule which is element identical to the federal rule in essence, that rule is not supposed to change the substantive law. So but that said, questions of justicability and standing are not raised typically in class action cases because

you're only talking about the standing of the person representative who is actually in front of you bringing the suit and you're not talking about the standing about the other 10,000 or 10,000,000 people out there who you say are members of this class.

I don't recall seeing a case where the Court went through and tried to determine whether all of those people have standing. So there is some feeling that that class determination can be made apart from the same kinds of questions that you would ask if each of those people came in one by one to file their lawsuit. So that I think is what the first paragraph is getting at.

But just to give you just a moment of history on this, the class action is an old, old device that now historians are in general agreement came from England, and it was just a joinder rule. It was just a way of joining a lot of people in common litigation. And the American courts imported it in the 19th century, and it was a well established device when the federal rules were written; and that's why Federal Rule 23 was in the book because there wasn't much question. But they were opt in. They were all opt in or mandatory classes. In fact they were used mostly as mandatory

classes where there either was a common fund or there was common relief sought that you needed to adjudicate in one class; but people didn't have any choice about being in that action either the plaintiffs or defendants because it was going, intended to bind everybody there.

So what is now the Rule 23(b)(3) class, the so called spurious class, which I've never understood why it's called that; but anyway the general class action provision which is (b)(4) in our Rule was changed in 1966 to provide that people had to opt out rather than opt in. And that really did not pose any problem in the litigation system up until the mid to late '80s and early '90s when people began to be more concerned in various different contexts, some personal injury and some economic that the device was being misused. But because the Rule 23 was very general and so is Rule 42 nothing has really been done to try to provide direction to how it's going to function in a world, a litigation context that nobody foresaw in 1966 or in 1978 when I noticed the other day in the records Shannon Ratliff was one of the proponents of adopting Rule 42. I'm not maligning him; but I saw his name. I was looking through some other stuff

and saw his name on that committee; and now I think he is advocating some changes in that across the street, which just shows that the litigation context has evolved to raise questions about should we give more direction in the class action rule as how members are, what kind of members can be in the class and how they're going to be joined and so on, how counsel is to be selected, how they're to be paid, what duty does the trial judge have to oversee all of this and so on rather than just wait to develop them case by case in the appellate cases.

CHAIRMAN BABCOCK: Judge Gaultney.

HONORABLE D. GAULTNEY: I just want to make a comment the way I understand the language in this rule. Is that okay?

CHAIRMAN BABCOCK: Sure. Yes.

HONORABLE D. GAULTNEY: Okay. I mean, the way it's worded, I mean, I think it applies not simply to economic damage, personal injuries and all types of mass --

COURT REPORTER: I'm sorry. Speak up just a little bit more.

HONORABLE D. GAULTNEY: It refers to mass tort litigation, personal injury, wrongful death claims; and you can see that it's an extremely

broad rule. As I understand the way it's written let's say that you have an economic, solely an economic damage claim with no injury. We have the tire defect no one has been hurt in, the computer defect no one has been hurt in. All the claims are inchoate. If that lawsuit is filed as a class action, then the rule as I read it is that the trial court cannot certify that claim.

CHAIRMAN BABCOCK: Right.

HONORABLE D. GAULTNEY: On the other hand, if there are two classes, two proposed classes, one of which there is the defect has resulted in economic harm or injury, for that group of people the class could conceivably be certified. At least it would not be ruled out by this rule because they would not be inchoate claims.

On the other hand, if there were those group of people that had that defect but the injury had not yet been sustained, that group would be characterized by the trial court as inchoate.

The difference in that situation from the first group of inchoate claims is that this second group would get the protection of a trial court finding that the statute of limitations has not run, which is in effect if you think about it some relief

as a class. So I just wanted to point out that there is a distinction between the way inchoate claims are treated under this rule. One is if you join them with someone who has a claim, then you get additional protection of the bar on statute of limitations preventing the statute from running on your claims.

So I think the way the Rule is currently written you would have an incentive to join inchoate claims with your class claims of people who do have claims in order to get the protection for those inchoate claims of the bar of the statute.

CHAIRMAN BABCOCK: Judge Christopher.

HONORABLE TRACY CHRISTOPHER: I just had two observations on the opt in part. Is that all right if we talk about that --

CHAIRMAN BABCOCK: Sure.

HONORABLE TRACY CHRISTOHPER: -- inchoate issue? A class action from a trial judge's perspective and the appellate court's perspective, a class certification process is a huge, time consuming, expensive process to certify it, to make your decision. And if ultimately we're going to have 10 people out of, you know, a thousand decide to join the lawsuit, it seems to me a real waste of

resources. I don't know how to fix it; but it's just something that I wanted this committee to consider.

And another thing from a trial judge's perspective that is frustrating in a class certification hearing is that you're not allowed to consider the merits of the action. And that of course is kind of falls into the inchoate claims too. If you don't really have any damages at this point, why are we having a class certification?

So I would like this committee to consider something with respect to whether we can consider the merits of the case before it is certified, because that's not allowed under federal law.

PROFESSOR DORSANEO: Well, unless it's standing. It's indistinguishable in our jurisprudence. Justicability and merits are indistinguishable concepts. I think the Court has a case before it now that will probably clear that up. And standing clearly is part of the drill in class certification. I don't know how you don't consider the merits whether you call them the merits. It's not obviously the merits of deciding the facts of the case, but whether the claim is justicable, justicable.

CHAIRMAN BABCOCK: Easy for you to say. Skip.

(Laughter.)

MR. WATSON: One of the areas that did not change when the federal rule became opt out rather than opt in were certain statutory causes of action such as Fair Labor Standard Act claims and others in the federal court. Under the FLSA claims which are opt in if we go that way, we need to consider this. There is currently a dispute between the Circuits, and the 5th Circuit has not clearly taken a stand on this yet, of whether the certification process when you are opt in is an informal process whereby quote "bare pleadings and affidavits" you say "we are representatives and we are representing all similarly situated workers who have not been paid overtime" or whatever it is and that there are similarly situated workers in these different plants in these different states. And at that time the choice is does the Court set that and kick out a notice that says "Okay. Mr. Employer, you have to notify all of your workers of this suit and give them a chance to opt in, and then you will conduct discovery for months and months in phase two of the process and we will then have a hearing on

which, if any, of the people who have opted in stay in," and during that course limitations is told, et cetera. Or as the 5th Circuit and a minority of the Curcuits appear to have gone or the 5th Circuit is leaning, do the traditional Rule 23 class certification standards and safeguards apply, that is, do you do the class stuff on the front of the case, do that discovery and have that hearing on the front end to determine each of the factors to see if these folks are suitable?

And there's quite a debate on which way it should work on the opt in; but the fact that it is opt in does not mean you're free of certification worries. You still have to determine. I mean, the ones that I've been through it's just incredible once you really do that work and you get people who are not employed whose social security numbers are, you know, not in the records, people who were employed but not employed during the relevant period of time, people who don't have the job that's at issue that is claiming the overtime. It's not just work in the sense of class action work; but even the the opt in process is extremely specialized and we will have to determine which of those two certification methods to use, the two-stage of

everybody who signs up is in. In fact you give them notice to get them in. Or the traditional Rule 23 process.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: I understand, and I haven't seen the Bill, that the legislature is dealing with this; and I've heard that there is some provision about agencies, going through an agency or some agency notification.

And what it brings to mind is a case, a class action case out in New Jersey where this company made an electrical box. I don't know what it cost. $500 or $600. And it was approved by UL; but then the box they actually manufactured was not that one. It didn't meet UL. So it went out that way. They had some fires. The people that had those have potential for fire and probably would like to know about it. But I mean, could that not be a class? They don't have a claim, I mean. And so maybe that's what the legislature is trying to do, some notification process sometimes. But I understand there is. Have you seen that bill, Judge?

JUSTICE NATHAN HECHT: I have not really studied it; but I think Tommy and I or

somebody were talking about it yesterday. There is a provision in the Bill that says if this involves basically jurisdiction of an agency, you have got to send it to the agency first.

MR. LOW: Okay.

JUSTICE NATHAN HECHT: Then there is another provision of House Bill 4 that limits the class counsel's attorney fees to four times a lodestar and prohibits a contingent fee in these kinds of cases. It also requires that the fee be paid out of common fund which would make it very difficult to pay counsel in a coupon case, for example, unless counsel wanted 10 million coupons, which you probably wouldn't want.

(Laughter.)

JUSTICE NATHAN HECHT: But it really does -- it's kind of a back door, if you will, or an indirect way of limiting these class actions, because it doesn't really get at what ought to be in the class. It just makes it difficult to proceed. Like I was telling Richard yesterday, you don't like the direction the car is going; but instead of steering it some other way, you just don't put any gas in it.

MR. LOW: No gas.

JUSTICE NATHAN HECHT: So that solves that problem.

MR. LOW: Slow it down.

CHAIRMAN BABCOCK: Anymore comments about class action? Obviously we're not doing anything with this today, and we'll come back.

Rather than try to start another subject, particularly when the person who is supposed to lead that is not, here I'll entertain a motion to recess and adjourn.

MR. ORSINGER: Before we do that, Skip, let me mention one thing. There was another --

CHAIRMAN BABCOCK: I'm Chip.

MR. ORSINGER: I'm sorry. Chip. There was another proposal from the Jamail committee regarding complex litigation under Rule 42(b) --

CHAIRMAN BABCOCK: Yes.

MR. ORSINGER: -- which we have not had a chance to talk about this morning; but I assume we will revisit. And so people should read it. In a nutshell as I understand it it allows a committee of five super judges appointed by either the Supreme Court or the Chief Justice of the Supreme Court to designate when litigation is

complex or constitutes mass tort litigation and then to assign all those cases to one particular court in State of Texas venue irrelevant to handle all pretrial matters. And I'm unclear on to what extent they could handle trial matters. However mandatory venue is not preempted by this rule as I understand it.

And then most significantly perhaps from the Constitutional standpoint at the end there are rules that when this judicial panel for complex litigation has initiated this process lawyers must stop advertising for those potential clients, and if they sign up a cleint as a result of advertising, it's voidable.

And I'm not sure what all can happen bad to somebody who is advertising while after one of these designations is made; and there does not appear to be any higher review of this judicial panel on their decision on the courts; and it requires much more study. But anyway.

CHAIRMAN BABCOCK: Is this your subcommittee that is looking at it?

MR. ORSINGER: Yes. This was a package, Rule 42 and 42(b).

CHAIRMAN BABCOCK: Right.

MR. ORSINGER: We just haven't talked about the complex litigation rule; but we will get to that next time.

CHAIRMAN BABCOCK: Okay.

MR. GILSTRAP: Is it true that we won't meet until after the legislature is finished with its session?

MR. ORSINGER: With its regular session.

CHAIRMAN BABCOCK: Yes. That's correct.

MR. GILSTRAP: So it is a possibility that House Bill 4 will be decided before we meet again, or it could be carried over to a special session? Is that the political reality?

CHAIRMAN BABCOCK: I think yes. Correct.

JUSTICE NATHAN HECHT: It looks as if something is going to pass this session. It looks as if, Tommy and I were just talking yesterday, it looks at if the Senate will make a number of changes in the Bill. Then it will go to a conference committee; but it seems to me at this point on track for something to pass.

CHAIRMAN BABCOCK: Nina.

MS. CORTELL: I was hoping to pick up on Justice Duncan's comments earlier in that in the future when we have a proposal submitted either the author of it, the author explain it, the author be here or in advance receive materials that would explain that, that we can set up a protocol to that effect.

CHAIRMAN BABCOCK: Well, we can't force people to show up. And I'm sure Mr. Jamail was invited; but...

MS. CORTELL: I'm just saying if they're not going to be here, maybe they could have a designee and/or provide written materials as to what was intended. I just think that it causes us to waste some degree of time trying to figure out what that person had in mind by writing it a certain way.

CHAIRMAN BABCOCK: Yes. This was a little unusual because we got this stuff so late.

MR. ORSINGER: And the legislature is in session and potentially taking action on many of these subjects. It's pretty unusual. And it's the first time the committee has met for this cycle. There is a lot of unusual confluence here.

CHAIRMAN BABCOCK: Yes. We didn't

get this new committee appointed as quickly as we thought we would; and that was partly because of the turnover in the Courts. Yes, Ken.

MR. SULLIVAN: Let me ask a work question, if I could. I understood that there was a vote taken by the last committee on the offer of settlement rule.

CHAIRMAN BABCOCK: Yes.

MR. SULLIVAN: I noted that yesterday, and I understand that this is apparently not the normal procedure for considering things. There was never a vote taken on the rule as a whole; but there apparently was some sort of vote taken at the last meeting. And I was just curious what exactly was that vote and what is the status of what we did yesterday? I confess I'm somewhat confused by that.

CHAIRMAN BABCOCK: Yes. The prior committee, not at its last meeting, but at several meetings ago, and I think this was reiterated by various individual members of that committee, expressed the sense of most of the members of the committee, the majority of the committee, that they did not believe that Texas needed to join the 43 other states and have an offer of judgment or offer

of settlement rule. So that was the sense of that committee.

The Court asked us to nevertheless come up with, if we were going to have a rule, come up with a rule; and so that's what we did. The status of yesterday's effort, because we want to have something tangible in the near future, is that Elaine Carlson and Tommy Jacks are going to incorporate all of the things we voted on yesterday and get that out to everybody by e-mail, revise it and get it out to everybody by e-mail, and your return comments will be encouraged and welcome and helpful. If and the standard they're going to use about incorporating your comments is that if it's something that is mechanical, it looks like "Woops, we missed a period here or a word there or we forgot to put 'not' in when it should have been," they'll make that change. Otherwise they will forward the revised rule with everybody's comments to the Court for its consideration. And then we'll see what happens.

JUSTICE NATHAN HECHT: And I think what is going to happen after that is we're not going to do anything. The Court is not going to consider the rule, adopting the rule until we see

what the legislature does; but we're going to allow the legislature to have the benefit of this committee's views on what a procedure like that ought to look like. They may care, or they may not care; and it's totally up to them.

If something passes, well, whether something passes or not, then I guess the Court would consider whether to have a rule in its place -- I think that would be unlikely -- to supplement it, you can't really tell what is going to happen, or to drop the project all together. And I think before the Court made a decision it would come back and revisit it with the Committee on what it ultimately thought was a good idea.

But really we are kind of in a different position here than we are with most Rules, because the principal function of trying to get done with that yesterday is just to have some voice in what those procedures ought to look like rather than them not have the benefit of our views procedurally. Not on whether right now whether there is going to be an offer of judgment procedure. Whether it's a good idea and whether there is going to be one is not something anybody in this room has a vote on.

CHAIRMAN BABCOCK: And for the

rookies, that yesterday was not typical as to how we go about the Rules. We went through it much more quickly than is our norm, although I will say we had at two or three meetings before that where we had talked about it and come up with a lot of discussion about it.

MR. SULLIVAN: But as I understand it yesterday we clearly didn't have a final approval or recommendation. Would we normally do that in the context of --

CHAIRMAN BABCOCK: Yes. Although we took a lot of votes. Yet we took one, two, three, four, five, six, seven, eight, nine, 10. We took 13 votes yesterday. So there were parts of it we clearly --

MR. SULLIVAN: Then I guess maybe this is my confusion. Will we ever revisit this as to the Rule as a whole once you got to see it as an integrated Rule and say up or down do we think this is a good idea?

CHAIRMAN BABCOCK: No.

MR. SULLIVAN: Is that the normal procedure or not?

CHAIRMAN BABCOCK: You know, I think we kind of took that on the front end of this one.

People said "No, we don't think we ought to have a rule." But now --

MR. SHENKKAN: Ken's questions is it normally? If we weren't doing this offer of settlement or offer of judgment under this very special circumstance, would we normally take an up or down vote on the proposed rule?

CHAIRMAN BABCOCK: We typically go through it section by section and vote on it. And it's rare. I can think of two or three other occasions where the committee has felt that a rule wasn't called for, but we went ahead. And the summary judgment would be a good example of that. The committee as a whole did not believe that the summary judgment statute should be changed; but the Court asked us to come up with a rule anyway, which we did, and then the Court modified what the Supreme Court Advisory Committee came up with. Judge Patterson.

HONORABLE JAN P. PATTERSON: On a smaller matter, and I know Frank will go along with me on this; but I think we have developed a protocol that when you do nonmaterial things like RSVPing, that goes only, you press your "reply" button and not your "reply to all" button. So all that goes to

Debra and not to the consideration of all of us what the hotel suite looks like.

(Laughter.)

CHAIRMAN BABCOCK: Stephen.

MR. YELENOSKY: Yes, just for future reference, sort of water under the bridge; but it was clear yesterday that the prior work of the prior committee which overlapped quite a lot with this committee was really addressed as an afterthought for the Jamail committee. And I didn't know if that was an unconscious decision about that. In other words, we didn't have in front of us the work that we had done before on offer of judgment; and it only came in sort of as an afterthought, "Oh, yeah" when we started talking about non monetary we had drafted something on that; but nobody ever had it in front of us. And I think it would be --

CHAIRMAN BABCOCK: We had it. It's in my notebook.

HONORABLE SARAH B. DUNCAN: We don't have notebooks, Chip.

CHAIRMAN BABCOCK: I know. We do it electronically.

MR. YELENOSKY: Yes. Okay. I mean, it was available to us if we had wanted to access

it.

CHAIRMAN BABCOCK: Right.

MR. YELENOSKY: But I guess I'm asking why was the precedence given to the Jamail report as opposed to the work we had done before? Why weren't they at least given equal attention if for no other reason we don't want to waste all our time and expense before?

CHAIRMAN BABCOCK: Well, because Tommy and Elaine I think tried to push the work we had done on this committee into the Jamail Rule to the extent they could.

MR. YELENOSKY: Okay.

JUSTICE NATHAN HECHT: And we had overlapping drafters. Elaine and Tommy both did work for the Jamail group and for this group.

MR. YELENOSKY: Okay.

JUSTICE NATHAN HECHT: And again, it's just oppressive circumstances. The whole thing is most likely going to be moot here in a few more hours or days.

CHAIRMAN BABCOCK: Paula.

MS. SWEENEY: Does the Jamail entity still exist? Is it considering anything else? Do they have a court reporter at their meetings? And

if so, can we see the transcripts?

CHAIRMAN BABCOCK: It still exists. We have one copy because we're investigating your life.

(Laughter.)

MS. SWEENEY: Knock yourselves out.

JUSTICE NATHAN HECHT: It's not looking good right now.

HONORABLE JAN P. PATTERSON: Yes, there is a transcript.

CHAIRMAN BABCOCK: No.

MR. LOW: Channel 5.

(Laughter.)

CHAIRMAN BABCOCK: I think the work is pretty much --

JUSTICE NATHAN HECHT: I think its pretty much done unless they need to reconsider some of this or want to. And no, there wasn't a transcript.

CHAIRMAN BABCOCK: Buddy.

MR. LOW: For the benefit of the new members, usually we've had, the Committee will have the old rule and present you a copy of the old rule, the red line version so you have something to work with and tell you why. On the evidence committee I

always put the Rule, the history, who referred it, recommendations to subcommittee, the reasons why we recommend it, and then I attach the Federal Rule and the history. But the last time we did that I did that for 509 and it brought about a 25-minute speech by Scott, so I think some people wanted to quit doing that.

(Laughter.)

MS. BARON: He's not here. Right?

CHAIRMAN BABCOCK: I noticed in the materials, for example, in your evidence stuff that we didn't get to today we've got at least the materials that were posted is the letter requesting the change, the old rule and the proposed new rule.

MR. LOW: And copies, for instance, yes. And then what I do, I have another chart that tells what the committee did. And if a rule is passed, then I send it to you and to Justice Hecht.

CHAIRMAN BABCOCK: Right. And I think that's pretty much the practice of ours.

MR. LOW: That was I was explaining that's what we generally kind of do.

CHAIRMAN BABCOCK: That's the practice of subcommittees.

HONORABLE SARAH B. DUNCAN: Just to

put it on the website I have not found very helpful. If you don't tell me what documents go with what agenda item, as Chris did in his e-mail yesterday, it doesn't help me that they're on the website, because there are hundreds of documents on the website that are no longer relevant to anything we're considering.

MR. ORSINGER: Or a possible suggestion would be that the items that we are supposed to print out for a particular topic would be under a meeting date. Like the June 12, 2003, meeting you go to that place and you have your level assistant print everything out.

CHAIRMAN BABCOCK: Well, Deb, how did my notebook get put together?

MS. LEE: I did it. The way I tried to set up the website is I make categories, say, for instance the Jamail report or Rule 42, all documents pertaining to those particular documents are under that title. So we go in and we just pull those documents; and I try to send you an e-mail telling you when I post documents that are relevant to the agenda so you don't have to search. You can go to the website. I give you the name of the document that has been posted. You print the document and

you have it.

So but whatever suggestions that you have to make it more convenient or accessible for you then I'm welcome to all those suggestions; but that was just my idea of doing it so everything would be under the category. And I haven't deleted anything because they may come up later and you might need them later, or someone else might want to refer to them later, so I leave them there.

CHAIRMAN BABCOCK: Okay. Judge Peeples.

HONORABLE DAVID PEEPLES: I have found that I'm able to get it when it's e-mailed to me a lot better than when I have to get it from the website.

MS. LEE: Okay. Now on that issue I have had other complaints that it bogs their e-mails down. If I send too many documents, some systems are not advanced enough to have all of those documents on there. But if I know individual preferences, I can send you e-mails. If you have a system that can handle that load, I can individually say "Okay. Judge Peeples, I'm going to e-mail his documents." I still post them on the website; but for your convenience I can still e-mail them to you

because it's not a problem at all.

HONORABLE CARLOS LOPEZ: We can e-mail you our preference in that regard?

MS. LEE: That would be fine.

CHAIRMAN BABCOCK: And we're happy to do that; and I know you'll be lenient when I'm late getting my brief to you, because --

(Laughter.)

CHAIRMAN BABCOCK: But we're happy to do that.

HONORABLE JAN P. PATTERSON: It's probably helpful to the judges I think since our secretaries --

HONORABLE SARAH B. DUNCAN: Legal assistants.

HONORABLE JAN P. PATTERSON: -- legal assistants aren't putting together our pretty notebooks.

MS. LEE: And if I may ask, Chip, in that regard, if you would like a notebook, I'm not sure what the cost would be; but I would be more than happy to make. May I make notebooks for anyone that wants them?

CHAIRMAN BABCOCK: The reason we have gone to e-mails is because it is so expensive to do

and there are not funds available.

HONORABLE SARAH B. DUNCAN: So you're just shifting the cost to the courts that are having to cut their budget. That's a great idea.

(Laughter.)

MS. SWEENEY: If we bring our computers. Instead of bringing the humongous black notebooks that we had, just bring your computer. If it's on e-mail, you can pick it up. If it's on the web page, we can't log in from here; but the e-mail is a huge advantage in that respect unless you remember to sit there and mess around and download everything. So put me down for e-mail. It's a huge help.

MR. YELENOSKY: What happened to using the projectors so that we can all look at something? Did that not work out?

CHAIRMAN BABCOCK: You can be the head of that protect. You can run the projector. Thank you-all for coming. (Adjourned 12:15 p.m.)

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CERTIFICATE OF THE HEARING OF

SUPREME COURT ADVISORY COMMITTEE

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I, ANNA RENKEN, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on the 14th day of April, 2003, and the same were thereafter reduced to computer transcription by me. I further certify that the costs for my services in the matter are $1068.00 charged to Charles L. Babcock.

Given under my hand and seal of office on this the 25th day of April, 2003.

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